

THE PROTECTION OF CHILDREN FROM THE SEXUAL OFFENCES ACT, 2012: A CRITIQUE OF THE DECISION TO RAISE THE AGE OF CONSENT FOR SEXUAL RELATIONS

CHITWAN DEEP SINGH*, PRASHANT PRANJAL** & SAHIL ARORA**

The lawmakers have for long ignored the glaring loopholes in the prevailing laws concerning sexual offences directed against children. Thus, the enactment of the Protection of Children from Sexual Offences Act, 2012 is an obvious step forward but it has its shortcomings too. Significantly departing from suggestions made by the National Commission for the Protection of Child Rights and other socio-legal luminaries, the Act has gone on to increase the qualification age of a child from the extant below 16 years to now below 18 years. In doing so, the lawmakers have failed to take into account the present societal trend wherein teenage sexual relations are on the rise. Such a legislation would now make teenagers, who were to be protected by the Act, subject to harassment by law enforcement officials. Thus, the paper argues in favour of reducing the age for consensual sexual activity. It states that in doing so, the law makers would not be abrogating India's international law commitments and would in fact be bringing the present Act in consonance with the other domestic legislations.

I. INTRODUCTION

In the summer of 2012, Sandeep Paswan stood trial for raping and kidnapping a minor girl, the same minor girl who was his lawfully wedded wife and with whom he had been cohabitating for over a year. But owing to the provisions of the newly enacted Protection of Children from Sexual Offences Act (hereinafter Act), Mr. Paswan was facing charges for raping and kidnapping his own wife.¹ The above

* Second Year Student at the WB National University of Juridical Sciences, Kolkata.

** Fourth Year Students at the WB National University of Juridical Sciences, Kolkata.

¹ Smriti Singh, *Raising age of consent for sex to 18 regressive, undemocratic: Court*, THE TIMES OF INDIA, (Jun 1, 2012), <http://timesofindia.indiatimes.com/india/Raising-age-of-consent-for-sex-to-18-regressive-undemocratic-Court/articleshow/13694982.cms?intenttarget=no>.

case is but one instance of the repercussions which would follow from the enactment of certain provisions of the Act which has among other things, criminalised any form of penetrative sexual conduct with a child², who has been defined as any person below 18 years of age. The consent of such person has been made immaterial and penetration interpreted comprehensively to include not only penal-vaginal but of any kind in the child's body.³ This may be by way of an object; by any part of the assaulter's body; or even if the child is made to penetrate him or herself.⁴

The Act, according to its Statement of Objects and Reasons, is aimed at empowering the child and strengthening the legal provisions for their protection from sexual abuse and exploitation.⁵ It makes the crimes gender neutral and has filled some glaring loopholes in the prevailing legal system by penalising, for the first time, a number of exploitative sexual actions against children. However, the Act has failed to take into consideration the prevailing societal trend of increasing number of teenagers indulging in sexual activities. This becomes pertinent given the provision for the penalisation of any form of consensual penetrative sexual interactions and not just 'sexual intercourse' between teenagers. Such a provision would, in the opinion of authors, open the floodgates for the possible harassment of teenagers by law enforcement agencies. It would give rise to a peculiar situation wherein the same provisions which have been enacted to empower the child and strengthen the legal provision for the protection of children from sexual abuse and exploitation⁶, would, amount to their unfair harassment.

The authors, calling for an amendment in the provisions of the Act to reduce the age of consensual sexual act to the pre-existing sixteen

² The Protection of Children from Sexual Offences Act, 2012, No. 32 of 2012 [June 19, 2012], §2(d).

³ *Id.* §3.

⁴ *Id.* §3.

⁵ The Protection of Children from Sexual Offences Act, 2012, *Ministry of Women and Child Development* PRESS INFORMATION BUREAU, GOVT. OF INDIA (May 22, 2012), <http://pib.nic.in/newsite/erelease.aspx?relid=84409>.

⁶ *Id.*

years, argue that the same would be in furtherance of child rights as well as in consonance with the international trend in this regard.

The article will address the Act in four sections. The authors will begin by analysing the background in relation to child offences and lay down the reasons which lead to the enactment of the present Act. In the second section, an examination of the provisions of the Act has been undertaken to highlight the major steps undertaken to protect the child and punish the perpetrator. In the third section, the authors bring to the fore the major drawbacks of certain provisions of the Act and the consequences it may have on the society. In the last part, the authors suggest possible initiatives which could be undertaken outside the purview of legislative enactments which, while having the same impact as what has been anticipated by the present provisions, would not lead to potential harassment of the child.

II. BACKGROUND ISSUES

Prior to an analysis of the aforementioned change, it is pertinent to dwell into the background issue of child sexual abuses which has become an everyday reality in our country and has led to the enactment of the present Act.

According to a study published by the Ministry of Women and Child Development in 2007, about 53% of the children interviewed reported some form of sexual abuse ranging from rape to somewhat milder forms such as forcible kissing.⁷ The study also interviewed 2,324 young adults between the ages of 18 and 24, almost half of whom reported being physically or sexually abused as children.⁸ What comes as no surprise is the fact that the perpetrators were family members, household staff, teachers and others known to the child and the abuse

⁷ *Ministry of Women and Child Development releases a study on Child Abuse*, PRESS INFORMATION BUREAU, GOVT. OF INDIA (Apr. 09, 2007), <http://pib.nic.in/newsite/crelease.aspx?relid=26737>.

⁸ *Over 53% children face sexual abuse: Survey*, THE TIMES OF INDIA, (Apr 10, 2007), http://articles.timesofindia.indiatimes.com/2007-04-10/india/27883340_1_child-abuse-sexual-abuse-corporal-punishment.

was mostly concentrated among the age groups of 5-12.⁹ This study was one of the first of its kind and showcased that most children choose not to report the abuse and this evidently results in child sexual abuse becoming one of the least documented violations in the country.¹⁰

In addition to this, the provisions of the Indian Penal Code (hereinafter IPC), the primarily criminal statute in India, was hopelessly deficient in dealing with the whole range of sexual crimes that are committed against a child and did not make any specific provisions for crimes against children.¹¹ Legal remedies were only available under Sections 375, 354 and 377 which covered rape, sexual molestation and unnatural sex. These limited provisions of the IPC largely focussed on offences committed against the female child, with little emphasis being given to the sexual offences against a male child thereby resulting in a very parochial approach. . Additionally, the IPC also failed to take into account the various forms of sexual violence committed on children and the range of sexual contexts according to the extent of coercion, injury, age and incapacitation of the child¹². It also did not take any note of the concept of relationship of the perpetrator with the child which as the aforementioned report suggests proves to be crucial in such cases. These deficiencies in the Indian penal system were also highlighted by the Law Commission in 2000 when it suggested that the term sexual assault be used in place of rape and should include all forms of penetration, both human and object.¹³

Quite evidently these appalling statistics and inadequacy in the law necessitated the formulation of a separate legislation which dealt exclusively with sexual crimes against children.

⁹ *Child Abuse Destroying Illusions*, 62 ECO. & POL. WKLY. 1400, 1400 (2007).

¹⁰ Asha Krishnakumar, *Silent Victims*, FRONTLINE (Oct 11-24, 2003), available at <http://www.frontlineonnet.com/fl2021/stories/20031024001609000.htm>.

¹¹ Protection of Children from Sexual Offences Act, *supra* note 5.

¹² Geeta Ramaseshan, *Law and the age of innocence*, THE HINDU (Jun 19, 2012) <http://www.thehindu.com/opinion/op-ed/article3543940.ece>.

¹³ Pallavi Gupta, *Child Marriages and the Law*, 47(43) ECO. & POL. WKLY. 49,51 (2012), available at, http://www.epw.in/system/files/pdf/2012_47/43/Child_Marriages_and_the_Law.pdf.

III. THE ACT AND ITS PROVISIONS

The Act is India's first legislation which deals exclusively with the issue of child sexual abuse and seeks to strengthen our legal provisions in order to prevent children from such atrocities. It recognises a child as a person being below the age of 18¹⁴ and provides protection of children from offences such as sexual assault¹⁵, penetrative sexual assault¹⁶ and sexual harassment¹⁷, all of which have been defined for the first time in our law and are accompanied by stringent punishments, as per gravity of the offence. The Act also takes cognisance of the role of internet in promoting commercial child sexual abuse and therefore to combat this menace, it has laid down imprisonment extending up to five years for using a child for pornographic purposes.¹⁸ It further provides for the creation of a 'Special Juvenile Police Unit' whose duty is to ensure care and protection of child within 24 hours of the reported crime.¹⁹ In addition to this, the Act also necessitates the establishment of special courts which bear the onus of speedy justice by completing the trial within a year.²⁰ These courts are also required to create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court and ensure that there is no aggressive questioning or character assassination of the child.²¹ Additionally, there are also provisions which provide for non-disclosure of identity of child by the media; victim relief and rehabilitation; and appointment of authorities to oversee the effective implementation of the provisions of the Act. Therefore, the overall setting of the Act appears to be aimed at creating a child friendly atmosphere wherein justice can be sought without the victimisation of the child.

¹⁴ Protection of Children from Sexual Offences Act, *supra* note 2, § 2.

¹⁵ Protection of Children from Sexual Offences Act, *supra* note 2, § 7.

¹⁶ Protection of Children from Sexual Offences Act, *supra* note 2, § 3.

¹⁷ Protection of Children from Sexual Offences Act, *supra* note 2, § 11.

¹⁸ See Protection of Children from Sexual Offences Act, *supra* note 2, § 14.

¹⁹ See Protection of Children from Sexual Offences Act, *supra* note 2, § 19(6).

²⁰ See Protection of Children from Sexual Offences Act, *supra* note 2, § 35(2).

²¹ Protection of Children from Sexual Offences Act, *supra* note 2, § 35(2).

However, the most outstanding achievement of the Act lies in the fact that it fills the lacunae created by the inadequate provisions of the IPC. The primary provisions of the IPC which dealt with cases such as those dealt with under the Act was Section 375. It has recognised as an offence only the non-consensual penal-vaginal intercourse and excluded from its ambit penetration of any other kind.²² In addition to this, the provisions of section 377 though recognised unnatural sexual intercourse as an offence, failed to acknowledge as a crime, the act of the victim being forced to touch himself, which is also a prime mode of sexual gratification for the deranged offender.²³ A close perusal of the provisions of the Act would indicate that these flaws in the aforementioned provisions have been negated under Section 3²⁴ of the Act, which defines 'penetrative sexual assault' as penetration of the vagina, mouth, urethra or anus vide the penis, or any other part of the body or any object.²⁵ The term has also been defined to include within its ambit the act of manipulating any part of the child's body to penetrate into the vagina, urethra, anus or any part of the body of the child and also the act of making the child to so with him or any other person.²⁶ The Act further recognises as an offence oral sexual intercourse whether given, taken or made to be undertaken with any other person.²⁷ The Act is thus the most comprehensive in terms of recognition of offences which a child is subjected to.

In addition to filling these lacunae in the law, the Act succeeds in three particular aspects. Firstly, it is gender neutral as it recognizes the fact that, despite presumptions to the contrary, boys are also subjected to sexual abuse. This gives a wider connotation to the Act and enables it to be more effective. Secondly, it shifts the burden of proof onto the accused in a very significant way with the introduction

²² PEN. CODE, § 375 (India).

²³ *Id.* § 377.

²⁴ Protection of Children from Sexual Offences Act, *supra* note 2, § 3.

²⁵ See Protection of Children from Sexual Offences Act, *supra* note 2, § 3(a) and (b).

²⁶ See Protection of Children from Sexual Offences Act, *supra* note 2, § 3(c).

²⁷ See Protection of Children from Sexual Offences Act, *supra* note 2, § 3(d).

of the concept of “culpable mental state”, which includes motive, knowledge, or intention.²⁸ Under the Act the Special Court is supposed to presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence.²⁹ This certainly helps in establishing fair trial standards and prevents victimization of children. Thirdly, the Act does away with euphemistic terms such as eve teasing by bringing about a distinction between sexual assault and penetrative sexual assault. The Act, unlike the IPC, specifically defines sexual assault under section 7³⁰ and also provides for a more stringent punishment as compared to the corresponding section 354³¹ of the IPC which deals with outraging the modesty of a woman. Thus, the inclusion of these provisions suggests that the Act seems to have got its initial footing right. Its aim is well laid down and its many provisions seem to have the potential to support the same. It is therefore no surprise that the Act was described by the lower house of parliament as a ‘landmark *legislation*’.³²

But what the legislators failed to recognize was the fact that this exuberant praise has led to an apparent rush to make the bill into a law, thus overlooking some crucial issues.³³

IV. DRAWBACKS OF THE ACT

The primary issue with the Act is that it criminalises all consensual sexual activity below the age of 18. In doing so, it moves on a ludicrous assumption that the adolescents of our country (where rampant child sexual abuse exists) are sexually inactive and all adolescent sexual encounters amount to violation of sexual autonomy of the person and cause harm.

²⁸ Ramaseshan, *supra* note 12.

²⁹ See Protection of Children from Sexual Offences Act, *supra* note 2, § 31(1).

³⁰ See Protection of Children from Sexual Offences Act, *supra* note 2, § 7.

³¹ PEN. CODE, *supra* note 22, § 377.

³² Nikhila Gill, *India's New Child Sexual Abuse Bill Draws Critics*, THE HIMALAYAN VOICE (Jun 12, 2012), <http://thehimalayanvoice.blogspot.in/2012/06/indias-new-child-sexual-abuse-bill.html> (last visited Aug 28, 2012).

³³ *Id.*

It is to be noticed that while the draft bill submitted by National Commission for the Protection of Child Rights had set the age limit for consensual sex at 16, the Standing Committee constituted by the parliament raised the age to 18. The Committee while justifying this change averred that most laws took a child to mean a person below 18 and therefore this ought to be the age for consent.³⁴ They further cited the Juvenile Justice Act 2006 (*hereinafter* JJ Act) and placed focus on the fact that the issue of consent becomes wholly irrelevant once a child has been described as being under the age of 18.³⁵ This rather rigid definition is in strict contrast to the psychological constructs of childhood, theories of which highlight that once the final stages of development are reached, there is little to distinguish the more psychologically mature minor from adults.³⁶ However ignoring such theoretical constructs, it was also asserted that the said definition is in consonance with the provisions of the United Nations Convention on the Rights of Children, 1990 (*hereinafter* CRC), to which India is a party.³⁷ But the Standing Committee failed to note of the provisions of Article 5 of the CRC which lays stress on the crucial aspect of a child's evolving capacities. This concept demonstrates the need for the law to realise that that growing up is a complex process which is not marked by a single rite of passage but by a series of staged transitions characterised by the acquisition of growing responsibility and self –sufficiency.³⁸

³⁴ Two Hundred Fortieth Report on The Protection Of Children From Sexual Offences Bill, 2011, DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, Cl. 6.8 (Dec 21, 2011), <http://nlrd.org/wp-content/uploads/2012/01/240-TH-REPORT-ON-PROTECTION-OF-CHILDREN-FROM-SEXUAL-OFFENCES.pdf>.

³⁵ T. K. Rajalakshmi, *Blind to Realities*, Frontline (May 19, 2012), <http://www.frontline.in/fl2910/stories/20120601291009900.htm>.

³⁶ Kieran Walsh, The Sexual Rights of Children and the Age of Consent, <http://www.inter-disciplinary.net/wp-content/uploads/2010/04/kwalshpaper.pdf> (last visited Nov 10, 2012).

³⁷ Manoj Mitta, *Regressive clause clashes with IPC rape laws*, THE TIMES OF INDIA (Apr. 30, 2012), http://articles.timesofindia.indiatimes.com/2012-04-30/india/31506390_1_sexual-offences-consent-penetrative.

³⁸ Walsh, *supra* note 36.

These particular assertions of the Standing Committee have been roundly criticized by scholars and legal experts alike. Learned A.S.J. Kamini Lau aptly described the provision as being, “*regressive and draconian*.”³⁹ This was followed by A.S.J. Bhat’s observation that “such a move would open the floodgates for prosecution of boys for offences of rape on the basis of complaints by girls’ parents irrespective of whether the girl was a consenting party”.⁴⁰

In fact, sociologists and psychiatrists have stressed that we cannot afford to ignore that many youngsters under the age of 18 do engage in sexual activity.⁴¹ Shanta Sinha, chairperson, National Commission for the Protection of Child Rights was quoted as saying that, “there are high chances of this Act being misused. Youngsters who are 16 or 17 may want to explore and enter into sexual relationships. They could end up being criminalised.”⁴²

This particular provision has thus, faulted primarily on three grounds. Firstly, it has given scant regard to prevailing social realities. Secondly, it is not in consonance with various other laws such as the Indian Penal Code, 1872 and the Prohibition of Child Marriage Act 2006. Lastly, the justification that the legislature is bound by international obligations to raise the age of consent among children is without any merit as no such obligations presently exist.

A. IGNORING SOCIETAL REALITIES

The main issue with the Act is that it grossly ignores the social realities prevalent in India. With rapidly changing contemporary attitudes in urban India, social sensibilities have seen a paradigm shift in adolescent sexual curiosities leading to increased experimentation

³⁹ *Raising age limit for consensual sex will be a backward step, says court*, EXPRESS INDIA (Jun. 1, 2012), <http://www.expressindia.com/latest-news/raising-age-limit-for-consensual-sex-will-be-a-step-backward-says-court/956395/>.

⁴⁰ Smriti Singh, *supra* note 1.

⁴¹ Sharmistha Das, *Age No Bar*, THE TELEGRAPH (Jun. 6, 2012), http://www.telegraphindia.com/1120606/jsp/opinion/story_15575183.jsp.

⁴² *Id.*

with one's sexuality. A detailed report by the Indian Institute of Population Studies states that among those people who reported to be in pre-marital romantic partnerships, 42 per cent of men and 26 per cent of women admitted to engaging in sex with their partners with a sizeable number being under the age of 18.⁴³ Therefore, criminalising sex between adolescents in a society where it is quite prevalent would lead to making thousands of men susceptible to rape cases whenever the issue of lack of consent comes up. Such instances were seen in the United States where the age of consent was increased to 18 in certain states.⁴⁴ It was noted that almost 41% of the total rape cases were false.⁴⁵ It must also be stressed that 16 to 18 are the ages when adolescents undergo many hormonal changes, so any case where there is a fallout between a couple and the girl accuses her partner of rape, the minor boy would be left with no legal recourse at all. These crucial issues have been overlooked by our lawmakers. They have sought to criminalise a phenomenon which could be very aptly described as being an essential part of 'growing up'. Thus, in outlawing such an act, the legislators who seek to occupy a "conservative higher moral ground" actually encourage moral policing which could further lead to harassment of the youth.

The logic behind this particular provision seems to be that seems to be that such legislation could possibly deter young people from engaging in sexual activity. A close perusal of the ground situation would however indicate otherwise.⁴⁶ With limited regard to legislations and more exposure of cable television and Internet, youngsters are becoming more aware of their sexuality and they do not hesitate in indulging in sexual relationships before the age of 18. By falling prey to moral prejudices, the lawmakers of this country have failed to acknowledge the fact that sexual exploration and activity start in a child's life much before entering into a marital relationship. Thus, this

⁴³ Das, *supra* note 41.

⁴⁴ Eugene J. Kanin, *False Rape Allegations*, 23 ARCHIVES OF SEXUAL BEHAVIOR 81,81 (1994).

⁴⁵ *Id.*

⁴⁶ Bharat Ali, *Age of Consent Catastrophe*, THE TRIBUNE, (May 21, 2012), <http://www.tribuneindia.com/2012/20120521/edit.htm#6>.

inconsistency between the legal provisions and societal configuration leads to lackadaisical implementation of the law. The increasing number of *Habeas Corpus* petitions filed in various High Courts by young persons seeking the right to exercise their personal choice in personal relationships also reflects this trend.⁴⁷

Additionally the lawmakers while submitting to their moral prejudices have also ignored the approaches of the courts which through their various decisions have employed the concept of age of discretion which in most of the cases has been kept between the ages of 16 and 18. Thus by setting the age of consent at 18, the lawmakers have conflated the age with moral values and this has negated any sexual autonomy which adolescents below the age of 18 can exercise. What the legislators ought to realise is that the so called moral values cannot be engrossed through legal provisions. In fact, in Sandeep Paswan's case⁴⁸ the court had observed that, "*Good virtues cannot be inculcated and good conscience cannot be imbibed in a child by legal provisions. It would be better and wiser to leave this job to parents and school teachers. Children need to be imparted sex education in the schools.*"⁴⁹ This observation echoes the concerns of many, who believe that this provision would not only lack conformity with social realities, but could also become detrimental to the youth rather than being of any assistance to them.

B. NOT IN CONSONANCE WITH DOMESTIC LEGISLATIONS

The other quintessential problem with the provision lies in the fact that it grossly ignores the existence of child marriage which is still rampant in India. UNICEF's State of the World's Children Report 2012 says that 47 percent of Indian children aged below 18 are married⁵⁰ and 26 percent of these married children do indulge in sexual

⁴⁷ Ramaseshan, *supra* note 12.

⁴⁸ State v. Sandeep Paswan, Dwarka Courts, New Delhi, SC No. 08/12, Unique Case ID No. 02405R0363092011.

⁴⁹ Smriti Singh, *supra* note 1.

⁵⁰ *The State of the World's Children 2012*, UNITED NATIONS CHILDREN'S FUND 121 (Feb. 2012), available at http://www.unicef.org/sowc/files/SOWC_2012-Main_Report_EN_21Dec2011.pdf.

activity.⁵¹ While the Prohibition of Child Marriage Act, 2006 forbids marriage below the age of 18 for girls and 21 for boys, it neither makes such marriage null nor void unless of course either of the parties seeks annulment.⁵² Such a provision in the Child Marriage Act brings it in direct conflict with the present Act as it has created a situation wherein the existence of child marriages is tolerated on one hand while any form of sexual relations which emanate from such relations has been made punishable.

Hence, it is clear that interdicting consensual sexual acts between such couples would lead to an extraordinary situation where two minors can marry and cohabit together but cannot have consensual sexual relations with their spouse. This certainly is a paradoxical situation which the Standing Committee while suggesting changes to the draft Bill, could have easily done away with.

Another legislation with which the said provision seems to be in apparent conflict is the IPC. The Code, *vide* Section 375 provides that 'sexual intercourse' with a married woman, who is above 15 years of age, cannot amount to rape. This is irrespective of whether the intercourse had the consent of the wife. It is pertinent to note that a 'married woman' under the Code who is above the age of 15 but below the age of 18 is also a child under the Act. Therefore, any form of sexual relations with such a 'married woman' would amount to an offence under the Act while the same person may go scot free under the Code even though his conduct may amount to 'sexual intercourse'. It must be noted that the anticipated Criminal Law Amendment Bill proposes a change to the present Section 375 of the Indian Penal Code which includes increasing the age of consent and ambit of the Section 375 from 'rape' to 'sexual assault', which appear to be on the lines of the Act. But this would still leave the present conflict unresolved as the proposed law would still contain an exemption for

⁵¹ Abantika Ghosh, *NCPCR unhappy with revision in age of consent for sex*, THE INDIAN EXPRESS, (Jul. 11, 2012), <http://www.indianexpress.com/news/ncpr-unhappy-with-revision-in-age-of-consent-for-sex/972746/>.

⁵² The Prohibition of Child Marriage Act, 2006, §3(1).

married couples.⁵³ Thus, even if an amendment is not passed to reduce the age of consent to 16 years, there must be an amendment to provide for an exception to married couples under the age of 18 but above 16, so as to appropriately take into consideration the quotidian nature of child marriage in the Indian society. It is only then that the Act would come in consonance with the Prohibition of Child Marriage Act as well as the Indian Penal Code, and will ensure that the Act does not lead to undue victimisation of children who are often forced into wedlock and subsequently pressurised to consummate.

C. NOT MANDATED BY INTERNATIONAL CONVENTIONS

The essential justification of the said definition of ‘child’ is that the obligations arising out of the CRC provide for the definition of ‘child’ to be “*any person who is under the age of eighteen years.*”⁵⁴ A close analysis of the said convention as discussed earlier would suggest that the definition is in no way a stipulation of the age of consent for sexual activities. Furthermore, there are, an overwhelming majority of countries, who are also parties to the CRC and have adopted an age of consent that is below 18 years. It was therefore argued that in determining the age of consent, several cues from international examples should be examined keeping in mind the trends in different countries.⁵⁵ One of the most notable cues comes from the 45th session of United Nations Commission on Population and Development in which a resolution passed on ‘Adolescents and Youth’ specifically urged its member states to confer rights on the young to decide freely and responsibly on matters related to their sexuality.⁵⁶ But surprisingly,

⁵³ Cabinet approves Bill to amend law on rape, THE PRS BLOG (Aug. 02, 2012), <http://www.prsindia.org/theprsblog/tag/criminal-law/> (last visited Aug. 29, 2012).

⁵⁴ See Convention on the Rights of the Child, art. 1 (For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier).

⁵⁵ Rajalakshmi, *supra* note 35.

⁵⁶ *Adolescents and youth*, THE UNITED NATION, Resolution 2012/1, available at, http://www.un.org/esa/population/cpd/cpd2012/Agenda%20item%208/Decisions%20and%20resolution/Resolution%202012_1_Adolescents%20and%20Youth.pdf.

our lawmakers have failed to take note of this aspect as well. The average global age of consent is 16 years and in countries like Sweden, UK, France, Germany and Canada it ranges from 13 to 16 years. It is countries like Rwanda, Sudan, Tanzania, Malta, Uganda, Gabon, Kazakhstan, and Egypt that have 18 as the age of consent for sexual activity. Therefore, it is quite clear to which group India belongs when it mandates the age of consent to be 19 years.⁵⁷

What is even more worrisome is that the legislators came up with such proposals even after the Law Commission headed by a retired Supreme Court judge had twice debunked the idea of increasing the age of consent in the last two years.⁵⁸ The first instance was in the year 2000 when the law commission headed by Justice B. P. Jeevan Reddy had specifically said in its review of rape laws that the existing age of consent should be retained. Then, while proposing amendments in 2008 to the Prohibition of Child Marriage Act, the commission headed by Justice A. R. Lakshmanan reiterated the need to maintain the present age of consent.⁵⁹

V. CONCLUSION

Though the Act is an effective tool which while curbing the menace of child sexual abuse also fills out certain frailties in the Indian Legal System; it ends up being a classical example of a “good act with bad provisions”. By stimulating a higher age, the Act, as it stands seems set to encourage frivolous and unwarranted complaints.⁶⁰ Raising the age limit is not the solution to the problem and would serve no purpose except giving a tool to the police to harass minors.⁶¹ The lawmakers have to take note of the fact that youngsters do engage in consensual sexual activity and putting them behind bars would amount to victimisation of the child, which is something the Act aims to prevent.

⁵⁷ Rajalakshmi, *supra* note 35.

⁵⁸ Mitta, *supra* note 37.

⁵⁹ See Smriti Singh, *supra* note 1.

⁶⁰ *Good Act, bad provision*, THE HINDU (May 26, 2012), <http://www.thehindu.com/opinion/editorial/article3456804.ece>.

⁶¹ See *Raising age limit*, *supra* note 39.

It is pertinent for the lawmakers to realise that what we need is not a punitive measure but a legislation which provides a workable balance between the need to punish the perpetrators of child sexual offences and preserving the sexual autonomy of the children. One of the ways that this has been done in competing jurisdictions is by way of providing ‘close in age’ exemptions wherein consensual sexual activities between persons of ‘*no great age difference*’ are not incarcerated.⁶² In the United States special legislations known as ‘Romeo and Juliet’ Laws have been enacted in many states to deal with the paramount issues of teenage sex. These laws primarily provide for elimination of the penalty of crime in instances where the age difference between the two parties is minor and the offence is considered rape only because of the alleged victim falling below the age of consent. The foremost achievement of these laws is the recognition of the quintessential difference between ‘sexual predators’ who ravage the very being of children and ‘adolescents’ who merely engage in consensual sexual activity.⁶³ Therefore it can be clearly seen that an incorporation of these provisions into the Act will surely facilitate it to fight this menace more effectively and further help in achieving a much desired balance in which the interests of children are protected without curtailing their autonomy.

Measures can also be undertaken to address the dire need to impart sex education to our children. This would not only impact the ability of the child to make an informed decision in matters relating to choice of sexual partners but would also build an effective response to overtures which constitute sexual abuse such as advances by an adult relative, which many a times goes unreported. A child who has been educated in such matters is more likely to recognize sexual abuse and is found empowered to inform someone if any instance of abuse arises.⁶⁴ Needless to say that in this context, the role of the

⁶² See FINLAND CRIM. CODE, Ch. 20 §6(2).

⁶³ Noël McLaren, *Understanding the Romeo and Juliet Law* (Apr. 20, 2011), <http://www.uppermichiganssource.com/news/story.aspx?id=608159>.

⁶⁴ Heather Corina, *Sex education can stop abuse* (Apr. 30, 2009), <http://www.guardian.co.uk/commentisfree/2009/apr/30/sex-education-children-primary-school>.

parents assumes importance. The impact of constant parent-child interaction on sexual abuse matters has been noted in a report by the United States Office of Juvenile Justice and Delinquency Prevention. The report which noted a remarkable 40% decline in sexual abuse cases between 1992 and 2000,⁶⁵ attributed the same to aggressive criminal justice activity and increased awareness of both the parents and the child. Parents therefore have a pivotal role to play in guarding their children against sexual abuse and hence must not refrain from talking about these matters at home. They ought to realise that culture is not a monolith; it needs to change and adapt to shifting realities

Hence, the authors firmly believe that amending clause 2(d) of the Act which provides the definition of a child, while retaining the rest of the provisions provides the most utilitarian solution to the problem. This would ensure that the legislation while getting rid of its absurdities does not lose its significance. At last taking from Prof. Conrad's⁶⁶ quote that '*a law which can effectively deal with absurdities in future is the best law*', the legislators should realise that it is their duty to formulate a law which deals with prospective absurdities rather than creating new ones.

⁶⁵ David Finkelhor and Lisa M. Jones, *Explanations for the Decline in Child Sexual Abuse Cases*, U.S. Department of Justice, JUVENILE JUSTICE BULLETIN (Jan 2004), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/199298.pdf>.

⁶⁶ Professor Dietrich Conrad, formerly head of the law Department, South Asia Institute of the University of Heidelberg, Germany, Lecture at the Law Faculty of the Banaras Hindu University: "*Implied Limitations of Amending Power*" (1965).