

**AN ANALYSIS ON THE CRIMINALISATION OF CONSENSUAL
SEXUAL RELATIONS BETWEEN ADOLESCENTS IN SOUTH ASIA**



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DECLARATION STATEMENT



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EXECUTIVE SUMMARY

Historically, the age of sexual consent was put in place to protect children, specifically, girls from adult perpetrators. This was largely influenced by the Victorian value system as well as the Abrahamic religious norms that prevailed at the time. In the present era, adolescents are more open to exercising their sexual autonomy. Unfortunately, the laws that were traditionally meant to protect children from adult perpetrators are now being used to criminalise adolescents for consensual sexual relations. As a result, adolescents needlessly come into conflict with the criminal justice system.

This research analysed the criminalisation of consensual sexual interaction between adolescents in South Asia (Bangladesh, India, Maldives, Pakistan and Sri Lanka) against international and regional frameworks. It also sought to address what measures countries can adopt to ensure that child rights compliant laws are adopted regarding consensual sexual relations between adolescents.

Four out of the five (Bangladesh, India, Pakistan Sri Lanka) South Asian countries analysed in this thesis find their Penal Code rooted in their colonial heritage. The Maldives is one of the youngest democracies in South Asia and has a Constitution and a Penal Code dating back only to the 2000s. Legal pluralism and growing religious conservatism in the region pose significant challenges to the implementation of international human rights standards.

In all countries in South Asia, non-exploitative consensual sexual intercourse is criminalised to a large extent. These laws mainly come in the form of addressing two sexual offences. First are statutory rape laws which stipulate children below a certain age cannot give valid consent. The laws were developed at the time to protect children from adult sexual perpetrators. However, in the present era, where adolescents are more sexually expressive, the laws used to protect them are now being used to criminalise them. Second are laws related to fornication that criminalise all sexual intercourse outside marriage. This offence can be observed in countries with legal systems principally based on Islamic Shari'ah.

The research found that as a result of such laws, many boys come into conflict with the adult criminal justice system. In some contexts, girls and women are also disproportionately prosecuted for sexual offences. Moreover, such laws also often discriminate against adolescents based on their sexual orientation. Such laws also create legal barriers for adolescents and unmarried persons in accessing Sexual and Reproductive Health (SRH) services.

Additionally, the research found that child marriages are seen as a solution to the legal and social consequences of unwanted pregnancies in the region. There are also links between premarital sexual relations and harmful practices such as honour crimes in some countries.

Two main recommendations are put forward in this research. First are suggestions for legal and policy reform, especially, the adoption of the close-in-age exemption clause under statutory rape to balance children's right to protection against their autonomy. Moreover, all countries need to remove exceptions under rape laws which provide leeway for adult perpetrators to avoid criminal sanctions by marrying the child victim. Appropriate age limits should also be set for marriage in line with international standards. In all countries, abortion must be decriminalised, especially in situations of rape. There are also legal barriers to accessing other SRH services that should be removed. Secondly, it is recommended that Comprehensive Sexuality Education (CSE) be introduced as part of the mandatory school curriculum and other platforms for children out of school.

The research is divided into four chapters. The first chapter provides the background to the thesis topic and the theoretical framework on the issue of consensual sexual relations between adolescents and laws relating to consent. The second chapter focuses on the international children's rights framework, namely the UNCRC and CEDAW and analyses the main related rights to the thesis topic. This chapter also looks at the SAARC regional framework and its challenges. The third chapter is a comparative analysis of the legal and policy framework and comprises of five sub-chapters covering each country. The final chapter concludes with the findings of the research and draws a list of recommendations that would support the countries to address the challenges in the legal and policy framework related to consensual sexual relations between adolescents.

MAIN FINDINGS

The research found that all countries in South Asia criminalise consensual sexual relations between adolescents to a large extent. The criminalisation is through the statutory rape law provisions which consider consent below a certain age invalid. The age of consent varies across countries, however, are on the high end, ranging from sixteen to eighteen years. All countries lack explicit consent provisions for boys. The object of these provisions is to protect children from adult perpetrators. Unfortunately, the very laws intended to protect children are utilised to criminalise adolescents for consensual sexual activities.

In Sri Lanka and Bangladesh, the age of sexual consent is sixteen. This means that consensual sexual relations of adolescents who are sixteen years or older, but below the age of eighteen are not criminalised. Disconcertingly, consensual sexual relations by any person over the age of sixteen with any person under the age of sixteen are also criminalised. Sri Lanka is the only country in South Asia which recognises consensual sexual relations of adolescents in its legislation, albeit only by providing a lesser sentence for boys under eighteen years who commit statutory rape where it was consensual. In India, Maldives and Pakistan the age of consent is eighteen therefore all consensual sexual relations between adolescents are criminalised. In Maldives and Pakistan adolescents are also prosecuted for Zina or fornication which encompasses all sexual relations outside marriage. It is reported that girls and women are disproportionately convicted for these crimes. In contrast, in Bangladesh, India and Sri Lanka boys are convicted and girls are considered to be the victims. In all countries except India, there are legal provisions which criminalise consensual same-sex sexual relations leading to discrimination against adolescents on the basis of their sexual orientation.

In India and Sri Lanka, it can be observed that Courts are increasingly considering the sexual autonomy of adolescents and are reluctant to convict boys for consensual sexual relations. Furthermore, legislative amendments have been proposed in Sri Lanka to address these challenges. Such trends are yet to be observed in other countries.

In Bangladesh, India, Sri Lanka and Maldives, child marriages are seen as a solution for unwanted pregnancies. Furthermore, It is frequently observed that parents marry off their young daughters as a preemptive protective action as well. Marital rape exceptions also recognise child marriages and consider the consent of minor spouses to be valid, except in India and Pakistan. In India and Pakistan, the research also found a prevalence of honour crimes associated with premarital sexual relations.

In all countries, abortions are criminalised unless under special circumstances to protect the life of the mother. In The Maldives there also exists an exemption for rape and incest. Consequently, it is reported that unsafe, clandestine abortions occur, putting the lives of many adolescent girls at risk. Adolescents face significant legal and social barriers in accessing other SRH Services as well. In Maldives and Pakistan, unmarried persons cannot access such services. It is the same case for all children under the age of eighteen in India. In Bangladesh and Sri Lanka, although there are no legal barriers, there are still significant social barriers and stigma associated with adolescent sexuality.

The research found that all five countries analysed in this thesis should amend their laws to decriminalise consensual sexual relations between adolescents to bring them in line with international standards. Moreover, legal barriers to accessing SRH services should also be removed. Further, marital rape exceptions which implicitly recognise child marriages must be repealed. Countries that have no lower age limits for marriage, must set appropriate age limits in line with international standards. These reform processes must be guided by evolving capacities and best interests of the children concerned, with due consideration to avoid unintended consequences.

See Annex II for a summary of the findings.

LIST OF ABBREVIATIONS AND ACRONYMS

CEDAW – Convention on Elimination of Discrimination Against Women

CEDAW Committee – Committee on the Convention on Elimination of Discrimination Against Women

CRC Committee – Committee on the Rights of the Child

CSE – Comprehensive Sexuality Education

IPC – Indian Penal Code

OPAC – Optional Protocol to The Convention on the Rights of The Child on the Involvement of Children in Armed Conflict

OPIC – Optional Protocol to The Convention on the Rights of the Child on a Communications Procedure

OPSC – Optional Protocol to The Convention on The Rights of The Child on The Sale of Children, Child Prostitution and Child Pornography

PCB – Penal Code of Bangladesh

PCM – Penal Code of Maldives

PCM – Penal Code of Pakistan

PCSL – Penal Code of Sri Lanka

SAARC – South Asian Association for Regional Cooperation

SAIEVAC – South Asia Initiative to End Violence Against Children

SRH – Sexual and Reproductive Health

UNCRC – United Nations Convention on the Rights of the Child

KEYWORDS

UNCRC – CEDAW – ADOLESCENTS – AGE-OF-SEXUAL-CONSENT –
AUTONOMY – PREMARITAL SEXUAL RELATIONS – STATUTORY RAPE –
CHILD MARRIAGE – SRH SERVICES

DEFINITION OF KEYWORDS

Adolescents – Any person between the ages of 10 to 18 years,

Age of sexual consent – The age at which a person can provide valid consent to sexual relations as prescribed by National laws.

Child marriage – A marriage where at least one of the parties is under the age of eighteen years.

Statutory Rape – The Criminal offence of rape committed against a person below the age of sexual consent based on the notion children below a certain age cannot provide valid consent. Traditionally, concerning girls.

CHAPTER ONE: INTRODUCTION AND BACKGROUND TO THE STUDY

1.0. Introduction

South Asia is a region with 616 million children under 18, hosting the largest portion of the child population in the world.¹ Out of this, 340 million are adolescents, amounting to 30% of the world's adolescent population.² South Asia is diverse in terms of culture, geography and ecology, making it a region prone to social, economic, and environmental challenges.

Historically, the geographical area of South Asia was highly interdependent in terms of trade as well as culture. The region is situated within the Indian plate, being a part of the prehistoric Supercontinent 'Gondwana' that later broke off and collided with the Asian plate, creating the modern geographical boundary of the Himalayas, Hindukush and Arkean mountain ranges.³ The common ecology has caused much of the flora and fauna to co-evolve over time into a distinct ecosystem. The richly irrigated river valleys provided a bountiful platform for some of the most advanced civilisations of their time to develop from the Indus Valley Civilisation, Indo-Aryan Vedic and Dravidian Civilisations and their cultural offshoots. Politics was dominated by independent regional states punctuated with imperial consolidations such as the Maurya or Mughal empires.

Popular religions included Hinduism, Buddhism and Jainism while the fragmented state structure encouraged a considerable diversity of beliefs. The later spread of Islam through Mughal conquest and trade across the Arabian Sea led to the consolidation of belief systems to primarily Hinduism, Islam and an isolated pockets of Buddhism and Sikhism. Upon increasing engagement with the west, first with Portuguese explorers and then with the Dutch, French and English East India companies, internecine struggle and European scientific advancement gradually led to the erosion of local power while the British East India Company emerged to be the dominant political power in the region, culminating in the establishment of the British Raj and British Ceylon.⁴

The legal systems of the respective successor republics of the region are heavily intertwined with this incremental nature of British expansion, whereby formal recognition of local customs was traded for political obedience. As British power consolidated and the Crown's influence in the British East India Company grew, there were increasing calls to standardise law to British customs led by missionary communities and enlightenment thinkers.⁵ A seminal moment in this movement was Regulation XVII issued in 1829 which declared the elite Hindu practice of *Sati*⁶ to be banned. After the formal accession of India to the Crown, the long-shelved Indian Penal Code of 1860 was implemented and quickly

¹ UNICEF, The State of the World's Children, *Dashboard*, October (2021) Available at <https://data.unicef.org/resources/sowc-2021-dashboard-and-tables/>

² UNICEF South Asia, The Situation for Children in South Asia, (2022) Available at <https://www.unicef.org/rosa/children-south-asia>

³ R.D., Müller, J.Y., Royer, and L.A., Lawver, Revised plate motions relative to the hotspots from combined Atlantic and Indian Ocean hotspot tracks, *Geology*, 21, 275-278, (1993) at pgs. 277–278.

⁴ D., Ludden, Early Modern Regions in: *India and South Asia: A short history*, Oneworld Publications, London 188-264 (2014) at pgs. 248-249.

⁵ A., Sharma, Sati: A Study in Western Reactions in: *Sati: Historical and Phenomenological Essays*. Motilal Banarsidass Publications, 1-14 (2001) at pgs. 6-7.

⁶ A former practice in India whereby a widow threw herself on to her husband's funeral pyre.

adopted across the subcontinent. In 1864, the Indian Law Commission explicitly stated that Hindu and Muslim laws would be limited to “succession, inheritance, marriage, and caste, and all religious usages and institutions”.⁷ Thus began a centuries-long parallel legal system of criminal and ethnically defined personal law, the intersections of which still remain murky. Post-independence, the respective successor states veered towards more cultural or religious exceptions to the Penal code, exacerbating the issue of legal pluralism.⁸ In the latter part of the 20th century, pressure from international human rights treaties has intimated a fresh push toward universal standards creating friction with the sovereign edicts of their respective states.

The laws that were derived from the colonial times, still remain to a large extent in South Asia, as will be observed in the present thesis. The patriarchal values that existed at the time are enshrined in the laws. Moreover, with the laws relating to sexual offences, the manner in which girls were viewed as helpless beings that needed to be protected from the sexual desires of men can be observed. This explains the gendered nature of rape laws. Additionally, laws which criminalise same-sex sexual relations and sexual relations outside marriage regardless of consent are influenced by the Abrahamic religious value system that existed and continues to exist in the present era.

1.1 Problem Definition

Adolescents in South Asia have limited autonomy and are voiceless and largely invisible. There is a considerable difference in how boys and girls experience adolescence. This notion is primarily due to the hierarchical and patriarchal nature of family and community ties. Girls face more significant difficulties than boys in moving freely and have autonomy over decisions impacting their lives. The honour of a family is closely linked to the perceived purity of their daughters. There are pervasive myths surrounding the virginity of girls, and it is considered a precondition for marriage.⁹ According to the Violence in Childhood Index, South Asia is with the third-highest rate of violence against children.¹⁰ In the past decade, South Asia has had the largest decline in the prevalence of child marriage. It has declined from 49% to 30%.¹¹ However, it remains a region with the second highest incidence¹² of child marriage. Further it is yet not on track to meet the SDG Target 5.3 to end child marriage by 2030.¹³

Further, the occurrence of pre-marital sex is repeatedly denied, and adolescent sexuality is a subject of taboo. There is no comprehensive statistics on teenage pregnancies outside marriage. Available teenage pregnancy statistics indicate 35 births per 1000 females aged 15 to 19 and is a significant public health challenge in the region.¹⁴ This is also linked with poor access to sexual and reproductive education and services¹⁵. In all countries in South Asia, no clear provisions exist related to consensual

⁷ First Report of Her Majesty’s Commissioners Appointed to Prepare a Body of Substantive Law for India, 60, HCPP, 1864 (3312) XVI.359.

⁸ M., Sharafi, South Asian Legal History, *Annual Review of Law and Social Science*, 11, 309–336, (2015) at pg. 311.

⁹ ICRW and UNFPA, *Child Marriage in South Asia: Realities, Responses and the Way Forward* (2013) at pg. 5.

¹⁰ Know Violence in Childhood, *Ending Violence in Childhood. Global Report* (2017) at pg. 18.

¹¹ UNICEF, *Towards Ending Child Marriage: Global trends and profiles of progress* (2021) at pg. 15.

¹² Ibid.

¹³ Ibid at pg. 68.

¹⁴ See <https://data.worldbank.org/indicator/SP> for country specific prevalence.

¹⁵ ICRW and UNFPA, *supra* 9 at pg. 10.

sexual relations amongst adolescents.¹⁶ Accordingly, all such sexual relations are criminalised to some extent. The legal age of sexual consent varies across the region, and the legal limits were instituted to protect children from adult perpetrators.¹⁷

Nevertheless, in practice, laws are utilised to criminalise consensual adolescent sexual relations and as a retaliatory mechanism against adolescent sexual relations. Parents in South Asia often fear for the safety of their adolescent girls, stemming from worries that they may choose to engage in sexual activity or be victims of sexual violence. This ultimately can have an impact on their marriageability. Being the region with the second-highest number of reported child marriages, especially in India, Bangladesh, Nepal and Afghanistan, there are links between adolescents engaging in sexual relations and the practice of child marriages as pre-emptive protection.¹⁸ There is evidence which suggests that a high number of cases concerning adolescents in the criminal justice system are related to consensual sexual relations.

Such laws are also contrary to international children's rights standards as they violate multiple children's rights. Such rights include the right to protection, the right to privacy, the right to the highest attainable standard of health, and the right to have their best interests and evolving capacities be given due consideration, to name a few. Accordingly, the present thesis critiques such laws that criminalise consensual sexual relations between adolescents in South Asia.

1.2 Objectives of the Research

To analyse the criminalisation of consensual sexual relations between adolescents in South Asia in line with international standards

- 1.3.1 *Identify and compare the legal and policy frameworks of South Asian countries relating to consensual sexual relations between adolescents*
- 1.3.2 *Identify links between the high prevalence of child marriage and adolescent sexual relations in the region*
- 1.3.3 *Determine whether there are barriers to accessing SRH services associated with the age of sexual consent*
- 1.3.4 *Make recommendations to introduce laws and policies dealing with consensual sexual interaction between adolescents that are in line with international standards as well as addressing region-specific challenges*

1.3. Main Research Question

To what extent does the legal and policy framework related to consensual sexual relations between adolescents in South Asia adhere to international standards?

1.4. Scope and Limitation of the Research

The South Asian Association for Regional Cooperation (SAARC) consists of Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka. This thesis, however, limits its research to

¹⁶ UNICEF South Asia, *The legal framework for child protection in South Asia* (2020) at pg. 26.

¹⁷ K., Nuray. "Close-in-Age Exemption Laws: Focusing on the Best Interests of Children and Adolescents" *International Journal of Adolescent Medicine and Health*, 33(2), 1-2, (2019) at pg.1.

¹⁸ ICRW and UNFPA, *supra* 9 at pg. 6.

the Commonwealth Nations of South Asia, focusing on the common colonial roots of the five nations. They are **Bangladesh, India, Maldives, Pakistan and Sri Lanka**.

1.5. Theoretical Framework

There are different categorisations of the children's rights discourse. One such categorisation is between the Child liberationists and the Child welfarists. Child liberationists focus on autonomy and the significance of self-determination. Whereas child welfarists on the contrary focus on the protection of children.¹⁹

Hanson differentiates between four schools of thought. They are paternalism, welfare, emancipation and liberation.²⁰ According to the paternalistic school of thought, children are seen as human becomings and children's rights are limited to being protected. Moreover, having control over children has been justified on the basis that children need to be protected from themselves and others.²¹ Liberation is the very opposite of paternalism and considers children as independent beings who are capable of making rational decisions. They have the right to autonomy similar to that of adults.²² The welfarists consider children as both being and becoming. In determining competence, the welfarists consider children to be incompetent, however, are open to accepting proof to the contrary.²³ Similarly, the emancipation school of thought consider children as both being and becoming. However, they differ in the determination of competence. Emancipationists are of the stance that children are competent unless proven otherwise.²⁴

As Skelton states, "the dilemma of "autonomy versus protection" is an ever-present tension in children's rights."²⁵ This is evident when we look at the evolution of children's rights. With the introduction of the UNCRC and the beginning of the children's rights movement, a new concept of childhood was introduced. This is the "autonomous child" as opposed to the concept of "incompetent child", which was dominant before. Both of these childhood conceptions have been instilled in the UNCRC through the protection and participation rights.²⁶

Article 25 of the Universal Declaration of Human Rights states that childhood entitles special care and assistance. Moreover, the Preamble of the UNCRC reiterates the same. It also refers to the Declaration of the Child, which states "the child, by reason of his physical and mental immaturity, needs special

¹⁹ K., Hanson, *Schools of Thought in Children's Rights in: Children's Rights from Below. Studies in Childhood and Youth*. Palgrave Macmillan, London, 1-19, (2008) at pg. 9.

²⁰ Ibid at pg. 11.

²¹ Ibid at pg.12.

²² Ibid at pg. 13.

²³ Ibid at pg. 14.

²⁴ Ibid at pg. 16.

²⁵ A., Skelton, *Balancing Autonomy and Protection in Children's Rights: A South African Account*, *Temple Law Review*, 88(4), 887-904, (2016) at pg. 903.

²⁶ D., Reynaert, M., Bouverne-De Bie & S., Vandevelde, *Between 'Believers' and 'Opponents': Critical Discussions on Children's Rights*, *International Journal of Children's Rights*, 20, 155–168 (2012) at pg. 158.

safeguards and care, including appropriate legal protection, before as well as after birth". These specific vulnerabilities create an obligation on states to protect children.²⁷

Tobin asserts that a protective paradigm that only emphasises their vulnerability at the cost of their evolving capacities will not increase children's resilience and their ability to protect themselves. Accordingly, there is a need to expand the conception of children in a way that recognises their evolving capacities and right to participation.²⁸

According to Freeman, we are prepared to impose responsibility on children, including criminal responsibility, often long before we are disposed to confer rights on them.²⁹ This is especially the case in the debate surrounding the criminalisation of consensual sexual relations between adolescents. In this debate, adolescents are deemed incapable of consenting to sexual relations whereby their evolving capacities and participation rights are disregarded. On the other hand, they are considered capable of carrying criminal responsibility for the very same acts.

To this end, as Skelton states, "a durable theory of children's rights must be flexible enough to encompass protection for children against harsh treatment and punishment when they commit crimes while at the same time allowing for their evolving capacities to be recognised so that they can begin to make appropriate decisions as they move through adolescence."³⁰

Traditionally, laws and social acceptability concerning the age of sexual consent were linked to reaching puberty. Further, perceptions concerning the purity and chastity of girls have also provided a basis for introducing the age of sexual consent.³¹ From a biological perspective, in the past decades, the age of menarche or puberty has decreased. For example, it has reduced by four years in early industrialised countries such as the UK and in newly industrialised countries such as China it is occurring faster with a rate of 4-5 months per decade.³² These factors have increased attention to protecting girls from sexual violence.³³

Considering the patriarchal and conservative nature of South Asian society, there is a need to find a balance between societal debates calling for criminalisation as a protective measure, the rights of parents and the rights of children. The main argument of the thesis will be to research the arguments to decriminalise adolescent consensual sexual relations, substantiated by legal arguments demonstrating that it violates several rights of children. These arguments will be based on examining the appropriate balance between the children's right to autonomy and protection as the underlying theoretical framework.

²⁷ J., Tobin, Understanding Children's Rights: A Vision Beyond Vulnerability, *Nordic Journal of International Law*, 84(2), 155-182, (2015) at pg. 166.

²⁸ Ibid at pg. 182.

²⁹ M. Freeman, Why It Remains Important to Take Children's Rights Seriously, *International Journal of Children's Rights*, 15, 5-23, (2007) at pg. 10.

³⁰ A., Skelton(2016), supra 25, Ibid.

³¹ S., Petroni, et al, Protection Versus Rights: Age of Marriage Versus Age of Sexual Consent, *The Lancet Child & Adolescent Health*, 3(4), 1-7, (2019) at pg. 2.

³² S. M., Susan, et al. The Age of Adolescence, *The Lancet Child & Adolescent Health* 2 (3), 223-228, (2018) at pg. 224.

³³ S., Petroni, et al, supra 31, Ibid.

1.6. Methodology and Research Techniques

The study will adopt a method of doctrinal and research philosophy. The data will be collected using a desk-based research method. A comprehensive analysis of the UNCRC, General Comments, and Concluding Observations of South Asian countries will be conducted. It will also entail a review of the relevant national legislation criminalising adolescent sexual relations. The research will also draw examples from the legal framework of countries in the Global South where consensual sex has been decriminalised to make recommendations for model laws and policies that would meet the region-specific challenges. In addition, relevant case law, books, peer-reviewed articles, reports from international NGOs and the UN, and internet sources will be used.

CHAPTER TWO: INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK CONCERNING CONSENSUAL SEXUAL RELATIONS BETWEEN ADOLESCENTS

2.0 Introduction

Children's rights are universal, indivisible, interdependent and interrelated.³⁴ Children are rights holders and the State Parties have an obligation to respect, protect and full fill their rights.³⁵ Accordingly, this chapter lays down the international and regional legal framework relating to the consensual sexual relations between adolescents and statutory rape laws. Moreover, rights relating to harmful practices such as child marriages and honour killings, and SRH services will be discussed. The international instruments looked at are the UNCRC and the CEDAW. (*See Annexure I for the ratification status of the countries*).

The regional framework will consist of the SAARC Charter. The high-level political commitments in the form of action plans that have been signed, such as on ending violence against children, will be discussed. Challenges of the SAARC mechanism will be laid down.

2.1. International Legal Framework

2.1.1. Definition of the child

According to Article 1 of the UNCRC, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier. Thereby, State Parties have the leeway to set an age of majority below the age of eighteen years. State Parties have utilised this to make exceptions to the definition of the child, in areas such as labour, marriage, sexual consent.³⁶ However, the CRC Committee is not always in favour of such exceptions and often makes recommendations to remove such exceptions. For example, in 2018 the Committee made a recommendation to Sri Lanka to make necessary legal amendments to establish an overarching definition of the child to eighteen years in all laws, without any possibility for exceptions.³⁷

2.1.2. Right to protection from sexual violence versus the right to sexual autonomy (evolving capacities)

Article 19 (1) of the UNCRC obligates State Parties to take all appropriate legislative, administrative, social and education to protect children from all forms of abuse, neglect, maltreatment or exploitation, including sexual abuse. Article 34 of the UNCRC obligates State Parties to protect children from all forms of sexual exploitation and sexual abuse.

Article 5 of the UNCRC introduces the concept of evolving capacities of the child. Under this Article, State Parties are required to respect the responsibilities, duties and rights of parents to provide

³⁴ UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14 at pg.3.

³⁵ Ibid at pg. 4.

³⁶ N. Peleg, General Principles, in: International Human Rights of Children, edited by Ursula Kilkelly and Ton Liefwaard. Singapore: Springer, 135-157, (2018) at pg. 136.

³⁷ CRC Committee, Concluding Observations on the combined fifth and sixth periodic reports of Sri Lanka, 02 March 2018, CRC/C/LKA/CO/5-6 at para 14.

appropriate direction and guidance in a manner consistent with the evolving capacities of the child, in the exercise of by the child, the rights recognised in the Convention. This concept has been considered a cross-cutting principle in the interpretation of the UNCRC by scholars and is recognised for providing a balancing role between children's autonomy and protection rights.³⁸ There is also a close link between the evolving capacities of the child and the right of the child to express their views freely on matters affecting the child.³⁹ Further, there is a requisite for such views to be given due weight according to the age and maturity of the child.⁴⁰ This reference to age and maturity together with recognition of a child's evolving capacities envisions that children are able to make informed decisions about matters that affect them independent of their parents.⁴¹

The CRC 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 the agency to take responsibility and exercise their rights.⁴² Thereby to respect the children's evolving capacities to take responsibility for their own decisions, there has to be a careful balance between considering their lack of relative experience without undermining their capacities to protect themselves.⁴³

According to the CRC Committee, child sexual abuse includes the inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity. This includes sexual activities imposed by an adult on a child requiring criminal proceedings. The Committee further elaborates that sexual act committed by a child on another child, if the child offender is significantly older than the child victim or uses power, threat or other means of pressure would be deemed sexual abuse. However, the Committee clarifies that sexual activities between children are not considered sexual abuse if the children are older than the age limit defined by the State party for consensual sexual activities.⁴⁴

The topic of consensual sexual activity between children is discussed further by the CRC Committee. The need to balance protection and evolving capacities and define an acceptable minimum age when determining the legal age of sexual consent has been highlighted. The Committee take a clear stance and recommends that State Parties should avoid criminalising adolescents of similar ages for factually consensual and non-exploitative sexual activity.⁴⁵ Additionally, while emphasising that any presumed consent of a child to exploitative or abusive sexual acts should be considered null and void, the

³⁸ K. Hanson & L. Lundy, Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child, *International Journal of Children's Rights*, 25, 285-306, (2017) at pg 301.

³⁹ Article 12(1) UNCRC.

⁴⁰ Ibid.

⁴¹ J., Tobin, 'Children's Right to Health' in: *International Human Rights of Children*, edited by Ursula Kilkelly and Ton Liefwaard. Singapore: Springer, 278-298, (2018) at pg. 284.

⁴² UN Committee on the Rights of the Child, General Comment No. 20 (2016) on the Implementation of the Rights of the Child During Adolescence, CRC/C/GC/20 at para 18.

⁴³ G. Lansdown, Evolving Capacities Explained, in *Measuring Maturity: Understanding Children's Evolving Capacities CRIN Review*, 23, 7-9, (2009) at pg. 8.

⁴⁴ UN Committee on the Rights of the Child, General Comment No. 13 (2011) on the Right of the Child to Freedom from All Forms of Violence, CRC/C/GC/13 at para 25 (a).

⁴⁵ UN Committee on the Rights of the Child(2016), supra 42 at para 40.

Committee states that State Parties should not criminalise adolescents of similar ages for consensual sexual activity.⁴⁶

Criminalising consensual sexual relations between adolescents is based on the adolescent's status as a child. Such offences are called status offences and are not crimes if committed by adults. According to the Committee, a systemic approach to the prevention of child offending also includes closing pathways into the child justice system through the decriminalization of minor offences. Further child victims of sexual exploitation and adolescents who engage with one another in consensual sexual acts are also sometimes criminalized. The Committee urges State Parties to remove status offences from their statutes.⁴⁷

The best interests principle is also significant in this debate. Article 3 (1) of the UNCRC states in all actions concerning children, the child's best interests shall be a primary consideration. The best interests principle is a threefold concept, it takes the form of that of a substantive right, an interpretative legal principle, and a rule of procedure.⁴⁸ As an interpretive legal principle, if a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child's best interests should be chosen.⁴⁹

There have been situations where the best interests principle has been used as a justification to criminalise and decriminalise consensual sexual relations between adolescents. The Kenyan case of ***CKW V Attorney General & Director of Public Prosecutions*** held that criminalisation of consensual sexual conduct between adolescents was in their best interests and to protect children from the harms of sexual activity.⁵⁰ On the other hand in the South African case of ***Teddy Bear Clinic V Minister of Justice and Constitutional Development***, it was held that imposing criminal liability on adolescent sexual conduct is a violation of the rights of the child, including, dignity and privacy, and is against the best interests of the child principle.⁵¹

According to the CRC Committee, an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention. Further, the Committee stresses that, when determining best interests, the child's views should be taken into account, consistent with their evolving capacities.⁵²

2.1.3 Right to protection from harmful practices

Under the broader umbrella of violence, harmful practices such as early and forced marriages and honour crimes are also included.⁵³ Further, under Article 16 (2) of CEDAW, the betrothal and the

⁴⁶ UN Committee on the Rights of the Child, Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2019), CRC/C/15 at para 72-73.

⁴⁷ UN Committee on the Rights of the Child, General Comment No. 24 (2019) on Children's Rights in the Child Justice System (2019), CRC/C/GC/24 at para 12.

⁴⁸ UN Committee on the Rights of the Child(2013), supra 34 at para 6.

⁴⁹ Ibid at para 6 (b).

⁵⁰ G., Kangaude & A., Skelton, (De) Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa, *SAGE Open*, 1-12, (2018) at pg. 2.

⁵¹ Ibid at pgs. 1-2.

⁵² UN Committee on the Rights of the Child(2013), supra 34 at para 22.

⁵³ UN Committee on the Rights of the Child(2011), supra 44 at para 29.

marriage of a child shall have no legal effect and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory. Child marriage also called early marriage, is any marriage where at least one of the parties is under eighteen years. It is considered to be a form of forced marriage as one or both parties have not expressed full, free and informed consent.⁵⁴

The CRC Committee and the CEDAW Committee state that forced marriages may occur when a rapist is permitted to escape criminal sanctions by marrying the victim, usually with the consent of her family.⁵⁵ They highlight that contrary to the obligations under both Conventions, many State Parties maintain legal provisions that justify, allow or lead to harmful practices, such as legislation that allows for child marriage, and provides the defence of so-called honour as an exculpatory or mitigating factor for crimes committed against girls and women or enables a perpetrator of rape and/or other sexual crimes to avoid sanctions by marrying the victim.⁵⁶ In States parties with plural legal systems as can be observed in South Asia, even where laws explicitly prohibit harmful practices, prohibition may not be enforced effectively because the existence of customary, traditional or religious laws may actually support those practices.⁵⁷

Honour crimes are referred to as acts committed in the name of so-called honour are acts of violence that are disproportionately committed against girls and women because family members consider that some suspected, perceived or actual behaviour will bring dishonour to the family or community. Such forms of behaviour include engaging in sexual relations before marriage, refusing to agree to an arranged marriage, entering into a marriage without parental consent.⁵⁸

To this end, the Committees have recommended that a minimum legal age of marriage for girls and boys, with or without parental consent, is established at 18 years.⁵⁹ Further, they call on State Parties to amend their legislation so that it is in full compliance with the relevant obligations outlined in the CEDAW, UNCRC and other international human rights standards that prohibit harmful practices and that it takes precedence over customary, traditional or religious laws that allow, condone or prescribe any harmful practice, especially in countries with plural legal systems.⁶⁰

2.1.4 The right to health, privacy and confidentiality

The right to health, like other economic social and cultural rights in the UNCRC, to some degree mirror the provision in ICESCR. Article 12 of ICESCR and Article 24 of UNCRC lays down the measures that are required to implement the right to **health**, but the latter focuses on **the** rights of

⁵⁴ UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, 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 (2019) on harmful practices*, CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1 at para 20 .

⁵⁵ Ibid at para 23.

⁵⁶ Ibid at para 42.

⁵⁷ Ibid at para 43.

⁵⁸ Ibid at para 29.

⁵⁹ Ibid at para 55 (f).

⁶⁰ Ibid at para 55 (b).

parents and children.⁶¹ The CESCR Committee⁶² and the CRC Committee⁶³ have specified that the right to health includes freedoms such as the right to control one's health and body, sexual and reproductive freedom and the right to be free from interference such as the right to be free from torture, non-consensual medical treatment and experimentation. The notion that such freedoms should be enjoyed by adults is understood by many, but it is far more contentious relating to children.⁶⁴

According to the CRC Committee, adolescence is a period characterized by rapid physical, cognitive and social changes, including sexual and reproductive maturation and it is also a period with significant challenges.⁶⁵ Adolescents right to sexual and reproductive freedom is however not considered an unbridled right to engage in sexual behaviour.⁶⁶

The CRC Committee urges State Parties to adopt comprehensive SRH policies specifically targeting adolescents considering the challenges they face. The Committee highlights that unequal access by adolescents to such information commodities and services amounts to discrimination. All adolescents should have access to universal SRH services which are sensitive to the needs of adolescents and are confidential.⁶⁷ The Committee states that there should be no barriers to accessing these services and further calls on States to de-criminalise abortion.⁶⁸ The educational aspect is also highlighted and calls for age-appropriate, comprehensive and inclusive SRH education, based on scientific evidence and human rights standards and developed with adolescents, to be part of the mandatory school curriculum.⁶⁹

Under Article 16 (1) of the UNCRC, no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. According to the CRC Committee, the right to health of adolescents is dependent on health care which respects confidentiality and privacy and includes appropriate SRH services.⁷⁰

⁶¹ A., Nolan, 'Children's Economic and Social Rights' in: International Human Rights of Children, edited by Ursula Kilkelly and Ton Liefaard. Singapore: Springer, 239-258, (2018) at pg. 241.

⁶² Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the right to sexual and reproductive health, E/C.12/GC/22 at para 5.

⁶³ UN Committee on the Rights of the Child, General comment No. 15 (2013) The Right to Health. CRC/C/GC/12 at para 24.

⁶⁴ J., Tobin (2018), supra 41 at pg. 282.

⁶⁵ UN Committee on the Rights of the Child(2016), supra 42, at para 2.

⁶⁶ J., Tobin (2015), supra 27, Ibid.

⁶⁷ UN Committee on the Rights of the Child(2016), supra 42 at para 59.

⁶⁸ Ibid at para 60.

⁶⁹ Ibid at para 61.

⁷⁰ Ibid at para 40.

2.2 Regional Legal Framework

2.2.1. The South Asian Association for Regional Cooperation (SAARC)

In 1985, the SAARC was established by signing the Charter of the South Asian Association for Regional Cooperation. The main objectives of SAARC are to promote the welfare of South Asian people and provide everyone with the opportunity to live with dignity and realise their potential, accelerate economic growth, promote mutual trust and active collaboration.⁷¹ The decisions of the SAARC at all levels are taken on the basis of unanimity, and bilateral and contentious issues are excluded from the Association's purview.⁷²

In 2002, the SAARC took its first steps to create a system which consists of agreements and mandated bodies similar to that of other regional bodies.⁷³ The first such agreements were Preventing and Combating Trafficking in Women and Children for Prostitution and the Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia 2002. Due to the common cultural, traditional and historical patterns, the region faces similar challenges concerning gender discrimination, against women and girls. These agreements portray the commitment of the South Asian nations to protect the rights of women and children. In 2004, the SAARC also signed the Social Charter which introduces commitments to uphold economic, cultural and social rights. Further in 2011, the Charter on Democracy was introduced, which is a commitment to democracy and to the government by the people. There have also been initiatives focused on climate change, health, food security and mutual assistance on criminal matters combating terrorism and drugs.⁷⁴

Aside from these Conventions, there have also been, South Asia Call for Action on Ending Violence against Children (Colombo Declaration, 2012) and the Kathmandu Call for Action to End Child Marriage in South Asia (2014). The multiple regional agreements the member states showcase some level of commitment to cooperation but the lack of infrastructure to ensure implementation makes it challenging.

2.2.1.1 South Asia Initiative for Ending Violence against Children (SAIEVAC)

In 2005, in response to the UN Global Study on Violence Against Children, a regional consultation was organised in South Asia. It led to the establishment of the South Asia Forum for ending violence against children (SAF). SAF is the first and only regional body in the world to lay the foundation for joint regional efforts to end violence against children. In 2010, SAF was transformed into SAIEVAC, and it is recognised as an apex body of the SAARC.

⁷¹ Article 1 Charter of the South Asian Association for Regional Cooperation.

⁷² Ibid, Article X.

⁷³ D., Debnath, Creation of the Human Rights Mechanisms in SAARC Region for the Victims of Human Trafficking: An Introspection of the Present Scenario, *Indian Journal of Law and Justice*, 5(2), 189-201 (2014). At pg. 189.

⁷⁴ Asian Forum for Human Rights and Development, SAARC and Human Rights: Looking Back and Ways Forward (2012) at pg. 10.

SAIEVAC contributes to promoting and protecting children's rights through SAARC mechanisms. Further, it attempts to translate the different commitments made by the SAARC into meaningful actions at the regional and country levels.⁷⁵

2.2.2. Challenges

South Asia is home to one-fifth of the world's population. The countries face significant challenges from high poverty levels,⁷⁶ underdevelopment, conflict and natural disasters. Political tensions between the countries and human rights allegations all countries face make tackling human rights issues from a regional level challenging.⁷⁷

In addition, the Charter of the SAARC enshrines the two principles of non-interference and the exclusion of contentious issues from its deliberations.⁷⁸ As a result, the Association is not able to engage in a meaningful manner in the area of human rights implementation. To date, SAARC is the only regional organisation with no human rights mechanism.⁷⁹ As a result, it lacks the mandate to engage meaningfully and cannot play a similar role to that of other regional human rights systems such as in Europe and Africa.

Therefore, the regional agreements remain to a large extent, only nominal commitments. They lack monitoring and implementation strategies to assess their impact and provide more meaning. As the UN High Commissioner for Human Rights stated, South Asia can draw inspiration from other regional bodies such as ASEAN, its regional peer. Establishing a human rights mechanism in South Asia can assist reinforce national-level human rights mechanisms and assist governments in implementing international human rights obligations.⁸⁰

⁷⁵ See <http://saievac.org/>

⁷⁶ According to the United Nations, 40% of South Asia's population live below the poverty line.

⁷⁷ M., Jiali, SAARC: Achievements and Challenges *Policy Perspectives*, 9 (1), 161-165, (2012) at pg. 163.

⁷⁸ Article X Charter of the SAARC, 1985.

⁷⁹ The case for a SAARC regional human rights mechanism": Statement by the United Nations High Commissioner for Human Rights, 23 November 2011, Available at <https://www.ohchr.org/en/statements/2011/11/case-saarc-regional-human-rights-mechanism-statement-united-nations-high>

⁸⁰ Ibid.

CHAPTER THREE: COMPARATIVE ANALYSIS OF THE LAWS AND POLICIES RELATED TO CONSENSUAL SEXUAL RELATIONS BETWEEN ADOLESCENTS IN SOUTH ASIA

3.0 Introduction

This chapter will conduct a comparative analysis of laws and policies among the five countries of the Commonwealth in the South Asian region. The purpose is to identify how consensual sexual relations are criminalised, their outcomes, and how to build a case against such laws.

3.1. Bangladesh

3.1.1 Introduction

Bangladesh is a party to both UNCRC and CEDAW.⁸¹ However, Bangladesh ratified the CEDAW in 1984, but with two reservations with the justification that it conflicts with Islamic Shari'ah. The reservations include Article 2 on non-discrimination and Article 16 (1)(c) on guaranteeing the same rights and responsibilities during marriage and its dissolution. While the latter provision is not relevant to the subject matter of this analysis, the former is consequential as some of the laws applicable to this discussion can be construed as discriminatory and in violation of Article 2. This reservation will be further discussed below. As a Dualist country, both treaties have not been directly incorporated into national law. As a result, they are not enforceable before domestic courts.⁸²

An 89% of Bangladeshis are Muslims, constituting a supermajority of the population. Religion is fundamental in shaping society's views on sexual practices in Bangladesh. Premarital sexual relations are deemed *haram* (prohibited). This not only guides the beliefs of adolescents who are increasingly becoming curious about sexual relations but also guides the formulation of laws and policies in Bangladesh.⁸³ In addition, laws restricting such behaviour dating back to the colonial era are still in place. For example, the Penal Code of Bangladesh (PCB) dates back to 1860 and codifies Victorian values. These colonial laws and subsequent laws passed to regulate sexual relations have created a framework of mutually contradictory provisions on the age of consent and the consented activities, with highly ambiguous real-world applications.

3.1.2 Laws and policies related to consent and statutory rape

Various laws in Bangladesh determine consent. Section 375 of PCB states that a man commits rape when sexual intercourse has occurred with a woman under five circumstances. The fifth relates to statutory rape which states when she is under fourteen years of age, with or without her consent. From this definition, it is implicit that the age of consent is fourteen years and only applies to girls.

⁸¹ See Annexure-I.

⁸² CRIN, Access to Justice for Children: Bangladesh (2015) at pg. 2.

⁸³ U., Rob, & M. U., Mutahara, Premarital Sex among Urban Adolescents in Bangladesh, *International Quarterly of Community Health Education*, 20(1), 103–111, (2000) at pg. 108.

Rape was also included under Section 9 of the Prevention of Oppression Against Women and Children Act of 2000 (POWC), consistent with the Penal Code provision but with a higher sentence. However, in 2003 it was amended, increasing the age of consent to sixteen.

There is no explicit reference to an age of consent for boys, and due to the gendered definition of rape, it can only be committed against a female. Section 377 of PCB includes unnatural offences, defined as voluntary carnal intercourse against the order of nature with any man, woman or animal. This has been interpreted to include same-sex intercourse. In 2013 in the case of **Md. Abdus Samad V State**, Section 9 of POWC was interpreted to criminalise penetrative sexual acts against boys under sixteen years.⁸⁴

There is also an exception to the statutory rape definition of rape described above. Where such sexual intercourse is with his wife, and if the wife is not under thirteen years of age, it is not considered rape.⁸⁵ The provision legitimises the practice of child marriage in Bangladesh. The exception is subjected to further confusion in the section related to punishment. Section 377 of PCB refers to punishment for rape and provides a lesser sentence where the woman raped is his wife and is not under 12 years of age. This conflicts with the fifth circumstance of rape, which refers to thirteen years. Hence it is unclear whether the minimum age of marriage is twelve or thirteen years. (See below 3.1.3).

The existing consent laws are contentious for three reasons. First, there is no explicit provision in the law defining male rape. Secondly, this gap discriminates against adolescents based on their sexual orientation, whereby sexual intercourse between same-sex partners is criminalised. Thirdly, there are inconsistencies in the age of consent for girls, with the PCB referring to fourteen years, the POWC referring to sixteen years and the exceptions for marital rape being twelve in one provision and thirteen in another.

The above analysis shows that the law provides no exceptions for consensual sexual behaviour between adolescents. Any such behaviour between children under the age of consent (also unclear whether it is fourteen or sixteen) is criminalised. Further, the law discriminates against adolescents based on their sexual orientation, as sexual intercourse between same-sex partners is criminalised regardless of age.

3.1.3 Assessment of links between prevalence of child marriage and adolescent sexual relations

Bangladesh has the highest rate of child marriage in South Asia. As of 2021, there were 38 million girls married before turning 18, out of which 13 million such girls were married before the age of 15.⁸⁶ The Government has attempted to curtail the practice through legal reform and awareness-raising.

The Child Marriage Restraint Act of 2017 (CMRA) defines the age of marriage for a female as 18 years and for a male as 21 years.⁸⁷ Additionally, CMRA Section 19 allows for child marriages in exceptional circumstances when prescribed by rules in the minor's best interests, at the court's

⁸⁴ UNICEF South Asia (2020), supra 16 at pg. 153.

⁸⁵ Section 375 PCB.

⁸⁶ Mahfuz, K., Child marriage in Bangladesh: Does a vacuum exist within the law? 18 April 2021, Available at <http://blog.brac.net/child-marriage-in-bangladesh-does-a-vacuum-exist-within-the-law/>

⁸⁷ Section 2 (1) of the Child Marriage Restraint Act 2017.

direction and with the consent of the parents or guardian of the child. It is reported that this law is seldom enforced and often ignored.⁸⁸

This special provision has been subjected to much criticism by local and international organisations. In 2015, the CRC Committee raised concerns about this law which was at the drafting stage.⁸⁹ Even though the delegation provided assurances, the Committee urged Bangladesh to refrain from enacting laws that would reduce the minimum age of marriage.⁹⁰ The CEDAW Committee in 2016 raised similar concerns.⁹¹ Despite these concerns, the law was passed in 2017. It has been reported that the background to this special provision was the high incidence of teenage pregnancies outside marriage, as discussed in Parliament. The special provision creating leeway for child marriages is for the 'greater good of the adolescent'.⁹² The need to protect the honour of girls who have become pregnant or who elope was put forward as the basis for introducing this law.⁹³

In 2018, The Child Marriage Restraint Rules (CMRR) were formulated. They established the Child Marriage Prevention Committees at different levels of the governance structure. They have a broad mandate but have been provided with limited guidance on the interpretation of the special provision. Even though the CMRA states that the special provision should be interpreted as provided by the Rules, the exceptional circumstances under which a child marriage can occur have not been defined, nor a procedure to determine such cases have been provided.

The CEDAW Committee has criticised these differing definitions between marriageable ages for boys and girls. With the differing definitions, if a marriage takes place between an 18-year-old girl and a 20-year-old boy, it would still be considered a child marriage, and the girl child would be penalised as the adult contracting party.⁹⁴ Additionally, there are penalties for minors contracting the marriage. The law fails to recognise the child involved as the victim and fails to consider the best interests of the child as provided by the law itself.

Even with the enactment of the CMRA and CMRR, there is no minimum age of marriage; child marriage may occur at any age if deemed an exceptional circumstance by the Courts and with the parent's consent. There is no mention of the consent of the child. This is alarming considering the background that led to the enactment of the special provision. When a child becomes pregnant, she may be forced to marry. It is also an opportunity for perpetrators to avoid criminal responsibility by

⁸⁸ Human Rights Watch, *Marry Before Your House is Swept Away: Child Marriage in Bangladesh* (2015) at pg. 13.

⁸⁹ CRC Committee, *Concluding Observations on the fifth periodic report of Bangladesh*, 30 October 2015, CRC/C/BGD/CO/5 at para 22.

⁹⁰ *Ibid* at para 23.

⁹¹ CEDAW Committee, *Concluding observations on the eighth periodic report of Bangladesh*, 18 November 2016, CEDAW/C/BGD/CO/8 at para 16.

⁹² P., Ruma & N., Bhalla, *Bangladesh law allowing child brides may legitimize rape: charities*, 1 March 2017, *Reuters News*, Available at <https://www.reuters.com/article/us-bangladesh-child-marriage-idUSKBN168551>

⁹³ Citizens' Initiatives on CEDAW, Bangladesh (CIC-BD), *Eighth CEDAW Shadow Report to the UN CEDAW Committee* (2017) at para 3.

⁹⁴ Section 7 CMRA 2017 If any adult, male or female, contracts a child marriage, it shall be an offence, and for this, he shall be punished with imprisonment which may extend to 2 (two) years, or with fine which may extend to 1 (one) lakh Taka, or with both, and in default of payment of the fine, shall be punished with imprisonment which may extend to 3 (three) months.

marrying a child rape victim. The most appropriate solution for unwanted pregnancies should not be child marriage, and this provision weakens children's protection against sexual violence.

3.1.4 Access to sexual and reproductive health services and education

Bangladesh has the highest teenage pregnancy rate outside Sub-Saharan Africa. 113 out of 1000 adolescent girls become pregnant before nineteen in Bangladesh. The leading cause of teenage pregnancy is inevitably the high rate of child marriage.⁹⁵ It is also important to note that one of the root causes of child marriage is safety concerns stemming from behaviours such as eve-teasing,⁹⁶ which is culturally considered a precursor to actual sexual behaviour, and other protection concerns of parents.⁹⁷ As discussed in the section above, child marriage is perceived as a solution for unwanted teenage pregnancies.

The provision of comprehensive sexual reproductive education and services is a priority of the Government.⁹⁸ There are no legal barriers to adolescents accessing SRH services, other than abortion⁹⁹ in Bangladesh. However, there are social and physical barriers. Premarital sexual relations are culturally unacceptable, and as a result, adolescents are reluctant to access services. Service providers are also unwilling to provide such services to unmarried persons, especially adolescent girls.¹⁰⁰ According to a recent study, it is estimated that 9.11% of Bangladeshi students between the ages of eleven and seventeen years have had sexual intercourse. The study also estimates that the exact prevalence is much higher.¹⁰¹ These adolescents are at a higher risk of unwanted pregnancies and STIs. Adolescents between fifteen to eighteen years are reported to have the highest rate of unmet contraception needs in Bangladesh.¹⁰² This is due to the limited number of SRH service providers and the lack of adolescent-friendly confidential services.

The school curricula include sexuality education. However, cultural norms and beliefs coupled with the lack of trained teachers and professionals have resulted in poor levels of the teaching of the curriculum.¹⁰³

3.1.5 Conclusions

There are no explicit legal provisions stating the age of consent and the minimum age of marriage in Bangladesh. Nor are there provisions for consensual sexual relations between adolescents below the age of consent, which itself is ambiguous. The law also discriminates against adolescents based on

⁹⁵ UNFPA Bangladesh, Young People, Available at <https://bangladesh.unfpa.org/en/topics/young-people-10>

⁹⁶ A common euphemism in South Asia for sexual harassment of women in public areas by men (S. L., Talboys, et al., 2017).

⁹⁷ Children on the Edge, Steps to Reducing Child Marriage: Case Study Bangladesh (2015).

⁹⁸ National Strategy for Adolescent Health 2017-2030 focuses on providing adolescent-friendly health services.

⁹⁹ Under the PCB abortion is only legalised to save a woman's life.

¹⁰⁰ N. S., Murshid & A., Irish., Understanding Teen Sex in Bangladesh: Results from Global School Health Survey 2014, *Children and Youth Services Review* 119, 1-8, (2020) at pg 3.

¹⁰¹ Ibid at pg. 4.

¹⁰² UNFPA Bangladesh, Family planning, Available at <https://bangladesh.unfpa.org/en/topics/family-planning-4>

¹⁰³ IPPF South Asia, Political environment and CSO networks relevant to SRHR in South Asia (2017) at pg. 26.

their sexual orientation regardless of age. The occurrence of premarital sexual interactions between adolescents is denied. A link between consensual sexual relations between adolescents and the child marriages can be observed. Child marriage is seen as a solution for unwanted pregnancies. Although this may not be a solution, societal norms that shape laws and policies give adolescents in Bangladesh limited choices. Therefore, legal reform aimed at combatting child marriage must be done gradually, guided by such realities in the region, whilst balancing children's rights to protection and autonomy. Comprehensive sexual and reproductive services and education can be an effective solution. However, Bangladesh lags in this regard due to cultural and socio-economic reasons.

3.2 India

3.2.1 Introduction

India ratified the UNCRC in 1992 and the CEDAW in 1993.¹⁰⁴ International treaties cannot be directly enforced before Courts in India unless the parliament has passed legislation to that effect. Neither the UNCRC nor the CEDAW has been directly incorporated to date, but the parliament has passed several laws giving effect to certain aspects of these treaties.¹⁰⁵ Article 51 of the Constitution of India places a duty on the State to foster respect for international law and treaty obligations. Indian Courts have been active in the use of UNCRC as an interpretive tool under these obligations.¹⁰⁶

253 million in India are adolescents, accounting for the world's largest adolescent population. One in every five people is between ten to nineteen years in India.¹⁰⁷ Although adolescence is a time where there's a drive for self-determination and autonomy, adolescents in India have limited agency and access to information regarding things that impact their lives. Due to deeply rooted social norms, there are inequalities and discrimination, especially directed at girls. Families play a significant role in determining adolescents' futures, including decisions in selecting romantic/life partners. Families have strong resistance to adolescent romantic relationships; it is considered taboo and detrimental to the family's dignity. Resistance is particularly strong where there are differences in caste, religion or economic status. It is reported that many adolescents resort to running away from their homes to continue their romantic relationships. Such behaviour has resulted in adolescents being in contact and or conflict with the criminal justice system¹⁰⁸ and victims of harmful practices such as child marriage and honour killings.

3.2.2 Laws and policies related to consent and statutory rape

The age of consent for statutory rape was sixteen years for almost two centuries. An amendment to the Indian Penal Code (IPC) in 2013 changed the age of consent to eighteen years with the intention

¹⁰⁴ See Annexure-I.

¹⁰⁵ Examples POCSO, Labour laws (CRIN,2015).

¹⁰⁶ CRIN, Access to Justice for Children: India (2015) at pg. 2.

¹⁰⁷ UNICEF South Asia, Empowering adolescent girls and boys in India, Available at <https://www.unicef.org/india/what-we-do/adolescent-development-participation>

¹⁰⁸ V., Anchan, et al, POCSO Act, 2012: Consensual sex as a matter of tug of war between developmental need and legal obligation for the adolescents in India. *Indian Journal of Psychological Medicine*, 43(2), 158–162, (2021) at pg.158.

of providing better protection for children.¹⁰⁹ This came about following the countrywide shock and anger that emanated from the infamous Nirbhaya gang-rape case in 2012.¹¹⁰

The current definition of rape in the IPC stipulates it as an offence that can only be committed by a man against a woman under seven circumstances. The sixth is of relevance to the present analysis, which states that with or without her consent when such a person is under 18 years of age. This implies that the age of consent for girls is 18 years. However, there are two exceptions, but only the second is relevant to this analysis. It states that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.¹¹¹ This categorically legalises marital rape as well as child marriages to a certain extent. (*Issues concerning child marriage will be further discussed below in Section 3.2.2*)

Due to the gendered nature of the definition, it excludes boys and does not recognise the rape of boys. Section 377 IPC refers to unnatural offences, defined as voluntary carnal intercourse against the order of nature with any man, woman or animal. This penalises any act with no consideration of consent. In a progressive move, in 2018, the Supreme Court of India (SCI) ruled that this provision was unconstitutional in the case of **Navtej Singh Johar & Ors. V Union of India The Secretary Ministry of Law and Justice**¹¹² as it discriminated against persons based on their sexual orientation.

This has arguably been further strengthened with the introduction of the Protection of Children from Sexual Offences Act 2012 (POCSO). The Act defines a child as any person below 18 years of age. Section 3 refers to penetrative sexual assault, which is essentially a gender-neutral definition of rape. It also introduces non-penetrative sexual assault as an offence.¹¹³ Regarding both provisions, the consent of the child is irrelevant, which implies that consensual sexual relations between adolescents are criminalised. The object of POCSO to protect children from sexual violence must be lauded. However, it disregards the evolving capacities of children and takes a paternalistic approach based on the premise that adolescents in India are sexually inactive.

This has also been observed in practice; a recent study reported that out of the total child sexual abuse cases filed under the POCSO, 21.58% in Delhi, 21.21% in Andhra Pradesh, 20.52% in Maharashtra, 15.69% in Assam and 5.45% in Karnataka are related to consensual sexual relations.¹¹⁴ It is reported that the adolescent boy is often subjected to criminal proceedings, and the adolescent girl is considered to be the victim. This is because the complaints are filed by the parents or relatives of the adolescent girl, either upon finding out the existence of a relationship, breaking it or when the adolescents elope to continue their relationship.¹¹⁵ In a recent case in 2017 concerning a 15-year-old girl who was found to be 12 weeks pregnant, the government hospital to which she visited with her

¹⁰⁹ Section 9 India Criminal Law (Amendment) Act 2013.

¹¹⁰ V., Anchan, et al, supra 108 at pg 159.

¹¹¹ Section 375 Indian Penal Code of 1860.

¹¹² Navtej Singh Johar & Ors. V Union of India Thr. Secretary Ministry of Law and Justice Writ Petition (Criminal) No. 76 of 2016 dated September 6, 2018.

¹¹³ Section 7 The Protection of Children from Sexual Offences Act 2012.

¹¹⁴ Centre for Child and Law and National Law School of India University. STUDY ON THE WORKING OF SPECIAL COURTS UNDER THE POCSO ACT, 2012 IN KARNATAKA (2017) at pg 72.

¹¹⁵ Amitabh Suman, A., Age of consent and Romeo-Juliet clause, 23 May 2021, *Times of India Blog*, Available at: <https://timesofindia.indiatimes.com/readersblog/ajayamitabhsumanspeaks/age-of-consent-and-romeo-juliet-clause-32417/>

parents to terminate the pregnancy immediately reported the incident to the police. In 2018, the 17-year-old boy was found guilty and was sentenced to life imprisonment.¹¹⁶

Positive trends can also be observed in High Courts across regions where judges are in favour of the decriminalisation of sexual activity where they find the child is deemed sufficiently mature to understand the outcomes of his or her actions. For example, this can be observed in the case of **Shambu Thilak V State of Kerala and Others**,¹¹⁷ related to a romantic relationship between a 17-year-old girl and a 20-year-old man. When the mother of the girl found they had engaged in sexual intercourse, she filed a case against him for penetrative sexual assault under POCSO and rape under the IPC. The Court clarified that this case did not consist of 'extreme depravity, perversity and cruelty' and that this case did not fall under the 'category of offences that have a serious impact on society',¹¹⁸ which is generally the contrary in cases of rape. Accordingly, the court quashed the criminal charges against the accused.

Another example is the case of **Sabari v. The Inspector of Police and Others**.¹¹⁹ This case was an appeal challenging the lower court's decision which sentenced the appellant to ten years imprisonment for penetrative sexual assault under POCSO, rape and kidnapping from the lawful guardian under the IPC. In the judgement, due consideration was given to the fact that the victim had become hostile and refused to collaborate to implicate the appellant with the offences he was charged with.¹²⁰ The Court raised concern over the increasing number of cases being prosecuted under the POCSO as well as the rigorous imprisonment of minors involved. Moreover, the Court reflected on the fact that adolescents engaging in these acts are unable to comprehend the severity of the enactment of the POCSO.¹²¹ Court also stated that awareness should be raised as stipulated in the POCSO itself.¹²² Recommendations were made to amend Section 2 (d) of POCSO to define a child as any person under the age of 16 years, to exclude consensual sexual relations from POCSO and lower the age of consent to 16 years, and include a close in age exceptions up to of 5 years older than the victim to provide further protection.¹²³

Another significant case in this regard is **Vijayalakshmi vs State Rep. By**,¹²⁴ which was also an incident where the parties to the case were in a romantic relationship. The victim in the case petitioned to quash the proceedings against the accused. The victim and the accused had eloped and contracted into marriage. As a result, the accused was charged under the POCSO, IPC and the Prohibition of Child Marriages Act.

¹¹⁶Mantri, G., POCSO criminalising teen sexuality? NCRB data suggests that may be true, 27 October 2021, *The News Minute*, Available at <https://www.thenewsminute.com/article/pocso-criminalising-teen-sexuality-ncrb-data-suggests-may-be-true-111281>

¹¹⁷Shambu Thilak v State of Kerala and Others, Crl.MC.No. 3810 of 2016, Kerala High Court.

¹¹⁸ Ibid at para 10.

¹¹⁹ Sabari v. The Inspector of Police and Others, Criminal Appeal No.490 of 2018, Madras High Court.

¹²⁰ Ibid at para 12.

¹²¹ Ibid at para 21.

¹²² Section 43 POCSO.

¹²³ Madras High Court(2018), supra 119 at para 28.

¹²⁴ Vijayalakshmi v. State Rep. By, Crl.O.P.No.232 of 2021 and Crl.M.P.No.109 of 2021, Madras High Court.

In consideration of the facts of the case, the Court highlighted a number of significant points. The fact that romantic relationships are part of adolescent development and their need for intimacy was discussed. The rise in the number of similar cases was raised with concern. The Court took the stance that 'painting a criminal colour to this aspect would only serve counter-productively to understanding biosocial dynamics and the need to regulate the same through the process of law'.¹²⁵

It was highlighted that the purpose of the POCSO was never to criminalise adolescent relationships. An adolescent boy and girl who were dealing with their biological changes and whose decision-making ability is yet to fully develop required the support and guidance of parents and society at large. Prosecuting adolescent boys is essentially looking at the issue from an adult point of view and that leads to a lack of empathy, the Court stated. Accordingly, it was proposed that with the changing societal needs legislature should bring necessary changes to the law in particular to the POCSO.¹²⁶

3.2.3 Assessment of links between prevalence of harmful practices and adolescent sexual relations

Child marriage is a deeply rooted cultural phenomenon in India. It is estimated that each year around 1.5 million girls under 18 years are married.¹²⁷ The Prohibition of Child Marriages Act 2006 (POCM) defines a child as 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.¹²⁸ Under this Act, child marriages are not void ab initio but are voidable at the discretion of the contracting party within two years of either party attaining the age of marriage.¹²⁹ There are also challenges with the IPC. As mentioned in the section above, there is an exception to rape when the female is the wife and above the age of fifteen years¹³⁰ that legitimises child marriages between fifteen to eighteen years. This provision also contradicts the POCSO, which criminalises sexual activities involving a person below eighteen years regardless of consent.

The CRC Committee¹³¹ and the CEDAW Committee¹³² also raised concerns over the marital rape exception and called on the government to address this contradiction in the law. It is reported that this contradiction among the three laws has encouraged child marriages. Adolescents engaging in consensual sexual relations enter into marriages to evade the severe punishments of POCSO and the IPC marital rape exception has been used to acquit adult perpetrators who married the victim or participated in rituals.¹³³

¹²⁵ Ibid at para 16.

¹²⁶ Ibid at para 19.

¹²⁷ UNICEF South Asia, supra 107, Ibid.

¹²⁸ Section 2 POCM

¹²⁹ Section 13 POCM

¹³⁰ Section 375 IPC

¹³¹ CRC Committee, Concluding Observations on the Combined Third and Fourth Periodic Reports of India, 7 July 2014, CRC/C/IND/CO/3-4, para 49.

¹³² CEDAW Committee, Concluding Observations: India, 2014, CEDAW/C/IND/CO/4-5, para 10 (b).

¹³³ A., Pitre & L., Lingam, Age of consent: challenges and contradictions of sexual violence laws in India, *Sexual and Reproductive Health Matters*, 29(2), 1-14, (2021) at pg. 10.

The CEDAW Committee specifically highlighted concern over the persistence of harmful traditional practices such as honour crimes perpetuated by families of girls and women.¹³⁴ Similar to its regional peer Pakistan, honour killings are prevalent in India. However, national prevalence data is lacking. It is reported that honour killings were mainly used as punishment for women and girls who showed sexual agency, such as by engaging in premarital relationships or marrying without consent. One study reports that 83% of honour killings involved upper-caste women or girls engaging in romantic relationships with lower-caste men or boys without parental consent.¹³⁵ To this end, the CEDAW Committee raised concern that India has not taken necessary steps to eliminate harmful practices and negative stereotypes.¹³⁶

In response to the issue of child marriages being recognised under the IPC, in 2017, a civil society organisation brought a case before the SCI on public interest litigation under Section 32 of the Indian Constitution. In this case, ***Independent Thought V Union of India Writ Petition (Civil) No. 382 of 2013***, as a result of the m, the Court held that the marital rape exception under the IPC which encouraged child marriage was void. Moreover, it held that POCSO which has a pre-eminence clause¹³⁷ would precede where there are contradictions in other laws. This judgement must be applauded as it recognised the child's right to equal protection from sexual violence. However, due to the current high age of sexual consent and social norms pressuring girls to marry at a young age, this causes complexities. Taking a strict approach to combat child marriages disregarding the views of adolescents concerned may be problematic (*See Section 4.2.1.2 for an in-depth discussion*). This decision has also created new challenges with regard to access to SRH services for children that continue to stay in child marriages.

3.2.4. Access to sexual and reproductive health services

POCSO not only criminalises all sexual activities between adolescents, but it also places a mandatory obligation to report. Section 19 requires any private citizen who has knowledge or suspects abuse, to report it to relevant authorities. The failure of any such person to report is an offence with a fine and or imprisonment of six months.¹³⁸ Additionally, the Criminal Procedure Code also places an obligation upon hospitals to report all cases of sexual offences to the police and failure to do can result in two years of imprisonment.¹³⁹

Even though the object of mandatory reporting was to protect children better, it has resulted in possibly unanticipated outcomes. Due to the burden of mandatory reporting, healthcare professionals are unwilling to provide SRH services to adolescents as doing so would be evidence that they possessed knowledge of the offence. It is reported that emergency contraceptives and medically terminated pregnancies are inaccessible to adolescents. There have also been several reports where doctors routinely report suspected cases of sexual assault and requests for abortion without seeking

¹³⁴ CEDAW Committee(2014), supra 132, para 10 (f).

¹³⁵ D., Tanya, et al. "For the Sake of Family and Tradition: Honour Killings in India and Pakistan." *ANTYAJAA: Indian Journal of Women and Social Change*, 5 (1) June 2020, 22–39, (2020) at pg. 29.

¹³⁶ CEDAW Committee(2014), supra 132 at para 20.

¹³⁷ Section 42A POCSO.

¹³⁸ Section 21 POCSO.

¹³⁹ Section 357C, Criminal Procedure Code of 1973, inserted with an amendment in 2013 via the India Criminal Law (Amendment) Act 2013.

the informed consent of the adolescent.¹⁴⁰ As a result, girls refuse treatment for fear of being reported and their partner being criminally sanctioned.¹⁴¹ It is evident that such practices violate a child's right to privacy and confidentiality and prevent them from exercising their right to access SRH services.

An additional challenge that has emerged is concerning married adolescents. Before *Independent Thought V Union of India*, as a result of the marital rape exemption, married adolescents could access SRH services without any legal repercussions. The law also protected service providers. As the POCSO does not provide any exceptions to married adolescents, those that were previously able to access services are now unable to do so.¹⁴² While the marital rape exception is not the answer to this issue, provision must be made to enable all adolescents to access necessary services.

3.2.5. Conclusion

The enactment of POCSO had the objective of protecting children from sexual violence. However, it enshrines patriarchal social norms and promotes a protectionist agenda. Even though the SCI has clarified the contradictions with regard to the age of consent for married and unmarried women, there are discrepancies between the IPC and POCSO. IPC does not provide equal protection for boys. Moreover, the POCSO criminalises all sexual relations between adolescents, failing to acknowledge the sexual autonomy of adolescents and their evolving capacities. This has also created legal barriers for adolescents to access SRH services. The increased number of prosecutions of consensual sexual relations between adolescents is alarming and it deters access to justice for real victims of sexual violence. Punitive actions against the very same adolescents that are intended to be protected under the POCSO cannot be taken lightly. As SCI suggests, legislative reform is essential considering the challenges that have emerged with the implementation of the Act.

3.3 Sri Lanka

3.3.1 Introduction

Sri Lanka is a party to both UNCRC and CEDAW but as a dualist country,¹⁴³ the treaties have not been directly incorporated into national laws. Sri Lanka takes the stance that its laws are in line with the UNCRC. Following the ratification of the UNCRC, Sri Lanka also adopted the Children's Charter of Sri Lanka,¹⁴⁴ but it only serves as a non-justiciable policy document.

It is estimated that 3.8 million in Sri Lanka are adolescents accounting for one-fifth of the total population.¹⁴⁵ The teenage pregnancy rate in Sri Lanka in 2019 was 4.4% which is comparatively lower than in other countries in the region. However, it is reported that premarital sex results in unwanted pregnancies as one of the main drivers of child or early marriage. Trends have also been observed in prosecuting boys for engaging in consensual sexual intercourse. In addition, often such

¹⁴⁰ A., Pitre & L., Lingam, supra 133, at pg 9.

¹⁴¹ Ibid at pg 10.

¹⁴² L. A., Mathew, Right to sexual autonomy of children—Implications of the UNCRC upon the Indian law on the age of consent, *International Journal for Crime, Justice and Social Democracy*, 8(2), 121-134, (2019) at pg 124.

¹⁴³ Article 157 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

¹⁴⁴ CRIN, Access to Justice for Children: Sri Lanka (2014) at pgs. 1-2.

¹⁴⁵ Department of Census and Statistics, 2012.

girls are taken into the child protection system and are institutionalised to go through a rehabilitation programme, sometimes through enforcement and too often with the push of the parents or families.¹⁴⁶

3.3.2 Laws and policies related to consent and statutory rape

In Sri Lanka, there is no explicit reference to the age of sexual consent. It can however be derived from laws related to rape. Up until 1995, the age of sexual consent was 12 years. Section 363 of the Penal Code of Sri Lanka (PCL)¹⁴⁷ states a man is said to commit rape when he has sexual intercourse with a woman under five circumstances. The fifth is of relevance as it states ‘with or without her consent when she is under sixteen years of age unless the woman is his wife who is over twelve years of age and is not judicially separated from the man’.¹⁴⁸ This defines statutory rape; however, it does not apply where a child over the age of twelve years is married to the alleged perpetrator. In Sri Lanka, marital rape is not an offence unless the parties are judicially separated.¹⁴⁹ (See Section 3.3.3).

Moreover, due to the gendered nature of the definition of statutory rape and rape in general, there is no equal protection for boys and girls in Sri Lanka. In 2018, the CRC Committee raised grave concern about the lack of legal recognition of male rape and under-reporting of sexual abuse of boys because of stigmatization, criminalization of homosexuality, and feelings of shame of so-called “emasculatation”.¹⁵⁰ The Committee recommended prompt measures to revise Article 363 of PCL to criminalise statutory rape of boys.¹⁵¹ In addition, all consensual sexual relations between same-sex partners are considered to fall under the so-called ‘unnatural offences’.¹⁵²

Section 364 of PCL lays down the punishment for rape. In non-aggravating circumstances, the minimum sentence is seven years and a maximum of twenty years of imprisonment. Section 364 (2) PCL specifies the aggravating circumstances to which the minimum sentence is ten years and a maximum sentence of twenty years of imprisonment. Section 364(2)E PCL refers to rape committed on a woman under 18 years of age as an aggravating circumstance. This is problematic because this includes statutory rape that includes both consensual and non-consensual sexual intercourse. Recognising the fact that this is problematic, in the proviso to Section 364 (2) PCL, an exception was introduced in 1995. It states that where the offence is committed in respect of a person under sixteen years and the offender is under eighteen years, and the intercourse has been with the consent of the person, the court is provided with the discretion to impose a sentence of imprisonment for a term less than ten years. This exception has been referred to as a Romeo and Juliet clause or a close-in-age exemption clause.¹⁵³ However, it does not serve the purpose traditionally met by a Romeo and Juliet clause, which is to decriminalise consensual sexual relations. The exception continues to criminalise

¹⁴⁶ K., Thilakarathna, & N., Jayarathna, Jurisprudence of statutory rape. *International Journal of Law*, 6(6), 270-277 (2020) at pg. 273.

¹⁴⁷ The Penal Code of Sri Lanka 1885.

¹⁴⁸ Section 363E PCL.

¹⁴⁹ Section 363A PCL.

¹⁵⁰ Para 23 (b).

¹⁵¹ Para 24 (b).

¹⁵² Section 365 PCL.

¹⁵³ Center for Policy Alternatives, Legal Reform to Combat Sexual and Gender-Based Violence Part I Reforming Existing Laws and Policies (2020) at pg 9.

consensual sexual intercourse only with a lesser sentence. It also contradicts the law, which does not find the capacity of a girl under sixteen years to consent by recognising the consent to make an exception. Aside from this, it does not provide an age range; for example, if a boy who is seventeen years has consensual sexual intercourse with a girl of any age, he still can be considered under this exception.

In 2008, the Anuradhapura High Court (HC)¹⁵⁴ dealt with a case concerning a girl who was sixteen years old that had eloped with a man. The Court refused to impose a minimum sentence for statutory rape. Instead, referred the case to the Supreme Court, seeking guidance on whether HC had the discretion to impose a sentence below the minimum sentence when a case falls under Section 364(2)E IPSL. The Supreme Court¹⁵⁵ held that HC had the judicial discretion to impose a sentence that it deems fit, other than for those considered to be serious in nature.¹⁵⁶ This discretion was further broadened by the Supreme Court in 2013,¹⁵⁷ where it held a similar stance but with regard to a case where a girl under sixteen years of age was subjected to (*non-consensual*) statutory rape by her sister's husband. The victim gave birth to a child and the Court looking at the best interests of the child alone decided to impose a suspended sentence on the accused as he was looking after the child of the victim. The decision shows poor use of the best interests principle and the subjective standards being set by the Court which is problematic. These standards trivialise statutory rape and fail to consider the situation of the victim.¹⁵⁸

There have been attempts to decriminalise consensual heterosexual relations between adolescents, dating back to 2005¹⁵⁹ and as recently as 2021.¹⁶⁰ The basis has been the recognition of the fact that high number of prosecutions¹⁶¹ made against boys on consensual sexual relations and being labelled as rapists is rendering injustice. It is reported that between the years 2015 – 2018 there had been a total of 4568 cases of statutory rape being investigated. Alarming 83% of such cases (3796) have been consensual sexual intercourse.¹⁶²

Against this background, the 2021 proposal made by the Minister of Justice to decriminalise consensual sexual relations between adolescents was approved by the Cabinet. It is reported that the proposal seeks to include a Romeo and Juliet clause and remove the minimum mandatory

¹⁵⁴ HC 333/04.

¹⁵⁵ SC 03/2008.

¹⁵⁶ Law Commission of Sri Lanka, Explanatory Note on the Sentencing Policy with regard to Statutory Rape and matters connected thereto (2014) at pg. 6.

¹⁵⁷ S.C. Appeal No. 17/2013 / S.C.Spl. LA No. 207/2012 / C.A.No. . 297/2008 / HC. Kurunegala No. 259/2006.

¹⁵⁸ R., Jayasundere, Trivialising Statutory Rape: The Dangers of Suspended Sentences, *International Journal of Law* 4(3), 1-14, (2015) at pgs. 8-9.

¹⁵⁹ Izzaddeen, A., Underage love and sex at 13? Sri Lanka debates the unthinkable, 28 September 2005, *Khaleej Times*, Available at <https://www.khaleejtimes.com/opinion/underage-love-and-sex-at-13-sri-lanka-debates-the-unthinkable>

¹⁶⁰ Lugoda, U., Amending SL's law on rape: Minimum sentence to change?. *The Sunday Morning*, Available at <https://www.themorning.lk/amending-sls-law-on-rape-minimum-sentence-to-change/>

¹⁶¹ Center for Policy Alternatives, supra 154 at pgs. 32-35.

¹⁶² Sri Lanka Police, Performance Report (2018) at pg. 5 Available at <https://www.parliament.lk/uploads/documents/paperspresented/performance-report-srilanka-police-2018.pdf>

sentence.¹⁶³ Due to the current political and economic turmoil in the country, the outcomes of this proposal are yet to be seen.¹⁶⁴

3.3.2 Assessment of links between prevalence of child marriage and adolescent sexual relations

The prevalence of child marriage is low compared to other countries in the region. There is a data gap, and the absolute number of child marriages in the country is unknown. However, according to an estimation a recent estimation, 16,000 to 24,000 girls and boys under eighteen years were formally married or were cohabiting.¹⁶⁵ In Sri Lanka, under the General Marriage Registration Ordinance,¹⁶⁶ the age of marriage is set at eighteen years for girls and boys.¹⁶⁷ However, personal and customary laws also parallelly apply. Customary marriages are recognised in Sri Lanka, including customary child marriages. In *Thyagaraja V Kurukkel*,¹⁶⁸ it was clarified that customary marriages also need to meet the requirements of capacity including age.¹⁶⁹ Cohabitation until the legal age of marriage, is a socially sanctioned form of marriage.¹⁷⁰ It is reported that there are strong links between early marriage and statutory rape with many incidences of early marriage and cohabitation preceded by incidents of statutory rape.¹⁷¹

The Muslim Marriages and Divorce Act¹⁷² (MMDA) applies to Sri Lankan Muslims. It does not specify a minimum age of marriage. According to Section 23 of MMDA, a marriage contracted by a Muslim girl who has not attained the age of twelve years shall not be registered unless the Qazi where the girl resides has, after such inquiry as he may deem necessary, authorise the registration of the marriage. This Section read, together with the exception provided in Section 364(2)E of PCSL (discussed above), implies that the minimum age of marriage may be twelve years. Further, this also means that the marital rape exception does not apply if the child is below twelve years.

The CRC Committee urged Sri Lanka to expeditiously, raise the minimum age for marriage to eighteen for all without exceptions.¹⁷³ The CEDAW Committee also raised concerns that law on statutory rape is not applicable to girls under sixteen years who are legally married under the

¹⁶³ Lugoda, U., supra 161, Ibid.

¹⁶⁴ Perera, A., Sri Lanka: Why is the country in an economic crisis?. 29 June 2022, *BBC News Asia*, Available at <https://www.bbc.com/news/world-61028138>

¹⁶⁵ UNICEF South Asia, Child Marriage Baseline Estimation, (2016).

¹⁶⁶ Marriage Registration Ordinance of 1908.

¹⁶⁷ Section 15 General Marriage Registration Ordinance (Amendment) Act No 18 of 1995.

¹⁶⁸ *Thyagaraja V Kurukkel* 25 NLR 1909.

¹⁶⁹ UNICEF Sri Lanka, Goonesekere, S., and H. Amarasuriya, Emerging Concerns and Case Studies on Child Marriage in Sri Lanka (2013) at pg. 7.

¹⁷⁰ Ibid at pg. 6.

¹⁷¹ Ibid at pg.2.

¹⁷² Muslim Marriages and Divorce Act No 41 of 1975.

¹⁷³ CRC Committee, Concluding observations on the combined fifth and sixth periodic reports of Sri Lanka, 02 March 2018, CRC/C/LKA/CO/5-6 at para 15.

MMDA.¹⁷⁴ The Committee called on Sri Lanka to amend Article 363 of the PCSL and to ensure that statutory rape applies to all girls under the age of 16 years, without exception.¹⁷⁵

The exceptions made in personal laws and perceived risks of premarital sexual relations are drivers of child marriage. There is also a tendency for parents to marry off their daughters to the alleged perpetrator to avoid societal shame and discrimination. The family's best interests tend to supersede that of the child/ren.¹⁷⁶ Exceptions made related to marital rape in PCSL have also resulted in perpetrators cohabiting with the victim with a promise to marry to evade criminal sanctions. It is reported that where the perpetrator was willing to marry the girl, law enforcement authorities sometimes did not prosecute the case. They would get him to promise in writing to marry the girl upon reaching majority.¹⁷⁷

3.3.4. Access to sexual and reproductive health services

Sri Lanka's law does not contain specific provisions related to consent to medical services including SRH services. Medical Officers (MO) have therefore been reluctant to provide services to adolescents under sixteen years with the fear of being prosecuted on the failure to report statutory rape.¹⁷⁸ This was clarified by the Ministry of Health in 2015, issuing a circular. It stated that Section 21 of the Code of Criminal Procedure Act does not imply a legal duty on health care professionals to report to law enforcement authorities if they learn that a person under the age of sixteen years is sexually active.¹⁷⁹ However, the circular takes a cautious approach stating that MO should provide SRH services only if it is in the best interests of the child concerned. Further states considering the 'norms of the country' MO must take all reasonable efforts to gain the consent of the parent or guardian. But allows for the provision of such services even in the absence of parental consent when found to be in the best interests of such child.¹⁸⁰

Adolescents are also reluctant to access SRH services due to cultural norms of shame associated with premarital sex. Lack of privacy and confidentiality also acts as an indirect barrier to access. SRH education in school is insufficient and inconsistent. Teachers are often reluctant to teaching guided by their own convictions and pressure from parents. As a result, many adolescents and young people lack knowledge about SRH.

Against this backdrop, the CRC Committee called on Sri Lanka to ensure age-appropriate SRH education with a focus on preventing early pregnancy and STIs.¹⁸¹ Also made recommendations to ensure that adolescent girls have access to safe and confidential abortion without stigmatisation and post-abortion care services for adolescent girls, making sure that their views are always heard and

¹⁷⁴ CEDAW Committee, Concluding observations on the eighth periodic report of Sri Lanka, 09 March 2017, CEDAW/C/LKA/CO/8 Para 44 (c).

¹⁷⁵ Ibid, Para 45 (f).

¹⁷⁶ ECPAT Sri Lanka, Child Marriage (2021) at pg. 24.

¹⁷⁷ Ibid at pg. 32.

¹⁷⁸ IPPF, Overprotected and Underserved: The Influence of Law on Young People's Access to Sexual and Reproductive Health in Sri Lanka (2014) at pg. 3.

¹⁷⁹ Ministry of Health and Indigenous Medicine, General Circular No 01/25/2015 at para 3.

¹⁸⁰ Ibid at para 4.

¹⁸¹ CRC Committee(2018), supra 174 at para 32(a).

given due consideration.¹⁸² The CEDAW Committee also recommended that Sri Lanka amend legislation to legalise abortion in all cases of rape, incest, and to decriminalise abortion in all other cases.¹⁸³

3.3.5. Conclusion

Consensual sexual relations between adolescents below the age of consent are criminalised in Sri Lanka and fall under the offence of statutory rape. The law also contradicts itself by stating that children below the age of sixteen cannot consent while simultaneously recognising such consent to create exceptions. Additionally, all sexual relations between same-sex partners are criminalised, regardless of consent. It is reported that a large percentage of statutory rape cases are related to consensual sexual intercourse. Moreover, there has been a high rate of prosecutions against boys, either in the form of imprisonment or fines. Girls are treated as victims and are at times institutionalised. There is a relationship between adolescents engaging in premarital sexual intercourse, unwanted pregnancies and the prevalence of child marriages. While the prevalence of child marriage and teenage pregnancies are comparatively lower in Sri Lanka in comparison to regional peers, it is still a cause for concern. Adolescents in Sri Lanka face challenges in accessing SRH services and education, therefore steps need to be taken to provide universal and confidential services. Positive trends can be observed in the legislative front, with proposals to decriminalise consensual sexual relations in Parliament being approved. It is imperative to ensure that such proposals come to light immediately.

3.4 Pakistan

3.4.1 Introduction

Pakistan ratified the UNCRC in 1990, and the CEDAW in 1981.¹⁸⁴ International instruments do not form part of domestic legislation unless incorporated via legislation to that effect. Provisions of the CEDAW and the UNCRC have not been fully incorporated, however certain matters have been domesticated.¹⁸⁵

Pakistan's adolescent population consists of 21% of the total population. Like their regional peers, adolescents in Pakistan have limited autonomy and opportunities to participate in matters that concern them. Girls especially continue to face critical challenges in accessing services with low levels of protection. UNICEF conducted a survey in 2016 to assess the extent to which adolescents' freedom of expression and participation in decisions directly affect their lives in three districts in Pakistan. The survey found low levels of adolescent freedom of expression and participation.¹⁸⁶ Religious and social norms play a critical role in this regard, and laws in Pakistan reflect the same. The minimum age of criminal responsibility is just ten years, causing many children to be treated as adults in the justice system. The incidence of child marriage is also high, particularly in rural regions

¹⁸² Ibid at para 32 (b).

¹⁸³ CEDAW Committee(2017), supra 175 at para 35 (a).

¹⁸⁴ See Annexure-I.

¹⁸⁵ CRIN, Access to Justice for Children: Pakistan (2014) at pg. 1.

¹⁸⁶ UNICEF South Asia, Empowering Adolescents (2018), at <https://www.unicef.org/rosa/stories/empowering-adolescents>

and among the poorest wealth quintiles.¹⁸⁷ It is reported that honour killings are also prevalent, motivated by rage over women and girls exercising autonomy.¹⁸⁸

3.4.2 Laws and policies related to consent and statutory rape

The Penal Code of Pakistan (PCP) dates back to 1860 and is rooted in the country's colonial history. At the time, the age of sexual consent was set at fourteen years. However, in 1977, Zia-ul-Haq took over the country and initiated the process of Islamisation¹⁸⁹ of Pakistan. He took it upon himself to revolutionise the country's laws and policies and bring them in line with the teachings of Islam. This period is commonly known as the Zia regime. During this period, the Zina Ordinance (ZO)¹⁹⁰ was introduced.¹⁹¹ The ZO replaced the PCP with regard to rape and other offences. Between 1979 to 2006, the offence of statutory rape was essentially removed from Pakistani law. This is because the offence introduced instead of rape, *Zina-bil-jabr*¹⁹² which made no reference to the consent of children. It has been reported that Courts at the time took into consideration the consent of children even when they were below fourteen years. Accordingly, consensual sexual intercourse with a girl below the age of fourteen years was regarded as *zina*.¹⁹³ For example, in the case of **Riaz V The State**,¹⁹⁴ the sentence of the accused was reduced on the basis that he was only seventeen years, even though there was evidence to the effect that he had raped a girl who was ten years. A trend in taking into account the circumstances of the accused while disregarding the situation of the victim was observed at the time.¹⁹⁵

The ZO had also resulted in possibly unforeseen repercussions, where women were prosecuted for Zina with unreliable evidence. After years of public outcry and lobbying from NGOs in 2006, it was decided to repeal these provisions. Accordingly, the Protection of Women (Criminal Amendment) Act of 2006 repealed the provisions related to rape in the ZO and reinserted provisions related to rape, including statutory rape to the PPC. The current definition of rape under the PPC is as follows, "A man is said to commit rape who has sexual intercourse with a woman under the circumstances falling under any of the five following descriptions".¹⁹⁶ The fifth circumstance is related to statutory rape; it states that "with or without her consent when she is under sixteen years of age".¹⁹⁷ This definition of statutory rape is implicit that the current age of sexual consent for girls is sixteen years. Accordingly, the age of sexual consent has been raised from that which was there in the pre-Zia period. There is

¹⁸⁷ UNICEF Pakistan, Situation Analysis of Children in Pakistan (2017) at pg. 105.

¹⁸⁸ Human Rights Commission of Pakistan, PAKISTAN HUMAN RIGHTS REPORT (2021) at pg 48.

¹⁸⁹ Islamization has been confined to the implementation of the laws of Sharia in their original form (Chawla, 2015).

¹⁹⁰ The Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

¹⁹¹ A., Shah, M., Waris, & A., Basit, Islamization in Pakistan: A Critical Analysis of Zia's Regime. *Global Regional Review*, 1(1), 260-270, (2022) at pg. 265.

¹⁹² Section 6 of the Zina Ordinance of 1979 (repealed) translation to English also means Rape.

¹⁹³ Section 4 of the Zina Ordinance of 1979 "A man and a woman are said to commit 'Zina' if they willfully have sexual intercourse without being married to each other."

¹⁹⁴ Riaz V The State 1994 SCMR 358.

¹⁹⁵ N., Zafar, The Impact of the Zina Ordinance, 1979 on Cases Involving Minors *PCL Student Journal of Law*, 3(2), 100-117 (2019) at pg. 110.

¹⁹⁶ Section 375 of the Penal Code of Pakistan of 1860.

¹⁹⁷ Section 375V PCP.

no reference to the age of sexual consent for boys. Sexual intercourse in same-sex relationships, regardless of consent, is criminalised under unnatural offences. It is defined as carnal intercourse against the order of nature.¹⁹⁸ As a result, boys are not provided with equal protection under the law, as statutory rape laws with severe punishments only concern girls. Further, this law discriminates against adolescents based on their sexual orientation. .

In addition, a broad definition of sexual abuse was introduced to the PCP in 2016. Under this definition, whoever employs, uses, forces, persuades, induces, entices or coerces any person to engage in, or assist any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism or any obscene or sexually explicit conduct or simulation of such conduct either independently or in conjunction with other acts, with or without consent where the age of the person is less than eighteen years, is said to commit the offence of sexual abuse.¹⁹⁹ According to this definition, the age of consent for non-penetrative sexual activity is eighteen years for boys and girls.

Section 496B (1) of the PCP states that 'A man and a woman not married to each other are said to commit fornication if they willfully have sexual intercourse with one another. The offence is punishable with imprisonment for a term of up to five years and a fine.²⁰⁰ Accordingly, all sexual intercourse outside marriage is criminalised, regardless of consent. With the application of this Section, all the above consent laws are made redundant to some extent. This means that any incident of sexual intercourse can be prosecuted under fornication. Further, marriage cannot be used as a defence for rape and marital rape is recognised as a crime on equal footing with other forms of rape.²⁰¹

3.4.3 Assessment of links between prevalence of harmful practices and adolescent sexual relations

Latest reports in 2021 indicate that 21% of marriages had taken place before the age of eighteen years and of which 3% have been before the age of fifteen years.²⁰² There are laws that criminalise child marriage, but the weaknesses in enforcement continue to warrant the practice. Regulation of child marriage falls under the purview of the provinces, although there is also a federal law on the subject presently.²⁰³ The Federal Child Marriage Restraint Act of 1929²⁰⁴ defines a girl child as a person under the age of sixteen years and a boy child as a person under the age of eighteen years.²⁰⁵ In Punjab, the exact definition is followed, in Sindh,²⁰⁶ a child is defined as a person under the age of eighteen years. Other provinces have not passed legislation to this effect, thereby the federal law

¹⁹⁸ Section 377 of the Penal Code of Pakistan of 1860.

¹⁹⁹ Section 377A Criminal Law (Second Amendment) Act, 2016.

²⁰⁰ Section 496B (2) Penal Code of Pakistan, 1860.

²⁰¹ UNICEF South Asia(2020), supra 16 at pg 26.

²⁰² Human Rights Commission of Pakistan, PAKISTAN HUMAN RIGHTS REPORT (2021) at pg. 51.

²⁰³ UNICEF and UNFPA, Key Drivers of the Changing Prevalence of Child Marriage in Three Countries in South Asia: Working Paper, UNICEF, Kathmandu (2018) at pg. 3.

²⁰⁴ Shared with Bangladesh and India through their colonial history.

²⁰⁵ Section 2(a) of the Child Marriage Restraint Act, 1929 substituted by the Punjab Child Marriage Restraint (Amendment) Act 2015 (XII of 2015).

²⁰⁶ Section 2(a) of the Sindh Child Marriage Restraint Act, 2013.

applies. The Hindu Marriage Act, 2017, applicable to the Hindus living across Pakistan²⁰⁷ sets out that both parties to the marriage must not be below eighteen years.²⁰⁸

There is a lack of data countrywide to assess whether there is a link between adolescent sexual relations as a driver for child marriage. Unlike the regional peers, child marriage studies do not list risks associated with premarital sexual relations as a driver for child marriage. A study conducted in two districts of the Sindh province found that as giving birth out of wedlock is highly stigmatized, most teenage pregnancies occurred after (child) marriage or during the same year of marriage. This indicates that teenage pregnancies occur under the sanction of marriage. Only 1% of the incidents reported involved first the occurrence of teenage pregnancy and, as a result, child marriage.²⁰⁹

On the other hand, it is reported that there are links between honour killings (commonly known as *Karo-Kari*, which originated from rural parts of Sindh) and premarital relationships. These relationships include those that are forced as well as consensual. Examples include girls and women who attempt to choose their romantic partners without the family's approval or any perceived act that dishonours the family, such as pregnancy out of marriage or marriage against family approval.²¹⁰ Further it is reported that marriage is used as a way of exchanging women as part of negotiations to end a dispute between two families or clans.²¹¹

For example, in Khyber Pakhtunkhwa Province, in June 2021, the main accused of the infamous murder case of Asma Rani, a medical student killed for refusing a marriage proposal, was sentenced to death. In July 2021, a couple was hanged to death in Mansehra by the male relatives of the girl's father in the name of honour for marrying for love. In August 2021, a couple was killed for honour in Battagram. In November 2021, a teenage girl in Charsadda was killed by a boy for refusing his marriage proposal.²¹²

The case of *Lal Baksh V The State*²¹³ is an appeal from a judgement where a young man (age unknown) was sentenced to ten years of imprisonment and thirty stripes for kidnapping and committing Zina against a thirteen-year-old girl (Mst. Parveen). The facts of the case provide that Mst. Parveen had consensually eloped with the appellant and contracted a marriage. However, later due to the pressure from her father and to safeguard her family's honour, she reversed the statement to state that she was kidnapped and the appellant forcefully committed Zina. In the trial stage, it was recognised that Mst. Parveen had gone on her own free and married the appellant. However, as Mst. Parveen was a minor the appellant was convicted.²¹⁴ Two considerations were made by the Court in this regard. First, the fact that according to Section 2(a) of ZO, an adult is a person being a girl who has attained sixteen years or has attained puberty. Medical certificates submitted provide that Mst.

²⁰⁷ Limited to Balochistan, Khyber Pakhtunkhwa and Punjab.

²⁰⁸ Section 4 (a) of the Hindu Marriage Act No VII of 2017.

²⁰⁹ YES I DO Alliance, Gaining insight into the magnitude of and factors influencing child marriage and teenage pregnancy and their consequences in Pakistan Baseline Report (2018) at pg. 40 and 52.

²¹⁰ S., Patel, & A.M., Gadit, 'Karo-Kari: A Form of Honour Killing in Pakistan', *Transcultural Psychiatry*, 45(4), 683–694, (2008) at pgs. 685-686.

²¹¹ D., Tanya, et al, supra 135 at pg. 33.

²¹² Human Rights Commission of Pakistan, State of Human Rights (2021) at pg. 93.

²¹³ Lal Baksh V The State Federal Shariat Court 2000 YLR 1871.

²¹⁴ Ibid at para 14.

Parveen has attained puberty, and this had been ignored by the trial judge.²¹⁵ Secondly, the Court looked at the societal ramifications that persist from where the girl was from.

The Honourable Judge highlighted that

“The usual customs and social values prevailing there cannot be overlooked. A young unmarried girl although pubert cannot be easily accepted in family if she chooses a life partner of her choice and it is not uncommon that such girls meet the wrath of "honour killing" as our illiterate and backward society in general, has not accepted the Islamic values of life according to dictates of our religion. It is clearly provided that a pubert girl has the right to choose a life partner of her choice. From the overall circumstances, the facts and the evidence recorded by the trial Court in this case, one cannot come to a different conclusion than the one that Mst. Parveen developed a liking for a young neighbour who was a police constable, and of her desire, she married him and lived with him as his wife, but her father did not accept it. As is prevalent in our society, when she was brought to the police station and saw her father, she changed her story to please her father and save the family's honour and her life, which in similar circumstances is done by many girls for they are afraid of social stigma and even death under the custom of Karo-Kari.”²¹⁶

Based on these considerations, the Court entitled the appellant the benefit of the doubt and acquitted the appellant from all charges.²¹⁷ There are laws that criminalise honour killings. However, many girls and women are reportedly victims of honour killings, and many more go unreported and unpunished despite the laws.²¹⁸

3.4.4. Access to sexual and reproductive health services

The provision of SRH services for adolescents remains one of the least priorities of the Government. It is reported that religious resistance is one of the main barriers to providing SRH services and education. In 2010, the devolution of powers to the provinces in areas of health, education and social welfare has also created disparities in the provision of SRH services.²¹⁹ There are legal barriers to accessing abortion under the PCP, abortion is only permitted when it is caused in good faith or to save the woman's life through necessary treatment.²²⁰

In the last report submitted before the CRC Committee, the extent of the input provided by the Government included the development of a training manual in collaboration with civil society partners.²²¹ It is reported that adolescent SRH issues are mostly left for the work of the CSOs being

²¹⁵ Ibid at para 15.

²¹⁶ Ibid at para 16.

²¹⁷ Ibid.

²¹⁸ UNICEF Pakistan(2017), supra 188, Ibid.

²¹⁹ V., Chandra-Mouli, et al, Building Support for Adolescent Sexuality and Reproductive Health Education and Responding to Resistance in Conservative Contexts: Cases From Pakistan. *Global Health, Science and Practice*, 6(1), 128–136, (2018) at pg.130.

²²⁰ Sections 338, 338A (Isqat-i--haml), 338B (Isqat-i-janin) and 338C (punishment) of the PCP.

²²¹ UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention, Fifth periodic report of States parties due in 2012: Pakistan*, (2015), CRC/C/PAK/5, at para 174.

addressed by the civil society organisations that undertake low-keyed, small-scale initiatives in the absence of any protective government and legislative support.²²² The topic of SRH education, specifically discussing risks of unsafe sex, is considered taboo and associated with a likelihood of promoting pre-marital sex.²²³

The CRC Committee has raised concerns about the low level of awareness among young people and reported a lack of access to SRH services for girls. Moreover, the Committee also raised concerns about the reports of large numbers of teenage pregnancies terminated using unsafe abortion procedures, especially by unmarried girls.²²⁴ The Committee recommended adopting a comprehensive SRH policy for adolescents and ensuring that SRH education is part of the mandatory school curriculum. A specific recommendation was also made to review legislation to ensure that children, including unmarried girls, have access to all SRH services and that their views are respected and heard.²²⁵

In recognition of the high fertility rates and impending population growth challenges, the Honourable Chief Justice of Pakistan took *suo moto* notice in **Human Rights Case No. 17599 of 2018**.²²⁶ To vide the order, the Supreme Court constituted a task force to develop a plan to manage the population growth in the country. Several recommendations were made, but the ones relevant to this discussion include the call to introduce the Early Child Marriage Restraint Act by Federal & Provincial Governments²²⁷, the introduction of life skills-based education and population dynamics in secondary and higher secondary schools.²²⁸ Unfortunately, there is no reference to adolescent access to SRH services or education.

3.4.5. Conclusion

In Pakistan, there is no clear age of sexual consent. Under the PCP, the age of sexual consent for penetrative acts is 16 years for girls; there is no exact age for boys. Moreover, different age of sexual consent applies for non-penetrative acts, which is 18 years for boys and girls. In addition, the law discriminates against adolescents based on their sexual orientation with the criminalisation of same-sex, sexual intercourse regardless of consent. The offence of fornication criminalises all heterosexual sexual intercourse outside of marriage irrespective of consent. Accordingly, the age of sexual consent remains irrelevant for consensual sexual intercourse between adolescents as any such behaviour outside marriage is criminalised. There are also societal sanctions such as honour killings for engaging in such relations. There is no strong correlation between child marriages and risks associated with premarital sexual relations because of the strong conservative values of society. Access to SRH services and education remains a challenge for adolescents, especially girls influenced by religious conservatism.

²²² Child Rights Movement Pakistan, Implementing Child Rights in Pakistan: Alternative Report for the UNCRC (2015) at para 74.

²²³ Center for Reproductive Rights, The Committee on the Rights of the Child Re: Supplementary information on Pakistan, scheduled for review by the Committee on the Rights of the Child during its 34th Session (2003) at para 3.

²²⁴ CRC Committee, Concluding observations on the fifth periodic report of Pakistan, 09 Jun 2016, CRC/C/PAK/CO/5 at para 51.

²²⁵ Ibid at para 52.

²²⁶ HUMAN RIGHTS CASE NO. 17599 OF 2018 Supreme Court of Pakistan 2019 SCMR 247.

²²⁷ Ibid at para 13 Recommendations 4 (ii).

²²⁸ Ibid at para 13 Recommendation 6 (ii).

3.5. The Maldives

3.5.1 Introduction

The Maldives is a party to both UNCRC and CEDAW. However, two reservations are made to the UNCRC concerning Article 14 (1) on the child's right to freedom of thought, conscience and religion and Article 21 on adoption,²²⁹ and another reservation to CEDAW on Article 16 on matters concerning the family. Some of the reservations were lifted in 2020, significantly the reservation on child marriage under Article 16 (2). However, reservations made under Article 16 (1) (a), (c), (d) and (f) dealing with equality in marriage remain.²³⁰ The justification for the reservations mentioned above is incompatibility of such provisions with the Constitution of Maldives, principally based on Islamic Shari'ah, and all citizens of the Maldives must be Muslim.²³¹ Article 10 (b) of the Constitution states that no law contrary to any tenet of Islam shall be enacted in the Maldives. International treaties do not automatically form part of domestic legislation; neither the UNCRC²³² nor the CEDAW has been directly incorporated to date.

Unlike its regional peers, the relationship with the British Colonial Monarchy was limited to being a protected state and not even a protectorate. The British only managed external affairs and had no control over internal affairs. The Maldives became independent in 1965. For centuries the Maldives was an autocracy, and it is also one of the youngest democracies in South Asia, with its current Constitution only dating back to 2008.²³³ The Penal Code of Maldives (PCM) also dates back to 2014. The legal tradition of Maldives had limited influence from British Common law, unlike its regional peers in the present thesis. The Maldives became a member of the Commonwealth in 1982. However, it withdrew its membership in 2016 following allegations of human rights violations and pressure from the Commonwealth. The Maldives was reaccepted by the Commonwealth in 2020.

There is a growing concern over religious conservatism and its impact on the country's cultural norms as well as the human rights of women and children.²³⁴ One of the main challenges faced by adolescents, especially girls, is limited autonomy in matters that affect their lives. Similar to its regional peer Pakistan, all sexual intercourse outside marriage is criminalised. As a result, unmarried adolescents face significant legal barriers to accessing SRH services.²³⁵

3.5.2 Laws and policies related to the age of sexual consent and statutory rape

²²⁹ See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en#EndDec

²³⁰ See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec

²³¹ Article 274 of the Constitution "Islamic Shari'ah" means, the Holy Qur'an and the ways preferred by the learned people within the community and followers of the Sunnah in relation to criminal, civil, personal and other matters found in the Sunna;

²³² CRIN, Access to Justice for Children: Maldives (2014) at pg. 2.

²³³ Ibrahim, M. and Karim, M., Research Guide on Legal System and Research of Maldives, June 2013, *Global Lex*, Available at: <https://www.nyulawglobal.org/globalex/Maldives.html#LegalHistoryofMaldives>

²³⁴ UNICEF Maldives, Situation Analysis of Children and Youth in the Maldives (2021) at pg. 21.

²³⁵ Ibid at pg. 17.

Under the PCM, “a person commits rape if he engages in sexual intercourse without consent.²³⁶ Offences are graded into different classes under the PCM. Rape is graded as a Class 2 felony²³⁷ if the victim is a minor and the defendant is four or more years older than the victim.²³⁸ A minor is defined as any person who is less than eighteen years.²³⁹ According to Section 134 (a) of PCM, the consent by a minor to sexual intercourse or sexual consent is deemed invalid unless where such minor is legally married to the defendant and is more than eighteen years old. Accordingly, it is implicit that the age of sexual consent is eighteen years. This definition suggests that the PCM recognises child marriages but not where the other spouse is also a child.

Unlawful sexual intercourse is defined under Section 411, and depending on the circumstances, there is a further classification of offences. Same-sex sexual intercourse is defined broadly to be unlawful regardless of consent. This provision discriminates against adolescents based on their sexual orientation. Moreover, under adultery and fornication, sexual intercourse where the person is unmarried and has intercourse with an unmarried person²⁴⁰ is defined as unlawful and is graded as a Class 2 misdemeanour.²⁴¹ Accordingly, regardless of consent, sexual intercourse outside marriage is criminalised. An additional punishment is prescribed following Islamic Shari’ah of 100 lashes for these offences.²⁴² The Sexual Offences Act No 14 of 2014 also covers rape with a higher sentence. The Law on Special Measures for Perpetrators of Child Sexual Abuse Act No 12 of 2009 covers non-penetrative acts with a higher sentence than the PCM. None of the laws provides exceptions for non-exploitative consensual sexual relations between adolescents.²⁴³

In February 2013, a decision by the Maldivian Court to sentence a fifteen-year-old girl to 100 lashes for engaging in premarital sex took the attention of the international media. The initial investigation was related to the rape of the fifteen-year-old girl by her stepfather. She had given birth to a child, and the stepfather had allegedly killed the baby. The girl had confessed to having consensual sex with another man during the investigations. Reportedly, she had post-traumatic stress disorder over the incident and was considered unfit for trial. Nevertheless, on the basis of her confession the Juvenile Court had convicted her. In August 2013, following intense international criticism and outcry from rights groups, the government appealed the decision to the High Court. The Court overturned the decision in August 2013.²⁴⁴

In general, it is reported that women and girls are disproportionately convicted for sexual offences compared to men and boys. According to the 2006 statistics published by the Department of Judicial Administration, 80% were women (146 out of 184 persons).²⁴⁵ In 2009, nationally representative data

²³⁶ Section 130 (a) PCM.

²³⁷ Section 92 (b) Class 2 felony is imprisonment for not more than 15 years, Ibid.

²³⁸ Ibid at Section 130 (d).

²³⁹ Ibid at Section 17 Definitions.

²⁴⁰ Ibid at Section 411 (b)(4).

²⁴¹ Ibid at Section 92 (g) Class 2 misdemeanour is imprisonment for not more than 6 months.

²⁴² Ibid at Section 411 (d).

²⁴³ UNICEF South Asia(2020), supra 16 at pgs. 262-263.

²⁴⁴ BBC Asia, Maldives girl's 100 lashes sentence overturned, 22 August 2013, *BBC News*, Available at <https://www.bbc.com/news/world-asia-23792120>

²⁴⁵ UNFPA Maldives, Reproductive Health Knowledge and Behaviour of Young Unmarried Women in Maldives (2011) at pg 33.

on premarital sexual activity was collected for the first time.²⁴⁶ The data showed that of young people between 15-19, only 1.6% had sexual intercourse before age 15.²⁴⁷ It is reported that policymakers, service providers and youth considered this figure a major underestimation.²⁴⁸ The most recent data for 2017 indicates higher rates than in 2009. Overall, the percentage of young women and young men who reported having sex before the age of fifteen is 3%. The percentage of young women who reported having sex before the age of eighteen is 5% and for young men is 15%.²⁴⁹

In 2021, the CEDAW Committee raised concerns that consensual premarital sexual relations are punished with flogging and the death penalty. Further highlighted this as a situation that disproportionately affects women and girls and prevents them from reporting sexual offences.²⁵⁰ The Committee recalled its previous recommendations and urged the Government to decriminalise and abolish the imposition of flogging or the death penalty for premarital consensual sexual relations. Further urged the amendment of legislation to ensure that survivors of sexual violence are not prosecuted for premarital sexual relations.²⁵¹

The CRC Committee in 2016 highlighted that there had been several cases of sexually abused children, especially girls being sentenced to flogging on charges of fornication.²⁵² The possibility to sentence children to flogging for consensual same-sex relations was also raised with concern.²⁵³ The Committee Against Torture also raised grave concerns over judicial flogging being used against survivors of sexual abuse, including rape.²⁵⁴

3.5.3 Assessment of links between prevalence of child marriages and adolescent sexual relations

The minimum age for the solemnization of marriage is eighteen years following the Gregorian Calendar for boys and girls.²⁵⁵ There is, however, an exception, where a person who has not completed eighteen years makes an application to marry, the Registrar of Marriages has the discretion, where that person has attained puberty, to approve the solemnization of that marriage upon having considered the person's physical well being, competence to maintain a livelihood, and

²⁴⁶ Ministry of Health and Family (MOHF) [Maldives] and ICF Macro. *Maldives Demographic and Health Survey 2009*. Calverton, Maryland: MOHF and ICF Macro (2010).

²⁴⁷ Ibid at pg. 146.

²⁴⁸ S., Hameed, To be young, unmarried, rural, and female: intersections of sexual and reproductive health and rights in the Maldives, *Reproductive Health Matters*, 26:54, 61-71, (2018) at pg 62.

²⁴⁹ Ministry of Health (MOH) [Maldives] and ICF. *Maldives Demographic and Health Survey 2016-17*. Malé, Maldives, and Rockville, Maryland, USA: MOH and ICF (2018) at pg 184.

²⁵⁰ CEDAW Committee, Concluding observations on the sixth periodic report of Maldives, 23 November 2021, CEDAW/C/MDV/CO/6 at para 53.

²⁵¹ Ibid at para 54.

²⁵² CRC Committee, Concluding observations on the combined fourth and fifth periodic reports of Maldives, 29 Jan 2016, CRC/C/MDV/CO/4-5 at para 44.

²⁵³ Ibid at para 40.

²⁵⁴ Committee Against Torture, Concluding Observation on the initial report of Maldives, 19 Dec 2018, CAT/C/MDV/1 at para 13.

²⁵⁵ Section 4 (a) Family Law Act No 4 of 2000.

reasons for contracting the marriage.²⁵⁶ In addition, as discussed in the section above, rape laws also recognise child marriages; where a minor is married to the defendant, consent is deemed valid. However, it is unclear whether it does not recognise child marriages where both parties are below eighteen years.

Aside from these laws, the recent Child Rights Protection Act No 19 of 2019 prohibits child marriages. According to this Act, notwithstanding anything to the contract in any other Act, children are not considered to have attained the same maturity as adults in terms of health and psychology. As Article 35 (a) of the Constitution stipulates that children are entitled to special protection and special assistance from the family, the community and the State, a marriage of a child who has not attained the age of eighteen shall not be solemnized.²⁵⁷

The prevalence of child marriages is the lowest in the Maldives compared to its regional peers. According to the latest available data, child marriages are rare. In 2017 there were no recorded marriages amongst fifteen to seventeen-year-olds. However, anecdotal evidence suggests that child marriages occur outside the Maldives or following informal Islamic rituals.²⁵⁸ It is reported that the primary decision-maker for child marriage was believed to be both parents. Moreover, the most common cause for marrying before eighteen is believed to be love.²⁵⁹ Some studies also suggest a perception among young people that if a pregnancy occurs outside marriage, usually the boy takes responsibility, thus removing the need for an abortion. This implies that while young people engage in premarital sexual relations, they also look at marriage as a possibility to avoid the social and legal consequences of such pregnancy.²⁶⁰

The CEDAW Committee highlighted with regret the high number of unregistered marriages in rural and remote areas, including child marriages and their negative impact on the rights of women and girls.²⁶¹ In 2016 the CRC Committee also raised concern that child marriages are reportedly increasing in the Maldives.²⁶² The Committee made several recommendations in this regard. They include ensuring the minimum age of marriage set at eighteen years is upheld²⁶³ and strengthening awareness-raising campaigns and programmes on the harmful effects of early marriages targeting households, local authorities, religious leaders, judges and prosecutors.²⁶⁴

3.5.4 Access to sexual and reproductive health services

²⁵⁶ Ibid at Section 4 (b).

²⁵⁷ Section 25 (a) Child Rights Protection Act No 19 of 2019.

²⁵⁸ UNICEF Maldives, supra 235, Ibid.

²⁵⁹ Society for Health Education & UNICEF Maldives, PREVALENCE STUDY AND KAP SURVEY ON CHILD MARRIAGE IN THE MALDIVES (2019) at pg. 23.

²⁶⁰ UNFPA Maldives, supra 246 at pg. 9.

²⁶¹ CEDAW Committee, supra 251 at para 54.

²⁶² CRC Committee, supra 253 at para 46.

²⁶³ Para 47 (a), Ibid.

²⁶⁴ Para 47 (c), Ibid.

Since premarital sexual relations are criminalised, there are significant restrictions to access contraceptives and other SRH services for unmarried young people. Moreover, abortion is only permitted to save the mother's life and in situations of rape or incest.²⁶⁵ Surveys conducted among young people in the Maldives indicate a high level of stigma associated with pre-marital sexual relations.²⁶⁶ Moreover, the social consequences were rated as the most significant concern trumping other factors such as religious values and pregnancy risks or STIs. In addition, it is reported that young women and girls face harsher criticism than young men and boys.²⁶⁷

There is limited attention being made by policymakers regarding the SRH needs of unmarried young people. Official reports of the Government indicate religious sensitivity as a barrier to researching and providing SRH services to unmarried, sexually active youth. Due to these barriers, there are also challenges with data which are often censored and have low validity. Nationally representative data collected through periodic DHS is also considered an underestimation regarding premarital sexual relations.

In 2013, the National Standards for Adolescent and Youth Friendly Health Services were released. Through Standards 2 and 3, it aims to provide non-discriminatory SRH services for unmarried young people.²⁶⁸ Under the National Reproductive Health Strategy 2014-2018,²⁶⁹ provision of SRH services to unmarried young people was also set as a specific target. However, there still remains some degree of ambiguity on the legality of the provision of SRH services to unmarried young people. As a result, service providers may or may not provide services to unmarried young people, and they are not held accountable for their actions or inaction. A study conducted in 2016 found that these policies and guidelines are intentionally kept ambiguous as a clear policy decision that requires the provision of SRH services to unmarried young people would require challenging religious authorities.²⁷⁰

In the Maldives, over 188 inhabited islands are populated with less than 1000 people. Accordingly, as the communities are extremely small, they are also characterised by an inward-looking culture that imposes social pressure and limitations within which young people must co-exist. These norms also pose challenges in accessing SRH services with confidentiality and sans legal consequences.²⁷¹

The CEDAW Committee also discussed these challenges in 2021. The Committee raised concerns about the restricted access, in practice, to SRH services for unmarried women and girls, despite the National Family Planning Guidelines providing for the right to receive services irrespective of marital status and the absence of information on the prevalence of unsafe and illegal abortions.²⁷² The CRC Committee also raised concern over the lack of universal access to SRH services for unmarried girls

²⁶⁵ Section 416 PCM.

²⁶⁶ UNICEF Maldives, *supra* 235 at pg 17.

²⁶⁷ *Ibid.*

²⁶⁸ Ministry of Health Maldives, *Maldivian National Standard Statements for Adolescent and Youth Friendly Health Services to be Provided to All Young People (2013)* at pgs. 8-12.

²⁶⁹ Ministry of Health Maldives, *National Reproductive Health Strategy 2014-2018* at pg. 26.

²⁷⁰ Society for Health Education & Hameed S. *Universal access to SRH: gaps in policies and legislature in the Maldives (2016)* at pgs. 20-21.

²⁷¹ S., Hameed, *supra* 249 at pg. 63.

²⁷² CEDAW Committee, *supra* 251 at para 45.

due to social stigma and criminalisation of pregnancies outside of marriage. The increasing number of illegal and unsafe abortions that put the lives of adolescent girls was also highlighted.²⁷³

The CEDAW Committee called on the Government to ensure the accountability of healthcare personnel for discrimination against women and girls seeking access to SRH services.²⁷⁴ In addition, the CRC Committee called on the Government to adopt a comprehensive SRH policy for adolescents and to include SRH education as part of the mandatory school curriculum for adolescents, with particular attention to preventing early pregnancy and STIs.²⁷⁵ Further, the Committee also made recommendations to decriminalise abortions in all circumstances²⁷⁶ and to develop and implement a policy to protect the rights of pregnant teenagers and their children and combat discrimination against them.²⁷⁷

3.5.5 Conclusion

In the Maldives, the age of sexual consent is set at eighteen years. However, all sexual intercourse outside marriage is criminalised under the offence of fornication regardless of consent. It is reported that girls and women are disproportionately convicted for sexual offences, including victims of rape. The prevalence of child marriage is lower than its regional peers, but there has been a reported increase in recent years. Young people consider marriage a solution for premarital pregnancies, and premarital relationships are a root cause for marriages under eighteen years. Due to the criminalisation of premarital sexual intercourse, unmarried young people face significant legal and social barriers to accessing SRH services.

²⁷³ CRC Committee, supra 253 at para 56 (b).

²⁷⁴ CEDAW Committee, supra 251 at para 46 (b).

²⁷⁵ CRC Committee, supra 253 at para 57 (a).

²⁷⁶ Ibid, para 57 (b).

²⁷⁷ Ibid, para 57 (c).

CHAPTER FOUR: MAIN FINDINGS, RECOMMENDATIONS, CONCLUSIONS

4.1. *Main Findings

The research found that all countries in South Asia criminalise consensual sexual relations between adolescents to a large extent. The criminalisation is through the statutory rape law provisions which consider consent below a certain age invalid. The age of consent varies across countries, however, are on the high end, ranging from sixteen to eighteen years. All countries lack explicit consent provisions for boys. The object of these provisions is to protect children from adult perpetrators. Unfortunately, the very laws intended to protect children are utilised to criminalise adolescents for consensual sexual activities.

In Sri Lanka and Bangladesh, the age of sexual consent is sixteen. This means that consensual sexual relations of adolescents who are sixteen years or older, but below the age of eighteen are not criminalised. Disconcertingly, consensual sexual relations by any person over the age of sixteen with any person under the age of sixteen are also criminalised. Sri Lanka is the only country in South Asia which recognises consensual sexual relations of adolescents in its legislation, albeit only by providing a lesser sentence for boys under eighteen years who commit statutory rape where it was consensual. In India, Maldives and Pakistan the age of consent is eighteen therefore all consensual sexual relations between adolescents are criminalised. In Maldives and Pakistan adolescents are also prosecuted for Zina or fornication which encompasses all sexual relations outside marriage. It is reported that girls and women are disproportionately convicted for these crimes. In contrast, in Bangladesh, India and Sri Lanka boys are convicted and girls are considered to be the victims. In all countries except India, there are legal provisions which criminalise consensual same-sex sexual relations leading to discrimination against adolescents on the basis of their sexual orientation.

In India and Sri Lanka, it can be observed that Courts are increasingly considering the sexual autonomy of adolescents and are reluctant to convict boys for consensual sexual relations. Furthermore, legislative amendments have been proposed in Sri Lanka to address these challenges. Such trends are yet to be observed in other countries.

In Bangladesh, India, Sri Lanka and Maldives, child marriages are seen as a solution for unwanted pregnancies. Furthermore, It is frequently observed that parents marry off their young daughters as a preemptive protective action as well. Marital rape exceptions also recognise child marriages and consider the consent of minor spouses to be valid, except in India and Pakistan. In India and Pakistan, the research also found a prevalence of honour crimes associated with premarital sexual relations.

In all countries, abortions are criminalised unless under special circumstances to protect the life of the mother. In The Maldives there also exists an exemption for rape and incest. Consequently, it is reported that unsafe, clandestine abortions occur, putting the lives of many adolescent girls at risk. Adolescents face significant legal and social barriers in accessing other SRH Services as well. In Maldives and Pakistan, unmarried persons cannot access such services. It is the same case for all children under the age of eighteen in India. In Bangladesh and Sri Lanka, although there are no legal barriers, there are still significant social barriers and stigma associated with adolescent sexuality.

The research found that all five countries analysed in this thesis should amend their laws to decriminalise consensual sexual relations between adolescents to bring them in line with international standards. Moreover, legal barriers to accessing SRH services should also be removed. Further, marital rape exceptions which implicitly recognise child marriages must be repealed. Countries that have no lower age limits for marriage, must set appropriate age limits in line with international standards.

The international standards discussed in *Section 2.1* clearly stipulate consensual non-exploitative sexual relations between adolescents should not be criminalised. They also call for the removal of barriers to accessing SRH Services. However, these reform processes must be guided by evolving capacities and the best interests of the children concerned, with due consideration to avoid unintended consequences. (**This section is also presented on pg. VI & see Annex II for a summary of findings*)

4.2. Recommendations

4.2.1 Legal and Policy Reforms

4.2.1.1. Close-in-Age Exemption Clause also known as the Romeo Juliet Clause

In order to make exceptions under statutory rape laws, many countries across the globe have passed laws including Romeo Juliet clauses or close-in-age exemptions. They are implemented to afford protection to adolescents who willingly, voluntarily and intentionally engage in sexual relations and to decriminalise the penalty for adolescents in statutory rape cases.²⁷⁸ Adolescent sexual relations undoubtedly carry risks. However, the law should not criminalise consensual sexual relations between adolescents the way it does adult perpetrators.²⁷⁹ Exceptions have to be made by law in recognition of the fact that it is part of normal adolescent sexuality.

In order to draft such laws, the countries can draw inspiration from South Africa. In the case, ***The Teddy Bear Clinic for Abused Children V Ministry of Justice and Constitutional Development***²⁸⁰ the Constitutional Court of South Africa dealt with a challenge made by two child children's rights organisations. The challenge was to confirm a previous judgement of a High Court which deemed invalid statutory rape and sexual assault provisions²⁸¹ in the Sexual Offences Act of South Africa which criminalise consensual sexual behaviour between adolescents. The crux of the case was whether it is constitutionally permissible or children to be subject to criminal sanctions in order to deter early sexual intimacy and combat the risks associated.²⁸² The Constitutional Court confirmed the decision and in the judgement, Justice Khampepe stated that it was irrational to state that adolescents did not have the capacity to make choices about their sexual activity and yet find that they have the capacity to be held criminally liable for such choices.²⁸³ Following this decision, with the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2015 close-in-age exemption clause was developed from being a defence that had previously only applied to non-penetrative consensual sexual acts, to being a non-prosecution rule applicable to all forms of consensual activity. (*See Annex III for the specific provisions.*)

²⁷⁸ K., Dumond, Cast Me Not Away: The Plight of Modern Day Romeo and Juliet, *Quinnipiac Law Review*, 36(3), 455-487, (2018) at pg 456.

²⁷⁹ Ibid at 487.

²⁸⁰ *The Teddy Bear Clinic for Abused Children v. Minister of Justice & Constitutional Dev.* 2014 (2) SA 168 (CC) (S. Afr.).

²⁸¹ Section 15 and 16 of the Sexual Offences Act.

²⁸² *The Teddy Bear Clinic for Abused Children v. Minister of Justice & Constitutional Dev.* 2014 (2) SA 168 (CC) (S. Afr.) at para 3

²⁸³ Ibid at para 79.

In South Africa, many had misunderstood decriminalisation as an encouragement for adolescents to engage in sexual relations.²⁸⁴ The South African experience suggests that it is imperative to clarify that such measures are not about lowering the age of consent. Further that such reforms are not related to offences concerning children and adults and about offences concerning non-consensual sexual activities between children. Most of all it is not about complete freedom for adolescents to engage in sexual relations.²⁸⁵ The Center for Child Law which acted for the applicants in the **Teddy Bear Clinic** case, brought forward the case developed key messages on the topic. Below are some examples:

“The criminal justice system should not deal with consensual sex between children; this should be the domain of parents, rather than the police.

Adolescents should be empowered by nurturing and caring adults to make good independent decisions about sexuality and life choices.²⁸⁶”

Sri Lanka, the only country in the region which has progressed to the stage of legislative amendments had faced similar challenges. For example, in a recent article critiquing the Government’s decision to introduce close-in-age exemptions to rape laws, had the title *“Ministry of Justice Law Reforms – Protecting Child Rights or Promoting Sexual Abuse of Underage Girls?”*.²⁸⁷ Such responses will not be surprising from other countries in the region as well considering the conservative religious and social norms that persist in South Asia. Therefore, messages used in the communication strategies implemented in South Africa will prove useful to be built into law reform processes. This will help law makers as well as society in general to understand the rationale behind the proposed legal changes.

4.2.1.2. Prohibition of Child Marriage, the Age of Sexual Consent, and the social realities in the region

The international standards set by the CRC and CEDAW Committee call for a total prohibition of child marriages. However, the social and legal realities of the region make the implementation of these standards difficult and fraught with unintended consequences. To a large extent, consensual sexual intercourse between adolescents is criminalised and often boys and girls are prosecuted. Marriage is considered to be the only socially sanctioned sexual interaction even for adolescents. The ages of sexual consent are in the higher age bracket as observed, which accentuates the problem. Unmarried girls and women in South Asia have limited economic freedom and freedom of movement as well. As a result, for these adolescents, sometimes marriage may be the only viable option to navigate tricky social circumstances such as unwanted pregnancies.

For example, when the alleged adolescent perpetrators of statutory rape cases are prosecuted, the girl is also often isolated from family and society. The couple is also unable to contract into marriage even with mutual understanding. Strict child marriage laws also result in them sometimes living together with a promise of marriage later. This leaves especially the girl in a vulnerable position if things do not work out as planned with no legal recourse due to non-recognition of such agreements.

²⁸⁴ The Centre for Child Law, University of Pretoria, Mapping a multi-faceted child rights strategic litigation and advocacy campaign in relation to the South African Sexual Offences Act (2021) at pg. 30.

²⁸⁵ Ibid at pg. 31.

²⁸⁶ Ibid.

²⁸⁷ Article available at <https://island.lk/60910-2/>

Moreover, if such marriages are automatically considered legally null and void it may cause further harm, especially to girls and if any children are born out of such marriage. The current Indian law maybe a model for discussion. Child marriages are not void ab initio but are voidable at the discretion of the contracting party within two years of either party attaining the general age of marriage.²⁸⁸

As Skelton states, the age of marriage is an issue where the CRC Committee demurs from its usual insistence on recognising children's autonomy.²⁸⁹ Previously, the Committee accepted exceptions to lower ages of marriage than eighteen years. This provided flexibility to contract a marriage where the child was sixteen years or above on strictly defined parameters with judicial supervision.²⁹⁰ This is somewhat the approach followed in Bangladesh, Maldives, Pakistan and Sri Lanka but with different age limits and procedures. This stance changed in 2019 where together with the CEDAW Committee, a hard line of eighteen years for marriage was created. This has been criticised for cutting across adolescents' agency with limited guidance offered.²⁹¹

In cases of rape, exceptions are made in all countries through laws and practices for alleged perpetrators by removing criminal charges in the event there is an agreement to marry the child. These laws and practices do not distinguish whether it is an adult perpetrator or a young alleged perpetrator who is, in fact, the victim's romantic partner. Such practices trivialise statutory rape provisions and expose child victims to further harm. In reality, it is reported that such exceptions are often made where there was an ongoing romantic relationship between the two parties. Nevertheless, incidents, where the child is married off to adult rapists, are reported and must not be ignored. Thereby, marital rape exceptions under which child marriages are recognised, should be removed, while providing protection from rape to any girls who remain in such marriages.

In several countries in the world, having a lower age of sexual consent than marriage is considered to be an endorsement of adolescents and unmarried young people to engage in sexual activity, which is regarded a social taboo leading to moral and legal conundrums as mentioned above. As a result, in countries where they are increasing the age of marriage to eighteen years in order to prohibit child marriages, they also propose increasing the age of sexual consent to eighteen years.²⁹² For example, in Ghana, petitions have been made to the national government by a regional child protection committee to increase the age of sexual consent to eighteen years, thereby bringing it in line with the age of marriage. The arguments put forward by the committee stated that this would ensure that girls under eighteen years "do not know or engage in sex".²⁹³ Similar push towards aligning the age of marriage and sexual consent can be observed in South Asia as well. This presents a further challenge to legal reform as the age of sexual consent and marriage need not align as the difficulty of legal annulment and marriage makes it a more irreversible decision with possible lifelong negative outcomes. By contrast, sexual activity is an intrinsic aspect of a healthy human life that can be

²⁸⁸ Section 13 Prevention of Child Marriages Act, 2006.

²⁸⁹ A., Skelton A., Skelton Children, in: Elgar Encyclopedia of Human Rights, edited by Christina Binder, Manfred Nowak, Jane A. Hofbauer, and Philipp Janig, 1-5 (2022) at pg.3

²⁹⁰ UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, 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 (2014), CEDAW/C/GC/31-CRC/C/GC/18 at para 55.

²⁹¹ A., Skelton(2022), supra 290, Ibid.

²⁹² S. Petroni et al, supra 31 at pg. 2.

²⁹³ Ibid at pg. 3.

exercised in an informed, safe, healthy and consensual manner that does not entail long term negative circumstances.²⁹⁴

Accordingly, in South Asia, exceptions made in law for the contraction of child marriages must be gradually repealed. Those provisions which provide no lower age limits must be repealed immediately. This process must give due consideration to unintended consequences discussed above. While child marriages should not be considered a solution for unintended consequences of premarital sexual relations, South Asian societies are yet to reach that level of acceptance. Further, due consideration must be given to the evolving capacities of the adolescents concerned and their views must be heard, balancing between their right to protection and autonomy.

4.2.1.3. Decriminalise abortion and remove legal barriers to access other SRH services

In all countries concerning the present thesis, abortion is criminalised and is only possible to save the life of the mother. This has resulted in a number of unsafe abortions occurring, putting the lives of many women and girls at grave risk. Both the CRC Committee and the CEDAW Committee have called on the countries to decriminalise abortion (see country-specific chapters) and legalise abortion specifically for victims of rape.

Further, due to the criminalisation of consensual sexual relations between adolescents under statutory rape laws, barriers have been created the access to other SRH services. In India, there is a mandatory reporting provision for statutory rape. As a result, medical professionals cannot provide preventive or emergency contraceptives to anyone under eighteen years. In the Maldives and Pakistan, any sexual relations outside marriage are criminalised. This also acts as a major barrier for unmarried persons, especially girls to access other SRH services. In Bangladesh, although there are no legal barriers to accessing other SRH services, these laws act as indirect barriers as they mirror social norms surrounding adolescent sexuality. In Sri Lanka, although parental consent is not mandatory, it is encouraged.

Accordingly, apart from decriminalising consensual sexual relations between adolescents, special attention must be paid to avoiding unintended consequences such as creating legal barriers to accessing SRH Services. Countries must aim to make SRH services remain adolescent-friendly, confidential and accessible in order to prevent unwanted pregnancies and STIs.

4.2.2. Comprehensive Sexuality Education (CSE)

According to the CRC Committee, CSE should include relevant information about right to health, the obligations upon States. Further it should include how such information and services can be accessed by children. This should be part of the mandatory school curriculum and through health services and in other settings for children out of school. SRH education should include social, biological, and psychological aspects and should be equally accessible and age appropriate. Further, the Committee states that information about children's health should be provided to all parents individually or in groups and society at large by utilizing a wide range of platforms. Such platforms include, parenting education programmes, and community awareness programmes.²⁹⁵

The lack of CSE in South Asia has been recognised by the CRC Committee as well as the CEDAW Committee. In the most recent Concluding Observations of all countries both Committees have called for the inclusion of CSE as part of the mandatory school curriculum.

²⁹⁴ Ibid at pg. 5.

²⁹⁵ CRC Committee(2013), supra 63 at pgs. 7-8.

4.3. Conclusions

Colonial age, statutory rape laws were intended to protect girls from adult perpetrators. The rationale behind such laws was that pre-puberty girls did not have the capacity to provide valid consent and to protect their so-called purity. These laws continue to exist in South Asia further influenced by the conservative values that persist. It must be acknowledged that they serve a purpose which is to protect children due to their specific vulnerabilities. They however fail to recognise the evolving capacities of children and their right to exercise agency.

Unlike the times at which these laws were developed, more and more adolescents exercise their sexual agency. Although governments in South Asia to a large extent are in denial about the sexual debut of adolescents, the number of prosecutions for consensual sexual relations show otherwise. This phenomenon has to be recognised as a natural course of adolescent development. Governments in South Asia need to take appropriate steps to decriminalise consensual sexual relations. Possible steps include the inclusion of close-in-age exemption clauses within statutory rape laws and increasing investments to improve CSE and provision of adolescent friendly SRH Services.

As Skelton states, “if the state wants to play a role in delaying sexual debut, its tools should not be police and courts, but rather increased provision of education, counselling, and reproductive health services”.²⁹⁶

²⁹⁶ A., Skelton(2016), supra 25, at pg. 904.

ANNEXURE I

COUNTRY	RATIFICATION STATUS				
	UNCRC	CEDAW	OPSC	OPAC	OPIC
BANGLADESH	1990	1984	2000	2000	NO
INDIA	1992	1980	2005	2005	
MALDIVES	1991*	1993*	2002	2004	
PAKISTAN	1990	1996*	2011	2016	
SRI LANKA	1991	1982	2006	2000	

Reservations***PAKISTAN**

"The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of article 29 of the Convention."

MALDIVES**UNCRC -**

"1) Since the Islamic Shariah is one of the fundamental sources of Maldivian Law and since Islamic Shariah does not include the system of adoption among the ways and means for the protection and care of children contained in Shariah, the Government of the Republic of Maldives expresses its reservation with respect to all the clauses and provisions relating to adoption in the said Convention on the Rights of the Child.

2) The Government of the Republic of Maldives expresses its reservation to paragraph 1 of article 14 of the said Convention on the Rights of the Child, since the Constitution and the Laws of the Republic of Maldives stipulate that all Maldivians should be Muslims."

CEDAW -"The Government of the Republic of Maldives reserves its right to apply article 16 of the Convention concerning the equality of men and women in all matters relating to marriage and family relations without prejudice to the provisions of the Islamic Sharia, which govern all marital and family relations of the 100 per cent Muslim population of the Maldives."

In 2020 reservations were partially withdrawn. The remaining reservations are to article 16 concerns sections (a), (c), (d) and (f) of paragraph 1.

UNCRC

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-11&chapter=4&clang=_en#EndDec

CEDAW

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-8&chapter=4&clang=_en#EndDec

ANNEXURE-II

COUNTRY	ARE CONSENSUAL SEXUAL RELATIONS CRIMINALISED?	AGE OF SEXUAL CONSENT	AGE OF MARRIAGE		ACCESS TO ABORTION	ACCESS TO OTHER SRH SERVICES
			Boys	Girls		
BANGLADESH	YES, below the age of consent	16 years	21 years	18 years	Available only under exceptional circumstances to save the life of the mother	No legal barriers but the stigma associated with adolescent sexuality together with statutory rape laws act as indirect barriers
			Child marriages are allowed under exceptional circumstances			
INDIA	YES, below the age of consent	18 years	21 years	18 years	Available only under exceptional circumstances to save the life of the mother	Legally inaccessible for persons under 18 years
MALDIVES	Sexual relations outside marriage criminalised		18 years Child marriages are allowed under the discretion of the Registrar for persons who have attained puberty		Available only under exceptional circumstances to save the life of the mother, rape and incest	Legally inaccessible for unmarried persons
PAKISTAN	Sexual relations outside marriage criminalised		18 years	16 years	Available only under exceptional circumstances to save the life of the mother	Legally inaccessible for unmarried persons
			Laws are under the discretion of the provinces. It is 18 years for boys and girls in Sindh only.			
SRI LANKA	YES, below the age of consent	16 years	18 years No minimum age of marriage for Muslim Marriages		Available only under exceptional circumstances to save the life of the mother	No legal barriers but the stigma associated with adolescent sexuality together with statutory rape laws act as indirect barriers

ANNEXURE-III

1. Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) (hereinafter referred to as the “principal Act”), is hereby amended by the substitution for the definition of “child” of the following definition: 5

“ ‘child’ means[—]
 [(a)] a person under the age of 18 years[; or
 (b) **with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years,**]
 and ‘children’ has a corresponding meaning.”. 10

Substitution of section 15 of Act 32 of 2007

2. The following section is hereby substituted for section 15 of the principal Act:

“Acts of consensual sexual penetration with certain children (statutory rape) 15

15. (1) A person (‘A’) who commits an act of sexual penetration with a child (‘B’) who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless A, at the time of the alleged commission of such an act, was— 20
 (a) 12 years of age or older but under the age of 16 years; or
 (b) either 16 or 17 years of age and the age difference between A and B was not more than two years.

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the [National] Director of Public Prosecutions if **[both] A [and B were children] was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between A and B was more than two years[: Provided that, in the event that the National Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1)].** 25 30

(b) The [National] Director of Public Prosecutions concerned may [not] delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.”.

Substitution of section 16 of Act 32 of 2007 35

3. The following section is hereby substituted for section 16 of the principal Act:

“Acts of consensual sexual violation with certain children (statutory sexual assault)

16. (1) A person (‘A’) who commits an act of sexual violation with a child (‘B’) who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child, unless A, at the time of the alleged commission of such an act, was— 40
 (a) 12 years of age or older but under the age of 16 years; or
 (b) either 16 or 17 years of age and the age difference between A and B was not more than two years. 45

(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the relevant Director of Public Prosecutions if **[both] A [and B were children] was either 16 or 17 years of age at the time of the alleged commission of the offence and the** 50

BIBLIOGRAPHY

International Legal Instruments

United Nations Convention on the Rights of the Child, 1989.

United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1979.

Optional Protocol to the CRC on sale of children, child prostitution and child pornography, 2002.

Regional Instruments

Charter of the South Asian Association for Regional Cooperation, 1985.

Kathmandu Call for Action to End Child Marriage in South Asia, 2014.

SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, 2002.

SAARC/SAIEVAC Regional Action Plan to End Child Marriage in South Asia, 2015–2018.

South Asia Call for Action on Ending Violence against Children (Colombo Declaration), 2012.

Thimphu Declaration on Juvenile Justice Systems in South Asia, 9th SAARC Chief Justices' Conference Declaration, 2013.

UN Documents

CEDAW Committee, Concluding Observations on the eighth periodic report of Sri Lanka, 09 March 2017, CEDAW/C/LKA/CO/8.

CEDAW Committee, Concluding Observations on the sixth periodic report of Maldives, 23 November 2021, CEDAW/C/MDV/CO/6.

CEDAW Committee, Concluding Observations on the fourth and fifth periodic report of India, 2014, CEDAW/C/IND/CO/4-5.

Committee Against Torture, Concluding Observation on the Initial Report of Maldives, 19 Dec 2018, CAT/C/MDV/1
Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/22.

CRC Committee, Concluding Observations on the combined fifth and sixth periodic reports of Sri Lanka, 02 March 2018, CRC/C/LKA/CO/5-6.

CRC Committee, Concluding Observations on the combined fourth and fifth periodic reports of Maldives, 29 Jan 2016, CRC/C/MDV/CO/4-5.

CRC Committee, Concluding Observations on the Combined Third and Fourth Periodic Reports of India, 7 July 2014, CRC/C/IND/CO/3-4.

CRC Committee, Concluding Observations on the fifth periodic report of Bangladesh, 30 October 2015, CRC/C/BGD/CO/5.

CRC Committee, Concluding Observations on the fifth periodic report of Pakistan, 09 Jun 2016, CRC/C/PAK/CO/5.

CRC Committee, *Consideration of reports submitted by States parties under article 44 of the Convention, Fifth periodic report of States parties due in 2012: Pakistan*, 4 May 2015, CRC/C/PAK/5.

UN CEDAW Committee, *Concluding observations on the eighth periodic report of Bangladesh*, 18 November 2016, CEDAW/C/BGD/CO/8.

UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, *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* 14 November 2014 CEDAW/C/GC/31-CRC/C/GC/18.

UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, *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 (2019) on harmful practices** 08 May 2019 CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1.

UN Committee on the Rights of the Child, *General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art 24)*, 17 April 2013, CRC/C/GC/15.

UN Committee on the Rights of the Child, *General Comment No. 20 (2016) on the Implementation of the Rights of the Child During Adolescence*, 6 December 2016, CRC/C/GC/20.

UN Committee on the Rights of the Child, *General Comment No. 24 (2019) on Children's Rights in the Child Justice System*, 18 September 2019, CRC/C/GC/24.

UN Committee on the Rights of the Child, *General Comment No. 13 (2011) on the Right of the Child to Freedom from All Forms of Violence*, 18 April 2011, CRC/C/GC/13.

UN Committee on the Rights of the Child, *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.

UN Committee on the Rights of the Child, *General Comment No. 4 (2003) on Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4.

UN Committee on the Rights of the Child, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 10 September 2019, UN Doc CRC/C/15.

Academic Literature

Journal Articles

A., Misasi, *The Sexual and Reproductive Rights of Adolescents: The Implementation and Expansion of the Reproduction Rights of Adolescents Through the Convention on the Rights of the Child*, *Journal of the University of California, Davis* 23(2), 221-252, (2017).

A., Pitre & L., *Lingam Age of consent: challenges and contradictions of sexual violence laws in India*, *Sexual and Reproductive Health Matters*, 29(2), 1-14, (2021).

A., Shah, M., Waris, & A., Basit, *Islamization in Pakistan: A Critical Analysis of Zia's Regime*. *Global Regional Review*, 1(1), 260-270, (2022).

A., Skelton, *Balancing Autonomy and Protection in Children's Rights: A South African Account*, *Temple Law Review*, 88(4), 887-904, (2016).

- D., Reynaert, M., Bouverne-De Bie & S., Vandeveld, Between 'Believers' and 'Opponents': Critical Discussions on Children's Rights, *International Journal of Children's Rights*, 20, 155–168 (2012).
- D., Debnath, Creation of the Human Rights Mechanisms in SAARC Region for the Victims of Human Trafficking: An Introspection of the Present Scenario, *Indian Journal of Law and Justice*, 5(2), 189-201 (2014).
- D., Tanya, et al. "For the Sake of Family and Tradition: Honour Killings in India and Pakistan." *ANTYAJAA: Indian Journal of Women and Social Change*, 5 (1) June 2020, 22–39, (2020).
- G., Kangaude & A., Skelton, (De) Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa, *SAGE Open*, 1-12, (2018).
- G. Lansdown, Evolving Capacities Explained, in *Measuring Maturity: Understanding Children's Evolving Capacities CRIN Review*, 23, 7-9, (2009).
- J., Tobin, Understanding Children's Rights: A Vision Beyond Vulnerability, *Nordic Journal of International Law*, 84(2), 155-182, (2015).
- K., Hanson & L. Lundy, Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child, *International Journal of Children's Rights*, 25, 285-306, (2017).
- K., Nuray. "Close-in-Age Exemption Laws: Focusing on the Best Interests of Children and Adolescents" *International Journal of Adolescent Medicine and Health*, 33(2), 1-2, (2019).
- K., Dumond, Cast Me Not Away: The Plight of Modern Day Romeo and Juliet, *Quinnipiac Law Review*, 36(3), 455-487, (2018).
- K., Thilakarathna, & N., Jayarathna, Jurisprudence of statutory rape. *International Journal of Law*, 6(6), 270-277 (2020).
- K., Visweswaran, Gendered States: Rethinking Culture as a Site of South Asian Human Rights Work. *Human Rights Quarterly*, 26(2), 483–511 (2004).
- L. A., Mathew, Right to sexual autonomy of children—Implications of the UNCRC upon the Indian law on the age of consent, *International Journal for Crime, Justice and Social Democracy*, 8(2), 121-134, (2019).
- M. Freeman, Why It Remains Important to Take Children's Rights Seriously, *International Journal of Children's Rights*, 15, 5-23, (2007).
- M., Jiali, SAARC: Achievements and Challenges *Policy Perspectives*, 9 (1), 161-165, (2012).
- M., Sharafi, South Asian Legal History, *Annual Review of Law and Social Science*, 11, 309–336, (2015).
- N. S., Murshid & A., Irish., Understanding Teen Sex in Bangladesh: Results from Global School Health Survey 2014, *Children and Youth Services Review* 119, 1-8, (2020).
- N., Zafar, The Impact of the Zina Ordinance, 1979 on Cases Involving Minors *PCL Student Journal of Law*, 3(2), 100-117 (2019).
- R., Jayasundere, Trivialising Statutory Rape: The Dangers of Suspended Sentences, *International Journal of Law* 4(3), 1-14, (2015).
- R.D., Müller, J.Y., Royer, and L.A., Lawver, Revised plate motions relative to the hotspots from combined Atlantic and Indian Ocean hotspot tracks, *Geology*, 21, 275-278, (1993).

S. L., Talboys, et al. "What Is Eve Teasing? A Mixed Methods Study of Sexual Harassment of Young Women in the Rural Indian Context." *SAGE Open*, 1-10, (2017).

S., Patel, & A.M., Gadit, 'Karo-Kari: A Form of Honour Killing in Pakistan', *Transcultural Psychiatry*, 45(4), 683–694, (2008).

S., Petroni, et al, Protection Versus Rights: Age of Marriage Versus Age of Sexual Consent, *The Lancet Child & Adolescent Health*, 3(4), 1-7, (2019).

S., Hameed, To be young, unmarried, rural, and female: intersections of sexual and reproductive health and rights in the Maldives, *Reproductive Health Matters*, 26:54, 61-71, (2018).

S. M., Susan et al. The Age of Adolescence, *The Lancet Child & Adolescent Health* 2 (3), 223-228, (2018).

U., Rob, & M. U., Mutahara, Premarital Sex among Urban Adolescents in Bangladesh, *International Quarterly of Community Health Education*, 20(1), 103–111, (2000).

V., Anchan, et al, POCSO Act, 2012: Consensual sex as a matter of tug of war between developmental need and legal obligation for the adolescents in India. *Indian Journal of Psychological Medicine*, 43(2), 158–162, (2021).

V., Chandra-Mouli, et al, Building Support for Adolescent Sexuality and Reproductive Health Education and Responding to Resistance in Conservative Contexts: Cases From Pakistan. *Global Health, Science and Practice*, 6(1), 128–136, (2018).

Books and book chapters

A., Nolan, 'Children's Economic and Social Rights' in: *International Human Rights of Children*, edited by Ursula Kilkelly and Ton Liefwaard. Singapore: Springer, 239-258, (2018).

A., Sharma, Sati: A Study in Western Reactions in: *Sati: Historical and Phenomenological Essays*. Motilal Banarsidass Publications, 1-14 (2001).

A., Skelton Children, in: *Elgar Encyclopedia of Human Rights*, edited by Christina Binder, Manfred Nowak, Jane A. Hofbauer, and Philipp Janig, 1-5 (2022).

D., Ludden, Early Modern Regions in: *India and South Asia: A short history*, Oneworld Publications, London 188-264 (2014).

J., Tobin, 'Children's Right to Health' in: *International Human Rights of Children*, edited by Ursula Kilkelly and Ton Liefwaard. Singapore: Springer, 278-298, (2018).

K., Hanson, Schools of Thought in Children's Rights in: *Children's Rights from Below*. Studies in Childhood and Youth. Palgrave Macmillan, London, 1-19, (2008).

N. Peleg, General Principles, in: *International Human Rights of Children*, edited by Ursula Kilkelly and Ton Liefwaard. Singapore: Springer, 135-157, (2018)

Reports

Asian Forum for Human Rights and Development, SAARC and Human Rights: Looking Back and Ways Forward (2012).

Center for Policy Alternatives, Legal Reform to Combat Sexual and Gender-Based Violence Part I Reforming Existing Laws and Policies (2020).

Version 01 July 2022

Center for Reproductive Rights, The Committee on the Rights of the Child Re: Supplementary information on Pakistan, scheduled for review by the Committee on the Rights of the Child during its 34th Session (2003).

Centre for Child and Law and National Law School of India University. STUDY ON THE WORKING OF SPECIAL COURTS UNDER THE POCSO ACT, 2012 IN KARNATAKA (2017).

Child Rights Movement Pakistan, Implementing Child Rights in Pakistan: Alternative Report for the UNCRC (2015).

Children on the Edge, Steps to Reducing Child Marriage: Case Study Bangladesh (2015).

Citizens' Initiatives on CEDAW, Bangladesh (CIC-BD), Eighth CEDAW Shadow Report to the UN CEDAW Committee (2017).

CRIN, Access to Justice for Children: Bangladesh (2015).

CRIN, Access to Justice for Children: India (2015).

CRIN, Access to Justice for Children: Maldives (2014).

CRIN, Access to Justice for Children: Pakistan (2014).

CRIN, Access to Justice for Children: Sri Lanka (2014).

ECPAT Sri Lanka, Child Marriage (2021).

First Report of Her Majesty's Commissioners Appointed to Prepare a Body of Substantive Law for India, 60, HCPP, 1864 (3312) XVI.359.

Human Rights Commission of Pakistan, PAKISTAN HUMAN RIGHTS REPORT (2021).

Human Rights Commission of Pakistan, State of Human Rights (2021).

Human Rights Watch, Marry Before Your House is Swept Away: Child Marriage in Bangladesh (2015).

ICRW and UNFPA, Child Marriage in South Asia: Realities, Responses and the Way Forward (2013) at pg. 6.

IPPF South Asia, Political environment and CSO networks relevant to SRHR in South Asia (2017).

IPPF, Overprotected and Underserved: The Influence of Law on Young People's Access to Sexual and Reproductive Health in Sri Lanka (2014).

Know Violence in Childhood, Ending Violence in Childhood. Global Report (2017).

Law Commission of Sri Lanka, Explanatory Note on the Sentencing Policy with regard to Statutory Rape and matters connected thereto (2014).

Ministry of Health (MOH) [Maldives] and ICF. *Maldives Demographic and Health Survey 2016-17*. Malé, Maldives, and Rockville, Maryland, USA: MOH and ICF (2018).

Ministry of Health and Family (MOHF) [Maldives] and ICF Macro. *Maldives Demographic and Health Survey 2009*. Calverton, Maryland: MOHF and ICF Macro (2010).

Ministry of Health Maldives, Maldivian National Standard Statements for Adolescent and Youth Friendly Health Services to be Provided to All Young People (2013).

Version 01 July 2022

Society for Health Education & Hameed S. Universal access to SRH: gaps in policies and legislature in the Maldives (2016).

Society for Health Education & UNICEF Maldives, PREVALENCE STUDY AND KAP SURVEY ON CHILD MARRIAGE IN THE MALDIVES (2019).

Sri Lanka Police, Performance Report (2018) Available at <https://www.parliament.lk/uploads/documents/paperspresented/performance-report-srilanka-police-2018.pdf>

The Centre for Child Law, University of Pretoria, Mapping a multi-faceted child rights strategic litigation and advocacy campaign in relation to the South African Sexual Offences Act (2021).

UNICEF, Towards Ending Child Marriage: Global trends and profiles of progress (2021).

UNFPA Maldives, Reproductive Health Knowledge and Behaviour of Young Unmarried Women in Maldives (2011).

UNICEF Maldives, Situation Analysis of Children and Youth in the Maldives (2021).

UNICEF Pakistan, Situation Analysis of Children in Pakistan (2017).

UNICEF South Asia, Child Marriage Baseline Estimation, (2016).

UNICEF South Asia, The legal framework for child protection in South Asia (2020).

UNICEF Sri Lanka, Goonesekere, S., and H. Amarasuriya, Emerging Concerns and Case Studies on Child Marriage in Sri Lanka (2013).

UNICEF and UNFPA, Key Drivers of the Changing Prevalence of Child Marriage in Three Countries in South Asia: Working Paper, UNICEF, Kathmandu (2018).

YES I DO Alliance, Gaining insight into the magnitude of and factors influencing child marriage and teenage pregnancy and their consequences in Pakistan Baseline Report (2018).

Web Resources

Amitabh Suman, A., Age of consent and Romeo-Juliet clause, 23 May 2021, *Times of India Blog*, Available at: <https://timesofindia.indiatimes.com/readersblog/ajayamitabhsumanspeaks/age-of-consent-and-romeo-juliet-clause-32417/>

BBC Asia, Maldives girl's 100 lashes sentence overturned, 22 August 2013, *BBC News*, Available at <https://www.bbc.com/news/world-asia-23792120>

Ibrahim, M. and Karim, M., Research Guide on Legal System and Research of Maldives, June 2013, *Global Lex*, Available at: <https://www.nyulawglobal.org/globalex/Maldives.html#LegalHistoryofMaldives>

Izzaddeen, A., Underage love and sex at 13? Sri Lanka debates the unthinkable, 28 September 2005, *Khaleej Times*, Available at <https://www.khaleejtimes.com/opinion/underage-love-and-sex-at-13-sri-lanka-debates-the-unthinkable>

Lugoda, U., Amending SL's law on rape: Minimum sentence to change? 31 January 2021, *The Sunday Morning*, Available at <https://www.themorning.lk/amending-sls-law-on-rape-minimum-sentence-to-change/>

Mahfuz, K., Child marriage in Bangladesh: Does a vacuum exist within the law? 18 April 2021, Available at <http://blog.brac.net/child-marriage-in-bangladesh-does-a-vacuum-exist-within-the-law/>

Version 01 July 2022

Mantri, G., POCSO criminalising teen sexuality? NCRB data suggests that may be true, 27 October 2021, *The News Minute*, Available at <https://www.thenewsminute.com/article/pocso-criminalising-teen-sexuality-ncrb-data-suggests-may-be-true-111281>

P., Ruma & N., Bhalla, Bangladesh law allowing child brides may legitimize rape: charities, 1 March 2017, *Reuters News*, Available at <https://www.reuters.com/article/us-bangladesh-child-marriage-idUSKBN168551>

Perera, A., Sri Lanka: Why is the country in an economic crisis?. 29 June 2022, *BBC News Asia*, Available at <https://www.bbc.com/news/world-61028138>

The case for a SAARC regional human rights mechanism”: Statement by the United Nations High Commissioner for Human Rights, 23 November 2011, Available at <https://www.ohchr.org/en/statements/2011/11/case-saarc-regional-human-rights-mechanism-statement-united-nations-high>

UNICEF, The State of the World's Children, *Dashboard, October 2021*, Available at <https://data.unicef.org/resources/sowc-2021-dashboard-and-tables/>

UNICEF South Asia, The Situation for Children in South Asia, 2022, Available at <https://www.unicef.org/rosa/children-south-asia>

National Legal Instruments

Bangladesh

Bangladesh National Strategy for Adolescent Health 2017-2030.

Child Marriage Restraint Act 2017 and Rules.

Constitution of the People's Republic of Bangladesh 1972.

Penal Code 1860.

Prevention of Oppression against Women and Children Act 2000, as amended 2003.

India

Constitution of India

Criminal Procedure Code of 1973.

India Criminal Law (Amendment) Act 2013.

Indian Penal Code of 1860.

Protection of Children from Sexual Offences Act 2012.

Maldives

Child Rights Protection Act No 19 of 2019.

Constitution of the Republic of Maldives 2008.

Family Law Act No 4 of 2000.

Law on Special Measures for Perpetrators of Child Sexual Abuse Act No 12 of 2009.

Ministry of Health Maldives, National Reproductive Health Strategy 2014-2018.

Penal Code of 2014.

Sexual Offences Act No 14 of 2014.

Pakistan

Child Marriage Restraint Act, 1929.

Constitution of the Islamic Republic of Pakistan 1973.

Criminal Law (Second Amendment) Act, 2016.

Hindu Marriage Act No VII of 2017.

Pakistan Penal Code 1860.

Penal Code of Pakistan, 1860.

Punjab Child Marriage Restraint (Amendment) Act 2015 (XII of 2015).

Sindh Child Marriage Restraint Act, 2013.

The Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

Sri Lanka

Constitution of the Democratic Socialist Republic of Sri Lanka 1978.
 General Marriage Registration Ordinance (Amendment) Act No 18 of 1995.
 Marriage Registration Ordinance of 1908.
 Ministry of Health and Indigenous Medicine, General Circular No 01/25/2015.
 Muslim Marriages and Divorce Act No 41 of 1975.
 Penal Code and Amendment Acts No. 22 of 1995, 29 of 1998, 16 of 2006.

Case Law

High Court of Sri Lanka 333/04.
 Human Rights Case No. 17599 OF 2018 Supreme Court of Pakistan 2019 SCMR 247.
 Independent Thought V Union of India Writ Petition (Civil) No. 382 of 2013.
 Lal Baksh V The State Federal Shariat Court 2000 YLR 1871, Pakistan.
 Md. Abdus Samad V State, 2013 Bangladesh.
 Navtej Singh Johar & Ors. V Union of India Thr. Secretary Ministry of Law and Justice Writ Petition (Criminal) No. 76 of 2016 dated September 6, 2018).
 Riaz V The State 1994 SCMR 358, Pakistan.
 S.C. Appeal No. 17/2013 / S.C.Spl. LA No. 207/2012 / C.A.No. 297/2008 / HC. Kurunegala No. 259/2006, Sri Lanka
 Sabari v. The Inspector of Police and Others, Criminal Appeal No.490 of 2018, Madras High Court.
 Shambu Thilak v State of Kerala and Others, Crl.MC.No. 3810 of 2016, Kerala High Court.
 Supreme Court of Sri Lanka 03/2008.
 Teddy Bear Clinic for Abused Children & Another v. Minister of Justice and Constitutional Development and Another, CCT 12/13, [2013] ZACC 35 South Africa, Constitutional Court.
 Thyagaraja V Kurukkel 25 NLR 1909.
 Vijayalakshmi v. State Rep. By, Crl.O.P.No.232 of 2021 and Crl.M.P.No.109 of 2021, Madras High Court.