



सत्यमेव जयते

**GOVERNMENT OF INDIA  
LAW COMMISSION OF INDIA**

**AGE OF CONSENT UNDER THE PROTECTION OF  
CHILDREN FROM SEXUAL OFFENCES ACT, 2012**

**Report No. 283**

**September, 2023**

The 22<sup>nd</sup> Law Commission was constituted by Gazette Notification for a period of three years vide Order No. F No. 45021/1/2018-Admn-III(LA) dated 21<sup>st</sup> February, 2020 issued by the Government of India, Ministry of Law and Justice, Department of Legal Affairs, New Delhi. The term of the 22<sup>nd</sup> Law Commission was extended vide Order No. FA No. 60011/225/2022-Admn.III(LA) dated 22<sup>nd</sup> February, 2023.

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Law Commission of India



DO No. 6(3) 332/2022-LC(LS)

Date: 27<sup>th</sup> September, 2023

Hon'ble Sir Arjun Ram Meghwalji  
Nemastak!

I am pleased to forward you **Report No. 283** of the Law Commission of India on "**Age of Consent under the Protection of Children from Sexual Offences Act, 2012**". The Law Commission received a reference from the Hon'ble High Court of Karnataka (Dharwad Bench), *vide* letter dated 9<sup>th</sup> November, 2022, asking the Commission to rethink on the age criteria for consent, taking into consideration the rising number of cases relating to minor girls above the age of 16 years falling in love, eloping and having sexual intercourse with the boy, thereby attracting the provisions of the Protection of Children from Sexual Offences Act, 2012 ("POCSO") and/or the Indian Penal Code, 1860. The Commission is also in receipt of a reference from the Hon'ble High Court of Madhya Pradesh (Gwalior Bench), *vide* letter dated 19<sup>th</sup> April, 2023, wherein the Court has drawn the Commission's attention on how the enforcement of the POCSO Act, in its present form, causes gross injustice in cases of statutory rape where *de facto* consent is present. The Court further requested the Commission to suggest amendment to the POCSO Act, vesting discretionary power in the Special Judge to not impose the statutory minimum sentence in cases where *de facto* consent is apparent on part of the girl child or where such a relationship has culminated in marriage, with or without children.

The Commission thoroughly examined the judgments rendered by High Court of Karnataka in *State of Karnataka v. Basavraj S/o Yellappa Madar [(2023) 1 AIR Kant R 23]* and the High Court of Madhya Pradesh in *Veekesh Kalawat v. State of Madhya Pradesh & Ors. [Misc. Criminal Case No. 4521 of 2023]*, forwarded to us in this regard. In pursuance of the same, the Commission held extensive consultations on the subject-matter concerned with the National Commission for Protection of Child Rights (NCPCR), former judges, lawyers, child rights activists, NGOs and academicians who have expertise in this field. The Commission also solicited response from all the High Courts and the National Crime Records Bureau (NCRB) for relevant data on the issue.

**Justice Ritu Raj Awasthi**  
(Former Chief Justice of High Court of Karnataka)  
Chairperson  
**22<sup>nd</sup> Law Commission of India**



सत्यमेव जयते



**न्यायमूर्ति ऋतु राज अवस्थी**  
(सेवानिवृत्त मुख्य न्यायाधीश, कर्नाटक उच्च न्यायालय)  
अध्यक्ष  
**भारत के 22<sup>वें</sup> विधि आयोग**

After a careful review of existing child protection laws, various judgements and considering the maladies of child abuse, child trafficking and child prostitution that plague our society, the Commission is of the measured view that it is not advisable to tinker with the existing age of consent under the POCSO Act. However, having cautiously considered all the views and suggestions furnished in this regard, the Commission considers it necessary that certain amendments need to be brought in the POCSO Act to remedy the situation in cases wherein there is tacit approval in fact though not consent in law on part of the child aged between 16 to 18 years. This is so because in our considered opinion, such cases do not merit to be dealt with the same severity as the cases that were ideally imagined to fall under the POCSO Act. The Commission, therefore, deems it fit to introduce guided judicial discretion in the matter of sentencing in such cases. This will ensure that the law is balanced, thus safeguarding the best interests of the child. Accordingly, this Report is being submitted for your kind perusal.

With warmest regards,

Yours sincerely,

**(Justice Ritu Raj Awasthi)**

**Shri Arjun Ram Meghwal**  
Hon'ble Minister of State (Independent Charge)  
Ministry of Law & Justice  
Government of India  
Shastri Bhawan  
New Delhi -110001.

## ACKNOWLEDGEMENT

Upon receiving the reference for the subject-matter of this Report from the Hon'ble High Court of Karnataka, Dharwad Bench, through a copy of its judgment in Criminal Appeal No.100515/2021(A), dated 4<sup>th</sup> November, 2022 and from the Hon'ble High Court of Madhya Pradesh, Gwalior Bench, through a copy of its final order in Miscellaneous Criminal Case No. 4521 of 2023, dated 28<sup>th</sup> February, 2023, the Law Commission held expansive deliberations with all the relevant stakeholders, primarily, the concerned statutory body, retired judges, lawyers, academicians, scholars and child rights activists to grasp the legal and technical nuances of the subject. The Commission also sought the relevant data from all the Hon'ble High Courts and Government agencies. We remain deeply thankful to all of them.

The Commission extends its heartfelt gratitude towards the following individuals/organisations in particular, who took out their valuable time to furnish their valuable insights, comments and submissions on the instant subject:

1. Shri Priyank Kanoongo, Chairperson, National Commission for Protection of Child Rights
2. Hon'ble Justice (Retd.) Shri R. Basant, Senior Advocate, Supreme Court of India
3. Prof. (Dr.) Ved Kumari, Vice-Chancellor, National Law University, Odisha
4. Prof. (Dr.) Asha Bajpai, School of Law, Rights and Constitutional Governance, Tata Institute of Social Sciences
5. Dr. Kumar Askand Pandey, Associate Professor (Law), Dr. Ram Manohar Lohiya National Law University, Lucknow
6. Dr. Latika Vashist, Associate Professor, School of Law, Governance and Citizenship, Dr. B.R. Ambedkar University, Delhi
7. Shri O.P. Singh (IPS Retd., Former DGP, U.P.), Chief Executive Officer, India Child Protection Fund
8. Shri Bhuwan Ribhu, Advocate, Kailash Satyarthi Children's Foundation
9. Shri Vikram Srivastava, Advocate and Founder, Independent Thought
10. Ms. Swagata Raha, Director, Research and Co-Director Restorative Practices, Enfold Proactive Health Trust
11. Ms. Maharukh Adenwalla, Advocate
12. Ms. Vidya Reddy, Executive Director, Tulir - Centre for the Prevention & Healing of Child Sexual Abuse
13. Ms. Bharti Ali, Co-Founder & Executive Director, HAQ: Centre for Child Rights
14. Shri Kumar Sanjay, Additional Public Prosecutor, Rouse Avenue Court, New Delhi
15. National Crime Records Bureau

The Commission gratefully acknowledges the commendable assistance rendered in the preparation of this Report by **Mr. Rishi Mishra, Mr. Gaurav Yadav, Mr. Shubhang Chaturvedi, Mr. Davinder Singh, Ms. Priya Rathi** and **Ms. Ruchika Yadav**, who worked as Consultants. We place on record our profound admiration for their meticulous efforts in conducting research and extending aid in drafting of this Report.

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## 1. INTRODUCTION

1.1. The thought-process, habits, attitude and behavioural conduct of an adult are shaped mostly in the early years of his or her childhood. The rivulet of love and innocence that flows from a child is what makes him or her such an exuberant source of delight for all. If the physical and mental development of a child takes place in an environment full of effervescence, the child goes on to metamorphose into a confident and successful adult. On the other hand, a child who faces constant abuse and is made to undergo untold physical or mental suffering is most likely to transfigure into a bruised and distraught individual. The agonies that one is compelled to endure in one's childhood leave an indelible scar on one's traits and personality. It is in this sense that one reminisces William Wordsworth's immortal lines, "*The Child is father of the Man.*" Hence, it becomes peremptory that all civilised societies adopt moral as well as legal practices to secure and nourish their children. As Mahatma Gandhi put it, "*If we are to reach real peace in this world and if we are to carry on a real war against war, we shall have to begin with children; and if they will grow up in their natural innocence, we won't have to struggle; we won't have to pass fruitless idle resolutions, but we shall go from love to love and peace to peace, until at last all the corners of the world are covered with that peace and love for which consciously or unconsciously the whole world is hungering.*"

1.2. In the realm of human rights and social justice, the responsibilities of a state towards its children are of paramount



importance. Ensuring the development and protection of children is not only a moral imperative but also a legal obligation that every state bears. As Bhagwati J., has stated in *Sheela Barse v. Union of India*,<sup>1</sup> “if a child is a national asset, it is the duty of the State to look after the child with a view to ensuring the full development of its personality”. Thus, States bear a vital obligation to ensure the holistic development of children and shield them from any form of exploitation. This dual responsibility is anchored in both moral imperatives and constitutional commitments. The State’s commitment to development of the child encompasses the provision of quality education, accessible healthcare, proper nutrition, and essential social services. Simultaneously, the State must establish and enforce stringent laws and safeguards to protect children from exploitation, including child labour, trafficking, and abuse. By fulfilling these obligations, the government lays the foundation for a just and thriving society, ensuring that every child’s rights are upheld and their potential is nurtured in a safe and secure environment.

1.3. The origin of child rights marks a significant milestone in human history, highlighting the growing recognition of the unique vulnerabilities and needs of children. It reflects our collective understanding that children, as individuals in their own right, require special safeguards and protections to ensure their well-being, development, and dignity. Child rights origins underscore the belief that every child has the right to survival, education, health, and protection from harm. They emphasize the importance of nurturing children’s

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<sup>1</sup> 1986 3 SCC 596.

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physical, emotional, and cognitive growth, allowing them to reach their full potential. These concerns have also been previously expressed by the Law Commission in its 259<sup>th</sup> Report on “Early Childhood Development and Legal Entitlement”, wherein the Commission opined that:

*“This critical period up to the age of six years is a ‘window of opportunity’, i.e., if the child receives favourable environmental inputs of health, nutrition, learning and psychosocial development, the chances of the child’s brain developing to its full potential are considerably enhanced. If the environmental experiences are unfavourable and the child faces deprivation or emotional or physical abuse, the brain’s development is negatively affected and the ‘window of opportunity’ is lost, often irrevocably.”<sup>2</sup>*

1.4. As the concept of child rights evolved, the fact that children are not merely extensions of adults but have distinct rights and needs gained recognition. This acknowledgement has prompted the re-evaluation of legal frameworks aimed at safeguarding children from exploitation, abuse, neglect, and discrimination. This becomes all the more crucial in light of the judicial pronouncement in *K. S. Puttaswamy v. Union of India*<sup>3</sup>, wherein the right to privacy was accorded the status of a fundamental right. One of the contours of the right to privacy is that it protects a decisional aspect of the individual, seeking to safeguard the realm of autonomous social development of the person. Thus, it is critical to address child abuse while also considering the

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<sup>2</sup> Law Commission of India, “259th Report on Early Childhood Development and Legal Entitlements” 2 (August, 2015) available at <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081688.pdf> (last visited August 16, 2023).

<sup>3</sup> (2017) 10 SCC 1.

delicate balance between protecting children and respecting their development of personal autonomy.

1.5. Child abuse is a deeply concerning issue that threatens the well-being and future of our society's most vulnerable members. It encompasses various forms of physical, emotional, or psychological harm inflicted upon children, which can have long-lasting and devastating effects. In India, the legal framework has taken significant steps to curb child abuse and protect children's rights. The most prominent legislation addressing this grave concern is the Protection of Children from Sexual Offences Act (hereinafter, referred to as "POCSO Act") enacted in 2012. This Act specifically focuses on addressing and preventing sexual offences against children, ensuring a child-friendly legal process, and establishing stringent penalties for offenders.



## 2. REFERENCE TO THE LAW COMMISSION

2.1. In the light of influx of cases pertaining to romantic relationships between 16 to 18 year-olds, various High Courts in the country have echoed the opinion that either the age of consent be reduced to 16 years or the trial judge be given some kind of discretion while trying such cases so as to alleviate the harm and suffering that is inevitably caused to male children or adolescents who engage in consensual sexual relations with female children and are later prosecuted on account of the mandatory reporting requirement under law or at the behest of the girl child's family who disapprove of such relationship. The Hon'ble High Courts, such as those of Madras, Karnataka, Madhya Pradesh, Delhi, Bombay, etc., while dealing with cases filed under the POCSO Act, have highlighted the need for reduction of age of consent for the victim from 16 to 18 years, in so far as it relates to a romantic relationship with the accused.

2.2. In this regard, two separate references were received by the Commission from the Hon'ble High Courts of Karnataka and Madhya Pradesh.

### *A. Reference received from the Hon'ble High Court of Karnataka*

2.3. In *State of Karnataka versus Basavraj S/O Yellappa Madar*<sup>4</sup>, the Dharwad Bench of the High Court of Karnataka, was faced with a case under the POCSO Act wherein the victim was a girl aged 17 years and

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<sup>4</sup> *State of Karnataka v. Basavraj S/O Yellappa Madar* (2023) 1 AIR Kant R 23 ; (2023) 1 KANT LJ 486.

9 months and had eloped with the accused. The two had subsequently married and had two children. The accused was acquitted by the Special Judge as the prosecution had failed to bring forth sufficient evidence to successfully establish the case. The State, being aggrieved, preferred an appeal before the Hon'ble High Court. The High Court, while confirming the order of acquittal, requested the Law Commission to rethink the age-criteria provided under the Act. The Court thus observed:

*"29.1. This Court is coming across several matters alleging offences under Section 376(2)(j) or under the POCSO Act when the girl is 16 years and above, where the girl and the boy are said to be in love with each other and wanted to get married. However, there being opposition to their marriage, the girl and the boy eloped resulting in either the mother or the father of the girl filing a complaint. Thereafter, upon investigation the girl and the boy are traced living happily in a different city. However, since a complaint has been lodged, investigation is completed and the girl and the boy when traced, a charge sheet is laid resulting in criminal prosecution of the boy.*

*29.2. The effect of such criminal prosecution of a minor girl and/or minor boy and/or boy who has attained majority recently, causes severe harm and injury to all the concerned including the families.*

*29.3. When a criminal prosecution is initiated and the boy is taken into custody, there is also a possibility of misunderstanding occurring between the boy and the girl which could impact their relationship. The parents of boy and girl, the siblings of the boy and girl and if they are married, their respective spouses and their respective families would also undergo severe mental trauma apart from being ostracized, severe financial losses are also caused.*



29.4. Many a time the complaint is filed in the heat of the moment on account of objection to the marriage, however later on the complainant and the other family members turn hostile and do not support the case of the prosecution.

29.5. The other set of complaints is when the same is filed by an NGO or the doctor on noticing that the girl is pregnant. In such cases the family members turn hostile and do not support the case of the prosecution.

29.6. In the present case, though initially a complaint was filed making various allegations, all the witnesses turned hostile since probably they realized that the minor girl wanted to marry the boy. Thus, though the complaint had been lodged no one has supported the same. On the date of hearing before this court, the mother and father of the minor girl along with the boy were present before this Court along with their two children. On enquiry, the girl, who is now a major, has stated that she and the boy got married on 17.01.2017 and thereafter they are living together as husband and wife, the boy has been taking care of her properly and two children have been born, who are also being taken care of by the boy, now her husband, the mother and father of the girl also stated that both of them are living happily and they never wanted to prosecute the case.

29.7. The aim and objective of POCSO Act is to protect the minor children from sexual exploitation and it is made clear that a minor cannot provide consent, the minor under POCSO Act being a person under the age of 18 years.

29.8. **Having come across several cases relating to minor girls above the age of 16 years having fallen in love and eloped and in the meantime, having had sexual intercourse with the boy, we are of the considered opinion that the Law Commission of India would have to rethink on the age criteria, so as to take into consideration the ground realities.** (emphasis added)

29.9. The aspect of consent even by a girl of 16 years and above would have to be considered if there is indeed an offence under

*the IPC and/or or POCSO Act. Normally when evidence is lead the victim is a major and the testimony given then of an act committed while being a minor would have to be given due value."*

***B. Reference received from the Hon'ble High Court of Madhya Pradesh***

2.4. In *Veekesh Kalawat v. State of Madhya Pradesh*<sup>5</sup>, the Gwalior Bench of the High Court of Madhya Pradesh was seized with a similar case of child sexual assault under the POCSO Act, wherein a minor girl had voluntarily eloped with a boy and the relationship had also resulted in their marriage and birth of a child. While rendering its judgment, the High Court suggested an amendment to be introduced in the POCSO Act so as to allow discretion to the Special Judge in deciding such cases. The High Court further requested the Law Commission to consider the same and accordingly suggest an amendment to the Parliament. The observations made by the Court are as follows:

***"REQUEST TO THE HON'BLE LAW COMMISSION OF INDIA (WITH SPECIFIC REFERENCE TO PARAGRAPH 21)***

*7. The oppressiveness of the POCSO in its application to the marginalised sections of the society reeling under the combined negative effects of illiteracy and poverty, is most pronounced in the State of Madhya Pradesh. This Court feels it necessary to bring it to the notice of the Hon'ble Law Commission of India, how the operation of the POCSO in certain cases is disrupting and devastating families in rural Madhya Pradesh by sending the sole bread winner in the family to jail for a minimum of ten years,*

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<sup>5</sup> *Veekesh Kalawat v. State of Madhya Pradesh*, High Court of Madhya Pradesh, Misc. Criminal Case No.4521 of 2023.

*at times leaving his wife and children to the vagaries of social exploitation if the parents and the in-laws of the prosecutrix/wife are not willing to keep her. Where the prosecutrix is unemployed as is mostly the case, the options for survival are dismal ranging from prostitution to crime. The State has no obligation under the POCSO to provide for the basic minimum required for survival of the so-called "survivor". The enforcement of the POCSO to such cases in its present form, does gross injustice.*

*8. The vision of the Law Commission of India is "Reforming the laws for maximizing justice in society and promoting good governance under the rule of law" and its mission is "The Terms of Reference of the Law Commission, inter alia, includes review/repeal of obsolete laws, to examine the Laws which affect the poor and carry out post-audit for socio-economic legislations, to keep under review the system of judicial administration to ensure that it is responsive to the reasonable demands of the times and in particular to secure, to examine the existing laws in the light of Directive Principles of State Policy and to suggest ways of improvement and reform and also to suggest such legislations as might be necessary to implement the Directive Principles and to attain the objectives set out in the Preamble to the Constitution, Examine the existing laws with a view for promoting gender equality and suggesting amendments there to, to revise the Central Acts of general importance so as to simplify them and to remove anomalies, ambiguities and inequities, to examine the impact of globalization on food security and employment and recommend measures for the protection of the interests of the marginalised".*

.....

*21. Therefore, the Hon'ble Law Commission of India is requested to kindly consider the following and suggest the amendment of the POCSO to the Parliament (if the Hon'ble Commission so deems fit), to give discretion to the Special Judge where; (a) Where the prosecutrix is below the age of consent but de facto consent is apparent, not to have a minimum sentence and instead, give the discretion to the Special Court (who is a senior Session Judge usually with more than twenty years of judicial*



experience) to impose a sentence as per the facts and circumstances of the case, which can extend up to twenty years and (b) Where the prosecutrix is below the age of consent and the relationship has culminated in marriage (with or without children), there should not be any sentence of imprisonment and instead the Special Court be empowered to impose alternate correctional methods like community service etc."  
(emphasis added)



### 3. BACKGROUND OF THE ISSUE

3.1. It is undeniable that pendency of cases before the POCSO Special Courts is an issue that needs to be considered. Some attribute this pendency to the fact that cases that ought not to be criminalised are given a criminal colour by the strict wording and implementation of the POCSO Act, thereby increasing the number of cases as well as rendering precarious the plight of those that are caught within the folds of its application. There is a growing concern that the Special Courts are plagued with false cases, especially those arising out of teenage romantic relationships, which are filed by the family members who disapprove of such relationships or come to the forefront due to mandatory reporting requirements under law. Various High Courts have expressed the opinion that the POCSO Act was never meant to criminalise consensual romantic relationships between young adults which are a ground reality in today's day and age. It has been observed that consensual sex between minors is a legal grey area as consent of a minor is no consent in the eyes of law.<sup>6</sup> Such an opinion is largely resonated by the academia and experts as well.

3.2. There remains a great deal of divergence regarding how to best address this issue. While there are some who favour lowering the age of consent for consensual sexual relationships to 16 years as was the position prior to enactment of the POCSO Act, others have suggested introducing "close-in-age" exemptions as present in the USA and

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<sup>6</sup> *Arhant Janardan Sunatkari v. State of Maharashtra (Through Sanpada Police Station)* (2021) 1 Bom CR (Cri) 658.



Canada; or introducing judicial discretion in the matter of sentencing but not lowering the age of consent under any circumstance. The issue of romantic relationship between minors or with a minor is a nuanced one and requires careful consideration, which this Report tries to achieve.



#### 4. BACKGROUND OF CHILD RIGHTS LAWS

4.1. "Child rights" as a discourse is of much recent origin, gaining formal shape only in the twentieth century.<sup>7</sup> While some laws did treat children as separate legal persons and recognised the State's obligation towards them, for instance the Code of Hammurabi, comprehensive set of rights such as those present in the recent times were largely absent. Any rights that did accrue to children flowed from the understanding that children were dependent on their parents for their rights and were properties of their parents and not independent in themselves.<sup>8</sup> Thus, earlier the approach of the State towards children was limited in its protection<sup>9</sup> and domains such as their education, inheritance and protection of vulnerable children were the focal areas when it came to laws pertaining to children or rights explicitly vested in them.

4.2. The shift towards a true rights-based approach occurred only in the twentieth century starting with the Geneva Declaration of the Rights of the Child adopted by the League of Nations in 1924, which for the first-time acknowledged child rights and emphasised the importance of providing special safeguards and care for children.<sup>10</sup> Thereafter, the Universal Declaration of Human Rights, 1948 though not specific to children, did recognise that a child is entitled to special care and

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<sup>7</sup> Abhay Vikram Singh, "Theory of Human Rights in Perspectives to Child Rights", 73 *The Indian Journal of Political Science* 365 (2012).

<sup>8</sup> Christine Alice Corcos, "The Child in International Law: A Pathfinder and Selected Bibliography" 23 *Case Western Reserve Journal of International Law* 171 (1991).

<sup>9</sup> Geeta Chopra, *Child Rights in India: Challenges and Social Action* 10-11 (Springer India, 2015).

<sup>10</sup> Geneva Declaration of the Rights of the Child, 1924 available at <http://www.un-documents.net/gdrc1924.htm>.



assistance, and that all children shall enjoy the same social protection.<sup>11</sup> The Declaration of the Rights of the Child (1959) adopted by the UN General Assembly was the next comprehensive document outlining child rights and highlighting the principle of best interest of the child. The most landmark instrument in the field of child rights, United Nations Convention on the Rights of the Child, 1989 (UNCRC), came after that. The UNCRC is a legally binding treaty that has been ratified by 196 countries, thus making it one of the most ratified international treaties. Out of all UN members, only the United States of America has not ratified this Convention.<sup>12</sup> The UNCRC is a comprehensive treaty encompassing a broad variety of rights be it civil, social, political, economic or cultural rights. Besides the child specific instruments and declarations, recognition of the rights of a child can also be found in human rights instruments<sup>13</sup> such as the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR),<sup>14</sup> the International Covenant on Civil and Political Rights, 1966 (ICCPR)<sup>15</sup> as well as International Labour Organisation Conventions.<sup>16</sup> The move towards a rights based approach to child rights was on account of the change in attitude towards a child, that is to say, children started being viewed as autonomous individuals separate from their parents whose rights, interests and needs were unique on account of the vulnerabilities

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<sup>11</sup> Universal Declaration of Human Rights, 1948, art. 25(2).

<sup>12</sup> United Nations Treaty Collection, Status of Convention on the Rights of the Child available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=en).

<sup>13</sup> Abhay Vikram Singh, "Theory of Human Rights in Perspectives to Child Rights", 73 *The Indian Journal of Political Science* 365 (2012).

<sup>14</sup> International Covenant on Economic, Social and Cultural Rights, 1966, arts. 10(3) & 12(2)(a).

<sup>15</sup> International Covenant on Civil and Political Rights, 1966, art. 24.

<sup>16</sup> Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182).

they faced compared to the adults, thus warranting separate framework, recognition and protection.<sup>17</sup>

4.3. In the Indian context, the earliest traces of any form of implicit or explicit recognition of child rights can be found in various labour laws that were passed during the colonial times, for instance, the Factories Act, 1881 which, *inter alia*, brought in conditions to regulate child labour.<sup>18</sup> Similarly, the Apprentices Act, 1850 had provisions pertaining to welfare of child workers and for the first time it provided that convicted children, aged 10-18 years, be provided vocational training as part of their rehabilitation process.<sup>19</sup> In a similar fashion, the Reformatory Schools Act, 1876 focused on reformation and rehabilitation of young offenders.<sup>20</sup> The Code of Criminal Procedure, 1898<sup>21</sup> also provided for differential treatment of juvenile offenders. The next step forward in juvenile justice system came from the Indian Jail Committee (1919-1920)<sup>22</sup> which recommended that child-offenders should not be treated the same as adults<sup>23</sup> and that juveniles should not be imprisoned<sup>24</sup> but sent to remand homes<sup>25</sup> and attempt must be made

<sup>17</sup> Geeta Chopra, *Child Rights in India: Challenges and Social Action* 10-11 (Springer India, 2015).

<sup>18</sup> The Indian Factories Act, 1881 (Act No. 15 of 1881). The word "child" was defined as a person under the age of 12 years. The Act prohibited employment of a child under the age of 7 in any factory and also imposed a restriction of maximum 9 hours of work per day for a child. The Act also laid down other requirements such as one-hour daily interval for food and rest during the working hours, at least four holidays per month, children not to be employed in certain dangerous works etc.

<sup>19</sup> The Apprentices Act, 1850 (Act No. 19 of 1850).

<sup>20</sup> The Reformatory Schools Act, 1876 (Act No. V of 1876). The Act for the first time provided a system separate from adult criminal system catering to reformation of male youthful offenders which was defined as a boy under the age of 16 years convicted of any offence punishable with imprisonment or transportation.

<sup>21</sup> Code of Criminal Procedure, 1898 (Act V of 1898).

<sup>22</sup> Indian Jails Committee, *Report of the Indian Jails Committee 1919-20: Volume I – Report and Appendices* (Superintendent Government Central Press, Simla, 1920).

<sup>23</sup> *Id.*, para 363 at pg 50.

<sup>24</sup> *Id.*, para 367 at pg 195.

<sup>25</sup> *Id.*, para 386 at pg 195.

towards their reformation. It also suggested the creation of Children's Courts.<sup>26</sup> Consequent to the Indian Jail Committee Report, provincial legislations, namely, Madras Children Act, 1920<sup>27</sup>; Bengal Children Act, 1922<sup>28</sup>; and Bombay Children Act 1924<sup>29</sup> were enacted, all of which provided for detailed procedure for trial of a child offender, thus treating child offenders on a different footing as a category separate from adult offenders. However, juvenile justice is just one dimension of child-welfare and other areas were also touched upon. For instance, the Child Marriage Restraint Act, 1929<sup>30</sup> was a piece of beneficial legislation aimed at securing the interests of a child by prohibiting child marriage.

4.4. The post-independence scenario is quite different and more progressive. There is emphatic recognition of the rights of a child and their position is explicitly emphasised within the Constitution itself. Article 15(3) of the Indian Constitution allows the State to make special laws for children.<sup>31</sup> Further, Article 24 prohibits employment of children in hazardous industries.<sup>32</sup> The inclusion of Article 21A, which provides the right to free and compulsory education for children between the ages of 6 to 14 years, in 2002, also reflects the evolving and growing recognition of child rights in India.<sup>33</sup> Further, the Directive Principles of State Policy recognise the State's obligation towards

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<sup>26</sup> *Id.*, para 370 at pg 197.

<sup>27</sup> The Madras Children Act, 1920 (Madras Act IV of 1920).

<sup>28</sup> The Bengal Children Act, 1922 (Bengal Act II of 1922).

<sup>29</sup> The Bombay Children Act, 1924 (Bombay Act XIII of 1924).

<sup>30</sup> The Child Marriage Restraint Act, 1929 (Act No. 19 of 1929).

<sup>31</sup> The Constitution of India, art. 15(3).

<sup>32</sup> *Id.*, art. 24.

<sup>33</sup> *Id.*, art. 21.



welfare and protection of children as provided under Articles 39 and 45.<sup>34</sup> In furtherance of the constitutional mandate and India's international obligations, various child-specific legislations addressing different dimensions of child rights and welfare have been enacted over the years such as the Immoral Traffic (Suppression) Act, 1956, the Child Labour (Prohibition and Regulation) Act, 1986, the Child and Adolescent Labour (Prohibition and Regulation) Amendment Act, 2016, the POCSO Act, 2012 and the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter, referred to as "JJ Act"), the last two being relevant for the purposes of this Act.

4.5. The terms "child" and "minor" are often used synonymously and interchangeably in common parlance. Further, both "child" and "minor" have multiple and varying definitions under different laws and the legal meaning of these terms lacks uniformity. The age of majority is set at 18 years under the Indian Majority Act, 1875. The Hindu Minority and Guardianship Act, 1956<sup>35</sup> and the Guardians and Wards Act, 1890<sup>36</sup> also define "minor" as a person below the age of 18. Under the Prohibition of Child Marriage Act, 2006, "child" is a person under the age of 21 in case of males and under 18 in case of females.<sup>37</sup> The Right of Children to Free and Compulsory Education Act, 2009, defines "child" as a person between the age of 6 to 14 years.<sup>38</sup> Further, under

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<sup>34</sup> *Id.*, arts. 39, 45.

<sup>35</sup> The Hindu Minority and Guardianship Act, 1956 (Act No. 32 of 1956), sec. 4(a).

<sup>36</sup> The Guardians and Wards Act, 1890 (Act No. 8 of 1890), sec. 4(1).

<sup>37</sup> The Prohibition of Child Marriage Act, 2006 (Act No. 6 of 2007), sec. 2(a).

<sup>38</sup> The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35 of 2009), sec. 2(c).



the JJ Act<sup>39</sup> and the POCSO Act,<sup>40</sup> “child” is defined as any person under the age of 18 years. The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, defines a child as a person who has not completed the age of 14.<sup>41</sup> Additionally, the Act also defines “adolescent” as a person between the age of 14 to 18 years<sup>42</sup>, which is notable given that definition of adolescent is largely absent under other laws and is mostly defined in the context of governmental policies and programs.

4.6. Under the criminal law jurisprudence, there is a presumption that a child is incapable of doing any wrong or committing a crime. This is best reflected in the Latin maxim *doli incapax*. This presumption also finds place in the Indian Penal Code, 1860 (hereinafter, referred to as “IPC”), with different degrees of immunity being extended to children falling under different age brackets. Section 82 of the IPC provides absolute immunity to children below the age of 7 by stating “*Nothing is an offence which is done by a child under 7 years of age*”. A child over 7 years is, however, considered *doli capax* and Section 83 of the IPC provides only qualified immunity to a child over 7 years and under 12 years who has “*not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion.*” The immunity would flow once it is proved that the child in question has not attained sufficient maturity of understanding. While the IPC

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<sup>39</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act No. 2 of 2016), sec. 2(12).

<sup>40</sup> The Protection of Children from Sexual Offences Act, 2012 (Act No. 32 of 2012), sec. 2(d).

<sup>41</sup> The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 (Act No. 61 of 1986), sec. 2(ii).

<sup>42</sup> *Id.*, sec. 2(i).

provides varying degrees of immunity to children from criminal liability, the JJ Act also devolves upon a child in conflict with law a certain degree of immunity from punishment and sentencing. However, recognising the fact that children falling in different age brackets have different levels of maturity and understanding, a child between the ages of 16 to 18 years can be tried as an adult under the JJ Act and receive punishment as such.<sup>43</sup>

4.7. The law as it stands now, has different statutes dealing with different ambits of child rights ranging from education to child labour, sexual exploitation and juvenile delinquency. For the limited purpose of this Report, the POCSO Act and the JJ Act are most relevant.

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<sup>43</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act No. 2 of 2016), sec. 15 r/w sec. 18(3).

## 5. THE POCSO ACT: HISTORY, OBJECT AND CONTENT

5.1. The POCSO Act, 2012 was enacted by the Parliament with the view to protect children from offences of sexual assault, sexual harassment and pornography. The Act also provides for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. The Act came into force on 14<sup>th</sup> November, 2012.

5.2. Before the enactment of the POCSO Act, there was no specific legislation dealing with sexual exploitation of children.<sup>44</sup> Prior to the POCSO Act, charges were filed under the IPC, especially under Section 375, 354 and 377.<sup>45</sup> Barring Section 377, other provisions are not gender neutral and thus male children did not enjoy equal protection against sexual abuse under the law.<sup>46</sup> Against sexual abuse of the male child, the general provisions of the IPC relating to hurt, criminal force and/or assault were attracted.<sup>47</sup> However, the issue remained that there were several sexual offences which were not specifically defined and made punishable under the scheme of the IPC and were hence charged under the general non-specific sections of the IPC. Thus, the earlier legal framework to deal with a crime of such grave nature was

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<sup>44</sup> The term “children” or “child” in this Report means any person below the age of 18 unless the context otherwise specifies.

<sup>45</sup> Law Commission of India, “156<sup>th</sup> Report on Indian Penal Code, 1860” 180 (August, 1997) available at

<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/09/2022092329.pdf> (last visited June 13, 2023); *Sakshi v. Union of India* (2004) 5 SCC 518.

<sup>46</sup> Rajya Sabha Debates on May 10, 2012.

<sup>47</sup> Law Commission of India, “156<sup>th</sup> Report on Indian Penal Code, 1860” 180 (August, 1997) available at

<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/09/2022092329.pdf> (last visited on June 13, 2023); *Sakshi v. Union of India* (2004) 5 SCC 518.

thoroughly inadequate and even the punishment did not seem commensurate with the gravity of the offence.<sup>48</sup> The POCSO Act finally remedied this situation. It is a gender-neutral law covering within its purview any person below the age of 18 years and provides for a wider and defined category of sexual offences committed against children with stricter punishments in proportion with the gravity of the offence.<sup>49</sup> The Act is intended to protect children from the offences of sexual assault, sexual harassment and pornography. The Act also provides for establishment of Special Courts for trial of offences under the Act so that the best interest of the child, who is a victim of such abominable acts, be prioritised and trials be conducted in a sensitive manner. The Act recognizes the right to privacy and confidentiality of a child and places paramount importance on the best-interest and well-being of the child.<sup>50</sup>

5.3. The POCSO Act has been enacted keeping in mind the goals enshrined in our Constitution. Article 39(f) of the Constitution, being a Directive Principle of State Policy, is a fundamental principle of governance. It provides that the State shall frame its policy towards ensuring that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.<sup>51</sup> Further, Article 15(3), *inter alia*,

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<sup>48</sup> *Nawabuddin v. State of Uttarakhand* (2022) 5 SCC 419.

<sup>49</sup> The Protection of Children from Sexual Offences Act, 2012 (Act No. 32 of 2012), sec. 2(d), sec. 2(d).

<sup>50</sup> *Eera v. State (NCT of Delhi) and Another* (2017) 15 SCC 133.

<sup>51</sup> The Constitution of India, 1949, art. 39(f).



empowers the State to make laws for children.<sup>52</sup> The justification for this special law can also be found in India's international obligations under various conventions, in specific, the Convention on the Rights of the Child, 1989, which was signed by India on 11<sup>th</sup> December, 1992. The preamble of the POCSO Act reflects this most perspicuously.

5.4. Over the years, there were mounting concerns about the rising cases of child sexual abuse and in this regard certain recommendations were made by various concerned quarters from time to time. The Law Commission, in its 156<sup>th</sup> Report released in 1997, had noted the increase in incidences of child rape.<sup>53</sup> The Commission, in order to address the sexual exploitation and rape of girl children, recommended amendments in Section 375, 354 and 509 of the IPC<sup>54</sup>, which however would have not come to the aid of male children being subjected to sexual abuse as the victim of the offences specified under the said provisions can only be a female. The 156<sup>th</sup> Report had a separate section dealing with child abuse, wherein the Commission stated that the amendments to Section 375 and 377 in terms of increased punishment and broader coverage were adequate to deal with this "epidemic" that had emerged over the past decade.<sup>55</sup> The 156<sup>th</sup> Report noted that Section 375 and 354 of the IPC would specifically cover cases of sexual abuse

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<sup>52</sup> *Id.*, art. 15(3).

<sup>53</sup> Law Commission of India, "156<sup>th</sup> Report on Indian Penal Code, 1860" 174 (August, 1997) available at <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/09/2022092329.pdf> (last visited June 13, 2023).

<sup>54</sup> Law Commission of India, "156<sup>th</sup> Report on Indian Penal Code, 1860" 180 (August, 1997) available at <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/09/2022092329.pdf> (last visited June 13, 2023).

<sup>55</sup> *Id.*

of a female child involving penile penetration into the vagina and penetration with finger and/or inanimate object, respectively. Section 377 of the IPC would cover other cases of carnal intercourse with a child, be it male or female. Further, penal provisions dealing with 'hurt', 'criminal force' or 'assault' could be invoked for acts of penetration with finger or inanimate object committed on a male child.<sup>56</sup> Any attempt to commit any of these offences would attract penal sanction under Section 511 of the IPC.

5.5. The exigency for a protective legislation for children was echoed by the Hon'ble Supreme Court in *Sakshi v. Union of India*,<sup>57</sup> wherein the Apex Court recognised that in light of an alarming increase in cases of child abuse and rape, an appropriate legislation in that regard was urgently required. In *Sakshi v. Union of India*,<sup>58</sup> a writ petition was filed before the Supreme Court for declaring, *inter alia*, the words "sexual intercourse" in Section 375 of the IPC shall mean to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration, as an otherwise narrow interpretation of the law was leading to treatment of non-penile/vaginal penetration as a lesser offence even though the trauma suffered by victims in both scenarios may be equivalent. The Petitioner therein, further contented that such an interpretation ran counter to the contemporary understanding on rape and had an adverse bearing upon

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<sup>56</sup> *Id.*

<sup>57</sup> *Sakshi v. Union of India* (2004) 5 SCC 518 : 2004 SCC (Cri) 1645.

<sup>58</sup> *Id.*

the sexual integrity and autonomy of women and children thereby violating Article 21 of the Constitution. The Court solicited the opinions of the Law Commission which cited the 156<sup>th</sup> Report. However, the precise issues raised in the writ petition were different than those considered by the Commission in its 156<sup>th</sup> Report. Consequently, the Apex Court had requested the Law Commission to examine the feasibility of introducing amendments to the IPC or making recommendations to deal with the issue of child sexual abuse by interpreting the provision for rape in a manner so as to plug the loopholes that existed.

5.6. The Law Commission, subsequently, in its 172<sup>nd</sup> Report considered the review of rape laws in light of rising cases of sexual abuse of children.<sup>59</sup> The Commission, *inter alia*, recommended not only widening the scope of offence falling under Section 375 of the IPC by substituting “sexual assault” for “rape” but also making it gender neutral.<sup>60</sup>

5.7. The POCSO Act was brought in light of the increasing cases of crimes against children, especially of sexual nature, as was reflected in the data provided by National Crime Records Bureau as well as the “Study on Child Abuse: India 2007”<sup>61</sup> conducted by the Ministry of

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<sup>59</sup> Law Commission of India, “172<sup>nd</sup> Report on Review of Rape Laws” 4 (March, 2000) available at <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022082487.pdf> (last visited July 7, 2023).

<sup>60</sup> *Id.*, at 13-15.

<sup>61</sup> Government of India, “Study on Child Abuse: India 2007” (Ministry of Women and Child Development, 2007).

Women and Child Development. The position as it stood then was that sexual crimes against a child and an adult were treated the same and were charged under the same provisions of the IPC, which was detrimental to the interests of the child and proved largely ineffective in tackling cases of child abuse. It was observed that on account of lack of specific provisions dealing with sexual abuse of children, the perpetrators often were unpunished and went scot-free. It was with the aim of addressing this glaring gap in law and providing for a suitable legislation with stringent provisions to curb child sexual abuse that the POCSO Act was introduced. The significance of this Act can only be understood when considering the humongous child population that India has. As per the Census 2011 data, there were more than 400 million persons in India below the age of 18 years, which is about 36.7% of the total population.<sup>62</sup> Thus, the POCSO Act serves to be a protective umbrella for the future torch bearers of our nation who form a significant part of our populace.

5.8. The underlying philosophy of the POCSO Act is quite pioneering in comparison to views on child protection expressed earlier by various quarters. The Act is gender neutral and quite monumental in that regard. The Act provides for various child-friendly provisions in order to adequately safeguard the interests of children in its entirety and at every step.

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<sup>62</sup> Government of India, "Census of India 2011" Table C-13 (Office of the Registrar General & Census Commissioner, India, Ministry of Home Affairs, 2015), available at: <https://censusindia.gov.in/nada/index.php/catalog/1436> (last visited on May 30, 2023).



5.9. The entire scheme of the Act is devised by the Legislature in such a manner that it ensures the child is protected at every stage and the trial is appropriately conducted.<sup>63</sup> The Act is divided into nine chapters and various parts therein. **Chapter II** defines various kinds of Sexual Offences Against Children, hence titled the same. It contains the definitions of the offences of penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual assault and sexual harassment and prescribes stringent punishments for the said offences. **Chapter III** addresses using a child for pornographic purposes and storage of such content. This is a grave issue that has magnified lately as an ugly consequence of increased use of the internet. **Chapter IV** deals with abetment of and attempt to commit an offence under the Act so that any person who aids and abets in the sexual exploitation of a child cannot escape the vigour of its stringent provisions.

5.10. **Chapter V** is on procedure for reporting of cases and introduces a vital safeguard in the form of mandatory reporting so as to ensure that no case is left out of purview of the system and all cases are actually investigated by the authorities. The severity of offence and the vigour with which the State endeavours to protect children is well reflected in this mandatory reporting requirement prescribed under the Act. The Act enjoins upon a person, having knowledge of an offence under the Act or apprehension of the same, a legal obligation to report the same to the relevant authorities.<sup>64</sup> The mandatory nature of reporting is enforced by

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<sup>63</sup> *Alakh Alok Srivastava v. Union of India* (2018) 17 SCC 291 : (2019) 4 SCC (Cri) 184.

<sup>64</sup> The Protection of Children from Sexual Offences Act, 2012 (Act No. 32 of 2012), sec. 2(d), sec. 19 and 20.

the penal sanction attached to the failure to discharge the said duty.<sup>65</sup> Even though the quantum of punishment prescribed under law is not too high, the Courts have consistently viewed this duty to report very seriously and its dereliction a serious crime as the failure to report commission of an offence would be deleterious to the very object of the Act.<sup>66</sup> Apart from this, obligations of the media while reporting offences under the Act as well as punishment for reporting false cases or information has also been clearly laid down under Chapter V.

5.11. The procedural requirements under **Chapters VI to IX** highlight the child friendly procedure to be adopted in line with the best interest of the child. **Section 28** mandates designation of a Court of Session in each district as Special Court for ensuring a speedy trial of offences under the Act. Further, **Section 32** obligates the State Government to appoint a Special Public Prosecutor for every Special Court designated under Section 28, to conduct trials under the POCSO Act. Furthermore, **Chapter VIII** of the Act deals with the procedure and powers of these Special Courts and the procedure for recording evidence of the child victim. **Section 33** lists numerous safeguards at the trial stage to protect the interests of the child. **Section 35** provides for recording of the evidence of the child within thirty days of cognizance by the Court and disposal of the cases within a period of one year. Moreover, **Section 37** further provides for an in-camera trial in the presence of the child's parents or any other person in whom the child has trust or confidence. Importantly, **Section 36** obligates the Special Court to shield the child

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<sup>65</sup> *Id.*, sec. 2(d), sec. 21.

<sup>66</sup> *State of Maharashtra v. Maroti* (2023) 4 SCC 298; *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546 : (2013) 3 SCC (Cri) 402.

from the accused at the time of recording of the evidence while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate, thereby striking a balance between the competing interests of protecting the child from further trauma and right of the accused to fair trial.<sup>67</sup>

5.12. The true seriousness of the Legislature in taking the devil of child sexual abuse by its horns is best reflected in Section 29 and 30 of the Act. **Section 29** reverses the presumption of innocence usually present in criminal law. Under Section 29, the person being prosecuted is presumed to be guilty unless the contrary is proved. **Section 30** further states that where ever there is a culpable mental state specified for an offence under this Act, the Court shall presume that such culpable mental state or *mens rea* exists on part of the accused, the same being a rebuttable presumption. However, the burden of proof on the accused is quite high and it has to be proved beyond reasonable doubt that the accused had no such mental state.

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<sup>67</sup> *Alakh Alok Srivastava v. Union of India* (2018) 17 SCC 291 : (2019) 4 SCC (Cri) 184.

## 6. AGE OF CONSENT PRIOR TO THE POCSO ACT

6.1. The age of consent is the age at which a person is considered legally capable of agreeing to marriage or sexual intercourse.<sup>68</sup> This age is defined by statute. At present the age of consent for sexual intercourse is 18 years on account of the POCSO Act. However, prior to the POCSO Act, there was no age of consent defined separately and it was fixed by virtue of Section 375 of the IPC, which defines “rape”. Rape being defined as a crime that can only be committed against a woman, the age of consent for sexual intercourse was only defined for a female, under which age consent is immaterial and any sexual activity amounts to statutory rape. On the other hand, there was no age of consent for males. In fact, the term “child” itself was not defined either under the IPC or the General Clauses Act, 1897. Further, the age of consent defined for a woman by virtue of Section 375 of the IPC defining “rape”, has had a chequered history with the age set at 10 years in 1860 to 18 years as it stands presently.

6.2. In 1860, the age of consent for women stood at 10 years. Thereafter, in 1891, the age of consent for a woman was raised to 12 years under Section 375 in the aftermath of the public outcry caused by the *Phulmoni* case.<sup>69</sup> Phulmoni was an eleven-year-old girl who died of haemorrhage from a rupture of vagina caused by her husband who had forced sex on her. The husband was held guilty of only causing grievous

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<sup>68</sup> Black's Law Dictionary, 9th ed., Pg. 70.

<sup>69</sup> *Queen-Empress v. Hurree Mohun Mythee*, (1891) ILR 18 Cal 49.

hurt by doing a rash or negligent act dangerous to life and sentenced to one year's rigorous imprisonment.

6.3 Thereafter, the age of consent was raised to 14 years in 1925 and to 16 years in 1940. Up till 2012 when the POCSO Act was enacted, the age of consent remained to be 16 years for women and there continued to be no age of consent defined for a male. However, the minimum age of marriage was 18 years for women and 21 years for men. The marital rape exception in Section 375 has also witnessed changes over the years starting from 10 years in 1860 to 15 years in 2012. The changes in age of consent can be summarised as follows:<sup>70</sup>

<b>Year</b>	<b>Age of consent under Section 375, 5<sup>th</sup> Clause of IPC</b>	<b>Age mentioned in the Exception to Section 375 of IPC</b>	<b>Minimum age of marriage under the Child Marriage Restraint Act, 1929</b>
<b>1860</b>	10 years	10 years	-
<b>1891(10 of 1891) (after the amendment of IPC)</b>	12 years	12 years	-
<b>1925 (after the amendment of IPC)</b>	14 years	13 years	-
<b>1929 (after the passing of the</b>	14 years	13 years	14 years

<sup>70</sup> Law Commission of India, "205<sup>th</sup> Report on Proposal to Amend the Prohibition of Child Marriage Act, 2006 and other Allied Laws" (February, 2008) available at <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081072-1.pdf> (last visited June 1, 2023); *Independent Thought v. Union of India* (2017) 10 SCC 800.

<b>Child Marriage Act)</b>			
<b>1940 (after the amendment of Penal Code and the Child Marriage Act)</b>	16 years	15 years	15 years
<b>1978</b>	16 years	15 years	18 years
<b>2006 (after enactment of Prohibition of Child Marriage Act, 2006)</b>	16 years	15 years	18 years for female and 21 years for male
<b>2013 (after Criminal Law Amendment Act, 2013 which amended IPC and followed shortly after enactment of POCSO)</b>	18 years	15 years	18 years for female and 21 years for male
<b>2017 (After the Supreme Court's decision in Independent Thought v. UOI)</b>	18 years (even in case of a married woman under 18 on account of reading down of Exception 2 of Section 375 in light of POCSO)	15 years however the same was read down	18 years for female and 21 years for male

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## 7. LAW COMMISSION REPORTS RELATING TO AGE OF CONSENT

7.1. The Law Commission, in its 84<sup>th</sup> Report titled “Rape and Allied Offences- Some Questions of Substantive Law, Procedure and Evidence”<sup>71</sup>, had suggested that the age of consent under fifth clause of Section 375 as it stood then should be increased to 18 years as the minimum age for marriage of a girl was 18 years under the erstwhile Child Marriage Restraint Act, 1929 (as amended in 1978). However, the Parliament in its wisdom, thought it fit to retain the age of consent at 16 years.

7.2. Thereafter, in its 156<sup>th</sup> Report on Indian Penal Code, 1860,<sup>72</sup> the Law Commission, while considering the age of consent, accepted the suggestion of the National Commission for Women to increase the age of consent to 18 years and accordingly recommended that the age specified in the sixth clause of Section 375 be increased to 18 years. However, the age of consent was not increased by the Parliament as recommended and continued to be 16 years till 2012 when POCSO was enacted and under IPC till Section 375 was amended in 2013.

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<sup>71</sup> Law Commission of India, “84<sup>th</sup> Report on Rape and allied offenses-some questions of substantive law, procedure and evidence” (April, 1980) *available at* <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080544.pdf> (last visited June 13, 2023).

<sup>72</sup> Law Commission of India, “156<sup>th</sup> Report on Indian Penal Code, 1860” 161 (August, 1997) *available at* <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/09/2022092329.pdf> (last visited June 13, 2023).

## 8. AGE OF CONSENT UNDER THE POCSO ACT

8.1. The age of consent under the POCSO Act is 18 years on account of the definition of “child” and the manner in which the sexual offences have been defined under the Act. It is pertinent to note that the age of consent was not always envisaged as 18 years under the Act. Initially, when the Act was being drafted and subsequently debated, there were proposals to recognise consent by a child between the ages of 16 to 18 years and there was debate on the same. However, it was a conscious decision that the Parliament made to keep the age of consent at 18 years without exception, given the special vulnerabilities faced by children and keeping in consideration the social situation prevailing in our nation.

8.2. The Protection of Children from Sexual Offences Bill, 2010 as prepared by National Commission for Protection of Child Rights (“NCPCR”) in November 2010 provided for a close-in-age exemption and recognized the possibility of two children engaging in sexual activities. Clause 3 of the said Bill defined “Unlawful Sexual Act with a Child” in the following manner:

### *“3. Unlawful Sexual Act with a Child*

*A. Subject to the exceptions hereinafter provided, any sexual act committed with a Child under the age of 16 years, with or without such child’s consent, is unlawful.*

#### *Exceptions:*

*Notwithstanding anything contained in this chapter or in any other law for the time being in force:*





*(i) Any consensual non-penetrative sexual act penalized by this chapter (except for sections 23, 25, 27 and 31) is not an offence when engaged in between two children who are both over 12 years of age and are either of the same age or whose ages are within 2 years of each other.*

*(ii) Any consensual sexual act penalized by this chapter (except for sections 23, 25, 27 and 31) is not an offence when engaged in between two persons who are both over 14 years of age and are either of the same age or whose ages are within 3 years of each other.*

*B. Any sexual act with a Child aged between 16 –18 years is unlawful when, a person engages in a sexual act with that Child in any of the following circumstances:*

*Firstly: With or without the Child's consent when the sexual act is accompanied or preceded by express or implied force or violence on the Child or on any other person in whom the Child is interested, which overpowers or intimidates or subdues that Child;*

*Secondly: With or without the Child's consent when the sexual act is accompanied or preceded by coercion which is sufficient to make a Child submit to the sexual act in the circumstances of the case;*

*Thirdly: With or without the Child's consent when the sexual act is accompanied or preceded by threat of serious harm or injury to the Child or to any other person in whom the Child is interested, or conduct instilling in the Child a reasonable fear of such harm, violence or injury, and the said threat or conduct is enough to make a Child submit to the sexual act in the circumstances of the case;*

*Fourthly: With or without the Child's consent when that person impersonates another person to engage in the sexual act, and knows, or has reason to know, that the Child is mistaken about that person's identity;*

*Fifthly: With or without the Child's consent when the Child is made to engage in the sexual act mistaking it to be something else and that person knows or has reason to know that the Child is so mistaken;*

*Sixthly: With or without the Child's consent when, by reason of intoxication or the administration by that person personally or through another of any stupefying or unwholesome substance, the Child is unable to understand the nature and consequences of the sexual act.*

*Seventhly: With or without the Child's consent when that person has taken undue advantage of the mental or physical incapacity of the Child to understand the nature and consequences of the sexual act or to voluntarily participate in it or to resist it.*

*Eighthly: When the Child is sleeping or unconscious;*

*Ninthly: Against the Child's will or without the Child's consent to engage in or continue with that sexual act.*

*Explanation:*

*(a) The fact that a Child did not say or do anything to indicate consent to a sexual act is enough to show that the act took place without that Child's consent.*

*(b) A Child is not to be regarded as having consented to a sexual act only because—*

*(i) the Child did not protest or physically resist; or*

*(ii) the Child did not sustain any physical injury; or*

*(iii) on that or an earlier occasion the Child had consensually engaged in or consented to engage in a sexual act (whether or not of the same type) with that or another person.*

*General Exception:*

*No act is an offence if that act is done bona fide, in good faith and in a reasonable manner for proper hygiene or medical examination or requirement.*<sup>73</sup>

8.3. The POCSO Bill, 2011<sup>74</sup> (hereinafter, referred to as “the Bill”) as introduced by the Ministry of Women & Child Development recognized the possibility of consent by a child between the ages of 16 to 18 years. Clause 2(d) of the 2011 Bill defined “child” as any person below the age of 18 years save as provided otherwise. Though “child” was defined as any person under 18 years, the age of consent was set at 16 years as the Bill of 2011 recognized that a child between the ages of 16 to 18 years could consent to sexual activities. A *proviso* to that effect was provided in Clauses 3 & 7 of the 2011 Bill dealing with penetrative sexual assault and sexual assault, respectively. The said *proviso* read:

*“Provided that where such penetrative sexual assault is committed against a child between sixteen to eighteen years of age, it shall be considered whether the consent for such an act has been obtained against the will of the child or the consent has been obtained by use of violence, force, threat to use force, intoxicants, drugs, impersonation, fraud, deceit, coercion, undue influence, threats, when the child is sleeping or unconscious or where the child does not have the capacity to understand the nature of the act or to resist it.”* (emphasis added)

8.4. The said Bill was introduced in the Rajya Sabha on 23<sup>rd</sup> March, 2011 and was subsequently referred to the Parliamentary Standing Committee. The Department Related Parliamentary Standing Committee on Human Resource Development, with regard to the same,

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<sup>74</sup> The Protection of Children from Sexual Offences Bill, 2011, Bill No. XIV of 2011.

recommended that the said exception should be dropped as once a child is defined as any person under the age of 18, the element of consent becomes irrelevant. With respect to the definition of “child” and the *proviso* in Clauses 3 & 7 the committee had made the following recommendations:<sup>75</sup>

*“V Clause 2: Definitions*

*5.1 Clause 2 of the Bill deals with definitions. Sub-clause 2(d) defines the term ‘child’ as “any person below the age of eighteen years save as provided otherwise”.*

*5.2 It was pointed out that the words “save as provided otherwise” should be deleted from the provision to remove any misunderstanding or confusion. **The proposed definition tended to create an exception which was not required.** (emphasis added)*

*5.3 The Ministry justified the wording by stating that it was not always the adult who committed an offence against the child. **There was a need to protect children from sexual abuse by their own peers and relatively older children.** Further, the definition was in consonance with the Juvenile Justice (Care and Protection of Children) Act, 2000 and the United Nation Convention on the Rights of the Child (UNCRC) to which India was a party. (emphasis added)*

.....

*6.5 Committee’s attention was drawn to the following identical proviso to clauses 3 and 7: -*

*“Provided that where such penetrative sexual assault is committed against a child between sixteen to eighteen years of age it shall be considered whether the consent for such an act has been obtained against the will of the child or the consent has been obtained by use of violence, force, threat to use force,*

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<sup>75</sup> Parliament of India, “240<sup>th</sup> Report of the Parliamentary Standing Committee on Human Resource Development on the Protection of Children from Sexual Offences Bill, 2011” 27 and 31-33 (Rajya Sabha, December, 2011).

*intoxicants, drugs, impersonation, fraud, deceit, coercion, undue influence, threats, when the child is sleeping or unconscious or where the child does not have the capacity to understand the nature of the act or to resist it."*

***6.6 It was contended by the stakeholders that the proposed provisos were completely erroneous, misleading and against the interests of the children. Such a provision would completely negate our legal commitments under UNCRC 1989/1992 and JJ Act 2000/2006. Whereas the declared age of the child in these enactments was 18 years, in the proposed legislation for children between 16-18 years, these provisions were not made applicable on them. Clause 2(d) of the Bill defines 'child' as any person below the age of 18 years, which is the declared age of the child in other similar enactments. The provisos convey that children between the ages of 16-18 years are to be treated differently and can be outside the ambit of the provision. It was further stated that this provision had been borrowed from section 375 of IPC in which a man did not commit rape while having sexual intercourse with the woman of 16 -18 years if there was a consent for the same. Another argument given against having the component of consent for children between 16-18 years was that it would invariably lead to cross-examination of a victim and would make the entire trial process central to the conduct of the victim rather than that of the accused. It was felt that unequivocal voluntary agreement for a specific and limited act only could be dangerous as it would put the victim to unnecessary questioning to decide on whether the sexual act that took place was different from the one for which willingness was expressed. Another discrepancy pointed out by the stakeholders was that for much graver crimes like 'penetrative sexual assault in clause 3 and 'sexual assault' in clause 7, the age of the child has been kept at 16 years and for a much milder form of crime i.e. sexual harassment in clause 11 the age of the child has been kept 18 years. (emphasis added)***

*6.7 Justifying the provisions, the Ministry clarified that the definition of 'child' and the age of consent for sexual activity were two different issues. There was no contradiction in the*

*definition of 'child' as provided in clause 2 (d) and the age group mentioned in clauses 3 and 7 as the age of consent had been kept at 16 years consistent with the provisions of section 375 and 377 of the IPC. The Bill also provided for a uniform age of consent for all the children irrespective of gender. Another justification put forth by the Ministry was that emerging social reality regarding awareness, understanding and exposure of the adolescents cannot be overlooked and it would cause more detriment to criminalize consensual action by children between 16 to 18 years of age. (emphasis added)*

*6.8 The Committee notes that other enactments such as the Indian Majority Act, 1875, the Indian Contract Act and the Juvenile Justice (Care and Protection of Children) Act, 2000 define child as the one who has not completed 18 years of age. Further, the Prohibition of Child Marriage Act, 2006 stipulates that child means a person who, if a male has not completed 21 years of age, and if a female, has not completed 18 years of age. Only in the Immoral Traffic Prevention Act, 1986 a child has been defined as a person below 16 years of age. It can, therefore, be concluded that for most of the enactments a child means a person below 18 years of age. The Committee would also like to point out that the contention of the Ministry that the age of consent kept at 16 years in clauses 3 and 7 is consistent with the provisions under IPC cannot be considered correct. A reading of section 375 of IPC clearly indicates that out of the six descriptions of rape given thereunder, only one condition mentions the age factor which says a rape will be committed with or without consent when the woman is under sixteen years of age. Section 375 of IPC would operate in totally different circumstances when compared with the provisions in clauses 3 and 7 of the present Bill. The Committee is of the view that once the age of child has been specified as 18 years, the element of consent should be treated as irrelevant upto this age. Therefore, the provisos to clauses 3 and 7 of the Bill should be deleted to protect the rights of child and for the sake of protecting children against abuse. This would also be in consonance with the country's commitment towards UNCRC and the Juvenile Justice Act, 2000. (emphasis added)*

*6.9 The Committee has also a word of caution. By having the element of consent, the focus would be on the victim which would invariably lead to re-victimisation of the victim in the hands of the justice delivery process and would be especially problematic when dealing with children. The Committee would like to point out that a great deal of jurisprudence supports the theory that law should move away from this classical approach of trials in such cases and focus on the conduct of the accused and the circumstances surrounding the offence rather than the conduct of the victim thereby obviating the necessity of lengthy cross examination of the victim on the issue of consent.” (emphasis added)*

8.5. Most of the recommendations of the Parliamentary Standing Committee were accepted and the Bill was accordingly amended and reintroduced in the Rajya Sabha on 10<sup>th</sup> May, 2011. Thus, the Bill as reintroduced and passed by the Rajya Sabha<sup>76</sup> defined “child” as any person under the age of 18 and the *proviso* in Clauses 3 & 7 recognising consent by a child between 16 to 18 years of age was also dropped. The reason for dispensing with the *proviso* in case of sexual intercourse with a child between 16 to 18 years of age wherein consent was factored in was stated to be that repeated enquiry from a child as to whether they in fact consented to the act or not is traumatic. In the context of fixing the age of consent at 18 and not 16 years, it was stated that when children were posed the question as part of a Study, they themselves

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<sup>76</sup> The Protection of Children from Sexual Offences Bill, 2012, Bill No. XIV-C of 2011, passed by the Rajya Sabha on 10th May, 2012.

favoured the age of 18 and some even advocated for the age of 21. It was thus stated that:<sup>77</sup>

महोदय, इस बिल के मूल प्रारूप में धारा 3 और धारा 7 में हमने 16 से 18 की आयु के लिए जो सेक्सुअल एक्टिविटी में इंगेज्ड होने के लिए कंसेंट की बात कही थी, दूसरे शब्दों में प्रोविजन के अनुसार अगर एक 16 से 18 साल का बच्चा किसी व्यक्ति से, जो कितने भी वर्ष का हो, उससे शारीरिक सम्बन्ध बनाता है और बाद में अगर किसी कारण से उस व्यक्ति की शिकायत होती है, तो मूल प्रावधान के अनुसार यह देखा जाएगा कि सेक्सुअल एक्टिविटी के लिए बच्चे की मंजूरी थी या नहीं। बच्चे के लिए यह एक बड़ा ट्रामा होगा कि बार-बार उससे पूछा जाए कि तुमने हाँ कहा था या नहीं कहा था। इसलिए उस प्रोविजन को हटा दिया गया है।

बिल में बहुत सारे प्रावधान रखे गए हैं। मैं समझती हूँ कि यदि एक बच्चे के माता-पिता या कोई सम्बन्धी इसकी शिकायत करते हैं, तो उसे तुरंत केस में रखा जाता है। कई जगहों से शिकायतें मिली हैं कि आपने इसकी एज 16 से 18 बर्षों कर दी है, 16 ही बर्षों नहीं रहने दी, इसके लिए बच्चों में बहुत सारी स्टडी करवाई गई। बच्चों ने स्वयं यह माना कि जो sexual age है, वह 18 से ऊपर होनी चाहिए और कइयों ने तो इसे 21 साल मकाना है। मैं जानती हूँ कि बहुत सारी एनजीओज़ ने भी कहा कि इसको कम क्यों किया गया है, तो इसे कम करने के पीछे ये कुछ कारण थे। सदन से भी मैं चाहूँगी कि वह भी इस बात पर गौर दे। हमारी जो पार्लियामेण्टी र्टीडिंग कमेटी है, उसने भी यही कहा है कि इसके लिए 18 साल की उम्र ही होनी चाहिए।

मैं यह भी स्पष्ट कर देना चाहूँगी कि Teenage Sex के बारे में भीडिया की कुछ जगहों पर भी इस तरह की कुछ बात उठाई गई है, जो बिल्कुल निराधार है। इसमें बहुत सारे अन्य प्रावधान भी हैं, लेकिन समय भी कम है। कमेटी की सिफारिशों के अनुरूप धारा 42(ए) में इन्हे डाला गया है, जिनके अन्तर्गत केन्द्रीय सरकार और सभी राज्य सरकारों को यह सुनिश्चित करना होगा कि आम जनता, बच्चों और अभिभावकों को इस कानून के बारे में जानकारी दे, इसके लिए अवेयरनेस क्रिएट करे। जब अवेयरनेस क्रिएट की जाएगी तो बच्चों के खिलाफ होने वाले जो बहुत सारे अपराध हैं, उनको रोक जा सकेगा।

## 8.6. During the Parliamentary Debate following introduction of the Bill in the Rajya Sabha, the issue of teenage relationships and the

<sup>77</sup> Statement made by Minister of State, Ministry of Women and Child Development, Smt. Krishna Tirath, Rajya Sabha Debates on May 10, 2012, page 364 available at [https://rsdebate.nic.in/bitstream/123456789/603084/1/ID\\_225\\_10052012\\_p361\\_p391\\_29.pdf](https://rsdebate.nic.in/bitstream/123456789/603084/1/ID_225_10052012_p361_p391_29.pdf) (last visited on September 14, 2023).



likelihood of the provision being misused against young couples who get married without the permission of their parents was highlighted by some members.<sup>78</sup> In this context, it was argued that the age of consent be fixed between 16-18 years as was provided for in the Bill as introduced initially and that there also needs to be a provision akin to close-in age exemption in order to protect young people engaging in consensual sexual intercourse. It was stated that:

*“Firstly, about the provision regarding consent for sexual acts. Clauses 3 and 7 of the Bill have identical provisions which state that if a sexual assault is committed against a child between 16 and 18 years of age, it shall be considered whether the consent has been obtained or not. I understand that the Government has already decided to amend the similar provisions in the Indian Penal Code (375 and 377) in the matter of rape of women between 16 and 18 years of age. While supporting this provision of consent of age as 16-18 in the Bill, I would like to express my concern about the issue regarding the teenagers who are getting married without the permission of their parents. We know there are many incidents of honour killings reported from many, many States and it is happening every day in many States. Young people are getting married without the will of their parents. I am afraid, the penal provisions against the offenders who are involved in sexual relationship with minor girls provided in this Bill will be used as a tool against those young couples who are getting married without the permission of their parents. So, I would like to suggest that a provision should be added in this Bill that ‘if two young people engage in consensual act, then it should not be criminalized and the boy should not be punished. If the age difference is five years or more between the man and the minor girl, then the man can be held liable.’”<sup>79</sup> (emphasis added)*

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<sup>78</sup> Statements made by Dr. T.N Seema, Rajya Sabha Debates on May 10, 2012, page 373 available at [https://rsdebate.nic.in/bitstream/123456789/603084/1/ID\\_225\\_10052012\\_p361\\_p391\\_29.pdf](https://rsdebate.nic.in/bitstream/123456789/603084/1/ID_225_10052012_p361_p391_29.pdf) (last visited on September 14, 2023).

<sup>79</sup> *Id.*

8.7. Notwithstanding the concerns brought to the fore, the age of consent was fixed at 18 years when the Rajya Sabha passed the Bill. The Bill with age of consent set at 18 years without exception was also passed by the Lok Sabha and came to be enacted as the Protection of Children from Sexual Offences Act, 2012.<sup>80</sup> It is worth noting that similar concerns regarding potential misuse of the POCSO Act in cases of teenage relationships were also echoed in the Lok Sabha.<sup>81</sup>

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<sup>80</sup> The Protection of Children from Sexual Offences Act, 2012 (Act No. 32 of 2012).

<sup>81</sup> Statement made by Smt. Susmita Bauri, Lok Sabha Debates on May 22, 2012, page 781 available at [https://eparlib.nic.in/bitstream/123456789/758614/3/lsd\\_15\\_10\\_22-05-2012\\_english.pdf](https://eparlib.nic.in/bitstream/123456789/758614/3/lsd_15_10_22-05-2012_english.pdf) (last visited August 16, 2023).

## 9. JUSTICE J.S. VERMA COMMITTEE REPORT ON THE ISSUE OF AGE OF CONSENT/STATUTORY RAPE

9.1. The Justice J.S. Verma Committee, in its Report, had suggested lowering the age of consent under the POCSO Act to 16 years in line with Section 375 of the IPC. In the context of Section 375 of IPC, as it stood prior to Criminal Law Amendment Act, 2013 wherein the sixth clause mentioned age of consent as 16 years, Justice Verma Committee in its Report suggested that the sixth description under Section 375 be amended to read:

*"Sixthly, When the person is unable to communicate consent either express or impliedly."*<sup>82</sup>

9.2. Further, the Committee recommended the addition of a new Section 376B, defining and punishing rape of an underage person as follows:

*"Section 376B(1): Rape of an underage person: If a man has sexual intercourse with a person below sixteen years of age with or without that person's consent, he shall be deemed to have committed rape of an underage person, and shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life. Provided that the existence of a marital relationship between the accused and the underage person shall not be a valid defence. Explanation: For the purposes of this section, sexual intercourse shall mean any of the acts specified in Section 375 (a) to (c).*

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<sup>82</sup> Justice Verma Committee on Amendments to Criminal Law, "Report of the Committee on Amendments to Criminal Law, 2013" 440 (January 23, 2013).

*Section 376(B)(2): Punishment for causing death or a persistent vegetative state in the course of committing rape of an underage person.*

*Whoever, commits an offence punishable under Section 376B(1) and in the course of such commission inflicts an injury which causes the death of the person, or causes the person to be in a persistent vegetative state shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but may be for life, which shall mean the rest of that person's natural life.*"<sup>83</sup>

9.3. Justice Verma Committee stated the reasoning behind adoption of the age of 16 to categorize underage rape as follows:

*The Preamble to The Protection of Children from Sexual offences Act, 2012 states "And whereas, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State Parties in securing the best interests of the child...and whereas the State Parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent – (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; (c) the exploitative use of children in pornographic performances and materials; That further to the above, the Parliament earmarked eighteen as the age of consent for the purposes of Section 375, thereby achieving the result of criminalising all sexual activity whether consensual or non-consensual where one person is below the age of eighteen. That the above Convention was aimed inter alia to protect children from sexual assault and abuse and not to criminalise consensual sex between two individuals even if they*

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<sup>83</sup> Justice Verma Committee on Amendments to Criminal Law, "Report of the Committee on Amendments to Criminal Law, 2013" 443 & 444 (January 23, 2013).

*are below eighteen years of age. That on the basis of the interpretation of Article 34 of the Convention along with the representation made by various groups this Committee recommends that the age of consent be reduced to sixteen, and necessary amendments be made in the Protection of Children from Sexual Offences Act, 2012 (No. 32 of 2012), in order to avoid contradictions with the Indian Penal Code.*<sup>84</sup> (emphasis added)

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<sup>84</sup> Justice Verma Committee on Amendments to Criminal Law, "Report of the Committee on Amendments to Criminal Law, 2013" 443 & 444 (January 23, 2013).

## 10. AGE OF CONSENT AFTER ENACTMENT OF THE POCSO ACT

10.1. Though enacted to adequately protect children against any kind of sexual exploitation, the enactment of the POCSO Act brought in an inherent contradiction in law. There now existed an anomalous situation. The POCSO Act fixed the age of being categorised as a child at 18 years, thus making it the default “age of consent”, meaning thereby that once the person upon whom the sexual act is committed is a child i.e., he/she is below the age of 18 years, consent would be irrelevant for the purpose of attracting criminal liability under the POCSO Act. On the other hand, under Section 375 of the IPC which defines “rape” as it then existed, the age of consent remained to be 16 years. Further, an exception under Section 375 of the IPC provided that sexual intercourse by a man with his wife who is not under the age of 15 years shall not amount to rape. The Ministry of Home Affairs had introduced Criminal Law Amendment Bill, 2012 in the Lok Sabha on 4<sup>th</sup> December, 2012, wherein it has suggested amendments to the IPC, the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872.<sup>85</sup> The said Bill sought to amend Section 375 of the IPC to define the offence of “sexual assault” as against “rape” and it raised the age of consent to 18 years. Further, the Bill extended the exception with respect to sexual intercourse by a man with his wife only when the wife was not under the age of 16 years. It is interesting to note that the amendment as suggested under the said Bill made Section 375 gender

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<sup>85</sup> The Criminal Law (Amendment) Bill, 2012, Bill No. 130 of 2012, available at: [https://sansad.in/getFile/BillsTexts/LSBillTexts/Asintroduced/130\\_2012\\_Eng\\_LS.pdf?source=legislation](https://sansad.in/getFile/BillsTexts/LSBillTexts/Asintroduced/130_2012_Eng_LS.pdf?source=legislation) (last visited on May 24, 2023).

neutral as the terminology employed was no longer gendered and the word "person" was used instead of "man" or "woman". However, the exception applicable in case of intercourse happening within a marriage only exempted acts of a husband as not amounting to sexual assault. The amendment as proposed read as follows:

*"375. A **person** is said to commit "sexual assault" if that person—*

*(a) penetrates, for a sexual purpose, the vagina or anus or urethra or mouth of **another person** with—*

*(i) any part of the body including the penis of such **person**; or*

*(ii) any object manipulated by such **person**, except where such penetration is carried out for proper hygienic or medical purposes;*

*(b) manipulates any part of the body of another person so as to cause penetration of the vagina or anus or urethra or mouth of such **person** by any part of the **other person's** body;*

*(c) engages in "cunnilingus" or "fellatio", under the circumstances falling under any of the following six descriptions:—*

*Firstly.—Against the **other person's** will.*

*Secondly.—Without the **other person's** consent.*

*Thirdly.—With the **other person's** consent when such consent has been obtained by putting such other person or any person in whom such other **person** is interested, in fear of death or of hurt.*

*Fourthly.—When the **person** assaulted is a female, with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes to be lawfully married.*

*Fifthly.—With the consent of the **other person** when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by that **person** personally or through another of any stupefying or unwholesome substance, the **other person** is unable to*

*understand the nature and consequences of that action to which such other **person** gives consent.*

*Sixthly.—With or without the other **person's** consent, when such other **person** is under eighteen years of age.*

*Explanation I.—Penetration to any extent is “penetration” for the purposes of this section.*

*Explanation II.—For the purposes of this section, “vagina” shall also include labia majora.*

*Exception.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault.*

(emphasis added)

10.2. The aforesaid Bill as introduced in the Lok Sabha was referred to the Department-related Parliamentary Standing Committee on Home Affairs for examination; however, it was subsequently withdrawn on 19<sup>th</sup> March, 2013 in the wake of a series of developments, namely, the 16<sup>th</sup> December, 2012 Delhi rape case, the constitution of Justice Verma Committee, the promulgation of Criminal Law (Amendment) Ordinance, 2013 and the Recommendations made by the Department-related Parliamentary Standing Committee on Home Affairs in its Report tabled before the Parliament.<sup>86</sup> It is pertinent to note that the issue of fixing the age of consent was a sensitive and contested issue even back then as is evident from the contrary views of different Committees. While the Justice J.S. Verma Committee<sup>87</sup> in its Report had suggested that the POCSO Act be suitably amended and the age of consent under it be reduced to 16 years to bring it in line with the IPC,

<sup>86</sup> Lok Sabha Debates on March 19, 2013 available at: <https://eparlib.nic.in/bitstream/123456789/743726/1/9739.pdf> (last visited May 24, 2023).

<sup>87</sup> Justice Verma Committee on Amendments to Criminal Law, “Report of the Committee on Amendments to Criminal Law, 2013” 443 & 444 (January 23, 2013).





the Department-related Parliamentary Standing Committee on Home Affairs in its Report on the other hand suggested that the age of consent be fixed at 18 years in line with the Criminal Law (Amendment) Ordinance, 2013 which was also gender neutral. However, the Department-related Parliamentary Standing Committee in its Report had also noted the dissenting view of two members namely, Shri D. Raja and Shri Prasanta Chatterjee, who in the context of Section 375, expressed that:

*“4. Clause 5 raises the age of consent from 16 to 18 years in cases of sexual assault under Section 375 IPC. However, the social reality is that there are many instances of consensual sexual activity between adolescents between the ages of 16 and 18 and it would lead to injustice if in these cases there was prosecution for rape. The Law Commission in its 205th report has made a recommendation which may form the basis of this amendment we suggest. By way of a proviso to clause ‘sixthly’ to Section 375 IPC to exempt such consensual activity from the purview of statutory rape provided the accused person is not more than 5 years older.”<sup>88</sup>*

10.3. Thereafter, the Criminal Law (Amendment) Bill, 2013 was introduced in Lok Sabha on 19th March, 2013 wherein, on account of amendment suggested to Section 375 of IPC, the default age of consent for girls/women was set at 16 years.<sup>89</sup> The Bill continued to define “rape” as offence committed by a man against a woman unlike the gender-neutral definition employed under the earlier Bill of 2012, the

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<sup>88</sup> Parliament of India, “One Hundred and Sixty Seventh Report on the Criminal Law (Amendment) Bill, 2012” 81 (Department-Related Parliamentary Standing Committee on Home Affairs, March 2003).

<sup>89</sup> The Criminal Law (Amendment) Bill, 2013, Bill No. 63 of 2013, available at [https://sansad.in/getFile/BillsTexts/LSBillTexts/Asintroduced/63\\_2013\\_eng\\_ls.pdf?source=legislation](https://sansad.in/getFile/BillsTexts/LSBillTexts/Asintroduced/63_2013_eng_ls.pdf?source=legislation) (last visited August 16, 2023).



Ordinance of 2013 and the Standing Committee Report. Furthermore, in order to rectify the inherent contradiction in law as it then existed, the Bill sought to amend the definition of “child” under Section 2(1)(d) of the POCSO Act to mean any person below the age of 16 years. The amendment to the POCSO Act, as suggested by the said Bill of 2013 thus read as follows:

*“29. In section 2 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter in this Chapter referred to as the Protection of Children Act), in sub-section (1), in clause (d), for the words “eighteen years”, the words “sixteen years” shall be substituted.”*

10.4. The 2013 Bill, as originally introduced in Lok Sabha<sup>90</sup>, was more in line with the recommendations made by the J.S. Verma Committee; however, in the Bill as was finally passed by the Lok Sabha,<sup>91</sup> the age of consent was raised to 18 years and the amendment to Section 2(1)(d) of the POCSO Act was rejected. The same was passed by Rajya Sabha and became the Criminal Law (Amendment) Act, 2013. Since the passage of the said Act of 2013, the age of consent has been raised to 18 years on account of the clause *Sixthly* of Section 375, which is in line with the age criteria provided under the POCSO Act. However, the exception for a man having intercourse with his wife who is not under the age of 15 years remained on the statute-book and this was now contradictory to the POCSO Act as Section 42A of the POCSO Act, which gives it an overriding effect over other laws, was inserted by the same 2013 Amendment Act. The issue came up before the Hon’ble

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<sup>90</sup> *Id.*

<sup>91</sup> The Criminal Law (Amendment) Bill, 2013, Bill No. 63-C of 2013.

Supreme Court in *Independent Thought v. Union of India & Anr.*<sup>92</sup>, wherein, the age of 15 years in *Exception 2* to Section 375 was read down as 18 years, thereby bringing in uniformity so far as the age of consent under criminal law in India is concerned.<sup>93</sup>

10.5. Certain other amendments in law become relevant in context of the issue under consideration. There was considerable debate on prosecuting a child as an adult post the 2012 Delhi rape incident, wherein one of the perpetrators on account of being a minor, was thus being tried as a juvenile under the then applicable Juvenile Justice (Care and Protection of Children) Act, 2000, and the punishment imposed on him was not felt commensurate with the seriousness of offence committed by the juvenile. Consequently, Section 15 of the new JJ Act enacted in 2015 provided for trial of a juvenile as an adult in case of heinous offences. Section 2(33) of the JJ Act, 2015 defines "heinous offences" as offences for which the minimum punishment under the IPC or any other law for the time being in force is imprisonment for 7 years or more. Further, under the POCSO Act, punishment for penetrative sexual assault under Section 4 was enhanced by the Protection of Children from Sexual Offences (Amendment) Act, 2019 from imprisonment for not less than 7 years but which may extend to life to imprisonment for not less than 10 years but which may extend to life and in case the victim child is below the age of 16 years, imprisonment for not less than 20 years but which may extend to life. Thus, in case of a romantic relationship between two children who are

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<sup>92</sup> (2017) 10 SCC 800.

<sup>93</sup> *Id.*



between the age of 16 to 18 years, there is probability of the boy being tried as an adult as in most cases, the stringent provisions of the POCSO Act are pressed against the boy and not the girl even though the POCSO Act is gender neutral and technically the two children involved are individually both victim and offender. This is an area of concern that various High Courts have highlighted on multiple occasions.<sup>94</sup> There is a grey area in law on how to determine which child is the victim and which one is the offender in case of such consensual relationships between two children.

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<sup>94</sup> *Sabari v. Inspector of Police and Others* (2019) 3 RCR (Cri) 452; *Ranjit Rajbanshi v. State of West Bengal and Others* 2023 Cri LJ (NOC 74) 25; *Ravi @ Virumandi v. State represented by the Assistant Commissioner of Police & Anr.* Madras High Court CRL.A.No.627 of 2021 dated 18.11.2022.

## 11. AGE OF CONSENT IN OTHER JURISDICTIONS

11.1. The UNCRC<sup>95</sup> defines a child as any person below the age of 18 years. However, the age of consent ranges from 13 to 18 years globally.

### *A. Canada*

11.2. It is pertinent to note that the age of consent in Canada was raised from 14 to 16 years only in the year 2008 in light of increased incidents of teenagers being lured online. The Canadian law on sexual exploitation of children has been explained below.

11.3. As per the Canadian Criminal Code, the age of consent is 16 years. However, close-in-age exceptions are incorporated under the law. Certain situations have also been specified wherein there can be no consent, which largely include situations wherein the accused is in a position of trust, the complainant is in a relationship of dependency and the relationship is exploitative. Section 150 of the Canadian Criminal Code<sup>96</sup> provides for the same.

11.4. The close-in-age exemption has been categorised as:

- a. When the complainant is 12 years or above but below the age of 14 years, then consent can be present if the accused is less than two years older than the complainant;

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<sup>95</sup> United Nations Convention on the Rights of the Child, 1989, art. 1.

<sup>96</sup> Criminal Code of Canada, sec. 150.

b. When the complainant is 14 years or above but below the age of 16 years, then consent can be present if the accused is less than five years older than the complainant.

11.5. In both the above situations, however, the accused must not be in a position of trust or authority towards the complainant, must not be a person with whom the complainant is in a relationship of dependency and must not be in a relationship with the complainant that is exploitative of the complainant. Further, a person aged 12 or 13 years has also been exempted from being tried for offences under Sections 151, 152 or 173(2) of the Criminal Code unless the accused holds a position of trust or authority or there is a relationship of dependency or the relationship is exploitative in nature.

11.6. It is pertinent to highlight that while the age of consent has been set at 16 years, however, the law does protect against sexual exploitation of “young persons” from persons who are in a position of trust or authority over the young person, with whom the young person is in a relationship of dependency or who are in a relationship with a young person that is exploitative of the young person. The term “young persons” has been defined as a person aged 16 years or above but under the age of 18 years.<sup>97</sup> Further, Section 153 (1.2) of the Criminal Code provides for circumstances/factors under which the judge may infer sexual exploitation. The provision reads:

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<sup>97</sup> Criminal Code of Canada, sec. 153.

***“Section 153. Sexual exploitation***

...

***Inference of sexual exploitation***

***(1.2) A judge may infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including***

***(a) the age of the young person;***

***(b) the age difference between the person and the young person;***

***(c) the evolution of the relationship; and***

***(d) the degree of control or influence by the person over the young person.”***

11.7. In addition to the Criminal Code, each province and territory of Canada has its own child welfare laws to protect children against abuse, exploitation and neglect.<sup>98</sup>

***B. United States of America***

11.8. In the US, the age of consent varies by the State. Under the federal law, the age of consent is 18 years.<sup>99</sup> In many States, in addition to age of consent, there is a minimum age requirement and the criminality of sexual intercourse with an individual who is above the minimum age requirement and below the age of consent is dependent on the age differential between the two parties and/or the age of the defendant. For example, in the state of New Jersey, while the age of consent is 16 years, an individual who is 13 years or older can consent to sexual activity with another individual who is less than 4 years older

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<sup>98</sup> Department of Justice Canada, Government of Canada, “Age of Consent to Sexual Activity”, available at <https://www.justice.gc.ca/eng/rp-pr/other-autre/clp/faq.html> (last visited August 8, 2023).

<sup>99</sup> United States Code, sec. 2251.

than the minor in question.<sup>100</sup> The minimum age requirement or close-in-age exception are also referred to as the “Romeo and Juliet Laws”. Many States also provide for a minimum age of defendant, below which individuals cannot be prosecuted for engaging in sexual intercourse with minors. For instance, in Nevada while the age of consent is 16 years, sexual intercourse with someone who is under 16 years of age would amount to an offence of sexual assault only if the defendant is at least 18 years of age.<sup>101</sup> Further, a Romeo-Juliet exception has been carved out in law where the perpetrator is aged 18 years or above and the victim is 14 or 15 years of age and is at least 4 years younger than the perpetrator.<sup>102</sup>

### *C. Australia*

11.9. The age of consent in Australia varies between 16 to 17 years depending on the State or territory. Most States also make sexual interaction by a person in supervisory role with a person aged 16 or 17 years under their special care an offence. This would cover instances of persons with authority such as teachers, parents, medical practitioners having sexual contact with minors or children who are under their care and supervision. Many States also incorporate close-in-age exemptions within the statutory framework as a defence in situations where there is

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<sup>100</sup> The New Jersey Code of Criminal Justice, sec. 2C:14-2.

<sup>101</sup> Nevada Revised Statutes, sec. 200.366.

<sup>102</sup> *Id.*, sec. 200.364.



consensual mutual sexual interaction between two persons who are under the legal age of consent.<sup>103</sup>

#### ***D. Japan***

11.10. The age of consent in Japan was 13 years<sup>104</sup> till 2023, while the age of majority is 20 years<sup>105</sup> and the minimum age for marriage for a man is 18 years and that for a woman is 16 years.<sup>106</sup> Further, a minor has to take consent of their parents in order to marry.<sup>107</sup> There had been widespread criticism from various quarters for retaining such a low age of consent and inadequacy in punishment that has remained unchanged since 1907, among other issues plaguing the Japanese criminal law dealing with sexual offences. In light of the same, the Japanese Parliament recently passed a series of laws revamping the legal provisions for dealing with crimes of sexual nature, which includes raising the age of consent to 16 years.<sup>108</sup>

#### ***E. South Africa***

11.11. In South Africa, the age of consent is 16 years<sup>109</sup> even though a child has been defined as a person under the age of 18 years.<sup>110</sup> The age

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<sup>103</sup> Australian Institute of Family Studies, "Age of consent laws in Australia: CFCA Resource sheet — May 2021" (May, 2021) available at [https://aifs.gov.au/sites/default/files/publication-documents/2104\\_age\\_of\\_consent\\_resource\\_sheet\\_0.pdf](https://aifs.gov.au/sites/default/files/publication-documents/2104_age_of_consent_resource_sheet_0.pdf) (last visited July 31, 2023).

<sup>104</sup> Penal Code of Japan, 1907, art. 177.

<sup>105</sup> Civil Code of Japan, 1896, art. 4.

<sup>106</sup> *Id.*, art. 731.

<sup>107</sup> *Id.*, art. 738.

<sup>108</sup> Sayantani Biswas, "Japan raises age of consent from 13 to 16 after over a century" *Live Mint*, Jun. 16, 2023, available at <https://www.livemint.com/news/world/japan-raises-age-of-consent-from-13-to-16-after-over-a-century-11686931414374.html> (last visited August 5, 2023).

<sup>109</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007, sec. 15 & 16.

<sup>110</sup> *Id.*, sec. 1(a).

of consent debate ignited in the South African context as well and the same has been explained below:

11.12. Under the law as it stood in 2007, statutory rape (sexual penetration)<sup>111</sup> and statutory sexual assault (sexual violation – direct or indirect contact)<sup>112</sup> had been defined and the same could only be perpetrated against children between the ages of 12 to 15 years.<sup>113</sup> There was a defence available in the form of close-in-age exemption clause whereby, it would not be statutory sexual assault if both the parties were children and within an age gap of not more than two years from each other. However, the same did not apply to cases of statutory rape.<sup>114</sup> Further, such a defence was available only to persons under the age of 18 years. Moreover, if the age difference exceeded two years, then the exception would not apply and both the parties, who are adolescents, were required to be mandatorily prosecuted and even if one of them were below the age of 16 years, they could not claim benefit of the exception. Similar to its Indian counterpart, there is a mandatory reporting provision under the South African law as well which contributed to bringing in purported cases of consensual adolescent sex within the folds of criminal law.<sup>115</sup> This anomalous situation created by the statute was brought before the Constitutional Court of South Africa

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<sup>111</sup> *Id.*, sec. 15.

<sup>112</sup> *Id.*, sec. 16.

<sup>113</sup> *The Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Others* Case CCT 12/13 [2013] ZACC 35 (3 October 2013), para 15.

<sup>114</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007, sec. 56(2).

<sup>115</sup> *Id.*, sec. 54.

in the case of *Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Others*.<sup>116</sup>

11.13. In the *Teddy Bear Clinic* case, the harshness of the criminal justice system and the chilling effect of such exposure on the development of a proper understanding of and healthy attitudes towards sexual behaviour as well as the infringement of constitutional rights of children, namely, rights to human dignity, privacy and bodily and psychological integrity, besides the best-interests principle were highlighted before the Constitutional Court.<sup>117</sup> The Court recognised the need to ensure that children receive appropriate support to make healthy choices and are provided with a safe environment to do so. This was considered vital to ensure that children receive the benefit of guidance at a sensitive and developmental stage of their lives.<sup>118</sup> The adverse social and psychological impact of the impugned provision were also noted by the Constitutional Court.

11.14. The Constitutional Court of South Africa recognised that children merit special protection through legislation that guards and enforces their rights and liberties; however, in this endeavour, great care has to be taken to ensure that, in attempting to guide and protect children, interventions do not expose them to negative consequences having adverse effects on their development.<sup>119</sup> The Court also

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<sup>116</sup> *The Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Others Case CCT 12/13 [2013] ZACC 35 (3 October 2013)*, para 15.

<sup>117</sup> *Id.*, para 28-29.

<sup>118</sup> *Id.*, para 45.

<sup>119</sup> *Id.*, para 1.

recognised that children are individual rights-bearers rather than mere extensions of their parents.<sup>120</sup> The Court held in clear unequivocal terms that “*children’s dignity rights are of special importance and are not dependent on the rights of their parents. Nor is the exercise by children of their dignity rights held in abeyance until they reach a certain age.*”<sup>121</sup> In declaring the impugned provisions unconstitutional, the Court held that upholding best interest of the child involves a balancing act and, in each case, various factors need to be considered. The Court was of the view that the impugned Sections 15 and 16 of the Sexual Offences Act exacerbated the harm and risk to adolescents by undermining support structures, preventing adolescents from seeking help and potentially driving adolescent sexual behaviour underground.<sup>122</sup> The observations of the Court that also become relevant in the Indian context, read as follows:

*“[55] It cannot be doubted that the criminalisation of consensual sexual conduct is a form of stigmatisation which is degrading and invasive. In the circumstances of this case, the human dignity of the adolescents targeted by the impugned provisions is clearly infringed. If one’s consensual sexual choices are not respected by society, but are criminalised, one’s innate sense of self-worth will inevitably be diminished. Even when such criminal provisions are rarely enforced, their symbolic impact has a severe effect on the social lives and dignity of those targeted. It must be borne in mind that sections 15 and 16 criminalise a wide range of consensual sexual conduct between children: the categories of prohibited activity are so broad that they include much of what constitutes activity undertaken in the course of adolescents’ normal development. There can also be no doubt that the existence of a statutory provision that punishes forms of*

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<sup>120</sup> *Id.*, para 40.

<sup>121</sup> *Id.*, para 52.

<sup>122</sup> *Id.*, para 72.

*sexual expression that are developmentally normal degrades and inflicts a state of disgrace on adolescents.....*

.....  
[57] *The stigma of criminalisation is exacerbated by the provisions in section 41 of the Sexual Offences Act mandating that the name of any person who commits an offence in terms of sections 15 and 16 be placed on the Register..... The relevant provisions of section 41(1) are clearly and laudably aimed at protecting children from adult sexual predators. However, this goal will not be achieved by the inclusion in the Register of the details of adolescents who have engaged in consensual sexual penetration or sexual violation. Indeed, to prevent an adolescent from meaningfully interacting with children in the future purely because that adolescent engaged in what may be developmentally normal sexual conduct constitutes a significant limitation of his or her right to dignity.*

.....  
[60]..... *The offences allow police officers, prosecutors and judicial officers to scrutinise and assume control of the intimate relationships of adolescents, thereby intruding into a deeply personal realm of their lives. This intrusion is exacerbated by the reporting provisions: trusted third parties are obliged by section 54 of the Sexual Offences Act to disclose information which may have been shared with them in the strictest confidence, on pain of prosecution."*

11.15. While the Constitutional Court declared the impugned provisions to be invalid, however, the invalidity was suspended for 18 months to allow Parliament to correct defects and pass appropriate amendments. In the meanwhile, a moratorium was imposed on all investigations into, arrests in, prosecutions in, and criminal and ancillary proceedings regarding such Sections 15 and 16 offences. The South African Parliament brought in the Criminal Law (Sexual Offences and Related Matters) Amendment Act (5 of 2015), which

brought the law in consonance with the ruling of the South African Constitutional Court.



## 12. ANALYSIS OF THE POCSO ACT

12.1. The POCSO Act is aimed at performing two core functions that largely remained unaddressed in law as it stood erstwhile. *Firstly*, to enforce the rights of all children to safety, security and protection from sexual abuse and exploitation. *Secondly*, it is intended to define explicitly the offences against children countered through commensurate penalties as an effective deterrence.<sup>123</sup> The punishment for offences prescribed under the Act is directly proportionate to the severity of the offence. The punishment is also inversely proportional to the autonomy exercisable by the child, with offences against children below the age of 12 years falling under the “aggravated” nature, thus subject to greater terms of imprisonment and fine. Sexual assault is also of an “aggravated” nature under Sections 5 and 9 of the Act when committed by a person in a position of authority or those exercising authority over children in their care.<sup>124</sup>

12.2. While the POCSO Act is gender neutral,<sup>125</sup> it is an undeniable fact that the girl child is faced with greater threats in our society. The vulnerability of children, especially the girl child in our society was very aptly noted by the Hon’ble Supreme Court in *Nawabuddin v. State of Uttarakhand*,<sup>126</sup> wherein the Court observed:

*“Children are precious human resources of our country; they are the country’s future. The hope of tomorrow rests on them. But unfortunately, in our country, a girl child is in a very vulnerable*

<sup>123</sup> *Attorney General v. Satish* (2022) 5 SCC 545.

<sup>124</sup> *Id.*

<sup>125</sup> *Alakh Alok Srivastava v. Union of India* (2018) 17 SCC 291.

<sup>126</sup> *Nawabuddin v. State of Uttarakhand* (2022) 5 SCC 419.



*position. There are different modes of her exploitation, including sexual assault and/or sexual abuse. In our view, exploitation of children in such a manner is a crime against humanity and the society. Therefore, the children and more particularly the girl child deserve full protection and need greater care and protection whether in the urban or rural areas.*<sup>127</sup>

12.3. As a society, we often fail our children and in such situations the duty and responsibility rests upon the courts to ensure adequate legal protection to these children in need of special care and protection.<sup>128</sup> Further, a child who has been sexually abused is placed in a much more precarious situation than an adult victim of a similar crime as it can be much more difficult for a child to withstand the social ostracization and mental harassment meted out by society. The child also needs extra protection especially in light of the fact that in a significant number of cases the perpetrator is a family member or a close friend.<sup>129</sup> The courts thus cannot take a lenient view and are in fact obligated to follow the strict letter of law. In *State of U.P. v. Somu Kushwaha*,<sup>130</sup> the Supreme Court noted that the POCSO Act was a stringent legislation with mandatory minimum punishments intended to address the malady of child abuse plaguing our society and that the Courts were not empowered to award lesser punishments once a case was made out under the Act. The Court observed as follows:

***“15. The POCSO Act was enacted to provide more stringent punishments for the offences of child abuse of various kinds and that is why minimum punishments have been prescribed in***

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<sup>127</sup> *Id.*

<sup>128</sup> *State of Rajasthan v. Om Prakash* (2002) 5 SCC 745.

<sup>129</sup> *Nipun Saxena v. Union of India* (2019) 2 SCC 703.

<sup>130</sup> *State of U.P. v. Somu Kushwaha*, Supreme Court of India, Criminal Appeal No. 1633 of 2023.



*Sections 4, 6, 8 and 10 of the POCSO Act for various categories of sexual assaults on children. Hence, Section 6, on its plain language, leaves no discretion to the Court and there is no option but to impose the minimum sentence as done by the Trial Court. When a penal provision uses the phraseology “shall not be less than....”, the Courts cannot do offence to the Section and impose a lesser sentence. The Courts are powerless to do that unless there is a specific statutory provision enabling the Court to impose a lesser sentence. However, we find no such provision in the POCSO Act. Therefore, notwithstanding the fact that the respondent may have moved ahead in life after undergoing the sentence as modified by the High Court, there is no question of showing any leniency to him...<sup>131</sup>*

(emphasis added)

12.4. From the aforesaid observations of the Supreme Court as well as the Parliamentary discussions that took place after the introduction of the POCSO Bill in 2011, it is amply clear that the law is strict in its application and the element of “consent” of a child can have no role to play whatsoever. When the victim is a child, there can be no question of consent and any claim of there being consent is totally meaningless. This has already been held by the Supreme Court in the context of Section 375 Clause *Sixthly* of the IPC<sup>132</sup>, where the age of consent being 16 years was read down as 18 years to bring it in tune with the POCSO Act. It may be argued that any reading of the element of discretion will dilute the protective shield that has been built under law after a long-drawn process. To address a specific undesirable situation that has arisen, thousands of children, especially girl children who are in particular danger of being trafficked or abused, cannot be deprived of

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<sup>131</sup> *Id.*

<sup>132</sup> *Parhlad & Anr. v. State of Haryana* (2015) 3 SCC (Cri) 807.

the protective edifice that exists on account of strict provisions of the POCSO Act, which may be their only armour. Further, it can be observed that in certain cases, the courts are exercising discretion in terms of sentencing which otherwise does not exist. If such discretion, which is not otherwise vested in the court under the black letter of law, is allowed to be exercised and that too in an unguided manner, it will lead to blunting the edges of law by doing something that is contrary to that which was intended by the Legislature. While in order to remedy the anomalous situation created by the strict letter of law, various High Courts have imposed lesser sentences noting that the Act was not intended to criminalise adolescent love, however, the observations made by the Supreme Court in *State of U.P. v. Somu Kushwaha*<sup>133</sup> would restrict the trial Courts in imposing lesser sentence on the accused.

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<sup>133</sup> *State of U.P. v. Somu Kushwaha*, Supreme Court of India Criminal Appeal No. 1633 of 2023.

### 13. EMERGING ASPECTS RELATING TO CHILD ABUSE

13.1. The access to the internet, including to children, has increased in recent times. This is marked by the emergence of new dangers against children. There has been an alarming rise in cases of online child abuse and cyber-bullying. A worrisome dimension of these cases is that children and young people in romantic relationships, especially girls, are more vulnerable to online sexual abuse.<sup>134</sup> There has been an observable rise in incidents of sextortion and online grooming involving children. There has also been a rise in the availability of child sexual abuse material online.

13.2. The Parliament has been cognizant of the rising vulnerabilities that the children face in the virtual world, the consequences of which flow into the physical world. In this context, an *ad-hoc* committee was constituted on 12<sup>th</sup> December, 2019 in the Rajya Sabha to look into the issues that arise out of the increased accessibility of pornographic material and its effect on the society. The Report of the Committee focused on child pornography on social media and gave recommendations on amendments in law, including in the POCSO Act and the Information Technology Act, 2000, that were required to effectively tackle these issues that had mushroomed over the past years. In view of the increased vulnerability and threats to children online, the Committee suggested inclusion of provisions pertaining to cyber grooming, including defining the term “grooming”, so as to explicitly

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<sup>134</sup> Sonam Saigal, “Children in romantic relationships are at risk for online bullying and abuse, says helpline”, *The Hindu*, March 19, 2023, available at <https://www.thehindu.com/news/cities/mumbai/children-in-romantic-relationships-are-at-risk-for-online-bullying-and-abuse-says-helpline/article66634844.ece> (last visited July 25, 2023).

recognise it as a crime in India. Accordingly, the Committee had suggested inclusion of a new provision in the POCSO Act under Section 11, after sub-clause (vi), which would read:<sup>135</sup>

*“(vii) knowingly persuades, coerces, entices, grooms, communicates, arranges a meeting with a child for oneself or another person and/or meets with a child with the intent of sexually abusing the child, and even if the actor thinks he/she is communicating with a child but is actually talking to an adult.”*

13.3. Further, as regards the definition of “grooming”, the Committee recommended that India could adopt a definition similar to that adopted by the International Labour Organisation in its *“Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse”*. These guidelines define “grooming” as:

*“the process of establishing/building a relationship with a child either in person or through the use of the Internet or other digital technologies to facilitate either online or offline sexual contact with that person.”*

13.4. It is pertinent to mention that the Committee did note that minors/young adults are engaged in exchanging selfies or sexting and in this context, recommended a debate on the introduction of an exception clause in Section 15 of the POCSO Act that would apply in situations wherein such images or texts are shared between two minors/adolescents. The issue of introducing such an exception proved

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<sup>135</sup> Parliament of India, “Report of the Adhoc Committee of the Rajya Sabha to Study the Alarming Issue of Pornography on Social Media and its Effect on Children and Society as a Whole, 2020” 11 (Para 1.2) (Rajya Sabha, 2020) available at [https://sansad.in/getFile/rsnew/Committee\\_site/Committee\\_File/ReportFile/71/140/0\\_2020\\_2\\_17.pdf?source=rajyasabha](https://sansad.in/getFile/rsnew/Committee_site/Committee_File/ReportFile/71/140/0_2020_2_17.pdf?source=rajyasabha) (last visited August 14, 2023).

to be quite contentious, with some members feeling that young adults between the age-group of 16-19 years should also be covered under this exception while other members felt that the possession of any sexual material of whatever kind by minors must be banned outright. The proposed exception clause to be inserted after Section 15(3) of the POCSO Act, 2012, as recommended by the Committee read as follows:<sup>136</sup>

*“(4) Exceptions under this Act include (a) minors who cannot be prosecuted for child pornography offences if the child takes or stores or exchanges with another minor, indecent images of oneself; (b) if the individual is under 18 years and (i) no person in the image is more than two years younger than the individual; (ii) the image does not show an act that is a serious criminal offence.”*

13.5. The Committee further recommended the Ministry of Women and Child Development to engage in a widespread campaign through schools and community organisations to discourage risky online behaviour amongst children.<sup>137</sup>

13.6. At present, Section 67B of the Information Technology Act, 2000 is used to combat incidences of online child sexual abuse by criminalising any publication, transmission, creation, collection,

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<sup>136</sup> Parliament of India, “Report of the Adhoc Committee of the Rajya Sabha to Study the Alarming Issue of Pornography on Social Media and its Effect on Children and Society as a Whole, 2020” 11 and 12 (Para 1.3) (Rajya Sabha, 2020) available at [https://sansad.in/getFile/rsnew/Committee\\_site/Committee\\_File/ReportFile/71/140/0\\_2020\\_2\\_17.pdf?source=rajyasabha](https://sansad.in/getFile/rsnew/Committee_site/Committee_File/ReportFile/71/140/0_2020_2_17.pdf?source=rajyasabha) (last visited August 14, 2023).

<sup>137</sup> Parliament of India, “Report of the Adhoc Committee of the Rajya Sabha to Study the Alarming Issue of Pornography on Social Media and its Effect on Children and Society as a Whole, 2020” 12 (Para 1.3) (Rajya Sabha, 2020), available at [https://sansad.in/getFile/rsnew/Committee\\_site/Committee\\_File/ReportFile/71/140/0\\_2020\\_2\\_17.pdf?source=rajyasabha](https://sansad.in/getFile/rsnew/Committee_site/Committee_File/ReportFile/71/140/0_2020_2_17.pdf?source=rajyasabha) (last visited August 14, 2023).

promotion, exchange, distribution, or possession of child sexual abuse material as well as criminalizing the act of facilitating abuse of children online, recording acts of child abuse in electronic form and cultivating, enticing or inducing children for sexually explicit acts.<sup>138</sup>

13.7. Apart from the aspect of child abuse in the online realm, another aspect that has emerged is how the mandatory reporting requirement under the POCSO Act has worked to the detriment of adolescent girls in seeking reproductive and sexual health services. This was noted by the Apex Court in *X. v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Anr.*<sup>139</sup>. The Court, in this case, observed that while the POCSO Act does not consider factual consent by a minor, it in no way prevents adolescents from engaging in consensual sex. The Court noted that such activities continue to take place and may at times result in pregnancy and being aware of this reality, the Legislature included adolescents within purview of Rule 3B of the MTP Rules, which provides a category of women who may terminate their pregnancy up to 24 weeks. The Court further noted how the mandatory reporting requirement and insistence on the disclosure of the name of the minor in the report under Section 19(1) of the POCSO Act may act as a barrier for the minor to access safe termination of pregnancy. Upholding the right to reproductive autonomy and in order to ensure single and unmarried women are not deprived of

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<sup>138</sup> The Information Technology Act, 2000 (Act No. 21 of 2000), sec. 67B.

<sup>139</sup> *Supreme Court of India*, Civil Appeal No. 5802 of 2022 (Arising out of SLP (C) No. 12612 of 2022).

abortions between 20 and 24 weeks, the Court interpreted the rule purposively and in a broad manner. The Court held that:

*“84. To ensure that the benefit of Rule 3B(b) is extended to all women under 18 years of age who engage in consensual sexual activity, it is necessary to harmoniously read both the POCSO Act and the MTP Act. For the limited purposes of providing medical termination of pregnancy in terms of the MTP Act, we clarify that the RMP, only on request of the minor and the guardian of the minor, need not disclose the identity and other personal details of the minor in the information provided under Section 19(1) of the POCSO Act. The RMP who has provided information under Section 19(1) of the POCSO Act (in reference to a minor seeking medical termination of a pregnancy under the MTP Act) is also exempt from disclosing the minor’s identity in any criminal proceedings which may follow from the RMP’s report under Section 19(1) of the POCSO Act. Such an interpretation would prevent any conflict between the statutory obligation of the RMP to mandatorily report the offence under the POCSO Act and the rights of privacy and reproductive autonomy of the minor under Article 21 of the Constitution. It could not possibly be the legislature’s intent to deprive minors of safe abortions.”<sup>140</sup>*

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<sup>140</sup> *Id.*

## 14. INTERPLAY OF THE POCSO ACT WITH CHILD MARRIAGE AND CHILD TRAFFICKING

14.1. Apart from the internet, there is also the element of the POCSO Act and its interplay with other child-centric legislations, in particular, the Prohibition of Child Marriage Act, 2006 (hereinafter, referred to as “PCMA”). PCMA was brought in to address the age-old social practice of child marriage that continues to afflict our society even today. The battle to end child marriage has been a continuous one and India is firmly committed to ending the same by 2030 as a part of target 5.3 of the Sustainable Development Goals.

14.2. Although India has made laudable progress in the goal of eliminating child marriage yet one in three child brides in the world are in India.<sup>141</sup> The consequences of child-marriage are undeniably more adverse for young girls.<sup>142</sup> Majority of child brides give birth in their adolescence and face challenges when it comes to their education.<sup>143</sup> As per recent statistics, in India, 27% of young women got married in their childhood which is down from 47% earlier.<sup>144</sup> Nonetheless, this is a substantial number of women when seen in terms of real numbers that

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<sup>141</sup> United Nations Children’s Fund (UNICEF), “Ending Child Marriage: A profile of progress in India 2023 update” 4 (May, 2023) available at <https://data.unicef.org/resources/ending-child-marriage-a-profile-of-progress-in-india-2023/> (last visited July 20, 2023).

<sup>142</sup> B. Pramila, “Child Marriage: Scenario in India”, 74 *Proceedings of the Indian History Congress* 998 (2013).

<sup>143</sup> United Nations Children’s Fund (UNICEF), “Ending Child Marriage: A profile of progress in India 2023 update” 4 (May, 2023) available at <https://data.unicef.org/resources/ending-child-marriage-a-profile-of-progress-in-india-2023/> (last visited July 20, 2023).

<sup>144</sup> United Nations Children’s Fund (UNICEF), “UNFPA-UNICEF Global Programme to End Child Marriage: 2020 Country Profiles – India” 2 (2020) available at <https://www.unicef.org/media/111381/file/Child-marriage-country-profile-India-2021.pdf> (last visited July 20, 2023).



this percentage converts to. According to the National Family Health Survey – 5 (NFHS-5), 23.3% of the women between the ages 20-24 years were married before the age of 18 years.<sup>145</sup> It must be borne in mind that premature pregnancy, motherhood, disruptions in education, increased risk to violence and other health risks such as maternal mortality often accompany as consequences of an early marriage.<sup>146</sup> According to NFHS-5, 6.8 per cent of women aged 15-19 years were already mothers or pregnant at the time of the survey.<sup>147</sup> Thus, the risk towards becoming victims of violence that these young girls face cannot be understated.

14.3. The problem compounds further when one considers the prevailing social mindset against such violence. Around 35% male and 41% female adolescents consider it justified for a husband to beat his wife for reasons such as arguing with the husband, refusing sexual intercourse, burning food etc.<sup>148</sup> Such a high percentage of female adolescents considering domestic violence and abuse to be justified renders them further vulnerable. The Supreme Court has also taken note of the ill-impacts of child marriage upon the person and health of a girl child.

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<sup>145</sup> Ministry of Health and Family Welfare, "National Family Health Survey (NFHS – 5) 2019-21: Compendium of Fact Sheets India and 14 States/UTs (Phase-II)" 3 (September, 2021) available at [https://main.mohfw.gov.in/sites/default/files/NFHS-5\\_Phase-II\\_0.pdf](https://main.mohfw.gov.in/sites/default/files/NFHS-5_Phase-II_0.pdf) (last visited August 2, 2023).

<sup>146</sup> B. Pramila, "Child Marriage: Scenario in India", 74 *Proceedings of the Indian History Congress* 998 (2013);

<sup>147</sup> Ministry of Health and Family Welfare, "National Family Health Survey (NFHS – 5) 2019-21: Compendium of Fact Sheets India and 14 States/UTs (Phase-II)" 3 (September, 2021) available at [https://main.mohfw.gov.in/sites/default/files/NFHS-5\\_Phase-II\\_0.pdf](https://main.mohfw.gov.in/sites/default/files/NFHS-5_Phase-II_0.pdf) (last visited August 2, 2023).

<sup>148</sup> United Nations Children's Fund (UNICEF), "The State of The World's Children 2023: For Every Child, Vaccination" 180 (April, 2023) available at <https://www.unicef.org/media/108161/file/SOWC-2023-full-report-English.pdf> (last visited July 20, 2023).

14.4. Child marriage also has a socio-economic dimension<sup>149</sup> which can also be found to reflect in these “romantic relationship cases” that are coming up under the POCSO Act. A large number of child-brides come from a certain social-economic background and the same can be seen in the romantic cases falling under the POCSO Act. Even the courts that have highlighted the anomalous situation we have at hand have observed the same.<sup>150</sup> In cases of child marriage and child trafficking, the perpetrators often try to portray that the child has consented to the act. However, consent of a child is irrelevant as there is often a power imbalance in such situations and children usually occupy weak positions, are ill informed about marriages and thus incapable of giving free, full and informed consent.<sup>151</sup> Further, in cases of child trafficking, a child’s consent can also be gained by deceitful means.<sup>152</sup> The child might be encouraged, coerced, coaxed or manipulated into thinking that they are equal participants in the situation when it might not be so.<sup>153</sup> The emerging cases of online grooming are a perfect example of manipulation and manufactured “consent”. One cannot discount the reality that often enough it is a family member or a close person who pushes the child into such a marriage or prostitution or traffics them. As per NCRB data, in around 97% of cases that were reported under Sections 4 and 6 of the POCSO

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<sup>149</sup> United Nations Children’s Fund (UNICEF), “Ending Child Marriage: A profile of progress in India 2023 update” 12-15 (May, 2023), available at <https://data.unicef.org/resources/ending-child-marriage-a-profile-of-progress-in-india-2023/> (last visited July 20, 2023).

<sup>150</sup> *Veelesh Kalawat v. State of Madhya Pradesh*, Madhya Pradesh High Court Misc. Criminal Case No. 4521 of 2023.

<sup>151</sup> Ajwang Warri, “Forced Child Marriages as a Form of Child Trafficking”, 79 *Children and Youth Services Review* 274 (2017) available at <https://cdn.icmec.org/wp-content/uploads/2020/07/forced-child-marriages-as-HT-Warri-2017.pdf> (last visited July 20, 2023).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Act, the offender was someone known to the victim.<sup>154</sup> Thus, considering the “consent” of the child is introducing an element of subjectivity that provides a great scope for groomers, traffickers and perpetrators to escape their liability.

14.5. While the purpose of the PCMA and the POCSO Act may appear to be different, they are invariably correlated. Till 2017, *Exception 2* to Section 375 of IPC was used as a safe harbour for men having sexual intercourse with their minor wives and only when this exception was read down in *Independent Thought v. Union of India & Anr.*<sup>155</sup>, did true protection to children against sexual exploitation in the sense envisaged under the POCSO Act actually become a reality in law. It is important to appreciate the inter-linking between these laws. PCMA, though very noble in its goal, is a weak law. It does not declare a child marriage void but only voidable and while there are penal provisions against solemnising such marriages, the law does not deal with the question of sexual relations with a minor spouse. The POCSO Act fills in this void that was left unaddressed for long and provides a deterrent against marrying a child and initiating sexual relations with her as the consequences under the POCSO Act are much graver. The impact upon the avowed goal of preventing child-marriages has to be borne in mind while making any changes in the POCSO Act. As stated earlier, it is

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<sup>154</sup> National Crime Records Bureau, “Crime in India 2021 - Volume I”, table 4A.10, 372 (August, 2022), available at [https://ncrb.gov.in/sites/default/files/CI-2021/CI\\_2021Volume%201.pdf](https://ncrb.gov.in/sites/default/files/CI-2021/CI_2021Volume%201.pdf) (last visited August 7, 2023)

<sup>155</sup> (2017) 10 SCC 800.

young girls who are predominantly forced into child-marriages and any dilution in law may very well lead to further exploitation of a girl child.

14.6. An emerging aspect that needs to be factored in the discussion is that the Parliament is considering increasing the age of marriage under PCMA for girls to 21 years, thus making it at par with that of boys. The Bill introduced to affect the same has been referred to Department Related Parliamentary Standing Committee on Education, Women, Children, Youth and Sports for examination.<sup>156</sup> In such a situation, any tinkering with the age of consent in the opposite direction may compound the issues that already exist. While it is often tried to delink the age of consent and age of marriage, however, it is a reality in our country that consent to sexual activity exposes a girl child to the risk of early pregnancy and marriage. Thus, in all practicality, the two aspects cannot be divorced from each other entirely.

14.7. Yet another inter-play that has to be carefully considered in the context of the POCSO Act is child trafficking and prostitution of children. According to NCRB Data, in 2021, 6,533 victims were reported to be trafficked out of which 2,877 were children.<sup>157</sup> However, only 2189 cases of trafficking were registered.<sup>158</sup> A large percentage of

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<sup>156</sup> The Prohibition of Child Marriage (Amendment) Bill, 2021, Bill No. 163 of 2021; Ministry of Women and Child Development, "Policy Initiative to Check Child Marriages", *PIB* (March 17, 2023) available at <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1908007> (last visited August 7, 2023).

<sup>157</sup> National Crime Records Bureau, "Crime in India 2021 - Volume III", Table 14.2, 1017 (August, 2022), available at [https://ncrb.gov.in/sites/default/files/CI-2021/CI\\_2021Volume%203.pdf](https://ncrb.gov.in/sites/default/files/CI-2021/CI_2021Volume%203.pdf) (last visited August 7, 2023).

<sup>158</sup> National Crime Records Bureau, "Crime in India 2021 - Volume III", Table 14.1, 1016 (August, 2022), available at [https://ncrb.gov.in/sites/default/files/CI-2021/CI\\_2021Volume%203.pdf](https://ncrb.gov.in/sites/default/files/CI-2021/CI_2021Volume%203.pdf) (last visited August 7, 2023).

cases of human trafficking were for the purposes of sexual exploitation for prostitution and some were even for forced marriages.<sup>159</sup> The POCSO Act is an important tool to combat the scourge of child trafficking and child prostitution that exists. Trafficking can be done in the garb of child marriage<sup>160</sup> and the POCSO Act becomes all the more important in such a situation.<sup>161</sup> Thus, in considering the issue of age of consent under the POCSO Act, the two competing interests of child protection and consent of child have to be perfectly balanced.

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<sup>159</sup> National Crime Records Bureau, "Crime in India 2021 - Volume III", Table 14.5, 1021 (August, 2022), available at [https://ncrb.gov.in/sites/default/files/CII-2021/CII\\_2021Volume%203.pdf](https://ncrb.gov.in/sites/default/files/CII-2021/CII_2021Volume%203.pdf) (last visited August 7, 2023).

<sup>160</sup> *In re: Contagion of COVID-19 Virus in Children Protection Homes* 2020 SCC OnLine Cal 974, W.P. 5327(W) of 2020 (Cal HC); *Independent Thought v. Union of India* (2017) 10 SCC 800.

<sup>161</sup> *Lonkaran Chothmalji Parmar v. State of Maharashtra* 2016 SCC OnLine Bom 9851; (2017) 5 RCR (Cri) 198.

## 15. JUDICIAL DETERMINATION OF CONSENSUAL ROMANTIC RELATIONSHIPS UNDER THE POCSO ACT

15.1. The contentious issue of cases of romantic relationships being charged under the POCSO Act has invited significant judicial attention, with the various High Courts, confronted with the issue, having decided differently.<sup>162</sup> Some High Courts have expressed their helplessness in traversing beyond the plain language of the statute, and have thus, convicted the accused in cases where he has entered into a consensual sexual relationship with a minor girl.<sup>163</sup> On the other hand, different High Courts have adopted a distinct approach in giving effect to an interpretation which extends beyond the immediate confines of the POCSO Act.<sup>164</sup> By reading the provisions liberally and transcending their literal text, the courts have opined that it was never the objective of the POCSO Act to punish adolescent boys who enter into a consensual sexual relationship with minor girls.<sup>165</sup>

15.2. To take just one example from each set of many to be found, in *Ajay Kumar v. State (NCT of Delhi)*, the Delhi High Court opined that

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<sup>162</sup> *Sabari v. Inspector of Police and Others* (2019) 3 RCR (Cri) 452; *Ravi v. State*, Madras High Court, Criminal Application No. 627 of 2021; *Vijayalakshmi & Anr. v. State Rep. by the Inspector of Police & Anr.* (2021) 2 CTC 191, *Atul Mishra v. State of U.P.* (2022) 3 All LJ 278; *Ajay Kumar v. State (NCT of Delhi)*, Delhi High Court, Bail Application 2729/2022; *Sunil Mahadev Patil v. The State of Maharashtra*, (2015) 3 AIR Bom R (Cri) 594.

<sup>163</sup> *Ravi v. State*, Madras High Court, Criminal Application No. 627 of 2021; *State (NCT of Delhi) v. Vipin Sharma* 2023/DHC/001668.

<sup>164</sup> *Sabari v. Inspector of Police and Others* (2019) 3 RCR (Cri) 452; *Fija & Anr. v. State Govt. of NCT of Delhi & Ors.* High Court of Delhi, W.P.(CRL) 763/2022; *Ranjit Rajbanshi v. State of West Bengal and Ors.* 2023 Cri LJ (NOC 74) 25, *Ashik Ramjan Ansari v. The State of Maharashtra & Anr.*, Bombay High Court, Criminal Appeal No.1184 Of 2019; *Rahul Chandel Jatav v. the State of Madhya Pradesh & Anr.*, High Court of Madhya Pradesh, Miscellaneous Criminal Case No. 24691 of 2023; *Ajithkumar v. State*, High Court of Madras, Criminal Revision Case No. 877 of 2021;

<sup>165</sup> Madras High Court, Criminal Appeal No. 627 of 2021.

the intention of the POCSO Act was to protect children below the age of 18 years from sexual exploitation and it was never meant to criminalise consensual romantic relationships between young adults. On the other hand, taking a contrary position, in *Ravi v. State*, the Madras High Court held that in matters under the POCSO Act, the consent of the child is immaterial, holding that:

*“Whereas, the law defines that the person who has not completed the age of 18 years, is a child. This Court, being an Appellate Court, is a final fact finding Court and cannot traverse beyond the statute. This Court also eagerly is waiting for the amendment in the Legislature as expressed by my learned brothers. In the case on hand, this Court finds that the victim was a minor and the appellant took the custody of the minor without the knowledge or consent of her natural guardians and had committed penetrative sexual assault on her and hence, the offence committed by the appellant falls under Section 5(l) which is punishable under Section 6 of the POCSO Act.”<sup>166</sup>*

15.3. Thus, the concerns about the rising number of such cases, wherein minors are punished under the POCSO Act for indulging in sexual intercourse arising out of romantic relationships, are being expressed by various quarters in proceedings before the High Courts of the country as well as the POCSO Special Courts. Despite a clear stand being taken by a female in such an act, that it was a case of consensual sex, the other party, i.e., the male accused, stands convicted under the POCSO Act on the basis of the reasoning that the POCSO Act was never intended to exclude from its purview cases of consensual sex with the minor.

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<sup>166</sup> *Id.*, at 23.



15.4. The cases of consensual adolescent relationships have overwhelmed the judicial system, with the courts taking varied stands. However, one common trend that can be observed is that of the approach taken by High Courts in granting bail to the accused in such cases, which is otherwise often denied by the trial courts given the gravity of underlying offence. The High Courts, faced with an increasing number of bail applications and writ petitions or quashing of FIR cases, have laid down parameters to be considered by the trial courts in considering bail. These include certain real-life considerations such as age of the victim and accused, their comparative age and whether they were at an age of innocence; familial relationship between the victim and the accused; conduct of the accused after alleged act; comparative social standing of the accused and the victim; charges of witnesses being harassed/intimidated; whether the alleged act involved threat, intimidation or violence; and whether there appears to be tacit approval in fact on part of the victim, though not consent in law.<sup>167</sup> The High Courts have also been careful to point out that every case of such nature has to be adjudged on its own peculiar facts and circumstances.<sup>168</sup>

15.5. Another related dimension that has been touched by the courts is that of mandatory reporting and medical termination of pregnancy in such cases. The Madras High Court, in line with the Supreme Court's judgment in *X v. Principal Secretary, Health and Family Welfare*

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<sup>167</sup> *Dharmender Singh v. State (NCT of Delhi)*, (2020) 275 DLT 49; *Ajay Kumar v. State (NCT of Delhi)*, Delhi High Court, Bail Application 2729/2022, order dated 20.10.2022; *Sunil Mahadev Patil v. The State of Maharashtra*, (2015) 3 AIR Bom R (Cri) 594;

<sup>168</sup> *Mahesh Kumar v. State (NCT of Delhi)* 2023:DHC:3151.



*Department*<sup>169</sup>, has held that the registered medical practitioner may not insist on disclosure of the name of the minor while reporting under Section 19 of the POSCO Act in cases where a minor is seeking termination of pregnancy arising out of a consensual sexual relationship, as sometimes the minor and their guardian may not be interested in proceeding further with the case and to entangle themselves with a legal process.<sup>170</sup>

15.6. The trial courts, given the grave nature of POCSO cases, often refuse to grant bail or exercise any discretion in even if it is pleaded that the relationship between the victim and accused was consensual. In the matter of sentencing, there exists no discretion with the trial judge that can be exercised under the POCSO Act. The decisions rendered by the Special Courts in POCSO trials are subject to scrutiny of High Courts given the severe nature of offences involved. Any grant of bail without proper reasoning<sup>171</sup> or awarding of lesser punishment<sup>172</sup> by the Special Court is not permissible within the framework of the POCSO Act and doing the same may attract condemnation from the High Courts.

15.7. In a few States, the police, faced with such rising cases, have also tried to address the same without much success and sometimes to the dismay of the public and the courts. For instance, the Mumbai Police in

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<sup>169</sup> Supreme Court of India, Civil Appeal No. 5802 of 2022 (Arising out of SLP (C) No. 12612 of 2022).

<sup>170</sup> *Kajendran J v. The Superintendent of Police & Ors.*, High Court of Madras, H.C.P. No. 2182 of 2022, order dated 14.08.2023.

<sup>171</sup> *Ms. N v. State & Anr.*, Delhi High Court CRL.M.C.-3399/2023 : 2023:DHC:6253.

<sup>172</sup> *Rodhu Bhaga Wagh v. The State of Maharashtra & Anr.*, High Court of Bombay Criminal Appeal No. 833 of 2022, order dated 15.09.2023.

2020, *vide* its circular dated June 6, 2022, had made recommendation of Assistant Commissioner of Police (ACP) and approval of the zonal Deputy Commissioner of Police (DCP) mandatory before registering FIRs under the POCSO Act or molestation cases.<sup>173</sup> The said circular was challenged before the Hon'ble High Court of Bombay. The Mumbai Police first amended the circular on June 17, 2022 to require the ACP's permission only in controversial cases and was eventually withdrawn entirely.<sup>174</sup> The circular was severely criticised by the NCPCR and Maharashtra State Commission for Protection of Child Rights (MSCPCR) and was also challenged before the Bombay High Court by several NGOs.

15.8. Similarly, in light of the increasing cases of consensual romantic relationships under the POCSO Act, the Director General of Police, Tamil Nadu, has also issued a circular dated 03.12.2022, *vide* Rc.No.009464/Crime-4(3)/2022, advising investigating officers not to be hasty in arresting youngsters involved in romantic relationships and to invoke Section 41-A of the Code of Criminal Procedure, 1973 in lieu of arrest. This circular was passed by the Director General of Police, Tamil Nadu during the course of proceedings going on before the Madras High Court looking in to the implementation of the POCSO Act

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<sup>173</sup> Press Trust of India, *Can POCSO circular issued by Mumbai Police chief be withdrawn? High Court asks Maharashtra govt*, Firstpost, June 16, 2022, available at <https://www.firstpost.com/india/can-pocso-circular-issued-by-mumbai-police-chief-be-withdrawn-high-court-asks-maharashtra-govt-10801281.html> (last visited June 28, 2023).

<sup>174</sup> Vinay Dalvi, *CP withdraws circular on registration of molestation, Pocso cases*, Hindustan Times, June 12, 2022, available at <https://www.hindustantimes.com/cities/mumbai-news/cp-withdraws-circular-on-registration-of-molestation-pocso-cases-101657637269554.html> (last visited June 28, 2023).

in the State.<sup>175</sup> The Madras High Court has constituted a Special Bench for monitoring the implementation of the POCSO Act and the Juvenile Justice (Care and Protection) Act, 2015 on the judicial side.<sup>176</sup> The case before the Special Bench of the Madras High Court initially arose as a habeas corpus petition filed by the parents of girl for her restoration, alleging the she was being detained by the State in a child care home. Though the custody of the child was returned to her parents, several issues were flagged during the proceedings in cases involving juveniles. Since larger issues were involved which required continued monitoring and setting up of best practices, a Special Bench was constituted for monitoring implementation of the POCSO Act and the JJ Act on the judicial side. The issue of adolescent romantic relationships is also being considered extensively. The Special Bench of Madras High Court had called for particulars regarding the cases pending before the Courts/Juvenile Justice Board pertaining to victims and the children in conflict below the age of 18 years.<sup>177</sup> The Court had further directed the Director General of Police to identify cases involving consensual relationships from among the pending cases as already determined under previous orders of the Court.<sup>178</sup> The Court shall look into exercising its jurisdiction and quash the proceedings in appropriate cases, especially if the proceedings are ultimately going to be against the interest and future of the children involved in those cases and if it is found to be an abuse of process of Court or abuse of process of law.<sup>179</sup>

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<sup>175</sup> *Kajendran J v. The Superintendent of Police & Ors.*, High Court of Madras, H.C.P.No. 2182 of 2022.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*, order dated 16.06.2023.

<sup>178</sup> *Id.*, order dated 07.07.2023.

<sup>179</sup> *Id.*, order dated 07.07.2023.

In compliance with the Court orders, the Director General of Police had identified that there were 1274 pending cases out of which 111 cases have been identified as involving consensual relationship which are either at the stage of investigation or where the investigation has been completed and final report has been filed and the same is yet to be taken on file by the concerned Special Court.<sup>180</sup> The High Court will now, in deserving cases (among the 111 identified cases), exercise its jurisdiction ultimately to the benefit of the children involved by relieving them from the trauma of facing a criminal trial before the Court.<sup>181</sup>

15.9. In light of the foregoing, it is amply clear that the situation as to the rising cases of adolescent love that the courts are faced with needs to be carefully considered keeping in mind all the dimensions and balancing them to the best extent possible. Protecting children from any sexual abuse or exploitation, however, must remain the central and paramount consideration in this endeavour.



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<sup>180</sup> *Id.*, order dated 14.08.2023.

<sup>181</sup> *Id.*, order dated 14.08.2023.

## 16. DATA OF THE NATIONAL CRIME RECORDS BUREAU

16.1. The Crime in India 2021 Report released by National Crime Records Bureau (NCRB) shows that the largest number of victims of cases under the POCSO Act fall in the age group of 16 to 18 years and are majorly girls. When we look at the juveniles apprehended under the POCSO Act, a gendered picture of mostly boys being charged in such cases emerges. There is no separate record maintained of cases wherein romantic relationship is alleged and all cases irrespective of factual consent or absence thereof are treated as offences and collated as such in the data. The latest relevant data as available has been tabulated below:

*Age Profile of Child Victims of POCSO Act (all India) for the year 2019-2021:<sup>182</sup>*

	<b>BOYS</b>	<b>GIRLS</b>	<b>TRANS</b>
Victims below 6 Years (all India)	25	650	0
Victims 6 to 12 Years (all India)	140	3157	0
Victims 12 to 16 Years (all India)	83	13173	0
Victims 16 to 18 Years (all India)	69	16206	0
<b>Total Child Victims (all India)</b>		<b>33503</b>	

*Note: No data with regard to the age profile of victims provided for Crime Against Children in Metropolitan Cities under Chapter-4B.*

<sup>182</sup> National Crime Records Bureau, "Crime in India 2021 - Volume I", table 4A.9, 370-71 (August, 2022), available at [https://ncrb.gov.in/sites/default/files/CI-2021/CI\\_2021Volume%20I.pdf](https://ncrb.gov.in/sites/default/files/CI-2021/CI_2021Volume%20I.pdf) (last visited August 7, 2023).

*Data on Crimes under POCSO for the year 2019-2021:*<sup>183</sup>

	POCSO (All sections)		Under S. 4 & 6 POCSO or S. 4 & 6 POCSO r/w S. 376 IPC					
			Total		Against Girls		Against Boys	
	I	V	I	V	I	V	I	V
<b>States</b>	51863	52341	32099	32251	31792	31939	307	312
<b>UTs</b>	2011	2018	1249	1252	1244	1247	5	5
<b>Total</b>	<b>53874</b>	<b>54359</b>	<b>33348</b>	<b>33503</b>	<b>33036</b>	<b>33186</b>	<b>312</b>	<b>317</b>

*I = No. of Incidents*

*V = No. of Child Victims*

*R = Crime Rate per Lakh Population*

*Juveniles apprehended under POCSO Act in the year 2019-2021(all sections):*<sup>184</sup>

	Boys	Girls	Trans
<b>Below 12</b>	33	0	0
<b>12 - 16 years</b>	592	3	0
<b>16 - 18 years</b>	1720	5	0
<b>Total</b>		<b>2353</b>	

16.2. The Law Commission, during the consultation process, had elicited response from the NCRB regarding specific data pertaining to the cases under the POCSO Act. As per the response received, separate data reflecting the age and gender profile of juveniles apprehended and persons arrested under the POCSO Act, State/UT-wise, has been collected and published since 2017. Similarly, age and gender profile of victims under Sections 4 & 6 of the POCSO Act has also been

<sup>183</sup> *Id.*, table 4A.2(ii), 327.

<sup>184</sup> *Id.*, table 5A.4, 448.

collated and made available since 2017. The data relating to conviction rate under the POCSO Act has been collected and put in the public domain since 2014. For the latest data available i.e., for the year 2021, the all-India conviction rate stood 32.2%.



## **17. CONSULTATIONS HELD BY THE COMMISSION**

17.1. The Commission, cognizant of the wide import of any change made to the POCSO Act in light of the plethora of issues and nuances already highlighted, engaged in broad consultations with various stakeholders such as NCPCR, civil society and child rights organisations, domain experts, lawyers and academicians. The Commission also solicited the views of the Ministry of Women and Child Development and also reached out to all the twenty-five High Courts of the country to take stock of such cases that are pending.

17.2. During the course of this wide consultative process, various concerns pertaining to the present implementation of the laws were highlighted. While there emerged no consensus on what the statutory age of consent should be, all experts were of the view that the definition of “child” as present under the POCSO Act need not be altered, meaning thereby that all children below the age of 18 years should be protected under the beneficial shield of the POCSO Act, including those between the ages of 16 to 18 years when there is no consent, so as to attract higher penal consequences and afford better protection to all children given their special vulnerabilities. While children falling in different age brackets may differ in terms of their mental development and thinking capacity, they are all children nonetheless and merit greater protection under law by virtue of their status as a “child”.



17.3. Another aspect on which all views aligned was pertaining to sex education and health. Age-appropriate sex education needs to be scaled-up in all schools among adolescents so as to ensure that our children can make better and informed choices. Apart from the law, there needs to be awareness among the children about their body. There needs to be awareness among the children about the risks of engaging in early sexual activity and the manner of preventing risks associated with sexual behaviour. Comprehensive sexual education not only impacts sexual initiation by adolescents by delaying it but also has a positive bearing upon issues of contraception, partner selection, and reproductive health outcomes.<sup>185</sup> While there are government programmes addressing these issues in India, there is a definite need to restructure and upscale the same.

17.4. During the entire consultative process, whether the age of consent should be lowered to 16 years emerged to be the most contentious issue.

17.5. Arguments forwarded in favour of lowering the age of consent or introducing an exception for the age group of 16 to 18 years were as follows:

- i. It was highlighted that in fixing such a high age of consent at 18 years, India was a global outlier with a significant number of countries adopting 16 years as the age of consent. Post-

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<sup>185</sup> Laura Duberstein Lindberg and Isaac Maddow-Zimet, "Consequences of Sex Education on Teen and Young Adult Sexual Behaviors and Outcomes" 51 *Journal of Adolescent Health* 332 (2012).

independence, for more than sixty years, the age of consent in India remained to be 16 years and there was no rationale behind lowering it to 18 years in 2012. It was further argued that the current issue of adolescent love being criminalised emerged only as a consequence of ignoring adolescent sexuality and evolving capacities of a child, thereby disregarding the fact that all children cannot be viewed with the same lens as age is a differentiating factor. There needs to be a balance between 'protecting' and 'over-criminalising' and thus, the definition of child should remain the same and all children should receive protection under the Act. All Chapters of the POCSO Act, except Chapters II (Sexual Offences against Children), III (Using Children for Pornographic Purposes and Punishment thereof) and IV (Abetment and Attempt to commit an offence) should continue to govern all children. To address the present issue, Chapters II, III and IV should not apply to children between the age of 16 years to 18 years who engage in consensual sexual activity.

- ii. While there is a lack of any comprehensive all India study on the issue of POCSO and adolescent romantic relationships, there have been limited studies conducted by civil society and child rights organisations as well as individuals, such as the study conducted by Enfold Proactive Health Trust in Assam, Maharashtra, and West Bengal, which was relied on and referenced to show how a large number of cases under the

POCSO Act in these States pertained to romantic cases and how the accused's acquittal was a norm in such cases.<sup>186</sup> Another study that was cited was that conducted by the Centre for Child and the Law at National Law School of India University, Bangalore, carried out in Delhi, Assam, Maharashtra, Karnataka and Andhra Pradesh.<sup>187</sup> Three more studies were also referenced to buttress the argument as to how the law was actually being misused against adolescents.<sup>188</sup>

- iii. The impact upon dignity, privacy, deprivation of liberty, adverse impact on sexual & reproductive health and overburdening of the criminal justice system was also highlighted. It was stated how criminalisation of normative sexual behaviour by persons in the age range of 16 to 18 years and discounting the evolving capacity of a child is actually undermining the best interest of the child. It was expressed that close-in-age exemptions as present in certain other jurisdictions of the world would not solve the issue as age difference cannot be a proxy for coercion as there are multiple

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<sup>186</sup> Enfold Proactive Health Trust, ““Romantic” Cases under the POCSO Act: A Study of 1715 Judgments of Special Courts in Assam, Maharashtra & West Bengal” (June 2022) available at <https://enfoldindia.org/wp-content/uploads/2022/12/Romantic-cases-under-the-POCSO-Act.pdf> (last visited July 20, 2023).

<sup>187</sup> Centre for Child and the Law – National Law School of India University Bangalore, “Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues” (February, 2018).

<sup>188</sup> Maharukh Adenwalla and Prakriti Shah, ““Age of Consent” Under the POCSO Act” 8 *Supreme Court Cases* J-80 (2022); HAQ: Centre for Child Rights and Forum Against Sexual Exploitation of Children (FACSE), “Implementation of the POCSO Act: Goals, Gaps and Challenges: Study of cases in Special Courts in Delhi & Mumbai 2012 - 2015” (November 2017) available at <https://haqcr.org/wp-content/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf> (last visited July 20, 2023); “A Decade of POCSO: Developments, Challenges and Insights from Judicial Data” (November 2022) available at <https://vidhilegalpolicy.in/research/a-decade-of-pocso-developments-challenges-and-insights-from-judicial-data/> (last visited July 20, 2023).

factors that contribute to exploitation within a relationship. There should be no space for exploitative sexual relationships and only non-exploitative consensual acts should be decriminalised.

- iv. Further, given that documentation of birth registrations is still in a state of flux in our country, a close-in-age exemption would provide no respite in many cases warranting the same and will only increase age-related litigation. Judicial discretion as suggested by the Hon'ble High Court of Madhya Pradesh would also not provide adequate resolution as normative sexual behaviour would still be subject to criminal investigation and trial. Awarding judicial discretion for reducing sentence does not address the issue of labelling consensual conduct as 'criminal'. It was also underscored that judicial discretion in the area of sentencing, especially in cases of sexual violence, is often exercised based on gender stereotypes. To buttress the argument, the example of deletion of *proviso* to Section 375 of the IPC was cited.
  
- v. The costs of criminalising adolescent romantic relationships in terms of harms to the children involved, their future, mental and physical health, as well as to the justice system and other human resources wasted have also been raised. Certain case studies were brought forth to outline the plight of children who may engage in consensual sexual relationships and are caught within the folds of the POCSO Act, also shedding light on how the child-friendly

procedures outlined within the JJ Act and the relevant Rules framed therein were not being implemented.

17.6. Arguments put forth in favour of introducing a limited exception in case of consent by a child between the age of 16 to 18 years were as follows:

- i. The arguments in favour of a limited exception, without touching the age of consent or definition of child, were more or less identical to the ones advocating for lowering of the age of consent with the difference that it was argued there cannot be automatic decriminalisation of such cases and that a judicial determination as to the nature and factual existence of consent ought to be specified in order to prevent misuse of such an exception.
- ii. There is requirement for amendments in the POCSO Act as well as the IPC to decriminalise consensual sexual acts involving adolescents above 16 years, while ensuring that those below 18 years are protected against non-consensual acts within the framework of the POCSO Act itself. The age of consent should be retained at 18 years while carving out exceptions for those between the ages of 16 to 18 years engaging in consensual and normative sexual behaviour.



- iii. It was suggested that an exception recognising consent of person above the age of 16 years which would decriminalise non-exploitative consensual sexual acts is the need of the hour. The definition of “child” need not be altered and the protection available would remain available, however, the offence of penetrative sexual assault and sexual assault against child above the age of 16 years could be treated under a separate provision wherein consent would be a relevant factor.

17.7. Arguments forwarded against any tinkering with the age of consent:

- i. Some individuals/organisations expressed strong reservations against altering the age of child or of consent under any circumstance, whatsoever. Any such lowering would have a debilitating impact on the fight against child marriage and forced prostitution of children, especially the girl child. Children in the age group of 16 to 18 years face larger vulnerability when it comes to grooming and manipulation as can be observed in the recent cases that have come to the fore. Any reduction in the age of consent will motivate paedophiles and provide them an avenue to exploit young children in the name of so-called “love”. In the same vein, it was expressed that age of consent under the POCSO Act cannot and should not be viewed in isolation as it has a logical nexus with other equally important child protection laws such as PCMA.



- ii. In the above context, it was also highlighted that considering “consent” in these so-called “romantic cases” wherein two adolescents or one adolescent and an adult are involved will amount to legitimising violation of PCMA. It can be observed in many cases that the plea before the court is that the victim and accused have married each other or are going to marry each other and accepting the same will encourage child/teenage pregnancy and will have a disastrous impact upon the health of not only the child who ends up entering a marriage at a premature stage but also the child/offspring which will be begotten as a result of such sexual relations with the said child.
- iii. Attention was also drawn to the fact that there is a socio-economic dimension to the issue at hand. Considering all such circumstances, lowering the age of consent and allowing children to enter into such relationships will inevitably trap the child in the vicious cycle of multi-dimensional and multi-generational poverty. Any child that is born out of such a relationship would also be trapped in the same poverty cycle.
- iv. The aspect of protection of mental and physical dignity of children and also the high possibility of exploitation, trafficking, prostitution and prejudice to one’s mental and physical growth were also stressed upon as relevant considerations in this scenario that ought not to be ignored.



- v. Any decrease in the age of consent would negatively impact the age-old fight against child marriage by providing parents an opportunity to marry off minor girls. PCMA is silent on age of consent and sexual relations with a minor, with the POCSO Act filling this void, especially after *Exception 2* to Section 375 of IPC was read down by the Supreme Court in 2017. The Parliament is already considering increasing the age of marriage for girls to 21 years, at par with boys, and thus any decrease in the age of consent would be against the tide of rational change. Further, a Romeo-Juliet Clause would never work in India as the majority of cases would fall outside its protective purview which usually extends to relationships between a minor and an individual within an age bracket of 24 to 46 months.
- vi. A disturbing development was highlighted from the State of Assam, wherein some parents arrange marriage between minors or a minor and a major by signing notarized agreements, stating that the minors or the minor and major had fallen in love and hence the families had decided to marry them off. Through these incidents, it was demonstrated that any reduction in age of consent will inevitably provide an escape provision to coerce minor girls into subjugation, marital rape and other forms of abuse, including trafficking.



- vii. A child is neither matured physically nor mentally to understand the meaning of consent and its consequences of such acts. Reliance was placed on the Study by Ministry of Women and Child Development<sup>189</sup> to show that children in the age group of 15-18 years were most vulnerable to exploitation and child abuse. Results of Kailash Satyarthi Children's Foundation's (KSCF) National Prevalence Study<sup>190</sup> on Child Sexual Abuse showed that victims themselves identify friends and boyfriend/girlfriend as most common perpetrators across all acts of child sexual abuse, including penetrative assaults. Any element of consent is going to be an easy escape route for adult abusers, thereby enabling prostitution and exploitation of children. It was also highlighted how courts have failed to analyse the cause of victim turning hostile and also cases where the victim has been counselled to marry their abuser. Emerging forms of consensual sexual exploitation such as online grooming and online child sexual abuse material were also brought to the fore. All of these concerns are further compounded by the increased vulnerability and danger that children face in a digital world.
- viii. Imposing alternative punishment may trivialise the crime. However, judicial discretion with procedural safeguards can be

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<sup>189</sup> Government of India, "Study on Child Abuse: India 2007" (Ministry of Women and Child Development, 2007).

<sup>190</sup> Mr. Bhuwan Ribhu provided the Commission with the unpublished report of Satyarthi Global Policy Institute for Children, Kailash Satyarthi Children's Foundation (2022) on Prevalence and Nature of Child Sexual Abuse in India.



incorporated so as to determine the mental and physical capacity, ability to understand the consequences and circumstances leading to consent of the girl child, sexual relation and elopement, as the case may be. In cases of consensual sex where both the parties are under 18 years of age, the correct application of the JJ Act and its Rules can prevent any miscarriage of justice to the parties or any severe consequences. When one of the parties is an adult, then guided judicial discretion can be allowed to address the same, when warranted.

17.8. Another related aspect that was highlighted by all of those consulted by the Commission was the deprivation of access to sexual and reproductive health services to young girls as a result of the current system wherein there is a fear of a police case being initiated. In no situation should young girls be deprived of sexual and reproductive health services as it makes their precarious situation worse, with most of them often ending up seeking the services of quacks, thereby jeopardising their lives and well-being.

17.9. Comments were also sought from the Ministry of Women and Child Development. However, despite reminders, no response was received.

17.10. The Commission also wrote to all the High Courts seeking data of cases filed under the POCSO Act, wherein there is a case of romantic relationship and protection is sought against harassment by police and

private individuals. Responses were received from the High Courts of Sikkim, Jammu & Kashmir and Ladakh, Tripura, Meghalaya, Bombay, Telangana, Jharkhand, Madras, Gujarat, Kerala, Gauhati, Uttarakhand, Himachal Pradesh, Punjab & Haryana, Rajasthan and Madhya Pradesh. Many of these responses either stated that there were no such cases or provided information pertaining to general cases pending under the POSCO Act or protection-seeking cases as no separate data pertaining to the category of romantic cases was being maintained. The High Court of Kerala even sought time for physical verification of similar groups of cases since there is no specific code assigned to enable retrieval of data pertaining to such romantic cases. The Madras High Court stated that there is no such case pending before it; however, it is noteworthy that it recently constituted a Special Bench to ascertain the number of pending cases before the Courts/Juvenile Justice Boards involving consensual relationships of minor children. Thus, it is obvious from the responses received that appropriate data pertaining to cases that would qualify as those involving romantic relationship is not being separately maintained and thus, a blind study of court decisions will not present the true picture of the situation.



## 18. CONCLUDING ANALYSIS

18.1. While there is sea-wide divergence of opinion on how to resolve the issue at hand, there is unanimity of thought when it comes to the aspect of the POCSO Act working against the very children it ought to protect. The blanket criminalisation of sexual activity amongst and with a child, though intended to safeguard children, is leading to incarceration of young boys and girls who engage in such activities as a consequence of sexual curiosity and need for exploration that may to some extent be normative for an adolescent. There is a social cost associated with the present situation, including the negative impact upon the health, both physical and mental, of the children as well as a burden upon the investigating agencies and courts which takes away focus from the cases that are genuine and require immediate consideration. The mental trauma and harassment faced by children who, on account of engaging in such a consensual act, come to fall within the ambit of the POCSO Act is certainly an issue of concern. Thus, steps are obviously required to be taken to address this aberrant situation created by the working of law as intended in its black letter.

18.2. Broadly, three possible solutions came up during the deliberation of the Commission which are: (a) blanket reduction of the age of consent to 16 years as was the situation prior to enactment of the POCSO Act; or (b) to introduce a limited exception in case of consensual sexual act involving a child above the age of 16 years; or (c) to introduce judicial discretion in sentencing in cases of consensual

romantic relationship between adolescents or with an adolescent between the age of 16 to 18 years.

18.3. With respect to the first proposed solution, while giving a blanket exemption to consensual sexual acts by persons above 16 years may seem like a panacea for the situation we are faced with, however, the same will lead to many unintended consequences of much severe nature. If there is an automatic decriminalisation once the defence of consent is claimed, then it must be borne in mind that consent is something that can always be manufactured. The data available clearly reflects that most perpetrators are someone close to the child or someone the child knows including from their own family. Further, the Police investigation suffers from a great number of inadequacies and if it is the investigating agencies that get to determine if there was consent or not, then a lot of genuine cases that need to be prosecuted under the POCSO Act may not see trial on account of investigating agencies themselves declaring them to be cases of consensual romantic sexual relationship. Such a dilution will provide an easy route to reduce the cases under the POCSO Act or deal with them without getting into the complexity of issues that surround such a trial, thereby reducing the POCSO Act to a 'paper law'. Moreover, it cannot be ignored that reducing the age of consent will have a direct and negative bearing on the fight against child marriage and child trafficking, the battles against which have been hard-fought and are still ongoing.

18.4. With respect to the second proposed solution, carving out a limited exception for sexual relations with a child above 16 years is equally concerning and prone to misuse. The consent of a child is no consent and reading the same would be deeply problematic. All children deserve the protection of the special law enacted for this very purpose and diluting the age of consent will deprive a significant portion of the child population, especially young girls aged 16 to 18 years, of the protection and expose them to unchecked exploitation. The increasing incidents of grooming and cyber-crimes such as sextortion are classic examples of how children in this vulnerable age group can be trapped and exploited. Naivety is no reason to deprive these children of a higher protection under law that the Parliament in its wisdom thought fit to establish. A deeply concerning phenomena that has emerged in the State of Assam was highlighted during the consultation process and is quite relevant in this regard.<sup>191</sup> In Assam, some parents arrange marriage between minors or a minor and an adult by signing notarized agreements stating that the minors or the minor and the adult have fallen in love. Thus, any reduction in age of consent will inevitably provide a safe harbour provision to coerce minor girls into subjugation, marital rape and other forms of abuse, including trafficking. Further Studies<sup>192</sup> were referred to that showed that victims themselves identify friends and boyfriend/girlfriend as the most common perpetrators across all acts of child sexual abuse, including penetrative assaults. The very real possibility of young girls being easily seduced in love traps

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<sup>191</sup> Highlighted by Shri Vikram Srivastava of Independent Thought.

<sup>192</sup> Shri Bhuwan Ribhu provided the Commission with the unpublished report of Satyarthi Global Policy Institute for Children, Kailash Satyarthi Children's Foundation (2022) on Prevalence and Nature of Child Sexual Abuse in India.

and then sold off in trafficking cannot and should not be ignored. Any element of consent can be misused and may lead to children being at the mercy of adult abusers, thereby enabling prostitution and exploitation of children.

18.5. In arguing for introducing an element of consent in cases where the child is between the ages of 16 to 18 years by introducing an exception to that effect, various studies were brought to the notice of the Commission. The Commission is mindful that a true picture is not portrayed by any study as was also submitted by the NCPCR with respect to the Study conducted by Enfold Proactive Health Trust. While the Enfold Study analyses orders of the cases, it does not go into the cases per se. In some cases, it is clear that the victim girl has maintained a consistent stand as to the romantic relationship she shared with the accused and her unequivocal consent for the said sexual act; however, there are many cases in which the victim girl turns hostile during the trial at an advanced stage of the proceedings in the case. All such instances of victims turning hostile at a later stage cannot be equated with factual consent actually being present as the victim can easily turn hostile on account of pressure, lack of support from family or victim compensation to sustain herself during the protracted proceedings. It has been observed that there is a certain level of judicial laxity in cases where such a relationship is alleged to exist between the victim and accused.<sup>193</sup> The same can be seen from the absence of any determination

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<sup>193</sup> Veenashree Anchan, Navaneetham Janardhana and John Vijay Sagar Kommu, "POCSO Act, 2012: Consensual Sex as a Matter of Tug of War Between Developmental Need and Legal Obligation for the Adolescents in India" 43 *Indian Journal of Psychological Medicine* 158 (2020) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8313457/> (last visited 25 July, 2023).

into the circumstances leading to the consent of the victim and complete absence of any analysis of age difference between the accused and the victim, thereby completely ignoring that very real prospects of child-grooming being involved, especially where the age-gap is wide.<sup>194</sup> A lenient approach is also adopted in age-determination of the victim and courts overwhelmingly favour deeming the victim a major in cases where marriage has been solemnised or relationship has been admitted or where the victim turns hostile.<sup>195</sup> In such a situation, it is necessary to tread with caution. Providing for consent to negate the element of criminality is not appropriate as it could inevitably lead to inferring of consent where none exists, hence, defeating the very purpose of law to protect children from abuse and exploitation.

18.6. Another argument that was raised in the context of introducing exception when the child is between 16 to 18 years of age was that the age of consent and age of marriage ought not to be conflated as they serve different purposes. It is thought that while the same may be true in theory; however, in practice, given our social milieu, the two are intrinsically linked. In many cases before the High Courts, one of the grounds for allowing bail or quashing the proceedings is that the victim and accused have got married and, in a number of cases, have a child as well. Thus, marriage and age of consent cannot be considered mutually exclusive. Further, if as a result of sexual intercourse, the girl

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<sup>194</sup> Centre for Child and the Law – National Law School of India University Bangalore, “Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues” 37, 135 (February, 2018).

<sup>195</sup> Centre for Child and the Law – National Law School of India University Bangalore, “Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues” 91 (February, 2018).



gets pregnant, then marriage may be the consequence in such cases. If we are to disassociate age of consent and age of marriage, then consent can always be pleaded to exist where the accused marries the victim, even if the said “consent” arises after the occurrence of the alleged offence. The courts have also been circumspect of the fact that in many instances, the accused deceitfully marries the victim under the guise of willingness to evade criminal charges and once bail or acquittal is secured, he abandons the victim.<sup>196</sup> Thus, introducing the element of consent can provide opportunity to child-abusers to escape the rigours of law and enjoy impunity by using loopholes.

18.7. The third solution of introducing judicial discretion in sentencing seems to strike a delicate balance to address the issue at hand and at the same time protecting children from sexual exploitation. There cannot be any automatic decriminalisation of sexual acts with a person between the age of 16 to 18 years and carving out a limited judicial discretion at the stage of sentencing is a more reasonable approach. Such a discretion bestowed on the Special Court can be exercisable in cases where there appears to be factual consent on part of a child above the age of 16 years for the alleged act in question. It has to be further ensured that such a discretionary power is provided in such a manner that it is well guided and insulated from any potential misuse as far as possible. In this context, as to when such a discretion will come into play and who will determine if at all it applies, becomes relevant. Only a judicially trained mind aided by experts will be able to appropriately determine whether

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<sup>196</sup> *Mohd. Amaan Malik v. The State Govt NCT of Delhi & Anr.*, Delhi High Court, CRL.M.C. 7121/2022 & CRL.M.A. 8829/2023.

the consent in fact of the child in question was indeed free from any coercion, deception, fraud or undue influence. This would require proper investigation and evidence being adduced so as to determine if any reduction in sentence is warranted. The concerns raised about wide judicial discretion leading to arbitrariness and being exercised on gender stereotypes are genuine and have also been noted by the Supreme Court in *Aparna Bhat and Ors. v. State of Madhya Pradesh and Anr.*<sup>197</sup> Thus, the Commission is of the opinion that discretionary power of the Special Court in ascertaining consent and if discretion is to be exercised at all, ought to be limited and guided so as to prevent misapplication. The issue whether factual consent exists cannot be left to the hands of investigating agencies as there are more dangers of abuse and misapplication in such cases. Further, in order to ensure that there is no unnecessary harassment or protracted proceedings, the current system of investigation and judicial determination have to be strengthened and improved in order to ensure expeditious trial as envisaged under the POCSO Act.

18.8. There are two categories of cases within the umbrella of purported consensual romantic relationships that fall under the ambit of the POCSO Act. First, relationships between two consenting adolescents, both of whom are of the ages 16 to 18 years. In such situations, technically both the adolescents are equally victims as well as children in conflict with law. However, it is more often the boy who is labelled as an accused and the girl a victim, even though the POCSO

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<sup>197</sup> SCC OnLine SC 230.

Act is gender neutral. Ideally, such a boy should be prosecuted as per the provisions of the JJ Act, which allows for much liberal and wider discretion in punishment and sentencing. However, a child can be prosecuted as an adult in cases of heinous offences under the JJ Act. Offences defined under Sections 3 and 7 of the POCSO Act are heinous in nature and there is always the danger of the child being tried as an adult even though the sexual act had been consensual. Thus, changes are also required to be brought within the JJ Act in order to ensure that in such cases of romantic relationships, the child is not tried as an adult and gets the benefit of a trial in accordance with the JJ Act.

18.9. In the second category of cases, wherein there is an alleged consensual relationship between a child aged 16 years or above and an adult, the situation needs to be considered more delicately as consent by a child is difficult to ascertain and even more so in an adult-child relationship. Courts may fail to recognize predatory and exploitative behaviour wherein an adult may take undue advantage of a child's positive feelings towards them and may label them as consensual. There are nuances of inequality of power that ought to be considered carefully. The power balance is heavily skewed in an adult-child relationship owing to the factors such as difference in age and such an imbalance and the resultant exploitation may, in fact, even exist in a relationship between adolescents. There are instances when the court has considered the age difference, however, in no manner has it considered whether the "consent" of the child is in fact true consent.<sup>198</sup> There are also cases

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<sup>198</sup> *Javed v. State NCT of Delhi*, Delhi High Court Bail Application 4129/2021 decided on 23.11.2022.

wherein even if the adult is married and there is a large age difference, the court has considered consent to be present on part of the child/minor and the same is found to be sufficient to quash the proceedings.<sup>199</sup> Law cannot be blind to the coercive nature of large age-differences and ought to factor them in order to bring such exploitation within the purview of law. Thus, even though close-in-age exemptions have been largely considered inadequate to deal with the present situation, the Commission considers that the age-difference between the victim-child and the accused in such romantic cases ought to be a relevant factor that is to be carefully considered by the court. However, in light of the existing ground realities, if the age-difference between the victim child and the accused is less than three years, the Commission is of the considered view that introduction of judicial discretion in the matter of sentencing can help alleviate the plight of those truly aggrieved.

18.10. Solely providing judicial discretion under the POCSO Act to deal with such cases will not resolve the situation entirely as clause *Sixthly* of Section 375 of the IPC may still be invoked against the accused if the victim girl is below 18 years of age. It is pertinent to note even though *Exception 2* of Section 375 exempts a husband from any liability of rape under this section for indulging in sexual intercourse with his wife who is above the age of 15 years; however, the Supreme Court in the case of *Independent Thought v. Union of India & Anr.*<sup>200</sup>, read down *Exception 2* to Section 375 to the extent that 15 years is to

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<sup>199</sup> *Santamu Kaudi v. State of Odisha*, High Court of Orissa JCRLA No. 37 of 2019.

<sup>200</sup> (2017) 10 SCC 800.

be read as 18 years. Thus, the current position in law as it stands is that even if the husband has consensual sexual intercourse with his wife who is below the age of 18 years, it will amount to rape under this provision. Now such a position in law gives rise to a peculiar dilemma. As per the current scheme of law, sexual intercourse with a girl child by the husband, lover or any other person, amounts to an offence under Section 375 of the IPC as well as the POCSO Act. However, if certain reprieve is sought to be granted to the accused under the POCSO Act in cases of adolescent romantic relationships, as is being recommended in this Report, the same would be meaningless without a corresponding amendment in Section 375 punishable under Section 376 of the IPC. This is so because while the reprieve under the POCSO Act can be claimed by the lover of the child, the alleged offence in question shall continue to be penalised under Section 375 for both the lover or the husband of the child.

18.11. Another aspect that warrants attention is the barrier to access sexual and reproductive health services created by the operation of mandatory reporting as provided under the POCSO Act. Access to sexual and reproductive health services is vital to ensure that a victim is not rendered further vulnerable. Inaccessibility to such essential health services worsens the prospects for a young girl who due to the fear of prosecution and police can be driven to resort to unsafe abortions, thereby putting her life and health at great risk. The Hon'ble



Supreme Court<sup>201</sup> also gave guidelines to ensure that unmarried and single women including adolescents are not deprived access to safe abortion under the Medical Termination of Pregnancy Act, 1971 and the Rules made thereunder. The guidelines issued by the Supreme Court in *X. v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Anr.*<sup>202</sup>, exempting the registered medical practitioner from disclosing the identity of the minor victim, who has approached the medical practitioner for termination of pregnancy, at the request of the minor and the guardian of the minor, should assuage all fears of the prosecution, thereby encouraging such pregnant adolescents to avail the sexual and reproductive healthcare that they may require.

18.12. A recurring theme in the entire discussion was also the aspect of lack of awareness regarding child sexual abuse and the POCSO Act amongst the public. There is general lack of awareness amongst the children as to what constitutes child sexual abuse and its various forms. Even if the child knows that the act done is wrong and exploitative, a large number of them never report the same to their parents or even close friends out of fear of inviting further trouble for themselves and their family. Thus, the supportive mechanism available to children clearly requires strengthening. Further, awareness regarding sex, consequences of engaging in sex at an early age, information about contraception and safe sexual behaviour along with awareness regarding the POCSO Act is also the need of the hour. Mandatory

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<sup>201</sup> *X. v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Anr.*, Supreme Court of India, Civil Appeal No. 5802 of 2022 (Arising out of SLP (C) No. 12612 of 2022).

<sup>202</sup> *Id.*

inclusion of comprehensive age-appropriate sex education in school curriculum is required. Efforts should also be made for upscaling of schemes like **Rashtriya Kishor Swasthya Karyakram (RKSK)**, wherein health and well-being of adolescents so as to enable holistic development of the adolescent population is the central theme. This can go a long way in bridging this deficit in awareness that exists.

18.13. In a written reply to a question in the Rajya Sabha, it was informed that as of December 2022, there were 733 Fast Track Special Courts (FTSC) including 413 exclusive POCSO Courts operational across States/UTs.<sup>203</sup> As per the website of the Department of Justice, as of January 2023, 764 FTSCs including 411 exclusive POCSO Courts are functional in 28 States/UTs, which have disposed of more than 1,44,000 pending cases.<sup>204</sup> As per the latest statistics, there are 412 exclusive POCSO Courts functional in 29 States/UTs which have disposed of more than 1,74,000 pending cases.<sup>205</sup> However, there is still high pendency of POCSO cases and the same has also been highlighted by the Apex Court.<sup>206</sup> Cases such as consensual adolescent romantic relations are often listed as a reason for such pendency as these cases

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<sup>203</sup> Ministry of Law and Justice, "733 Fast Track Special Courts including 413 exclusive POCSO Courts operationalized in 28 States/UTs", *PIB*, Dec. 22, 2022, available at <https://pib.gov.in/PressReleasePage.aspx?PRID=1885668> (last visited August 18, 2023).

<sup>204</sup> Department of Justice, Ministry of Law and Justice, available at <https://doj.gov.in/fast-track-special-court-ftscs/#:~:text=As%20on%20January%202023%2C%20764,23%2C%20a%20total%20of%20Rs> (last visited July 23, 2023).

<sup>205</sup> Ministry of Law and Justice, "Fast Track Special Courts (FTSCs) achieving new heights", *PIB*, Aug. 24, 2023, available at <https://pib.gov.in/PressReleaseFramePage.aspx?PRID=1951673#:~:text=Under%20Centrally%20Sponsored%20Scheme%20of,speedy%20justice%20to%20the%20victims>. (last visited September 15, 2023).

<sup>206</sup> *Alarming Rise in the Number of Reported Child Rape Incidents, In re* (2020) 7 SCC 112; (2020) 3 SCC (Cri) 99.

clog the system and take away focus from the cases that merit actual attention. The judicial discretion once vested will enable the Special POCSO Courts to try the cases expeditiously and the High Courts will not be plagued with bail applications, quashing proceedings and writ petitions pertaining to the same.

18.14. There are several competing interests that call for a considered and balanced approach in the present situation. Law has to ensure a delicate balance between the evolving capacities of children and the need to protect them from harm. While adolescents falling in the age bracket of 16 to 18 years are indeed differently placed than children aged 10 or 15 years, their brains are still at a developmental stage. There exists sufficient scientific data to indicate that the brain continues to develop and the growth of a child continues at least till the child attains the age of 18 years.<sup>207</sup> Further, not only physical growth but mental growth is equally important, in assessing the maturity of a person below the age of 18 years.<sup>208</sup> Scientific and psychological studies have shown that the social-emotional part related to emotions is controlled by punishments or rewards, which undergoes massive changes during childhood. It is during this stage that juveniles may be driven to commit certain acts which give them a feeling of high.<sup>209</sup> In order to feel this sensation, children aged 16 to 18 years have a high tendency towards risky behaviour without any consideration regarding the pros and cons

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<sup>207</sup> *Salil Bali v. Union of India* (2013) 7 SCC 705 : (2013) 3 SCC (Cri) 686.

<sup>208</sup> *Id.*

<sup>209</sup> "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty" 58 *American Psychologist* 1009 (2003); Kumar Askand Pandey, "Brain Science, Juvenile Delinquency and the Juvenile Justice (Care and Protection of Children) Act, 2015: A Critique" 7 *RMLNLJ* 54 (2015).



of the same.<sup>210</sup> The development of the brain is hardly complete at the age of 18 years and continues well into adulthood and sometimes is not complete even until the age of 25 years. While teenagers today may seem to mature physically at a much younger age as compared to their parents and may often exhibit behaviour similar to that of an adult, it does not imply that they understand the true and full implications of their behaviours and actions.<sup>211</sup> The dangers of introducing any element of consent can be that the child may be induced to have sexual intercourse and later when the child realises that he/she was induced and hence wants to proceed with a case, the same may be dismissed saying that the sexual intercourse was voluntary. Further, a child may engage in sexual activity out of his/her own volition initially, but if he/she subsequently objects to it and the accused continues to have sexual activity with him/her, on a complaint being made by the child, the accused can always plead that the act was voluntary and get away with it because the law itself would provide them that avenue. There have been instances where courts have factored in initial consent of a child, even though it is impermissible under the current scheme of the POCSO Act, and have quashed cases against the accused even when the child maintains that such intercourse was not truly voluntary.<sup>212</sup> This can be deeply problematic. Thus, adolescents in the age bracket of 16 to 18 years still remain children who ought to enjoy higher protection

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<sup>210</sup> *Id.*

<sup>211</sup> Marty Beyer, "Recognizing the Child in the Delinquent" 7 *Kentucky Children's Rights Journal* 16 (1999); Kumar Askand Pandey, "Brain Science, Juvenile Delinquency and the Juvenile Justice (Care and Protection of Children) Act, 2015: A Critique" 7 *RMLNLUJ* 54 (2015).

<sup>212</sup> *Rahul Chandel Jatav v. the State of Madhya Pradesh & Anr.*, High Court of Madhya Pradesh, Miscellaneous Criminal Case No. 24691 of 2023.

of law and age of consent cannot be disturbed either by reducing it or introducing a limited exception.

18.15. It has also been observed by courts that adolescent love cannot be controlled and that the criminal intention may be missing in such consensual acts. However, the courts must tread with caution while deciding such cases. Each case has to be adjudged on its own peculiar facts and circumstances. Factors such as the age being in shadow of doubt, the consistency/inconsistency in the statement of the victim and lack of inducement or threat in such cases, have to be duly considered and adjudicated based on facts and circumstances of each case.<sup>213</sup> Even when holding that the POCSO Act is not intended to criminalise consensual romantic relationships of young adults, courts have cautioned that consensual nature of such relationships has to be seen from the prism of the facts and circumstances of each case and there might be cases where the survivor of sexual offence, may under pressure or trauma, be forced to settle.<sup>214</sup>

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<sup>213</sup> *Mahesh Kumar v. State (NCT of Delhi)*, Delhi High Court, Bail Application 1240/2023 on 08.05.2023.

<sup>214</sup> *AK v State Govt of NCT of Delhi and Anr.*, Delhi High Court Bail Application 2729/2022 decided on 20.10.2022.

## 19. RECOMMENDATIONS

Having regard to the detailed foregoing analysis, the Commission recommends the following:

### *A. Amendment to Section 4 of the POCSO Act*

19.1. Section 4 of the POCSO Act reads as under:

*"4. Punishment for penetrative sexual assault.—*

*(1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.*

*(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine.*

*(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."*

19.2. It is recommended that after sub-section (3) of Section 4, the following may be inserted as sub-sections (4), (5), (6), (7), (8) and (9):

*(4) Notwithstanding anything contained in sub-section (1), where the child on whom the offence is committed, was at the time of commission of the offence, of the age sixteen or above, and where the Special Court is satisfied, for reasons to be recorded in writing, that the relationship*

*between the accused and the child has been intimate, the Court may, in its discretion, impose any lesser sentence on the accused than the minimum sentence prescribed under sub-section (1), taking into account all the facts and circumstances of the case.*

*(5) While considering the facts and circumstances mentioned in sub-section (4), the Special Court shall take into account the following:*

*(a) that there was tacit approval of the child, though not consent in law, for the acts leading to the offence;*

*(b) that the difference in age between the accused and the child is not more than three years;*

*(c) that the accused has no criminal antecedents;*

*(d) that the accused bears good conduct after the occurrence of the offence;*

*(e) that there is no element of undue influence, fraud, misrepresentation, coercion, force, violence or deceit perpetrated on the child by the accused or any other person on behalf of the accused; or any element indicating child trafficking;*

*(f) that the accused is not in a dominating position to intimidate the child, parents or relatives of the child or the witnesses;*

*(g) that there is no change in the social or cultural background of the child, indicating an element of manipulation or indoctrination; and*

*(h) that the child was not used by the accused or at his instance by any other person for pornographic purposes or for any illegal or immoral activity.*

*(6) While considering the facts and circumstances mentioned in sub-section (4), the Special Court may also take into account the following:*

*(a) that the accused married the child on attaining majority of the child and they are leading a happy married life;*

*(b) that the family members of the accused or that of the child or that of both of them accept and approve the relationship between the accused and the child;*

*(c) whether any child was born in the relationship between the accused and the child;*

*(d) any other similar and convincing circumstances for exercising the discretion by the Special Court.*

*Explanation:- Mere claim of marriage or birth of a child in the relationship between the accused and the child, shall not ipso facto entitle the accused for a lesser sentence unless the circumstances mentioned under sub-section (5) are satisfied.*

*(7) Any accused to whom sub-sections (4), (5) and (6), as the case may be, apply would not be disentitled to the lesser sentence merely because he committed penetrative sexual assault on the child more than once or repeatedly, or that he has impregnated the child, notwithstanding anything contained in clause (l) of section 5 or sub-clause (ii) of clause (j) of section 5, respectively.*

*(8) The Special Court may get the assistance of experienced psychologists or psycho-social workers or other experts for the purpose of ascertaining any of the matters relating to sub-sections (4), (5) and (6).*

*(9) The Special Court may pass such orders as are necessary for protecting the interests of the child till the child attains the age of eighteen years.*

**B. Amendment to Section 8 of the POCSO Act**

19.3. Section 8 of the POCSO Act reads as:

*“8. Punishment for sexual assault.—Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.”*

19.4. It is recommended that Section 8 shall be re-numbered as sub-section (1) and the following shall be inserted as sub-sections (2), (3), (4), (5), (6) and (7):

*(2) Notwithstanding anything contained in sub-section (1), where the child on whom the offence is committed, was at the time of commission of the offence, of the age sixteen or above, and where the Special Court is satisfied, for reasons to be recorded in writing, that the relationship between the accused and the child has been intimate, the court may, in its discretion, impose any lesser sentence on the accused than the minimum sentence prescribed under sub-section (1), taking into account all the facts and circumstances of the case.*

*(3) While considering the facts and circumstances mentioned in sub-section (2), the Special Court shall take into account the following:*

*(a) that there was tacit approval of the child, though not consent in law, for the acts leading to the offence;*

*(b) that the difference in age between the accused and the child is not more than three years;*

*(c) that the accused has no criminal antecedents;*

*(d) that the accused bears good conduct after the occurrence of the offence;*

*(e) that there is no element of undue influence, fraud, misrepresentation, coercion, force, violence or deceit perpetrated on the child by the accused or any other person on behalf of the accused; or any element indicating child trafficking;*

*(f) that the accused is not in a dominating position to intimidate the child, parents or relatives of the child or the witnesses;*

*(g) that there is no change in the social or cultural background of the child, indicating an element of manipulation or indoctrination; and*

*(h) that the child was not used by the accused or at his instance by any other person for pornographic purposes or for any illegal or immoral activity.*

*(4) While considering the facts and circumstances mentioned in sub-section (2), the Special Court may also take into account the following:*

*(a) that the accused married the child on attaining majority of the child and they are leading a happy married life;*

*(b) that the family members of the accused or that of the child or that of both of them accepted and approved the relationship between the accused and the child;*

*(c) whether any child was born in the relationship between the accused and the child;*

*(d) any other similar and convincing circumstances for exercising the discretion by the Special Court.*

*Explanation:- Mere claim of marriage or birth of a child in the relationship between the accused and the child, shall*

*not ipso facto entitle the accused for a lesser sentence unless the circumstances mentioned under sub-section (3) are satisfied.*

*(5) Any accused to whom sub-sections (2), (3) and (4), as the case may be, apply would not be disentitled to the lesser sentence merely because he committed sexual assault on the child more than once or repeatedly, notwithstanding anything contained in clause (1) of section 9.*

*(6) The Special Court may get the assistance of experienced psychologists or psycho-social workers or other experts for the purpose of ascertaining any of the matters relating to sub-sections (2), (3) and (4).*

*(7) The Special Court may pass such orders as are necessary for protecting the interests of the child till the child attains the age of eighteen years.*

**C. Inclusion of Proviso and Explanation in Section 18 of the JJ Act, 2015**

19.5. Section 18 of the JJ Act reads as:

*"18. Orders regarding child found to be in conflict with law.—(1) Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, or a child above the age of sixteen years has committed a heinous offence and the Board has, after preliminary assessment under Section 15, disposed of the matter then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out*



*in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,—*

*(a) allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;*

*(b) direct the child to participate in group counselling and similar activities;*

*(c) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;*

*(d) order the child or parents or the guardian of the child to pay fine: Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;*

*(e) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years;*

*(f) direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years;*

*(g) direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformatory services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home: Provided that if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children*



*housed in a special home, the Board may send such child to the place of safety.*

*(2) If an order is passed under clauses (a) to (g) of sub-section (1), the Board may, in addition pass orders to—*

*(i) attend school; or*

*(ii) attend a vocational training centre; or*

*(iii) attend a therapeutic centre; or*

*(iv) prohibit the child from visiting, frequenting or appearing at a specified place; or*

*(v) undergo a de-addiction programme.*

*(3) Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences."*

19.6. It is recommended that the following *proviso* and explanation be added to Section 18 of the Juvenile Justice (Care and Protection of Children) Act, 2015:

*Provided that where a child in conflict with law is found to have committed any sexual offence under the Protection of Children from Sexual Offences Act, 2012 [Act 32 of 2012] or any other law for the time being in force against a child aged sixteen or above, having regard to the facts and circumstances of the particular case, if the Juvenile Justice Board or the Special Court, as the case may be, is satisfied that there exist special and adequate reasons, to be recorded in writing, it may pass any appropriate dispositional order under this section.*

*Explanation:- Special and adequate reasons include the circumstances listed in the sub-sections (5) and (6) of Section 4 and sub-sections (3) and (4) of Section 8 of the*

*Protection of Children from Sexual Offences Act, 2012  
[Act 32 of 2012].*

***D. Amendment in the Indian Penal Code***

19.7. Amendment in Section 375 or 376 of the IPC, as is found suitable, is required to be made in the context of what is stated in Chapter 18 paragraph 18.10 of this Report.

***E. Spreading Awareness regarding Child Sexual Abuse, Sexual & Reproductive Health as well as the provisions of the POCSO Act***

19.8. In order to ensure that children get the best environment to grow and flourish, it is necessary to increase awareness regarding child sexual abuse and the varied forms it can take. Further, as a part of their school curriculum, children can be made aware of their body and various physiological and psychological changes they experience as a part of growing up. Information about sex and the ill-effects of engaging in it at a young age can better equip children to make healthier and safer choices in life. Comprehensive and age-appropriate sex education should be made a mandatory part of school curriculum and government programs like **Rashtriya Kishor Swasthya Karyakram** should be utilised to inform and empower the adolescent population of India.

The Commission recommends, accordingly.



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**[Justice Ritu Raj Awasthi]**

Chairperson

**[Justice K.T. Sankaran]**

Member

**[Prof. (Dr.) Anand Paliwal]**

Member

**[Prof. D.P. Verma]**

Member

**[Mr. K. Biswal]**

Member Secretary

**[Dr. Niten Chandra]**

Member (*Ex-Officio*)

**[Dr. Reeta Vasishta]**

Member (*Ex-Officio*)



**[Mr. M. Karunanithi]**  
Part-time Member



**[Prof. (Dr.) Raka Arya]**  
Part-time Member