

LAW

RESEARCH ARTICLE

Adolescent abortions in the Covid-19 landscape: Exposing the legal Achilles' heel

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Abstract

The law ought to ensure that reproductive health services are accessible to all persons — married or unmarried — without subjecting them to heightened scrutiny or procedural requirements. However, the intersection of various laws and their impact on the willingness of medical professionals to offer abortion and reproductive health services to adolescents makes timely, safe, and affordable abortions difficult for adolescents to obtain. This challenge is exacerbated by a lack of public healthcare facilities, particularly in rural areas, and the overall restricted access to healthcare services during the Covid-19 pandemic.

We delve into how legal uncertainties and gaps in multiple legislations pose obstacles for adolescents seeking abortion services, particularly in consensual sexual relationships. We specifically examine the unintended barriers stemming from the Protection of Children from Sexual Offences Act, 2012 (POCSO), which categorises consensual sexual relationships among adolescents as sexual offences without recognising their evolving sexual autonomy. Notably, POCSO includes a mandatory reporting provision, compelling the reporting of all sexual offences involving a "child" to law enforcement. This complexity is further compounded by the requirement for third-party authorisation for abortion by medical boards. The Indian courts, in rendering inconsistent, moralistic, and biased judgments on adolescent access to abortion services during the Covid-19 pandemic, contributed to the complexities.

Keywords: *abortion, adolescents, Covid-19, courtroom bias, judiciary, legal reform.*

Introduction

On January 12, 2022, a gynaecologist was arrested for terminating the pregnancy of a 13-year-old in Maharashtra. Though the girl became pregnant after a consensual relationship with a 17-year-old boy, this is presumed to be rape under the Protection of Children from Sexual Offences Act (POCSO), 2012. When the pregnancy was discovered, the adolescent's girl's family and that of her sexual partner approached a gynaecologist, who provided abortion services. On a police complaint by the girl's mother of threats from the boy's family, the police arrested the gynaecologist, the girl's partner and his parents. While the girl's partner was arrested under POCSO, the doctor who provided abortion services was arrested for unlawfully terminating a pregnancy, among other offences, under the Indian Penal Code (IPC), 1860 [1].

In another 2020 case, the family of a 16-year-old girl from Pune learned that she was pregnant as a result of rape. She was already 21 weeks pregnant when taken to hospital and the doctors could not terminate her pregnancy, as it was beyond the 20-week permissible limit under the Medical Termination of Pregnancy (MTP) Act, 1971. A First Information Report (FIR) was filed for rape under POCSO, and the girl's father filed a petition in the Bombay High Court seeking permission for abortion. The Court referred to an earlier judgment in April 2019, which had held that if a pregnancy poses a risk to the mental and physical health of the pregnant person, they cannot be forced to continue it even beyond the 20-week gestation period [2], and allowed her to terminate the pregnancy [3].

Both these cases involved adolescent girls and offences committed under POCSO. However, in the first, POCSO caused fear around pregnant adolescents seeking a safe abortion and resulted in imprisonment for consensual sex between adolescents, which POCSO defines as "rape". In the latter case, it was used to benefit the young girl and her family, establishing a baseline of legal and safe abortion for adolescent rape survivors.

In this article, we analyse cases that involve adolescents' access to abortion services during the pandemic and demonstrate how legal ambiguities and lacunae in several legislations make adolescents' access to sexual and reproductive health (SRH) and SRH services near impossible.

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The situation is exacerbated during healthcare crises, as happened during the Covid-19 pandemic and the resulting lockdown.

Legal regulation of abortion

India's legal framework contains multiple laws that govern and impact abortion access, each enacted for a different purpose. Sections 312-318 of the IPC and the provisions of the MTP Act primarily govern and regulate abortion services in India. The IPC, which is the general penal law, criminalises any termination of pregnancy unless carried out in accordance with the MTP Act.

The MTP Act

First enacted in 1971, the MTP Act is a doctor-centric legislation which lays down strict conditions under which, pregnant persons may legally obtain abortions. First amended in 2002, and again in 2021 as the MTP (Amendment) Act, 2021 (MTP Amendment Act) [4], it has made some significant changes, one being that it made MTP available to unmarried women.

Prior to the 2021 amendment, the gestational limit within which a pregnancy could be terminated was 20 weeks. Pregnancies beyond 20 weeks of gestation could only be terminated to save the life of the pregnant person [5].

With the MTP Amendment Act, 2021, the gestational limit for termination of pregnancies has been increased to 20 weeks. As of 2021, one registered medical practitioner (RMP) must be consulted for the termination of a pregnancy that is up to 20 weeks in gestation; and two RMPs for termination of a pregnancy of 20 to 24 weeks gestation. Termination after 24 weeks is allowed only in cases of foetal anomaly or to save the life of the pregnant person. The gestational limit for medical abortions, assisted by a qualified RMP, has been raised to 9 weeks from the 7-week gestation rule under the earlier Act [6].

According to Rule 3B of the MTP Rules, 2021, the categories of persons eligible for termination between 20 and 24 weeks' gestation include survivors of sexual assault, or rape, or incest; minors; those with a change in marital status during the ongoing pregnancy (widowhood or divorce); persons with physical disabilities; persons with mental illness; persons carrying a foetus with a malformation that has substantial risk of being incompatible with life or, if the child is born, risk of suffering from such physical or mental abnormalities as to be seriously handicapped, and, lastly, pregnancies in humanitarian settings, or disaster or emergency situations as may be declared by the government.

Justice DY Chandrachud, in a landmark judgment, in *X v the Principal Secretary Health and Family Welfare Department & Another* [7], had taken a broader view of Rule 3B. Using the example of a woman facing a change in material circumstances, such as job loss, sudden caregiving responsibilities, or a diagnosis of an acute, chronic, or life-

threatening disease, he emphasised that the provisions of the Act and Rules should not be narrowly interpreted to the detriment of pregnant individuals. He had also stated that the term "woman" is "used in this judgment as including persons other than cisgender women who may require access to safe, medical termination of their pregnancies" [7].

It is also imperative to note that the permissibility of terminating a pregnancy is contingent on the discretion of medical practitioners, rather than the preference of the pregnant person. Abortion is criminalised under the IPC, and healthcare providers reserve the right to decline services to pregnant persons seeking termination, particularly if the circumstances do not align with the conditions outlined in the MTP Act [5].

The MTP Amendment Act, 2021 also introduced and institutionalised Medical Boards to be set up at approved facilities to determine whether a pregnancy beyond 24 weeks of gestation may be terminated. The role of the Medical Board is restricted to cases where there is a significant foetal anomaly, thus creating an arbitrary distinction for certain pregnancies which may be terminated irrespective of gestational age. Such a framework supports a eugenic rationale by further entrenching disability exceptionalism through the law [4]. Notably, the MTP Act faces conflicts with legislations such as the POCSO Act introducing stringent barriers that impede access to essential reproductive services for adolescents. This incongruity raises concerns about the restrictive nature of regulations, potentially hindering individuals from availing of crucial reproductive healthcare. This will be discussed in the next section.

POCSO

As per its Preamble, POCSO was enacted to protect children from sexual assault, sexual harassment, and pornography [8]. The Act defines a "child" as any person below the age of 18 years and has raised the age of consent in India from 16 to 18 years for children of all genders [9]. POCSO characterises all sexual contact with "minors" as sexual offences. Most importantly, it contains a mandatory reporting provision [8] under which all sexual offences under POCSO must be reported to the law enforcement authorities. Though the Act does benefit children and adolescents who are survivors of rape, sexual assault, or sexual harassment, it also broadly criminalises adolescent sexuality. This not only discourages SRH education for adolescents, as they are presumed to be abstinent under the law; but makes it perilous for them to seek the necessary medical care for sexually transmitted infections and prophylaxis for pregnancy after consensual sex. Additionally, POCSO discourages adolescents from seeking care after botched, back-alley abortions, as well as from obtaining contraceptives and other reproductive health services [10]. It also increases instances of illegal abortions and puts medical providers at risk of being criminalised when they

provide abortions to adolescents without reporting that they were sexually assaulted as per the POCSO provisions [2].

The intersection of POCSO with the MTP Act is such that adolescents seeking abortions are presumed to be survivors of rape or penetrative sexual assault, even if the sexual relationship was consensual, and the medical practitioner is bound to report the sexual activity to the police [10]. The mandatory reporting provision under Section 19 of POCSO is contradictory to the MTP Act, given that the MTP Act and Rules require that medical practitioners maintain confidentiality when carrying out terminations. The mandatory reporting provision makes access to a necessary health service conditional on invoking the criminal justice system, which violates the ethics of autonomy, beneficence, non-maleficence, justice, and dignity.

Both premarital sex and abortion carry stigma, making it essential to maintain anonymity in the abortion process. When the law under POCSO requires the abortion seeker to speak to or be examined by multiple authorities, including the police, it takes away the anonymity that could offset some of the stigma; pregnant adolescents are thus more likely to resort to unsafe and clandestine abortions. The Guttmacher Institute estimates that 78% of abortions among adolescents in India are unsafe and thus carry an elevated risk of complications; and that 190,000 adolescents do not receive the necessary care required after an unsafe abortion [11]. Since sexual activity involving adolescents is an offence under POCSO, reporting the abortion automatically involves State intervention, making anonymity impossible. On the other hand, in instances of non-consensual sex where an arrest should occur, societal stigma often compels adolescents to choose unsafe abortion services that pose life-threatening risks rather than jeopardise their anonymity.

Recognising the dire implications of the mandatory reporting requirement under the law, Justice Chandrachud in *X v the Principal Secretary, Health and Family Welfare Department & Another* chose to read the MTP and POCSO harmoniously [7]. Noting the on-ground challenges that result from a restrictive and carceral legal framework, the Court held that the mandatory reporting requirement under Section 19 of POCSO was likely to result in minors being forced to choose between approaching a medical practitioner and facing criminal consequences or seeking clandestine abortion services. The Court clarified that medical practitioners are not required to disclose the identity or personal information of any minor who seeks termination of their pregnancy if the adolescent asks them not to do so. However, the Court's directions on mandatory reporting requirements under POCSO were limited to cases under the MTP Act alone, to facilitate access to safe abortions, especially in cases of adolescent pregnancies resulting from consensual sexual relationships [7].

Further, the Madras High Court in *Sabari v Inspector of Police and Others*, in 2019 [12], decided a significant case where a girl aged 17 years eloped and married an adolescent boy from the

same school. The girl's parents, on discovering their relationship, filed a complaint against the boy of sexual assault under POCSO, and kidnapping under IPC. The Court noted that teenagers and young adults have increasingly been targets of prosecution under POCSO, even for consensual sexual acts. It also noted that due to "ground realities," the age of consent for POCSO provisions to apply should be 16, rather than 18 years [12], effectively decriminalising consensual relationships involving persons above 16 years of age. The Court additionally stated that when the offender and the victim are not more than five years apart in age, it should be an exception to statutory rape provisions, to ensure that "the impressionable age of the victim girl cannot be taken advantage of by a person who is much older and has crossed the age of presumable infatuation or innocence" [12].

An analysis of the cases decided in the period spanning 2020-2022 reveals that the existing barriers for adolescents to access safe abortion services were exacerbated by Covid-19. This is discussed in detail after explaining the methodology used in developing this research.

Methodology

A comprehensive review was conducted of cases under the MTP Act and POCSO. Information was collected on all cases before the High Courts in India involving judicial authorisation for a termination of pregnancy, that were adjudicated between March 15, 2020, and February 28, 2022. This period was selected to distinguish the Covid-19 period as recognised by the Supreme Court of India for computation of the limitation period for cases filed during the pandemic [13]. The data were procured from the state High Court websites by periodically mapping the decisions that were emerging from each of the High Courts on the issue of abortion access. One of us (AR) has conducted a study looking at cases of termination of pregnancies before the courts in the year 2019-2020 and the findings of that study have also informed this article, given the considerable overlap in some cases^b. We noted the total number of cases involving a person below 18 years of age seeking a termination of pregnancy, and then further distinguished cases of pregnancy resulting from a consensual sexual relationship from those resulting from rape. This proved to be a challenging task as the courts consider all sexual activity involving a person below the age of 18 years as rape, in view of POCSO and IPC, and only a few cases explicitly mention the consensual nature of the sexual relationship that resulted in the pregnancy. In 77 cases, the courts were dealing with the request for termination of a pregnancy, resulting from an alleged rape of someone below the age of 18. Of these, the courts had held consensual sexual relations to be rape in nine cases. In this paper, we use a few cases to illustrate our arguments.

Limitations

There are some limitations to the study. First, it is restricted

to judgments reported by the High Courts, and there may have been many more instances of adolescents seeking termination of pregnancies that did not reach the courts, and are not recorded. Second, judgments where information pertaining to the consensual nature of the sexual relationship was not provided, or where the word “rape” has been used, have been included in the category of rape/non-consensual cases. This does not convey an accurate representation of the number of cases involving consensual sex being prosecuted, since the courts have failed to recognise the validity of consensual adolescent sexual activity owing to the prevailing law. This often results in the lack of any discussion on consent in several judicial opinions. Moreover, Covid-19 related restrictions have also limited the availability of data on the provision of abortion services. The next section provides a brief overview of the Indian response to the pandemic to shed light on these aspects.

The lockdown effect

India confirmed its first case of Covid-19 on January 30, 2020, the same day the World Health Organization (WHO) declared it a Public Health Emergency of International Concern [11]. Covid-19 was managed in India based on the National Disaster Management Act, 2005 (NDMA) and the colonial-era Epidemic Diseases Act, 1897. Under the NDMA the National Disaster Management Authority authorises state governments to address a disaster, centralising operations and giving the central government overriding powers of enforcement [14]. At the state level, some state governments decided to invoke the Epidemic Diseases Act, 1897, which also gives them sweeping powers to undertake “any measures that may be needed to prevent the outbreak of an epidemic. or the spread thereof” [15].

The Indian response to Covid-19 also relied on the Criminal Procedure Code and the IPC, to allow law enforcement authorities to limit individual movement and to arrest anyone who disobeys an order of law enforcement personnel [16]. This archaic legal framework used to sanction extraordinary executive power and action during the pandemic led to restrictions, including lockdowns, and had an unprecedented impact on pregnant persons’ ability to access safe medical and surgical abortion services through medical facilities as well as pharmacists.

Access to medical professionals and other healthcare service providers, including personal protective equipment (PPE), was determined by the public health system infrastructure in every state. There was a substantial delay at the beginning of the pandemic in providing basic PPE to healthcare professionals. Due to this delay, doctors and healthcare workers reportedly started falling sick and many resigned from their jobs, exacerbating the shortage of medical professionals [17]. Additionally, several hospitals and health facilities were repurposed as Covid-19 centres, limiting the availability of and deprioritising SRH services. The Ministry of Health and Family Welfare’s guidance note called for

reproductive, maternal, new-born child and adolescent care medicines to be supplied even in containment zones but failed to undertake any follow-up measures to actively provide SRH in the time of crisis [18]. News reports further highlighted the grave shortage of medical abortion pills. The combi-pack of Mifepristone and Misoprostol is generally used to carry out medically managed abortions without the supervision of a healthcare worker [19]. Reports indicated shortages in almost all states. In Punjab and Haryana, a meagre 1% and 2% of pharmacies, respectively, had stock of the pills [20].

In assessing the impact of the pandemic in the three months during a nationwide lockdown from March 25, 2020 to June 24, 2020, a study conducted by Ipas Development Foundation concluded that out of the 3.9 million abortions that would have taken place in India in those three months, access to around 1.85 million was compromised due to Covid-19 restrictions, with SRH services being categorised as non-essential [21]. In addition, lack of access to contraception is likely to have resulted in more unintended pregnancies (around 2.95 million), unsafe abortions, maternal deaths and higher maternal morbidity [6]. Although so far, there is no concrete data on the increase in numbers of unsafe abortions during Covid-19, there have been on-ground reports of women resorting to unsafe abortions due to desperation and lack of access to safe abortion methods. This would have caused several complications such as haemorrhaging, infections or uterine perforation [22].

The complex web of laws regulating abortion access, particularly concerning adolescents and their SRH rights, creates confusion among young individuals, medical professionals, and law enforcement agencies. The pandemic exacerbated the challenges, with healthcare resources redirected and movement restrictions hindering adolescents’ ability to access safe and confidential abortion services. The POCSO Act and the MTP Act, which mandates parental consent for those under 18 years, turns every teenage pregnancy into a potential case of sexual abuse, making it difficult for adolescents to obtain abortion services without resorting to unreliable methods [23]. The next section illustrates how abortion access for adolescents was further restricted during the pandemic in view of these legal complexities.

Unveiling obstacles: Abortion access amidst the Covid-19 pandemic

Much like the legislative framework, the case law with respect to adolescents obtaining abortions or medical termination of pregnancies is largely inconsistent. There are multiple instances of High Courts allowing requests for termination of pregnancies even where the gestation period has exceeded the stipulated 20 weeks as per the MTP Act; courts have taken into consideration the social and psychological prospects of the “survivor” (assuming that the

pregnancy was not consensual) if the pregnancy were to continue. However, courts have also denied similar requests for different reasons.

Recently, one of us (AR) gave legal advice to a pregnant adolescent X, aged 17 years, along with her mother. X was in a consensual relationship with a boy who was 18 years of age. Around this time, Covid-19 was declared a pandemic, and the lockdown imposed, making it difficult to access any medical care beyond treatment for Covid-19. X and her mother managed to gain access to a reputed private hospital, where the doctor ascertained her age and insisted that they first inform the police. When X refused to reveal the identity of her partner in her police complaint, the doctor refused to provide abortion services. Thereafter, X along with her mother, approached a doctor at another hospital in a different police jurisdiction. When this doctor informed the police, they insisted on taking X and her mother to the police station to register an FIR and record their statements. They were surrounded by male police officers and were uncomfortable throughout the process. When they received a copy of the FIR, they realised that the police had distorted X's statement and had stated that she was forced to have sexual intercourse, despite her telling them that the relationship was consensual.

X and her mother returned to the second medical practitioner, as they had been told that because an FIR had been lodged, they could go ahead with the termination procedure. However, they learned that the police had arrested the 18-year old boy. The doctor refused to provide an abortion service without written police confirmation that the pregnancy could be terminated as per the MTP Act — a demand that is completely contrary to the Act's provisions. Given their discomfort in dealing with the police, X and her mother then decided to approach a third doctor and X was finally able to get an abortion. The boy spent nearly three months in custody before securing bail, and the FIR has not yet been quashed.

This case demonstrates how the legal framework in India criminalises even consensual sex between adolescents, characterising it as rape, and mandates that the persons aware of its occurrence to report it to law enforcement, under threat of penalty for non-compliance. Even after reporting, the involvement of law enforcement has a chilling effect on medical professionals who demand written permission to carry out abortions, as they are apprehensive of legal action otherwise.

The interaction between different laws and their consequent impact discourages adolescents from seeking safe abortions from legitimate and trustworthy sources. This, compounded by the overall lack of access to healthcare services during the Covid-19 pandemic, especially in remote areas, has resulted in adolescents being unable to access safe abortions. This constraint led many women and girls to approach courts seeking permission for abortion, resulting in several cases [24] before High Courts all over India, between March 2020 and

February 2022. The next section discusses decisions of the courts in such cases during the pandemic.

Abortion cases in the courtroom

The provisions of POCSO significantly restrict access to abortion services for adolescents. A review of jurisprudence around abortion during the pandemic shows that access to reproductive health services was seriously affected, especially with respect to accessing timely, safe and affordable abortion services. Several cases heard by the High Courts, even during restricted working periods, related to permission sought for termination of pregnancies beyond the 20-week limit. Several of these cases pertained to adolescents who experienced delays in accessing health services due to the pandemic. It is noteworthy that the courts have not explicitly recognised the challenges brought about by the pandemic nor demonstrated empathy in response to these issues, barring one case.

The next section critically evaluates cases on abortion where sex was consensual.

Court cases on consensual sexual relationships

The first set of cases to be noted involve adolescents seeking abortions in pregnancies resulting from consensual sexual relationships. Given the scheme of POCSO, and the requirement of mandatory reporting in particular, an additional barrier that adolescents encounter is the heightened stigma and non-recognition of their legal capacity to engage in sexual activity. Even under the MTP Act, though abortion is usually allowed in cases of rape, it is often denied when the pregnancy is the result of consensual sexual intercourse owing to moralistic reasoning, even if it causes mental or physical distress to the pregnant person. The lack of a rights-based framework in the MTP Act means the will of the pregnant person is not prioritised in terminations of pregnancy, and the opinions of society, often reflected in the Courts, take precedence.

For instance, in *Mahalakshmi v The District Collector and Others* [25], the adolescent J became pregnant after she eloped with one Sundar. She initially wanted to carry the pregnancy to full term and had subsequently changed her mind and informed the Court of her decision to terminate the pregnancy over video conferencing, given the pandemic. In this case, the court discussed the significance of taking into account the consent of the pregnant person, even if she is a "minor" and also of considering the circumstances of the "unborn child", especially in this case where the accused, Sundar, was also charged with several criminal offences. The judge said the child, if given a choice, "would definitely proclaim that it would not wish to be born" in such circumstances, and the Court would have to consider termination, irrespective of the adolescent's consent. Taking note that J had changed her mind and the medical opinion was also to terminate the pregnancy, the court ordered

termination of her pregnancy, emphasising her victimhood as a “child”. Similarly, in *Ram Avatar v State of Chhattisgarh* [26], a 17-year-old adolescent had become pregnant and wanted to continue the pregnancy, whereas her father wanted it to be terminated and petitioned the Court for the same. The gestational age of the pregnancy then was 27 weeks. An FIR was also registered under Sections 363, 366, 376(2)(n) of the IPC and Sections 5(l) and 5(j)(ii) of POCSO. The petitioner argued that given that the adolescent was a “minor” and a “victim” of rape, “termination of pregnancy is the only way to protect her” [26]. A Medical Board was constituted which opined that the request for abortion could not be allowed as per the MTP Act as it “can put mother’s health in danger due to excessive bleeding and risk of death” [26]. The request of the petitioner to terminate the pregnancy was therefore denied.

At first glance, the denial of abortion in this second case may appear to support the well-being of the pregnant individual, it is crucial to highlight that the Court explicitly referenced abortion as a sin in the Hindu religion. The reference, “Manu in his Dharma Sastra said that the sin of a foeticide is transferred to the person who partakes of his food” [26] underscores a religious perspective influencing the decision. Continuing a pregnancy in this context reinforces societal norms linking “motherhood” to women’s identities. In contrast, the act of seeking an abortion challenges and confronts stereotypical and reductionist beliefs about women. This dynamic reveals a complex interplay between legal decisions, religious considerations, and societal expectations regarding women’s roles and identities.

In the case of *Gopal Pattnaik v State of Orissa* [27], heard by the High Court of Orissa through video-conferencing, the petitioner was the father of an adolescent who was 18 weeks pregnant. The case was referred to a Medical Board and the adolescent also informed the Court that she did not want to carry the pregnancy to term. Although she was under 18 years of age, abundant caution was taken to consider her opinion. The court’s striking observation in this case was that sexual intercourse, even with the consent of the adolescent in question, could not be held to be with consent in the eyes of the law, owing to her age [27].

Even though the MTP Act makes abortion accessible for most people, Section 19 of POCSO results in certain legal complexities and barriers. The provision mandates that known or suspected sexual intercourse involving a minor should be reported to the authorities as rape, regardless of whether the adolescent claims it is consensual. This in turn discourages pregnant adolescents, who do not wish their partners to be prosecuted, from accessing safe abortions. Ironically, adolescents’ abortion cases that are taken to court are treated as abortions that are necessitated by the physical and emotional trauma of rape. Indian law does not differentiate between the two.

Court cases involving survivors of rape

The law is more liberal in permitting abortion in cases of rape. Pregnant survivors of rape are permitted to terminate their pregnancies up to 24 weeks of gestation. Cases of contraceptive failure are also permitted abortion for gestation up to 20 weeks, as both rape and contraceptive failure are classified as causing grave injury to the pregnant person’s mental health [28]. Cases requesting an abortion after rape are most often permitted by the courts.

In several instances of rape of minors and adolescents, the courts were lenient in allowing the requests for abortion even for pregnancies crossing the upper gestational limit for termination of pregnancy [29, 30, 31]. Courts have exhibited varying legal reasoning and decisions with respect to adults seeking abortions [32]. For instance, the Bombay High Court, in *Rubina Kasam Phansopkar v State of Maharashtra*, denied permission for abortion to a married person who claimed mental unpreparedness for the pregnancy, financial hardship, and advanced age [32]. In this case, the pregnant woman, who was the petitioner, cited the Covid-19 lockdown imposed nationwide, as well as in Maharashtra, as the reason for the delay in applying for termination of pregnancy before the Court. However, the Medical Board’s report in this case responded by claiming that the obstetrics department of the Government and private hospitals were operating full time even during the pandemic [32]. In contrast to this, for adolescents, who are uniformly considered to have been subjected to sexual assault (as per POCSO provisions) regardless of whether or not the sexual intercourse was voluntary, the courts have been more lenient in granting abortions, even at later stages of pregnancy.

Abortion permitted by High Courts

The Bombay High Court heard a petition by an adolescent rape survivor, in June 2020, who was at 25 weeks’ gestation [33]. The Court directed the adolescent rape survivor to appear before a medical board and considered the board’s report advising against the abortion. The courts almost always rely on the medical board’s opinion to decide on granting permission for termination on a case-by-case basis. However, in the present case, the court not only disregarded the medical board’s report advising against abortion, but granted permission to terminate her pregnancy on the ground of injury to the adolescent petitioner’s mental health. This case, therefore, forms an important exception to the jurisprudential landscape around abortions with its over-reliance on medical boards, and indicates a move towards allowing doctors to provide abortion services at their own discretion. Two similar cases — *Pramod A. Solanke v Dean of B.J. Govt. Medical College* in May 2020 [34] and *Sangita Sandip Dahilkar v State of Maharashtra*, in September 2020 [35] — before the Bombay High Court, resulted in

orders where the Court allowed both the 16-year-old rape survivors to terminate their pregnancies of 21 and 23 weeks, respectively.

It is evident, therefore, that there are certain circumstances, for instance, cases of rape, where courts are more amenable to permitting late-term abortions. The perceived "victim" status of petitioners, as minor and adolescent rape victims, seemed to influence judicial decisions that granted permission for abortion.

Abortion requests denied by the High Courts

Although there were several instances of High Courts granting permission for abortions during the pandemic, there are numerous other examples of permission being denied and some of these are discussed below.

In a case before the Bombay High Court's Aurangabad Bench, an adolescent approached the Court through her mother seeking to abort a pregnancy resulting from rape [36]. At the start of the hearings, the pregnancy was at 29 weeks gestation and the case was referred to an Expert Medical Committee. The Committee's report noted that there was no evidence of foetal anomalies and the pregnant adolescent was clinically normal and psychologically stable. The Court relied on this report and denied the request for termination, despite noting that the petitioner was below 18 years of age and a pregnancy alleged to have been caused by rape is presumed to constitute grave injury to the mental health of the pregnant person [36].

In two cases involving similar circumstances that were decided by the High Court of Madhya Pradesh in 2021 [37] and 2022 [38], the petitioners, fathers of adolescents who were 29 weeks and 32 weeks pregnant, respectively, had approached the Court seeking termination of their pregnancies resulting from rape. The Courts denied their requests, given the gestational age, noting that the termination had been advised against by a team of doctors as it could jeopardise the health of the foetus and pregnant person. In one case, the Court directed the State authorities to bear the expenses of the delivery [37]. In the second case, the Court directed that the adolescent must be given the option to give up the child for adoption, directing the State and its agencies to assume full responsibility for the child, if the adolescent were unwilling to keep the child [38].

In some cases where the adolescent was already married to the accused and the parents instituted POCSO proceedings, the courts have quashed the proceedings. For instance, in *Shri. Shembhalang Rynghangh and Another v State of Meghalaya*, the Meghalaya High Court quashed the FIR and criminal proceedings initiated against a man in a consensual relationship with a 16-year-old adolescent [39]. The Court was of the opinion that as the sexual relationship had been with a person below the age of 18, this could not be termed as "assault," given its voluntary nature and the proof of marital ties between the parties [39]. Marital relationships do make a

difference to Court rulings, though in both scenarios, of cases involving rapes and marriages, the decisional autonomy of the pregnant person is disregarded. Thus, both POCSO, as well as the way rape is prosecuted, are inconsistent between different, but similar, cases.

Courtroom bias

An analysis of court decisions on abortions for adolescents during the pandemic reveals that Courts often permitted abortions to adolescent rape survivors. Regardless of the consensual nature of intercourse leading to pregnancy amongst adolescents, the Courts considered the perceived "victim" status of the rape survivors and allowed abortion to take place. Most adolescents who approached Courts and were granted permission were 13-17 years of age, and some had been in consensual sexual relationships resulting in pregnancy.

AR found in her study that all aspects of abortion for adolescents are made more difficult by the mandatory involvement of the courts. Due to the discomfort of long interactions with police and RMPs, pregnant adolescents often need to visit multiple clinics to access legal abortion services. Courts, when granting permission for abortions to such petitioners, considered factors like the unmarried status of the petitioner, the grave injury to mental health that would occur if the pregnancy were to continue, as well as the trauma and social stigma suffered were the petitioners to have a child "out of wedlock." For instance, the High Court of Madhya Pradesh, in the case of *X Minor through her mother Madhu v State of M.P. & Ors.* [40], permitted termination of the pregnancy of a 17-year-old girl who alleged that she had been seduced by a man on the false pretext of marrying her. The Court, in allowing abortion, took note of her age and prior trauma, while also relying on the report of the medical board consulted, which had found the petitioner to be fit for termination of her 16-week pregnancy [40].

The seemingly progressive jurisprudential discourse around abortion is riddled with inconsistencies between the right to bodily integrity and the reproductive rights of a pregnant person and the construction of abortion as a "sin" The circumstances in which Courts have either granted or denied requests for termination are still influenced by moralistic notions, with a Court even citing Hindu scriptures that speak against abortion [26]. Institutional barriers and bureaucratic delays in constituting medical boards often lead to further hurdles in pregnant adolescents gaining access to safe abortion services.

As seen in the case of *Rubina Kasam Phansopkar v State of Maharashtra* [32], the petitioner attributed the delay in seeking termination of pregnancy to the overwhelming disruptions caused by Covid-19 and the subsequent nationwide lockdown, including restricted movement, overwhelmed healthcare systems, and the overall uncertainty created by the pandemic, were key factors contributing to the delayed application. However, it is

noteworthy that the Medical Board's response contested this assertion. According to their report, the obstetrics departments of both government and private hospitals were operating at full capacity even during the pandemic. This contradiction raises questions about the extent to which Covid-19 genuinely contributed to the delay in seeking abortion services. In this intricate scenario, the Courts had to weigh the genuine impact of Covid-19 on the petitioner's ability to seek timely abortion against the imperative of ensuring that legal procedures are followed. The case underscores the complex intersection of public health crises and individual rights, prompting a nuanced evaluation of the pandemic's role in causing delays in legal processes related to reproductive rights. However, several other judicial decisions overlooked the circumstances linked to the pandemic while rejecting requests for termination of pregnancy.

Finally, it is problematic that Indian law does not account for the evolving sexual autonomy principle:

The POCSO Act lumps all persons below 18 years together without consideration for their developing sexuality, evolving capacity, and the impact of such criminalisation on their best interests. It fails to strike an effective balance between protecting adolescents against sexual abuse and recognising their normative sexual behaviour [41].

The legal framework must consider the evolving capacity for sexual autonomy in adolescents as they grow older. This principle is currently undermined by POCSO, which does not emphasise comprehensive sexual and reproductive health education recommended by the WHO and several United Nations agencies [41]. This denies adolescents in India knowledge about and access to contraceptives and safe abortion services.

The analysis underscores the need for a nuanced and comprehensive approach to reproductive rights and sexual autonomy for adolescents in the legal framework. Striking a balance between protection against sexual abuse and recognising normative sexuality is crucial. Additionally, efforts to streamline the legal process, eliminate moralistic biases, and provide adequate sexual and reproductive health education are essential for ensuring the well-being and rights of adolescents.

Role of the medical board and bureaucratic delays

Among the key amendments contained in the MTP Amendment Act, 2021, was the introduction of medical boards at the State level to diagnose foetal anomalies in cases involving the termination of pregnancies beyond 24 weeks of gestation. The constitution of a medical board does not consider the ground realities of accessing abortion services, including the fact that a pregnant person may not be able to physically appear in front of a board when the pregnancy is at an advanced stage [42]. The processes involved in constituting medical boards, having the pregnant person be examined by the board, and sharing a report with the court, all require

multiple nodes of communication and coordination with different stakeholders. This does not sensitively account for a pregnant person's experiences, nor does it prioritise them. Further, the bureaucratisation of the process for seeking termination of pregnancies via approval through medical boards creates a landscape where there may be rampant delays in pregnant persons getting access to abortion services and other necessary medical care, thus jeopardising their health and rights [43]. Rather, the process places the pregnant person at the mercy of the court and medical professionals.

The courts prescribed the formation of medical boards, and in many cases relied heavily on their decisions; these decisions in turn were based on factors such as the viability of the foetus which are not reflected in the parameters mentioned in the MTP Act [44]. The Act further institutionalised the power of medical boards, at the expense of the autonomy of pregnant persons, mandating that every state government or Union Territory constitute a medical board. Given that medical boards lack uniformity in decision-making parameters and use inconsistent reasoning, the provisions of the Act further perpetuate arbitrariness when it comes to granting abortion requests beyond the prescribed gestational limits. A study conducted by the Centre for Justice, Law and Society found that there were "shortages of healthcare professionals and specialists across India, poor public health infrastructure and healthcare funding exacerbated by unsound privatisation policies, and significant data gaps for doctor availability" [43]. This impacts the ability to constitute medical boards in the first place, given the lack of availability of doctors to sign off on abortions. Furthermore, the courts' denial of permission for abortion in some cases without a comprehensive acknowledgment of the unique and challenging circumstances introduced by the pandemic reflects a lack of empathy and understanding. It raises concerns about the courts' ability to recognise and consider external factors, especially those arising from a global health crisis, in the adjudication of reproductive rights cases.

The lack of public health infrastructure, shortages of specialised doctors who are qualified to provide abortion services, as well as the statutory mandate in the MTP Amendment Act for third-party authorisation through medical boards creates a landscape of limited access to abortion services in India. Such barriers to access are disproportionately experienced by most pregnant persons who live in remote or rural areas, or are from marginalised communities. An additional complication is the requirement under POCSO that a female doctor must examine a girl child. Due to the shortage of women doctors in many parts of the country, most adolescents encounter challenges in access. This, when compounded by the effects of the Covid-19 pandemic, has had a grave impact on the ability of pregnant persons, adolescents in particular, to access abortion services, as well as healthcare facilities in general.

The experiences of adolescents in accessing safe abortion services during the Covid-19 pandemic in India reveal the grave harms that result from criminalisation of abortions and consensual sexual activity between adolescents. The deployment of a strict, carceral framework for regulating sexual and reproductive rights results in significant barriers to realisation of rights, especially for marginalised persons. Criminalisation perpetuates stigma and acts as a deterrent, leading adolescents to navigate complex legal processes, as highlighted by the need for court approval in certain cases. The pandemic further accentuated these challenges, with bureaucratic delays and institutional barriers exacerbating the difficulties faced by pregnant adolescents.

There is therefore a need to rethink the legal framework from an intersectional, reproductive justice framework that centres sexual and reproductive autonomy while building systems that can adequately respond to the healthcare needs of pregnant adolescents and foster respect for their decisional autonomy [10].

Conclusion

This article analyses the jurisprudence of several High Courts that dealt with adolescent access to abortion services during the Covid-19 pandemic. This period saw a rise in cases before the High Courts, with a significant number of adolescents (who already face challenges in accessing healthcare) seeking permission for abortion. Timely, affordable and safe access to reproductive healthcare services, including abortion services for adolescents, is subject to legal conflict and ambiguity through interaction between the criminal justice system, POCSO and the MTP Act that work to the detriment of adolescents. The penal provisions of POCSO render medical professionals reluctant to provide abortion services for adolescents and lead to the criminalisation of even consensual relationships involving adolescents. This makes it difficult for adolescents to access reproductive healthcare services.

A consistent pattern emerges from studies and legal judgments regarding the impact of the POCSO Act on adolescent sexuality and their ability to access reproductive health and abortion services. While the law was ostensibly designed to safeguard children, it has faced criticism for adopting a paternalistic approach that overlooks the natural progression of sexual exploration among adolescents, which is considered a healthy and normal part of their development [41]. Originally enacted to address the issue of sexual abuse in individuals below the age of 18, the protective and paternalistic provisions of the law now pose a significant obstacle for adolescents seeking safe abortion services. In addition, there is an urgent need for legal parity and reform to decriminalise consensual adolescent relationships, while simultaneously ensuring barrier-free access to SRH rights services.

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Notes:

^aAccording to the World Health Organization “adolescence” is “the phase of life between childhood and adulthood, from ages 10 to 19” (WHO 2023, Cited on 2023 Dec 25). Available from: https://www.who.int/health-topics/adolescent-health#tab=tab_1

^bAnubha Rastogi has been engaged in ongoing research focused on the obstacles encountered by individuals seeking abortions. The study involves an analysis of decisions rendered by the High Courts of the country on this matter. The first two segments of this project have already been published by the Pratigya Campaign in reports assessing the role of the judiciary in either facilitating or hindering access to safe abortions between 2016 and 2020. The research specifically addresses barriers hindering access to safe abortion services and the complications arising from a convoluted legal framework. This paper confines its discussion to the findings related to adolescents, emphasising the detrimental effects of criminalising consensual sexual acts among adolescents, as outlined by the provisions of POCSO.

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