



Beyond bars, coercion and death: Rethinking abortion rights and justice in India

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Abstract

The legal framework governing abortion in India is fundamentally a cis-hetero-patriarchal structure, utilizing a punitive criminal justice system to control the bodies of pregnant individuals. Sections 312-318 of the Indian Penal Code, along with the POCSO Act and the PCPNDT Act, compose this criminal framework, promoting state surveillance that intimidates abortion providers and seekers alike. Legal cases vividly illustrate the harmful “chilling effect” on both healthcare providers and abortion seekers resulting from criminalization. The stigma linked to criminalized abortions constrains reproductive decisional autonomy compelling individuals to choose between safe but prosecutable procedures, unsafe abortions with health risks, or carrying undesired pregnancies to term. This disproportionately affects marginalized communities,

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underscoring the inadequacy of carceral approaches in addressing structural barriers to realisation of reproductive rights. Advocates call for complete decriminalization, pushing for a transition to a reproductive justice framework. The proposal to completely abolish penal provisions that govern forced abortions begets concerns about leaving marginalized pregnant persons who frequently experience forced abortions with no legal recourse. This feminist dilemma that ensues requires the adoption of decarceral, intersectional approaches that maintain structures of accountability, without posing any risk to the rights of marginalized pregnant persons.

Key words

Carceral politics; access to safe abortion; fear of prosecution; decriminalization; reproductive justice

Resumen

El marco jurídico que rige el aborto en India es fundamentalmente una estructura cis-heteropatriarcal, que utiliza un sistema de justicia penal punitivo para controlar los cuerpos de las personas embarazadas. Las secciones 312-318 del Código Penal indio, junto con la ley de Protección de los niños contra los delitos sexuales y la ley de Técnicas de diagnóstico prenatal y antes de la concepción, componen este marco penal, promoviendo una vigilancia estatal que intimida por igual a quienes practican el aborto y a quienes lo solicitan. Los casos judiciales ilustran vívidamente el perjudicial “efecto amedrentador” que tiene la penalización tanto sobre los proveedores de atención sanitaria como sobre quienes buscan abortar. El estigma vinculado a los abortos penalizados limita la autonomía de decisión reproductiva, obligando a las personas a elegir entre procedimientos seguros pero perseguibles, abortos inseguros con riesgos para la salud, o llevar a término embarazos no deseados. Esto afecta de manera desproporcionada a las comunidades marginadas, lo que pone de relieve la inadecuación de los enfoques carcelarios para abordar las barreras estructurales a la realización de los derechos reproductivos. Los activistas piden la despenalización completa, impulsando una transición hacia un marco de justicia reproductiva. La propuesta de abolir por completo las disposiciones penales que regulan los abortos forzados suscita la preocupación de dejar sin recursos legales a las personas embarazadas marginadas que suelen sufrir abortos forzados. El dilema feminista que se plantea exige la adopción de enfoques descarceladores e interseccionales que mantengan las estructuras de rendición de cuentas sin poner en peligro los derechos de las mujeres embarazadas marginadas.

Palabras clave

Política carcelaria; acceso al aborto seguro; miedo a la persecución; despenalización; justicia reproductiva

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1. Introduction and road map

The convoluted and adverse impact of the Indian criminal framework on access to abortions can be seen in criminal cases across India, impacted by provisions of the Indian Penal Code, 1860 (IPC) and other laws such as the Protection of Children from Sexual Offences Act, 2012 (POCSO) or the Pre-Conception and Prenatal Diagnostic Techniques Act, 1994 (PCPNDT). One such case occurred as recently as 2021, where a medical professional in Meghalaya was arrested under POCSO for providing an abortion service on an adolescent below the age of 18 years (*Grikjang Marak v State of Meghalaya*, 2021). The adolescent, who had become pregnant, misrepresented herself at the abortion clinic as 19 years of age (above the age of legal consent) to legally terminate the pregnancy and prevent her boyfriend from facing criminal charges for rape under POCSO (*Grikjang Marak v State of Meghalaya*, 2021). The abortion, which was later not completed by the doctor (upon the wishes of the pregnant person), still resulted in the arrest of the doctor, who was criminalized under Section 312 of the IPC along with the mandatory reporting provision under Section 23 of the PCPNDT Act and Section 5(3) of the MTP Act (*Grikjang Marak v State of Meghalaya*, 2021). The various laws around preventing sex determination, child protection against sexual abuse and abortion came together to criminalize an individual in a myriad of ways.

Abortion services are criminalized under Sections 312-318 of the IPC that deal with “Causing of Miscarriage, of Injuries to Unborn Children, of The Exposure of Infants, And of Concealment of Births.” Section 312 of the IPC penalizes “causing miscarriage” of a pregnant person if the miscarriage is not done in “good faith” to save the pregnant woman’s life and Section 313 criminalizes causing a miscarriage without the woman’s consent. Sections 312 and 313 are inextricable, while Sections 314 to 318 deal with other associated offences performed against pregnant persons and children (Indian Penal Code, 1860). Sections 312 through 318 have the broad effect of creating a permissive environment for harassment and intimidation of pregnant persons and healthcare providers, thus requiring collective removal from the law books. There is a feminist dilemma, however, that arises from the consequent removal of Section 313 from the IPC on account of the apprehension that pregnant persons coerced into having abortions would have no legal recourse. This must be addressed, and all efforts for decriminalizing abortion must incorporate decarceral approaches that move recourse mechanisms away from the penal criminal justice framework for abortion regulation.

The criminalization of abortion creates ample avenues for the arrest and harassment of medical professionals and pregnant persons themselves, creating fear of prosecution and a “chilling effect” on physicians’ willingness to provide these services as well as pregnant persons’ ability and willingness to transparently avail of safe abortion services on account of widespread stigma (Jain 2019, *X v Principal Secretary Health*, 2022). Further, statistics around detention demographics in India show the disproportionate criminalization of religious minorities, marginalized castes and indigenous persons by the criminal justice system (Sen 2016). The increased policing of marginalized communities illustrates their increased susceptibility to being criminally prosecuted, which translates into how social justice laws have been historically implemented. For instance, when the Prevention of Atrocities (PoA) Act of 1989 was introduced to address grave atrocities against Scheduled Castes and Scheduled Tribes, it contained more

severe rape punishments to bring justice to Dalit victims (Sonavane 2017). It was found that several times, accused persons were acquitted as they had raped women on a promise to marry them (Sonavane 2017). This promise was considered socially unacceptable due to the inter-caste nature of the relationship, leading to such acquittal (Sonavane 2017). The PoA Act intended to protect persons from Dalit, Adivasi and indigenous persons from discrimination, but it was rarely utilized as such, given the casteist underpinnings of the entire criminal justice system. There is a disproportionate institutional protection of dominant caste women, who are considered the harbingers of caste purity, at the expense of Dalit men, whose sexuality has historically been considered to threaten such purity (Chakravarti 2003). The end result is that Dalit women face disregard and negative bias in the criminal justice system, most times failing to obtain adequate recourse.

Carceral solutions proposed to tackle social justice issues tend to disregard fundamental structural factors such as poverty and caste discrimination, which lie at the root of crime and vulnerability (Clegg and Usmani 2019). However, historical movements for social justice and reform have been highly carceral (which is true for India as well), with legal reforms continually granting primacy to the role of the criminal legal framework. Most legal reform movements in India, including the women's rights movement, have worked within a carceral framework, for instance, in 2013, leading to the enactment of the Criminal Law Amendment Act 2013 (CLA 2013) on sexual violence. Vrinda Grover, lawyer at the Supreme Court of India, has represented death row convicts and argues that the rape law reforms following the Delhi gang rape of 2012 do not diminish sexual violence against women. She finds that the absence of sensitive structures and processes discourages survivors from approaching the courts. Due to the carceral framework, the government does not allocate funds towards systemic change, which speaks to a lack of political will (Grover 2015).

Further, the amendments to the PoA Act too stemmed from a Dalit and anti-caste leaders and stakeholders for stronger punishments to tackle grave discrimination and violence against caste-oppressed groups (Saxena 2018, Pal 2023). The reliance on carcerality and punishment to address larger structural discrimination and violence has resulted in the law being used for individualistic purposes rather than fulfilling its larger societal mandate (Rao 2009). The enactment of legal reforms to purportedly protect Dalit, Adivasi, and Indigenous persons from violence and discrimination fails to recognize the structural causes (Teltumbde 2018). This legal exceptionalism and the failure to recognize violence that individualizes harm thus fails to disrupt the structural cause of violence which pervades socio-political systems and institutions (Rao 2009). Similarly, carceral approaches to abortion will serve to victimize marginalized persons by failing to acknowledge structural discrimination against them amongst healthcare institutions and criminal justice authorities.

The use of carcerality as a means for justice is a common part of historical narratives but has had pervasive problems. In the USA for instance, carceral state violence has led to an "era of punitive excess", which "is characterized as a modern expression of society's need to marginalize the poor and people of color through criminalization and punishment" that "has become a stubborn social fact" (Travis and Western 2021). These patent issues beg the question as to whether it is even possible to seek justice through

carceral means in India, considering the contemporary neoliberal State that promotes a “science-development-governance idea of progress”, while permitting and facilitating the rise of Hindu nationalism (anti-minority) in the country (Sahai 2017). This further complicates the landscape of citizenship in society, with “inclusions and exclusions of citizenship” depending on factors like gender, caste, class and religion (Jain and Kartik 2020). The consequent “othering” of specific groups of people, combined with the State’s carceral logic, calls for alternative approaches to social justice reform, particularly for the marginalized who are more vulnerable to State coercion. I argue that retention of Sections 313-318 of the IPC will constitute an inadequate measure to reform systems around abortion services. The following section shows how Sections 312 to 318 of the IPC have been (and are still being) judicially interpreted to prosecute safe abortion providers, persons facilitating abortions as well as pregnant abortion seekers, resulting in disruption or absence of abortion services to pregnant persons. Further, instances where women, often in vulnerable circumstances, lost their lives while seeking unsafe abortions underscore the unintended consequences of the carceral legal framework. This emphasizes that pregnant women and their families, due to their vulnerability, were compelled to resort to unsafe abortions. These repercussions were further aggravated by existing legal provisions and structural constraints, ultimately resulting in the prosecution of individuals supporting the abortion seeker or the abortion provider, whether quack or otherwise.

In this paper, I seek to outline instances of carceral overreach by the State that emerge from legal interactions between IPC provisions around abortion and the POCSO Act. The criminalization of abortion creates a fear of prosecution and facilitates a “chilling effect” on medical professionals’ and pregnant persons right to reproductive decisional autonomy. Thereafter, I go on to situate decriminalization of abortion within a reproductive justice framework, which takes an intersectional perspective to address systemic oppressions based on caste, religion and other structural factors. Exploring decarceral approaches that distance recourse mechanisms from the criminal justice framework becomes essential. In this paper, I do not represent the views of specific marginalized groups or individuals but draw on my location as a legal academic and advocate for reproductive justice. Rather than being interpreted as a critique of movements for legal reforms or legal interventions, I intend to critique carceral imaginings and their underpinning problems.

2. Legal framework on abortion in India

Historical criminalization of abortion heralds back to 1803, when abortion invoked capital punishment when a woman was “quick with child” in Britain and Ireland (Keown 2002). Thereafter, the death penalty was removed by the Offences Against the Person Act (OAPA) in 1837, which however, widened the scope of the offence by covering abortions before as well as after the stage of “quickening” of the foetus. The OAPA was further amended in 1861, prescribing a maximum punishment of life imprisonment for persons trying to obtain illegal abortions (Keown 2002) but the application of the law was clarified in 1856, with it only being enforced in situations resulting in the death of the pregnant person, regardless of the gestation period (Sharafi 2021). The IPC in its colonial form followed from this evolution, containing a wide variety of offences related to abortion with varying severe penalties and punishments.

The penal laws that governed India criminalized all acts that resulted in causing the miscarriage of a pregnant woman, unless such act was done in good faith to save the life of the pregnant woman. Thus, even pregnant persons themselves could be charged with an offence of causing miscarriage where an act was not done in good faith to save the life of the pregnant woman (Indian Penal Code, 1860). Pertinently, the law also made a distinction between acts resulting in a miscarriage when done with the consent of the pregnant woman from those that resulted in the forceful termination of a pregnancy, imposing a stricter punishment in case of the latter.

In postcolonial India, scholars have attributed the origins of birth control as “part of an elitist agenda that actually restrained mainly poor and working-class women from exercising control over their own reproductive capacities” (Ahluwalia 2010). The state administered family planning policies that grew in intensity in the 1960s (Sreenivas 2021). At this time, the Shantilal Shah Committee was formed in 1964 to provide recommendations on the legal framework to regulate abortion, mostly to address the concerns around high maternal mortality deaths. (Hirve 2004). In its report, the Committee recommended the legalization of abortion, amongst other points, citing medical and compassionate reasons (Hirve 2004). However, complete legalization could not occur, leading to the introduction of the MTP Act in 1971 as a population control tactic, to strictly control circumstances where abortions would be legally permitted (Hirve 2004). Up until the MTP Act was amended in 2021, it legally permitted conditional abortions up to 20 weeks, subject to mandatory authorization by one (upto 12 weeks) and two (upto 20 weeks) registered medical professionals, exhibiting the dearth of a rights-based framework that ascribes importance to the wishes and rights of the pregnant person (Jain 2019).

The MTP Act underwent certain amendments in 2021, through the enactment of the Medical Termination of Pregnancy (Amendment) Act, 2021. The amendments lengthened the permissible time period for pregnant people to legally get abortions from 20 to 24 weeks, and also widened access to abortion to all women, rather than only married women. Further, the MTP Amendment Rules, 2021 brought introduced “categories of women” whose extenuating circumstances would allow them to approach two medical practitioners and seek abortion between 20 and 24 weeks of gestation. These include survivors of sexual assault, rape or incest, minors, persons experiencing a change in marital status during their pregnancy, women with physical and mental disabilities, cases of foetal malformation and pregnant women in humanitarian settings, disaster or emergency situations as may be declared by the Government (Rule 3B, MTP Rules, 2021). In the case of *X v Principal Secretary Health* decided by the Supreme Court in 2022, it was stated that the “categories of women” as contemplated by the MTP Rules must be permissively interpreted, with Parliamentary intent being to provide a broad meaning to the provisions of the Act. The Court broadened the meaning of categories of women to include change in material circumstances, thereby expanding access (*X v Principal Secretary Health*, 2022). In the same judgement, the Supreme Court noted “It is not only the factors mentioned above which hinder access to safe abortion but also a fear of prosecution under the country’s criminal laws” (*X v Principal Secretary Health*, 2022).

Despite the recent amendments to the MTP Act and the seemingly progressive court judgment on expanding the scope of access to late-stage abortions between 20 and 24

weeks, the criminal justice framework still holds significant avenues for harassment and intimidation of pregnant persons and medical professionals. Several instances of the same are provided in the following section, to provide a basis to examine the effects of criminalization of abortion in India.

3. Prosecution and intimidation for abortions under IPC

A rendition of the salient features of the MTP Act shows that it only provides limited exceptions to IPC provisions that criminalize abortion and is not a rights-based legislation granting primacy to the pregnant person's wishes. Criminalization of abortion under the IPC creates fear of prosecution, which has adverse implications for access to abortion services (Jain 2019, *X v Principal Secretary Health*, 2022). There are several cases that have come before the Trial Court, High Courts and the Supreme Courts for a request of bail in cases of arrest under section 312 to 318 or a trial for causing abortion with or without the consent of the pregnant person. The word "miscarriage" that characterizes Chapter XVI of the IPC forms a vague parameter for the offences contained. This is seen in *State v Mahender Singh* (2011), which was a clear case where the complainant had experienced a forcible abortion. The persons found responsible by the Court included the complainant's abusive husband, as well as the medical professional who provided abortion services. The Court found that Section 312 ("Causing miscarriage") was proved beyond reasonable doubt but did not apply Section 313, granting an avenue to the complainant to hold her abusive husband liable for his crime. However, this outcome can be considered incidental, as in other cases, courts have acquitted accused on technical grounds, or the complainants themselves have been prosecuted under the same laws. For instance, in *State v Ashish Aggarwal* (2013), the complainant claimed that the accused had forced her to have abortions in the past and had engaged in sexual relations with her on false promise of marriage. The case was filed when the complainant had again gotten pregnant, after which the accused threatened to leave her unless she had an abortion. Despite the compelling circumstances, the Court acquitted the accused of crimes under Sections 312 and 313, citing irregularities in the complainant's testimony during trial (*State v Ashish Aggarwal*, 2013).

Variable interpretations of Sections 312 and 313 widen the scope of liability of offences to healthcare professionals, family members (such as the complainant's husband in *State v Mahendar Singh*, 2011) and even the pregnant person themselves. For instance, in *Rani Manohar Kamble v State of Maharashtra* (2022), the Bombay High Court read Section 312 along with Section 315 of the IPC ("Act done with intent to prevent child being born alive or to cause it to die after birth") to prosecute the appellant, who was prescribing women medical abortion pills to terminate pregnancies based on sex determination. In this case, the doctors have terminated pregnancies on grounds of sex determination and the Court sentenced them under Section 312 and 315 of IPC. Additionally, when persons are prosecuted under these sections, courts are often reluctant to grant bail. This has often led to harassment of doctors at the hands of the criminal justice system. In the case of Dr. Nargish Paul (*Dr. Nargish Paul v The State of Jharkhand & Ors.* 2015), a doctor was accused of forcibly terminating a pregnancy by the spouse of the pregnant person. The complainant had also alleged that the accused doctor had informed them the baby was born prematurely had died and he had subsequently found out that the baby was alive and taken him to a different hospital for treatment, where he had subsequently died. The

complainant filed charges under Sections 312 and 318 of the IPC for termination of a pregnancy and concealment of birth. The incident was first reported in 2002, 3 months after the alleged forceful termination by the accused doctor. A Judicial Magistrate also took cognizance of the offences under Sections 312 & 318 of the IPC. The accused doctor then approached the High Court of Jharkhand seeking the quashing of all criminal charges. An enquiry was then carried out by the police and a Medical Board was also constituted to investigate the issue of the premature death of the baby. The police enquiry revealed that the charges against the doctor were false, and the complainant had in fact owed money to the accused doctor's clinic. In view of the same, the criminal proceedings against Dr. Nargish were quashed by the High Court vide its order in February 2015, almost 13 years after the false charges had first been brought against the doctor (*Dr. Nargish Paul v The State of Jharkhand & Ors.*, 2015).

In several other cases, a recurring pattern emerges where pregnant women sought illegal and unsafe abortion services for various reasons, often leading to the death of the pregnant person. In the case of *Vatchalabai Maruti Kshirsagar v The State of Maharashtra* (1992), an unmarried woman's search for a more affordable abortion option resulted in a distressing experience. A nurse, accused of aiding in the procedure, made several unsuccessful abortion attempts before finally succeeding. Sadly, the woman's health deteriorated after the procedure, ultimately leading to her passing. A similar situation unfolded in the *Jangir Kaur v State of Punjab* (1993) case, where a woman sought pregnancy termination and underwent an incomplete and unsafe abortion, which led to her death. These cases underscore the dangers associated with the absence of affordable, safe, and legal abortion services, often driving individuals to seek unsafe alternatives due to stigma, discrimination, and legal restrictions. In another case, *Madan Raj Bhandari v State of Rajasthan* (1968), an individual faced legal consequences for their involvement in a woman's death following an abortion. The woman had a close relationship with the person in question, and her abortion resulted in her demise. The appellant, despite being initially charged and tried for abetting the abortion seeker in causing the miscarriage, was ultimately convicted for abetting the abortion provider in the commission of the offense under sections 314, 107, and 109 of the IPC. Overall, these cases emphasize the urgent need for affordable, legal and safe abortion services to prevent such tragic outcomes and the importance of legal frameworks that safeguard a pregnant person's reproductive health. These examples illustrate how these legal clauses can have various consequences, such as denying bail, prolonging the detention of suspects, potentially enabling law enforcement intimidation, and impacting pregnant women's access to safe abortion services, potentially leading to fatal outcomes.

The interconnection between Sections 312 to 318 of the Indian Penal Code underscores the need for the complete elimination of these provisions to fully decriminalize abortion. For instance, Louk Hulsman has pointed to the heterogeneity of acts that are categorized as crime to illustrate why a "standard response in the form of criminal justice punishment cannot a priori be assumed to be effective" (Hillyard and Tombs 2007). Therefore, decarceral approaches to decriminalization of abortion are imperative. Such decriminalization, as well as the rethinking of laws relating to reproductive health within a gender and reproductive justice framework, are essential to ensure that pregnant persons from all backgrounds, with all identities, of all ages can freely access reproductive health services.

It is evident that criminalization of abortion causes fear of prosecution as is apparent in several other countries. For instance, in the Philippines, criminalization leads to increased stigma, forcing Filipino pregnant persons to carry unwanted pregnancies to term, have larger family sizes than desired, and to avail of unsafe abortions. The fear of prosecution also acts as a deterrent to pregnant persons seeking healthcare services (Finer and Hussain 2013). Oppressive laws continue to be implemented in the Philippines, with the 2012 arrest of an 88-year-old midwife and her aide, resulting from the death of an 18-year-old pregnant person in Caloocan City, showing how criminalization results in serious consequences for medical providers (Laude 2012). The arrest took place on an undercover operation where a policewoman approached the midwife and her aide, posing as an abortion seeker (Laude 2012). Further, doctors practicing in the Philippines have formally stated that such entrapment operations deter them from freely providing abortion services (Gutierrez 2018). The criminalization of abortion and its consequent effects on access to healthcare services contribute to the fact that unsafe abortion is a leading cause of maternal mortality in the Philippines. Similarly, in Malaysia, Mala (name changed to maintain anonymity), a migrant worker from Nepal, was prosecuted for seeking abortion services during her sixth pregnancy. She was sentenced to twelve months' imprisonment after visiting a local abortion clinic at six weeks' gestation but ended up spending about four months in prison (Puvanesvaran 2020). This case shows how risky criminalization can be for marginalized persons, such as migrant workers, and the grave implications of criminal laws around abortion. Section 312 which punishes causing miscarriage can be removed from the IPC, but this, by itself, would be ineffective in preventing prosecutions under the law.

The full decriminalization of abortion must essentially comprise of decriminalization of Sections 312-318, to ensure that people who avail and provide abortion services cannot possibly be prosecuted. The present criminal legal framework contained in the IPC and MTP Act around abortion, when coupled with other carceral laws like POCSO, also have far-reaching implications for safe abortion access. This is discussed below.

4. POCSO, carceral overreach and implications on adolescents

Legal ambiguities around the joint interpretation of the POCSO Act and the MTP Act show how a prohibitive environment is created around adolescent abortion, centered around state surveillance and punishment. The POCSO Act has purportedly been enacted to protect children (under 18 years of age) from sexual offences, including assault, harassment and pornography. The law criminalizes all sexual conduct involving a "child" and contains a mandatory reporting provision that punishes anyone who does not report any knowledge or apprehension of commission of an offence under the Act to law enforcement. It further requires anyone with the knowledge or apprehension of commission of an offence, including the survivor, to report to the police. Since adolescents are not deemed capable of consent, the mandatory reporting requirement under law becomes a major barrier to abortion access for pregnant adolescents. Healthcare professionals are naturally fearful of prosecution, experiencing hesitance to provide abortion services to pregnant adolescents and violate POCSO's mandatory reporting provision. Adolescents, in turn, are forced to avail of unsafe abortion methods.

The roots of regulating adolescent sexuality come from the Foucauldian idea of using law to regulate sexual behaviors and perpetuate normative social hierarchies (Foucault

2012). Gayle Rubin has written about the “erotic hysteria” that has historically pervaded the way adolescent sexuality is treated in law and society, furthering a carceral child protection agenda. This “condemn to protect” mentality results in the enactment of criminal laws (Rubin 2002), which, in the Indian abortion context, has impeded access to safe abortion services and shows the limits of carcerality. The overregulation of adolescent sexuality negatively affects adolescent health (Jain and Tronic 2019), seen in situations such as the arrest of two nurses and a doctor in Arvi, Wardha district of Maharashtra in 2021, for providing an abortion to a 13-year-old. The pregnancy was a result of rape, as per a statement given by the pregnant adolescent’s mother, who accused a 17-year-old boy of the same. The POCSO Act ensured that the 17-year-old boy was arrested for rape, and his parents were arrested for harassment of the pregnant girl’s mother (Express News Service 2022). In another case, a 16-year-old was found to be over 20 weeks pregnant, because of rape in May 2020. Given the advanced gestational stage, the girl’s doctors filed an FIR for rape using the POCSO Act. Additionally, the girl’s father filed a case before the High Court seeking judicial authorization for abortion, which was allowed on the grounds that no pregnant person whose pregnancy, regardless of gestational period, poses a risk to their mental and physical health can be forced to continue such pregnancy (Thummar 2020).

The above two cases show the divergent ways in which the POCSO Act can be interpreted, with the first case showing widespread arrests of multiple people, on account of familial issues. The criminal framework of POCSO easily facilitated multiple arrests in that case, whereas in the second case, the process for obtaining an abortion happened to occur quickly with judicial authorization. However, in both cases, there was clear prosecution – for alleged rape by the adolescent boys, as well of the medical professionals in the first case. Prosecuting adolescents for rape who are in consensual relationships with pregnant persons is a fallout of the carceral approach of the POCSO Act to address instances or apprehensions of sexual offences against children. Further, the mandatory reporting provision under POCSO creates a surveillance structure even amongst healthcare institutions, resulting in pregnant adolescents running the risk of their consensual sexual partners being prosecuted for rape if they visit safe abortion providers. In such situations, pregnant adolescents may be coerced into carrying the pregnancy to term without availing of healthcare services even post-pregnancy, which has the potential for grave mental and physical health outcomes – or they may be forced to avail of unsafe abortions (Chandra *et al.* 2021).

5. Arguments against criminalization of abortion

There are several arguments against the criminalization of abortion. I will underline three major arguments on why abortion needs to completely be decriminalized. First, the cases cited above demonstrate that criminalization results in the frequent prosecution of safe abortion providers, creating fear of prosecution and perpetuating a “chilling effect” amongst healthcare professionals, who hesitate to provide abortion services due to potential law enforcement involvement (Canes-Wrone and Dorf 2015). The oft-overlapping legal interactions between the IPC, MTP, PCPNDT and POCSO Acts contribute actively to the plethora of ways in which abortion can be criminalized, potentially through an anti-sex determination agenda or a child protection agenda. The stigma furthered by criminalization results in these procedures being carried out “under

an air of secrecy and criminality” (Jain 2019). Such taboos adversely affect pregnant people’s health-related decisions, such as whether they decide to tell people about the situation or whether to obtain a safe or unsafe abortion (Jain 2019). Criminalizing abortion creates and perpetuates an oppressive atmosphere for pregnant persons in several ways, impeding access to abortions, particularly for marginalized persons.

Second, the MTP Act’s strict regulations around legal abortions limit the reproductive options of marginalized and oppressed groups, forcing them to either continue with unwanted pregnancies or obtain back-alley abortions. Access to healthcare services, including safe abortion services, is strongly influenced by factors such as poverty, bureaucracy and caste discrimination, which disproportionately effect on economically disadvantaged persons, persons with disability, transgender and gender diverse persons, Dalit, Bahujan, and Adivasi communities. (Patel *et al.* 2018). For instance, in the *Amita Kujur v State of Chhattisgarh* case, an Adivasi (indigenous) girl who was a survivor of rape sought to terminate her twelve-week pregnancy. When she tried to obtain an abortion at a hospital, she was asked to provide various documents including an FIR, medico-legal records, and a referral letter from the District Hospital. By the time she petitioned the Court, her pregnancy had progressed to twenty-one weeks, which exceeded the limits set by the Medical Termination of Pregnancy (MTP) Act. Despite this, the court granted permission for the termination of her pregnancy in her best interest (*Amita Kujur v State of Chhattisgarh*, 2016). This case highlights the numerous social and legal barriers that hinder marginalized individuals’ access to healthcare services. The removal of criminal legal framework that govern abortions will be an important step to eliminate the “chilling effect” caused to healthcare professionals and ultimately improve access to abortions without judicial authorization. The disproportionate impact of criminalization, particularly on marginalized persons can be illustrated through Section 377 of the IPC that criminalizes carnal intercourse “against the order of nature”. The scope and ambit of the legal provision equates same-sex relations with non-consensual sex, which in turn implicitly targets queer groups. Justice Chandrachud stated, “Section 377 has consigned a group of citizens to the margins....it has lent the authority of the state to perpetuate social stereotypes and encourage discrimination” (Mandal 2018). There is a link between such criminalization and difficulty in accessing healthcare by these groups. State monitoring systems that are maintained in institutions including prisons, schools and hospitals have actively dictated ideas of “natural” behaviour, imposing legitimized punitive measures on “perverse” people exhibiting “unnatural” behaviour, through carceral models (Kafer and Grinberg 2019).

Third, the arguments against criminalization stem from narratives around carcerality and problems experienced in the carceral state. Gottschalk (2015) argues that the carceral State was “no longer confined to the prison cell, prison yard, or to poor urban communities and minority groups”, but has gone on to actually change “key governing institutions, public services, and benefits” in a variety of social contexts (Gottschalk 2015). She has attributed the omnipresence of the carceral state to “distorting” “demographic, political, and socioeconomic” indicators and interfering in how trends around public health, unemployment, political participation, poverty and economic growth are perceived (Gottschalk 2015). Further, the targeting of specific groups by the carceral state happens on account of it creating “a large and permanent group of

political, economic, and social outcasts” (Gottschalk 2015). Reliance on punishment has been termed “inherently unfair”, on account of being primarily used against underprivileged sectors of society, as “rulers will never prosecute their own class associates” (Bagaric *et al.* 2021).

International jurisprudence has shown a “global trend” towards liberalizing restrictive laws around abortion (Zampas and Gher 2008). Recent efforts in several countries of the Global South may be cited as successful examples of the adoption of an anti-carceral framework to facilitate reproductive justice. Abortion was decriminalized in Colombia in 2022, with the law now allowing termination of pregnancies up to 24 weeks of gestation. Argentina also ruled to legalize abortion in 2020 after mass protests across the country (Lopreite 2023). Similarly, in South Korea, serious advocacy which gained momentum in 2016 led to the decriminalization of abortion (Kim *et al.* 2019). The decriminalization of abortion through legislative and judicial measures in these jurisdictions can serve as an example for similar efforts in India. The next section discusses decriminalization of abortion as the path to reproductive justice in the Indian context.

6. Reproductive justice and decriminalization

In India, unsafe abortions are the cause of about 8% of maternal deaths, with a study in 2019 evidencing higher rates of unsafe abortions in “Muslim, Christian, or ‘other’” religions as opposed to “Hindu” persons. Further, Dalit, Bahujan, Adivasi, and rural women are seen to have a 26% higher chance of availing of unsafe abortions (Yokoe *et al.* 2019). A recent study highlights that 67% of abortions are unsafe, resulting in 8 deaths per day (Baker *et al.* 2022). Even though abortion is conditionally legal in India, criminalization causes harm. The disproportionate impact of criminalization of abortion on marginalized persons emphasizes the importance of considering structural factors that contribute towards discrimination, such as caste, poverty and religion, amongst others. Reproductive justice can be a useful framework to situate discussions of decriminalization whose framework encompasses “the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities” (Ross 2011). Reproductive justice found its origins in Black feminist thought and theory, interrogating the effects of various types of inequities on access to reproductive healthcare services and upholding of reproductive rights (Winters and McLaughlin 2020). The concept of reproductive justice has been consistently implemented in numerous global South countries, encompassing regions in Asia and Latin America. The pursuit of a justice-centered approach to sexual and reproductive health has been a fundamental aspect of women’s movements, even when the specific term “reproductive justice” was not explicitly in use. For instance, women’s groups like the All-India Democratic Women’s Association (AIDWA) concurrently emphasized the importance of acknowledging how caste and class structures significantly shaped women’s experiences concerning rights within a broader context and, notably, reproductive autonomy in India (Armstrong 2013). The importance of incorporating a reproductive justice perspective lies in the primacy accorded to marginalized communities’ health and wellbeing, with the acceptance that they are most vulnerable to both state-sanctioned and gendered violence. Advocacy under a reproductive justice framework does not rely on carceral policies, but focuses on other

kinds of community-based, reparative or restorative mechanisms built through collaboration between non-state actors and the government.

Legal reform under the reproductive justice framework must be anti-carceral, with decriminalization of abortion being the first step, bolstered by advocacy for structural changes in economic access. A holistic approach to abortion reform must begin with the removal of the criminalization framework, which harms marginalized persons' access to healthcare services, particularly SRH services. Simultaneously, structural reform initiatives to improve abortion access can supplement such decriminalization. Reform needs to account for harms faced by marginalized communities on account of carceral policies, as well as structural and economic circumstances that restrict their fertility choices. Anti-abortion narratives, when analysed through reproductive justice practice, show deliberate attempts to criminalize women and medical professionals, especially those with multiple marginalized identities (Zureick *et al.* 2018). Redressal mechanisms for forced abortions cannot rely on this same carceral framework that ends up putting pregnant persons at risk of prosecution.

In the past, Indian initiatives for legal reform around gender-based violence, including sexual harassment, sexual assault and domestic violence have relied on punitive systems of criminal law that are based on state carceral responses (Kapur 2020). The criminal justice system exacerbates the overall vulnerability of pregnant persons to the whims of doctors and other societal taboos, compounded by poor or no access to sexual and reproductive health rights and services. Apprehensions abound regarding the abolition of all criminal provisions concerning abortions, including Sections 312-318 of the IPC, as a means to deny pregnant persons justice if they experience any harm during or after undergoing abortions. Such concerns are founded, as several instances have been recorded of pregnant persons from marginalized communities undergoing coerced abortions, which are currently punishable under the IPC. A dilemma emerges in feminist discourse between abolishing all legal regulation of abortion to uphold an absolute right and laws designed to uphold the rights of marginalized pregnant persons with limited decisional autonomy due to structural vulnerability.

Kapur and Cossman remind us of diverse feminist interactions with law have often recommended or supported carcerality, and “produce complex and contradictory outcomes” (Kapur and Cossman 2018). State carceral responses are based on the notion that the “creation of new offenses and the declaration of more rights is the most important pathway to sustainably addressing sexual violence against women” (Mehta and Tiwari 2021). Carceral feminism has been seen to place sexual violence on a different footing from other crimes, calling for immediate punitive measures and detention for accused persons, as opposed to taking more social justice-forward approaches.

However, the feminist movement in India is hardly uniform, with several anti-caste feminist scholars like Jenny Rowena (2017), speaking out against legal reforms that disregard caste, such as those around sexual harassment, which only served “to formulate a caste-blind gender discourse based on Savarna women's need for protection in elite workplaces” (Rowena 2017). Further, the reduction of carceral and non-carceral feminism to a binary is highly reductive, disregarding narratives from feminist abolitionist scholars, such as Angela Davis (2003) who advocate for complexity in a prison abolition framework, opining that a multifaced approach would be more effective

than a single alternative to traditional prisons. The binary choice of “carceral versus anti-carceral” narratives within feminism, while engaging with the criminal justice system, have been criticized, with scholars advocating a more nuanced and complex framework on a “spectrum of decarceration” (McGlynn 2022). “Continuum thinking” is termed as a “means of making connections” and challenging “established binaries” and dichotomies, and in the criminalization context, it can offer an approach beyond a binary choice of criminalization (bad) and non-criminalization (good) (McGlynn 2022). This can pave the way for the incorporation of diverse narratives within a choice-based framework that can protect the rights and still provide recourse for marginalized persons.

The proposition for prison abolition, for instance, is a “continuum of alternatives to imprisonment – demilitarization of schools, revitalization of education at all levels, a health system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance” (Davis 2003). Such approaches can only be adopted if decarceral narratives that acknowledge structural inequalities are integrated into justice and redressal mechanisms.

In India, the effect of laws to “undermine the interests of women,” in terms of their reading and implementation is acknowledged by feminists (Baxi 2013). The State has been receptive to “populist demands” for punitive measures as a response to sexual violence, with a perceived dichotomy between carcerality and anti-carcerality acting as a limitation to holistic solutions in these active debates. Such narratives show the failings of the present criminal justice system, but do not move beyond such acknowledgment to propose solutions. As argued by Baxi, this can be seen in the case of the artist Mahmood Farooqui, who had been convicted of raping an American woman in 2016 on grounds that forcing oral sex upon someone falls within the legal scope of “rape” under Section 375(d) of the IPC (Baxi 2016).

The assumption that the only way to safeguard the rights of women is through a criminal law framework is a flawed one. Criminal law not only falls short in ensuring justice but also disproportionately impacts minorities. Therefore, relying on a criminal law framework for the protection of rights is questionable. An anti-carceral framework represents “a paradigm shift beyond demanding gender equality or attaching abortion rights to a broader reproductive health agenda” acknowledging that “the impacts of race, class, gender and sexual identity oppressions are not additive but integrative, producing this paradigm of intersectionality” (Ross 2011).

Embracing an anti-carceral approach to ensure safe and legal abortions is rooted in the recognition that the criminalization of abortion often worsens structural inequalities, hindering pregnant individuals’ access to essential sexual and reproductive health services. By reframing this approach, we aim to address systemic violence and oppression exacerbated by such criminalization. Such a shift would prioritize the autonomy of pregnant individuals in making reproductive decisions, focusing on their will rather than requiring third-party authorization. A call for the adoption of an anti-carceral, reproductive justice approach then is the demand for the State to move away from strict penal regulation and dedicate energies towards building capacities beyond the legal system. This will also counter the problems that result from structural issues including the lack of adequate public healthcare infrastructure, shortages of healthcare

personnel, lack of awareness among medical professionals on the legal status of abortion, and other such limitations that are currently impeding access to safe abortions for pregnant persons, the burden of which is disproportionately placed on marginalized persons.

It must therefore be clarified that an anti-carceral framework does not discount for instances of forced abortions or cases where pregnancies are terminated in unsafe conditions to the detriment of the health and well-being of pregnant persons by unqualified individuals. It is not premised on decriminalization as an end goal but a first step towards imagining alternative justice systems rooted in community-centric values.

What these alternate imaginations of justice may be is a question that warrants larger conversations and consultations that can inform systems and processes developed to respond to the SRHR needs and challenges faced by individuals.

The project of reproductive justice then is an ongoing effort which moves beyond the question of abortion alone to address the broader landscape of SRHR from an intersectional lens and facilitate a shift in the discourse by shifting emphasis from legal responses alone to structural changes that will dismantle the systemic barriers to access.

The call for decriminalization is thus a demand for the obvious inadequacies of the Indian criminal justice system in acknowledging structural inequalities that affect reproductive health access and outcomes for marginalized persons to be addressed proactively. Adopting intersectionality in the reproductive justice framework is essential to develop a substantive understanding of reproductive politics and policies.

7. Conclusion

The carceral nature of the Indian legal framework around abortion, through the IPC, MTP, POCSO AND PCPNDT Acts, is evidenced by provisions that strictly govern pregnant persons' bodies through a system relying heavily on law enforcement action, criminal prosecution and punishment. The interpretation of these laws, together and separately, invite a broad range of legal offences associated with abortions, that have the potential to hold doctors, consensual partners (adolescent), family members and even the pregnant persons themselves criminally liable for abortions. The carceral legal framework adds structures of surveillance to govern adolescent sexuality, through the mandatory reporting provision and strict punishments in the POCSO Act. The legally sanctioned monitoring and prosecution structures prescribed by POCSO result in adolescents largely being unable to avail of safe abortions without apprehension of criminal prosecution.

The effects of such criminalization on health outcomes and access to healthcare services are well-documented in India and abroad, with these laws creating a "chilling effect" on medical professionals' willingness to provide abortions.

Further, criminalization affects marginalized persons in a much graver manner than the mainstream population, severely limiting their reproductive decisional autonomy and healthcare options. In India, the health outcomes of Dalit, Bahujan, Adivasi and minority religious groups are notably different from those of dominant caste and religious groups, adding credence to the deleterious effects of abortion criminalization. The carceral logic of the state has the effect of alienating specific groups with marginalized characteristics,

exhibiting disproportionately severe State coercion over these groups through the criminal justice system. The rise of the contemporary neoliberal State and the correspondingly burgeoning mainstream outlook of Hindu nationalism reinforce existing anti-minority sentiments, societal hierarchies and power imbalances. Such a system renders persons from marginalized communities most vulnerable to disregard by the healthcare system, to prosecution by the criminal justice system and to discrimination by both. Therefore, to ensure that abortion is decriminalized while still allowing pregnant persons to have recourse from coerced abortions, a decarceral approach that prioritizes the health and well-being of pregnant persons is imperative. An intersectional approach to reproductive justice that accounts for intersecting marginalized identities is also essential for furthering egalitarian access to reproductive health services, across society, that centres a pregnant person's decisional autonomy based on abortion at will without any third-party authorization.

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