Partners for Law in Development[1]

RECOMMENDATIONS TO THE NATIONAL COMMISSION FOR WOMEN FOR REVIEW OF CRIMINAL LAW RELATING TO WOMEN AND GIRLS

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1. INTRODUCE EXCEPTIONS TO MANDATORY REPORTING.

S. 19 of the Protection of Children from Sexual Offences Act, 2012, (POCSO Act) mandates reporting of the offences under the Act. As per S. 19(1), any person who has apprehension that an offence under the POCSO Act is likely to be committed or has knowledge that such an offence has been committed, shall provide such information to the Special Juvenile Police Unit or the local police.

This provision applies to all adolescent sexual activity, without distinguishing between abusive from that which is consensual and non-coercive relations between peers. This provision is singularly detrimental to adolescent girls, obstructing their access to safe, quality and institutional sexual and reproductive health information and services. It compels health care providers to breach professional confidentiality and report adolescent patients to the police, which not only delays the health care responses, but also criminalises, subjecting the girl to criminal proceedings and the male partner to criminalisation. As a result, girls often turn away from accessing safe services, putting themselves at risk.

A study by the Centre for Enquiry into Health and Allied Themes (CEHAT) found that, of the 728 cases they received in the course of working with three Municipal Hospitals in Mumbai, 90 were cases of elopement. Of the girls in elopement cases, 22% reported that they had married their partners after running away from home, and about 51% refused to cooperate with the hospital for evidence collection as it would criminalise their partner. In cases where girls approached public hospitals for seeking MTP for unwanted pregnancy, the hospitals compelled them to register case with police and FIR, by making abortion conditional upon reporting.[2]

Studies show that the already stretched criminal justice system cannot address victims of child sexual assault and a burdened public healthcare system is unable to provide sufficient care services to child victims. The overloading of systems leads to delays beyond 20 weeks within which abortion is allowed under Section 3 of the Medical Termination of Pregnancy Act. This forces girls, whose pregnancy could be a result of a consensual relationship or sexual assault, to

[1] PLD is a legal resource group pursuing the realisation of social justice and equality for women. We work in contexts of marginalisation shaped by gender, sexuality, caste, culture and poverty, to take into account the intersecting systems of oppression that diminish recognition and access to rights. We pursue our mission through three mutually complementary strategies – of developing capacities, creating evidence-based knowledge and information resources, alongside influencing engaging with social policy at domestic and global levels.

[2] Centre for Enquiry into Health and Allied Themes (2018), Understanding Dynamics of Sexual Violence : Study of case records, CEHAT and MCGM, Mumbai, India.

either approach the courts, that they seldom have access to, or carry the pregnancy to a full term. This pushes girls to seek unsafe underground MTP services, at great risk to their health and well-being. All of the very limited courses of action available to girls are detrimental to girls' health.

It is feared that mandatory reporting makes families avoid taking underage daughters-in-law for institutional delivery to avoid being charged under the POCSO, putting underage mothers at risk of maternal mortality and morbidity.

We recommend introducing exceptions to mandatory reporting under S. 19 of POCSO, to enable health care providers, counsellors, doctors and social workers to provide confidential medical and support services in line with their professional ethics and the well-being of the adolescent.

2. INTRODUCE EXCEPTIONS FOR CONSENSUAL RELATIONSHIPS BETWEEN ADOLESCENTS OF PROXIMATE AGES IN THE IPC AND THE POCSO ACTS.

In 2012, with the enactment of POCSO, the age of consent was increased from 16 to 18 years, bringing it on par with the minimum age of marriage for girls.[3] The increase in age of consent was undertaken in disregard of the National Commission for the Protection of Child Rights (NCPCR) which recommended decriminalising non-penetrative consensual relations for 12 to 14 years old between children who are no more than two years apart, and consensual non-coercive sexual relations between 14 years and above if they are no more than three years apart.[4] Likewise, the Criminal Law Amendment, 2013 raised the age of consent to 18 years in disregard of the Verma Committee recommendations to retain age of consent at 16 years. Subsequently, the Law Commission, in its Consultation Paper in 2018, observed that criminalising all intercourse between the ages of 16-18, may result in criminalising consensual intercourse among adolescents.[5]

Studies thereafter, confirm that a worryingly large number of non-coercive consenting sexual relations involving adolescents are criminalised. Evidence from studies across the country testify to the widespread use of POCSO by the girls' parents against eloping couples, and the criminalizing of consensual relations between peers. A five-state study[6] carried out in Andhra Pradesh, Assam, Delhi, Karnataka and Maharashtra, as well as another study in tribal areas of

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[3] S. 2(d), POCSO Act.

[4] Protection of Children from Sexual Offences Bill 2010, submitted by the National Commission for Protection of Child Rights New Delhi. Available at http://feministlawarchives.pldindia.org/wp-content/uploads/NCPCR_POCSOBill.pdf?.

[5] Consultation Paper on Reform of Family Law (2018), Law Commission of India. Available at https://lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf..

[6] Centre for Child and the Law-NLSIU (2018), Implementation of the POCSO Act, 2012 by the Special Courts: Challenges and Issues Centre for Child and the Law-NLSIU's Studies on the Working of Special Courts in Five States. Available at https://bit.ly/2vuJwt1; Of the 2788 cases across five states, the study found that romantic cases (cases in which the prosecutrix admitted to a relationship with the accused) constituted 21.2 percent in Andhra Pradesh, 15.6 percent in Assam, 21.58 percent in Delhi, 21.8 percent in Karnataka (in 3 districts), and 20.5 percent in Maharashtra.

Dahod, Panchmahal, and Morbi districts of Gujarat,[7] show romantic cases being prosecuted under POCSO and the IPC. Likewise, a study of cases in special courts from 2012-2015 in Delhi,[8] shows that the numbers of romantic cases have inflated number of cases prosecuted since 2012, on account of the increase in age of consent under POCSO and the consequent criminalisation of adolescent relations.

This development is a violation of the Convention on the Rights of the Child, which prohibits criminalisation of adolescent sexuality and recommends differential treatment of adolescents in accordance with their development stage, maturity and evolving capacities, with corresponding rights to access sexual and reproductive health information and services.

We recommend that exceptions for consensual non-coercive relationships between adolescents of proximate ages be introduced in Sectionm 375 IPC and the POCSO be introduced, and in line with the NCPCR bill of 2010, so as to decriminalise non-penetrative and penetrative sexual relations involving adolescents with their peers.

3. REMOVE ADULTERY AS AN OFFENCET IN LINE WITH THE RULING IN THE CASE OF JOSEPH SHINE V. UNION OF INDIA.

In 2017, in the case of *Joseph Shine v. Union of India*, the Supreme Court struck down Section 497 of the IPC as unconstitutional, being violative of Articles 14, 15 and 21 of the Constitution of India and held that Section 198(2) CrPC was unconstitutional to the extent that it was applicable to Section 497, IPC.[9] The Court opined that S. 497 stripped a woman of her autonomy, dignity and privacy and resulted in the infringement of a woman's right to life and personal liberty.

The impugned provision, heavily based on gender stereotypes, disregarded the concept of equal partnership in a marriage and viewed women as the property of their husband. Exposing the oppressive socio-legal roots of the offence of adultery, which was used as a means to enforce patriarchal ownership over women's bodies and autonomy, the judgment concretely affirmed that the right to privacy exists in the context of sexual agency of women within marriage.

Being a personal issue and not an act against the society, adultery remains a civil wrong but is no longer a criminal offence. **We recommend that the offence of adultery be removed completely, in line with the Supreme Court's ruling in *Joseph Shine v. Union of India*.**

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[7] Dand, Sejal and Arundhati Sridhar (2019). Criminalizing Choice: Case Studies from Gujarat. ARROW for Change, Vol 25, No. 1, 2019; The study looked at 731 reports of missing girls between ages of 14-18 years from these districts in 2017 registered as abduction cases. Of these, 46% were for reasons of marriage, with the girls' parents as complainants. Likewise, Aarambh India (Prerna) in Mumbai worked on 260 cases under POCSO of which about 25% cases were consensual; of this category of consensual cases, 45% of the victims were in the age group of 16-18 years and 71% of the alleged accused was between 16-23 years – showing that consensual relations between peers is criminalised.

[8] UNICEF, FACSE, HAQ: Centre for Child Rights (2017), Implementation of the POCSO Act: Goals, Gaps and Challenges – Study of Cases of Special Courts in Delhi and Mumbai (2012-15); From a total data of 224 cases, 79 cases (35%) related to 'romantic relationship' in the 16-18 age group; of these, 74 cases (94%) ended in acquittal. The romantic cases formed 39% of the total acquittal cases (190).

[9] Joseph Shine v. Union of India, (2019) 3 SCC 39, AIR 2018 SC 4898.

4. MARITAL RAPE EXCEPTION

Marital rape exception does not stand, for the same reasons why the offence of adultrey was struck down as unconstitutional by the Supreme Court in *Joseph Shine vs UoI* (2018). It is premised on the husband's propreitory ownership of the wife's body and sexuality, analogous to chattle. Principally, this exception fails the test of unconstittutionality. Nonetheless, this provision does not cover a range of non-penetrative sexual offences within marriage, which are equally cruel and degrading. Hence, the following four recommendations are made:

a) Removal of the exception 2 to section 375 IPC.
b) Insertion of explantation in section 498A to explicitly state that sexual violence and assault within the matrimonial home will also amount to cruetly, to remove any ambiguity in the matter.
c) Consider parity in punishment and sentencing between section 498A and marital rape, to allow for proportionality of sentencing with the gravity of violence. Domestic violence prosecuted under 498A is equally degrading and ought not to be minimised in comparison with marital rape. Refer to recommendation on sentencing for rape.
d) In 2017, the Supreme Court, in the case of *Independent Thought v. Union of India*, removed the bar against prosecuting the husband for rape of minor wife, without reference to consent, to hold all sex with a wife under 18 to be statutory rape.[10] The legal position now is to treat sex with a minor wife as an offence under the IPC and POCSO, without recognising adolescents' capacity to consent. The withdrawal of blanket marital rape exception ought not to be replaced with blanket imposition of statutory rape. Instead, the notion of consent within marital relations, including with wife of 15 years and above, be recognised, to decriminalise consensual non-coercive marital sexual intercourse with wife of between 15 to 18 years.

6. REVIEW SENTENCING STRUCTURE FOR RAPE AND RESTORE JUDICIAL DISCRETION IN RELATION TO SENTENCING

Prior to the Criminal Law Amendment Act, 2013, the law permitted judges to reduce sentences below the mandatory minimum for "adequate and special reasons". The 2013 Amendment introduced a mandatory minimum punishment of seven years for rape, and later, in the Criminal Law Amendment Act, 2018, the mandatory minimum punishment for rape was increased to ten years and death penalty was introduced for rape of children below 12 years of age.[11] In 2019, the Parliament increased the mandatory minimum punishments for sexual offences against children under the POCSO Act.[12]

There are two problems arising from these changes. The first relates to removal of judicial discretion in rape sentencing. Rape verdicts have been critiqued extensively for victim blaming for (real or assumed) previous sexual history, dress, behaviour, delay in reporting, and for low sentencing based on these or equally problematic reasoning. Yet, it is through recognition of forms of judicial stereotyping, that sensitisation programmes for judiciary are developed. Comparative studies have shown that removal of judicial discretion hampers rather than

[10] *Independent Thought v. Union of India & Anr.*, (2017) 10 SCC 800.
[11] S. 9, The Criminal Law (Amendment) Act, 2013; S. 5, The Criminal Law Amendment Act, 2018.
[12] The Protection of Children Against Sexual Offences (Amendment) Bill 2019.

advances justice delivery – for judges tend to acquit than convict an accused for actions they do not view worthy of a high mandatory minimum sentence.[13] When coupled with high mandatory minimum sentences that exist now, it greatly reduces convictions. Studies also establish that denying discretion to the judges does not eliminate discretion – which manifests in acquittals but also, is likely to shift discretion to other sites within the legal system, such as the police. What is needed instead, are sentencing guidelines that set grounds on which acquittals and sentencing are possible.[14]

The high mandatory minimum today is the result of arbitrary increase in rape sentencing to assuage public outcry against heinous cases. Rather than correct gaps in refusal or delay to register rape cases in face of influence of local elite, delays and shoddy investigation – populist steps like raising sentencing are repeatedly adopted. This, in combination with the lack of judicial discretion, makes redress for sexual violence more difficult, limiting convictions to egregious cases, or those where the accused are from marginalised populations.

We recommend the following –

a) **statutory minimum sentences for rape be reviewed and reduced;**
b) **that judicial discretion be restored in relation to rape sentencing;**
c) **sentencing guidelines be formulated in relation to cases of rape and sexual violence.**

5. REDUCE MINIMUM AGE OF MARRIAGE FOR BOYS TO 18 YEARS.

As per S. 2(a) PCMA, "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age. In 2018, the Law Commission suggested that 18 years should be the minimum age of marriage for men and women alike. The Commission, in its 'Consultation Paper on Reform of Family Law' stated that, "The difference in age for husband and wife has no basis in law as spouses entering into a marriage are by all means equals and their partnership must also be of that between equals."[15]

Besides contravening the principle of equality, this gap in minimum age of marriage for men and women contributes to the stereotype that wives must be younger and less mature than their husbands. Legal adulthood is attained at 18 years, and any attempt to create a legal fiction for purposes of marriage alone, would amount to curtailment of fundamental civil rights to young persons - male or female.

A minimum age of marriage only sets a threshold below which a marriage may be prosecuted, and does not signify an ideal or desirable age for marriage. The legal age of adulthood at 18 years is universal norm, and signifies legal capacity, regardless of the maturity or capabilities of individuals. In addition to statutory rights, and the capability to be tried as an adult for criminal

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[13] Mrinal Satish, Discretion, Discrimination and the Rule of Law: reforming rape sentencing in India (CUP, 2016). See also, https://scroll.in/article/823982/interview-though-indias-rape-law-has-been-overhauled-it-still-lacks-a-sentencing-policy.

[14] supra

[15] See LCI Report no. 205 (2008) https://lawcommissionofindia.nic.in/reports/report205.pdf; and LCI Consultation paper on family law reform (2018) https://archive.pib.gov.in/documents/rlink/2018/aug/p201883101.pdf

offences - it also guarantees human rights enshrined in the Universal Declaration and the ICCPR which includes the right to found a family and contract marriage.

Accordingly, tackling the problem of child and early marriage must seek to create conditions and opportunities that enable those vulnerable to early marriage on account of poverty, to delay marriage until 18 years and beyond. Early marriage is rooted in poverty, and must be addressed through accessible, affordable, quality education, skills development and its linkages with livelihood, and by tackling patriarchal value systems that require sexual purity of women. Rasing marriage age of girls or retaining 21 as marriage age for boys, suspends fundamental rights, denying all young person a choice in personal matters; subjects couples from vulnerable communities to criminalisation; while not addressing the root causes of early marriage.

We recommend that the age of majority, i.e., 18 years, be recognised uniformly as the legal age for marriage for men and women, as per the Indian Majority Act, 1875.