

CHAPTER SIX

ADOLESCENT REPRODUCTIVE RIGHTS AND CRIMINAL LAWS

From 1940 until 2012, the age of consent for sexual activity for women in criminal law was 16 years. Sexual intercourse with a woman under the age of 16 was considered to be rape, except if the intercourse was with her husband, where the age was set at 15 years. The law did not have a comprehensive framework to address non-penile-vaginal penetrative acts, and non-penetrative acts involving minors, and did not have any age of consent for sexual activity for boys. To address gaps in the criminal law framework for redressing child sexual abuse, the Protection of Children from Sexual Offences Act (POCSO Act) was enacted in 2012. It defined a child as a person under the age of 18 years. Any sexual activity with a person (of any gender) under the age of 18, including penetrative and non-penetrative acts, has been made an offence under the Act. The consent of the minor under the law is immaterial. This implies that all adolescent sexual activities, including those that are consensual, are criminalized.¹

Questions arise whether criminalization of consensual adolescent sexual activities, have an adverse bearing on reproductive and sexual health rights of adolescents. This concern is further exacerbated due to Sections 19 and 21 of the POCSO Act, which require that a person, including a health-care provider, who knows or has reason to believe that an offence under the POCSO Act has been or is likely to be committed has to report the same to the police.² It is in this context of reproductive and sexual health rights of adolescents³ that the following three issues are discussed in this chapter:

- Criminalization of Consensual Sexual Acts Between Minors
- Marital Sex
- Mandatory Reporting Under the POCSO Act and the Criminal Procedure Code

Criminalization of Consensual Sexual Acts Between Minors

As discussed above, the POCSO Act defines a “child” as a person under the age of 18 years and criminalizes all sexual activity (penetrative and non-penetrative) with minors, even if both the parties are minors or within the same age group and the acts are consensual. The mandatory minimum punishment for penetrative sexual assault under the POCSO Act is 10 years. Under the Indian Penal Code (IPC), the minimum mandatory sentence prescribed is 10 years if the girl is under 18 and 20 years if the girl is under 16 years.⁴ The Madras High Court in *Sabari v. Inspector of Police*⁵ noted the blanket criminalization of consensual underage sexual acts. It suggested that the POCSO Act be amended to reduce the age of consent from 18 years to 16 years. It also recommended introduction of an age-proximity clause, wherein if the parties were in the same age group, they would be treated differently. In this context, it is appropriate to note that the Justice Verma Committee on Amendments to Criminal Law, had in fact recommended that the age of consent under the IPC be fixed at 16, and that the POCSO Act be accordingly amended.⁶

Marital Sex

Any sexual act with a woman under 18 is considered rape under the IPC. However, Exception 2 to Section 375, which provides an exemption from criminal liability for rape within marriage, effectively lowered the age to 15 for married girls. This meant that, on the one hand, women and girls above the age of 15 could not file a claim of rape against their husbands, as consent was presumed within marriage, but on the other, any sexual act with an unmarried girl under 18 would amount to rape, regardless of whether it was consensual. The POCSO Act, on the other hand, did not provide for such an exception for marital relationships.

This issue of rape within child marriages, and the contradiction between the IPC and the POCSO Act, was dealt with by the Supreme Court in *Independent Thought v. Union of India*.⁷ The Supreme Court held that the distinction between married and unmarried girls was unnecessary and artificial. It had no rational nexus with any objective sought to be achieved. Given the link between child marriage, forced or coerced sex, and maternal deaths and injuries, the Supreme Court found Exception 2 to be contrary to Article 21 of the Indian Constitution and contrary to the bodily integrity of the girl and her right to reproductive choice. Therefore, it read down Exception 2 to Section 375 to mean that intercourse with one's wife who is below 18 years of age is rape. The Court rejected the defence of child marriage as part of culture and

tradition, particularly given growing awareness of the associated risks and harms. It noted that traditions and conventions should change with time. Hence, after the judgment of the Supreme Court in *Independent Thought*, the age of consent for sexual intercourse both within and outside marriage stands at 18 years. However, a husband cannot be held guilty of raping his wife if she is over 18 years old. Thus, the case recognizes that marital rape is a violation of a girl's sexual autonomy, and also her reproductive choice, since the decision to procreate or not is taken away from her.

Mandatory Reporting Under the POCSO Act and the Criminal Procedure Code

Section 19(1) of the POCSO Act requires a person who has knowledge or has an apprehension that an offence punishable under the Act has been committed or is likely to be committed to report the same to the police. Failure to report the commission of an offence is a punishable offence under Section 21 of the POCSO Act. Similarly, Section 357C of the Code of Criminal Procedure, 1973 (Cr.P.C.), imposes a duty on hospitals to provide immediate medical treatment to victims of acid attacks and rape (Sections 326A, 376, 376A, 376B, 376C, 376D, 376E, IPC).⁸ It further mandates that after providing such treatment the hospital should immediately report the incident to the police. Punishment for failing to report is provided in Section 166 B of the IPC.

The Supreme Court in *Shankar Kisanrao Khade v. State of Maharashtra*,⁹ a case involving the rape and murder of a minor girl, noted with disappointment that the eyewitness to the offence failed to report the offence to the police. It noted that failure to report a crime against minors is a serious offence under the POCSO Act and persons failing to report are liable to punishment under Section 21 of the Act.¹⁰

The interpretation of Sections 19 and 21 came up before the Chhattisgarh High Court in *Kamal Prasad Patade v. State of Chhattisgarh*.¹¹ A chargesheet had been filed against the headmaster of a school for not reporting an offence of penetrative sexual assault committed against a student by an employee of the school. The grandmother of the child had informed the petitioner around two and a half hours before she filed an FIR against the employee. The High Court held that a prosecution under Section 21 cannot be initiated unless the main offence, which was not reported (here the penetrative sexual assault), is proved before a criminal court. Hence, it mandated that conviction of the original offender under the POCSO Act is a prerequisite for initiation of action against a person for not reporting the act, once it comes to his/her knowledge. It also held that if the information regarding the commission of the act reaches the police through other sources, then prosecution under Section 21 cannot be initiated against another person for not reporting the act. The court's reasoning was that Section 19 is in the nature of providing information to the police, and failure to report is not intended to be punitive. Further, on the basis of the facts of the case, the court held that two hours was not sufficient time for the headmaster to have made enquiries in the school before informing the police. It advised prosecution agencies to be circumspect before initiating prosecutions under Section 21.

In *Dr. Sr. Tessy Jose v. State of Kerala*,¹² the Supreme Court quashed the prosecution under Section 21 of the POCSO Act, of two doctors and a hospital administrator. A girl, whose age was noted as 18 when she was admitted in the hospital, was brought to the hospital with a complaint of stomach ache and was discovered to be in an advanced stage of pregnancy. She went into labour right after she was admitted, and a baby was delivered by the gynaecologist who attended to her. The newborn child was attended to by a paediatrician, who was prosecuted, as also a hospital administrator. The prosecution argued that since the girl had informed the hospital and the doctors that she was 18 years old, they should have reported the case to the police, since at the time of conception, the girl would have been under 18, and a victim of an offence under POCSO Act. The Court, interpreting the term "knowledge" in Section 19 of the Act ruled that "knowledge" does not imply that the person has to investigate and gather knowledge about commission of the offence. In the context of the present case, since neither the victim, nor her mother, had informed the doctor that the girl had been raped, the Court held that there was no obligation on the doctor to investigate and find out the girl's age at the time of conception of the child.

While the objective of the above mandatory reporting provisions may be laudable, the requirement of mandatory reporting under the provisions of POCSO Act and Cr.P.C. may have a detrimental impact on reproductive and sexual health of young women. Since Section 19 requires reporting if there is an apprehension of an offence under the Act being committed, access to contraceptive services for young girls may be impacted. This has a detrimental effect on the sexual and reproductive health rights of young women. It may lead to young women resorting to unsafe abortions, thus endangering their lives. Further, mandatory reporting provisions are in conflict with confidentiality requirements in the Rules under the Medical Termination of Pregnancy Act, 1971.

Related Human Rights Standards and Jurisprudence

Below is a selection of human rights standards and jurisprudence relating to state obligations to ensure adolescents' sexual and reproductive health and rights, including through recognition of the evolving capacity of adolescents to make independent, informed decisions about their sexual and reproductive health while respecting the principle of best interest of the child.

The Government of India has committed itself to comply with obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child, and the International Covenant on Civil and Political Rights (ICCPR).¹³ Under international law, all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.¹⁴ The Supreme Court has held that in light of the obligation to “foster respect for international law” in Article 51 (c) of the Indian Constitution “[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”¹⁵

INTERNATIONAL TREATY STANDARDS

TREATIES

- **Convention on Rights of the Child, Articles 3, 5, 24, 34, 39** (protecting children's right to health and to be free from coercion into “any unlawful sexual activity,” and to support the recovery of child survivors of exploitation or abuse; all rights are to be interpreted through the lens of the best interest of the child, with respect for their evolving capacities).
- **CEDAW, Articles 2, 12, 16** (outlining women's right to non-discrimination, health, and equality within marriage, and to determine the number and spacing of their children).

SELECTED GENERAL COMMENTS

- **Committee on the Rights of the Child (CRC), *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence***, U.N. Doc. CRC/C/GC/20 (2016), paras. 39–40, 46 (recommending that legislation recognize the evolving capacities of adolescents to make their own health-care decisions, including “a legal presumption that adolescents are competent to seek and have access to preventive or time-sensitive sexual and reproductive health commodities and services”; reminding states parties that 18 years should be the minimum age for marriage for boys and girls; raising concerns about violations of adolescents' right to privacy in respect of confidential medical advice; and outlining that states “should avoid criminalizing adolescents of similar ages for factually consensual and nonexploitative sexual activity”).
- **CRC, *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (Article 24)***, U.N. Doc. CRC/C/GC/15 (2013), paras. 24, 31, 56, 69 (outlining that children have the right to control their own health, including by accessing confidential counselling and advice without parental or guardian consent and making independent choices about their sexual and reproductive health, in keeping with their evolving capacities; and instructing states parties that they should ensure “confidential, universal access to goods and services for both married and unmarried female and male adolescents”).
- **CRC, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child***, U.N. Doc. CRC/GC/2003/4 (2003), paras. 5, 7, 12(b), 22, 24, 26–29, 36–37 (articulating obligation to ensure health-care providers maintain confidentiality about medical information, which can be disclosed only with the consent of the adolescent or in the same situations that apply to the violation of an adult's confidentiality; stipulating adolescents' rights to health information, privacy, and confidentiality, and to give their independent and informed consent, particularly regarding sexual and reproductive health matters; and urging states to address cultural and other taboos surrounding adolescent sexuality).
- **Committee on the Elimination of Discrimination against Women (CEDAW Committee) & CRC, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices***, U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18 (2014), para. 55(j) (outlining that mandatory reporting requirements should ensure the protection of the privacy and confidentiality of children and women in situations of abuse).

- **CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19***, U.N. Doc. CEDAW/C/GC/35 (2017), paras. 14, 26(a), 28, 38(c) (states should aim to prevent, protect, prosecute, punish, and redress gender-based violence “with a victim/survivor-centered approach, acknowledging women as subjects of rights and promoting their agency and autonomy, including the evolving capacity of girls, from childhood to adolescence,” including by ensuring privacy, confidentiality, and victims/survivors’ free and informed consent).
- **CEDAW Committee, *General Recommendation No. 24 on Art. 12 of the Convention (women and health)***, U.N. Doc. A/54/38/Rev.1 (1999), paras. 8, 12(b), 12(d), 18, 20–23 (noting that a lack of confidentiality in medical services can have a disproportionately detrimental effect on women’s and girls’ right to health; women and girls are entitled to access sexual and reproductive health care under conditions of confidentiality and informed consent).
- **Committee for Economic Social and Cultural Rights (CESCR), *General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the ICESCR)***, U.N. Doc. E/C.12/GC/22 (2016), paras. 18–19, 41, 43–44, 49(f) (outlining states parties’ human rights obligations with respect to sexual and reproductive health, including to information, privacy, confidentiality, and consent-based care, specifically for adolescent girls in line with their evolving capacities).
- **CESCR, *General Comment No. 14 on the Right to the Highest Attainable Standard of Health (Art. 12)***, U.N. Doc. E/C.12/2000/4 (2000), paras. 21, 23 (outlining that the realization of adolescents’ right to health “is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services”).

INQUIRIES AND INDIVIDUAL COMPLAINTS

- **CEDAW Committee, *LC v. Peru, Communication No. 22/2009***, U.N. Doc. CEDAW/C/50/D/22/2009 (2011), paras. 8.7–8.18, 9(b)(ii) (where a 13-year-old girl became pregnant following rape and was denied critical medical care, including an abortion: finding violations of, *inter alia*, the rights to non-discrimination, to prevent sex-based stereotyping, and to access health services, further exacerbated because the victim was a minor and sexual abuse victim; and requiring the state to train health providers to “change their attitudes and behavior” towards adolescent women seeking reproductive health services and to address specific health needs of sexual violence survivors).
- **Human Rights Committee, *K.L. v. Peru, Communication No. 1153/2003***, U.N. Doc. CCPR/C/85/D/1153/2003 (2005), paras. 6.1–8 (where an adolescent girl was denied a legal abortion to the detriment of her mental and physical health, finding violations of the rights to privacy, to special measures of protection as an adolescent girl, including psychological and medical support, and to be free of inhuman and degrading treatment; and requiring the state to pay compensation and guarantee non-repetition).

UNITED NATIONS HUMAN RIGHTS EXPERT REPORTS

- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR Health), *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover***, U.N. Doc. A/HRC/14/20 (2010), paras. 47–50 (summarizing children’s rights to medical confidentiality, medical counselling and advice, and consent-based medical goods and services, especially with respect to sexual and reproductive health, in keeping with the child’s evolving capacities).
- **SR Health, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. E/CN.4/2004/49 (2004), paras. 36–37, 39–42 (with respect to sexual and reproductive health, underscoring adolescents’ right to and need for sexual and reproductive health information, to privacy and confidentiality in medical settings, to protection from abuse, exploitation and violence, to nondiscrimination, and to participation in decisions affecting them with regard for their evolving capacities, in particular for survivors of gender-based and/or sexual violence).

REGIONAL CASE LAW

EUROPEAN COURT OF HUMAN RIGHTS

- ***P and S v. Poland, Application No. 15966/04 (2009)***, paras. 108–109, 111, 128–137, 157–169 (affirming state obligation to ensure adolescents' autonomous reproductive choices and privacy in a case where a 14-year-old rape survivor was denied abortion care and where medical professionals shared her personal information without her permission; establishing that authorities should have taken into account her young age and vulnerability as a rape survivor; and finding violations, *inter alia*, of the rights to be free from ill treatment, to private life, and to liberty and security of the person).

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

- ***Asunto niña Mainumby respect de Paraguay, Precautionary Measures No. 178/15, (2015)***, para. 23, section V [*available only in Spanish*] (in a case where a 10-year-old rape survivor's health was determined to be at risk from her pregnancy, issuing precautionary measures to protect her life and personal integrity, to ensure her access to adequate medical treatment, to ensure that the rights of the child are guaranteed in all health decisions affecting the child's health in accordance with her age and maturity, and to guarantee her protection from future abuse).
- ***Paulina Ramírez v. Mexico, Report No. 21/07, Petition 161–02, Friendly Settlement (2007)*** (outlining the terms of friendly settlement by a state providing reparations and public apology, and preventing reoccurrence in a case involving a 13-year-old rape survivor who was given false information about the safety of abortion procedures and therefore decided to carry her pregnancy to term under incorrect, coercive pretenses).

RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

IN THE SUPREME COURT OF INDIA

Shankar Kisanrao Khade v. State of Maharashtra

(2013) 5 SCC 546

K.S.P. Radhakrishnan and Madan B. Lokur, JJ.

The accused kidnapped a minor girl diagnosed with moderate intellectual disability and then raped and murdered her. The rape was witnessed by a man, but he did not report the same to the police. The accused was convicted and sentenced to death by the Additional Sessions Court; this was confirmed by the High Court. The accused filed an appeal before the Supreme Court against the High Court's confirmation order. While deciding the issue, the Court made certain observations on the mandatory reporting requirement under the POCSO Act. Note however, that the incident had occurred before 2012, when the POCSO Act was enacted and came into force.

Radhakrishnan, J.: "...

NON-REPORTING THE OFFENCE OF SEXUAL ASSAULT

64. Let me now refer to another disturbing trend in our society that is non-reporting of sexual assault on minor children, which has happened in this case as well. Ravindra Lavate (PW8), in his deposition, has stated as follows:

"I heard that the girl was weeping. I, therefore, come in Verandah and observed that Accused No.1 was lying on the body of the said girl. I observed it in the electric light. I also observed that Accused No.1 was committing sexual intercourse with the girl. I and my wife asked Accused No.1 as to what he was doing. I asked Accused No.1 Shankar to take out the said girl. Accused No.1 thereafter took away the said girl on cycle."

65. PW8 has admitted in his cross-examination that he had not reported the said fact to the police, possibly due to the reason that there was no clear cut legislative provision casting an obligation on him to report to the J.J. Board or to the S.J.P.U. dealing with sexual offences towards children after having witnessed the incident. Is there not a duty cast on every citizen of this country if they witness or come to know any act of sexual assault or abuse on a minor child to report the same to the police or to the J.J. Board or can they keep mum so as to screen the culprit from legal punishment?

...

69. ... Parliament later passed the Act titled "The Protection of Children from Sexual Offences Act, 2012. (Act 32 of 2012) which received the assent of the President on 19th June, 2012. The Act provides for reporting of sexual offences and the punishment for failure to report or record punishment for filing false complaint and/or false information. The Act also provides for a Justice Delivery System for child victims and few other provisions to safeguard the interest of children.

70. Chapter V of the Act deals with the Procedure of reporting of cases. Sec. 19(1) deals with the manner in which the case has to be reported to the Special Juvenile Police Unit or local police...

71. Section 21 prescribes punishment for failure to report or record a case, which reads as follows:

"21. Punishment for failure to report or record a case. -

(1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine."

72. ... Witnesses of many such heinous crimes often keep mum taking shelter on factors like social stigma, community pressure, and difficulties of navigating the criminal justice system, total dependency on perpetrator emotionally and economically and so on. Some adult members of family including parents choose not to report such crimes to the police on the plea that it was for the sake of protecting the child from social stigma and it would also do more harm to the victim. Further, they also take shelter pointing out that in such situations some of the close family members having known such incidents would not extend medical help to the child to keep the same confidential and so on, least bothered about the emotional, psychological and physical harm done to the child. Sexual abuse can be in any form like sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted or encouraging, inducing or forcing the child to be used for the sexual gratification of another person, using a child or deliberately exposing a child to sexual activities or pornography or procuring or allowing a child to be procured for commercial exploitation and so on.

73. In my view, whenever we deal with an issue of child abuse, we must apply the *best interest child standard*, since best interest of the child is paramount and not the interest of perpetrator of the crime. Our approach must be child centric. Complaints received from any quarter, of course, have to be kept confidential without casting any stigma on the child and the family members. But, if the tormentor is the family member himself, he shall not go scot-free. Proper and sufficient safeguards also have to be given to the persons who come forward to report such incidents to the police or to the Juvenile Justice Board.

74. The conduct of the police for not registering a case under Section 377 IPC against the accused, the agony undergone by a child of 11 years with moderate intellectual disability, non-reporting of offence of rape committed on her, after having witnessed the incident either to the local police or to the J.J. Board compel us to give certain directions for compliance in future which, in my view, are necessary to protect our children from such sexual abuses. This Court as *parens patriae* has a duty to do so because Court has guardianship over minor children, especially with regard to the children having intellectual disability, since they are suffering from legal disability. Prompt reporting of the crime in this case could have perhaps, saved the life of a minor child of moderate intellectual disability.

...

77. In my opinion, the case in hand calls for issuing the following directions to various stake-holders for due compliance:

77.1. The persons in-charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails etc. or wherever children are housed, if they come across instances of sexual abuse or assault on a minor child which they believe to have committed or come to know that they are being sexually molested or assaulted are directed to report those facts keeping utmost secrecy to the nearest S.J.P.U. or local police, and they, depending upon the gravity of the complaint and its genuineness, take appropriate follow up action casting no stigma to the child or to the family members.

77.2. Media personals, persons in charge of hotels, lodges, hospitals, clubs, studios, photograph facilities have to duly comply with the provision of Section 20 of the Act 32 of 2012 and provide information to the S.J.P.U., or local police. Media has to strictly comply with Section 23 of the Act as well.

77.3. Children with intellectual disability are more vulnerable to physical, sexual and emotional abuse. Institutions which house them or persons in care and protection, come across any act of sexual abuse, have a duty to bring to the notice of the J.J. Board/S.J.P.U. or local police and they in turn be in touch with the competent authority and take appropriate action.

77.4. Further, it is made clear that if the perpetrator of the crime is a family member himself, then utmost care be taken and further action be taken in consultation with the mother or other female members of the family of the child, bearing in mind the fact that best interest of the child is of paramount consideration.

77.5. If hospitals, whether government or privately-owned or medical institutions where children are being treated come to know that children admitted are subjected to sexual abuse, the same will immediately be reported to the nearest J.J. Board/SJPU and the JJ Board, in consultation with SJPU, should take appropriate steps in accordance with the law safeguarding the interest of child.

77.6. The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.

77.7. Complaints, if any, received by NCPDR, SCPCR, Child Welfare Committee (CWC) and Child Helpline, NGO's or Women's Organizations etc., they may take further follow up action in consultation with the nearest J.J. Board, S.J.P.U. or local police in accordance with law.

77.8. The Central Government and the State Governments are directed to constitute SJPU's in all the Districts, if not already constituted and they have to take prompt and effective action in consultation with J. J. Board to take care of child and protect the child and also take appropriate steps against the perpetrator of the crime.

77.9. The Central Government and every State Government should take all measures as provided under Section 43 of the Act 32/2012 to give wide publicity of the provisions of the Act through media including television, radio and print media, at regular intervals, to make the general public, children as well as their parents and guardians, aware of the provisions of the Act.

...”

IN THE HIGH COURT OF CHHATTISGARH

Kamal Prasad Patade v. State of Chhattisgarh

Writ Petition (Criminal) No. 8/2016, decided on May 12, 2016

Sanjay K. Agrawal, J.

The petitioner was a headmaster in a school. A chargesheet was submitted by the police against him alleging commission of an offence punishable under Section 21, POCSO Act. The allegation was that a worker in the school had committed an offence of penetrative sexual assault on a student of the school. The grandmother of the child informed the petitioner of the incident, in his capacity as the headmaster of the school. Around two and a half hours later, the grandmother filed an FIR against the worker. The petitioner was arrested the next day for not reporting the offence as required by Section 19(1) of the POCSO Act. The petitioner filed this writ petition seeking quashing of the chargesheet.

Agrawal, J.: “...

3. ...[L]earned counsel appearing for the petitioner, would submit that initiation and continuance of the prosecution against the petitioner for offence under Section 21(2) of the POSCO Act for non-reporting the commission of offence by co-accused Indrajeet Thakur under Section 4 of the POSCO Act as envisaged under Section 19(1) of the POSCO Act is nothing but sheer abuse of process of the law as co-accused Indrajeet Thakur is still facing trial and it has not been established beyond reasonable doubt that he has committed offences under Section 377, 506 Part-II, 511 of the IPC and Sections 4 & 6 of the POSCO Act and unless and until he is convicted for the aforesaid offences, there is no reason to implicate the petitioner for offence under Section 21(2) of the POSCO Act for non-reporting the commission of the Act under Sections 4 & 6 of the POSCO Act. He would further submit that the prosecution ought to have waited till the principal offences for which co-accused Indrajeet Thakur is charged are determined finally by the jurisdictional criminal Court/Special Judge (POSCO). He would further submit that simultaneous prosecution of the petitioner with co-accused Indrajeet Thakur, before the co-accused is held guilty for the principal offences, runs contrary to the settled law in this behalf. He would also submit that even otherwise, he was not having exclusive knowledge of offences in question, even otherwise, on 21.8.2015 at 10.30 a.m. the matter was reported to Kanker Police and Kanker Police immediately started investigation and the petitioner was also arrested on 22.8.2015 i.e. on the very next day, therefore, he has no such opportunity to investigate the matter and report the matter to the police as required under Section 19(2) of the POSCO Act, therefore, the initiation and continuance of prosecution even if taking the entire charge-sheet in its face value as it is, does not disclose the prima-facie offence under Section 21(2) of the POSCO Act against the petitioner. Therefore, prosecution against the petitioner in the jurisdictional criminal Court being abuse of process of law deserves to be quashed.

4. ...[L]earned counsel appearing for respondent No. 1/State would vehemently oppose the writ petition and would submit that the petitioner was duly informed by respondent No. 2 on 21.8.2015 at about 8 a.m. in the morning, but he did not report the matter to the authority concerned that offence under the POSCO Act has been committed by his subordinate and co-accused Indrajeet Thakur and as such, the petitioner was having knowledge that such an offence has been committed failed to report the matter as envisaged under Section 19(1) of the POSCO Act to the competent

authority, therefore, he is criminally liable under Section 21(2) of the POSCO Act and therefore, initiation and continuance of prosecution along with co-accused Indrajeet Thakur for the above-stated offences is in accordance with law and the writ petition deserves to be dismissed.

...

6. Mr. Prasun Kumar Bhaduri, learned counsel appearing as Amicus Curiae would submit that Section 21(2) of the POSCO is itself liability on any person being in-charge of any company or in institution to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control presumes imprisonment for one year with fine as a punishment if such person being in-charge failed to report the commission of an offence in accordance with Section 19(1) of the POSCO Act. Such provision is imperative in character. He would rely upon paragraphs 71, 72 and 73 of the judgment of the Supreme Court in the matter of *Shankar Kisanrao Khade v. State of Maharashtra* in which Their Lordships have held since best interest of the child is paramount and not the interest of perpetrator of the crime, therefore, approach must be child-centric. He has also highlighted paragraph 77.6 of the judgment in which it has been held by the Supreme Court that non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening the offenders from legal punishment and hence they be held liable under the ordinary criminal law and prompt action be taken against them in accordance with law.

...

11. At this stage, it is appropriate to notice Section 19(1) of the POSCO Act which states as under:-

“19. Reporting of offences.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2) of 1974), any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to.-

(a) the Special Juvenile Police Unit; or

(b) the local police.”

Non-compliance of Section 19(1) of the POSCO Act is made punishable under Section 21(2) of the POSCO Act, which states as under:-

“21. Punishment for failure to report or record a case.-

(1) xxx xxx xxx

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.”

(3) xxx xxx xxx”.

12. Thus, sub-section (2) of Section 21 of the POSCO Act is charging provision for non-compliance of the provisions of the POSCO Act, which is prescribed under Section 19(1) of the POSCO Act. The Act which constitutes an offence under Section 21(2) of the POSCO Act relates to failure to make report of commission of offence under the provision of the POSCO Act under Section 19(1) of the POSCO Act which prescribes that any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information. Thus, this provision is in three parts:-

(A) Any person including the child or

(B) who has apprehension that an offence under POSCO Act is likely to be committed or

(C) has knowledge that such an offence has been committed under POSCO Act.

13. The qualifying word in Section 19(1) of the POSCO Act is apprehension regarding an offence is likely to be committed or has knowledge that such an offence under POSCO Act has been committed, he shall provide such information to the Special Juvenile Police Unit or local police. Thus, Section 19(1) of the POSCO Act can be invoked only when the person concerned was having exclusive knowledge of commission of offence under POSCO Act and if the person is in-charge of the institution who fails to report the commission of an offence under sub-section (1) of Section 19 of the POSCO Act in respect of a subordinate under his control, he would be liable for prosecution under Section 21(2) of the POSCO Act.

14. Meaning of “knowledge” has been defined in the law lexicon as under:-

Knowledge: The certain perception of truth; belief which amounts to or results in moral certainty indubitable apprehension; information; intelligence; implying truth, proof and conviction; the act or state of knowing; clear perception of fact; that which is or may be known; acquaintance with things ascertainable; specific information; settled belief; reasonable conviction; anything which may be the subject of human instruction.

15. The word ‘*knowledge*’ has been considered by the Supreme Court in the matter of *Joti Prasad v. State of Haryana* (AIR 1991 SC 1167). Paragraph 5 of the said judgment reads as under:-

“5. Under the Indian Penal law, guilt in respect of almost all the offences is fastened either on the ground of “intention” or “knowledge” or “reasons to believe”. We are now concerned with the expressions “knowledge” and “reasons to believe”. “Knowledge” is awareness on the part of person concerned indicating his state of mind. “Reasons to believe” is another facet of the state of mind. “Reasons to believe” is not the same thing as “suspicion” or “doubt” and mere seeing also cannot be equated to believing. “Reasons to believe” is higher level of state of mind. Likewise “knowledge” will be slightly on higher plane than “reasons to believe”. A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same...”

16. Likewise, in the matter of *A.S. Krishnan v. State of Kerala*, (2004) 11 SCC 576, their Lordships of the Supreme Court have held as under:-

“9. Under the IPC, guilt in respect of almost all the offences is fastened either on the ground of “intention” or “knowledge” or “reasons to believe”. We are now concerned with the expressions “knowledge” and “reasons to believe”. “Knowledge” is awareness on the part of person concerned indicating his state of mind. “Reasons to believe” is another facet of the state of mind. “Reasons to believe” is not the same thing as “suspicion” or “doubt” and mere seeing also cannot be equated to believing. “Reasons to believe” is higher level of state of mind. Likewise “knowledge” will be slightly on higher plane than “reasons to believe”. A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26, IPC explains the meaning of the words “reason to believe” thus.

26. “Reason to believe”. A person is said to have ‘reason to believe’ a thing, if he has sufficient cause to believe that thing but not otherwise”.

17. At this stage, it would be appropriate to mention that charge-sheet against the petitioner and co-accused Indrajeet Thakur was filed consolidatedly and simultaneously by the jurisdictional police in the criminal court for trying co-accused Indrajeet Thakur for the principal offences under Sections 377, 506 Part-II, 511 of the IPC and Sections 4 & 6 of the POSCO Act and to the petitioner under Section 21(2) of the POSCO Act together for trying them jointly.

18. From careful perusal of the record, it is quite vivid that in a proceeding launched by the prosecution against co-accused Indrajeet Thakur, the prosecution is yet to establish that the co-accused Indrajeet Thakur has committed penetrative sexual assault/aggravated penetrative assault within the meaning of Sections 3 & 5 of the POSCO Act which is punishable under Sections 4 & 6 of the POSCO Act respectively with grandson of respondent No. 2 on 20.8.2015 and also to establish other offences, which are pending trial. Thus, this fact is to be established that such an offence has been committed by co-accused/principal offender Indrajeet Thakur with grandson of respondent No. 2. In the prosecution under Section 21(2) of the POSCO Act, it is necessary for the prosecution to establish first commission of main offence under Sections 4 & 6 of the POSCO Act before making the person liable under Section 21(2) of the POSCO Act as the prosecution has firstly to establish beyond doubt in the jurisdictional criminal court that an offence under Sections 4 & 6 of the POSCO Act has been committed by an accused person and once finding is recorded by jurisdictional criminal court convicting the accused therein for offences under Sections 4 & 6 of the POSCO Act, then to establish the petitioner had exclusive knowledge of such an offence having been committed by the co-accused under POSCO Act and despite such knowledge, he failed to report the matter under Section 19(1) of the POSCO Act to the competent authority including local police station, then only penal provision contained in Section 21(2) of the POSCO Act would attract.

19. The law in this regard is well settled. Way back, in the matter of *Harishchandrasing Sajjansinh Rathod v. State of Gujrat*, (1979) 4 SCC 502, Their Lordships of the Supreme Court while considering the scope and applicability of Section 202 of the IPC have held that said provision does not apply to the person alleged to have committed the principal offence and also held that for prosecution under Section 202 of the IPC, it is necessary for the prosecution to establish that main offence before making the person liable under Section 202 of the IPC...

...

21. Thus, it is absolutely necessary for the prosecution to establish the main offence under the POSCO Act before the criminal court beyond reasonable doubt and main offender is brought to book before the Head of the Institution is charged/prosecuted for intentionally not giving information to the competent authority including the police under Section 19(1) of the POSCO Act. The Madhya Pradesh High Court has also struck similar proposition and held that accused of the principal offences and accused of offence under Section 202 of the IPC cannot be tried jointly. Thus, applying the law so laid down by Their Lordships of the Supreme Court in *Harishchandrasing* (supra) to the facts of the present case, undoubtedly prosecution of main accused for commission of offence under Sections 4 & 6 of the POSCO Act and related offences under the IPC is pending trial and the petitioner is being tried jointly as consolidated charge-sheet has been filed by the prosecution against main accused Indrajeet Thakur and the petitioner. Therefore, pending establishment of the principal offences against main accused for commission of offences under POSCO Act, the initiation and continuance of prosecution against the petitioner for offence under Section 21(2) of the POSCO Act is nothing but clear abuse of the process of law.

22. This matter can be considered from another angle. Pari-materia provision like Section 21(2) of the POSCO Act is also exist in other enactments i.e. Section 201 of the IPC for causing disappearance of evidence of offence, or giving false information to screen offender. Section 202 of the IPC i.e. intentional omission to give information of offence by person bound to inform. Section 376F of the IPC i.e. liability of person in-charge of workplace and others to give information about offence and likewise the provisions in the Cr.P.C. i.e. Sections 39 and 40 of the CrPC. It has been held that omission to give information must be with reasonable cause to avoid culpability.

...

26. In the matter of *Ramphal v. King Emperor*, AIR 1921 Oudh 227, it has been held that provisions contained in Section 202 IPC are not intended to be punitive in themselves, but are intended to be facilitate information as to the commission of an offence...

27. In the matter of *P.K. Sarangi v. State of Orissa*, 1995(1) OLR 319, it has been held by the Orissa High Court that omission under Section 202 IPC must not only be omission, but a willful omission with some ulterior object...

...

29. A conspectus of the afore-stated judgments would show that Section 21(2) of the POSCO Act is a penal provision which obliges any person being in-charge of the institution to give information before the police about the commission of an offence under the POSCO Act. The said provision has been enacted for the purpose of screening the offender relating to commission of offence under the POSCO Act with an intention that information relating to commission of offence under the POSCO Act must reach to the police authorities with all expedition so that wheels of investigation for the offences under the POSCO Act will start running at the earliest and once the information relating to commission of offence actually reaches to the Police Station, the requirement of Section 19(1) of the POSCO Act stood satisfied and therefore, no prosecution for non-reporting the matter under Section 21(2) of the POSCO Act would lie against the Head of the Institution.

30. Thus, on the basis of aforesaid discussion, it is held that the prosecution of the petitioner for non-reporting the commission of offence by co-accused Indrajeet Thakur under Sections 4 & 6 of the POSCO Act offence under Section 21(2) of the POSCO Act is unsustainable in law as the prosecution of co-accused Indrajeet Thakur for the principal offences is still pending consideration and it has not been established beyond doubt that co-accused Indrajeet Thakur has committed the offence under Sections 4 & 6 of the POSCO Act and other related offences under the provisions of the IPC and therefore, unless the commission of the principal offences by the main accused for offences under the POSCO Act is established, question of prosecution of the petitioner for non-compliance of Section 19(1) that he has knowledge of commission of offence would not arise. The information as to the commission of offence has already reached to the jurisdictional police and after registration of an offence under the POSCO Act & IPC, crime has been investigated and offender has been charge-sheeted, thereafter, prosecution of the petitioner for offence under Section 21(2) of the POSCO Act is unsustainable in law.

...

33. Section 21(2) of the POSCO Act is a penal provision. Any person being in-charge of any institution is liable to be prosecuted criminally for failure to report for commission of an offence under Section 19(1) and 20 of the Act. In this case, the Head of the Institution is the Principal of Central School. The Principal is the key post in the running of a school...

...

35. Thus, the petitioner being the Head of the Institution/Principal of a reputed school holding such a key post of running of a school was not given due respect which the Head of the Institution is usually entitled to by giving reasonable/sufficient time to inquire and collect the material as on 21.8.2015 at 8 a.m. alleged crime was said to be reported to him and before he could collect the material at his own school, the matter was reported to police at 10 a.m. on said day, crime was registered against the co-accused and investigation commenced, but unfortunately on the next date, the petitioner was arrested for non-reporting the matter to police under Section 21(2) of the POSCO Act for his failure of non-reporting the matter between 8 a.m. to 10 a.m. on 21.8.2015. Such a course on the part of investigating agency is wholly impermissible in law. Head of the Institution is entitled to and should be allowed sufficient/reasonable time to find out the correct facts by making an enquiry at the institutional level before reporting the matter to make the reporting of an offence responsible by the Head of Institution based on material collected, which legislature has intended while enacting the provision under Section 21(2) of the POSCO Act and therefore the prosecuting agency should be circumspect in initiating prosecution under Section 21(2) of the POSCO Act against the In-charge of the institution.

..."

IN THE SUPREME COURT OF INDIA

Independent Thought v. Union of India & Anr.

(2017) 10 SCC 800

Madan B. Lokur & Deepak Gupta, JJ.

The petitioner society filed a writ petition under Article 32 of the Indian Constitution in public interest to challenge the exception created under Section 375 of the IPC with regard to married girls above 15 and below 18 years of age. The issue before the Court was whether sexual intercourse between a man and his wife, the wife being a girl between the age of 15 and 18 years, is rape and thus a punishable offence.

Lokur, J.: "The issue before us is a limited but one of considerable public importance — whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape? Exception 2 to Section 375 of the Penal Code, 1860 (IPC) answers this in the negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The Exception carved out in IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil.

...

4. According to the petitioner, Section 375 IPC prescribes the age of consent for sexual intercourse as 18 years meaning thereby that any person having sexual intercourse with a girl child below 18 years of age would be statutorily guilty of rape even if the sexual activity was with her consent. Almost every statute in India recognises that a girl below 18 years of age is a child and it is for this reason that the law penalises sexual intercourse with a girl who is below 18 years of age. Unfortunately, by virtue of Exception 2 to Section 375 IPC, if a girl child between 15 and 18 years of age is married, her husband can have non-consensual sexual intercourse with her, without being penalised under IPC, only because she is married to him and for no other reason. The right of such a girl child to bodily integrity and to decline to have sexual intercourse with her husband has been statutorily taken away and non-consensual sexual intercourse with her husband is not an offence under IPC.

5. The learned counsel for the petitioner submitted that absolutely nothing is achieved by entitling the husband of a girl child between 15 and 18 years of age to have non-consensual sexual intercourse with her. It was also submitted that whatever be the (unclear) objective sought to be achieved by this, the marital status of the girl child between 15 and 18 years of age has no rational nexus with that unclear object. Moreover, merely because a girl child between 15 and 18 years of age is married does not result in her ceasing to be a child or being mentally or physically capable of having sexual intercourse or indulging in any other sexual activity and conjugal relations. It was submitted that to this extent Exception 2 to Section 375 IPC is not only arbitrary but is also discriminatory and contrary to the beneficial intent of Article 15(3) of the Constitution which enables Parliament to make special provision for women and children. In fact, by enacting Exception 2 to Section 375 IPC in the statute book, the girl child is placed at a great disadvantage, contrary to the visionary and beneficent philosophy propounded by Article 15(3) of the Constitution.

LAW COMMISSION OF INDIA – 84TH REPORT

6. The learned counsel for the petitioner drew our attention to the 84th Report of the Law Commission of India (LCI) presented on 25-4-1980 dealing with the rape of a girl child below the prescribed minimum age. The report considered the anomalies in the law relating to rape, particularly in the context of the age of consent for sexual intercourse with a girl child. The view expressed by the LCI is quite explicit and is to be found in Paras 2.18, 2.19 and 2.20 of the Report. The view is that since the Child Marriage Restraint Act, 1929 prohibits the marriage of a girl below 18 years of age, sexual intercourse with a girl child below 18 years of age should also be prohibited and IPC should reflect that position thereby making sexual intercourse with a girl child below 18 years of age an offence. ...

...

10. ... [T]he counter-affidavit of the Union of India refers to the National Family Health Survey-3 (of 2005) in which it is stated that 46% of women in India between the ages of 18 and 29 years were married before the age of 18 years. It is also estimated, interestingly but disturbingly, that there are about 23 million child brides in the country. As far as any remedy available to a child bride is concerned, the counter-affidavit draws attention to Section 3 of the Prohibition of Child Marriage Act, 2006 (the PCMA). Under Section 3(1) of the PCMA a child marriage is voidable at the option of any contracting party who was a child at the time of the marriage. The marriage can be declared a nullity in terms of the proviso to Section 3(1) of the PCMA through an appropriate petition filed by the child within two years of attaining majority and by approaching an appropriate court of law. It is also stated that in terms of Section 13(2)(iv) of the Hindu Marriage Act, 1955 a child bride can file a petition for a divorce on the ground that her marriage (whether consummated or not) was solemnised before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining 18 years of age. In other words a child marriage is sought to be somehow “legitimised” by the Union of India and the onus for having it declared voidable or a nullity is placed on the child bride or the child groom.

DOCUMENTARY MATERIAL

11. Apart from but in addition to the legal issue, the learned counsel for the petitioner and the learned counsel for the intervener (The Child Rights Trust) relied on a large amount of documentary material to highlight several adverse challenges that a girl child might face on her physical and mental health and some of them could even have an inter-generational impact if a girl child is married below 18 years of age. The girl child could also face adverse social consequences that might impact her for the rest of her life. ...

12. [The Report titled ‘A Statistical Analysis of Child Marriages in India based on Census 2011’] refers to the consequences of child marriage in Chapter 5. Broadly, it is stated:

“Child marriage is not only a violation of human rights, but is also recognised as an obstacle to the development of young people. The practice of child marriage cuts short a critical stage of self-discovery and exploring one’s identity. Child marriage is an imposition of a marriage partner on children or adolescents who are in no way ready and matured, and thus, are at a loss to understand the significance of marriage. Their development gets comprised due to being deprived of freedom, opportunity for personal development, and other rights including health and well-being, education, and participation in civic life and nullifies their basic rights as envisaged in the United Nation’s Convention on the Right of the Child ratified by India in 1989. Marriage at a young age prevents both girls and boys from exercising agency in making important life decisions and securing basic freedoms, including pursuing opportunities for education, earning a sustainable livelihood and accessing sexual health and rights.

The key consequences of child marriage of girls may include early pregnancy; maternal and neonatal mortality; child health problems; educational setbacks; lower employment/livelihood prospects; exposure to violence and abuse, including a range of controlling and inequitable behaviours, leading to inevitable negative physical and psychological consequences; and limited agency of girls to influence decisions about their lives.

Census data have demonstrated an *upswing of female deaths* in the age group of 15-19 years. This high mortality rate could be attributed to the deaths of teenage mothers. Child marriage virtually works like a double-edged sword; lower age at marriage is significantly associated with worse outcomes for the child and worse pregnancy outcomes for the mother. All these factors push girls and their families into perpetuation of intergenerational poverty and marginalisation. The impact of early marriage on girls—and to a lesser extent on boys—is wide-ranging, opines the Innocenti Digest on child marriage. Child brides often experience overlapping vulnerabilities—they are young, often poor and undereducated. This affects the resources and assets they can bring into their marital household, thus reducing their decision-making ability. Child marriage places a girl under the control of her husband and often in-laws, limiting her ability to voice her opinions and form and pursue her own plans and aspirations. While child marriage is bound to have a detrimental effect on boys who would need to shoulder the responsibility of a wife and in most cases, have to also discontinue their education, there is very little research evidence to capture the long-term economic and psychological effect on boys who are married early. The Lancet 2015 acknowledges that adolescent boys are not important and neglected part of the equation. The assumption that girls need more attention than boys is now being challenged.

Looking at the impact of early marriage from rights perspective, it can be said that the key concerns are denial of childhood and adolescence, curtailment of personal freedom, deprivation of opportunities to develop a full sense of selfhood and denial of psychosocial and emotional well-being, reproductive health and educational opportunity along with consequences described earlier.” (emphasis supplied).

13. There is a specific discussion in the Statistical Analysis on the impact of early childbirth on health in which it is stated that “girls aged 15 to 19 [years] are twice more likely than older women to die from childbirth and pregnancy, making pregnancy the leading cause of death in poor countries for these age groups. Girls from the Scheduled Castes and Scheduled Tribes were on an average 10 per cent more likely (after accounting for other variables) to give birth earlier than girls from the other castes”. It has been found that girls most likely to have had a child by 19 years (as compared with all other married and unmarried girls) were from the poorest groups; were more likely to live in rural areas; had the least educated mothers; had earlier experiences of menarche; had lower education aspirations; and were less likely to be enrolled in school between the age of 12 and 15 years. Being young and immature mothers, they have little say in decision-making about the number of children they want, nutrition, health-care, etc. Lack of self-esteem or of a sense of ownership of her own body exposes a woman to repeated unwanted pregnancies.

...

15. We are not dealing with these reports in any detail but draw attention to them since they support the view canvassed by the learned counsel. All that we need say is that a reading of these reports gives a good idea of the variety and magnitude of problems that a girl child who is married between 15 and 18 years of age could ordinarily encounter, including those caused by having sexual intercourse and child-bearing at an early age.

IN-DEPTH STUDY ON ALL FORMS OF VIOLENCE AGAINST WOMEN

16. On 6-7-2006 the Secretary-General of the United Nations submitted a report to the General Assembly called the “*In-depth study on all forms of violence against women*”. In the chapter relating to violence against women within the family and harmful traditional practices, early marriage was one of the commonly identified forms of violence. [“*In-depth study on all forms of violence against women*”, para 111 (9-10-2006)] Similarly, early marriage was considered a harmful traditional practice [*Id*, para 118] — a thought echoed a year later in the *Study on Child Abuse: India 2007* (referred to later) by the Government of India.

17. An early marriage is explained as involving the marriage of a child, that is, a person below the age of 18 years. It is stated that:

“121. ... Minor girls have not achieved full maturity and capacity to act and lack ability to control their sexuality. When they marry and have children, their health can be adversely affected, their education impeded and economic autonomy restricted. Early marriage also increases the risk of HIV infection.”

Among the under-documented forms of violence against women are included traditional harmful practices, prenatal sex selection, early marriage, acid throwing and dowry or “honour” related violence, etc. [*Id*, para 222]

...

24. A reading of the National Policy and the National Plan of Action for Children reveals, quite astonishingly, that even though the Government of India realises the dangers of early marriages, it is merely dishing out platitudes and has not taken any concrete steps to protect the girl child from marital rape, except enacting the Protection of Children from Sexual Offences Act, 2012.

...

26. In our opinion, it is not necessary to detail the contents of every report or study placed before us except to say that there is a strong established link between early marriage and sexual intercourse with a married girl child between 15 and 18 years of age. There is a plethora of material to clearly indicate that sexual intercourse with a girl child below the age of 18 years (even within marriage) is not at all advisable for her for a variety of reasons, including her physical and mental well-being and her social standing—all of which should ordinarily be of paramount importance to everybody, particularly the State.

27. The social cost of a child marriage (and therefore of sexual intercourse with a girl child) is itself quite enormous and in the long run might not even be worth it. This is in addition to the economic cost to the country which would be obliged to take care of infants who might be malnourished and sickly; the young mother of the infant might also require medical assistance in most cases. All these costs eventually add up and apparently only for supporting a pernicious practice.

28. We can only express the hope that the Government of India and the State Governments intensively study and analyse these and other reports and take an informed decision on the effective implementation of the PCMA and actively prohibit child marriages which “encourage” sexual intercourse with a girl child. Welfare schemes and catchy slogans are excellent for awareness campaigns but they must be backed up by focused implementation programmes, other positive and remedial action so that the pendulum swings in favour of the girl child who can then look forward to a better future.

...

32. ... Section 375 IPC provides for three circumstances relating to “rape”. *Firstly*, sexual intercourse with a girl below 18 years of age is rape (statutory rape). *Secondly*, and by way of an exception, if a woman is between 15 and 18 years of age then sexual intercourse with her is not rape if the person having sexual intercourse with her is her husband. Her willingness or consent is irrelevant under this circumstance. *Thirdly*, sexual intercourse with a woman above 18 years of age is rape if it is under any of the seven descriptions given in Section 375 IPC (non-consensual sexual intercourse).

33. The result of the above three situations is that the husband of a girl child between 15 and 18 years of age has blanket liberty and freedom to have non-consensual sexual intercourse with his wife and he would not be punishable for rape under IPC since such non-consensual sexual intercourse is not rape for the purposes of Section 375 IPC. Very strangely, and as pointed out by Sakshi before the LCI, the husband of a girl child does not have the liberty and freedom under IPC to commit a lesser “sexual” act with his wife, as for example, if the husband of a girl child assaults her with the intention of outraging her modesty, he would be punishable under the provisions of Section 354 IPC. In other words, IPC permits a man to have non-consensual sexual intercourse with his wife if she is between 15 and 18 years of age but not to molest her. This view is surprisingly endorsed by the LCI in its 172nd Report adverted to above.

THE PROTECTION OF HUMAN RIGHTS ACT, 1993

34. The Protection of Human Rights Act, 1993 defines “human rights” in Section 2(1)(d) as meaning the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in International Covenants and enforceable by courts in India. There can be no doubt that if a girl child is forced by her husband into sexual intercourse against her will or without her consent, it would amount to a violation of her human right to liberty or her dignity guaranteed by the Constitution or at least embodied in International Conventions accepted by India such as the Convention on the Rights of the Child (the CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW).

...

THE PROHIBITION OF CHILD MARRIAGE ACT, 2006 (PCMA)

37. ... Interestingly, and notwithstanding the fact that a child marriage is only voidable, Parliament has made a child marriage an offence and has provided punishments for contracting a child marriage. For instance, Section 9 of the PCMA provides that any male adult above 18 years of age marrying a child shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both. Therefore regardless of his age, a male is penalised under this section if he marries a girl child. ...

37. ... Parliament is not in favour of child marriages per se but is somewhat ambivalent about it. However, Parliament recognises that although a child marriage is a criminal activity, the reality of life in India is that traditional child marriages do take place and as the studies (referred to above) reveal, it is a harmful practice. Strangely, while prohibiting a child marriage and criminalising it, a child marriage has not been declared void and what is worse, sexual intercourse within a child marriage is not rape under IPC even though it is a punishable offence under the Protection of Children from Sexual Offences Act, 2012.

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 (POCSO)

...

43. The Preamble to the POCSO Act states that it was enacted with reference to Article 15(3) of the Constitution. The Preamble recognises that the best interest of a child should be secured, a “child” being defined under Section 2(1)(d) as any person below the age of 18 years. In fact, securing the best interest of the child is an obligation cast upon the Government of India having acceded to the *Convention on the Rights of the Child* (the CRC). The Preamble to the POCSO Act also recognises that it is imperative that the law should operate “in a manner that the best interest and well-being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child”.

Finally, the Preamble also provides that “sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed”. This is directly in conflict with Exception 2 to Section 375 IPC which effectively provides that the sexual exploitation or sexual abuse of a girl child is not even a crime, let alone a heinous crime—on the contrary, it is a perfectly legitimate activity if the sexual exploitation or sexual abuse of the girl child is by her husband.

44. Under Article 34 of the CRC, the Government of India is bound to “undertake all appropriate national, bilateral and multilateral measures to prevent the coercion of a child to engage in any unlawful sexual activity”. The key words are “unlawful sexual activity” but IPC declares that a girl child having sexual intercourse with her husband is not “unlawful sexual activity” within the provisions of IPC, regardless of any coercion. However, for the purposes of the POCSO Act, any sexual activity engaged in by any person (husband or otherwise) with a girl child is unlawful and a punishable offence. This dichotomy is certainly not in the spirit of Article 34 CRC.

45. Further, in terms of our international obligations under Article 1 and Article 34 of the CRC, the Government of India must undertake all appropriate measures to prevent the sexual exploitation or sexual abuse of any person below 18 years of age since such sexual exploitation or sexual abuse is a heinous crime. What has the Government of India done? It has persuaded Parliament to convert what is otherwise universally accepted as a heinous crime into a legitimate activity for the purposes of Section 375 IPC if the exploiter or abuser is the husband of the girl child. But, contrarily the rape of a married girl child (called “aggravated penetrative sexual assault” in the POCSO Act) is made an offence for the purposes of the POCSO Act.

46. Section 3 of the POCSO Act defines “penetrative sexual assault”. Clause (n) of Section 5 provides that if a person commits penetrative sexual assault with a child, then that person actually commits aggravated penetrative sexual assault if that person is related to the child, inter alia, through marriage. Therefore, if the husband of a girl child commits penetrative sexual assault on his wife, he actually commits aggravated penetrative sexual assault as defined in Section 5(n) of the POCSO Act which is punishable under Section 6 of the POCSO Act by a term of rigorous imprisonment of not less than ten years and which may extend to imprisonment for life and fine.

47. The duality therefore is that having sexual intercourse with a girl child between 15 and 18 years of age, the husband of the girl child is said to have not committed rape as defined in Section 375 IPC but is said to have committed aggravated penetrative sexual assault in terms of Section 5(n) of the POCSO Act.

48. There is no real or material difference between the definition of “rape” in the terms of Section 375 IPC and “penetrative sexual assault” in the terms of Section 3 of the POCSO Act. [**3. Penetrative sexual assault.**—A person is said to commit “penetrative sexual assault” if—(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or (b) he inserts, to any extent, any object

or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”“**375. Rape.**—A man is said to commit “rape” if he—(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person....”] The only difference is that the definition of rape is somewhat more elaborate and has two Exceptions but the sum and substance of the two definitions is more or less the same and the punishment [under Section 376(1) IPC] for being found guilty of committing the offence of rape is the same as for penetrative sexual assault (under Section 4 of the POCSO Act). Similarly, the punishment for “aggravated” rape under Section 376(2) IPC is the same as for aggravated penetrative sexual assault under Section 6 of the POCSO Act. Consequently, it is immaterial if a person is guilty of the same sexual activity under the provisions of the POCSO Act or the provisions of IPC—the end result is the same and only the forum of trial changes. In a violation of the provisions of the POCSO Act, a Special Court constituted under Section 28 of the said Act would be the trial court but the ordinary criminal court would be the trial court for an offence under IPC.

49. At this stage it is necessary to refer to Section 42-A inserted in the POCSO Act by an amendment made on 3-2-2013. This section reads:

“**42-A. Act not in derogation of any other law.**—The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.”

The consequence of this amendment is that the provisions of the POCSO Act will override the provisions of any other law (including IPC) to the extent of any inconsistency.

50. One of the questions that arises for our consideration is whether there is any incongruity between Exception 2 to Section 375 IPC and Section 5(n) of the POCSO Act and which provision overrides the other. To decide this, it would be necessary to keep Section 42-A of the POCSO Act in mind as well as Sections 5 and 41 IPC which read:

“5. **Certain laws not to be affected by this Act.**—Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.

41. “**Special law**”.—A “special law” is a law applicable to a particular subject.”

51. These two provisions are of considerable importance in resolving the controversy and conflict presented before us.

...

53. It is obvious from a brief survey of the various statutes referred to above that a child is a person below 18 years of age who is entitled to the protection of her human rights including the right to live with dignity; if she is unfortunately married while a child, she is protected from domestic violence, both physical and mental, as well as from physical and sexual abuse; if she is unfortunately married while a child, her marriage is in violation of the law and therefore an offence and such a marriage is voidable at her instance and the person marrying her is committing a punishable offence; the husband of the girl child would be committing aggravated penetrative sexual assault when he has sexual intercourse with her and is thereby committing a punishable offence under the POCSO Act. The only jarring note in this scheme of the pro-child legislations is to be found in Exception 2 to Section 375 IPC which provides that sexual intercourse with a girl child between 15 and 18 years of age is not rape if the sexual intercourse is between the girl child and her husband. Therefore, the question of punishing the husband simply does not arise. A girl child placed in such circumstances is a child in need of care and protection and needs to be cared for, protected and appropriately rehabilitated or restored to society. All these “child-friendly statutes” are essential for the well-being of the girl child (whether married or not) and are protected by Article 15(3) of the Constitution. These child-friendly statutes also link child marriages and sexual intercourse with a girl child and draw attention to the adverse consequences of both.

...

RIGHT TO BODILY INTEGRITY AND REPRODUCTIVE CHOICE

61. The right to bodily integrity and the reproductive choice of any woman has been the subject of discussion in quite a few decisions of this Court. The discussion has been wide-ranging and several facets of these concepts have been considered from time to time. The right to bodily integrity was initially recognised in the context of privacy in *State of Maharashtra v. Madhukar Narayan Mardikar* [*State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57 : 1991 SCC (Cri) 1] wherein it was observed that no one has any right to violate the person of anyone else, including of an “unchaste” woman.

...

62. In *Suchita Srivastava v. UT of Chandigarh* [*Suchita Srivastava v. UT of Chandigarh*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] the right to make a reproductive choice was equated with personal liberty under Article 21 of the Constitution, privacy, dignity and bodily integrity. It includes the right to abstain from procreating. In para 22 of the Report it was held: (SCC p. 15)

“22. There is no doubt that a woman's right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India. *It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods.* Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a “compelling State interest” in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.” (emphasis supplied)

...

65. Finally, in *Devika Biswas v. Union of India* [*Devika Biswas v. Union of India*, (2016)10 SCC 726] it was observed that: (SCC p. 754, para 110)

“110. Over time, there has been recognition of the need to respect and protect the reproductive rights and reproductive health of a person.”

This is all the more so in the case of a girl child who has little or no say in reproduction after an early marriage. As observed in *Suchita Srivastava* [*Suchita Srivastava v. UT of Chandigarh*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] : (SCC p. 18, para 37)

“37. ... the “best interests” test requires the Court to ascertain the course of action which would serve the best interests of the person in question.”

66. The discussion on the bodily integrity of a girl child and the reproductive choices available to her is important only to highlight that she cannot be treated as a commodity having no say over her body or someone who has no right to deny sexual intercourse to her husband. The human rights of a girl child are very much alive and kicking whether she is married or not and deserve recognition and acceptance.

RAPE OR PENETRATIVE SEXUAL ASSAULT

67. Whether sexual intercourse that a husband has with his wife who is between 15 and 18 years of age is described as rape (not an offence under Exception 2 to Section 375 IPC) or aggravated penetrative sexual assault [an offence under Section 5(n) of the POCSO Act and punishable under Section 6 of the POCSO Act] the fact is that it is rape as conventionally understood, though Parliament in its wisdom has chosen to not recognise it as rape for the purposes of IPC. That it is a heinous crime which also violates the bodily integrity of a girl child, causes trauma and sometimes destroys her freedom of reproductive choice is a composite issue that needs serious consideration and deliberation.

...

72. ... An anomalous state of affairs exists on a combined reading of IPC and the POCSO Act. An unmarried girl below 18 years of age could be a victim of rape under IPC and a victim of penetrative sexual assault under the POCSO Act. Such a victim might have the solace (if we may say so) of prosecuting the rapist. A married girl between 15 and 18 years of age could be a victim of aggravated penetrative sexual assault under the POCSO Act, but she cannot be a victim of rape under IPC if the rapist is her husband since IPC does not recognise such penetrative sexual assault as rape. Therefore such a girl child has no recourse to law under the provisions of IPC notwithstanding that the marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the POCSO Act. We see no rationale for such an artificial distinction.

...

HARMONISING IPC, THE POCSO ACT, THE JJ ACT AND THE PCMA

76. There is an apparent conflict or incongruity between the provisions of IPC and the POCSO Act. The rape of a married girl child (a girl child between 15 and 18 years of age) is not rape under IPC and therefore not an offence in view of Exception 2 to Section 375 IPC thereof but it is an offence of aggravated penetrative sexual assault under Section 5(n) of the POCSO Act and punishable under Section 6 of that Act. This conflict or incongruity needs to be resolved in the best interest of the girl child and the provisions of various complementary statutes need to be harmonised and read purposively to present an articulate whole.

77. The most obvious and appropriate resolution of the conflict has been provided by the State of Karnataka—the State Legislature has inserted sub-section (1-A) in Section 3 of the PCMA (on obtaining the assent of the President on 20-4-2017) declaring that henceforth every child marriage that is solemnised is void ab initio. Therefore, the husband of a girl child would be liable for punishment for a child marriage under the PCMA, for penetrative sexual assault or aggravated penetrative sexual assault under the POCSO Act and if the husband and the girl child are living together in the same or shared household for rape under IPC. The relevant extract of the Karnataka Amendment reads as follows:

“3. (1-A) Notwithstanding anything contained in sub-section (1) [of Section 3 of the PCMA] every child marriage solemnised on or after the date of coming into force of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 shall be void ab initio.”

78. It would be wise for all the State Legislatures to adopt the route taken by Karnataka to void child marriages and thereby ensure that sexual intercourse between a girl child and her husband is a punishable offence under the POCSO Act and IPC. Assuming all other State Legislatures do not take the Karnataka route, what is the correct position in law?

79. There is no doubt that pro-child statutes are intended to and do consider the best interest of the child. These statutes have been enacted in the recent past though not effectively implemented. Given this situation, we are of opinion that a few facts need to be acknowledged and accepted:

79.1. *Firstly*, a child is and remains a child regardless of the description or nomenclature given to the child. It is universally accepted in almost all relevant statutes in our country that a child is a person below 18 years of age. Therefore, a child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an unmarried child or a divorced child or a separated child or a widowed child. At this stage we are reminded of Shakespeare's eternal view that a rose by any other name would smell as sweet—so also with the status of a child, despite any prefix.

79.2. *Secondly*, the age of consent for sexual intercourse is definitively 18 years and there is no dispute about this. Therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. The age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, we must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age.

79.3. *Thirdly*, Exception 2 to Section 375 IPC creates an artificial distinction between a married girl child and an unmarried girl child with no real rationale and thereby does away with consent for sexual intercourse by a husband with his wife who is a girl child between 15 and 18 years of age. Such an unnecessary and artificial distinction if accepted can again be introduced for other occasions for divorced children or separated children or widowed children.

80. What is sought to be achieved by this artificial distinction is not at all clear except perhaps to acknowledge that child marriages are taking place in the country. Such child marriages certainly cannot be in the best interest of the girl child. That the solemnisation of a child marriage violates the provisions of the PCMA is well known. Therefore, it is for the State to effectively implement and enforce the law rather than dilute it by creating artificial distinctions. Can it not be said, in a sense, that through the artificial distinction, Exception 2 to Section 375 IPC encourages violation of the PCMA? Perhaps “yes” and looked at from another point of view, perhaps “no” for it cannot reasonably be argued that one statute (IPC) condones an offence under another statute (the PCMA). Therefore the basic question remains—what exactly is the artificial distinction intended to achieve?

JUSTIFICATION GIVEN BY THE UNION OF INDIA

81. The only justification for this artificial distinction has been culled out by the learned counsel for the petitioner from the counter-affidavit filed by the Union of India. This is given in the written submissions filed by the learned counsel for the petitioner and the justification (not verbatim) reads as follows:

(i) Economic and educational development in the country is still uneven and child marriages are still taking place. It has been, therefore, decided to retain the age of 15 years under Exception 2 of Section 375 IPC so as to give protection to husband and wife against criminalising the sexual activity between them.

(ii) As per National Family Health Survey-III, 46% of women between the ages 18-29 years in India were married before the age of 18. It is also estimated that there are 23 million child brides in the country. Hence, criminalising the consummation of a marriage union with a serious offence such as rape would not be appropriate and practical.

(iii) Providing punishment for child marriage with consent does not appear to be appropriate in view of socio-economic conditions of the country. Thus, the age prescribed in Exception 2 of Section 375 IPC has been retained considering the basic facts of the still evolving social norms and issues.

(iv) The Law Commission also recommended for raising the age from 15 years to 16 years and it was incorporated in the Criminal Law (Amendment) Ordinance, 2013. However, after wide ranging consultations with various stakeholders it was further decided to retain the age at 15 years.

(v) Exception 2 of Section 375 IPC envisages that if the marriage is solemnised at the age of 15 years due to traditions, it should not be a reason to book the husband in the case of offence of rape under IPC.

(vi) It is also necessary that the provisions of law should be in such a manner that it cannot affect a particular class of society. Retaining the age of 15 years in Exception 2 of Section 375 IPC has been provided considering the social realities of the nation.

82. The above justifications given by the Union of India are really explanations for inserting Exception 2 in Section 375 IPC. Besides, they completely sidetrack the issue and overlook the provisions of the PCMA, the provisions of the JJ Act as well as the provisions of the POCSO Act. Surely, the Union of India cannot be oblivious to the existence of the trauma faced by a girl child who is married between 15 and 18 years of age or to the three pro-child statutes and other human rights obligations. That these facts and statutes have been overlooked confirms that the distinction is artificial and makes Exception 2 to Section 375 IPC all the more arbitrary and discriminatory.

83. During the course of oral submissions, three further but more substantive justifications were given by the learned counsel for the Union of India for making this distinction. The *first* justification is that by virtue of getting married, the girl child has consented to sexual intercourse with her husband either expressly or by necessary implication. The *second* justification is that traditionally child marriages have been performed in different parts of the country and therefore such traditions must be respected and not destroyed. The *third* justification is that Para 5.9.1 of the 167th Report of the Parliamentary Standing Committee of the Rajya Sabha (presented in March 2013) records that several Members felt that marital rape has the potential of destroying the institution of marriage.

84. In law, it is difficult to accept any one of these justifications. There is no question of a girl child giving express or implied consent for sexual intercourse. The age of consent is statutorily and definitively fixed at 18 years and there is no law that provides for any specific deviation from this. Therefore unless Parliament gives any specific indication (and it has not given any such indication) that the age of consent could be deviated from for any rational reason, we cannot assume that a girl child who is otherwise incapable of giving consent for sexual intercourse has nevertheless given such consent by implication, necessary or otherwise only by virtue of being married. It would be reading too much into the mind of the girl child and assuming a state of affairs for which there is neither any specific indication nor any warrant. It

must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property. Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an unconstitutional myth, then that theory deserves to be completely demolished.

85. Merely because child marriages have been performed in different parts of the country as a part of a tradition or custom does not necessarily mean that the tradition is an acceptable one nor should it be sanctified as such. Times change and what was acceptable a few decades ago may not necessarily be acceptable today. ...

...

89. We have adverted to the wealth of documentary material which goes to show that an early marriage and sexual intercourse at an early age could have detrimental effects on the girl child not only in terms of her physical and mental health but also in terms of her nutrition, her education, her employability and her general well-being. To make matters worse, the detrimental impact could pass on to the children of the girl child who may be malnourished and may be required to live in an impoverished state due to a variety of factors. An early marriage therefore could have an intergenerational adverse impact. In effect therefore the practice of early marriage or child marriage even if sanctified by tradition and custom may yet be an undesirable practice today with increasing awareness and knowledge of its detrimental effects and the detrimental effects of an early pregnancy. Should this traditional practice still continue? We do not think so and the sooner it is given up, it would be in the best interest of the girl child and for society as a whole.

90. We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity. The documentary material placed before us clearly suggests that an early marriage takes away the self-esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl child lives a life of dignity. The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by IPC. Her husband, for the purposes of Section 375 IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape. Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provisions of IPC. This was recognised by LCI in its 172nd Report but was not commented upon. It appears therefore that different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonise the provisions of various statutes and also harmonise different provisions of IPC inter se.

91. We have also adverted to the issue of reproductive choices that are severely curtailed as far as a married girl child is concerned. There is every possibility that being subjected to sexual intercourse, the girl child might become pregnant and would have to deliver a baby even though her body is not quite ready for procreation. The documentary material shown to us indicates that there are greater chances of a girl child dying during childbirth and there are greater chances of neonatal deaths. The results adverted to in the material also suggest that children born from early marriages are more likely to be malnourished. In the face of this material, would it be wise to continue with a practice, traditional though it might be, that puts the life of a girl child in danger and also puts the life of the baby of a girl child born from an early marriage at stake? Apart from constitutional and statutory provisions, constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 IPC that sanctifies a tradition or custom that is no longer sustainable.

...

94. Assuming some objective is sought to be achieved by the artificial distinction, the further question is: what is the rational nexus between decriminalising sexual intercourse under IPC with a married girl child and an unclear and uncertain statutory objective? There is no intelligible answer to this question particularly since sexual intercourse with a married girl child is a criminal offence of aggravated penetrative sexual assault under the POCSO Act. Therefore, while the husband of a married girl child might not have committed rape for the purposes of IPC but he would nevertheless have committed aggravated penetrative sexual assault for the purposes of the POCSO Act. The punishment for rape (assuming it is committed) and the punishment for penetrative sexual assault is the same, namely, imprisonment for a minimum period of 7 years which may extend to imprisonment for life. Similarly, for an "aggravated" form of rape the punishment is for a minimum period of 10 years' imprisonment which may extend to imprisonment for life (under IPC) and the punishment for aggravated penetrative sexual assault (which is what is applicable in the case of a married girl child) is the same (under the POCSO Act). In other words, the artificial distinction merely takes the husband of the girl child out of the clutches of IPC while retaining him within the clutches of the POCSO Act. We are unable to understand why this is so and no valid justification or explanation is forthcoming from the Union of India.

APPLICATION OF SPECIAL LAWS

95. Whatever be the explanation, given the context and purpose of their enactment, primacy must be given to pro-child statutes over IPC as provided for in Sections 5 and 41 IPC. There are several reasons for this including the absence of any rationale in creating an artificial distinction, in relation to sexual offences, between a married girl child and an unmarried girl child. Statutes concerning the rights of children are special laws concerning a special subject of legislation and therefore the provisions of such subject-specific legislations must prevail and take precedence over the provisions of a general law such as IPC. It must also be remembered that the provisions of the JJ Act as well as the provisions of the POCSO Act are traceable to Article 15(3) of the Constitution which enables Parliament to make special provisions for the benefit of children. We have already adverted to some decisions relating to the interpretation of Article 15(3) of the Constitution in a manner that is affirmative, in favour of children and for children and we have also adverted to the discussion in the Constituent Assembly in this regard. There can therefore be no other opinion regarding the pro-child slant of the JJ Act as well as the POCSO Act.

...

(i) The JJ Act

97. A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a child in need of care and protection [Section 2(14)(xi) of the JJ Act]. In our opinion, it cannot be said with any degree of rationality that such a girl child loses her status as a child in need of care and protection soon after she gets married. The JJ Act provides that efforts must be made to ensure the care, protection, appropriate rehabilitation or restoration of a girl child who is at imminent risk of marriage and therefore a child in need of care and protection. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not be physically, mentally or psychologically ready. The intention of the JJ Act is to benefit a child rather than place her in difficult circumstances. A contrary view would not only destroy the purpose and spirit of the JJ Act but would also take away the importance of Article 15(3) of the Constitution. Surely, such an interpretation and understanding cannot be given to the provisions of the JJ Act.

(ii) The POCSO Act

98. Similarly, the provisions of the POCSO Act make it quite explicit that the dignity and rights of a child below 18 years of age must be recognised and respected. For this purpose, special provisions have been made in the POCSO Act as for example Section 28 thereof which provides for the establishment of a Special Court to try offences under the Act. Section 29 of the POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit an offence under Section 3 (penetrative sexual assault) or under Section 5 (aggravated penetrative sexual assault) then the Special Court shall presume that such a person has committed or abetted or attempted to commit the offence unless the contrary is proved. Similarly, the procedure and powers of a Special Court have been delineated in Section 33 of the POCSO Act and this section provides for not only a child-friendly atmosphere in the Special Court but also child-friendly procedures, some of which are given in subsequent sections of the statute. Once again the legislative slant is in favour of a child thereby giving substantive meaning to Article 15(3) of the Constitution.

99. However, of much greater importance and significance is Section 42-A of the POCSO Act. This section provides that the provisions of the POCSO Act are in addition to and not in derogation of the provisions of any other law in force which includes IPC. Moreover, the section provides that in the event of any inconsistency between the provisions of the POCSO Act and any other law, the provisions of the POCSO Act shall have overriding effect. It follows from this that even though IPC decriminalises the marital rape of a girl child, the husband of the girl child would nevertheless be liable for punishment under the provisions of the POCSO Act for aggravated penetrative sexual assault.

100. Prima facie it might appear that since rape is an offence under IPC (subject to Exception 2 to Section 375) while penetrative sexual assault or aggravated penetrative sexual assault is an offence under the POCSO Act and both are distinct and separate statutes, therefore there is no inconsistency between the provisions of IPC and the provisions of the POCSO Act. However the fact is that there is no real distinction between the definition of "rape" under IPC and the definition of "penetrative sexual assault" under the POCSO Act. There is also no real distinction between the rape of a married girl child and aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act. Additionally, the punishment for the respective offences is the same, except that the marital rape of a girl child between 15 and 18 years of age is not rape in view of Exception 2 to Section 375 IPC. In sum, marital rape of a girl child is effectively nothing

but aggravated penetrative sexual assault and there is no reason why it should not be punishable under the provisions of IPC. Therefore, it does appear that only a notional or linguistic distinction is sought to be made between rape and penetrative sexual assault and rape of a married girl child and aggravated penetrative sexual assault. There is no rationale for this distinction and it is nothing but a completely arbitrary and discriminatory distinction.

...

CONCLUSION

107. On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is — this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 IPC — in the present case this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years — this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 IPC — this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 IPC to now be meaningfully read as: “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.” It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the Framers of our Constitution can be preserved and protected and perhaps given impetus.

108. We make it clear that we have not at all dealt with the larger issue of marital rape of adult women since that issue was not raised before us by the petitioner or the intervener.

Gupta, J. (concurring): “...

181. When a girl is compelled to marry before she attains the age of 18 years, her health is put in serious jeopardy. As is evident from various reports referred to above, girls who were married before the age of 19 years are likely to suffer medical and psychological problems. A 15 or 16-year-old girl, when forcibly subjected to sexual intercourse by her “husband”, undergoes a trauma, which her body and mind is not ready to face. The girl child is also twice as more likely to die in childbirth than a grown up woman. The least, that one would expect in such a situation, is that the State would not take the defence of tradition and sanctity of marriage in respect of girl child, which would be totally violative of Articles 14, 15 and 21 of the Constitution. Therefore, this Court is of the view that Exception 2 to Section 375 IPC is arbitrary since it is violative of the principles enshrined in Articles 14, 15 and 21 of the Constitution of India.

...

183. Law cannot be hidebound and static. It has to evolve and change with the needs of the society. Recognising these factors, Parliament increased the minimum age for marriage. Parliament also increased the minimum age of consent but the inaction in raising the age in Exception 2 is by itself an arbitrary non-exercise of power. When the age was being raised in all other laws, the age under Exception 2 should also have been raised to bring it in line with the evolving laws especially the laws to protect women and the girl child aged below 18 years. Therefore, I have no hesitation in holding that Exception 2, insofar as it relates to the girl child below eighteen years, is unreasonable, unjust, unfair and violative of the rights of the girl child. To that extent the same is arbitrary and liable to be set aside.

WHETHER EXCEPTION 2 TO SECTION 375 IPC IS DISCRIMINATORY?

184. There can be no dispute that a law can be set aside if it is discriminatory. Some elements of discrimination have already been dealt with while dealing with the issue of arbitrariness. However, there are certain other aspects which make Exception 2 to Section 375 IPC insofar as it deals with the girl child totally discriminatory. The law discriminates between a girl child aged less than 18 years, who may be educated and has sexual intercourse with her consent and a girl child who may be married even before the age of 15 years, but her marriage has been consummated after 15 years even against her consent. This is invidious discrimination which is writ large. The discrimination is between a consenting girl child, who is almost an adult and non-consenting child bride. To give an example, if a girl aged 15 years is married off by her parents without her consent and the marriage is consummated against her consent, then also this girl child

cannot file a criminal case against her husband. The State is talking of the reality of the child marriages. What about the reality of the rights of the girl child? Can this helpless, underprivileged girl be deprived of her rights to say “yes” or “no” to marriage? Can she be deprived of her right to say “yes” or “no” to having sex with her husband, even if she has consented for the marriage? In my view, there is only one answer to this and the answer must be a resounding “no”. While interpreting such a law the interpretation which must be preferred is the one which protects the human rights of the child, which protects the fundamental rights of the child, the one which ensures the good health of the child and not the one which tries to say that though the practice is “evil” but since it is going on for a long time, such “criminal” acts should be decriminalised.

185. The State is entitled and empowered to fix the age of consent. The State can make reasonable classification but while making any classification it must show that the classification has been made with the object of achieving a certain end. The classification must have a reasonable nexus with the object sought to be achieved. In this case the justification given by the State is only that it does not want to punish those who consummate their marriage. The stand of the State is that keeping in view the sanctity attached to the institution of marriage, it has decided to make a provision in the nature of Exception 2 to Section 375 IPC. This begs the question as to why in this Exception the age has been fixed as 15 years and not 18 years. As pointed out earlier, a girl can legally consent to have sex only after she attains the age of 18 years. She can legally enter into marriage only after attaining the age of 18 years. When a girl gets married below the age of 18 years, the persons who contract such a marriage or abet in contracting such child marriage, commit a criminal offence and are liable for punishment under the PCMA. In view of this position there is no rationale for fixing the age at 15 years. This age has no nexus with the object sought to be achieved viz. maintaining the sanctity of marriage because by law such a marriage is not legal. It may be true that this marriage is voidable and not void ab initio (except in the State of Karnataka) but the fact remains that if the girl has got married before the age of 18 years, she has the right to get her marriage annulled. Irrespective of the fact that the right of the girl child to get her marriage annulled, it is indisputable that a criminal offence has been committed and other than the girl child, all other persons including her husband, and those persons who were involved in getting her married are guilty of having committed a criminal act. In my opinion, when the State on the one hand, has, by legislation, laid down that abetting child marriage is a criminal offence, it cannot, on the other hand defend this classification of girls below 18 years on the ground of sanctity of marriage because such classification has no nexus with the object sought to be achieved. Therefore, also Exception 2 insofar as it relates to girls below 18 years is discriminatory and violative of Article 14 of the Constitution.

186. One more ground for holding that Exception 2 to Section 375 IPC is discriminatory is that this is the only provision in various penal laws which gives immunity to the husband. The husband is not immune from prosecution as far as other offences are concerned. Therefore, if the husband beats a girl child and has forcible sexual intercourse with her, he may be charged for the offences under Sections 323, 324, 325 IPC, etc. but he cannot be charged with rape. This leads to an anomalous and astounding situation where the husband can be charged with lesser offences, but not with the more serious offence of rape. As far as sexual crimes against women are concerned, these are covered by Sections 354, 354-A, 354-B, 354-C, 354-D IPC. These relate to assault or use of criminal force against a woman with intent to outrage her modesty; sexual harassment and punishment for sexual harassment; assault or use of criminal force to woman with intent to disrobe; voyeurism; and stalking respectively. There is no exception clause giving immunity to the husband for such offences. The Domestic Violence Act will also apply in such cases and the husband does not get immunity. There are many other offences where the husband is either specifically liable or may be one of the accused. The husband is not given the immunity in any other penal provision except in Exception 2 to Section 375 IPC. It does not stand to reason that only for the offence of rape the husband should be granted such an immunity especially where the “victim wife” is aged below 18 years i.e. below the legal age of marriage and is also not legally capable of giving consent to have sexual intercourse. Exception 2 to Section 375 IPC is, therefore, discriminatory and violative of Article 14 of the Constitution of India, on this count also.

187. The discrimination is absolutely patent and, therefore, in my view, Exception 2, insofar as it relates to the girl child between 15 to 18 years is not only arbitrary but also discriminatory, against the girl child.

...”

IN THE SUPREME COURT OF INDIA

Dr. Sr. Tessy Jose v. State of Kerala

2018 SCC OnLine SC 957

A.K. Sikri and Ashok Bhushan, JJ.

Two doctors, a gynaecologist and a paediatrician, along with a hospital administrator were prosecuted under the POCSO Act for not reporting a case to the police as required under the Act. A girl was brought to the hospital when she was in labour and gave birth under the care of a gynaecologist in the hospital. The paediatrician had attended to the newborn child, once it was delivered. Since the age of the girl (mother) was recorded as 18 at the time of admission, the prosecution argued that the doctors and the hospital administrator should have known that the girl was under 18 when she conceived. Consequently, they should have reported the case to the police, since an offence under the POCSO Act had been constituted. The accused persons approached the Supreme Court seeking quashing of the case registered against them.

Sikri, J.: “... ”

3. First Information Report under the provisions of Protection of Children from Sexual Offences Act, 2012 (For short, POCSO Act) has been registered in which charge sheet has been filed and the case registered...is pending before the Special Judge, Ernakulam. The appellants herein are arrayed as accused nos. 3, 4 and 5. Insofar as the appellants are concerned, allegations against them are under Sections 201 read with Section 34 of the Indian Penal Code (for short, 'IPC'), Section 19(1) read with Section 21(1) of POCSO Act and Section 75 of the Juvenile Justice Act.

4. The case of the prosecution, in brief, is that accused no. 1 had raped the victim when she was a minor in the year 2016. As a result, she became pregnant. As per victim's mother, when the victim started complaining about pain in her stomach, thinking it to be some problem related to stomach, she brought her to the hospital where the appellants were working, on 7th February, 2017. It was found that the victim was in advance stage of pregnancy. In fact, soon after she was brought to the hospital, she went into labour. She delivered the child. Insofar as the appellants are concerned, their role is that they attended to the victim. Appellant no. 1 is a 66 years' old lady who is a Gynecologist and had conducted the delivery. Appellant no. 2 is a Paediatrician who had attended to the baby of the victim after the delivery. Appellant no. 3, is a 69 years' old Hospital Administrative. She is roped-in in that capacity though she did not attend to the victim or the baby.

5. It is not the case of the prosecution that these appellants had any knowledge about the alleged rape of the victim allegedly committed by accused No. 1 at any time earlier. In fact, they did not come into picture before 7th February, 2017 when the victim was brought to the hospital. However, the charge against these appellants is primarily on account of purported commission of an act under Sections 19(1) of POCSO Act. This Section reads as under:

“Section 19(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to—

- (a) the Special Juvenile Police Unit; or
- (b) the local police.

...

6. As is clear from the aforesaid provision, a person who had an apprehension that an offence under the said Act is likely to be committed or has knowledge that such an offence had been committed would be required to provide such information to the relevant authorities.

7. Thus, what is alleged against the appellants is that they had the knowledge that an offence under the Act had been committed and, therefore, they were required to provide this information to the relevant authorities which they failed to do.

8. After going through the record and hearing the counsel for the parties, we are of the opinion that no such case is made out even as per the material collected by the prosecution and filed in the Court. The statement of the mother of the victim was recorded by the police. The statement of the victim was also recorded. They have not stated at all that when the victim was brought to the hospital, her mother informed the appellants that she had been raped by the accused no. 1 when she

was a minor. Admittedly, the victim was pregnant and immediately went into labour. In these circumstances, it was even the professional duty of Appellant No. 1 to attend to her and conduct the delivery, which she did. Likewise, after the baby was born, the Appellant No. 2 as a Paediatrician performed her professional duty.

9. The entire case set up against the appellants is on the basis that when the victim was brought to the hospital her age was recorded as 18 years. On that basis appellants could have gathered that at the time of conception she was less than 18 years and was, thus, a minor and, therefore, the appellants should have taken due care in finding as to how the victim became pregnant. Fastening the criminal liability on the basis of the aforesaid allegation is too far fetched. The provisions of Section 19(1), reproduced above, put a legal obligation on a person to inform the relevant authorities, inter alia, when he/she has knowledge that an offence under the Act had been committed. The expression used is “knowledge” which means that some information received by such a person gives him/her knowledge about the commission of the crime. There is no obligation on this person to investigate and gather knowledge. If at all, the appellants were not careful enough to find the cause of pregnancy as the victim was only 18 years of age at the time of delivery. But that would not be translated into criminality.

10. The term “knowledge” has been interpreted by this Court in *AS Krishnan v. State of Kerala*¹ to mean an awareness on the part of the person concerned indicating his state of mind. Further, a person can be supposed to know only where there is a direct appeal to his senses. We have gone through the medical records of the victim which were referred by Mr. Basant R., Senior Advocate for the appellants. The medical records, which are relied upon by the prosecution, only show that the victim was admitted in the hospital at 9.15 am and she immediately went into labour and at 9.25 am she gave birth to a baby. Therefore, appellant no. 1 attended to the victim for the first time between 9.15 am and 9.25 am on 7th February, 2017. The medical records of the victim state that she was 18 years' old as on 7th February, 2017. Appellant no. 1 did not know that the victim was a minor when she had sexual intercourse.

11. Appellant no. 2 had not even examined the victim and was not in contact with the victim. As per the medical records relied upon by the prosecution, the baby was attended to by appellant no. 2 at 5.30 pm on 7th February, 2017. He advised that the baby be given to the mother. Therefore, appellant no. 2 had no occasion to examine/treat the victim.

12. Appellant no. 3 had not come in contact with the victim or the baby at all. Being the administrator of the hospital it was not possible for her to be aware of the details of each patient. Considering that the victim was brought to the said hospital for the first time on 7th February, 2017, it would not be possible for appellant no. 3 to be aware of the circumstances surrounding the admission of the victim.

13. The knowledge requirement foisted on the appellants cannot be that they ought to have deduced from circumstances that an offence has been committed.

14. Accordingly, we are of the view that there is no evidence to implicate the appellants. Evidence should be such which should at least indicate grave suspicion. Mere likelihood of suspicion cannot be the reason to charge a person for an offence. Accordingly, these appeals are allowed and the proceedings against the appellants in the aforesaid Sessions Case...are hereby quashed.”

IN THE HIGH COURT OF MADRAS

Sabari @ Sabarinathan v. The Inspector of Police, Belukurichi Police Station & Ors.

Criminal Appeal No. 490/ 2018, decided on April 26, 2019

V. Parthiban, J.

The appellant in this case had been convicted by a Sessions Court for the offences punishable under Section 6 of the POCSO Act (penetrative sexual assault), and Section 363 of the IPC (kidnapping from lawful guardian). He had been sentenced to rigorous imprisonment for ten years under Section 6 of the POCSO Act. The victim did not support the prosecution's case at the trial. Moreover, multiple witnesses had also turned hostile. The High Court acquitted the appellant of the charges. It then made certain observations relating to criminalisation of consensual sexual activity by adolescents.

Parthiban, J.: "...

21. When this case was taken up for hearing, this Court became concerned about the growing incidence of offences under the POCSO Act on one side and also the Rigorous Imprisonment envisaged in the Act. Sometimes it happens that such offences are slapped against teenagers, who fall victim of the application of the POCSO Act at a young age without understanding the implication of the severity of the enactment.

...

26. [T]his Court is of the view that as per the 3rd respondent's report, majority of cases are due to relationship between adolescent boys and girls. Though under Section 2(d) of the Act, "Child" is defined as a person below the age of 18 years and in case of any love affair between a girl and a boy, where the girl happened to be 16 or 17 years old, either in the school final or entering the college, the relationship invariably assumes the penal character by subjecting the boy to the rigours of POCSO Act. Once the age of the girl is established in such relationship as below 18 years, the boy involved in the relationship is sure to be sentenced 7 years or 10 years as minimum imprisonment, as the case may be.

27. When the girl below 18 years is involved in a relationship with the teen age boy or little over the teen age, it is always a question mark as to how such relationship could be defined, though such relationship would be the result of mutual innocence and biological attraction. Such relationship cannot be construed as an unnatural one or alien to between relationship of opposite sexes. But in such cases where the age of the girl is below 18 years, even though she was capable of giving consent for relationship, being mentally matured, unfortunately, the provisions of the POCSO Act get attracted if such relationship transcends beyond platonic limits, attracting strong arm of law sanctioned by the provisions of POCSO Act, catching up with the so called offender of sexual assault, warranting a severe imprisonment of 7/10 years.

28. Therefore, on a profound consideration of the ground realities, the definition of "Child" under Section 2(d) of the POCSO Act can be redefined as 16 instead of 18. Any consensual sex after the age of 16 or bodily contact or allied acts can be excluded from the rigorous provisions of the POCSO Act and such sexual assault, if it is so defined can be tried under more liberal provision, which can be introduced in the Act itself and in order to distinguish the cases of teen age relationship after 16 years, from the cases of sexual assault on children below 16 years. The Act can be amended to the effect that the age of the offender ought not to be more than five years or so than the consensual victim girl of 16 years or more. So that the impressionable age of the victim girl cannot be taken advantage of by a person who is much older and crossed the age of presumable infatuation or innocence.

29. In this regard, the respondents 3 to 5 are directed to place the decision before the competent authority and initiate appropriate steps to explore whether the suggestions made by this Court are acceptable to all stakeholders. The respondents are directed therefore to take the issue forward as they deem fit, as expeditiously as possible.

..."

Endnotes

- 1 Subsequent to the enactment of the POCSO Act, the Criminal Law (Amendment) Act, 2013, amended Section 375 of the Indian Penal Code (IPC) (which defines rape) and increased the age at which a person can consent to sexual activity from 16 years to 18 years, bringing the IPC in line with POCSO Act. Consequently, both the IPC and POCSO Act, criminalize all sexual activity for children under the age of 18.
- 2 Section 19, POCSO Act. Section 21, POCSO Act provides the punishment for violation of Section 19.
- 3 Note: Cases relating to access to medical termination of pregnancy for adolescents are discussed in Chapter 5, “Medical Termination of Pregnancy”.
- 4 Section 376(3), IPC.
- 5 Criminal Appeal No. 490/2018, decided on Apr. 26, 2019 (High Court of Madras)
- 6 Report of the Justice Verma Committee on Amendments to the Criminal Law (2013), p. 444.
- 7 (2017) 10 SCC 800.
- 8 Note that the POCSO Act does not have a similar express provision.
- 9 (2013) 5 SCC 546.
- 10 The case involved an incident that had occurred prior to 2012, when the POCSO Act was enacted, and came into force. Hence, there was no prosecution under POCSO in this case. The Supreme Court notes the enactment of the POCSO Act and discusses its provisions.
- 11 Writ Petition (Criminal) No. 8/2016, decided on May 12, 2016 (High Court of Chhattisgarh)
- 12 2018 SCC OnLine 257.
- 13 U.N. Office of the High Commissioner for Human Rights, “Status of Ratification Interactive Dashboard—India,” <http://indicators.ohchr.org/>.
- 14 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.*
- 15 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.