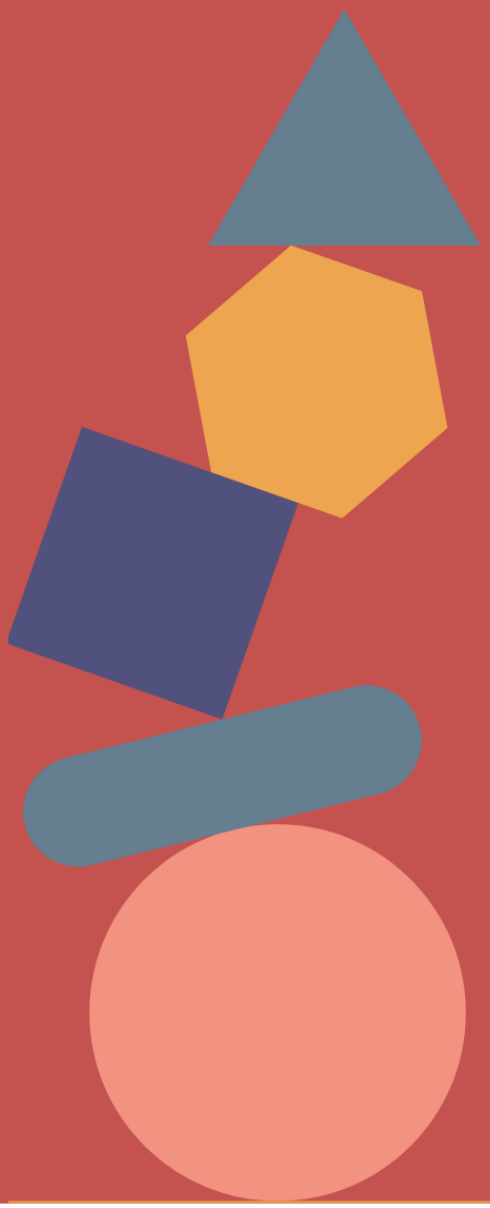
Balancing Protection and Autonomy: Rethinking the Criminalisation of Adolescent Sexuality

September 2025



National Coalition Advocating for Adolescent Concerns

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Endorsed by

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Enfold Proactive Health Trust is a non-profit based in Bengaluru founded in 2001, and is working towards building safer, rights affirmative, inclusive spaces and justice systems for children and communities. For more information, **visit www.enfoldindia.org**
Contact us: **info@enfoldindia.org**

NCAAC

The National Coalition Advocating for Adolescent Concerns (NCAAC) is a coalition of 22 cross-sectoral organisations from different parts of India, working on the rights of women, children, persons with disability – on concerns relating to legal rights, public health, sexual and gender-based violence, sexual and reproductive health, life skills, education and restorative justice. The coalition members' work ranges from community level, to the state and national levels. For more information, visit **https://pldindia.org/advocating-for-adolescent-concerns/about-us.php**

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1. Bharat, Vishakha
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ABBREVIATIONS

AIR	All India Reporter
BNS	Bhartiya Nyaya Sanhita, 2023
BNSS	Bharatiya Nagarik Suraksha Sanhita, 2023
CSAM	Child Sexual Abuse Material
CRC	Committee on the Rights of the Child
CWC	Child Welfare Committee
IPC	Indian Penal Code, 1860
IT Act	Information Technology Act, 2000
JJ Act	Juvenile Justice (Care and Protection of Children) Act, 2015
JJB	Juvenile Justice Board
INSC	Indian Supreme Court
LCI	Law Commission of India
PCMA	Prohibition of Child Marriage Act, 2006
POCSO Act	Protection of Children from Sexual Offences Act, 2012
SCC	Supreme Court Cases
SCR	Supreme Court Reports
SGSM	Self-Generated Sexual Material
SRH	Sexual and Reproductive Health
UNCRC	United Nations Convention on the Rights of the Child
UNFPA	United Nations Population Fund
UNICEF	United National Children's Fund
WHO	World Health Organisation

GLOSSARY OF TERMS

Factually consensual and non-exploitative sexual activity: This refers to sexual acts which are voluntary and with consent, and is not against a person's will, without their consent, or where their consent has been obtained through fear of death or hurt. It excludes acts if at the time of giving consent, by reason of mental illness or intoxication, the victim is unable to understand the nature and consequences of their consent, or when they are unable to communicate consent. It also excludes acts where the accused is in a position of trust or authority such as a public servant, staff of a child care institution or facility, or educational institution, or the victim is in a relationship of dependency with the accused.

Consent means an unequivocal voluntary agreement when the person, by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act. A person who does not physically resist the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Self-generated sexual material: Sexual content generated by the adolescent themself. This can be created and shared consensually or under coercive or exploitative circumstances.[1]

Self-initiated marriages: Marriages where "both spouses choose to marry each other"[2] or "[w]hen young people decide to marry, elope or cohabit in order to have a sexual or "love" relationship".[3]

Special Courts: Under Section 28 of the Protection of Children from Sexual Offences Act, 2012, the State Government and High Court are required to designate a Court of Sessions in each district of the state to be a "Special Court" to try the offences under the Act and provide speedy trials.

[1] Interagency Working Group on Sexual Exploitation of Children, 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse' (ECPAT International, Luxembourg 2016) 43; Committee on the Rights of the Child, 'Guidelines Regarding the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (10 September 2019) CRC/C/156 ("CRC Optional Protocol 2019"); WeProtect Global Alliance, 'Self-Generated Sexual Material'.

[2] UNFPA-UNICEF Global Programme to End Child Marriage, 'Phase II Programme Document (2020 - 2023)' (UNICEF and UNFPA 2019), 4.

[3] United Nations Children's Fund and United Nations Population Fund, 'Beyond Marriage and Motherhood: Empowering girls by addressing adolescent pregnancies, child marriages and early unions – Tailoring Programme Interventions for Southeast Asia and the Pacific' (UNICEF East Asia and Pacific Regional Office 2022) ("UNICEF and UNFPA 2022").

BALANCING PROTECTION AND AUTONOMY: RETHINKING THE CRIMINALISATION OF ADOLESCENT SEXUALITY

Executive Summary

Context

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) raised the age of consent from 16 years to 18 years in India. The POCSO Act does not distinguish between exploitative and non-exploitative sexual acts and consent of a child is entirely irrelevant. Consequently, sexual acts involving persons under 18 years, even where they are factually consensual and non-exploitative, are offences punishable with high minimum sentences. The POCSO Act obligates persons or institutions with knowledge or apprehension of commission of an offence under the POCSO Act to report it, and failure to report commission is punishable.

Adolescence is universally recognised as a unique stage where physical, cognitive, emotional and hormonal changes take place and sexual exploration, is also a part of their developmental journey of understanding boundaries, and their identity. International standards urge States to support adolescents through this stage of growth and not penalise factually consensual and non-exploitative sexual activity among adolescents of similar ages. Empirical studies and public health surveys reveal that adolescent sexuality is a reality in India, with multiple studies based on judgements indicating that 15-27% of POCSO cases involve consensual relationships with adolescents. The criminalisation of such acts has been widely recognised as a problem by India's higher judiciary, the National Human Rights Commission, civil society organisations, and health experts. In 2023, the Law Commission of India acknowledged the adverse effects of blanket criminalisation, but expressed concerns that decriminalisation could weaken efforts to address child marriage, trafficking, and online harms faced by children.

Implication of Criminalisation

Blanket criminalisation conflates factually consensual and non-exploitative sexual acts with rape and other sexual offences, disregards normative adolescent sexual development, the evolving capacities of adolescents, and violates their bodily integrity and dignity. Adolescents also face the risk of prosecution for consensually sharing their self-generated sexual material (SGSM) due to the broad wording and expansive judicial interpretation of offences prohibiting child pornography. When reported, adolescents are subjected to criminal investigations, arrest and detention, medical examinations, inquiries and trials which have a stigmatic and disruptive impact on their life. It violates their fundamental rights to life and liberty, dignity, and privacy, undermines their best interests, and affects their education, employment, self-esteem, mental health, social reputation, and family life. Although convictions are rare, the process is the punishment and the strict application of the law and the absence of judicial discretion results in the imposition of high minimum mandatory punishment, in some instances.

Despite the law being gender neutral, when both parties are minors, adolescent boys are by default treated as perpetrators and the girls as 'victims'. Adolescent boys above 16 years also risk trial as an adult in cases of alleged rape and penetrative sexual assault. Minor girls are invariably institutionalised in child care institutions till they turn 18 years, if they refuse to return to their parents or their parents refuse to take them back. This disrupts their access to education and employment, affects their physical and mental health, and deprives them of their liberty.

Adolescents' right to barrier-free access to sexual and reproductive health services is heavily impeded due to the mandatory reporting obligation under the POCSO Act which requires reporting, even if the minor does not wish to do so. This deters adolescents from seeking healthcare services due to fear of disclosure, potential entanglement with the criminal justice system and social stigma.

Further, such cases overburden an already-strained criminal justice system by consuming significant time and resources of the judiciary, police, child protection system, forensic science laboratories, and healthcare providers. It inflates the statistics on incidence of sexual offences against children, impacts the speedy dispensation of justice, skews the rate of acquittals, and ultimately affects the public perception of justice in cases of sexual violence.

Proposed Framework for Decriminalisation of Adolescent Sexuality

It is proposed that factually consensual and non-exploitative sexual acts involving adolescents between 16 to 18 years be decriminalised, while all protections available under the POCSO Act, including trial by Special Courts and child-friendly procedures remain applicable to those between 16-18 years. Specifically, consensual sexual acts with persons above 16 years should not constitute an offence unless it falls under specific grounds that vitiate consent or amount to exploitation, such as when the partner is in a position of trust or authority.

Decriminalisation must be accompanied by comprehensive sexuality education, access to barrier-free sexual and reproductive health services, and sensitisation of legal and child protection functionaries to uphold adolescent autonomy and dignity.

While close-in-age exemptions and judicial discretion have been proposed as alternatives to blanket criminalisation, both approaches do not address the trauma and disruption caused by the process of arrest, trial and institutionalisation. These alternatives fail to acknowledge the inherent harm of criminalising normative adolescent sexual behaviour and risk arbitrary outcomes. Decriminalisation, coupled with clear grounds for vitiated consent and adolescent-friendly support systems, is the most just and effective approach.

Child Protection Concerns Related to Decriminalisation of Adolescent Sexuality and Potential Solutions

Implications on Child Marriage

There is a concern that decriminalisation of consensual and non-exploitative sexual acts involving adolescents could undermine efforts to reduce child marriage, and adversely impact girls' education, health, and well-being. The prevalence of child marriage in India is strongly correlated with poverty and lack of access to education. There is a need to address the wider context of poverty and structural inequalities that underpin early and child marriages. Studies reveal that the POCSO Act and Prohibition of Child Marriage Act, 2006 (PCMA) are disproportionately used against self-initiated marriages stemming from consensual relationships including inter-faith and inter-caste unions, as opposed to family-arranged marriages. Criminal law is primarily used to enforce parental control over the choices of adolescent girls to maintain social and cultural norms, and caste boundaries, rather than protecting them from the harm of early or forced marriages. Health risks associated with early pregnancy that arise from early marriage necessitates comprehensive and direct intervention such as comprehensive sexuality education, timely access to reproductive health services, contraception, and adequate nutrition. Criminalisation exacerbates the barriers to their sexual and reproductive health, creates an environment of risk for their family, and deters adolescent girls in these marriages from accessing medical care for fear of triggering the criminal justice system.

While consent in self-initiated underage marriages may be influenced by social realities and pressures, criminalisation is not effective in addressing these root causes as it reinforces these taboos, notions of sexual purity and parental control. Rather than over-relying on the POCSO Act, efforts should focus on strengthening prevention measures and the effective implementation of the PCMA. Moving beyond penal law, positive remedies such as the option of annulment need to be operationalised. Interventions should be designed to recognise and address the unique drivers of early, forced, and self-initiated marriages. Structural interventions, such as ensuring exclusive Child Marriage Prohibition Officers, poverty alleviation, access to free and compulsory education till 18 years, conditional cash transfers, and gender transformative approaches, are more effective than punitive laws in reducing child marriage.

Finally, the considerations for sexual consent and age of marriage are fundamentally different and should not be conflated. While adolescent exploration of sexuality raises questions about the threshold for consent and autonomy, marriage entails significant additional responsibilities and legal obligations, justifying different ages for the two. Further, decriminalising adolescent sexuality does not preclude the enforcement of laws against underage marriage. The emphasis must shift from punitive criminal sanctions to supportive mechanisms that empower adolescents to resist, delay, and exit child marriages, without causing further harm to adolescents.

Implications on Child Trafficking

There is a concern that decriminalisation of factually consensual and non-exploitative sexual acts involving adolescents will impede the efforts to combat child trafficking. Trafficking can occur through various means, for a variety of purposes, and while some relationships may act as conduits for trafficking, policies cannot be framed on the assumption that all adolescent relationships or self-initiated child marriages will inevitably result in trafficking. Assuming all adolescent relationships are invariably exploitative blurs the distinction between sexual acts that are normative and those that are for the purpose of sexual exploitation. Sexual abuse and trafficking for sexual exploitation are distinct harms and require different frameworks for the effective prosecution of the offences. The apprehension that consent of a minor can act as a valid defence in trafficking-related acts is misplaced as consent of the victim is immaterial in determination of the offence of trafficking. Further, a strategy that relies only on the POCSO Act to address trafficking ignores the liability of different actors involved and the multiple wrongs caused during the different stages of trafficking. Effective anti-trafficking responses require training enforcement agencies to identify exploitation, not to penalise all adolescent intimacy.

Implications on Online Harm against Children

Adolescents and children today are digital natives, and for many, digital spaces are not separate from their real lives. Apart from using the internet for various purposes, adolescents, are using it for romantic and sexual exploration, relationship maintenance, coping with the dissolution of a romance, and accessing sexual health information. There are risks for adolescents in the digital realm, such as bullying, coercion, and non-consensual sharing of images. However, Indian laws fail to distinguish between consensual SGSM and exploitative child sexual abuse material (CSAM). Adolescents who create, store, or share sexually explicit content of themselves, even privately, risk prosecution under the POCSO Act and the Information Technology Act, 2000. This exposes minors to criminal liability for normative behaviour and deters them from seeking help when their private images are shared without consent.

International and regional bodies, including the UN Committee on the Rights of the Child, have called for the decriminalisation of consensual SGSM among adolescents, cautioning that criminalising such conduct violates their rights to privacy and self-expression. Different jurisdictions have introduced legal exceptions or diversion mechanisms to separate consensual SGSM from CSAM. As digital intimacy becomes a part of adolescent development, legal frameworks must reflect evolving realities, distinguishing abuse from normative behaviour.

Conclusion

Continued criminalisation of adolescents cannot be justified as a measure to combat child marriage, child trafficking, and online child sexual abuse and exploitation. There are laws to address these distinct issues and any lacunae in their design or implementation cannot justify the blanket criminalisation of all adolescent sexual behaviour. Factors that make children vulnerable to under-age marriage, early motherhood, and child trafficking require an empowering approach that

involves investment in socio-economic measures, functional community-based child protection systems, free and accessible education till 18 years, life-skills, comprehensive sexuality education , confidential access to sexual and reproductive health services, gender transformative approaches, and robust enforcement systems.

Criminalisation of factually consensual and non-exploitative sexual acts among adolescents and young people denigrates their constitutionally protected rights to dignity and privacy, undermines their best interests and evolving capacities, deters them from seeking sexual and reproductive health services, and results in the deprivation of their liberty. Viewing all adolescent relationships from the prism of potential exploitation blatantly disregards the harm it causes to the adolescents the law seeks to protect.

The proposal to decriminalise sexual acts involving persons above 16 years and below 18 years is consonant with their fundamental rights to life, liberty, dignity, and privacy, and their best interests and evolving autonomy. This approach ensures that adolescents are recognised as individuals undergoing a critical developmental phase who should not be subject to the trauma of criminalisation for normative sexual acts under the garb of protection. It also ensures that all protections under the POCSO Act remain in place to address non-consensual or exploitative acts against them. Such decriminalisation will not impact other protection laws regarding under-age marriage, trafficking, and cybercrimes which remain independently enforceable. Protecting adolescents from harm cannot come at the cost of subjecting them to unjust criminalisation. Instead, there is a need to invest in supportive, rights-based interventions that foster healthy, informed, and empowering transitions into adulthood in accordance with Article 39(f) of the Indian Constitution.

I. INTRODUCTION

This paper outlines the existing legal framework and examines the implications of blanket criminalisation of all sexual acts on adolescents' rights. It also deals with child protection concerns related to the decriminalisation of sexual acts involving adolescents on child marriage laws, trafficking laws, and children's online safety. It proposes policy changes premised on children's rights under the Indian Constitution and international legal standards, particularly the principle of best interest of the child and their right to life, liberty, dignity, sexual and reproductive health, and privacy.

1.1. Context

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) was enacted to "protect children from offences of sexual assault, sexual harassment and pornography"[4] and lay down procedural standards for a child-friendly investigation and trial. While it plugged significant gaps in the general penal law, it raised the age of consent from 16 years to 18 years. Consequently, any sexual act with a person below 18 years constitutes a sexual offence, which attracts stringent punishment based on the nature of the act. Additionally, any person or hospital with knowledge or apprehension of a sexual offence against a child is legally required to report it to the police, and failure to do so is punishable.[5]

The law operates on the assumption that children are asexual and that sexual activities among or with adolescents under 18 years are inherently exploitative.[6] However, public health surveys reveal that 39% of women and 6% of men in the age group of 25-49 years had their first sexual intercourse before the age of 18 years.[7] The *Crime in India, 2022* report indicates that 52.2% of all registered cases of penetrative and aggravated penetrative sexual assault under the POCSO Act are cases where the offender's relation to the child victim was "Friends/Online-Friends or Live in Partners on Pretext of Marriage".[8] While the crime data does not offer any insight on whether the relationships were consensual or exploitative, empirical studies based on

[4] POCSO Act 2012, Objects and Reasons.

[5] POCSO Act 2012, ss 19(1), 20, 21; Bharatiya Nagarik Suraksha Sanhita 2023 (BNSS), s 397/ The Code of Criminal Procedure 1973 (CrPC), s 357.

[6] Swagata Raha, 'Criminalizing adolescent sexuality –– The protection of children from sexual offences act and the rights of adolescents' (*P39A Blog*, 4 March 2021) ("Raha 2021"); Amita Pitre and Lakshmi Lingam, 'Age of consent: challenges and contradictions of sexual violence laws in India' (2021) 29:2 Sexual and Reproductive Health Matters 461 ("Pitre and Lingam 2021").

[7] International Institute for Population Sciences (IIPS) and ICF, 'National Family Health Survey (NFHS-5), 2019-21, India' (Ministry of Health and Family Welfare, Government of India) vol I ("NFHS 5"); Swagata Yadavar, 'Why India is unprepared for its gathering teen sexual revolution' *Business Standard* (12 January 2018).

[8] National Crime Record Bureau, 'Crime in India 2022' (Ministry of Home Affairs, Government of India) Table 4A.10, 372 ("Crime in India 2022").

judgments of Special Courts under the POCSO Act indicate that "romantic" cases constitute between 15-27% of decided cases.[9]

International standards urge States to support adolescents through this stage of growth and not penalise factually consensual and non-exploitative sexual activity among adolescents of similar ages. Several Indian High Courts have emphasised that criminalisation of consensual sex is not the objective of the POCSO Act[10] and that teenagers acting on their emotions and physical attraction is normal.[11] They have quashed proceedings in cases involving consensual adolescent sex,[12] urged the need for legislative amendments recognising

[9] Shruthi Ramakrishnan and Swagata Raha, '"Romantic" Cases under the POCSO Act: A Study of 1715 Judgments of Special Courts in Assam, Maharashtra & West Bengal' (Enfold Proactive Health Trust, 2022) ("Ramakrishnan and Raha 2022"); Enfold Proactive Health Trust and Project 39A, National Law University, Delhi 'The Verdict and Beyond: Judicial trends and Survivor Narratives in Child Sexual Abuse Cases' (Enfold Proactive Health Trust, 2024) 100 ("Enfold and P39A 2024") - In this study, "romantic" cases are those where "victim", her family or other prosecution witnesses stated that the victim was in a "romantic" relationship with the accused at the time of offence or Special Court concludes that the "victim" was having a love affair with the accused or was in a consensual relationship at the time of offence; Enfold Proactive Health Trust, 'Response of the Child Protection System to Violence against Children in Rajasthan' (Enfold Proactive Health Trust, 2022); Maharukh Adenwalla and Prakriti Shah, 'Age of Consent under the POCSO Act' (*SCC Online Blog,* 12 March 2023); Centre for Child and the Law, 'Study on the working of Special Courts under the POCSO Act, 2012 in Delhi' (National Law School of India University, Bangalore, January 2016) 18 ("CCL Delhi Study 2016"); Centre for Child and the Law, 'Study on the working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh' (National Law School of India University, Bangalore, November 2017) 35; Centre for Child and the Law, 'Study on the working of Special Courts under the POCSO Act, 2012 in Assam' (National Law School of India University, Bangalore, February 2017) 63; Centre for Child and the Law, 'Study on the working of Special Courts under the POCSO Act, 2012 in Maharashtra' (National Law School of India University, Bangalore, September 2017) 38; Centre for Child and the Law, 'Study on the working of Special Courts under the POCSO Act, 2012 in Karnataka' (National Law School of India University, Bangalore, August 2017) 66; HAQ: Centre for Child Rights and Forum Against Sexual Exploitation of Children, 'Implementation of the POCSO Act: Goals, Gaps and Challenges – Study of cases in Special Courts in Delhi & Mumbai 2012 - 2015' (HAQ, 2017) ("HAQ and FACSE 2017"); Vidhi Centre for Legal Policy, 'A Decade of POCSO: Developments, Challenges and Insights from Judicial Data' (Vidhi, 2022), 95.

[10] *Vijaylakshmi v State represented by the Inspector of Police*, 2021 SCC OnLine Mad 317 (Madras High Court); *Atul Mishra v State of Uttar Pradesh*, Criminal Miscellaneous. Bail Application No. 53947 of 2021 decided by the Allahabad High Court on 25 January 2022; *Aarush Jain v State of Karnataka*, Criminal Petition No. 3710 of 2022 decided by the Karnataka High Court on 9 September 2022; *Vrushabh Sudhir Shinde v The State of Maharashtra and Anr*., Bail Application No. 257 of 2022 decided by the Bombay High Court on 20 November 2022; *K. Anantha Perumal v The Inspector of Police*, Criminal Appeal No. 59 of 2016 decided by the Madras High Court on 31 March 2023; *XXXX v State Government of National Capital Territory of Delhi*, Bail Application 2729/2022 decided by the Delhi High Court on 20 October 2022.

[11] *Sabari @ Sabarinathan v Inspector of Police*, AIR OnLine 2019 Mad 1364 (Madras High Court); *Agavai v The State*, 2022 SCC OnLine Mad 1961 (Madras High Court); *Ashik Ramjan Ansari v State of Maharashtra*, 2023 SCC OnLine Bom 1390 (Bombay High Court) and *E. Nareshkumar v State*, Criminal Appeal No. 544 of 2018 decided by the Madras High Court on 10 September 2024.

[12] *John Franklin Shylla v State of Meghalaya*, 2023 SCC OnLine Megh 303 (Meghalaya High Court); *Karan v State of Himachal Pradesh*, Criminal Miscellaneous Petition No. 1191 of 2022 decided by the Himachal Pradesh High Court on 3 January 2023; *Tarun Vaishnav v State of Rajasthan*, 2022 SCC OnLine Raj 2237 (Rajasthan High Court); *Amit Kumar v The State*, 2022 SCC OnLine Del 4188 (Delhi High Court); *Aarush* (n 10); *Vijaylakshmi* (n 10); *V Anil Kumar v The State of Andhra Pradesh*, Criminal Petition No. 3355 of 2022 decided by the Andhra Pradesh High Court on 2 May 2022*; Mohit v State of Uttar Pradesh*, Under Section 482/378/407 No. 551 of 2021 decided by the Allahabad High Court on 8 March 2021; *Unni A. and Ors. v State of Kerala and Ors*., 2020 SCC OnLine Ker 17576; *Md. Jahirul Maulana v State of Assam*, 2016 SCC OnLine Gau 781 (Gauhati High Court); *Sunilkumar Dilipbhai Patel v State of Gujarat*, 2020 SCC OnLine Guj 2434 (Gujarat High Court); *Ashok Dhondiba Kale v State of Maharashtra and Ors* 2018 SCC OnLine Bom 1826 (Bombay High Court); *Akash Gupta v State of Uttarakhand and Ors*, Criminal Miscellaneous Application No. 502 of 2018 and Compounding Application No. 511 of 2018 decided by the Uttarakhand High Court on 27 October 2018; *Parampreet Singh v State of Punjab and Ors.* Criminal Miscellaneous Petition No. 5009/2022 in Criminal Main-35578/2020 (O&M) decided by the Punjab and Haryana High Court on 21 March 2022.

consent[13] and recommended that instead of an adult-centric approach, a support-oriented one anchored on a biosocial approach to adolescent sexuality be adopted.[14]

Two High Courts requested the Law Commission of India (LCI) to reconsider the age of consent in light of the criminalisation of adolescents engaged in consensual relationships,[15] following which the LCI considered this in Report No. 283 on Age of Consent under the POCSO Act in 2023 (LCI Report).[16] The report acknowledged that 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."[17] However, it expressed concerns that decriminalising consensual sexual acts involving adolescents above 16 years could adversely affect efforts to address child marriage, trafficking, and online harms faced by children. It recommended that judicial discretion be introduced in sentencing to deal with such cases instead of imposing high mandatory minimum sentences.[18]

However, the continued criminalisation of adolescents above 16 years and young persons for factually consensual and non-exploitative acts have significant implications on their rights.

1.2. Statement of the Problem

The criminalisation of adolescents who engage in consensual non-exploitative sexual acts has been acknowledged as a problem by India's higher judiciary, the LCI, the National Human Rights Commission,[19] civil society organisations,[20] health experts,[21] among others. The dominant

[13] *Sabari* (n 11); *Vijaylakshmi* (n 10); *Anandan and Ors. v State and Ors.*, Criminal Miscellaneous Petition Nos. 13296 and 13297 of 2022 decided by the Madras High Court on 2 September 2022; *Kothandapani v State and Ors.*, Criminal Original Petition No. 20729 of 2022 decided by the Madras High Court on 2 September 2022; *S. Kanthasamy v The State and Ors.*, Criminal Original Petition No. 17614 of 2022 decided by the Madras High Court on 26 August 2022; *Manimaran v The Station House Officer, Kottucherry Police Station and Ors.*, 2021 SCC OnLine Mad 6613 (Madras High Court); *Rahul Chandel Jatav v State of Madhya Pradesh*, 2023 SCC OnLine MP 7078 (Madhya Pradesh High Court); *Veekesh Kalawat v State of Madhya Pradesh*, 2023 SCC OnLine MP 6937 (Madhya Pradesh High Court); *State of Karnataka v Basavaraj*, 2022 SCC OnLine Kar 1608 (Karnataka High Court).

[14] *Vijaylakshmi* (n 10) [13].

[15] *Basavraj* (n 13); *Veekesh* (n 13).

[16] Law Commission of India, *Age of Consent under the Protection of Children from Sexual Offences Act, 2012* (Law Commission Report No. 283, 2023) ("LCI Report 2023").

[17] ibid para 18.2, 101.

[18] LCI Report 2023 (n 16) 116-118.

[19] National Human Rights Commission, 'Recommendations, North West Regional Conference held on 18-19 June, 2018'.

[20] CCL Delhi Study 2016 (n 9); Partners for Law in Development, 'Submissions to the ICJ: Impact on Health and Human Rights Through Criminalisation in Adolescent Sexuality' (2018); HAQ and FACSE 2017 (n 9).

[21] Sumitra Debroy, 'Mumbai: 95% Fall in Abortions Among Under-15, Experts Worry Unsafe Options on Rise' *The Times of India* (13 May 2019); Centre for Child and the Law, 'An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children' (National Law School of India University, June 2018) ("CCL 2018"); Veenashree Anchan and others, 'POCSO Act, 2012: Consensual Sex as a Matter of Tug of War Between Developmental Need and Legal Obligation for the Adolescents in India' (2020) 43(2) Indian Journal of Psychological Medicine ("Anchan and others 2020"); N. Jagadeesh and others, 'Ethical concerns related to mandatory reporting of sexual violence' (2016) 2(2) Indian Journal of

concerns related to the legal framework are as follows:

- It conflates factually consensual non-exploitative sexual acts with rape and other sexual offences, disregards normative sexual adolescent development and evolving capacities of adolescents, and violates their bodily integrity and dignity.
- Adolescents and young persons engaging in factually consensual and non-exploitative sexual acts, when reported, are subjected to criminal investigations, arrest and detention, medical examinations, inquiries and trials which have a stigmatic and disruptive impact on their liberty, dignity, best interests, development, education, employment, self-esteem, physical and mental health, social reputation, and family life.
- Despite the law being gender neutral, when both parties are minors, adolescent boys are by default treated as perpetrators and the girls as 'victims'. Adolescent boys above 16 years also face the risk of trial as an adult in cases of alleged rape and penetrative sexual assault.
- Minor girls are invariably institutionalised in child care institutions when they refuse to return to their parents or their parents refuse to take them back. This disrupts their access to education and employment, affects their physical and mental health, and deprives them of their liberty.
- Although convictions are rare, the process is the punishment and the strict application of the law and the absence of judicial discretion results in the imposition of high minimum mandatory punishment in some instances.
- Adolescents' right to barrier-free access to sexual and reproductive health (SRH) services is heavily impeded due to the mandatory reporting obligation under the POCSO Act which requires anyone with knowledge of sexual activity involving a minor, including healthcare professionals, to report it, even if the minor does not wish to do so.[22] This deters adolescents from seeking healthcare due to fear of disclosure, potential entanglement with the criminal justice system and social stigma.
- Adolescents face the risk of prosecution for consensually sharing their self-generated sexual material (SGSM) due to the broad wording and expansive judicial interpretation of provisions prohibiting child pornography.
- Such cases overburden an already-strained criminal justice system by consuming significant time and resources of the judiciary, police, child protection system, forensic science laboratories, and healthcare providers. It inflates the statistics on incidence of sexual offences against children, impacts the speedy dispensation of justice, skews the rate of acquittals,

Medical Ethics, 116 ("Jagadeesh and others 2016"); Prarthana Lohia and Anshit Baxi, 'Balancing protection and autonomy: Navigating sexual and reproductive healthcare for adolescent girls in India' (*SVRI Blog*).

[22] POCSO Act 2012, ss 19(1), 20, 21; BNSS 2023, s 397/ CrPC 1873, s 357); CCL 2018 (n 21); Jindal Global Law School and others, 'The POCSO Act and Adolescents' Access to Abortion in India: Heightened Vulnerabilities, Health Risks, and Impact on Their Rights' (2024); Jagadeesh and others 2016 (n 21).

and ultimately affects the public perception of justice in cases of sexual violence.

1.3. Methodology

This paper is primarily based on secondary data gathered through desk research, including court judgments, books, research papers, studies and articles. The research was further supplemented by interviews with experts in the area of child trafficking, child marriage and digital safety, and online consultations with 90 individuals representing organisations working on child protection, child rights, trafficking, gender justice, digital safety, as well as child protection functionaries in India.

1.4. Challenges and Limitations

Experiences and perspectives of adolescents could not be directly captured through interviews due to resource constraints and hence their views could not be incorporated in the paper. Addressing this gap will be a key priority in future.

II. Domestic Legal Framework

Indian laws do not distinguish between sexual offences and factually consensual normative adolescent sexual activity, whether offline or online, treating both alike, thereby conflating protection with over-criminalisation.

Sexual Offences against Children

The POCSO Act was enacted pursuant to Article 15(3), Constitution of India, which empowers the State to make special provisions for women and children and India's obligation under the United Nations Convention on the Rights of the Child, 1989 (UNCRC).[23] A "child" is defined in Section 2(d), POCSO Act to mean "any person below the age of eighteen years" and all sexual acts - penetrative and non-penetrative - with a child are criminalised. With the enactment of the POCSO Act, India's age of consent for sexual acts was effectively raised from 16 years to 18 years.[24] This change was also introduced in the Indian Penal Code, 1860 (IPC) in 2013 and is reflected in the Bharatiya Nyaya Sanhita, 2023 (BNS).[25]

Penetrative sex with a child is punishable under Section 64, BNS and Section 4(1), POCSO Act with a minimum imprisonment of 10 years which may extend to life imprisonment till the remainder of a person's natural life. If the child is below 16 years, the minimum punishment is 20 years'

imprisonment. Aggravated penetrative sexual assault, which includes sex that results in a pregnancy, or repeated penetrative sexual acts, is punishable under Section 6, POCSO Act, with a minimum of 20 years' rigorous imprisonment, which may extend to life imprisonment, or the death penalty. Courts have no discretion to award sentences below the minimum terms prescribed under the POCSO Act or IPC. The POCSO Act also provides for mandatory reporting of sexual offences against children and the police are legally obligated to record information received about commission of a sexual offence under the POCSO Act, and failure to do so is a punishable offence.[26]

Section 67B, Information Technology Act, 2000 (IT Act) and Section 15, POCSO Act target the creation and sharing of sexually explicit material involving children in compliance with the UNCRC to prevent "the exploitative use of

[23] POCSO Act 2012, Preamble.

[24] Further, in *Independent Thought v Union of India,* AIR 2017 SC 494 (Supreme Court), the marital rape exception in the Indian Penal Code 1850 (IPC) was read down and thus sex with a wife below the age of 18 years constitutes rape under Section 375, IPC. This change is reflected in the Bharitya Nyaya Sanhita, 2023 (BNS).

[25] The Bharatiya Nyaya Sanhita, 2023 (BNS) is the new penal code in India that came into effect on July 1, 2024, replacing the Indian Penal Code, 1860 (IPC) and lists the major criminal offences, their elements and punishment. Similarly, the Code of Criminal Procedure 1974 (CrPC), which details the procedure to be followed in the investigation and trial of criminal offences, was replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) with effect from July 1, 2024.

[26] POCSO Act 2012, s 21(1).

children in pornographic performances and materials."[27] "Child pornography" is defined under Section 2(da), POCSO Act, as "any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer generated image indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child." Sections 13 and 14, POCSO Act, penalise the use of a child for pornographic purposes, i.e, in any form of media for the purposes of sexual gratification and punishments range from five years to seven years' imprisonment. They criminalise the representation of sexual organs of a child, usage of a child engaged in real or simulated sexual acts, or the indecent or obscene representation of a child. Section 15, POCSO Act, criminalises the storage of pornographic material and can apply to adolescents storing their own sexually explicit images or sharing such images with their consensual sexual partners. Punishments range from fines to imprisonment up to seven years. Additionally, Sections 11 and 12, POCSO Act, dealing with sexual harassment *inter alia* prohibits any form of communication with a child with sexual intent and can be construed to apply where adolescents share sexually explicit material or texts with a sexual/romantic partner or engage in sexual acts through videocalls or ask their adolescent partner for sexually explicit content.

Creation of texts or digital images depicting a child, including oneself, in an "obscene, indecent or sexually explicit manner" also constitutes an offence under Section 67B(b), IT Act. Publishing or transmitting such images to a sexual or romantic partner constitutes an offence under Section 67B(a), IT Act and browsing and downloading this material by the partner constitutes an offence under Section 67B(b), IT Act. While the term "publishes" is not defined in this provision, Section 66E, IT Act defines "publishes" for that section as "reproduction in the printed or electronic form and making it available for public". Thus, an adolescent posting pictures on social media platforms of a "sexually explicit act" risks prosecution and punishment under Section 67B(a), IT Act.

The Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act) applies in cases where the accused is below 18 years on the date of commission of the offence. If the child is above 16 years and is accused of penetrative or aggravated penetrative sexual assault, the Juvenile Justice Board (JJB) can transfer the child for trial as an adult after a preliminary assessment.[28] Children tried and punished as adults can be sentenced to imprisonment with the exception of death penalty and life imprisonment without the possibility of release.[29] Further, minors who have eloped with or married their partner, may be dealt with as children in need of care and protection by the Child Welfare Committee (CWC) under the JJ Act, if they refuse to return to their parents or their parents refuse to take them home.

Child Marriage

The Prohibition of Child Marriage Act, 2006 (PCMA) and provisions related to kidnapping under the BNS are applicable in cases entailing elopement and marriage. Under the PCMA,

[27] POCSO Act 2012, Preamble.

[28] JJ Act 2015, ss 15, 18(3).

[29] JJ Act 2015, s 21.

"child" means a female below 18 years and a male below 21 years[30] and a marriage involving either or both is a child marriage.[31] Males above 18 marrying a female child, and families arranging a child marriage are offences punishable with imprisonment of up to two years.[32] The marriage is, however, valid and voidable at the option of the child party,[33] except in certain situations where it is void.[34] This results in a dichotomous situation wherein child marriage is valid, but sex within the marriage is unlawful and attracts stringent punishment. In Karnataka and Haryana, however, child marriages are void *ab initio*.[35]

Judicial Responses

The higher judiciary in India has questioned the appropriateness of criminalisation of adolescent relationships in the course of deciding bail applications, appeals, and petitions to quash such cases. They have highlighted the several harms of blanket criminalisation of normative sexual acts involving adolescents. Courts in some cases have also taken the interpretation that consensual acts may not meet the legal threshold of "assault" required for the offence of penetrative sexual assault.[36] They have drawn attention to the conflation of consensual acts with rape[37] and observed that the acts in a consensual sexual relationship cannot be equated with assault based on the lack of "cruelty" or "depravity".[38] Voicing the danger of applying a strict interpretation of the law in these cases, the Meghalaya High Court remarked "**the course or cause of justice may not have been served, but only the letter of the law fulfilled.**"[39]

[30] PCMA 2006, s 2(a).

[31] PCMA 2006, s 2(b).

[32] PCMA 2006, ss 9, 10, 11 and 13(10).

[33] PCMA 2006, s 3.

[34] PCMA 2006, ss 12 and 14.

[35] The Prohibition of Child Marriage Act (Karnataka Amendment) Act 2016, s 2; The Prohibition of Child Marriage (Haryana Amendment) Act 2020, s 2.; See also Pitre and Lingam 2021 (n 6) 10.

[36] *Shembhalang Rynghang v State of Meghalaya*, 2022 SCC OnLine Megh 67 (Meghalaya High Court); *Ananta Boro v State of Meghalaya*, Criminal Petition No. 75 of 2022 decided by the Meghalaya High Court on 22 February 2023; *Teiborlang Kurkalang v State of Meghalaya*, 2022 SCC OnLine Megh 65 (Meghalaya High Court); *Silvestar Khonglah v State of Meghalaya and Anr.*, 2022 SCC OnLine Megh 575 (Meghalaya High Court).

[37] *Anoop v State of Kerala*, Bail Application No.3273 of 2022 decided by the Kerala High Court on 8 June 2022.

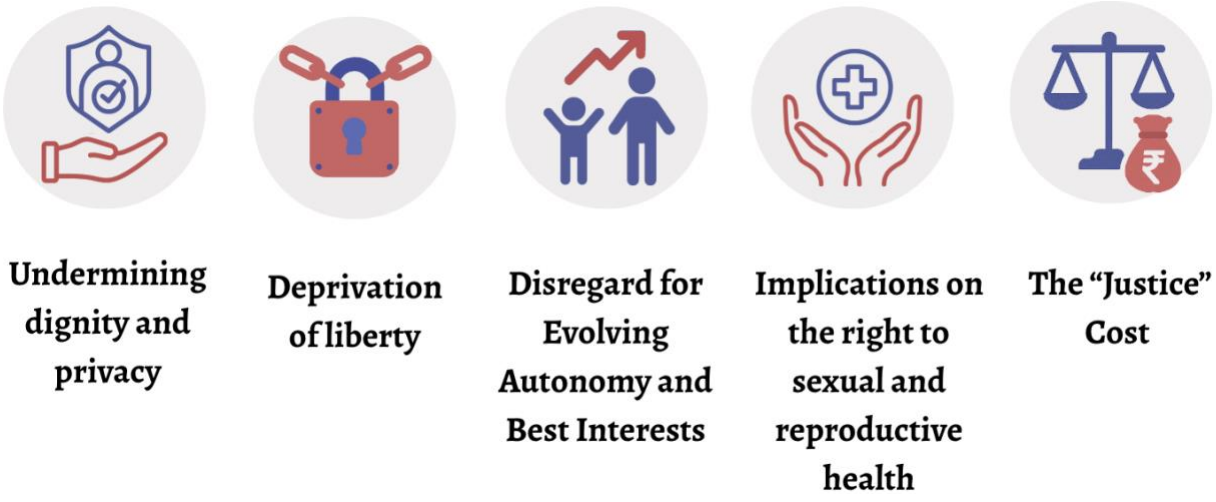
[38] *Shambu Thilak v State*, Criminal Miscellaneous Case No. 3810 of 2016 decided by the Kerala High Court on 6 January 2017. See also *Muhammed Fasil v Sabira and Ors.*, 2017 SCC OnLine Ker 5952 (Kerala High Court).

[39] *Olius Mawiong v State of Meghalaya,* 2022 SCC OnLine Megh 332 (Meghalaya High Court).

III. Implications of Criminalisation and the Case for Decriminalisation

Blanket criminalisation of all adolescent sexual activity unjustly penalises normative sexual exploration that is a natural and integral part of adolescent development and transition into adulthood.[40] Adolescence is universally recognised as a "unique defining stage of human development", marking a transition between childhood and adulthood and "characterized by rapid brain development and physical growth, enhanced cognitive ability, the onset of puberty and sexual awareness and newly emerging abilities, strengths and skills."[41] Sexual exploration, is also a part of their developmental journey of understanding boundaries, and their identity.[42]

In 2016, the Committee on the Rights of the Child (CRC) expressly recommended that "States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity."[43] It urged States to "introduce measures to help them to thrive, explore their emerging identities,



[40] Anchan and others 2020 (n 21); Committee on the Rights of the Child, General Comment No. 20 on the implementation of the rights of the child during adolescence (2016) CRC/C/GC/20, para 9 ("CRC General Comment No. 20"); Deborah L. Tolman and Sara I. McClelland, 'Normative Sexuality Development in Adolescence: A Decade in Review, 2000–2009' [2011] Journal of Research on Adolescence; WHO Regional Office for Europe and BZgA, 'Standards for Sexuality Education in Europe' (WHO Europe 2010); Megan Price and others, 'Young Love: Romantic Concerns and Associated Mental Health Issues among Adolescent Help-Seekers' (2016) 6(2):9, Behavioural Sciences (Basel); *Vijayalakshmi* (n 10).

[41] CRC General Comment No. 20 (n 40), para 9.

[42] Report of the United Nations High Commissioner for Human Rights submitted to the Human Rights Council (28 June 2018) A/HRC/39/33, para 31; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health submitted to the Human Rights Council (4 April 2016) A/HRC/32/32, paras 9-13 ("Report of the Special Rapporteur 2016"); World Health Organisation, *Assessing and supporting adolescents' capacity for autonomous decision-making in health-care settings* (2021), para 3.2.

[43] CRC General Comment No. 20 (n 40), para 40.

beliefs, sexualities and opportunities, balance risk and safety, build capacity for making free, informed and positive decisions and life choices, and successfully navigate the transition into adulthood."[44] In 2019, the CRC, in General Comment No. 24 on Children's Rights in the Justice System, reiterated that States should remove status offences, such as offences that criminalise "adolescents who engage with one another in consensual sexual acts".[45] This is also reflected in standards related to children's rights in the digital realm.[46] The blanket criminalization under the POCSO Act under the guise of protecting all persons below 18 years from sexual abuse, is thus not in alignment with India's obligations under the UNCRC.

High Courts in India have questioned the use of the POCSO Act – a law enacted to protect children from sexual abuse – to regulate adolescent sexuality[47] and the wisdom of criminalising such acts.[48] They have reiterated that adolescent love is not "unnatural" or "alien" and is a result of natural "biological attraction".[49] Some High Courts have called for a change in the law noting the inappropriateness of treating consensual adolescent sexual acts on par with rape and proposed a "biosocial approach" that is informed by adolescent psychology and recognises the normative nature of adolescent romance.[50]

The LCI Report acknowledged these concerns but instead of decriminalisation, proposed judicial discretion in sentencing. However, there are several rights violations inherent in the criminalisation of normative acts that merit consideration.

3.1 Undermining dignity and privacy

The fundamental rights to dignity and privacy extend to all individuals, including adolescents.[51] The Supreme Court has recognised that privacy, inherently linked to dignity, encompasses personal spheres such as family, procreation, and marriage, and the ability to make intimate decisions.[52] High Courts have also highlighted the disproportionate intrusion of the criminal law into the personal sphere particularly when the adolescent in question does not seek criminal intervention in POCSO cases.[53] The Madras High Court in *Vijayalakshmi v State Rep. the*

[44] CRC General Comment No. 20 (n 40), para 16.

[45] CRC General Comment No. 20 (n 40), para 12. Committee on the Rights of the Child, General Comment No. 24 on children's rights in the child justice system (2019) CRC/C/GC/24, para 12.

[46] Committee on the Rights of the Child, General Comment No. 25 on children's rights in relation to the digital environment (2021) CRC/C/GC/25, para 4 ("CRC General Comment No. 25").

[47] *Vijaylakshmi* (n 10); *Atul Mishra* (n 10); *Shembhalang* (n 36); *Kuldeep v State of Himachal Pradesh* 2019 SCC OnLine HP 2659 (Himachal Pradesh High Court); *Roujalin Rout v State of Odisha,* 2024 SCC OnLine Ori 1339 (Odisha High Court).

[48] *Vijaylakshmi* (n 10) [28].

[49] *Sabari* (n 11); *Aarush* (n 10).

[50] *Vijaylakshmi* (n 10) [13]; *Atul Mishra* (n 10) [14].

[51] JJ Act 2015, s 3(xi); *Justice K.S. Puttaswamy v Union of India*, [2017] 10 SCR 569 (Supreme Court); *Navtej Singh Johar v Union of India*, (2018) 10 SCC 1 (Supreme Court); *X v The Principal Secretary, Health and Family Welfare Department, Government of National Capital Territory of Delhi*, [2022] 7 SCR 686 (Supreme Court).

[52] *Puttaswamy* (n 51), Justice Chandrachud, [142], [169] and Justice Sanjay Kishan Kaul, [78].

[53] *Pooja and Ors. v State of U.P. and Ors.*, Application under Section 482 No. 136 of 2016 decided by the Allahabad High Court on 29 February 2024 [17]; *Parampreet* (n 12).

Inspector of Police,[54] emphasised that the use of the POCSO Act could lead to irreversible damage to the reputation and livelihood of youth whose actions were only a consequence of "biological attraction",[55] emphasising the deleterious impact of excessive criminalisation on the dignity and worth of the individual accused. In *Veekesh Kalawat v State of Madhya Pradesh*,[56] the Madhya Pradesh High Court also noted the "oppressiveness" of the POCSO Act against marginalised sections already affected by illiteracy and poverty. By ignoring normative adolescent development, social realities, and diverse tribal and cultural practices that accept adolescent sexuality,[57] the law disproportionately impacts adolescents and places those in inter-caste and inter-faith relationships at significant risk of being criminalised.

The ensuing police interrogation, arrest, detention, invasive medical examinations, and interface with child protection authorities aggravates the intrusion and exposes young persons to moral judgment, humiliation, and loss of liberty.[58] Both accused persons and victims experience stigma, shame, erosion of self-worth[59] and disruption at every stage, significantly hindering their development, education, and employment. For those convicted, the consequences are even more severe, and include lengthy imprisonment and inclusion in the Sex Offenders Registry.

In *State v Hitesh*,[60] the Delhi High Court observed "[l]ove is a fundamental human experience, and adolescents have the right to form emotional connections. The law should evolve to acknowledge and respect these relationships, as long as they are consensual and free from coercion."

In *Teddy Bear Clinic for Abused Children and Anr. v Minister of Justice and Constitutional Development and Anr.*,[61] the South African Constitutional Court held that legal provisions criminalising consensual sex amongst adolescents offended their dignity, even if rarely enforced. It concluded that "[i]f one's consensual sexual choices are not respected by society, but are criminalised, one's innate sense of self-worth will inevitably be diminished."

In the Indian context, labelling acts of normative adolescent sexuality as a sexual offence, especially rape, essentially punishes adolescents for seeking human connection and engaging in developmentally appropriate behaviour. It subjects adolescents to legal scrutiny and humiliation for private experiences that are central to their growth and identity, striking at the core of their right

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[54] *Vijaylakshmi* (n 10).

[55] ibid [28].

[56] *Veekesh* (n 13).

[57] M. Santhanaraman, 'Branded a criminal for following custom' *The Hindu* (13 April 2022); Saritha S Balan, 'How POCSO Act continues to unfairly impact tribal communities in Kerala' *The Newsminute* (19 December 2022); *Roujalin* (n 47); Juvenile Justice Committee of Madhya Pradesh High Court, 'Madhya Pradesh State Level Multi-Stakeholders Consultation on Effective Implementation of POCSO Act, 2012 "Manthan"' (5th and 6th November, 2022) 20.

[58] Enfold and P39A 2024 (n 9) 149-152; *Kajendran J v Superintendent of Police*, Habeas Corpus Petition No. 2182 of 2022 decided by the Madras High Court on 7 July 2023 and 15 July 2024.

[59] See *Teddy Bear Clinic for Abused Children and Anr. v Minister of Justice and Constitutional Development and Anr* (CCT 12/13) [2013] ZACC 35 (Constitutional Court of South Africa).

[60] *State v Hitesh*, 2025 SCC OnLine Del 962 (Delhi High Court) [30].

[61] *Teddy Bear Clinic* (n 59).

to life which encompasses dignity, bodily integrity, and autonomy. It is also a violation of the constitutional obligation under Article 39(f) to ensure that children have opportunities and facilities "**to develop in a heathy manner and in conditions of freedom and dignity"** while ensuring that childhood and youth are protected against exploitation, moral and material abandonment."

3.2. Deprivation of Liberty

The law's unintended consequence has been the gross deprivation of the liberty of adolescents and young persons in consensual relationships. While male parties are invariably treated as accused persons, facing arrest and incarceration, the female parties are treated as victims facing institutionalisation. Even where both are minors, the law remains gendered in its application and minor boys above 16 years face the risk of being tried and punished as adults.

Though convictions are rare in consensual cases,[62] the accused persons are arrested and taken into custody as rape is a non-bailable offence.[63] Regardless of the outcome of the trial, the arduous processes they are subjected to during investigation and trial and the threat of conviction inflicts significant suffering.[64] Where, however, courts have applied the law strictly, disregarding the consensual nature of the relationship, convictions have resulted in the imposition of minimum mandatory sentences ranging from 10 years to 20 years.[65]

High Courts have taken note of the adverse impact of prolonged incarceration,[66] the exposure to hardened criminals,[67] and standing trial,[68] including the disruption of the education and livelihood of the accused[69] and exercised their inherent power to quash ongoing trials and provided other reliefs in consensual cases. The Madras High Court has noted that the accused person's "youthful life comes to a grinding halt"[70] and that "[a]n adolescent boy who is sent to prison in a case of this nature will be persecuted throughout his life."[71] Recognising the deprivation of liberty and disruptions caused by arrests in such cases, the Juvenile Justice Committee and the POCSO Committee of the Madras High Court passed a resolution directing the Tamil Nadu Police to issue a notice of appearance to the accused in "mutually consensual" cases under the POCSO Act, rather than arresting them. Based on this resolution, the Tamil Nadu Police issued a circular implementing this directive, which is now followed in practice.[72]

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[62] Ramakrishnan and Raha 2022 (n 9) 28.

[63] BNSS 2023, sch I/ CrPC 1873, sch I.

[64] *Rama @ Bande Rama v State of Karnataka,* 2022 SCC OnLine Kar 1717 (Karnataka High Court) [9].

[65] *State of Gujarat v Ashokbhai*, 2018 SCC OnLine Guj 1123 (Gujarat High Court); *Vijayakumar v State*, Criminal Appeal Nos. 56 of 2023 and 368 of 2025 (Madras High Court).

[66] *Vrushabh* (n 10).

[67] *Imran Iqbal Shaikh v State of Maharashtra*, 2023 SCC OnLine Bom 1040 (Bombay High Court).

[68] *Rama* (n 64).

[69] *Aarush* (n 10).

[70] *Vijayalakshmi* (n 10) [18]. Also see *Anandan* (n 13).

[71] *Anandan* (n 13) [10].

[72] Tamil Nadu Police, Circular memorandum, Rc.No.009464/Crime-4(3)/2022 dated 3 December 2022.

Adolescent girls are also deprived of their liberty as cases under the POCSO Act invariably result in their institutionalisation in Children's Homes when they refuse to return to their parents and insist on being with their partner.[73] Alternatives are rarely explored and institutionalisation is deemed as being 'in the best interest of the child,' as the girl is not allowed to remain with her partner. Institutionalisation is also used as a form of punishment and judgment of the girl's choices for entering into a relationship. Further, confusion about the authority responsible for ordering their release and concerns about release to their "accused" partner or his family has resulted in prolonged detention of girls, sometimes even after they have attained 18 years. In the absence of periodic reviews, institutionalisation deprives girls of education, employment, and personal liberty, and compromises their physical and mental health. It also leaves pregnant girls or those with children with limited access to sexual and reproductive health services and familial care.

Over-criminalisation has thus resulted in the unjust loss of liberty of adolescent boys and girls for engaging in normative sexual behaviour.

3.3. Disregard for Evolving Autonomy and Best Interests

The law diminishes the identity of adolescent girls by reducing them to "victims," and negates their best interests and evolving autonomy.[74] Though the age of majority is set at 18 years,[75] the Indian legal system recognises the concept of evolving capacities with varying age thresholds specified for access to free and compulsory education, labour, consent for medical examination, giving a statement under oath, and culpability for heinous offences,[76] among others. The POCSO Act, however, blurs the developmental differences between children and adolescents.

Incidentally, the POCSO Bill, 2011, acknowledged that adolescents above 16 years enter into consensual sexual relationships.[77] The National Commission for Protection of Child Rights (NCPCR) in its separate draft of the POCSO Bill, 2010, included provisions recognising consensual non-penetrative acts among children above 12 years of age who are of the same age or within two years of each other, and consensual penetrative acts between persons above 14 years who are of the same age or within three years of each other.[78] It also recognised consensual penetrative acts by

[73] See *Javed v State of Haryana and Ors*., Criminal Writ Petition No. 7426 of 2022 decided by the Punjab and Haryana High Court on 30 September 2022.

[74] Ramakrishnan and Raha 2022 (n 9) 60; Raha 2021 (n 6); Enfold Proactive Health Trust, 'Trends in Child Marriage: Insights from Judgments under the Prohibition of Child Marriage Act, 2006 in Assam, Maharashtra and Tamil Nadu' (2024) 20 ("Enfold Proactive Health Trust 2024"); Partners for Law in Development, 'Why Girls Run Away to Marry - Adolescent Realities and Socio-Legal Responses in India' (2019) 31, 37; Medha Shukla and Biraj Swain, 'The Unintended Victims: How POCSO Affects Adolescents' Autonomy and Access to Health' (*LiveLaw*, 14 November 2024) ("Shukla and Swain 2024").

[75] The Majority Act 1861, s 3(1).

[76] There are constitutional concerns about the treatment of adolescents above 16 years accused of heinous offences as adults, as well concerns about its compatibility with the UNCRC and other international standards. This is, however, beyond the scope of this brief.

[77] The Protection of Children from Sexual Offences Bill, 2011, as introduced in the Rajya Sabha.

[78] National Commission for Protection of Child Rights (NCPCR), Protection of Children from Sexual Offences Bill, 2010, Exception to Clause 3A.

children between 16-18 years and specified circumstances of force, violence, coercion, threats, intoxication, impersonation, and the like, in which the consent would be vitiated.[79] Despite this, the POCSO Act takes a "one size fits all" approach that has prompted Courts to question its alignment with ground realities. For example, the Meghalaya High Court recognised the evolving autonomy of adolescents, maturity of parties, and the ability of the victim for rational thinking and decision-making.[80] It has also held sexual relationships between two consenting persons cannot be termed as "sexual assault" in the absence of any threat or attempt to inflict offensive physical contact or bodily harm.[81]

UN treaty-bodies and special mechanisms have consistently recognised the unique nature of adolescence as a development phase that entails physical, behavioural, emotional and neurological changes.[82] Observing that "[a]dolescence is a life stage of intrinsic value, not merely a transition between childhood and adulthood",[83] the Special Rapporteur on the Right to Health emphasised the evolution, development and learning that takes place during adolescence and observed that:

> "....while adolescents under 18 years of age continue to be entitled to protection from violence, abuse and exploitation, as well as to consideration of their best interests, under the Convention on the Rights of the Child, the nature of those protections and their application must reflect the emerging competencies acquired throughout adolescence."[84]

Courts have recognised several elements of best interests such as the views of the "child", the significance of preservation of family relationships, particularly when parties are married and have children, and the overall adverse impact of criminalisation on their safety and well-being. They have observed that criminalisation is counterproductive and effectively punishes the victim, making her more vulnerable to exploitation, contrary to the objective of the POCSO Act.[85] Criminalization also strains ties with families of both parties and often results in girls having to navigate difficult circumstances such as criminal processes, pregnancy, institutionalisation, and arranging bail for their partner, with negligible support. Recognising the complexities involved, the Supreme Court *In Re: Right to Privacy of Adolescents*[86] refused to sentence the

[79] Ibid, Clause 3B.

[80] *Teiborlang* (n 36); *Biju Marak v State of Meghalaya*, Criminal Petition No. 70 of 2022 decided by the Meghalaya High Court on 15 March 2023; *John Franklin Shylla* (n 12); *Rahul Kumar Choudhury and Ors. v State of Meghalaya and Ors.*, 2023 SCC OnLine Megh 366 (Meghalaya High Court).

[81] *Shembhalang* (n 36); *Ananta Boro* (n 36); *Teiborlang* (n 36).

[82] CRC General Comment No. 20 (n 40), para 9.

[83] Report of the Special Rapporteur 2016 (n 42) para 19.

[84] ibid, para 11.

[85] See *Roujalin* (n 47); *Balaji @ Panai Balaji v State*, Criminal Original Petition No. 8025 of 2024 decided by the Madras High Court on 4 April 2024; *In Re: Right to Privacy of Adolescents*, 2025 INSC 778 [25], [26]; *Pradeep Yadav v State of U.P. and Ors.*, 2024 SCC OnLine All 392 (Allahabad High Court). Also see *Ankit Kumar v State of U.P. and Ors.*, Application under Section 482 No. 9944 of 2023 decided by the Allahabad High Court on 22 December 2023, where the court considered that the life of the girl and the child would be ruined in case the trial continues.

[86] *In Re: Right to Privacy of Adolescents* (n 85).

accused-husband emphatically noting that "if we send the accused to jail, the worst sufferer will be the victim herself" and deciding that "in order to do real justice to the victim, the only option left before us is to ensure that the accused is not separated from the victim."[87] While reliefs purely on the consideration of marriage are problematic, it reflects attempts to mitigate the law's far-reaching disruptive impact on the lives of young couples.

These observations illustrate how the POCSO Act's overwhelmingly protectionist approach disregards the evolving autonomy of adolescents, and erodes the identity, agency, feelings, and desires of adolescents – ultimately victimising them in the criminal justice system.

3.4. Implications on the Right to Sexual and Reproductive Health

The criminalisation of consensual adolescent sexual acts combined with mandatory reporting requirements under the POCSO Act has aggravated the barriers for adolescents of all genders seeking confidential sexual and reproductive health (SRH) information and services.[88] Many POCSO cases are reported when a pregnancy is detected by healthcare providers and shifts the focus from treatment to prosecution. It also conflicts with Indian health and education policies such as the Rashtriya Kishor Swasthya Karyakram (RKSK), School Health Program (SHP),[89] and Adolescence Education Program (AEP) that acknowledge adolescent sexuality and emphasise the provision of confidential and barrier-free access to SRH services. It is also incompatible with CRC's recommendation to India that measures be taken "to ensure that adolescent girls and boys have effective access to confidential sexual and reproductive health information and services such as modern contraception as well as girls' access to legal abortions in practice."[90]

The climate of fear deters adolescent girls, including married and/or pregnant adolescent girls from accessing reproductive health or abortion services,[91] seeking mental health support, diagnostic tests for pregnancy or sexually transmitted infections, or contraception for fear of triggering criminal proceedings against their partners.[92] This results in grave consequences for their physical and mental health[93] and may push

[87] ibid [25] and [26].

[88] CCL 2018 (n 21) 14-15; Aparna Chandra and others, 'Legal Barriers to Accessing Safe Abortion Services in India: A Fact Finding Study' (Centre for Reproductive Rights and National Law School of India University, Bangalore 2021) 140-142 ("Chandra and others 2021"); Pitre and Lingam 2021 (n 6); International Planned Parenthood Federation, 'Over-protected and under-served :A multi-country study on legal barriers to young people's access to sexual and reproductive health services' (2014).

[89] Ministry of Human Resource Development and Ministry of Health and Family Welfare, 'Operational Guidelines on School Health Programme under Ayushman Bharat' (Government of India 2018), 3.

[90] Committee on the Rights of the Child, 'Concluding observations on the consolidated third and fourth periodic reports of India' (13 June 2014) CRC/C/IND/CO/3-4, para 66(b).

[91] Susheela Singh and others, 'The incidence of abortion and unintended pregnancy in India, 2015' (2018) 6(1) The Lancet Global Health e111 ("Singh and others 2018"); Shukla and Swain 2024 (n 74); Vrinda Grover, 'Criminalisation of even consensual sex between adolescents obstructs access to safe abortion for girls' *Times of India* (19 October 2019) ("Grover 2019").

[92] CCL 2018 (n 21) 14-15; Chandra and others 2021 (n 88) 140-142; Pitre and Lingam 2021 (n 6).

[93] *State of Maharashtra v Mohsin Basuddin Pakhali and Ors.*, Special Case POCSO No. 24/2019 decided by the Special Court in Kolhapur (Maharashtra) on 20 July 2019; '17-yr-old girl delivers baby watching YouTube videos in Kerala, lover arrested under POCSO Act' *Onmanorama* (27 October 27); 'Minor hospitalised after illegal abortion' *Times of India* (3 June 2019); 'Minor girl dies after taking abortion pills' *Times of India* (9 June 2019).

them to seek unsafe abortions,[94] a fact acknowledged by the LCI.[95]

Adolescent boys, especially, are overlooked in SRH research and interventions,[96] despite evidence that they engage in risky sexual behaviours,[97] sometimes as an exploration of their sexuality.[98] This leaves them vulnerable to STIs and yet their access to accurate SRH information and services remains limited, due to taboos around pre-martial sex.[99] The social barriers may be further compounded by legal barriers in the form of mandatory reporting and criminalisation.

Mandatory reporting requirements also conflict with doctor-patient confidentiality.[100] A WHO Rapid Programme Review of Adolescent Reproductive and Sexual Health Programme and RKSK noted that the mandatory reporting of even consensual sexual activity between minors led to confusion among service providers who are "inclined to deny SRH services to young people in some states."[101] The Supreme Court recognised the conflict in *X v Principal Secretary, Health and Family Welfare Department*,[102] and clarified that in the case of minors below 18 years engaging in consensual sexual activity and seeking a termination of pregnancy, the registered medical practitioner "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."[103] However, its operationalisation is fraught with confusion and the exception is limited to adolescents seeking termination and requires parental involvement, which may not be forthcoming in such cases. It does not cover the full spectrum of sexual and reproductive health needs, including for those who wish to continue with the pregnancy or require other health services.

As long as the law continues to criminalise all sexual activity below 18, and adopts a punitive

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[94] Singh and others 2018 (n 91); Grover 2019 (n 91); Dipika Jain and Anubha Rastogi, 'Beyond Bars, Coercion and Death: Rethinking abortion rights and justice in India' (2024) 14(1) Oñati socio-leg 99, 108; Dipika Jain and Anubha Rastogi, 'Adolescent abortions in the Covid-19 landscape: Exposing the legal Achilles' heel' (2024) 9(32) IJME 50; Chandra and others 2021 (n 88) 45; Dipika Jain, 'Time to rethink criminalisation of abortion? Towards a gender justice approach' (2019) 12 NUJS L.Rev. 21.

[95] LCI Report 2023 (n 16) paras 13.7, 15.5 and 18.11.

[96] Neeraj M. Srivastava, 'Adolescent health in India: Need for more interventional research' (2016) 4 Clinical Epidemiology and Global Health 101.

[97] Santosh K. Sharma and Deepanjali Vishwakarma, 'Transitions in adolescent boys and young Men's high-risk sexual behaviour in India' (2020) 20 BMC Public Health 1089; Surendran U.Maheswari and S Kalaivani, 'Pattern of sexual behavior in adolescents and young adults attending STD clinic in a tertiary care center in South India' (2017) 38(2) Indian J Sex Transm Dis AIDS 171.

[98] Beena Joshi and Sanjay Chauhan 'Determinants of youth sexual behaviour: program implications for India' (2011) 16 Eastern Journal of Medicine 113.

[99] Arundhati Char, Minna Saavala and Teija Kulmala, 'Assessing young unmarried men's access to reproductive health information and services in rural India' (2011) 11 BMC Public Health; MKC Nair and others, 'ARSH 5: Reproductive health needs assessment of adolescents and young people (15-24 y): a qualitative study on perceptions of community stakeholders' (2013) 80(2) Indian J Pediatr 214; Shubhangi Nayak and others, 'A study on knowledge about sexually transmitted infections (STIs) and AIDS among adolescents of rural areas of Jabalpur district' (2016) 5(8) International Journal of Medical Science and Public Health.

[100] Chandra and others 2021(n 88) 147-148; Ekatha Ann John, 'Child sex abuse: More TN kids queue up in clinics to treat sexually transmitted infections' *Times of India* (19 April 2018).

[101] Alka Barua and others, 'Adolescent health programming in India: a rapid review' (2020) Reproductive Health 17:87.

[102] *X v Principal Secretary* (n 51) [79-82].

[103] ibid [81].

approach instead of a help-oriented one,[104] access to sexual and reproductive health services remains complicated and compromises the health and well-being of adolescents.

3.5. The "Justice" Cost

According to *Crime in India, 2022,* 89.2% of POCSO cases are pending disposal,[105] highlighting the severe burden on an overstretched and under-resourced justice system. Empirical studies of judgments reveal that at least one in four cases under POCSO Act is "romantic" in nature.[106] The significant strain arising from criminalisation of such cases diverts limited institutional capacity away from the investigation and trial of actual cases of sexual violence, and delays justice for survivors.[107]

The burden extends to higher courts that are inundated with appeals, petitions to quash proceedings, bail applications, and habeas corpus petitions related to consensual cases. High Courts themselves have considered the impact upon the justice system lamenting on the futility of the criminal proceedings when victims do not support the case,[108] the lack of any purpose served in these cases,[109] waste of time of the courts,[110] the "personal"[111] nature of the cases, the lack of any overriding public interest or any harm to society's interests,[112] and concluded that the continuation of proceedings would amount to an abuse of the legal process.[113]

The absurdity of using criminal law to regulate adolescent sexuality is further evinced by the high acquittal rates in such cases.[114] In a study of 1,715 "romantic" cases, 93.8% resulted in an acquittal,[115] with the "victim" herself stating that she was in a romantic relationship with the accused in 87.9% of the cases.[116] In another study of 264 cases of aggravated penetrative sexual assault under POCSO Act, 67 cases (25.4%) were "romantic", and the acquittal rate in these cases was 97%.[117] Further, the rate of testimony against the accused was significantly lower in "romantic

[104] Paulo Sérgio Pinheiro, *World Report on Violence Against Children* (United Nations Secretary-General's Study on Violence against Children 2006), 85.

[105] Crime in India 2022 (n 8) 357.

[106] Ramakrishnan and Raha 2022 (n 9) 6.

[107] Karthik Muralidharan, *Accelerating India's Development* (Penguin Random House India 2024) 438 ("Muralidharan 2024").

[108] *Shambu* (n 38), *Arun Babu v Xxx and Ors.*, Criminal Miscellaneous Case No. 7310 of 2023 decided by the Kerala High Court on 25 October 2023; *Mohit* (n 12); *Sarbjit Singh v State of Punjab and Ors.*, Criminal Main-39252-2022 decided by the Punjab and Haryana High Court on 23 November 2022 ; *Karan* (n 12).

[109] *Xxxxxx v State of Kerala*, Criminal Miscellaneous Case No. 3141 of 2022 decided by the Kerala High Court on 16 October 2023; *Karan* (n 12); *Aarti and Ors. v State of Uttar Pradesh and Ors.*, Miscellaneous Bench No. 5503 of 2018 decided by the Allahabad High Court on 30 May 2018; *Mohit* (n 12); *Kailash Sharma v State of Madhya Pradesh and Ors.*, 2023 SCC OnLine MP 2074 (Madhya Pradesh High Court).

[110] *Amit Kumar and Ors. v State of Himachal Pradesh and Ors.*, Criminal Miscellaneous Petition (Main) No. 384 of 2020 decided by the Himachal Pradesh High Court on 17 December 2020.

[111] *Anandan* (n 13); *Kothandapani* (n 13).

[112] *Sachin Thakur and Ors. v State of Himachal Pradesh and Ors.*, Criminal Miscellaneous Petition (Main) No. 1101 of 2022 decided by the Himachal Pradesh High Court on 19 December 2022.

[113] *Jameel Jabbar v State of Karnataka*, 2017 SCC OnLine Kar 3712 (Karnataka High Court).

[114] Enfold and P39A 2024 (n 9); Ramakrishnan and Raha 2022 (n 9).

[115] Ramakrishnan and Raha 2022 (n 9) 39.

[116] Ramakrishnan and Raha 2022 (n 9) 14.

[117] Enfold and P39A 2024 (n 9) 100, 104.

cases" (9%) as compared to other cases (36%).[118]

These outcomes highlight the futility of prosecutions of factually consensual and non-exploitative sexual acts under the POCSO Act. They also distort overall POCSO Act conviction statistics, creating the impression that cases of child sexual abuse routinely go unpunished. This erodes public trust in the criminal justice system,[119] fuels panic in public discourse about the failure of the system in dispensing justice in sexual violence cases, and leads to more punitive responses.

Rather than regulating adolescent sexuality through criminal law, normative acts should be distinguished from sexual violence to ensure optimal utilisation of limited resources and strengthening of investigation, prosecution and disposal of cases of actual sexual violence against children.

3.6. Case for Decriminalisation of Adolescent Sexuality

The criminalisation of factually consensual and non-exploitative sexual acts involving adolescents is fundamentally misguided, both as a matter of principle and policy. It comes at the severe cost of violating the fundamental rights of the adolescents that outweighs any purported benefits. There is, thus, a need for decriminalisation while continuing to protect all persons below 18 years from sexual abuse.

Proposed Framework for Decriminalisation of Adolescent Sexuality

Balancing evolving autonomy with protection concerns will require identifying an age threshold above which adolescents' autonomy should be given greater weightage and they should not be prosecuted for factually consensual and non-exploitative sexual acts. It is proposed that factually consensual and non-exploitative sexual acts involving adolescents between 16 to 18 years be decriminalised, while the term "child" continues to be defined as a person below 18 years.

Notably, the age of consent for sexual intercourse in India was 16 years from 1949-2012 (a period of 63 years), till the POCSO Act came into force. While there is no scientific basis for 16 years, and the age of consent varies across jurisdictions, the age of 16 appears to be the common threshold across different countries[120] including South Asian countries such as Sri Lanka,[121] Bangladesh,[122] and Bhutan.[123] The Justice Verma Committee also recommended that the age of consent for sexual acts under the POCSO Act be lowered to 16 years.[124]

However, all protections available under the POCSO Act, including trial by Special Courts and child-friendly procedures should continue to apply to those between 16-18 years. Consensual sexual acts with persons above 16 years should not constitute an offence unless it falls under specific grounds that vitiate

[118] Enfold and P39A 2024 (n 9) 103.

[119] Muralidharan 2024 (n 107) 438.

[120] Legal age of consent by country is available at https://www.ageofconsent.net/world. The age of consent is 16 years in the United Kingdom, Norway, Canada, South Africa and Spain , as well as several States in Australia and the USA.

[121] Penal Code 1883, s. 363(e) [Sri Lanka].

[122] The Penal Code 1860, s. 375 [Bangladesh].

[123] Penal Code (Amendment) Act of Bhutan 2021, s. 183 [Bhutan].

[124] Justice Verma Committee on Amendments to Criminal Law, 'Report of the Committee on Amendments to Criminal Law' (23 January 2023), 443-444.

consent or amount to exploitation. For example, a penetrative sexual act with a person above 16 years and below 18 years would amount to penetrative sexual assault in circumstances where the sexual act:

- is against their will;
- is without their consent;
- is based on consent obtained by putting them or any person in whom they are interested, in fear of death or of hurt;
- is with a person who is in a position of trust or authority like a public servant, staff of a child care institution or facility, school, religious institution, or institution providing services to children;
- is with a person with whom the 16-18-year-old person is in a relationship of dependency;
- is committed in the context of hiring, employing, engaging or using a child for sexual exploitation or child sexual abuse material;
- is with their consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration of any stupefying or unwholesome substance, they are unable to understand the nature and consequences of acts to which they give consent;
- is committed when they are unable to communicate consent.

The explanation of "consent" in Section 63, BNS may be adapted[125] - a person is said to consent when they express unequivocal voluntary agreement, by words, gestures or any form of verbal or non-verbal communication, their willingness to participate in the specific sexual act. Absence of physical resistance to the act of penetration shall not by the reason only of that fact, be regarded as consent to the sexual activity.

Suitable modifications will also have to be made to the framing of rape under the BNS, and non-penetrative sexual offences under the POCSO Act and BNS, as well as the IT Act to recognise factually consensual and non-exploitative sexual acts involving persons above 16 years and below 18 years. Further, the presumption as to the absence of consent under Section 120 of the Bhartiya Sakshya Adhiniyam, 2023 in certain prosecution for rape, may be extended to victims above 16 years and below 18 years. The presumption states that "where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent."

There is a concern that recognition of consent will shift the focus of criminal trials under the POCSO Act on the victim and result in re-victimisation and lengthy cross-examination. To protect against this, judicial officers and prosecutors should strongly enforce the prohibition on questions during cross-examination that are aggressive, assassinate the character of the child victim, or undermine their dignity under Section 33(6), POCSO Act, and questions as to the general immoral character, or previous sexual experience, of the victim with any person for proving such consent or the quality of consent under Section 149, Bhartiya Sakshya Adhiniyam, 2023.

The police, prosecutors, judges, doctors, and child protection officials should be trained on respecting adolescents' dignity and autonomy, recognising grounds that vitiate consent, age-appropriate communication,

[125] BNS 2023, s 63.

and non-judgmental provision of services and information.

Decriminalisation also has to be accompanied by provision of comprehensive sexuality and life skills education, and barrier-free SRH information and services. It is also important to understand the limitations of close-in-age provisions and sentencing discretion while considering policy alternatives to criminalization.

Limitations of Close-in-age Exceptions

Some countries have incorporated close-in-age exceptions, also referred to as "Romeo and Juliet laws", which prescribe proximate age-gaps ranging between one to five years, within which consent is recognised and are in the form of a legal defence or exception. Notably, in countries with close-in age exemptions, the age of consent is already low – ranging from 14 to 16 years[126] – which is much lower than the age of consent in India. Further, close-in-age exceptions will not prevent the criminal investigation and trial or inquiry. Adolescents falling within the prescribed age gap will still be subjected to criminal proceedings until Special Courts or JJBs determine that the parties fall within the age limits specified and the act was consensual. Legal complexities connected to establishing the age of parties beyond reasonable doubt during trial will also have to be considered as they will inevitably protract trials and increase the period of detention for both parties.

It is also essential to note that multiple factors contribute to coercion within adolescent sexual relationships, and that age difference is only one such factor.[127] A sound approach would be to comprehensively consider the circumstances that vitiate consent, respect adolescents' views on the nature of the relationship, and focus on their empowerment through comprehensive sexuality education.

Concerns regarding Sentencing Discretion

Judicial discretion in sentencing, as proposed by LCI, is also not a viable solution as it will neither spare adolescents from the humiliation and trauma that result from arrest, deprivation of liberty, institutionalisation, medical examination, and a trial, nor reduce the workload of the court and the police. Both close-in-age exceptions and sentencing discretion do not recognise the inherently harmful effects of criminalisation of normative adolescent sexual behaviour and may result in the arbitrary use of discretion.

[126] Age of consent is 14 years in Germany, Italy, Austria, Bolivia, Hungary, Chile, 15 years in Sweden, Greece, Croatia, Romania, France, Costa Rica, and 16 years in Canada, South Africa, Spain, Israel, Switzerland, Antigua and Barbuda, Trinidad and Tobago, Norway, Belgium, Finland, Moldova, Netherlands, Japan, Philippines. These countries have a close-in-age-exception.

[127] Z Essack and J Toohey, 'Unpacking the 2-Year Age-Gap Provision in Relation to the Decriminalisation of Underage Consensual Sex in South Africa' (2018) 11(2) South African Journal of Bioethics and Law 86.

IV. Child Protection Concerns Related to Decriminalisation of Adolescent Sexuality and Potential Solutions

4.1. Implications on Child Marriage

Child marriages have been on the decline in India, and the percentage of women between 20-24 years who married before the age of 18 years has dropped from 47.4% in 2004-2005[128] to 23.3% in 2019-2021.[129] There is, however, a concern that decriminalisation of consensual and non-exploitative sexual acts involving adolescents could undermine efforts to reduce child marriage, and adversely impact girls' education, health, and well-being.[130]

Socio-economic measures more effective than criminal laws

Child marriages are "driven by poverty … crises and shocks, and social norms that deem girls a 'burden on the household'."[131] Globally, progress toward eliminating child marriage is threatened by a polycrisis, marked by the interplay of health crises, climate change, conflict and economic instability.[132] The prevalence of child marriage in India is strongly correlated with poverty and lack of access to education.[133] The economic impact of COVID-19 and school closures has further exacerbated the risk of child marriage.[134] Evidence shows that cash or in-kind schemes for education, and programmes and policies addressing the underlying causes of child marriage such as poverty and gender inequality through structural interventions are most effective at reducing child marriage.[135] They also have a "greater indirect impact, **and come with less risk of causing harm to girls**" as opposed to "[d]irectly engaging on child marriage laws".[136]

The LCI, however, emphasised a penal approach, noting that the PCMA is a "weak law" as it does not address sexual acts with a

[128] International Institute for Population Sciences (IIPS) and ICF, 'National Family Health Survey (NFHS-4), 2015-2016, India' (Ministry of Health and Family Welfare, Government of India) vol I, 3.

[129] NFHS 5 (n 7) 3.

[130] LCI Report 2023 (n 16) paras 14.2, 14.3 and 17.7.

[131] UNICEF and UNFPA 2022 (n 3) 3; See also Shireen Jejeebhoy, 'Ending Child Marriage in India, Drivers and Strategies' (UNICEF 2019) 17-20 ("Jejeebhoy 2019").

[132] UNFPA-UNICEF Global Programme to End Child Marriage, 'Sustaining the Gains in the Polycrisis Era Annual Report' (2022).

[133] United Nations Children's Fund, 'Ending Child Marriage: A profile of progress in India' (5 May 2023).

[134] United Nations Children's Fund, 'COVID-19 A threat to progress against child marriage' (2021); Girls Not Brides, 'Girls's Education and Child Marriage' (Septemeber 2022) 6; Shireen Jejeebhoy, 'Child Marriages During the Pandemic' (*The India Forum*, 14 June 2021); See also United Nations Children's Fund, UN Women and Plan International, 'Girl Goals: What has changed for girls? Adolescent girls' rights over 30 years' (2025) 34 ("UNICEF, UN Women and PI 2025").

[135] United Nations Children's Fund and United Nations Population Fund 'Evidence Review: Child marriage interventions and research from 2020 to 2022' (2023) 6 ("UNICEF and UNFPA 2023"); Manahil Siddiqi and Gillian Mann, 'A synthesis of what we know works to prevent and respond to child marriage: Evidence Paper for UNFPA-UNICEF Global Programme to End Child Marriage Phase III' (UNFPA and UNICEF 2024); Anju Malhotra and Shatha Elnakib, '20 Years of the Evidence Base on What Works to Prevent Child Marriage: A Systematic Review' (2021) 68(5) Journal of Adolescent Health 847; Jejeebhoy 2019 (n 131) 41; Susan Lee-Rife and others, 'What works to prevent child marriage: a review of the evidence' (2012) 43(4) Studies in Family Planning 287; The Centre for Development and Population Activities, 'Adolescent Girls in India Choose a Better Future: An Impact Assessment' (2001); Anju Malhotra and others, 'Solutions to End Child Marriage: What the evidence shows' (International Centre for Research on Women 2011).

[136] ibid, UNICEF and UNFPA 2023, 22; See also UNICEF and UNFPA, 'Child Marriage and the Law: Technical Note for the Global Programme to End Child Marriage' (November 2020) 2-3 ("UNICEF and UNFPA 2020").

minor spouse and the POCSO Act "fills this void" as it deters child marriage through grave punishments for sexual intercourse with a child.[137] Use of the POCSO Act, a stringent legislation aimed at child sexual abuse, to address the complexities of child marriage will be counterproductive as it will result in over-criminalisation of vulnerable populations without bringing any shift in their lived realities or social norms. Importantly, the Supreme Court in *Society for Enlightenment and Voluntary Action v Union of India*,[138] has noted that criminal prosecution is "ineffective at bringing about social change"[139] in the context of child marriage and emphasised prioritising "prevention before protection and protection before penalisation".[140]

Distinction between Age of Consent for Sexual Acts and Age of Marriage

There are views that the age of consent for sexual acts should be the same as the legal age of marriage. However, the considerations for sexual consent and age of marriage are fundamentally different and should not be conflated. While adolescent exploration of sexuality raises questions about the threshold for consent and autonomy, marriage entails significant additional responsibilities and legal obligations, justifying different ages for the two. Historically, the legal age of marriage has not always aligned with the legal age of consent. Notably, for 34 years until 2012, the age of consent for girls was 16 years while the age of marriage was 18 years. Even now men can consent to sex at 18 years but cannot marry till they are 21 years. Decriminalising adolescent sexuality is necessary given the normative nature of sexual behaviour during adolescence, and **does not preclude the enforcement of laws against underage marriage**.

Criminalisation Operates Against Adolescents

Criminal sanctions, even when they act as a deterrent, have not fundamentally changed the way parents or adolescents view the institution and they continue to enter into child marriages.[141] Often, cases are reported not because they are child marriages per se, but due to associated factors such as elopement, forced marriage, pregnancy, domestic violence, or family disputes.[142] The assumption that the POCSO Act and PCMA are being used for the benefit of child victims of forced marriages is not supported by evidence. Instead, studies reveal that they are disproportionately used against self-initiated marriages stemming from consensual relationships against the wishes of the families, including inter-faith and inter-caste unions, as opposed to family-arranged In a three-state study of 174 judgements in PCMA cases between 2015 and 2023, nearly half of them (49.4%) involved self-initiated marriages.[143] The girl's family was the informant in 80.2% of self-initiated marriages, whereas they approached the police in only 30.9% of cases with arranged marriages/forced marriages.[144] Another study based on 83 PCMA cases between 2008 and 2017 found that the PCMA is used twice as

[137] LCI Report 2023 (n 16) para 14.5.

[138] *Society for Enlightenment and Voluntary Action v Union of India*, 2024 INSC 790 (Supreme Court).

[139] ibid [211].

[140] *Society for Enlightenment and Voluntary Action* (n 138) [210].

[141] ActionAid Karnataka Projects, 'Teenage Pregnancy and Motherhood in India' (2024) 55-57 ("AKP 2024").

[142] ibid 58; Enfold Proactive Health Trust 2024 (n 74) 20-21.

[143] Enfold Proactive Health Trust 2024 (n 74) 14. Arranged/forced marriages constituted 31.6% and data on the type of marriage was unavailable in 19% of the cases.

[144] ibid 19-20.

much against self-arranged marriages, than arranged marriages.[145] Thus, criminal law is primarily used to enforce parental control over the choices of adolescent girls to maintain social and cultural norms, and caste boundaries, rather than protecting them from the harm of early or forced marriages.[146]

While consent may be factually present in self-initiated underage marriages, it may nevertheless be influenced by social realities and pressures. The context in which self-initiated marriages takes place is also significant as such marriages are sometimes a means to escape abusive natal family circumstances or marriages arranged by their families against their wishes.[147] The taboo around pre-marital sex that fuels the fear of being separated from their partner combined with the lack of educational and employment opportunities for girls, and oppressive conditions at home, push young people into elopements and early marriages.[148] In some cases, the eloping couple may view pregnancy as a way to legitimise the relationship[149] and in others, marriage may emerge as a way to legitimise a pregnancy.[150]

In such cases, criminalisation of adolescent sexuality reinforces these taboos, notions of sexual purity and parental control over the intimate choices of young persons, driving these relationships underground and becoming a tool for enforcing patriarchal norms.[151] Criminal law operates disproportionately against those from marginalised communities making them more vulnerable to institutionalisation. It creates barriers to sexual and reproductive health, and, in some cases, drives adolescents in consensual relationships to early marriage in an attempt to avoid criminal sanctions under the POCSO Act.

Criminal Law cannot Ensure Healthy Relationships or Mitigate Adverse Health Consequences and Teenage Pregnancies

Adverse consequences of early marriage for girls include early pregnancy and associated health complications, maternal mortality, increased risk of domestic violence and disruption in education.[152] **The POCSO Act, however, does not prevent or deter teenage pregnancies or promote adolescent health.** Teenage pregnancies and health risks associated with early pregnancy can be effectively addressed through health and educational measures such as comprehensive sexuality education, timely access to reproductive health services, accessible contraception, and adequate nutrition,

[145] Partners for Law in Development, 'Who uses the Prohibition of Child Marriage Act 2006 (PCMA) Most and Why?'; Mehra and Maheshwari 2021 (n 143) 56-57.

[146] PLD 2019 (n 74) 33; Mehra and Maheshwari 2021 (n 143) 56; Neetika Vishwanathan 'The Shifting Shape of the Rape Discourse' (2018) 25(1) Indian Journal of Gender Studies; Swagata Raha, 'Child Marriage and the Protection of Children from Sexual Offences Act, 2012' (Centre for Child and the Law, National Law School of India University, Bangalore 2013) 2-3; AKP 2024 (n 141) 56; Enfold Proactive Health Trust 2024 (n 74) 14; ANANDI India, 'The Early Marriages in Conflict with Law & Society: The case of young girls in Gujarat' (2017) 4.

[147] PLD 2019 (n 74) 22-23; Ramakrishnan and Raha 2022 (n 9) 9.

[148] PLD 2019 (n 74) 35; AKP 2024 (n 141) 32-33.

[149] AKP 2024 (n 141) 33.

[150] UNICEF and UNFPA 2022 (n 3); PLD 2019 (n 74) 25, 34.

[151] Pitre and Lingam (n 6) 468; PLD 2019 (n 74) 66. See also Sarah Baird and others, 'A call to action: the second Lancet Commission on adolescent health and wellbeing' (2025) 405 The Lancet Commissions 1945, 1981, 2007 where the Lancet Commission recognises that not all adolescent unions are forced or non-consensual and recommends that countries should prohibit forced and non-consensual child marriage.

[152] AKP 2024 (n 141) 1-2; UNICEF, UN Women and PI 2025 (n 134) 37-39; LCI Report 2023 (n 16) paras 14.2, 14.3, 17.7.

irrespective of the girls' age and marital status.[153]

Adolescent mothers often face additional barriers in accessing government schemes for nutrition and healthcare, either because these schemes exclude minors ostensibly to deter child marriage or due to a lack of required documentation.[154] Criminalisation also exacerbates the barriers to their sexual and reproductive health, creates an environment of risk and isolation for the girl,[155] deters pregnant adolescent girls from accessing medical care for fear of triggering the criminal justice system.[156]

Intimate partner violence and the inability of adolescent girls to negotiate healthy relationships or make decisions about their reproductive health stem from deeply entrenched gender norms accepted by both men and women that normalise control and violence by men.[157]

Addressing these norms is essential for all intimate relationships and relying primarily on criminal law to enforce a minimum age of marriage does not dismantle these underlying power dynamics. If the primary concerns are exposure to domestic violence, disruption in education, and maternal health, the criminal law cannot alleviate these concerns and will only aggravate them.

There is a need to address the wider context of poverty and structural inequalities that underpin early and child marriages. Rather than over-relying on the POCSO Act, efforts should focus on strengthening prevention measures and the effective implementation of the PCMA. Moving beyond penal law, positive remedies such as the option of annulment need to be operationalised. Interventions should be designed to recognise and address the unique drivers of early, forced, and self-initiated marriages. Where families justify child marriages on the basis of cultural norms or consent of the adolescent party, the response should prioritise strengthening Village and Block-level Child Protection Committees, engaging with religious and local leaders, and improving access to Child Marriage Prohibition Officers. Structural interventions, such as ensuring functional Child Marriage Prohibition Officers, poverty alleviation schemes, access to free and compulsory education till 18 years, conditional cash transfers, and gender transformative approaches, are more effective than punitive laws in reducing child marriage.

The emphasis must shift from punitive criminal sanctions to supportive mechanisms that empower adolescents to resist, delay, and exit child marriages, without causing further harm to adolescents, particularly girls and their families.

[153] UNICEF, UN Women and PI 2025 (n 134) 43-44, 48; SAARC, UNICEF, UNFPA and WHO, 'Re-shaping the future for at-risk, married, pregnant and parenting girls: Regional technical brief and action plan on adolescent pregnancy in South Asia' (2024) 5.

[154] AKP 2024 (n 141) 57-58.

[155] Pitre and Lingam 2021 (n 6) 471; *X v Principal Secretary* (n 51).

[156] Vidya Reddy and Sannuthi Suresh, 'Assam government's drive against child marriage a ham-handed attempt' *Frontline* (23 February 2023); Sukrita Baruah, 'Assam cracks down on child marriages, over 2,000 arrested across the state' *Indian Express* (5 February 2023).

[157] UNICEF, UN Women and PI 2025 (n 134) 35, 44.

4.2. Implications on Child Trafficking

There is a concern that decriminalisation of factually consensual and non-exploitative sexual acts involving adolescents will impede the efforts to combat child trafficking. This specifically stems from the "very real possibility of young girls being easily seduced in love traps and then sold off in trafficking" and that a legal recognition of consent provides a legitimate pathway and defence for traffickers.[158]

Separating Exploitation from Adolescent Relationships

Sex with and among adolescents occurs in a variety of contexts – some normative and non-exploitative while others exploitative. Trafficking can occur through various means, for a variety of purposes, and while some relationships may act as conduits for trafficking, policies cannot be framed on the assumption that all adolescent relationships or self-initiated child marriages will inevitably result in trafficking.[159]

Children may be pushed into trafficking by persons known to them including their family members.[160] While it would be absurd to assume that all familial relationships are inherently exploitative of children, it is a similar leap to assume that all adolescent relationships are invariably exploitative and for the purpose of trafficking. This blurs the distinction between sexual acts that are normative and those that are in the context of trafficking for the purpose of sexual exploitation.

The risk of adolescents being enticed and groomed into exploitative sexual relationships and later being trafficked, owing to the imbalance of power, is a compelling concern. However, criminalisation of all sexual acts without consideration of factually consensual non-exploitative acts causes more harm than good. Viewing all relationships solely from the lens of inherent or potential exploitation undermines evolving autonomy, infantalises adolescents, and places them at greater risk of marginalisation for normative expressions of love and connection.

Distinct Harms require Distinct Approaches

There is no official data available on the interplay between the POCSO Act and trafficking related offences, and empirical studies based on judgments under the POCSO Act do not indicate a strong intersection either.[161] Despite the low intersection between trafficking and POCSO cases, and the fact that the POCSO Act was not enacted to address trafficking, the LCI report observed that:

> "To address a specific undesirable situation that has arisen, thousands of children, especially girl children who are in particular danger of being trafficked

[158] LCI Report 2023 (n 16) paras 14.4, 14.7.

[159] Ajwang Warria, 'Forced Child Marriages as a Form of Child Trafficking' (2017) 79 Children and Youth Services Review 274, 275; See also Catherine Turner, 'Out of the Shadows: Child marriage and Slavery' (Anti-Slavery International 2013) 8, 15 where Turner describes the option to leave the marriage as a factor to distinguish when a child marriage is consensual and when it is forced.

[160] LCI Report 2023 (n 16) 75.

[161] Enfold and P39A 2024 (n 9) - This study based on 264 judgments under Section 6 between 2019 and 2022 found no cases with charges under Section 370 of the IPC (offence of trafficking) and only one case with charges under the Immoral Trafficking (Prevention) Act, 1956 (the legislation regulating "prostitution" and criminalising trafficking for "prostitution" in India); Ramakrishnan and Raha 2022 (n 9) 6 - This study of 1715 'romantic' cases decided by Special Courts in the States of Assam, Maharashtra, and West Bengal registered and disposed between 2016 and 2020 indicated that the trafficking charge was applied in only three cases.

> or abused, cannot be deprived of the protective edifice that exists on account of strict provisions of the POCSO Act, which may be their only armour."[162]

However, with laws framed specifically to address trafficking, especially of minors, the POCSO Act is neither the appropriate, nor the only protection afforded to those vulnerable to trafficking. Sexual abuse and trafficking for sexual exploitation are distinct harms and require different frameworks for the effective prosecution of the offences.

Child trafficking is an organised crime that entails exploitation of children for different purposes such as labour, sexual exploitation, removal of organs, among others. The basis for criminalisation is that commodification of children for sexual purposes is exploitative, inherently wrong and harmful.[163] The prosecution has to establish the act, means and purpose for the offence of trafficking, and the consent of the victim is entirely irrelevant.[164] Under the POCSO Act, the establishment of the commission of a sexual assault against a child is sufficient for prosecution – the means and purpose are entirely irrelevant. If a minor is trafficked for sexual exploitation, those involved can be charged with aiding and abetting a sexual offence under the POCSO Act.[165] However, a strategy that relies only on the POCSO Act to address trafficking ignores the liability of different actors involved and the multiple wrongs caused during the different stages of trafficking.

Consent is Not a Defence for Trafficking

The LCI noted that if the POCSO Act recognised consent of children, perpetrators of child marriage and child trafficking may take the defence of consent, even when such consent may be obtained through coercion or manipulation. They expressed concern that reducing the age of consent will provide a "safe harbour provision" for perpetrators to more easily coerce minor girls into "subjugation, marital rape and other forms of abuse, including trafficking",[166] concluding that legal recognition of consent may also result in evasion of liability by traffickers.[167]

The age of consent for sexual intercourse has no bearing on the prosecution of trafficking as both children and adults can be victims of trafficking. The apprehension that consent of a minor can act as a valid defence in trafficking-related acts is misplaced as the offence of trafficking under Section 143, BNS expressly states that "consent of the victim is immaterial in determination of the offence of trafficking".[168] Accordingly, courts and prosecutors have to ensure that all claims of consent as a defence are disregarded.

Further, the police have to be trained in identifying the presence of factual circumstances that signal exploitation or elements of trafficking, regardless of consent.

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[162] LCI Report 2023 (n 16) 67.

[163] Sharedhope International, 'Child Sex Trafficking is Distinct from Statutory Rape: The Critical Importance of Using Sex Trafficking Laws to Combat Child Sex Trafficking Crimes' 4.

[164] BNS 2023, s 143(1) Explanation 2/ IPC 1860, s 370(1) Explanation 2.

[165] POCSO Act 2012, ss 16-17.

[166] LCI Report 2023 (n 16) 97.

[167] LCI Report 2023 (n 16) 75-76.

[168] BNS 2023, s 143(1) Explanation 2/ IPC 1860, s 370(1) Explanation 2; See also The Warnath Group, 'The Consent Defense in Trafficking in Persons Cases' (2020), 3-5.

Blanket criminalisation of adolescent sexuality cannot insulate girls from the risk of trafficking and overlooks the larger socio-economic context in which trafficking occurs. Factors such as poverty, uneven development, lack of employment opportunities, weak law enforcement, and harmful gender norms fuel trafficking and also underpin relationships and early marriages. The answer lies in strong community-based preventive systems, functional child protection response systems, accessible schools, access to social security schemes, and life skills and comprehensive sexuality education.[169] Efforts and investment must also be intensified to advance effective investigation and prosecution of trafficking. Protection cannot come at the cost of the dignity, self-esteem, liberty, and well-being of children and by exacerbating their vulnerabilities.

[169] D. Ligiero and others, 'What Works to Prevent Sexual Violence Against Children: Evidence Review' (Together for Girls 2019) 111, 112; United Nations Children's Fund, 'Action to end child sexual abuse and exploitation: A review of the evidence' (2020) 176.

4.3. Implications on online harm against children

Adolescents and children today are digital natives, and for many, digital spaces are not separate from their real lives. There is a concern that 'romantic' relationships will further expose adolescents, particularly girls, to risks of online sexual abuse, including grooming, sextortion, and the circulation of child sexual abuse material (CSAM).[170]

Distinction between Adolescent Normative Behaviour Online and Technology-facilitated Violence

Apart from using the internet for various purposes, studies from different jurisdictions reveal that adolescents, in particular, are using it for romantic and sexual exploration,[171] for relationship maintenance and coping with the dissolution of a romance,[172] and to access sexual and reproductive health information.[173] While exchanging sexually explicit text messages, including photographs, is normalised amongst adolescents,[174] it brings with it risks of bullying, coercion, and non-consensual sharing of images.[175]

Existing laws criminalise a plethora of online harms such as generation, storage, and transmission of CSAM, as well as cultivating, enticing, or inducing "children to online relationship",[176] online harassment and stalking.[177] The recognition of consent of adolescents above 16 years will not preclude the application of existing laws to non-consensual and/or exploitative technology facilitated violence.

On the contrary, existing laws fail to adequately consider the complexities of adolescent sexuality in the digital age and conflate self-generated sexual material (SGSM) with CSAM. Adolescents can be held liable for consensually creating and sending SGSM, or viewing/downloading SGSM sent by other minors.

In *Just Rights for Children Alliance v S. Harish*,[178] the Supreme Court held that mere possession is enough to attract the offence of storage of pornographic material involving a child unless there are circumstances that make it clear that there was no intention to share the images.[179] Sharing and transmission of the material that is stored in one's device is an offence.[180] No distinction was made by the apex court between non-exploitative

[170] LCI Report 2023 (n 16) para 13.1; UNICEF, UN Women and PI 2025 (n 130) 17, 36.

[171] Daniel C. Semenza, 'Dating and Sexual Relationships in the Age of the Internet' in Thomas Holt and Adam Bossler (eds), *The Palgrave Handbook of International Cybercrime and Cyberdeviance* (Palgrave Macmillan 2020) 1067; Shelley Walker and others, 'Sexting: young women's and men's views on its nature and origins' (2013) 52(6) Journal of Adolescent Health 697.

[172] Ian Kwok and Annie B Wescott, 'Cyberintimacy: A Scoping Review of Technology-Mediated Romance in the Digital Age' (2020) 23(10) Cyberpsychology, Behavior, and Social Networking 657.

[173] Laura Simon and Kristian Daneback, 'Adolescents' Use of the Internet for Sex Education: A Thematic and Critical Review of the Literature' (2013) 10(4) International Journal of Sexual Health 305; Enfold Proactive Health Trust, 'Pathways for Healthy Digital Engagement: Perspectives of Children and Adult Stakeholders from Karnataka, India' (31 August 2024) 9, 93.

[174] Jessica Dully and others, 'Adolescent Experiences of Sexting: A Systematic Review of the Qualitative Literature, and Recommendations for Practice' (2023) 95(6) Journal of Adolescence 1077.

[175] Caoimhe Doyle, Ellen Douglas and Gary O'Reilly, 'The Outcomes of Sexting for Children and Adolescents: A Systematic Review of the Literature' (2021) 92(1) Journal of Adolescence 86.

[176] The Information Technology Act 2000 (IT Act), s 67B(c).

[177] BNS 2023, s 78/ IPC 1860, s 354D; BNS 2023, s 95; IT Act, s 67B; POCSO Act, ss 11(iii)-(vi), 12-15.

[178] *Just Rights for Children Alliance v S. Harish*, 2024 INSC 716 (Supreme Court).

[179] ibid [98].

[180] ibid [89].

consensual storage and exchange of SGSM among minors and exploitative or non-consensual content.[181] Thus, adolescents creating and storing sexually explicit images of themselves on their device, sending such material, or storing the material while intending to send it, can technically be prosecuted. Further, adolescents who approach authorities for the non-consensual sharing of their private images face the risk of being prosecuted themselves, for creating those images and sharing them in the first place.

Notably, consensual sexual activity by adolescents in the digital realm was considered by an ad-hoc Committee of the Rajya Sabha in December 2019, constituted to examine issues arising out of the increased accessibility of pornographic material and its effect on society.[182] It observed that minors/young adults are engaged in exchanging selfies or sexting and, in this context, considered the introduction of an exception clause in Section 15 as follows:

> "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."[183]

Some members of the Committee felt 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".[184]

Although sexting amongst minors is typically criminalised under child pornography laws in most jurisdictions, exceptions have been carved out in some countries (See Box) such as treating consensual sexting separately, allowing police discretion, reducing penalties, applying close-in-age exemptions, offering affirmative defences, or diverting such cases from the criminal system.

Criminalisation of an adolescent for non-exploitative and consensual SGSM offends their right to privacy as interpreted in *Justice K.S. Puttaswamy v Union of India*[185] to include "at its core the preservation of personal intimacies…."[186]

While acknowledging the risks related to sexting such as sexualised images of children being disseminated beyond the child's control, difficulty in taking down such images, and the possibility of the material being used for bullying or sexual extortion,[187] the Committee on the Rights of the Child has cautioned that:

> "A distinction must be made between… "child pornography", which constitutes a criminal offence, and the production by children of self-generated sexual content or material representing themselves. The

[181] Siddharth P and Uma Subramanian, 'SC Ruling on Child Sexual Exploitation Material Could Criminalise Normal Adolescent Behaviour' *Indian Express* (26 September 2024).

[182] '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' (Rajya Sabha 2020) ("Ad hoc Committee Report 2020").

[183] ibid, para 1.3.

[184] Ad hoc Committee Report 2020 (n 182) para 1.3.

[185] *Puttaswamy* (n 51).

[186] ibid [844].

[187] CRC Optional Protocol 2019 (n 1).

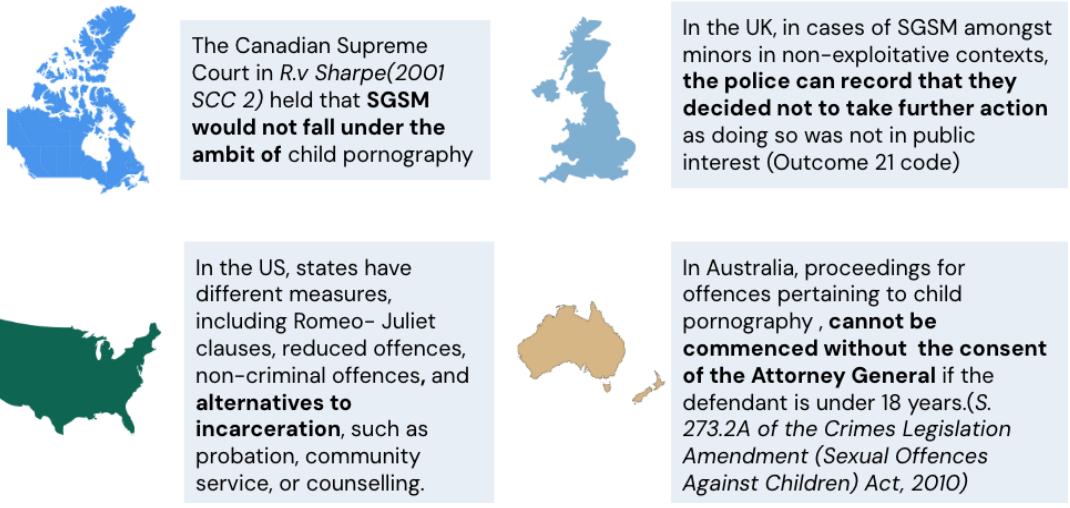
Committee is **concerned that the self-generated aspect of such material could increase the risk that the child is considered responsible instead of being treated as a victim, and underscores that children should not be held criminally liable for producing images of themselves**."[188]

Further, in General Comment No. 25 (2021) on Children's Rights in relation to the Digital Environment, the CRC emphasised the need to balance the agency of children based on their competence and understanding, with protection from risks,[189] stating:

> **"Self-generated sexual material by children that they possess and/or share with their consent and solely for their own private use should not be criminalised**. Child-friendly channels should be created to allow children to safely seek advice and assistance where it relates to self-generated sexually explicit content."[190]

At the regional level, the Lanzarote Committee under the Council of Europe's Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, emphasised the right to privacy in the context of self-generated sexual material by children for their private use and urges States to "relieve them from offences related to 'child pornography'…".[191] It also re-emphasised that such acts do not constitute criminal offences, and criminal prosecution should be the last resort.[192] The African Committee of Experts on the Rights and Welfare of the Child also states that children should not be held criminally liable for producing images of themselves[193] and such material should not be regarded as child sexual abuse material if it is made consensually and for private use, unless such images are a result of coercion, blackmail or any other undue pressure on the child.[194]

Illustrative Legal Approaches to SGSM



[188] ibid para 67.

[189] CRC General Comment No. 25 (n 46) para 20.

[190] ibid para 118.

[191] Lanzarote Committee, 'Opinion on Child Sexually Suggestive or Explicit Images and/or Videos Generated, Shared and Received by Children' (Council of Europe, adopted on 6 June 2019) 3.

[192] ibid 4.

[193] African Committee of Experts on the Rights and Welfare of the Child, 'General Comment No 7 on Article 27 of the ACRWC: Sexual Exploitation' (1 July 2020) 26.

[194] ibid 26.

Concerns related to risks faced by adolescents online are best addressed through age and culturally-appropriate comprehensive sexuality education programs at an early age in schools and public campaigns that address the risks associated with SGSM, and include aspects such as respect, confidentiality, body image, consent, bullying, harassment, and the difference between healthy and harmful online behaviours.[195] Content also needs to be user friendly, customised and efforts must be made to reflect the lived realities and reach out to all children including those in rural areas, children with disabilities, children in shelters, and out of school children.[196] Teachers and parents should also be included in these interventions, so as to ensure they can respond to children in a non-judgmental and effective manner.[197] Technology companies must moderate their platforms, and respond effectively to reports of threatening behaviour,[198] along with development of tools and protocols that enable timely removal of abusive material.[199] Capacities of child protection functionaries need to be built on the rapidly changing characteristics of technology facilitated exploitation, abuse and coercion, and for them to respond in an empathetic, trauma-informed manner.[200]

Existing laws should recognise adolescent behaviour online and ensure that non-exploitative and consensual SGSM is not criminalised. The unintended consequence of criminalisation is that adolescents will be prevented from seeking help for technology-facilitated violence for fear of prosecution.

[195] Clara Rübner Jørgensen and others, 'Young people's views on sexting education and support needs: findings and recommendations from a UK-based study' (2019) 19(1) Sexuality, Society and Learning 25; Alexandra Kushner, 'The Need for Sexting Law Reform: Appropriate Punishments for Teenage Behaviors' (2013) 16 University of Pennsylvania Journal of Law and Social Change 281.

[196] ECPAT International 'Promising Government Interventions Addressing Online Child Sexual Exploitation and Abuse' (End Violence Against Children 2022) 6.

[197] WeProtect Global Alliance, 'Global Threat Assessment 2021' 65 ("WeProtect 2021").

[198] Thorn, 'Self-Generated Child Sexual Abuse Material: Attitudes and Experiences' (2020) 45.

[199] WeProtect Global Alliance, 'Child 'Self-Generated' Sexual Material Online: Children and Young People's Perspectives'.

[200] WeProtect 2021 (n 197) 65.

V. Conclusions and Action Pathways

Criminalisation of factually consensual and non-exploitative sexual acts among adolescents and young people denigrates their right to life, dignity and privacy under the Indian Constitution, undermines their best interests and evolving capacities, deters them from seeking sexual and reproductive health services, and results in the deprivation of their liberty.[201] Viewing all adolescent relationships from the prism of potential exploitation blatantly disregards the harm it causes to the adolescents the law seeks to protect.

International standards emphasise approaches that balance protection with respect for adolescents' evolving capacities and autonomy. They caution against criminalising consensual, non-exploitative sexual activity and self-generated sexual content among adolescents. It is necessary for laws to reflect the reality and normalcy of adolescent sexual behaviour and support young people in their choices,[202] rather than criminalising them for normative acts that are a reflection of their evolving autonomy. [203]

Continued criminalisation of adolescents cannot be justified as a measure to combat child marriage, child trafficking for sexual purposes, and online child sexual abuse and exploitation. There are laws to address these distinct issues and any lacunae in their design or implementation cannot justify the blanket criminalisation of all adolescent sexual behaviour. While the concerns related to early marriage and trafficking are real and pressing, they are driven by deep-rooted socio-economic inequalities, patriarchal norms, poverty, and lack of access to education and employment. Factors that make children vulnerable to under-age marriage, early motherhood, and child trafficking require an empowering approach that involves investment in socio-economic measures, functional community-based child protection systems, free and accessible education till 18 years, life-skills, comprehensive sexuality education (CSE), confidential access to sexual and reproductive health services, gender transformative approaches and robust enforcement systems. Recent judgements of the Supreme Court on child marriage[204] and CSAM[205] have also acknowledged the critical role of sexuality education in empowering adolescents.

The proposal to decriminalise sexual acts involving persons above 16 years and below 18 years is consonant with their fundamental rights to life, liberty, dignity, and privacy, and their best interests and evolving autonomy. This approach ensures that adolescents are recognised as individuals undergoing a critical developmental phase who should not be

[201] Ramakrishnan and Raha (n 9) 60; Raha 2021 (n 6); UNICEF and UNFPA 2020 (n 136) 3; UNFPA, 'Technical Brief: Criminalization of Consensual Sexual Acts among Adolescents in East and Southern Africa' (2020); See also *Teddy Bear Clinic* (n 59); *Vijaylakshmi* (n 10) [28]; *Pooja* (n 53) [17]; *Parampreet* (n 12); *Anandan* (n 13).

[202] UNICEF and UNFPA 2022 (n 3) 2; AKP 2024 (n 141) 64-65.

[203] UNICEF and UNFPA 2022 (n 3) 7.

[204] *Society for Enlightenment and Voluntary Action* (n 138) [158], [195].

[205] *In Re: Right to Privacy of Adolescents* (n 85) [18].

subject to the trauma of criminalisation for normative sexual acts under the garb of protection. It also ensures that all protections under the POCSO Act remain in place to address non-consensual or exploitative acts against them. Such decriminalisation will not impact other protection laws regarding under-age marriage, trafficking, and cybercrimes which remain independently enforceable.

Protecting adolescents from harm cannot come at the cost of subjecting them to unjust criminalisation. Instead, there is a need to invest in supportive, rights-based interventions that foster healthy, informed, and empowering transitions into adulthood.

Action Pathways

1. The Central Government and Parliament must engage in extensive stakeholder consultations and decriminalise factually consensual non-exploitative sexual acts involving adolescents between 16-18 years by examining the following suggestions:

- Amendment of the POCSO Act and BNS to exclude factually consensual and non-exploitative sexual activity with those between 16-18 years while ensuring their protection against non-consensual and/or exploitative sexual acts.
- Amendment of the POCSO Act, BNS, and IT Act to prevent and avoid prosecuting children for creating or sharing self-generated sexual content.
- Amendment of the POCSO Act and BNSS to recognise the right of those between 16-18 years to refuse to report a case to the police and ensure their unhindered and confidential access to medical services and treatment.
- Amendment to Section 120 of the Bhartiya Sakshya Adhiniyam, 2023 to extend the presumption as to the absence of consent in certain prosecutions for rape, to victims above 16 years and below 18 years.

2. Police, Juvenile Justice Boards, and Child Welfare Committees need to adopt interim harm reduction measures recognised under existing laws, such as:

- Utilising Section 35, BNSS to avoid arrest in cases of factually consensual and non-exploitative sexual acts involving those between 16-18 years.
- Applying the principles of dignity and worth, participation, best interest, and institutionalisation as a measure of last resort under the JJ Act, 2015 while making decisions in cases of children involved in factually consensual and non-exploitative acts, including to avoid the transfer of children above 16 years for trial as an adult and explore alternatives to institutionalisation.
- Periodic review of decisions related to institutionalisation of adolescent girls above 16 years in factually consensual and non-exploitative sexual acts.
- Ensuring access to legal representation to approach High Courts to quash trials or institutionalisation in cases of factually consensual and non-exploitative sexual acts.

3. Central Government and State Governments need to invest in structural, proactive, and preventive interventions including:

- Ensuring functional Village and block level Child Protection Committees to identify risks, provide timely support, and reduce vulnerabilities.
- Ensuring culturally sensitive and age-appropriate CSE in schools and child care institutions.
- Ensuring free and compulsory education up to 18 years.
- Expanding access of adolescents at risk to vocational training, hostel facilities, skilling programmes, adolescent support groups, and social security schemes.
- Providing comprehensive life skills education to children empowering them to make better decisions concerning their lives and body, negotiating consent, and exercising their agency.
- Ensuring barrier-free and confidential access of adolescents to SRH services and schemes through adolescent-friendly health clinics and helplines.
- Operationalising the Supreme Court's directive[206] on respecting the privacy of minors seeking abortion arising from a consensual case.
- Strengthening and enforcing laws on child marriage, child trafficking, and online child sexual abuse and exploitation, drawing on evidence-based strategies targeting factors that make adolescents vulnerable to these harms.

4. National and State Training Academies for the judiciary, police, doctors, and child protection workforce should include a module on building perspectives on adolescent rights, interplay of laws, and rights-based responses, including:

- Adolescent development, including adolescent sexual behaviour, and concepts of evolving autonomy and best interests.
- Interaction of the POCSO Act with the PCMA, IT Act, and other laws and its impact on adolescents.
- Harm reduction measures within the law that can be applied in cases of factually consensual and non-exploitative sexual acts.
- Implications of criminalisation on the rights of adolescents.
- Techniques of sensitive and non-judgmental communication with adolescents.

5. Judiciary, Nodal Ministries and Departments, National and State Commissions for Protection of Child Rights, universities, researchers, and media should sensitively monitor and collect data on the extent of criminalisation and its impact on adolescents, including:

- Collecting disaggregated data on offences to indicate ages of parties, nature of cases such as whether they are factually consensual or exploitative, length of detention pending trial, outcomes, and time taken to dispose of cases.
- Tracking impact of criminalisation on education, employment, and access to sexual and reproductive health services, disaggregated by gender and age.
- Making data available to the public to promote transparency, accountability and informed public discourse on age of consent laws.

[206] *X v Principal Secretary* (n 51).

National Coalition
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