



**SUBMISSIONS TO THE ICJ:
IMPACT ON HEALTH AND HUMAN RIGHTS THROUGH
CRIMINALISATION IN ADOLESCENT SEXUALITY**

ABOUT PARTNERS FOR LAW IN DEVELOPMENT

Partners for Law in Development (PLD) is a legal resource group pursuing the realisation of social justice and women's rights, through three inter-connected strategies: a) building capacities and perspectives of State and non-State stakeholders on laws relating to women through workshops, trainings, roundtable discussions; b) creation of new knowledge through multi-disciplinary and action research that tracks interaction of law with women's lives; c) engagement with public policy through submissions to government, statutory and UN human rights bodies on themes related to women's equality. PLD is a non-profit organisation that has consistently been supported by public funds as well as grants from UN agencies and private foundations.

PLD's thematic focus is on marginalisations arising from intersections of gender, sexuality, caste, minority status, class, age and conflict in relation to women's rights. The present submissions are based on research studies, field studies and sector wide consultations that highlight the intersections between adolescent sexuality and early marriage. It is pertinent to mention PLD's credible and consistent record of using research to inform perspectives and policy, a brief overview of which is attached as Annexure A.

THE LAW AND ADOLESCENT SEXUALITY

This submission pertains to the adverse consequences of criminalisation of adolescent sexuality under the Indian Penal Code (IPC) and the Protection of Children from Sexual Offences (POCSO) Act in India. Until 2012, when POCSO was enacted, the law did not address child sexual abuse directly, except through the provisions of 'statutory rape' which treated sexual intercourse with a girl under the age of 16 years as rape regardless of her consent. Forms of sexual abuse that did not involve penile penetration of the vagina were not expressly covered by the law, but could be addressed indirectly as 'outraging the modesty' or 'sex against the order of nature' – both highly problematic provisions based on notions of morality.¹ The minimum age of marriage was set at 18 years to protect girls in child/ early marriage from sexual and other violations.²

¹ Section 354 and 377 of the IPC deal with the offences of outraging the modesty of women and unnatural sex. The latter provision served to criminalise homosexuality, and was recently (2018) read down by the Supreme Court in *Navtej Johar v. Union of India*, to de-criminalise consensual same sex relations.

² The minimum age of marriage is set by the Prohibition of Child Marriage Act, 2006 (PCMA) and offers parties to the marriage below minimum ages the option of nullity once they attain majority as distinguished from earlier legislations on the subject that did not invalidate the marriage itself, outside of penal liability.

Under pressure of increasing evidence of widespread child sexual abuse, campaigning and a PIL³, the POCSO was enacted in 2012. Being a special law on child sexual abuse, it is gender neutral and covers a gradation of abuse against children. It however, raised the age of consent from 16 years to 18 years without exceptions for consensual relations between peers/ or those in proximate age groups. The history of age of consent is closely tied up with that of the minimum age of marriage under colonial law, with sexual activity for girls being traditionally sanctioned within marriage.

When the Indian Penal Code was enacted in 1860, the age of consent in India was fixed at 10 years for girls with no specific law on minimum age of marriage. It was not until the death of Phulmoni Das, a 10 year-old, who died in 1889 as a result of sexual intercourse forced upon her by her 30 year-old husband, that age of consent emerged as a concern. Despite the horrific circumstances leading to Phulmoni's death, it did not amount to an offence in law, as Phulmoni was a wife who had attained the age of consent. This led to an increase in age of consent to 12 years in 1891, and later again to 14 years, as part of an ongoing momentum for social reform around child marriage (inextricably linked to child widows). Finally, in 1929 the Child Marriage Restraint Act (or Sarda Act) was passed, setting not just a minimum age of marriage, but also introducing a distinction between minimum age of marriage and that of consent or 'statutory rape.' From 1978-2012, the age of consent remained lower than the minimum age of marriage.

Table: Age of Consent vs. Minimum Age of Marriage

Year	Age of Consent (Sec. 375 IPC)	Age at/ under which marital rape can be prosecuted	Min. age of marriage (except in Muslim personal law)
1860 - IPC enacted	10	10	--
1891 - IPC amended	12	12*	--
1925 - IPC amended	14	13	--
1929 - The Sarda Act enacted	--	--	14
1940 - Sarda Act, IPC amended	16	15	15
1978 - Sarda Act	--	--	18 for girls; 21

³ *Sakshi v. Union of India*, 2004 Supp (2) SCR 723.

amended			for boys
2006 - PCMA replaces Sarda Act	--	--	18 for girls; 21 for boys
2012 - POCSO enacted	18	15 in IPC; 18 in POCSO	--
2013 - IPC amended	18	15 in IPC; 18 in POCSO	--
2017 - SC in <i>Independent Thought v. Union of India</i>	18	18	--

*Statutory marital rape made non-cognizable.

In 2012, with the enactment of POCSO, two troubling features emerged in the context of protection against sexual abuse of children, both of which are the focus of this submission.⁴

- a) Increase in age of consent from 16 to 18 years
- b) The statutory obligation upon service providers and parents to mandatorily report instances of child sexual abuse to the police, without ascertaining the therapeutic needs or consent of child/ adolescent in the matter.⁵

A year from passage of POCSO, the IPC was amended to align the age of statutory rape in 2013 to 18 years. The age of sexual consent was thus brought on par with minimum age of marriage, as part of the demand for fixing a flat uniform age centric indicator across voting, sexuality and marriage. In its historical origins, and subsequent changes, the concern of the law has been about ‘protecting’ against harms and violations against persons under 18 years, without respect for their choices, agency, changing capacities and developmental stages.

REASONS WHY STATUTORY AGE OF SEXUAL CONSENT MUST NOT BE 18 YEARS

1. **Inconsistent with the Convention of the Rights of the Child (CRC):** The CRC considers all persons under 18 years as children, whose rights the State and non-State stakeholders are obliged to protect. All rights under CRC are to be applied based on the two key principles: namely that of the best interests of the child, which is to be determined according to the evolving capacities of the child. The CRC General Comment 14 clarifies that the assessment of what might be the best interest of the child must not be treated

⁴ The increase in age of consent was introduced in disregard of the recommendations of civil society groups and the National Commission for Protection of Child Rights, presented to the Parliamentary Standing Committee on Human Resource Development, *240th Report on the Protection of Children from Sexual Offences Bill 2011*, December 2011.

⁵ S. 19(1), POCSO Act, 2012.

as fixed, universal and definitive across all situations but is in fact contingent on “the physical, emotional, educational and other needs at the specific moment of the decision” as well as the development in the short and long term.⁶ The decisions must “assess continuity and stability of the child’s present and future situation.”

Applying the evolving capacities to the category of adolescents, the UN CRC’s General Comment 20 elaborates: “The Committee defines evolving capacities as an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights.” And further that, while this principle applies to all persons under 18 years, it must specifically ensure “the realization of the rights of adolescents”, recognising that these will “differ significantly from those (rights) adopted for younger children.”⁷ That capacities required across different areas of life - whether sexual identity, expression, marriage, voting, or to enter into legally binding contracts vary with the degree of responsibilities these carry, the nature and length of obligations these entail, the context within which these occur as well as the physiological and psychological development of the person. To fix a uniform age across these different roles, or indeed, to treat age as the singular indicator of capacity is a proposition that will stifle rights of the child rather than enable their protection. It is with this rationale that the Committee recommended that “States introduce minimum legal age limits, consistent with the right to protection, the best interests” principle and respect for the evolving capacities of adolescents’ whilst also noting “States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.”

2. **A uniform age of sexual consent for children from 0-18 years is unscientific and contrary to the principle of evolving capacities of the adolescent child:** The psychological and physiological development of children evolves with age, distinguishing capacities of infants, toddlers, pre-schoolers, pre-teens, younger and older adolescents. Sexual consciousness of adolescents arises with puberty, growing considerably through adolescence. Rather than acknowledge a biological and social realities that shape adolescent sexuality, towards facilitating age appropriate sexual health information and services, the law taboos all expressions of sexuality. With a special law such as POCSO, the scope of criminalisation extends from caressing to kissing, to sexual intercourse - all part of the spectrum of offences under POCSO.
3. **Barrier to quality, legal and confidential sexual health services and counselling:** The criminalisation of adolescent sexuality imposes an obligation to mandatorily report cases

⁶ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, 29 May 2013, CRC/C/GC/14.

⁷ UN Committee on the Rights of the Child (CRC), *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, 6 December 2016, CRC/C/GC/20.

to the police, severely obstructing health care workers, doctors and counsellors, who are otherwise ethically bound to maintain doctor-patient confidentiality. The law requires reporting of teenage pregnancy and even confessions of sexual activity made to a counsellor, to the police – without a corresponding requirement for therapeutic healing or ascertaining the child’s decision or indeed, preparing the child for the consequences of criminal prosecution, which include breaking the child’s trust, recollecting accounts of abuse over and over again before the agencies, and disruption of family support systems, all of which re-traumatise the child.⁸ Criminalisation obstructs access to safe abortions, confidential HIV testing⁹ and a range of other sexual health information/services, as the service provider is required to immediately alert the police. In the cases of the adolescent respondents in the PLD’s field based action research, the health providers, social workers approached by the girl had to inform the police after learning that the girls were in consensual relationships.

4. **Barrier to age appropriate Comprehensive Sexuality Education:** While some form of life skills education is imparted to children in schools, it is far removed from offering comprehensive sexuality education. The government programme for adolescent health, the Rashtriya Kishore Swasthya Karyakram (RKSK) focuses mainly on menstrual hygiene to the exclusion of concerns relating to sexuality and gender identity, and particularly excludes curriculum for adolescent boys. This skewed and partial focus comes from taboos and stigma related to the sexuality of girls, and the belief that sexuality education could encourage sexual activity.
5. **False equivalence between the age of sexual consent and the minimum age of marriage:** the argument for increasing the age of sexual consent to 18 years was that it should be aligned with the minimum age of marriage. The proponents primarily see sexual activity outside of marriage as deviant and harmful instead of viewing sexuality as an intrinsic and natural part of life. On the other hand, the CRC recognises that capacities vary – not just based on age, but also based on situations. Hence, the capacities required for sexual expression differ vastly from those required for marriage, which carries responsibilities to manage finances, enter into contracts, parenting, often lifelong in nature. To conflate such onerous responsibilities with those of sexual interest and experimentation are not rational or tenable in science as in human rights. The lives of adolescent girls, in particular, are regulated to control their sexuality. Anxiety about girls’ sexuality impedes their access to schooling, friends, work, and public life. The ‘honour’ of family and community often hinges on girls’ ability to navigate adolescence without compromising her sexual purity and innocence, to render her suitable for marriage.

⁸ Centre for Child and Law, NLSIU, *An Analysis of Mandatory Reporting Requirement under the POCSO Act and its Implications on the Rights of Children*, June 2018, available at <https://nls.ac.in/ccl/publications/mandatory.pdf>.

⁹ The General Comment 20 of the CRC mandates that states must ensure adolescents have access to confidential HIV testing, counselling, prevention and treatment from health care providers who respect their rights to privacy and non-discrimination, *supra* note 7.

6. **PLD's research findings on the use of POCSO and the use of PCMA bring out intersections between the two laws:** There is substantial evidence to demonstrate the use of law as a tool of power in the hands of parents and communities to punish premarital sexual activity of their daughters and enforce endogamous marriages. PLD's field based action research on adolescent girls in consensual relationships, as well as the case law research on Prohibition of Child Marriage Act, 2006 and POCSO shows systematic prosecution by parents of girls (even those who have attained majority) of their daughters' boyfriends/ husbands, as a way of 'recovering' control and custody over their daughters while punishing the boyfriend/s. In many such cases where the boy is prosecuted under POCSO, the under-age girls refuse to succumb to parental pressure to complain of rape to the police, and opt to stay in shelter homes instead of their natal homes, to escape abuse and forced marriage.¹⁰ Even in cases where a husband/partner attempts to invoke habeas corpus to recover the girl from forced confinement in natal home, proceedings under POCSO are likely to be attracted.
7. **Incarceration on account of criminalisation:** As PLD's study indicates, there is considerable prosecution (at the behest of girls' parents) resulting in incarceration of boys and men from marginalised backgrounds. The girls in consensual (love) relationships typically opt for shelter homes to escape domestic abuse in natal home, and to keep open the prospect of re-uniting with their boyfriends/ husbands on attaining majority. In such cases, the couple has to tediously seek permission from Courts to secure release of the girl from the shelter homes, once she attains majority. Rather than ensuring the best interests of the adolescent child, the law has increased their vulnerability to 'honour' and caste based retaliation, particularly when they are from marginalised, minority and resource poor communities – who lack access to legal aid or the wherewithal to shield themselves.
8. **Lifelong stigma and stringent punishment:** In 2018, the Government conceptualised a Sex Offenders Registry¹¹ as well as introduced an Ordinance, and later legislative amendments to introduce death penalty for rape of a minor who is under 12 years of age amongst other increased sentences. Given the draconian nature of the law on child sexual abuse in terms of criminalising consensual adolescent sex, this puts youth, from marginalised communities more so, at the risk of being labelled as 'sex offender' in public records for life, in addition to facing increased incarceration.

¹⁰ Partners for Law in Development, CASE LAW ANALYSIS ON THE APPLICATION OF PCMA, Forthcoming (2019). See also, Partners for Law in Development, MULTI-STATE FIELD STUDY ON 15 ADOLESCENT GIRLS IN CONSENSUAL SELF-ARRANGED RELATIONSHIPS, Forthcoming (2019) (The study traces how adolescent girls elope to marry their partners only on discovery by disapproving parents or family, in a bid to escape retribution, separation or even forced marriage)

¹¹ See Geetika Mantri, *India starts first-ever sex offenders' registry: Who will it help and how?*, TheNEWSMinute, September 2018; <https://bit.ly/2UWPpGg>.

RECOMMENDATIONS AND THEIR POTENTIAL IMPACT

1. It is imperative that the age of sexual consent is restored/ reduced to 15 or 16 years. This signals acknowledgment of adolescent sexuality as an aspect of natural psychological and physiological development related to puberty, which the state is obliged to respect. It will strengthen advocacy for adopting age appropriate comprehensive sexuality education and sexual health services for adolescents, which will enable autonomous initiatives to carry out quality sexual and reproductive health programmes for adolescents without fear of criminality. Affirming adolescent sexuality will help create a distinction between positive consensual expressions from acts of sexual abuse, and removing shame and stigma that shrouds all sexuality currently. This will enable young victims to identify abuse, seek redress and support services while shielding consenting adolescents from wrongful prosecution, moral policing and 'honour' based retaliation.¹²
2. Introduce a proximity clause in relation to sexual consent for adolescents between ages of 15-18 years, to free consensual sex between peers from the ambit of criminalisation while providing redress for sexual exploitation, coercion and manipulation. Such proximity or Romeo Juliet clauses typically exempt couples with an age gap of 5-7 years for prosecution for consensual sex. Age by itself, is an insufficient indicator of agency or coercion, so the elements of power can be addressed through age proximity condition.
3. Do away with the provision of mandatory reporting of sexual activity (including abuse) in relation to adolescents completely, and make it contingent on the informed consent of the child in question – especially for professional counselors and health care workers. The application of this for adolescents must be distinguished from that of younger children. Counselling and health enquiries from service providers should not expose adolescents to mandatory reporting; the confidentiality of patient-doctor should be maintained. This measure is in acknowledgement of the necessity and value of confidential therapeutic services, which are based on trust and open communication.¹³ For younger children, while it is necessary to initiate criminal prosecution, it requires some preparatory work, family counseling to ensure that reporting the offence does not cause re-traumatisation.
4. The age of consent should be delinked from the minimum age of marriage at 18 years, across societies and contexts. Age of consent should necessarily be lower than the age of marriage. The capacities and responsibilities related to sexual expression vary greatly with those that relate to marriage. PLD's study offers substantial evidence of the child sexual abuse law being invoked by parents against their daughter's boyfriends,¹⁴ or husbands¹⁵ (as the case may be). The POCSO is being actively used as a tool of retribution in cases where the girl is below the minimum age of marriage. To disallow

¹² Partners for Law in Development, SAMA, STATUS OF HUMAN RIGHTS IN CONTEXT OF SEXUAL HEALTH AND REPRODUCTIVE HEALTH RIGHTS- COUNTRY ASSESSMENT UNDERTAKEN FOR NHRC, 2018, available at <https://bit.ly/2J8tQ55>, 32, 38. ('SRHR Report')

¹³ See SRHR Report, 48, 49.

¹⁴ Partners for Law in Development, CASE LAW ANALYSIS ON THE APPLICATION OF POCSO ACT IN CASES OF CONSENTING ADOLESCENTS, Forthcoming (2019).

¹⁵ *Id.* See note 10, Partners for Law in Development, CASE LAW ANALYSIS ON THE APPLICATION OF PCMA & MULTI-STATE FIELD STUDY ON 15 ADOLESCENT GIRLS IN CONSENSUAL SELF-ARRANGED RELATIONSHIPS, Forthcoming (2019).

this misuse of the law, a distinction between the age of consent and the minimum age of marriage must be introduced, with the age of consent being necessarily lower than that of marriage.

5. Educational institutions must include provision of age appropriate compulsory comprehensive sexuality education, under the life skills program – which includes not just information about biological reproduction but about gender identities, relationships, and sexuality, without stigma or prejudice.¹⁶ In order to enable community outreach and educational curriculum to evolve in relation to sexuality education, it is absolutely necessary to remove the shadow of criminalization, which puts community workers and teachers at risk of prosecution.
6. Formulate non-discrimination guidelines for hospitals, and provide orientations to health care providers to enable sexual health services to be responsive and respectful of adolescents, of diverse sexual orientations and practices, and gender identities.
7. Abortion services for children and adolescents must be protected in law beyond the stipulated period of 20 weeks, without subjecting decisions to ‘medical board’ evaluations that have often been faulty and protracted. The Medical Termination of Pregnancy Act, 1971, should be amended to ensure it protects the best interests of child rape victims and of adolescents (irrespective of rape). This would enable availability of and access to abortion services by adolescents as a matter of right. Especially so, in cases of pregnancy resulting from rape, it is absolutely imperative to recognise the threat to life in the broadest possible terms as encompassing physical, mental and physiological well-being and not just in terms of risk of death.¹⁷

ANNEXURE ‘A’

PLD’s KEY CONTRIBUTIONS IN LEGAL RESEARCH AND ADVOCACY

1. Using its field mapping of diverse non-normative conjugalities, in customary and contemporary forms, PLD’s research argued for rights in intimate relationships to be recognised for women who are not legally recognised wives.¹⁸ We filed review and intervenor’s petitions before the SC in *Velusamy v. Patchaiammal & Chanmuniya v. Khushwaha*¹⁹, arguing for extension of legal protection to women in arrangements that resembled marriage. PLD has staked a continued association at the UN Level through submissions on this issue– both CEDAW and HRC bodies agreeing that legality of status

¹⁶ See SRHR Report, 39.

¹⁷ See Common Health, Sexual Abuse of Girls Followed by Refusal of Abortion: a Statement of Concern, available at <https://bit.ly/2JeAY00>. (The statement expresses its reservations with ‘legal’ recourses with ad-hoc ‘medical’ committees constituted in emergencies that denied a 10-year-old girl, pregnant by sexual abuse, an abortion forcing her to carry the fetus to full term)

¹⁸ Partners for Law in Development, RIGHTS IN INTIMATE RELATIONSHIPS- TOWARDS AN INCLUSIVE AND JUST FRAMEWORK OF WOMEN’S RIGHTS AND THE FAMILY, 2010, available at <https://bit.ly/2HxBKtT>.

¹⁹ See Madhu Mehra, *Identity in Crisis: Marriage? Not for ‘keeps’*, Times of India, July 2015, available at <https://bit.ly/2MXyHof>.

- should not come in the way of extending legal protection to women in de-facto relationships²⁰ and recognising the existence of diverse family forms.²¹
2. In 2014/15, PLD was supported by the Department of Justice to study the compliance with **victim-centric pre-trial and trial procedures for rape prosecutions** in the special courts in Delhi.²² The study ascertained that the law, despite its attempts to furnish victim-sensitive procedures, was not being implemented and that these procedures were found to be falling short of comparative best practices in relation to rape.
 3. With support from the Ministry of Women & Child Development, PLD carried out an extensive study on the **targeting of women as witches** in states where a specific witch-hunting law was operational: Jharkhand, Bihar and Chhattisgarh²³ and in Assam where no state law existed despite prevalence of witch hunting.²⁴ These studies confirmed that the special laws in the states will not pre-empt targeting in the form of ostracism, eviction and violence – but are used only in conjunction with the Indian Penal Code for more serious offences, without justice as reparations or compensation. The impact of this work can be seen in the Rajasthan state law on witch hunting, and in PLD’s being enlisted by the State Government to inform the law.
 4. Through continued work around sexual violence, strong advocacy for the implementation of the law, as well as the **decriminalisation of consensual sexual activity**, has been integral. PLD was a founding member of the coalition of civil society and community voices, ‘Voices Against 377’, to collectivise against the criminalisation of homosexual activity, that helped gain the landmark victory at the Delhi High Court in 2009²⁵ The coalition continued to be a part of further processes at the SC, ultimately resulting in decriminalisation of homosexuality in 2018.²⁶ PLD intervened in the *Joseph Shine* case²⁷ introducing critical perspectives around historical comparative laws, to challenge criminalisation of adultery not just on grounds of discrimination, but as a violation of sexual autonomy under Article 21 of the Constitution. As a part of the first country assessment of sexual health rights commissioned by the National Human Rights Commission, PLD addressed similar concerns, in relation to all dimensions of sexuality.²⁸

²⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic Consequences of Marriage, Family Relations and their Dissolution)*, 30 October 2013, CEDAW/C/GC/29.

²¹ UN Human Rights Council, *Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice*, 2 April 2015, A/HRC/29/40.

²² Partners for Law in Development, *TOWARDS VICTIM FRIENDLY RESPONSES AND PROCEDURES FOR PROSECUTING RAPE- A STUDY OF PRE-TRIAL AND TRIAL STAGES OF RAPE PROSECUTIONS IN DELHI*, 2017, available at <https://bit.ly/2E3jLln>.

²³ Partners for Law in Development, *CONTEMPORARY PRACTICES OF WITCH HUNTING: A REPORT ON SOCIAL TRENDS AND THE INTERFACE WITH LAW*, 2015, available at <https://bit.ly/2RUK7d6>. See also, Partners for Law in Development, *WITCH HUNTING IN ASSAM: INDIVIDUAL, STRUCTURAL AND LEGAL DIMENSIONS*, 2014, available at <https://bit.ly/2SIS35N>.

²⁴ *Id.*

²⁵ *Naz Foundation v. Govt. of NCT of Delhi*, 2009 SCC OnLine Del 1762.

²⁶ *Navej Singh Johar v. Union of India*, (2018) 1 SCC 791.

²⁷ *Joseph Shine v. Union of India*, 2018 SCC OnLine SC 1676.

²⁸ Partners for Law in Development, *SAMA, STATUS OF HUMAN RIGHTS IN CONTEXT OF SEXUAL HEALTH AND REPRODUCTIVE HEALTH RIGHTS- COUNTRY ASSESSMENT UNDERTAKEN FOR THE NHRC*, 2018, available at <https://bit.ly/2J8tQ55>.