Age of consent: challenges and contradictions of sexual violence laws in India*

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Abstract: India enacted a new child sexual abuse law in 2012 and made important changes to the rape law in 2013 to expand the definition of rape and sexual assault, introduce several reforms and improve gender sensitivity in rape trials. However, the child sexual abuse law with its definition of who is a child has increased the age of consent for sex from 16 years to 18 years, echoed by similar changes in the rape law. This paper revisits the debates on the age of consent in India in the late nineteenth century. It reviews them in the light of the new legislative changes, adjudication of cases of sexual assault, and examines the implications of the new laws on adolescents and their sexuality. We contend that the changes in the law have resulted in several challenges: for adolescents exploring their sexuality on the one hand, and for courts to adjudicate on love, romance, and elopement, on the other. Further, in conjunction with raising the age of consent, other changes such as mandatory reporting of sexual activity among adolescents, especially by hospitals, have increased family control on adolescents' sexuality and strengthened regressive social norms linked to marriages. One of the most troubling developments is the resulting barriers to adolescents' access to reproductive and sexual health care. This paper explores how laws devised to address harm and extend protection to children play into dominant social norms and are in the service of protectionist and patriarchal control on young people and their sexuality.

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Introduction

India introduced the Protection of Children from Sexual Offences (POCSO) Act, 2012, which provided for the first time in the country’s legislation, a comprehensive and graded definition of sexual assault against children.1 The Act defines a range of penetrative and non-penetrative sexual assaults and stipulates penal provisions for the same. POCSO has been widely welcomed for filling the void in legislation against sexual assault experienced by children, including boys and trans-persons under the age of 18. Close on the heels of this legislation, the Indian Penal Code (IPC) Sections 375 (defining rape), 376 (providing punishment for rape) and 354 (providing definitions and penal provisions for sexual harassment) were amended in 2013 against the background of a shocking gang rape in 2012 in New Delhi. The Criminal Law Amendment (CLA) Act, 2013, which includes the rape law amendments, expanded the definition of rape from an offence limited to non-consensual peno-vaginal penetration to a range of penetrative and non-penetrative sexual assaults without consent, including penetration of the vagina, anus, and urethra by the penis, objects or other body parts; penetration of the mouth with the penis and application of the mouth to the vagina, urethra or anus without consent.2 While the POCSO, 2012 and CLA Act 2013 are distinct criminal laws, they are used in conjunction in the case of all sexual assaults faced by girls under the age of 18 years.

The provisions in the POCSO Act, 2012 are significant in covering different forms of child sexual abuse. However, the definition of “child” as anyone

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below the age of 18 years, and the stipulation that doctors, hospitals, and all private citizens, including school personnel and parents, were mandatorily to report sexual activity of children and adolescents to the police, has effectively criminalised all sexual activity under the age of 18. The POCSO Act also increased the age of consent for sexual activity (referred hereafter as “age of consent”) from 16 years to 18 years for children of all genders.

It is worth pointing out that in postcolonial countries like India, the penal code is derived from common law provisions, where “age of consent” is provided in the criminal law and defined only for girls. Age of consent, as per law, is the age at which a girl may be legally considered mature enough to give consent for sexual activity, especially sexual intercourse. It is presumed that a person is incapable of consenting to sexual activity below the age of consent. Therefore, any sexual activity before this age is equated to statutory rape. Before 2012, the age of consent was 16 years for girls as provided under the Indian Penal Code, section 375, and has been so since the year 1940. POCSO law, 2012 is a special law that raised the age of consent to 18 years, for both boys and girls, followed by an amendment to the Indian Penal Code through the, CLA Act, 2013, which did the same.

This paper attempts to trace how discussions on age of consent pertaining to sexual activity have always coalesced with age of consent for marriage. The age of consent laws have thereby played into social norms that do not approve sexual relations before marriage and marriages without parents’ consent. The first section of the paper covers the theoretical perspective that informs the age of consent with examples from the USA, Uganda, and Canada.

Section 2 of the paper provides a historical perspective on the “age of consent” law in India which also sheds light on how the society and families traditionally viewed matters of consent for sexual activity, marriage and sexuality. The third section uses historical debates and policy documents to trace the more recent historical context of the age of consent and the linkages between the age of consent and age of marriage. The paper’s fourth section provides the broader context of family, marriage, and kinship embedded in caste, class, and religious hierarchies in India to understand social norms linked to sexual activity and marriages. In the fifth section, the paper looks at the evidence of sexual activity among young people and the implementation of sexual violence laws, including mandatory reporting provisions, to understand how these laws operate in the social context described in Section 2. This part draws upon empirical studies on sexual violence, which point to substantial numbers of statutory rape cases. Section 6 describes the compromised access of young people, especially young women, to reproductive and sexual health care, that is a result of the way age of consent laws embedded within the sexual violence laws have worked in India. The final section discusses the overall implications of greater control on young people’s sexuality and their marriages through laws in a multicultural and hierarchical Indian society.

In this paper, we will refer to children between the ages of 15–18 years as adolescents to highlight the need to understand childhood in a graded manner and recognise the sexual and reproductive health and rights of this age group.

**Section 1. Juridico-discursive and disciplinary regulatory power**

Michael Foucault alludes to two types of regulatory power in society: one is juridico-discursive power, and the other is disciplinary power. The juridico-discursive power rests with the law and its application. It is formal, written down, uniform, and defines what is criminalised or worthy of society's disapproval. It is applied at once in a violent, top-down manner. By contrast, disciplinary power is exercised in schools, hospitals, or prisons and is concerned with maintaining discipline. This form of regulatory power is non-formal, fragmented, discontinuous, operating at all times, not uniform, and used differently by different actors. It aims not to punish but to discipline and “normalise”: for example, institutional rules of attendance in classes; wearing of identity cards around the neck at all times; dress codes and so on. Disciplinary power is concerned with ensuring that social norms and order are maintained in society. The presence of law and state power provides the context for disciplinary power to operate.

Using Foucault’s ideas, Sutherland has studied how the age of consent provision in criminal laws of various states in the United States was used in the 1990s to prosecute several cases of consensual sex where the girl and/or the boy were underage. The prosecution was generally initiated either by parents or by welfare officials and often directed towards preventing teenage
pregnancies and, more importantly for the latter, preventing the burden of the welfare consequences on the exchequer. The application of the law appeared to be less concerned with its stated aim of protecting young girls from sexual assault. In the service of these objectives, not all consensual underage sex was prosecuted. Cases of sexual assault were selectively brought against the boyfriend when teenage mothers made any application for government welfare support. Cases where the boyfriend or father of the child was ready to take responsibility for the child, even where he was a minor, were either dismissed or treated leniently by the courts. On the other hand, where consensual sex among underage girls did not result in pregnancies or was among the middle and upper classes, it was unlikely to result in welfare payments. Such incidents were ignored. Sutherland’s paper also documents selective prosecution of minority men – Black or Hispanic – who had sex with white girls. She observed that the law seems to work both in a juridico-discursive manner and in a disciplinary fashion by penalising directly and signalling indirectly what is considered undesirable sexual behaviour.  

We cite here experiences from two other countries, which are very reminiscent of using the law to enforce hierarchical social norms, discipline “wayward” behaviour, and establish parental controls over young people. The first is Uganda, where the age of consent was raised from 14 years to 18 years in 1990 to dismantle the “sugar daddy” culture of older men having sexual relationships with adolescent girls, as it was believed to be fuelling the HIV epidemic. In Uganda, the prosecutions under the statutory rape provisions were mostly of poor, labouring young men in consenting relationships with young girls, instead of the rich, middle-aged predatory men who established relationships with adolescent girls for material gifts. The cases were mostly filed by the fathers of underage girls. In traditional Ugandan culture, a girl is considered to be the father’s property before marriage. Following the transfer of a bride-price at marriage, the “virgin” daughter becomes the husband’s property. Sexual activity of a girl before marriage is considered to “defile” her. Not surprisingly, the age of consent law in Uganda is also referred to as the defilement law. As sexual liaisons were brokered by young girls themselves with older men, the father’s rule was largely hampered before the age of consent was increased under the law. The increase in the age of consent by the state played into the hands of fathers who could bring rape charges against the men in sexual relationships with their daughters. However, the rich men paid the fathers handsomely to prevent any prosecution and loss of reputation for them, and no cases of sexual assault were filed. Most notably, the average age of men convicted under the statute is 21.5 years and those convicted were poor men who could not buy their way out of the prosecution.  

The second example is the raising of the age of consent in Canada from 14 years to 16 years in 2008 by a conservative government, again in a bid to protect young girls from sexual assault. This is evident from the usage of the term “age of protection” in framing the law. A feminist critique of the law shows that it does not achieve what it sets out to do, primarily because non-consensual sexual relationships were always criminalised for all ages. Sexual relationships of adolescents with adults in positions of power, authority, trust, or exploitation were already prohibited under the previous law. On the other hand, the new law allows young girls between the ages of 14 and 16 to consent to a sexual relationship within marriage. As Desrosiers points out, “A young woman age fifteen may therefore have lawful sexual relations with her forty-year-old husband, but she may not have a twenty-one-year-old lover” (para 30). Therefore, it is mostly egalitarian consensual relationships that are sought to be criminalised. The law also continues with discrimination against gay relationships by maintaining a differential age of consent for consensual anal intercourse (18 years). Thus the new law seeks to “protect” both adolescents and the institution of marriage, and to proscribe what is considered deviant sexual behaviour, i.e. sex outside of marriage and non-heteronormative sex. The critique is further relevant because it is feared that the law will not deter teenagers’ consensual relationships with adults but rather impede access to sexual and reproductive health care and education programmes, which are crucial for young people to safely express their sexuality.

Section 2. History of the “age of consent” law in India

Need to increase the age of marriage of girls in the nineteenth century

The age of consent at 10 years was codified in the Indian Penal Code (IPC) drafted by Lord Thomas
Babington McCaulay and introduced in 1860 during British rule. The law made marital rape a criminal offence only when the wife was below the age of consent. The first elaborate documentation of how the age of consent law in India became associated with the age of marriage was during the struggle by social reformers in the latter half of the nineteenth century to raise the age of consent to 12 years with the explicit aim of increasing the age of marriage. Child marriages were common in India, and in some provinces such as Bengal, infant marriages were also practised. There was an earnest and enduring movement by Indian social reformers that became especially sharp and focused between 1880 and 1891 to stop this practice by strongly advocating with the British government. They contended that it was well within the government’s legitimate powers to take this up, given that these marriages were not with the girls’ consent and had extremely deleterious effects on their health. On the other hand, Hindu nationalists resisted any attempts by the British to stop child marriages by way of legislation or other reforms. The domain of personal laws concerning marriages, property, and inheritance was left alone by the British, to be governed by the community’s religious and customary laws. Not only did the nationalists welcome this, but preserving this domain from any outside influence became a project of nationalism.

Proxy measure to increase the age of marriage
Following the death of an 11-year-old child bride in 1890 due to forced sexual consummation by her much older husband, the advocacy campaign to prevent marriages in very young girls came to a head and bore fruit in 1891. The proposal drawn up by the social reformers was the Age of Consent bill which would raise the age of sexual consent from 10 years to 12 years by an amendment to the criminal law, the Indian Penal Code (IPC) of 1891. This spared the British establishment from going against the personal laws of Indians and reduced some opposition to the change. Prohibition of sexual activity before the age of consent applied to unmarried and married girls irrespective of consent. This first struggle illuminates how families and communities saw it as their prerogative to marry infant girls as per their religious, social, or economic interests and their intense opposition to any reforms even if they were meant for safeguarding girls. It also illustrates how the age of consent was coterminal to the age of marriage. It is worth noting that the breach of the age of consent was a non-cognisable offence, thus leaving very little possibility for any complaints under this IPC.

The family’s primacy on matters of marriage and sexuality
The Sarda Act, which later became the Child Marriage Restraint Act (CMA), 1929, introduced the minimum age of marriage at 14 years. However, the IPC section 37 created an exception to sexual activity within marriage, and this was placed at 13 years. This exception to sexual activity with an underage girl within marriage as legally acceptable is tantamount to accepting marital rape. Both the age of consent and age of marriage continued to increase till the year 1978, always with exception to marital rape set lower than the age of consent. This points to the twin aspects of (1) primacy accorded to the family to perform the marriage of girls even below the stipulated age of marriage and (2) the sexual right of a husband over an underage wife.

In 1978 the minimum legal age of marriage for girls was raised to 18 years, which is the current age of marriage, and the age of consent for sex was retained at 16 years. The permissible age for engaging in sexual activity with a girl within marriage was fifteen years or above.

It is important to clarify here that the concepts of “age of consent” (for sexual activity) and “minimum legal age of marriage” are distinct. The former is about the act(s) of sexual intercourse and at what age the young person may or may not consent. The latter is about the social and legal marriage contract and at what age a girl or boy is considered eligible to enter the same. Sexual activity is an interpersonal relationship that can be engaged in with or without marriage. Marriage, on the other hand, places the interpersonal relationship within social norms and legal frameworks. Sexual activity independent of marriage and marriage that provides social and legal legitimacy to sexual activities and procreation interact interestingly.

Section 3. Age of consent and age of marriage
Selective protection under the age of consent
It is worth noting that both the age of consent law and the marital rape exception to the law have their roots in colonial concepts of women as
property. Before marriage, a woman is the property of the father and after marriage she belongs to the husband, as seen in the Ugandan context. Thirteenth-century England introduced the idea of statutory rape by defining an age of consent for girls, which was fixed at 10 years. Later this law travelled to other common law countries, including India. In those days, the law was more about a socially approved age when girls could be said to be sexually available. The age of consent served to protect the chastity and virtue of white, virtuous, upper-class women. These provisions were often ignored when the girl did not fit this description. On similar lines, in the Ugandan context, not all young girls were considered children and worthy of protection. Girls who had dropped out of school, were pregnant, or mothers, or from underprivileged backgrounds might be expected to take on adult responsibilities. In contrast, the middle-class girls with education and career prospects may have an extended protected childhood.

The conflation of age of marriage and age of consent

It has been observed that there have been intermittent demands to have an identical age of marriage and age of consent. Lawmakers have been confronted with the issue of the difference in the age of consent and age of marriage on the one hand, and reduced age of consent in the case of marriages on the other hand, for a long time.

The 84th Law Commission Report, 1980, while recommending the increase in age of consent to 18 years, observed:

“2.20 The question to be considered is whether the age (of consent) should be increased to 18 years. The minimum age of marriage now laid down by law (after 1978) is 18 years in females, and the relevant clause of section 375 should reflect this changed attitude. Since marriage with a girl below 18 years is prohibited (though it is not void as a matter of personal law), sexual intercourse with a girl below 18 years should also be prohibited.

Recommendations:

Sec 375: Sixthly: With or without her consent when she is under eighteen years of age.” (Emphasis added) (Law Commission of India, section 2.20: 9)

Though the above recommendation was not accepted in 1980, it shows that the Law Commission conflated the two: the age of consent and the age of marriage.

In another instance, the 205th Law Commission of India (LCI) report on “Proposal to amend the Prohibition of Child Marriage Act, 2006 and allied laws” mentions the writ petition filed by the Delhi Commission of Women and National Commission of Women asking for: a uniform definition of a child across laws in the country to ensure uniformity and protection of children against sexual abuse; raising of the age of consent to 18 years to bring it in conformity with a minimum age of marriage; and deletion of exception to marital rape in IPC Section 375. Though not accepted at that time, the recommendation to increase the age of consent was made here too, to protect all girls under the age of 18 years from sexual violence within or outside marriage.

Across the world, the justification for an age of consent has gradually evolved from when a girl can be sexually available to when she can give valid consent to sexual activities. In effect, this is also a journey from sexual control to the protection of girls from sexual “harm”. The following sections discuss whether protection leaves behind sexual control or whether there is sexual control under the guise of protection.

Section 4. Sexuality and marriage embedded in caste and religious divisions

Arranged marriages as a means to retain the purity of caste and religion

A rigid, stratified, and hierarchical caste system is the hallmark of Indian society, and the caste system permeates not only Hindu communities but also exists among Muslims and Christians.

The reference to different castes as upper or lower castes is with respect to a well-defined relational hierarchy. Traditionally, the “lowest” sections of society did not find a place in the caste hierarchy and were the “outcasts”. The “outcastes” of yesteryear are now known as Dalits, a politically conscious term taken up by the Dalits themselves in consideration of their enforced degraded status in society. Caste endogamy, essential to maintain such a rigid caste system, is another defining feature of Indian society. Within this system, marriage between an upper caste man and a lower caste woman is somewhat acceptable, but the reverse is both unacceptable and considered a dishonour to the woman’s family. Within this scheme of things, inter-
religious marriages are unacceptable, and marriage within the caste is the norm. The greatest outrage was and continues to be reserved for sexual alliance or marriage between an upper-caste Hindu and a Dalit\(^{16,19}\) or between a Hindu and a Muslim.\(^{16}\) The other prescription of this system is that a woman’s expression of her sexuality has to be only within the boundaries of marriage, with primacy attached to procreation and perpetuation of patriliny.

Therefore, early marriage is considered essential to ensure that the young girl does not become sexually active before marriage and break the rigid caste norms. Apart from expecting the bride to be a virgin at the time of marriage, norms of strict monogamy are expected to be practised by women among upper caste Hindus. Marriages arranged by parents, also known as “arranged marriages”, are essential to maintaining this hierarchical system of desirable alliances and ruling out sexual transgressions.

Another defining feature of this kinship structure where the woman’s identity is subsumed in the family – belonging first to her father and then to her husband – is the norm of compulsory heterosexual marriages, which provide women a legitimate entry into kinship through the pathway of marriage. Having no property or economic resources, or mobility and independence to garner these on their own, for many women marriage is the only pathway for economic and social security.

The continued preference for marriages within the caste and religion

Families in Indian society continue to adhere to marriage within the religion and caste while making alliances, and in some parts of North India, marrying within the kinship groups is strictly restricted.\(^{20,21}\) There is routine opposition to alliances that do not follow rules of compatibility for the groom and bride.\(^{22}\) Alliances that do not adhere to religion and caste norms are termed inter-religious and inter-caste marriages.

As per data from the India Human Development Survey (IHDS) of 2011–12, no more than 5–10% of marriages in contemporary India are inter-caste in nature, a mere 2% are inter-religious, and there has been little change in this number since the last IHDS of 2005.\(^{20,21}\) The increase in girls’ self-chosen matches has been from 3% in the 1970 IHDS to 6% in the 2000s. Whereas 17% of self-chosen marriages were inter-caste in the IHDS 2011–12, only about 5% of marriages where parents were involved were inter-caste. However, even within self-chosen marriage, the proportion of inter-caste marriages is less than one-fifth,\(^{20}\) which shows that young people prefer to marry within their caste and religion. A study based on matrimonial advertisements shows that nearly 74% of young women and men are against inter-caste marriages.\(^{23}\) This shows how much the institution of marriage is shaped and dominated by family and religious community norms.\(^{20}\)

Underage marriages and parental control

While underage marriages are on the decline as per National Family Health Survey (NFHS)-4 (2015–16), 27% of young women between the ages of 20–24 years reported that they were married before the age of 18 years.\(^{24}\) The Prohibition of Child Marriage Act (PCMA) 2006 is a civil law that provides a minimum permissible age of marriage at 18 years for girls and 21 years for boys. While underage marriages are to be stopped before they are solemnised as per the law, the act does not automatically make such marriages void once they are solemnised. However, they are voidable, especially at the behest of the contracting party who is underage at the time of marriage or the guardian of such a person where the person is a minor.\(^{†}\) Annulment of underage marriage is possible within two years of the contracting party attaining majority.\(^{25}\)

A recent study of how the child marriage law has been used on the ground showed that it was more often invoked by parents of girls who have eloped to get married to their lovers against parental wishes, to prevent a marriage from taking place; POCSO and rape laws were also invoked in many of these cases.\(^{26,27}\) Many of these marriages are also outside the strict compatibility of caste and religious restrictions.

The staunch opposition to inter-caste marriages even of young couples above the stipulated legal age of marriage takes a serious turn and many times plays out quite tragically for the young couple.\(^{22}\) There are nearly 1000 killings of young people in India annually, 80% of these women, based on notions of so-called honour, when they

\(^{†}\)An exception is an amendment carried out by Karnataka, and more recently Haryana where all underage marriages have been made void.
get married against their parents’ wishes and in relationships that are considered incompatible with religion, caste and clan. Maximum opposition is faced by Hindu girls of all castes marrying Dalit boys, Hindu girls marrying Muslim boys, and marriages within their own kinship groups in parts of North India. As Loomba writes, “Sexual and gender relations remain a volatile arena for both challenging and enforcing caste hierarchies; equally, one could argue that caste is a crucible in which gender and sexual norms are flouted or maintained”. Marriage and women’s sexuality in India are located within the peculiar conundrum of the Indian caste, class, religion, family, and kinship systems as elaborated above.

Section 5. Evidence of sexual activity among young people

Adolescent sexuality

The subject of sexuality and pre-marital sexual activity is shrouded in silence and denial. The existing data highlight that adolescents are sexually active before the age of 18 years. The NFHS-4 (2015–16) records 11% of girls had their first sexual intercourse before the age of 15, and 39% before the age of 18. In the same survey, 6.3% of women who got married at the age of 18 years or above have reported having their first sexual intercourse before 15 years. The Youth in India: Situation and Needs 2006–07 study, the first comprehensive youth study in India, reported that the probability of having experienced sexual activity increased from young adolescents to older adolescents to young women. Globally too, UNICEF has estimated that 10–12% of adolescents in low- and middle-income countries have had sex before the age of 15 years. However, social norms and silences around sexuality education contribute to ignorance, sexism, misogyny, gender discrimination, and patriarchal attitudes present in school and college spaces among young people. These silences, in turn, lead to poor knowledge of sexuality, pleasure, safety, and rights around the body, and knowledge of changes in the law.

Brief findings of five studies on sexual assault cases in court

Informed by the discussions elaborated thus far, this section of the paper analyses the impact of the increased age of consent on the profile of rape adjudications in India after the age of consent was raised from 16 to 18 years in 2012 and 2013. We examine five studies based on reviews of district court cases of sexual assault filed under POCSO in Delhi, Mumbai, and Lucknow between 2013 and 2016. The studies recorded a peculiar phenomenon whereby survivors of alleged sexual assault testified in court that they had consented to a relationship with the accused. Such cases made up between 18% and 54% of all rape cases. These particular complaints of rape were filed by parents of adolescent girls who were in consenting relationships.

Two studies by a leading daily, The Hindu, undertaken in 2013 in Delhi and 2015 in Mumbai, showed that cases of consensual sex (as stated by the adolescent girl in court) registered as rape amounted to approximately 30% and 23% of total cases of sexual assault in the respective cities.

A detailed study of trial court cases from January 2013 to September 2015 in Delhi State undertaken by the Centre for Child and the Law, National Law School of India University (NLSIU), Bangalore, recorded a total of 526 complaints of sexual assault under POCSO. Twenty-eight percent of these (186 complaints) concerned adolescents between the ages of 16 and 18. It should be noted that 167 of these 186 complaints (90% of cases in the age group of 16–18 years) resulted in acquittal after the adolescent girl refused to testify against the sexual partner. Of the total number of cases (526), 19% (100) of the accused (boys or men) had married the adolescent girl by the time the case came to court, 10% (51) of adolescent girls testified that the accused was their boyfriend and another 7% (36) testified that the accused was a friend. It was also found through regression analysis that the higher the adolescent girl’s age, the greater the chance that she would not support the prosecution. In general, in such cases, adolescent girls do not support the prosecution of a sexual assault case because they are in a consensual relationship and never wanted to complain of rape.

A similar study undertaken of cases in a fast-track court dedicated to sexual offences against women between April and May 2015 in Lucknow found that more than 50% of cases were filed by parents of underage daughters who were in a consenting relationship.

The first author studied 50 cases of sexual assault from a sessions court in Mumbai.
adjudicated between 2013 and 2014 and found 14 cases involved sex between adolescent girls ranging from 15 to 18 years of age and their sexual partners registered under POCSO. Of these 14 cases, eight involved consensual sexual relationships, and the adolescent girls testified as such in the court. Here too, it was clear that consensual relationships tended to increase as adolescents' age increased.

An overwhelming number of these cases pertained to relationships without the knowledge or consent of the adolescent girls' parents, including many inter-caste and inter-religious relationships. The cases typically have a similar trajectory. First, the adolescent girl is found missing, and the parents file a missing person complaint with the police. When the adolescent girl is found, she either informs her parents that she had sexual intercourse with her boyfriend or this is revealed to the doctor when she is sent for a medical examination, which is the norm when the police suspect a sexual assault. After this, charges of kidnapping (IPC Section 363), kidnapping, abducting or inducing a woman to compel her for marriage (IPC Section 366), rape (IPC Sec 375), and sexual assault1 are added to the complaint. The adolescent girl is either sent to her parents or sent to a children's home if she refuses to go to her parents' home. In a majority of cases, as referenced earlier, the girl testifies in court that she eloped voluntarily with the boy. Often, she is already married to the young man, and sometimes the couple also has a child. An adolescent girl's statement of consent to the relationship is often not considered in court either because she is under the legal age of consent, or it is claimed that she is underage. In one of the Delhi studies, the author has noted that girls were harassed, beaten, confined, and forced to undergo a medical examination and sometimes abortions, even while they pleaded in court to be allowed to go with their boyfriends or husbands.

As outlined by the Mumbai and Delhi studies, although most parents were actively involved in filing the rape cases and also acknowledged at times that they filed a complaint because they did not approve of the relationship, by the time the cases were up for a trial, many of them supported a compromise or marriage. While most young men were given bail after spending between a few days and a few months in prison and were later acquitted, it is of concern that in a minority of cases, there have also been convictions under the statutory rape clause. Even when bail is secured, the boy fights the case for several months or sometimes years thereafter. A recent study of cases of young girls' elopement by Partners in Law and Development26 observed that girls are forced to elope with their boyfriends due to parental opposition to consensual relationships. They eventually end up marrying the boyfriends though there is a lot of uncertainty in the relationship and ill-preparedness to take on the responsibilities of marriage. In turn, the marriage-only option again reinforces the belief that there is no place for sex outside marriage, especially for adolescents. These notions also reinforce the concepts of virginity, legitimacy of children, and of honour linked to women's sexuality.

The court opines to reduce the age of consent

In recent years, courts have been forced to take cognisance of this profile of “rape” cases. In its ruling in April 2019, the Madras High Court opined:

“From our records, the analysis shows that majority of the cases are elopement cases registered under POCSO…. Due to this, the actual cases of minor rape victims are not prioritized, resulting (sic) in delays in rendering justice for the minor victim of rape. … If the boy and girl belong to the same community, then the whole villagers (sic) support the child marriage, and no case is filed against them, but in the case of different community’s case is made out against the boy which ends up with communal unrest. In case the boy and girl below 18 years elope, only the boy is punished, which is detrimental against (sic) the natural justice for the boy.”35

The Madras high court heard the appeal petition of a young man of 19 years, who was accused of kidnapping and sexually assaulting a 17-year-old girl in 2014. In 2018 a fast-track sessions court sentenced him to 10 years’ rigorous imprisonment and Rs 3000/- fine, despite the adolescent girl stating that she had consented to the sexual relationship and lived with him for six months.36 The case was primarily based on the grandfather’s complaint that his grand-daughter had gone missing. The case was also based on the doctor’s opinion in court that the adolescent girl could have had sexual intercourse as her hymen was ruptured. On examination of all the facts, the high court stated that there was inadequate evidence to prove the charges,
reprimanding the trial court for not heeding concerns such as the fact that the girl’s signature was obtained on a blank sheet of paper while filing the complaint, and that the victim had stated that she had gone missing on an earlier occasion because her parents were arranging for her marriage.

Thus the stipulation of age of consent embedded in the POCSO Act is used selectively for punishing young men by way of its arbitrary framing and implementation. It appears that the Act serves to actively maintain conservative social norms, weeding out “undesirable” behaviour, and supporting the status quo, irrespective of the stated aim of protecting children from sexual offences. In the process, the law reinforces control of young people, especially young women’s sexuality, in the hands of the family and perpetuates unequal gender and family relationships.

While acquitting the young man, the court opined that girls older than 16 years were mature enough to consent to sexual activity. The court further suggested that the concept of “child” under 2(d) of the POCSO Act be redefined as 16 years instead of 18. The Justice Verma Committee set up after the Delhi Gang Rape of 2012 to recommend criminal law reforms to the rape law gave the same recommendation of restricting the criminalisation of adolescent sex to 16 years or under in POCSO, and maintaining the age of consent in IPC section 375. The Criminal Law Amendment Bill, 2012 was still under discussion. However, the legislature still went ahead and increased the age of consent under the CLA Act, 2013 to 18 years.

Close-in-age exceptions to statutory rape
The Madras High Court judge, while adjudicating on the above-mentioned case, also called for instituting a close-in-age exception of five years to prevent older men from taking advantage of young girls. Close-in-age exceptions to statutory rape, which mean that underage sexual activity between adolescents is not deemed an assault if there is an age gap of 2–5 years or less between them, have been increasingly used by western countries such as the USA and Canada in modern times. While this would be a welcome move, feminists offer a word of caution. Observations from Africa show that there may be a larger gap of more than five years in age among adolescent girls and men with whom they have sexual relationships. Experiences from Indian court cases of sexual assault studied by the author indicate the same. Feminists have observed that this is in line with gendered and socialised expectations of girls preferring older sexual partners and spouses. Hence the mere focus on age without looking at the totality of circumstances of consent or coercion, power and authority in relationships, and the maturity of the adolescents making those decisions, may not turn out to be in the adolescents’ best interest.

Section 6. Compromised access to health care for young women
Besides raising the age of consent, there are other changes to the law that make the journey for sexually active adolescents a tricky affair. POCSO, 2012 mandates any private citizen, including parents, doctors, and school personnel, who has knowledge of or suspects abuse under the law to report it to law enforcement authorities. Not reporting an offence under the act, irrespective of whether the information is received confidentially as part of professional duties (e.g. as a counsellor or care provider or in the course of personal interaction), commits an offence under the Act punishable with imprisonment and/or a fine. Moreover, an amendment through the CLA Act 2013 to Section 357C of the Criminal Procedure Code, 1973, mandates that hospitals report all cases of sexual offences to the police. Failure to report is treated as an offence punishable with two years imprisonment.

Sexually active adolescents require a range of healthcare services: contraception and emergency contraception; prevention, diagnosis, and treatment of sexually transmitted infections; and access to safe abortion services, among others. Whether it is a consensual relationship or an assault, mandatory reporting compromises adolescents’ autonomy and privacy in accessing health care. As a direct fall-out of the law which criminalises all sexual activity under the age of 18, doctors and hospitals are legally bound to report any case of underage sexual activity to the law enforcement agencies, especially for services such as a Medical Termination of Pregnancy (MTP) and complaints of sexual assault. In fact, it is often the doctor’s documentation of sexual intercourse garnered from the girl’s story, which precipitates sexual assault charges. Informed consent, right to privacy, and confidentiality of the adolescent girl are undermined in these cases.
Several reports from the ground indicate that doctors routinely report cases of suspected sexual assault and requests for abortion to law enforcement without asking for the adolescent girl’s consent. This often leads to the adolescent girl refusing treatment, avoiding the hospital for fear of being reported, or simply running away from the hospital.\textsuperscript{30,39} The dilemma for young girls is either to risk reporting their boyfriends for sexual activity or to forgo health care.

On 13th May 2019, a reputed newspaper reported that there has been a 95\% drop in abortions among girls less than 15 years of age as per data from registered abortion clinics.\textsuperscript{40} There is a high possibility that adolescent girls who cannot access safe abortions in approved facilities are now accessing abortions that are undocumented and/or unsafe, or are being forced to give birth, all deleterious to their health. Doctors are known to refuse seeing minor girls who are pregnant in order to avoid the legal hassles resulting from the mandatory reporting provision.\textsuperscript{42} Thus the stipulation of mandatory reporting is highly problematic for the sexual and reproductive health and rights of adolescents. It is also in direct conflict with the National Adolescent Health Programme (Rashtriya Kishor Swasthya Karyakram – RKSK), a dedicated health programme for adolescents that is meant to provide adolescent-friendly sexual and reproductive health services and education on menstruation, nutrition, mental health, and other concerns important for adolescents. A rapid programme review by WHO shows that doctors in the public health system in some states are reluctant to provide sexual and reproductive health services to adolescent girls and inclined to deny services.\textsuperscript{43} The staff for the National Adolescent Health Programme, including frontline staff expected to facilitate services for young people, are also liable for breaking the law.

As seen above, criminalising adolescent sexuality and mandatory reporting of adolescent sexual activity to law enforcement, especially by healthcare providers, have compromised young people’s access to reproductive and sexual health care. This has created a cumulative effect where adolescent girls are worried about accessing sexual health services, and the medical staff are afraid of making these services available.\textsuperscript{30,42}

The slippery slope of arbitrary legislation
Apart from an increased age of consent for sexual activity and mandatory reporting laws, there have been other amendments to the law which have progressively created a difficult terrain for sexually active adolescents. In several court cases discussed above, the marital rape exception in the IPC Section 375 has been used to exonerate accused men who have married the woman, or where marriage-like rituals had taken place. In October 2017, a civil society organisation, Independent Thought, approached the Supreme Court of India through a Public Interest Litigation (PIL), with a petition to repeal the marital rape exception in these cases. The Supreme Court repealed the exception only in the case of adolescent brides under 18 years of age, to bring the age of consent law in line with the POCSO, 2012 which does not provide any exception to married adolescents.\textsuperscript{43} While this move is welcome because it chips away at the highly problematic marital rape exemption, it has taken away the relief available to underage couples in consenting relationships. Additionally, it has affected adolescent girls’ sexual and reproductive health rights in these situations, including for adolescent girls married under the age of 18 years with the consent of parents. Earlier, the marital rape exception ensured that married adolescent girls were not stopped from accessing sexual and reproductive health care, since the law also protected doctors from committing a crime. However, this has been a grey area since the enactment of POCSO, 2012. Even this veiled protection to adolescent girls no longer exists.

There are also some other pieces of legislation that appear disconnected but together create a slippery slope for young people. For example, Karnataka state has legislated to automatically make all underage marriages void \textit{ab-initio} without any consideration for young people who may want to stay married.\textsuperscript{44} Another state, Haryana, has followed suit more recently, in March 2020.\textsuperscript{47} Besides criminalising sexually active underage couples, such a move has also jeopardised the supposed social protection afforded by marriage, as well as the autonomy of adolescents. There is an urgent need to see what actual and potential impact these moves are having on the lives of adolescent girls who are often positioned as “victims” and adolescent boys positioned as “aggressors”.

Discussion and conclusions
The POCSO Act, while addressing the important issue of child sexual abuse, has simultaneously strengthened a protectionist and patriarchal
control on adolescent sexuality. The age of consent set at 18 years provides an automated script of non-consent and any proof of consent given by adolescent girls through their testimony of consensual sexual activity is ignored. In line with Sutherland’s 2003 analysis, the situation in India begs the question of whether laws necessarily function as they are expected to, or contribute to reproducing dominant power relations and social inequalities. The law also works to enforce punitive measures and endorse institutional disciplining of adolescent bodies through a variety of censuring of undesirable behaviour and undesirable relationships.

While mandatory reporting, the other problematic clause in recent sexual violence laws discussed in the paper, has not stopped young people from being sexually active, conflicting, and contradictory laws in India have made it an unsafe terrain. The greatest toll has been on restricting access to sexual and reproductive healthcare services.

Adolescents married with parents’ consent, eloping within compatible caste groups, or adolescents from rich and middle-class families in India who prefer to settle matters among themselves, may largely escape mandatory reporting of sexual activity, similar to the economically well off pregnant adolescent girls. By contrast, the law is most often invoked when young couples run foul of their families, especially for inter-caste, inter-religious liaisons, or liaisons outside acceptable kinship groups and belonging to lower socio-economic groups. The rights and welfare of the young couple are short-changed by families, legislators, the medical profession and the criminal justice system.

This paper points to the paternalistic and erroneous belief that raising the age of consent for sex will curb sexual assaults for adolescents under 18 years. This thinking has several flaws, including presumptions that: (a) all sexual activity under the age of consent is sexual assault; (b) the interests of adolescents, families, and the justice system are the same; (c) reporting crimes is in the best interest of adolescents; and (d) families always know and do what is in the best interest of their children. Several of these presumptions have severe repercussions on young people’s lives, such as the profile of cases being filed in court and denial of essential health care.

A way out of these contradictions in sexual violence laws impinging on young people’s rights would be to repeal existing mandatory reporting provisions for all public officials, especially for doctors and hospitals, and to roll back the age of consent to 16 years. Mandatory reporting to social services and counsellors instead of the police, with strict safeguarding of the confidentiality and privacy of young people, and removing the penal provisions on doctors, hospitals, teachers, psychologists, counsellors, parents, and all those who work with children and young people, will be an important modification to enable young people’s access to health care.

Close-in-age exceptions to statutory rape may also be considered, with the explicit understanding that they are not a panacea for all the problems with the current legislation. At best, they dismantle the notion that all adolescent sexual relations are rape, and provide an understanding of the realities of adolescents’ lives and protection from criminalisation. At the same time, there is the real possibility of close-in-age exceptions not being in sync with the realities of Indian adolescents, especially girls, and of selective prosecution, as discussed in this paper. There is also a possibility of a continued focus on age obscuring the possibility of coercion in close-in-age relationships. Instead of focusing only on age, primacy needs to be given to girls’ testimony in the way it has been articulated in rape laws for adult women. Further, access to sexual and reproductive healthcare services must be facilitated for adolescents by removing mandatory reporting requirements, which is more likely to foster equitable gender relationships in the long run.

Legal instruments alone cannot solve complex social issues unless accompanied by access to comprehensive sexuality education, the independence and empowerment of girls, the autonomy of young people, access to sexual and reproductive health services, gender-sensitive and efficient law enforcement, and social support for young people and adolescent girls when they fall out with their families. Acceptance of adolescent sexuality, comprehensive sexuality education, and a supportive state apparatus can actually create more options for adolescents to enjoy healthy sexual relations, rather than enter into marriages for which they may be ill-prepared.

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Résumé

L’Inde a promulgué une nouvelle loi relative aux abus sexuels sur enfants en 2012 et a introduit d’importants changements à la loi sur le viol en 2013 pour élargir la définition du viol et de l’agression sexuelle. Elle a introduit plusieurs réformes et a amélioré la prise en compte du genre dans les procès pour viol. Néanmoins, la loi relative aux abus sexuels sur enfants avec sa définition de l’enfant a porté l’âge du consentement à des relations sexuelles de 16 ans à 18 ans, avec des modifications du même ordre dans la loi sur le viol. Cet article revisite les débats sur l’âge du consentement en Inde à la fin du XIXe siècle. Il les examine à la lumière des nouveaux changements législatifs et du traitement des affaires judiciaires d’agression sexuelle, et il analyse les conséquences des nouvelles lois sur les adolescents et leur sexualité. Nous estimons que les changements législatifs ont créé plusieurs difficultés: pour les adolescents qui explorent leur sexualité d’un côté et de l’autre pour les tribunaux qui doivent se prononcer sur l’amour, les idylles et les fugues amoureuses. De plus, conjointement avec le relèvement de l’âge du consentement, d’autres nouveautés telles que la déclaration obligatoire de l’activité sexuelle chez les adolescents, spécialement par les hôpitaux, ont accru le contrôle exercé par la famille sur la sexualité des adolescents et durci des normes sociales régressives liées au mariage. L’une des évolutions les plus troublantes est la création d’obstacles à l’accès des adolescents aux soins de santé sexuelle et reproductive. Cet article se demande comment des lois conçues pour redresser des torts et élargir la protection des enfants vont dans le sens des normes sociales dominantes et sont au service du contrôle protectionniste et patriarcal des jeunes et de leur sexualité.

Resumen

India promulgó una nueva ley sobre abuso sexual infantil en 2012 e hizo cambios importantes a la Ley sobre Violación en 2013 para ampliar la definición de violación y acoso sexual, introducir varias reformas y mejorar la sensibilidad de género en juicios por violación. Sin embargo, la ley sobre abuso sexual infantil con su definición de niño/a aumentó la edad de consentimiento para tener relaciones sexuales de 16 años a 18 años, y a la Ley sobre Violación se hicieron cambios similares. Este artículo vuelve a analizar los debates sobre la edad de consentimiento en India a finales del siglo diecinueve. Los revisa a la luz de nuevos cambios legislativos y los fallos emitidos relativos a casos de acoso sexual, y examina las implicaciones de las nuevas leyes para adolescentes y su sexualidad. Argumentamos que los cambios en la ley han causado varios retos: por un lado, para adolescentes que exploran su sexualidad y, por otro lado, para que los tribunales se pronuncien en cuestiones de amor, romance y escapada para casarse. Además del aumento de la edad de consentimiento, otros cambios como el reportaje obligatorio de actividad sexual entre adolescentes, especialmente por hospitales, han incrementado el control que tiene la familia sobre la sexualidad de adolescentes y han fortalecido las normas sociales retrógradas asociadas con el matrimonio. Una de las consecuencias más preocupantes es las barreras al acceso de adolescentes a servicios de salud sexual y reproductiva. Este artículo explora cómo las leyes formuladas para abordar daños y extender la protección a los niños contribuyen a las normas sociales dominantes y están al servicio del control protectionista y patriarcal sobre las personas jóvenes y su sexualidad.