



Right to Sexual Autonomy of Children—Implications of the UNCRC upon the Indian Law on the Age of Consent

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Abstract

This article discusses the implications of sexual autonomy of children under international child rights regime upon Indian law. Indian general criminal law defining the offence of rape and a special statute defining different types of child sexual assault led to the inference that the current age of consent is 18 years. Despite statutory prohibition of child marriages in India, the general criminal law contains an explanatory provision exempting the rape of a married woman above the age of 15. The Supreme Court of India struck this down as discriminatory and inconsistent with existing provisions of law, increasing the age of consent of a married woman to 18. It is necessary for Indian law to clearly define the age of consent of children, and grant rights of sexual autonomy to children who are capable of making their own decisions, without compromising on penalising sexual offenders of children.

Keywords

Age of consent; age-proximity exceptions; child marriage; child rights; criminal law; sexual autonomy.

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Introduction

Respect for human dignity and freedom lies at the core of the concept of human rights. The principle of personal autonomy underlies the interpretation of the right to respect for human rights. Lack of respect for the rights of human dignity and freedom cannot be justified by attitudes of former times, and states are obligated to remove the negative effects of such attitudes. A person has freedom to develop and fulfil his or her personality only when there is free expression, and the freedom to establish and develop relationships with other people, especially in emotional terms. The freedom to engage in consensual sexual activity and the right to privacy embodies the right to personal development (Graupner and Bullough 2012). The age of consent has historically coincided with puberty, although it has sometimes been as young as seven years. Initially, this was a tribal or familial matter, which became a legal one in the Greco-Roman period. The Roman tradition served as the basis for Christian Europe and the Christian Church, which set the age of consent at 12 or 14 years based on biological development, but continued to set the absolute minimum at seven years. There has been a tendency to raise the age of consent in the past century, but the exact reasons have not been documented clearly. This has distorted the importance of biology on the age of consent (Bullough 2012).

Under Article 12 of the *United Nations Convention on the Rights of the Child 1989 (UNCRC)*, the state is obligated to make provisions to ensure a child is free to express his or her own views in accordance with age and maturity. Children should also be given an opportunity to be heard before any judicial and administrative proceedings affecting the child. This is particularly relevant in judicial proceedings involving relationships, when the age of consent has been fixed at a particular age.

India acceded to the *UNCRC* in 1993. However, there was no federal law that punished sexual offences against children. The general criminal law in the *Indian Penal Code 1860 (IPC)* does not have a chapter on specific offences against children. The *Juvenile Justice (Care and Protection of Children) Act 2000* included a chapter on offences against children, including offences of cruelty through physical and mental abuse, employment of a child in begging, provision of intoxicating substances like liquor and drugs to children, and exploitation of a child for the purpose of employment. However, it was a regional statute for the state of Goa—the *Goa Children's Act 2003*—that clearly listed various offences against children of a physical, mental and sexual nature.

Prosecution of sexual offenders of girl children is possible, as various provisions in the *IPC* created offences of 'rape' (sections 375 and 376), 'word or act intended to insult the modesty of a woman' (Section 509) and 'assault or criminal force to woman with intent to insult her modesty' (Section 354). These offences are problematic in many ways, as the definitions, judicial interpretations and punishments are inadequate to address the issue of sexual violations of girl children. Even today, there is no offence that defines or punishes the sexual molestation of boy children in the *IPC*. Section 377 of *IPC* ('unnatural offences') punishes voluntary sexual intercourse of an 'unnatural' nature with a man, woman or animal. This is generally understood as the provision that punishes homosexuality in India. Sexual violations of boy children by males have been wrongly categorised under this provision, due to the lack of an adequate alternative.

It was only in 2012 that federal special legislation for protecting children from sexual abuse—the *Protection of Children Against Sexual Offences Act 2012 (POCSO)*—was enacted to specifically punish offences of sexual nature against children under 18 years of age all over India. Thereafter, Section 375 of the *IPC* was amended in 2013. It clarifies that non-consensual sexual intercourse with a woman over the age of 18 years constitutes rape. Thus, the age of consent for women has been increased to 18 years; sexual intercourse under this age amounts to statutory rape. However, no offence in *IPC* punishes sexual misdemeanours against boy children.

A classification of sexual behaviour among children

Sexual activity can be grouped into consensual and non-consensual, and abusive or non-abusive. Consent of children under the age of 18 is now technically immaterial, as they are deemed by law to be incapable of consent. However, social science evidence shows that it is a common part of sexual development for young people to explore and experiment sexually with their peers (Araji 2004). Appropriate sexual exploration is when there is mutual agreement between same or similar-aged peers, it is non-coercive, and all participants have the power to participate, continue or stop the behaviour (Barbaree and Marshall 2006).

This research paper proceeds on the premise that the sexual activity of children can be both abusive and non-abusive. It is necessary for law enforcement personnel to be equipped to identify and deal with both abusive and non-abusive sexual behaviour of children in a child-friendly manner to uphold child rights principles under Article 12 of the *UNCRC*.

Historical evolution of the law regarding age of consent in India

When the *IPC* was enacted in 1860, Section 375 punished the offence of rape of a woman over the age of 10 years (Clause 5, Section 375), and allowed an exemption to the husband of a child-wife above the age of 10. The original exception to Section 375 *IPC* in 1860 read: 'Sexual intercourse of a man with his own wife, the wife not being under ten years of age, is not rape'.

In *Queen Empress v Hurree Mohun Mythee* (1891; ILR 18 Cal 49), Phulmoni, an 11-year old premenstrual girl, died of haemorrhaging following forced sexual intercourse with her 35-year-old husband in 1890. It was held that intercourse was not the cause of death. The charge of rape did not arise because she was clearly over 10 years of age—the legally permissible age for sexual intercourse within marriage under the exception to Section 375. The husband was found merely guilty of causing death inadvertently by a rash and negligent act and given one year's rigorous imprisonment. After Phulmoni's death, 44 women doctors, as part of the reformist movement to raise the age of consent, brought out lists of child-wives who had died or suffered grievous hurt, igniting debate on marital rape in India (Kannabiran 2009). After considerable opposition from some Indian leaders (who viewed this as interference by British rulers into the Hinduism), the colonial government succeeded in increasing the age of consent for sexual intercourse for a girl from 10 to 12 years by the *Age of Consent Act* passed in 1891 (Sharma and Gupta 2015).

It is pertinent to note that both married and unmarried women had the same age of consent (12 years). In 1925, a distinction was created regarding the age of consent for married and unmarried women. The age of consent for married women was increased to 13 years, and for unmarried women, 14 years. In 1940, the age of consent was increased to 15 years for married women and 16 years for the unmarried.

In 2012, *POCSO* criminalised all sexual activity of children below the age of 18 years under the offences of penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual assault, sexual harassment, using a child for pornographic purposes and so on. The age of consent for sexual activity of both boys and girls under the age of 18 was stated for the first time in the case of boy children as 18, and increased from 16 to 18 in the case of girl children. Thus *POCSO* criminalised all sexual activity, both penetrative and non-penetrative, of male and female children below the age of 18.

The Justice JS Verma Committee—constituted in December 2012 by the Union government to suggest changes to criminal laws in India—objected to the increase in the age of consent. Such an increase would criminalise all consensual sexual activity of children below the age of 18, which goes against the spirit of the *UNCRC* (Verma, Seth and Subramaniam 2013, 443–444).

In 2013, the age of consent of unmarried women was increased to 18 by the *Criminal Law (Amendment) Act 2013* amendment of Section 375 *IPC*. However, the age of consent of married women remained at 15 years. It is also of significance to note that males are excluded from the ambit of victims of the offence of rape under Section 375 *IPC*. *IPC* prohibits consensual and non-consensual penetrative sexual activity of an unmarried woman below the age of 18 with a man of any age. It does not penalise homosexual sexual activity of women or men or non-penile-vaginal sexual offences of men and women of a non-voluntary nature under Section 377 *IPC* or any other provision in *IPC*.

The age of consent before and after POCSO –A lack of clarity

To summarise, before passing the *POCSO* in 2012, law regarding the age of consent was governed entirely by *IPC* and was as follows:

1. Age of consent of an unmarried female—16 years
2. Age of consent of a married female—15 years
3. No age of consent for males.

POCSO in 2012 altered the age of consent as follows:

1. Age of consent for females—18 years
2. Age of consent for males—18 years.

Hence, the law regarding the age of consent of unmarried females conflicted in *IPC* and *POCSO*. *POCSO* does not distinguish between married and unmarried female children. The age of consent for males also differed between *IPC* and *POCSO*. Section 42 of *POCSO* stated that in case of conflict between *POCSO* provisions and any other law, the law that provides for greater punishment would prevail. Since *POCSO* punishments were greater than *IPC* punishments, the general rule was that *POCSO* would override *IPC* in cases of sexual assault.

After the amendment to *IPC* in 2013, the law (reading *IPC* and *POCSO* together) with regard to the age of consent was as follows:

1. Age of consent of an unmarried female—18 years
2. Age of consent of males—18 years.

Section 42 of *POCSO* was amended by the *Criminal Law (Amendment) Act 2013* to include a statement that in the event of conflict between *POCSO* and certain provisions of the *IPC*, the offender would be punished as per the law that provides for greater punishment. Section 42A was inserted into *POCSO* by virtue of this amendment, stating that the provisions of *POCSO* shall override the provisions of any law that is inconsistent with *POCSO*. As *POCSO* does not recognise sexual intercourse between a child-wife above the age of 15 with her husband, it stands to reason that by virtue of Section 42A of *POCSO*, the age of consent of a married female ought also to be 18 years (Mathew 2017b).

To complicate things further, the *Prohibition of Child Marriage Act 2006* specifies 18 as the legal age of marriage for a woman, and 21 as the legal age for marriage of a man. So as per the statute, women can enter sexual relationships within marriage from the age of 15, and enter sexual relationships outside marriage after the age of 18 (pre-2013 *Criminal Law (Amendment) Act 2013*, women's age of consent was 16 as per Section 375), while males can enter sexual relationships within marriage before the age of 21, and outside marriage from the age of 18.

Independent Thought v Union of India and Another (AIR 2017 SC 4904) questioned the lack of clarity regarding age of consent laws for married and unmarried females. The Supreme Court

struck down the offending explanation to Section 375 *IPC* and substituted the age of 18 years for a married woman for 15 years.

The Supreme Court reasoned that although Exception 2 of Section 375 *IPC* states that sexual intercourse with a girl over the age of 15 is not rape, this exception creates an artificial distinction between a married girl-child and an unmarried girl-child, which is arbitrary and against the best interests of the girl-child. It struck down this exception as violative of the Indian Constitution, which guarantees fundamental rights of equality, non-discrimination and life and personal liberty. This *IPC* provision also conflicts with *POCSO* provisions that define the offences of penetrative sexual assault and aggravated penetrative sexual assault. The Supreme Court upheld the prevalence of *POCSO* over *IPC* based on Section 42A of *POCSO*, which outlines the principle of the pre-eminence of *POCSO* over conflicting laws.

Thus, the distinction between married and unmarried women regarding the age of consent for sexual intercourse, and the incongruence between age of consent for females in *IPC* and *POCSO*, has been removed by the Supreme Court. However, incongruence regarding the age of consent for males in *IPC* and *POCSO* remains, as *IPC* still does not recognise the sexual violation of males.

The age of consent and child marriages in India

In 1929, the *Child Marriages Restraint Act 1929* took measures to restrain child marriage by providing for mild punishments against the adult male marrying the child, the parent/guardian of the child whose marriage was performed, and the person who performed or directed the ceremony. It was silent about the validity of a child marriage. It took another 77 years for the Indian government to prohibit child marriage through a national law: the *Prohibition of Child Marriages Act 2006*. Here, a 'child' is defined as a person who, if a male, has not completed 21 years of age, and if a female, has not completed 18 years of age. Yet, child marriage is not void under this enactment. Such a marriage is voidable, and can be nullified upon attainment of the age of majority. Arguments state that the age of marriage for females can increase only when the standard of living is raised, and when public spaces are safe for them to pursue their education. Hence, the age of consent for women ought to be 16 years, not 18, as this would only strengthen patriarchal power and weaken the negotiating power of young girls contracting marriages of choice (Agnes 2018).

General criminal procedural law also contains a provision that discriminates against the child-wife. Section 198 of the *Code of Criminal Procedure 1973* deals with prosecution for offences against marriage. According to Sub-Section 6, the courts cannot consider an offence of rape under Section 376 of *IPC* one year after the lapse of an offence regarding sexual intercourse by a man with his own wife who is below 18 years of age.¹

In paragraph 12 of *Independent Thought (2017)*, the judges relied upon documentary evidence enumerating the immense negative effects on the physical and mental health of the girl-child. These effects included social consequences like early pregnancy, maternal and neonatal mortality, child health problems, exposure to violence and abuse, negative physical and psychological consequences, educational setbacks, lower employment/livelihood prospects and limited agency to influence decisions about their lives to reach their decision. Such adverse effects might even have an intergenerational impact (Mathew 2017a).

With regards to children between the age of 16 and 18, it is important to establish the age of consent for sexual activity. The *Prohibition of Child Marriage Act 2006* specifies 18 as the legal age of marriage for a woman, and 21 as the legal age for marriage of a man. This enactment recognises the validity of child marriage. According to Section 13, child marriages are not void ab initio, but only voidable at the option of the contracting party, provided that such marriage, whether consummated or not, was repudiated within two years of either party attaining the marriage age.

The age of consent of children involved in consensual sexual relationships

In 2012, the *POCSO* criminalised all sexual activity with children under the age of 18, irrespective of the age of the offender. It is of particular concern when a minor is convicted for rape, even if he has consensual sex with a girl below the age of 16, especially when teenage consensual sex is increasing (Jaising 2015). *POCSO* criminalises sexual behaviour with and by children up to 18 years, which has resulted in discriminatory situations in which two children who are in non-abusive sexual relationships become criminals before the law. The only legal recourse for children below the age of 18 who enter into consensual sexual relations, to evade a minimum term of 10 years' rigorous imprisonment under the *POCSO*, is to marry (Raha and Giliyal 2012). Any consensual sexual act that may constitute penetrative sexual assault should not be an offence when it is between two consenting adolescents, otherwise both adolescents will be charged under the *POCSO* (Moirangthem, Kumar and Math 2015)

The age of consent of children—Whether case law recognises the difference between 'coercion' and 'consent'

Indian law does not adequately recognise the issue of non-consensual sexual experiences of young people or the special vulnerability that adolescents face by virtue of their age in situations of sexual coercion. There is need to adopt a comprehensive definition and understanding of both 'sexual violence' and 'coercion' based on the particular experiences of adolescent communities and developments in international and national law. This must also consider the different fiduciary and non-fiduciary relationships of adolescents that involve coercion. Any process of reform must emphasise sensitive and effective procedures that recognise the reality of adolescents' vulnerability, and ensure that this vulnerability is not aggravated in courts. A simultaneous process of legislative and judicial reform is necessary to incorporate this recognition in Indian laws and judicial processes (Jaising 2005).

Non-criminalisation of consensual sexual activity between consenting individuals: Case law in India

The following are case law from various High Courts in India that show the intersection between child marriage, sexual consent of children below the age of 18 and Indian criminal law. It is pertinent to note that in certain cases, criminal proceedings against the accused have been quashed by invoking Section 482 of the *Code of Criminal Procedure 1973 (CrPC)*.² The *CrPC* lays down the general procedure for the prosecution of offenders with a specific hierarchy of criminal courts that applies uniformly across every state.³

Yunusbhai Usmanbhai Shaikh v State of Gujarat and Others (MANU/GJ/0876/2015)

The 16-year-old daughter of the complainant married the accused according to Muslim rites. The accused was 12 years older than her. He was charged for kidnapping, abducting and inducing a woman to compel her marriage, and rape under the *IPC*. It was found that the daughter of the complainant admitted she had accompanied the accused of her own free will. It could not be proved that she had received any promise, assurance or tempting offer from the accused to force or entice to leave her parental home. Hence, it could not be proved that he had kidnapped her, nor could rape be proved. Pending criminal proceedings against him were likely to be quashed. The Court stated that the object of enacting the *Prohibition of Child Marriages Act 2006* was to curb the menace of child marriages, which is most common among the Muslim community and in rural areas. Poverty, culture, tradition and values based on patriarchal norms are reasons for child marriage. The low level of education of girls, lower status of girls, the consideration of girls as a financial burden, social customs, and a mixture of these causes result in the imprisonment of girls in marriage without consent. However, no case was made for the offences charged upon the husband.

Sunil Mahadev Patil v The State of Maharashtra (MANU/MH/3141/2015)

A 15-year-old girl and a 20-year-old man eloped. They performed a ceremony in lieu of marriage and began residing together in a relative's home. The girl's father charged her partner with the offences of rape, kidnapping and procurement of a minor girl under the *IPC* and penetrative sexual assault and aggravated penetrative sexual assault (under the *POCSO*). The High Court stated that biologically, whenever a child reaches puberty, the child begins to understand his or her sexual needs. Some sects and religions acknowledge this biological factor and perform early-age marriages to regulate sexual behaviour in the community. These social and biological factors meant that lawmakers used 15 years as the age of consent for marriage. In such cases, trial judges ought to pass orders of bail. The High Court allowed the bail application and summed up the considerations regarding applications of bail:

When a boy and a minor girl are in love with each other and chose to live together without consent of their parents, then the following factors are to be considered:

- (i) What is the age of the prosecutrix, who is minor
- (ii) Whether the act is violent or not.
- (iii) Whether there are antecedents or not.
- (iv) Whether the offender is capable of repeating the Act or not.
- (v) Whether there is likelihood of threats or intimidation, if at all the boy is released.
- (vi) Whether any chance of tampering with the material witnesses when their statements are recorded.
- (vii) It is also to be taken into account in such cases that a boy in his early 20s deserves to get employment and to plan, stabilize and secure his future.

Shambu Thilak v State of Kerala and Others (MANU/KE/0043/2017)

The petitioner and third respondent were schoolmates and deeply in love. When the third respondent was 17 years old, she went missing from her friend's house and was found to have engaged in sexual intercourse with the petitioner, who was 20 years old. Her mother filed a case against the petitioner for rape under *IPC* and penetrative sexual assault under *POCSO*. In 2015, when both the petitioner and third respondent attained the age of majority, they married. The Court opined that this was a case of elopement of a girl with her lover against the wishes of her family members, and not a case wherein the allegations reek of extreme depravity, perversity or cruelty. Hence, the offence in this case does not fall in the category of offences that have a serious impact on society. This was a case of a long-term love affair between two young people that had endured and ended in marriage.

Justice Raja Vijayaraghavan of the High Court of Kerala exercised the extraordinary powers of the High Court under Section 482 of *CrPC* to quash the criminal proceedings against the petitioner, citing the extreme hardship caused to the third respondent if criminal proceedings against her husband were to continue. The learned judge reasoned that when the third respondent asserted that she did not want to prosecute her husband any further, the prospects of an ultimate conviction are remote.

Various decisions of Indian High Courts demonstrate that judges favour non-criminalisation of sexual activity when the child is mature and responsible enough to understand the implications of his or her sexual act. These decisions illustrate a trend against the criminalisation of sexual activity between mature individuals, even though the female party may be a minor.

The age of consent for sexual activity—Perspectives from international law

The *UNCRC* defines many rights regarding children. The *UNCRC* was acceded to by India on 11 December 1992, with certain reservations relating to child labour. This convention contains internationally recognised principles on child sexual abuse that need to be adopted into Indian domestic law.

Article 34 of the *UNCRC* defines sexual exploitation and sexual abuse as comprising:

The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.

Article 19 of the *UNCRC* stipulates that state parties ought to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of sexual abuse while in the care of parent(s), legal guardian(s) or any other person who has care of the child.

Child marriage is not unlawful in India. It cannot be considered ‘unlawful sexual activity’, which comes within the ambit of Clause 1 of Article 34. However, it is not possible to legalise child marriage, as Article 19 stipulates protection of a child from all forms of sexual abuse when in the care of any other person who has care of the child. Here, the husband is entrusted with the care of his child-wife. Hence, India is obligated to fulfil its international obligations by making child marriage unlawful.

In 2011, the Committee on the Rights of the Child, which elaborated on the meaning of ‘sexual abuse’ for the purpose of interpreting and applying Article 19, stated that sexual abuse comprises any sexual activities imposed by an adult on a child, against which the child is entitled to protection by criminal law. Sexual activities are also considered abuse when committed against a child by another child, if the child offender is significantly older than the child victim or uses power, threats or other means of pressure. Sexual activities between children are not considered sexual abuse if the children are older than the age limit defined by the state party for consensual sexual activities (United Nations Committee on the Rights of the Child 2011, 10).

Under Article 12 of the *UNCRC*, the state is obligated to make provisions that a child is free to express his or her own views in accordance with age and maturity. The child shall be given an opportunity to be heard before any judicial and administrative proceedings affecting the child. This is particularly relevant in judicial proceedings involving romantic relationships, when the age of consent has been fixed at 18 under the *POCSO*. It is clear that a problem exists in establishing whether a child is of sufficient maturity to decide on matters of sexual consent.

The lower judiciary currently faces a large number of cases wherein the victim is a girl between the ages of 16 and 18, who has made a choice to enter a relationship with a man. If these relationships are against parental wishes, or the girl-child feels that her lover has cheated her, then cases against the man/boy involved would be booked under the *POCSO*. In many cases, the *POCSO* is used against innocent parties to settle scores. This is because the law does not recognise sexual autonomy in any form. The criminal justice system is compelled to respond by prosecuting the adult male in such circumstances, and the judiciary and police stand as mute witnesses to this abuse of the right of mature children to exercise their sexual freedom and choice of sexual partner.

Five studies were conducted by the Centre for Child and the Law at the National Law School of India University in the states of Delhi, Assam, Maharashtra, Karnataka and Andhra Pradesh

between 2016 and 2017. As subordinate courts are not Courts of Record, obtaining data regarding *POCSO* court judgments is fraught with difficulty. The CCL-NLSIU studies analysed *POCSO* court decisions passed between 2013 and 2017. In many cases involving romantic relationships, a complaint was filed by the family, following which the prosecutrix and the accused were found to have married each other. In a few cases, the complaint was filed by the prosecutrix because of a breach of the promise to marry. In none of the cases in which the prosecutrix admitted to a romantic relationship was the voluntary nature of the relationship or the age gap between them scrutinised by the court (CCL-NLSIU 2016).

The absence of a clear law regarding the age of consent creates problems for the criminal justice system. Not only should the law specify the age of consent, it should define the age of consent for a person to have sexual relations with older or younger partners. There is a need for a general law on the specific matter of the age of consent. Such a law must not be appended to a provision on rape in the *IPC* or the *POCSO*, as these laws deal with crimes against children. Instead, this law should specify the civil rights of a person regarding two factors. It should define the age of consent for a person to have sex with partners older than them. Second, it should affirm the age at which a person can consent to have sex with someone who is within a certain age category if both partners are under the age of 18. Many jurisdictions have specific laws on this. As rightly pointed out by the Justice JS Verma Committee, the aim of the *UNCRC* (upon which the *POCSO* is based) is to protect children from sexual assault and abuse, not to criminalise consensual sex between two people, even if they are under 18 years of age (Verma, Seth and Subramaniam 2013). The absence of a general law that allows for sexual autonomy of a person below the age of 18 in certain circumstances makes the law incorrect. This is because it does not provide adequate protection to people between the ages of 16 and 18 who choose to engage in consensual sexual activities that do not amount to assault or abuse or compulsion due to customary practices.

Age-proximity exceptions in international law

Article 40 of the *UNCRC* exhorts state parties to recognise the right of every child alleged as, accused of, or recognised as having infringed the law to be treated in a manner consistent with the promotion of the child's dignity and sense of worth. This reinforces the child's respect for the human rights and fundamental freedoms of others and considers the child's age and the desirability of promoting the child's reintegration and constructive role in society. Many countries have 'close-in-age' or 'age-proximity' exceptions for consensual sexual acts between adolescents close in age. This kind of liberal defence minimises unjust prosecution (Warner 2013).

In Australia, the age of consent is 16 years in all states, except for Tasmania and South Australia, which have a higher age of consent (17 years). Western Australia, Tasmania, Victoria and the Australian Capital Territory provide a legal defence when the sexual interaction is between two young people close in age. In South Australia, the defence of consent is only available to a person under the age of 17 and only when the person with whom they had sexual intercourse (the complainant) is at least 16 years of age [s49[4] of the *Criminal Law Consolidation Act 1935* [SA]]. In Victoria, as long as the complainant is at least 12 years old and the accused is not more than two years older, consent is a defence [s45[4] of the *Crimes Act 1958* [Vic]]. The Australian Capital Territory has a similar-age consent defence if the complainant is 10 years of age or older and the accused is not more than two years older [s55[3] of the *Crimes Act 1900* [ACT]].

In Austria, Bolivia, Croatia and Sweden, close-in-age exceptions are stipulated for sexual acts if the age difference is less than three years.⁴ Hungary has an age of consent of 14 years, with a close-in-age exception for sexual acts from age 12 if the older party is under 18. In the Netherlands, close-in-age exceptions within 'social-ethical norms' are at the discretion of the prosecution.⁵ In the Netherlands, the age of consent for both males and females is 16 years. However, in 1990, the morality laws were revised so that only upon complaint of a child will all

'non-violent' sexual intercourse with a child between 12 and 16 years be prosecuted, although the age of consent remains 16 years for both males and females (Simpson and Figgis 1997). In Canada, there are two close-in-age exceptions, depending on the age of the younger partner. A youth of 12 or 13 can consent to sexual activity with an individual less than two years older. A 14- or 15-year-old can consent to sexual activity with a partner who is less than five years older (ss150.1[2]–[2.1] of the *Criminal Code [Canada]*)

In the United States, the age of consent varies from state to state, from 16 to 18. Close-in-age exceptions exist, but vary across the states. Federal legislation—the *Adam Walsh Child Protection and Safety Act*—was signed into law in July 2006. Title I of the Act, known as the Sex Offender Registration and Notification Act, establishes minimum registry standards states have to meet, which include registering juveniles found guilty of certain crimes. Various states have enacted laws commonly referred to as 'Romeo and Juliet' laws, which are intended to protect young people who are relatively close in age who engage in consensual sex from registering as sexual offenders. Some states, like Florida, have done this using a motion or petition process for registration relief. Some states have provided age-gap provisions, while others have gone so far as to legalise certain sexual conduct between minors and/or those close in age to avoid the registration requirement and the criminal charge associated with the sexual conduct (Committee on Criminal Justice 2011). Florida's age of sexual consent is 18 years. Its law provides a mechanism for the offender to petition or make a motion to the court to remove the requirement to register as a sexual offender if certain criteria are met: the victim must be at least 14 years old, the offender no more than four years older than the victim at the time of the offence, and the victim must have consented to the sexual conduct (s943.04354 of Florida Statutes). In Delaware, the age of consent is 18, but close-in-age exceptions exist that allow minors aged under 18 years to consent to sexual intercourse if their partner is under the age of 30 or if they were married at the time of the incident (s770 [2] of Title 11, *Delaware Criminal Code*). Minors over 12 may consent to a partner no more than 18 years of age, while children under 12 may not consent under any circumstances (s768-773 of Title 11, *Delaware Criminal Code*). In Hawaii, the age of consent is 16. However, a child aged 14 or 15 can consent to sexual relations with a person not more than five years older than the child (ss707-730, 707-732 of the *Hawaii Revised Statutes*).

The Netherlands model, in which close-in-age exceptions within 'social-ethical norms' are at the discretion of the prosecution, gives provisions to judges to set aside convictions if the accused and victim are within a reasonable age range, with both testifying on the non-abusive nature of the sexual activity. Further, the judge must be convinced that the sexual offence alleged is a manipulation of the legal system for personal vendetta (Mathew 2017a).

In this context, it is interesting to note the case of *Yunusbhai Usmanbhai Shaikh* (2015), discussed earlier, in which a girl of 16 years married a man 12 years older according to Muslim rites, against the wishes of her parents. The Delhi High Court could not find proof of kidnapping or rape of the child, and acquitted the accused husband. It would be helpful for age-proximity exceptions to be inserted via statute in India so that informed decisions may be made by the judiciary regarding whether the right to sexual autonomy was indeed exercised by the child. The fixation of the range of the age of proximity can be problematic, as India is a land of immense cultural diversity.

Conclusion

In a traditionally closed society like India, where religion dominates culture, discussions on sexuality are taboo, and premarital relationships by women are actively discouraged. It may seem highly unlikely that even a discussion on age-appropriate sexual behaviour can be initiated, much less legislation providing defence mechanisms for non-abusive sexual activity. Judicial decisions by the High Courts of various states in India have dismissed cases filed by the minor girl's relatives against adult males who have been found to be genuinely in love with the girl, by taking steps to marry after the girl-child reaches majority. The use of the Section 482 *CrPC* to quash criminal

proceedings under *POCSO* and the *IPC* pending against the accused husband, 'in the interest of justice', is problematic. The legislation clearly stipulates punishment of an offender who involves any child under the age of 18 in sexual activity, with no discretion being granted to sessions judges to waive sentencing duties in case an accused is found guilty of any offence under *POCSO*. This indicates that there is a judicial trend not to criminalise sexual activity when a child is found to be mature and responsible enough to understand the implications of his or her sexual act.

A purview of the law on sexual consent of children in India shows that where the legislature has lagged behind—as portrayed even in major amendment of criminal laws in 2013—by refusing to rethink the law on marital rape of a child-wife, the judiciary has stepped in to redress the anomaly by striking down the offending Exception 2 to Section 375 as unconstitutional. While parliamentarians have not yet risen to classify the parameters of child sexual abuse to exclude non-criminal sexual activities of children, recent judicial decisions in India show that judges favour non-criminalisation of sexual activity when the child is mature and responsible enough to understand the implications of his or her sexual act. This is a welcome step, which will hopefully usher in clear laws regarding sexual consent of children, in tune with child rights principles. Legislative measures for bringing uniformity in Indian law concerning the age of consent of children for marriage and sexual autonomy are essential. These judicial practices highlight the gaps in the law that need to be addressed by legislation.

Age-proximity exceptions for consensual sexual acts between adolescents minimise unjust prosecution. An examination of independent studies by CCL-NLSIU of *POCSO* judgments in various states and judicial decisions of High Courts in India between 2013 and 2017 show that non-criminalisation of non-abusive sexual activity is essential in the interest of justice. Further research is needed to examine whether age-proximity exceptions would solve the current legal dilemma in India regarding the criminalisation of romantic relationships by *POCSO*. This is because of the extreme cultural diversity of Indian society. What may be construed as abusive in one caste or religious group may not be perceived as abusive in another caste or religious group within the same geographical area. The Netherlands model offers positive examples: giving judges discretion to set aside convictions for justifiable reasons (i.e., the non-abusive nature of the sexual activity, the accused and the victim being within a reasonable age range, and the alleged sexual offence as a manipulation of the legal system for personal vendetta).

A method of ensuring compliance with the *UNCRC* would be to make *POCSO* courts into Courts of Record by statute. Currently, only the Supreme Court of India and the High Courts of every state are Courts of Record. The Court of Sessions is the highest subordinate criminal court in India. The Special Court constituted under *POCSO* is a sessions court, with exclusive trial jurisdiction. Unlike ordinary sessions courts, it does not function as a court of appeal from subordinate courts. It would greatly help the administration of justice if legislation could declare *POCSO* courts as Courts of Record, thereby making the decisions of *POCSO* courts widely accessible to all, to facilitate research and development in the area of child rights in India. Uploading decisions to court websites is not a daunting task, given the high access to information technology in India. Accessibility to *POCSO* court decisions would further aid in achieving transparency and ensuring accountability, and thereby strengthen the child rights regime.

It is necessary for the legislators, judiciary and police personnel in India to understand the difference between abusive and non-abusive childhood sexual behaviour while interpreting provisions of the law. The training of stakeholders in various aspects of child psychology is essential, as the general understanding of sexuality and sexual behaviour in India is limited due to social taboos. Such stakeholders would not only include legislators, judiciary and police personnel, but also people under the *Juvenile Justice (Care and Protection of Children) Act 2015*, who include members of the district Juvenile Justice Board and Child Welfare Committee, and personnel employed by non-governmental organisations working with children. It is also

necessary to include parents, teachers, and community and religious leaders, as they are often the first points of contact for a child in distress.

The responsibility of the state to protect children from abusive sexual activity must be balanced with the responsibility of law to respect children's right to sexual autonomy and their evolving capacities of sexual behaviour. It is important to focus on the fact that that a line must be drawn against punishing non-abusive sexual activity by children. Judicial practice in this regard paves the way for changes in legislation and civil society. Other possible solutions can be explored by legislators, judiciary and policymakers to achieve greater transparency and accountability to international principles on child rights.

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¹Through a 2008 amendment, 'fifteen years of age' in this section was substituted with 'eighteen years of age'.

²Section 482 of *CrPC*: 'Saving of inherent power of High Court—Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice'.

³The Supreme Court is the highest appellate court in the Union of India for both civil and criminal matters. The High Court is the highest civil and criminal appellate court within the state, with supervisory powers over lower judicial courts. The Court of Sessions is the highest criminal court of the subordinate judiciary, followed by the Assistant Sessions Court, the Chief Judicial Magistrate Court, and the Magistrate's Courts of First Class and Second Class. The Magistrate Courts are called Metropolitan Magistrates Courts in the metropolitan areas of Delhi, Mumbai, Chennai and Calcutta. There are also various special courts that have been constituted under different enactments. Special Courts constituted under *POCSO* have powers of a Sessions Court and ought to function in every district.

⁴Legal Ages of Consent by Country <https://www.ageofconsent.net/world> (accessed on 25 October 2018).

⁵Age of Consent in Netherlands <https://www.ageofconsent.net/world/netherlands>.

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