ADOLESCENT SEXUALITY IN INDIAN CRIMINAL LAW: TOWARDS BALANCING AUTONOMY AND VULNERABILITY

SHRADDHA CHAUDHARY

FITZWILLIAM COLLEGE

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DECLARATION

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text. It is not substantially the same as any work that has already been submitted, or, is being concurrently submitted, for any degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

ABSTRACT

In this thesis, I critique Indian criminal law's regulation of adolescent sexuality and propose recommendations aimed at balancing the developing sexual autonomy of adolescents with their particular vulnerabilities.

I argue that the regulation of adolescent sexuality by Indian criminal law is normatively over- and underinclusive. It is overinclusive because it criminalises all sexual interactions with all minors, notwithstanding their capacity to consent to the sexual interaction. It is underinclusive because it fails to recognise the scope for sexual exploitation in family-approved practices such as child marriage and *devadasi* dedication.

Through an evidence-based discussion of the capacities and vulnerabilities of adolescents in sexual decision-making, I explain why the developing sexual autonomy of adolescents must be balanced with typical vulnerabilities that arise from their stage of development in the Indian social context. I argue in favour of recognising the consent of adolescents to non-wrongful sexual activity in accordance with their moral capacity to consent. At the same time, I argue based on a moral theory grounded in the Indian social context, that sexual exploitation is a pro-tanto wrongful sexual conduct to which adolescents do not have the capacity to consent. This means that where an adolescent is competent to consent to the sexual acts involved, her consent negates the moral wrong of rape or sexual assault, but an adolescent's consent cannot justify sexual exploitation.

Finally, I propose a tentative two-pronged solution to the simultaneous over- and underinclusiveness of Indian criminal law: (a) recognising as legally relevant the consent of those adolescents who are competent to consent to non-wrongful sexual activity and (b) incorporating a broader concept of 'sexual exploitation' into Indian criminal law. I consider the normative and regulatory concerns that might arise in operationalising this solution to provide actionable directions towards reform.

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LIST OF ABBREVIATIONS

AIDS: Acquired Immunodeficiency Syndrome

BNS: Bharatiya Nyaya Sanhita, 2023

BNSS: Bharatiya Nagarik Suraksha Sanhita, 2023

PLD: Partners for Law in Development

CCL-NLSIU: Centre for Child and the Law, National Law School of India University

CLA: Child and Adolescent Labour (Prohibition and Regulation) Act,1986

CMRA: Child Marriage Restraint Act, 1929

CrPC: Code of Criminal Procedure, 1973

CUP: Cambridge University Press

DNA: Deoxyribonucleic acid

FIR: First Information Report

HIV: Human Immunodeficiency Virus

IEA: Indian Evidence Act, 1872

ILO: International Labour Organisation

IPC: Indian Penal Code, 1860

ITPA: Immoral Traffic (Prevention) Act, 1956

LCI: Law Commission of India

LGBT: Lesbian, Gay, Bisexual, Transgender

NCRB: National Crime Records Bureau (Ministry of Home Affairs, Government of India)

NFHS: National Family Health Survey

NGO: Non-governmental Organisation

NHRC: National Human Rights Commission

OBC: Other Backward Classes

OUP: Oxford University Press

PCMA: Prohibition of Child Marriage Act, 2006

PIL: Public Interest Litigation

POCSO: Protection of Children from Sexual Offences Act, 2012

SC: Scheduled Caste

ST: Scheduled Tribe

STI: Sexually transmitted infection

UDAYA: Understanding the Lives of Adolescents and Young Adults

UK: United Kingdom

UNCRC: United Nations Convention on the Rights of the Child, 1989

UNFP: United Nations Population Fund

UNICEF: United Nations Children's Fund

USA: United States of America

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INTRODUCTION

I. Context and Questions

This thesis is concerned with the regulation of adolescent sexuality by Indian criminal law. The age of consent for all sexual interactions in India is 18 years. All persons under the age of 18 are defined as 'children' by the Protection of Children from Sexual Offences Act, 2012 (POCSO), and all sexual interactions with a 'child', so defined, are criminally punishable without exception.[1] This is because the consent of a person under the age of 18 is irrelevant to the definitions of offences under POCSO. In other words, offences under POCSO are statutory sex offences.[2] Other laws regulating sexual offences in India, discussed in detail in Chapter 3, also take the same approach towards minors. Consequently, in the eyes of Indian criminal law, de-facto consensual sexual intercourse between an 18-year-old and a 16-year-old is no different from coercive sexual intercourse by an 18-year-old with a 16-year-old or from potentially exploitative sexual intercourse between a 17-year-old and her 40-year-old relative (see the example discussed in Chapter 6.III). All of these instances attract the same mandatory minimum punishment of imprisonment for 10 years (with an upper limit of imprisonment for life),[3] and in that sense, are treated as wrongful in the same way and as deserving of harsh punishment.

However, there is something amiss in such a characterisation. Our ordinary intuitions suggest that consensual sexual intercourse between an 18-year-old and a 16-year-old *should not be* placed in the same normative category as sexually abusive behaviour like rape or sexual exploitation.[4] This normative conflict between the law as it is and as it should be, is the starting point of my enquiry. In this thesis, I investigate the wisdom of the blanket criminalisation of all sexual activity with a minor in Indian criminal law, as well as of the intuition that meaningfully consensual sexual activity between or with *certain* minors should not be equated with rape or sexual exploitation. At one level, this is an examination of where the line should be drawn. The criminalisation of all sexual intercourse with young children (say, 5-year-olds)

[1] I use the term 'minor' to refer to persons under the age of 18 in this thesis because, as I argue in Chapter 5, adolescents are a distinct normative category and should not be conflated with pre-pubescent children.
[2] By this I mean a sexual act to which criminal liability attaches 'solely by virtue of the fact that the complainant is underage.', meaning that the consent, or lack thereof, of the complainant is not the determinant of criminal liability for such sexual offences. Green, *Criminalizing Sex: A Unified Liberal Theory* (Chapter 3, n 43), 155.
[3] Protection of Children from Sexual Offences Act, 2012 (POCSO), s. 4: 'Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.'
[4] The term 'sexual abuse' is used in this thesis as a non-technical umbrella term to refer to a wide range of sexual behaviours that are wrongful by virtue of being coercive, such as rape or sexual assault, deceptive and exploitative.

is generally uncontroversial, but the criminalisation of *all* sexual intercourse with older adolescents (say, 16-year-olds) seems excessive. Nevertheless, we may feel (and rightly so, as I demonstrate through Chapters 5, 6 and 7) that regulating sexual interactions with older adolescents requires different standards compared to regulating sexual interactions with mature adults. How can we begin to explain these differences? How and to what extent can the law reflect them? At another level, this is an analysis of the operation of the law when measured against its own stated aims. Purportedly, the law is meant to promote the best interest of the child and protect minors from sexual abuse and exploitation.[5] But how far are these aims achieved? Does the operation of the law have harmful consequences of its own?

The aim of these enquiries is to chart a path towards a more nuanced approach to adolescent sexuality in Indian criminal law, reflecting both the developing sexual autonomy of (older) adolescents and their vulnerability to wrongful sexual conduct.

My tentative solution, which I present in Chapter 7, is two-pronged. First, that the developing sexual autonomy and competence of adolescents be recognised in Indian criminal law by acknowledging their right to positive sexual autonomy, and by making the consent of those adolescents who are competent to consent to non-wrongful sexual conduct[6] legally relevant. Second, that a broader concept of sexual exploitation, which can apply to contexts outside the commercial sex industry, be incorporated into Indian criminal law as an additional layer of protection against such exploitative sexual interactions.

The first prong of my proposal is a straightforward countermeasure to the over-inclusiveness of Indian criminal law's regulation of adolescent sexuality. The second prong needs further explanation. In addition to being overinclusive, Indian criminal law's approach to sexual interactions with adolescents is also underinclusive in an important way. The law's understanding of 'sexual exploitation', as I argue in Chapter 3, is limited to the commercial

[5] POCSO, Statement of Objects and Reasons: 'AND WHEREAS it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;
AND WHEREAS the State parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent—
(a)the inducement or coercion of a child to engage in any unlawful sexual activity;
(b)the exploitative use of children in prostitution or other unlawful sexual practices;
(c)the exploitative use of children in pornographic performances and materials;
AND WHEREAS sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.'
The statute does not define the terms 'abuse' and 'exploitation'.

[6] By this I mean sexual conduct that is not wrongful by virtue of being coercive, deceptive, or exploitative. For further elaboration, see Chapter 6.I.

exchange of sex by a sex worker, and the provision criminalising sex by 'abuse of authority' (which could arguably cover some exploitative sexual conduct outside these commercial contexts) is both unclear and limited in its scope. This means that Indian law is ill-equipped to capture instances of sexual exploitation other than the commercial exchange of sex by a sex worker. As research in the United Kingdom (UK) demonstrates, adolescents are just as vulnerable to sexual exploitation within seemingly consensual relationships and by their own families, as by strangers looking to purchase their sexual services.[7] In the Indian context, the inability to recognise the family as a site for sexual exploitation is a particular weakness of the law. The sexual element in family-approved practices, such as child marriage and *devadasi* dedication,[8] are not recognised by Indian criminal law. Moreover, laws that recognise these practices as non-sexual offences (the act of arranging and facilitating a child marriage, as well of dedicating a girl as a *devadasi* are recognised as criminal offences), are so poorly implemented that these practices carry on with impunity.

The second prong of my proposal seeks to address this gap in Indian criminal law. It is meant to serve as an additional layer of protection from exploitative sexual conduct, whether in apparently consensual sexual interactions or in practices approved by the family. If the consent of (certain) adolescents becomes legally relevant, it would be possible for a person accused of a sexual offence against the adolescent to claim that no sexual offence *in fact* took place because the adolescent, who is above the age of consent, gave a token of consent to the sexual act. In such a case, operationalising a broader concept of sexual exploitation would enable judges to assess whether the sexual interaction was non-wrongful sexual conduct to which the adolescent was competent to consent, or exploitative sexual conduct which, as I argue in Chapter 6, is a kind of wrongful sexual conduct to which adolescents cannot meaningfully consent.

I have limited myself to sexual exploitation in this thesis, even though it is not the only kind of wrongful sexual conduct to which adolescents might be vulnerable, for two reasons. First,

[7] Adele Gladman and Angie Heal, *Child Sexual Exploitation After Rotherham: Understanding the Consequences and Recommendations for Practice* (Jessica Kingsley Publishers, 2017) 82-92; Helen Beckett, 'Moving Beyond Discourses of Agency, Gain and Blame: Reconceptualising Young People's Experiences of Sexual Exploitation' in Jenny Pearce (ed.) *Child Sexual Exploitation: Why Theory Matters* (Policy Press, 2019) 23, 35-36; See, Sophie Hallett, 'An Uncomfortable Comfortableness': 'Care', Child Protection and Child Sexual Exploitation' (2016) 46 British Journal of Social Work 2137.

[8] The practice of dedicating girls to a temple around the time of puberty, after which the dedicated girl provides sexual services to the temple priest and others in the village in exchange for money (usually kept by the parents or other family members). The practice is discussed in detail in Chapters 2 and 3.

coercive sexual acts, such as rape and sexual assault, as well as various forms of deceptive sexual interactions,[9] are already extensively criminalised in India. Sexual exploitation, however, is a form of wrongful sexual conduct which Indian criminal law is ill-equipped to capture in its different forms. Second, as I discuss further in Chapter 3, recommendations to reform the over-inclusiveness of Indian law's approach to adolescent sexuality often suggest exempting non-exploitative sexual interactions with adolescents from criminal prosecution. However, there is nothing in the literature on sexual conduct in the Indian context to suggest what sexual exploitation means, why it is wrong, or why adolescents need to be protected from it. This gap needs to be addressed. Therefore, in Chapter 6, I argue that sexual exploitation involves taking advantage of a person's vulnerabilities to induce her to consent to an unwanted and degrading sexual interaction. The regulation of sexual exploitation, so understood, enables a balancing of adolescents' developing sexual autonomy and competences with their continuing need for protection.

II. Structure and Contributions of the Thesis

Chapter 1 provides a detailed overview of the methodology used generally in this thesis, and a critical reflection on the field work, explaining what was sought to be achieved by it, why it was necessary, its scope and limitations, and the ethical considerations and practical concerns that arose.

The second two substantive chapters of this thesis lay out the social and legal context of 'the problem' with Indian criminal law's regulation of adolescent sexuality and establish the social and legal norms which serve as the backdrop to all sexual activity (whether by adults or adolescents).

In Chapter 2, I demonstrate that the only socially legitimate space for sexual expression in India is hegemonised marriage, that is, marriage that complies with the norms of caste and honour, or, at the very least, is approved by the families of those getting married. This ensures that sexual activity is largely contained within marriage and the sexuality and reproductive capacity of women and girls remains in the control of their families and caste-based communities. This, in turn, is meant to uphold the norms of caste and honour by maintaining caste purity through

[9] In Chapter 3, I demonstrate that even though any form of deceptive sex can be prosecuted under Indian criminal law, 'promise to marry' cases, in which a man induces a woman's consent by promising to marry her without ever intending to do so (or later reneging on the promise), are overwhelmingly the most commonly prosecuted deceptive sex cases in India.

endogamy (marriage and reproduction within the same caste). I argue that these norms are widely (though not universally) accepted in Indian society, applying across religious and caste communities. They are enforced directly through child marriage, and through social reprisal against disobedience of these norms, sometimes extending to violence and even murder of those found in breach. They are also enforced indirectly by creating a culture of fear that makes it costly to risk transgression. I argue that the enforcement and acceptance of these norms creates a binary between legitimate and illegitimate sex, and between chaste wives and degraded others. While this norm emerged in the context of contestations between the British colonial government and the movement for independence in the Indian subcontinent during the late 19th and early 20th centuries, it is now entrenched in the way sex is constructed and understood in Indian society. However, despite the patina of respectability over the sexuality of wives, they may nevertheless perform sex as work or labour, and do not necessarily enjoy real respect.

In Chapter 3, I consider how Indian criminal law regulates the sexuality of minors (or persons under the age of 18). As I mentioned in Part I of this Introduction, Indian criminal law defines all minors as 'children', making no distinction between pre-pubertal minors and adolescents. All sexual interactions with all minors are criminally punishable without exception. The law gives extremely limited discretion to the police or prosecution about whether or not a particular case should be investigated and prosecuted, and once the minority of the prosecutrix and the occurrence of the sexual act are proved in court, the judge is bound to convict the accused.[10] Sentencing discretion is also limited, with high statutory minimum sentences, and even the possibility of capital punishment. Furthermore, POCSO contains a mandatory reporting provision which makes the failure to report a sexual offence against a minor criminally punishable. Given the breadth of POCSO, this essentially encompasses *all* sexual interactions with a minor. Consequently, de-facto consensual sexual interactions with and between minors often get drawn into the criminal justice system. Mapping the conclusions of Chapter 2 onto this legal framework, and considering its language, scope, and operation, I argue that rape statutes in India frequently further the social norm of containing sex within marriage and thereby controlling female sexual and reproductive capacity. When it comes to adolescents (and adolescent girls in particular), despite their stated purpose to 'protect children', the effect of these laws is to increase the control of the family and caste community over the sexuality of

[10] As I discuss further in Chapter 3.I.B, India has not had trials by jury since 1973.

adolescent girls. On the flip side, when adolescent girls make their own sexual choices and elope with their adolescent or adult partners, their parents and/or family members report a sexual offence, which sets the criminal justice system in motion. Police then trace the adolescent girl and her partner, and she is either returned to her family, who thereby regain control over her sexual and reproductive capacities or placed in a shelter home while her partner is arrested. On the other hand, the potential for sexual exploitation in family-approved practices such as child marriage and *devadasi* dedication are not even recognised, and the laws prohibiting these offences are so poorly implemented that they continue with impunity. Finally, I argue that though it is frequently suggested (by non-governmental organisations working in child protection, as well as in judgments of various Indian courts) that older Indian adolescents should be permitted to consent to non-exploitative sexual interactions, the provisions of Indian law which currently recognise 'sexual exploitation' or practices akin to it are insufficient to protect adolescents because of their limited and/or unclear scope.

Through these two Chapters, I bring together a wide range of historical, sociological, and ethnographic literature to demonstrate that the permissibility of sex in Indian society is determined by the legitimacy granted to sex through marriage, preferably hegemonised (compliant with the norms of caste and honour and/or family-approved) marriage, rather than consent or sexual choice. Containing sex within marriage allows the family to control the sexual and reproductive capacities of women and girls, which is essential to upholding the norms of caste and honour. That the social norms of containing sex within marriage and of controlling the sexual and reproductive capacity of women and girls by the family are upheld and even strengthened by Indian rape law has previously been noted by Indian feminist scholars. My analysis traces how the language, scope, and operation of Indian criminal laws regulating the sexuality of minors enables such control. Because these norms affect females more than they do males, and because the prosecutrices in most cases under POCSO are female and the accused persons male, despite POCSO being gender neutral, I use the pronouns 'she/her' to refer to prosecutrices/victims and he/him to refer to accused persons/perpetrators in this thesis. In doing this, I also situate the problems with Indian criminal law's regulation 'adolescent sexuality' within the larger social context of the control of female sexuality within India's caste-based patriarchy.

In Chapters 4 and 5, I attempt to draw out the normative category of 'adolescent', and to distill the capacities and vulnerabilities of adolescents from available evidence, as far as possible within the Indian context.

Chapter 4 provides an overview of the Indian socio-normative[11] conceptions of childhood, adolescence, and adulthood, as well as the transitions between these phases. Though the *experience* of life stages is contingent on socio-economic position, I argue based on ethnographic, sociological, and anthropological literature that childhood and adolescence are socio-normatively distinguished from each other by the emergent sexuality of adolescence. Because sexuality is considered antithetical to the perceived innocence of childhood, the emergence of reproductive capacity and sexuality, recognised through socially significant pubertal events such as menstruation, mark the definitive end of childhood and the beginning of adolescence. Adolescence ends and adulthood begins when it is considered appropriate for a person to be inducted into the domain of marriage, and sexuality and reproduction within marriage (whether or not they are actually married). I also argue that unlike in the West, growing out of childhood in India is not marked by autonomy in the sense of individuation and separation from one's natal family, but by finding one's place within collective structures. The collective and hierarchical nature of Indian society means, moreover, that children are brought up to learn deference and obedience towards elders in the family and towards authority figures in general, a habit that continues into adolescence and possibly into adulthood. Finally, I argue that though socio-normative conceptions of adolescence recognise the emergent sexuality of adolescents, they tell us nothing about the *competence* of adolescents to make sexual decisions. This is because, as Chapter 2 shows, the Indian social view of the permissibility of sex is based on marriage rather than on consent, and therefore competence to make sexual decisions is irrelevant within this view. However, I argue that this view represents public or majoritarian morality which is in conflict with critical[12] and constitutional morality.[13] I also argue that this morality is not universally accepted within Indian society, as is demonstrated by the evidence on adolescent sexual activity in India. A comparison between data from the West (mainly the United Kingdom, United States of America, and some European countries) and from India

[11] This term refers to what is normative as per the informal and unwritten rules of Indian society, or what is widely perceived to be correct and appropriate according to Indian social norms.
[12] This term refers to a more universally applicable set of rules and standards which are reflexive and can, in the words of Hart, be 'used in the criticism of actual social institutions'. Herbert Lionel Adolphus Hart, *Liberty, Law and Morality* (Stanford University Press, 1963) 20.
[13] By this term I mean morality that is in accordance with the values of the Constitution of India, 1950. The meaning and use of this term is discussed further in Chapter 7.

indicates that the recorded incidence of sexual activity (outside marriage) during adolescence in India is much lower than in the West. Nevertheless, I argue that this sexual activity is significant because it represents a counter-current against majoritarian morality.

Because socio-normative conceptions of adolescence and adolescent sexuality represent majoritarian morality, Chapter 5 provides a different basis for the moral assessment of adolescent sexuality. In this Chapter, I argue that the permissibility of a sexual interaction with an adolescent ought to be based on their competence to consent to that sexual interaction, and with that in mind, consider the evidence available on the decision-making capacities of adolescents. At the same time, I consider the vulnerabilities of adolescents to assess whether and to what extent the decision-making capacity and autonomy of adolescents is affected by them. This lays the foundation for the discussion, in Chapters 6 and 7, on the sexual exploitation of adolescents. Based on the findings of a wide range of studies from the West (and a smaller sample from India), I argue that the emergent sexual self-concept of adolescents makes it possible for them to have a right to positive sexual autonomy. Most studies find that older adolescents (16 to 18-year-olds) have rational decision-making capacities that are indistinguishable from that of adults, including mature adults, and that functional autonomy also increases with age. This means, I argue, that adolescents have the underlying cognitive capacities essential for the moral capacity to consent to sex. However, there is robust evidence to indicate that psychosocial maturity, or the combination of abilities that allows a person to make decisions in their long-term interests,[14] is generally not reached before the age of 18. This lack of psychosocial maturity makes adolescents inherently vulnerable to those who seek to take advantage of them and constrains their *capacity* to make decisions. Thus, when it comes to decision-making, I argue that psychosocial maturity is the categorical critically normative distinguisher between adolescents and adults. I then argue that adults and adolescents alike experience situational and pathogenic (within relationships of care and trust) vulnerabilities as constraints on their *autonomy* to make decisions and discuss the factors that might aggravate or mitigate the effect of these vulnerabilities.

[14] The cognitive capacities necessary for rational decision-making include only the ability to receive, understand and process information, as well as metacognition and the ability to make and understand abstractions. Psychosocial maturity, however, requires the development of a different set of skills, including the ability to value a perceived benefit or reward correctly, understand the likelihood of a negative consequence occurring, weigh the likely risk against the perceived benefit appropriately, avoid unnecessary risk-taking while pursuing reward, among others. The literature on adolescent development suggests that while older adolescents' cognitive capacities are indistinguishable from that of mature adults, they are not psychosocially mature. This is discussed in detail in Chapter 5.I.B and 5.II.A.

Through Chapters 4 and 5, therefore, I develop socio-normative and critically normative constructions of 'the adolescent'. Relying on psychological, behavioural, and neuroscientific research, I provide contextually specific normative underpinnings for the claim that the developing sexual autonomy of adolescents coexists with their continuing need for protection. I do this by demonstrating that adolescents' competence to consent to non-wrongful sexual activity is on par with adults, but unlike adults, they are inherently vulnerable to being taken advantage of and lack the capacity to make decisions that are in their long-term interest.

In considering capacities and vulnerabilities and their effect on decision-making, my frame of analysis is competence based on age, and therefore, I limit myself to neurotypical persons. This is for two reasons. First, the wide variety of intellectual and cognitive disabilities and their differing effects on competence to make decisions makes it impossible for me to do justice to the subject within the scope of this thesis. Second, though intellectual or cognitive disabilities can disrupt typical trajectories of development, and therefore affect both capacity and vulnerability, the effect of intellectual and cognitive disabilities is not the same as that of age-related immaturity. For one, capacity constraints related to adolescence (the lack of psychosocial maturity) are typically outgrown. While the capacities of non-neurotypical adults do not necessarily remain static over time, it is also not inevitable that their capacity constraints will be removed with time.[15] Furthermore, some of the problems with adolescent decision-making (related to lack of information) can be removed by providing sex education and necessary information about sex, sexuality, contraceptives, sexually transmitted diseases, and so on. Whether this is possible in the case of non-neurotypical adults depends on the degree of their cognitive or intellectual disability, meaning that in some cases providing education and information might possibly make little to no difference to the capacity of a non-neurotypical person.

The use of the concept of 'mental age' should, therefore, be avoided in assessing the capacity of non-neurotypical adults to consent to sexual interactions. As Grant and Benedet astutely observe, such an approach infantilises adults.[16] This is not to say that non-neurotypical adults might not need additional support in decision-making or might not be more vulnerable than neurotypical adults to sexual exploitation, but that treating them as though they were

[15] Jillian Craigie and others, 'Legal Capacity, Mental Capacity and Supported Decision-Making: Report from a Panel Event' (2019) 62 International Journal of Law and Psychiatry 160, 164.
[16] Janine Benedet and Isabel Grant, 'A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law' (2013) 43(1) Ottawa Law Review 1, 9.

adolescents (or indeed, children) is inappropriate. In addition to being patronising, the approach is also practically flawed because, as Grant and Benedet argue, it equates very different capacities, such as the ability to do mathematics or understand grammar, with the ability to make sexual decisions.[17] Consequently, the capacity constraints of intellectual or cognitive disabilities should not be conflated with those of age-related immaturity, and the focus of this thesis is age-related immaturity.

Chapters 6 and 7 build on the foundational arguments of Chapters 2 to 5 to consider *how* the capacities and vulnerabilities of adolescents may be balanced.

In Chapter 6, I make normative arguments about why adolescents' consent to non-wrongful sexual activity should, to the extent that they have the competence to consent to it, be considered morally meaningful. I argue that the standards of majoritarian morality rooted in Indian socio-normative conceptions of permissible sex are inappropriate against the standards of critical morality, within which consent is central to determining the permissibility of sexual conduct. Therefore, the competence of adolescents to consent to sex should inform our assessments of which sexual interactions with and involving adolescents ought to be permissible. First, I argue that anyone who has the moral capacity to consent to non-wrongful sexual conduct should not be prevented from engaging in it, despite its potentially harmful or injurious consequences, *because* such conduct is not morally wrongful. Second, I argue that the same approach cannot be taken to exploitative sexual conduct because it *is* wrongful. To make this argument, I lay out a moral theory of the wrongfulness of sexual exploitation according to which sexual exploitation is the exchange of sexual labour or services for some perceived benefit to the exploitee (or facilitator), which is wrong for two reasons: (a) the exploiter takes advantage of the vulnerabilities of the exploitee in a situation where it was wrong to do so, and (b) the exploiter degrades the exploitee. I argue that this degradation occurs because (i) unwanted sex is performed as labour, which is always seen as dirty work in the Indian context regardless of the gender of the person performing it, or (ii) unwanted sex is performed in a social context where, for women, the possibility of degradation is always built into sex.[18] Relying on the layered framework of vulnerability discussed in Chapter 5, I also consider how vulnerabilities relate to sexual exploitation and its wrongfulness, arguing that

[17] ibid, 9-10.

[18] This is a theoretical discussion of what sexual exploitation is and what makes it wrong. It does not specifically consider the different ways in which sexual exploitation may take place, in-person, online, in the context of the family or the commercial sex industry. However, the principles laid out can apply to any and all of these contexts.

pathogenic and situational vulnerabilities act as constraints on a person's decision-making autonomy, and in the case of adolescents, their inherent vulnerabilities constrain decision-making *capacity*.

Because my account of sexual exploitation involves taking advantage of a person's vulnerabilities to induce them to consent to unwanted sex, and because these vulnerabilities often take the form of material and non-material needs that are met by the exploiter,[19] sexual exploitation may seem conceptually similar to 'grooming'. However, I do not consider grooming behaviours within my account of sexual exploitation for two reasons. First, the ambiguity involved in recognising what, precisely, amounts to 'grooming' requires greater attention than it would have been possible for me to give the subject.[20] Second, my focus is the meaning and moral significance of sexual exploitation within the larger aim of addressing the simultaneous over- and underinclusiveness of Indian criminal law's approach to adolescent sexuality. Therefore, grooming in relation to sexual exploitation (or indeed sexual abuse of any kind), which may (at best) be a preparatory offence,[21] is beyond the scope of this thesis.

Having set out a theory of sexual exploitation rooted in the Indian context, I argue that critically normative adults, being capable of consenting to both the sexual *acts* and the exchange that is proposed by the exploiter, can meaningfully consent to their own sexual exploitation and therefore, the sexual exploitation of adults is permissible despite being pro-tanto wrongful. However, since adolescents are not psychosocially mature, they do not have the capacity to consent to the *exchange* that is proposed by the exploiter, even when they have the capacity to consent to the sexual *acts* that are proposed. Therefore, their consent to sexual exploitation should not be considered morally meaningful and the sexual exploitation of adolescents is all-things-considered wrong. That adolescents have the capacity to consent to the sexual acts involved in sexual exploitation, I argue, makes the sexual exploitation of adolescents morally distinct from rape.

In Chapter 7, I draw from the discussions on morality in Chapter 6 to make prescriptive arguments about how Indian criminal law *should* regulate adolescent sexuality. First, I

[19] These terms are explained in detail in Chapter 6.II.B.1.
[20] Anne-Marie McAlinden, *'Grooming' and the Sexual Abuse of Children: Institutional, Internet and Familial Dimensions* (OUP, 2012) 3-4. Anne-Marie McAlinden, *Children as 'Risk': Sexual Exploitation and Abuse by Children and Young People* (CUP, 2018) 128-133.
[21] Samantha Craven, Sarah Brown and Elizabeth Gilchrist, 'Sexual Grooming of Children: Review of Literature and Theoretical Considerations' (2006) 12(3) Journal of Sexual Aggression 287, 297; Limor Ezioni, 'The Crime of Grooming' (2020) 8(1) Child and Family Law Journal 1, 10-11.

demonstrate that recent decisions of the Supreme Court of India have explicitly recognised a right to positive sexual autonomy linked to personal choice and held that the permissibility of sexual conduct in criminal law must be based on consent. Therefore, I argue that the assessment of who *should* be allowed to engage in a particular type of sexual activity ought to be based on who has the competence to consent to that sexual activity. I then argue that although the articulation of the right to positive sexual autonomy has thus far been limited to adults in India, there are good reasons to extend this right to those (generally older) adolescents who are competent to consent to non-wrongful sexual intercourse. On this basis, I advance normative arguments to establish, based on the discussions in Chapters 2 and 3, that Indian criminal law's approach to adolescent sexuality is, indeed, simultaneously over- and underinclusive. Finally, I propose the tentative two-pronged solution mentioned in Part I above to address this simultaneous over- and underinclusiveness: (a) recognising as legally relevant the consent of those adolescents who are competent to consent to non-wrongful sexual activity, and (b) incorporating a broader concept of sexual exploitation, capable of capturing instances of sexual exploitation outside the context of the commercial sex industry, to safeguard adolescents from exploitative sexual interactions. I consider the options available to operationalise this two-pronged proposal in Indian criminal law, and the regulatory concerns likely to arise in so doing. While I do not propose a model statute or provision, I lay out actionable directions on operationalising this two-pronged proposal by incorporating findings from my field work.

Through Chapters 6 and 7, I bring together and engage with the normative (from the perspective of moral theory and law) and regulatory considerations at play in addressing the simultaneous over- and underinclusiveness of Indian criminal law's approach to adolescent sexuality. I engage critically with the literature on the meanings and moral significance of exploitation, which Stephen Wilkinson categorises into two broad types: 'disparity of value exploitation' and 'wrongful use exploitation'.[22] I also engage with feminist literature on prostitution/sex work and sexual labour to argue that the wrongfulness of sexual exploitation does not draw *merely* from the sexual nature of the labour or services performed. I build on existing accounts (by Ruth Sample and Robert Goodin) of 'exploitation' to craft a moral theory specific to 'sexual exploitation' as it would operate in the Indian context and provide a framework to balance the capacities and vulnerabilities of adolescents. In considering the different ways in which this moral theory can be operationalised, I grapple with concerns around the manner and effect of

[22] Stephen Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade* (Routledge, 2003) 13-14.

incorporating this broader concept of ‘sexual exploitation’ into criminal law, the difficulties and imperfections of reflecting components of sexual exploitation such as ‘vulnerability’, especially relating to non-material needs, in law, and the messiness of drawing lines in a way that reflects the capacities and vulnerabilities of adolescents while still serving its signalling purpose.

It is often suggested, as I demonstrate in Chapter 3, that Indian law should allow adolescents to consent to sexual interactions that are non-exploitative. This is the first attempt to engage with the many dimensions of that suggestion, to lay out its foundational normative considerations, to suggest the ways in which it might be done and to grapple with (at least some of) the normative and regulatory concerns that would arise in doing it. This thesis does not offer a complete or even uncontroversial solution to the simultaneous over- and underinclusiveness of Indian criminal law’s approach to adolescent sexuality. Rather, it is intended as a detailed opening salvo in an overdue debate, and a framework against which future research can be undertaken.

CHAPTER 1: RESEARCH METHODOLOGY

This chapter outlines the methodology used in this thesis, specifying the research questions, the theoretical framework and the design, conduct and function of the empirical research element.

I. Research Questions

The main question this thesis seeks to answer is: how can Indian criminal law be reformed to enable the developing sexual autonomy of adolescents to be balanced against their vulnerability to wrongful sexual conduct? In answering this central question, I also address the following related and subsidiary questions:

1) What is the approach of Indian law towards adolescent sexuality? What are the reasons motivating this approach?
2) How does Indian law's approach to adolescent sexuality prop up social practices of caste and social notions of honour? In doing so, does the law fail against its stated purpose of 'protection children from sexual abuse and exploitation'?

As I mentioned in the Introduction to this thesis, I conclude from my assessment of Indian law's approach to adolescent sexuality that it is simultaneously over- and underinclusive. It punishes adolescents and their partners for non-wrongful sexual conduct to which they should have a right to consent, while failing to protect them from practices which have the potential to be sexually exploitative but occur at the behest of, or with the approval of, the family and caste-based community. One possible solution to this simultaneous over- and underinclusiveness, which is frequently also suggested by child rights activists and courts in India (see Chapter 3.IV), is to recognise the sexual autonomy of some minors, usually older adolescents, while still protecting them from wrongful sexual conduct to which they are vulnerable, particularly sexual exploitation. To that end, I examine the following questions:

3) Should the legal category of 'child', which includes all persons under the age of 18, be reconfigured within the criminal law to better reflect the differences between younger (especially pre-pubertal) children and older children, or adolescents, as regards their competence to consent to sexual interactions? If so, what should be the basis of this reconfiguration?

4) What, if anything, can Indian socio-normative conceptions of the life-stages of childhood, adolescence and adulthood tell us about how the legal category of 'child' should be reconfigured?
5) Should the consent of older adolescents to sexual interactions be recognised? If so, on what basis?
6) Are there sexual interactions to which the consent of older adolescents should not be considered legally valid? If so, why?
7) How should sexual exploitation be understood in the Indian social context? What role do the concepts of 'vulnerability', 'unwantedness' and 'degradation' play in this understanding of 'sexual exploitation'?
8) Provided there is an argument to be made in favour of recognising the consent of adults to sexual exploitation as legally valid, should the consent of older adolescents to sexual exploitation likewise be recognised as legally valid?
9) Assuming that the answer to question (5) is positive but the answer to question (8) is negative, how could Indian law protect older adolescents against 'sexual exploitation' in the event that it decided to recognise the consent of older adolescents to sexual interactions as valid?
10) What are the chief practical concerns that arise in recognising the consent of older adolescents to some (non-wrongful) forms of sexual conduct? How can these concerns be addressed?
11) What are the chief practical concerns that arise in operationalising 'sexual exploitation' in Indian law? How can these concerns be addressed?

The following section details the methodological approaches and theoretical lens employed in exploring these research questions.

II. Methodology and Theoretical Lens

Most of my research is best described, in Rubin's words, as 'standard legal scholarship'.[1] I assess the normative and pragmatic concerns that arise in Indian criminal law's regulation of sexual interactions with minors and propose directions for reform that would (to some degree) address the identified concerns. My reflections on the law are generally not doctrinal or interpretative. This is because child sexual abuse and, in particular, de-facto consensual cases

[1] See, Edward L. Rubin, 'Law and and the Methodology of Law' (1997) 3 Wisconsin Law Review 521.

under POCSO have not seen much jurisprudential engagement by Indian courts or the Indian legal academia. As empirical studies on POCSO cases indicate,[2] most de-facto consensual cases under POCSO end in acquittals because the prosecutrix and all other prosecution witnesses (usually her relatives) turn hostile (that is, refuse to testify or to support the prosecution case). Given this trend, there have been few opportunities for Indian courts, at any level, to consider the law doctrinally.[3] In any case, the language of the law, which I discuss in detail in Chapter 3, provides little room for doctrinal or interpretative engagement. It creates a strict liability offence, whereby once the minority of the prosecutrix and the fact of the sexual act between the prosecutrix and the accused are proved, a judge has little choice but to convict the accused person. There is no scope for the interpretation of, or even fact-finding on, the consent of the prosecutrix, which is deemed legally irrelevant if she is a minor, or the *mens rea* of the accused (intention, knowledge, recklessness, negligence or any other mental element regarding the sexual act, the consent of the prosecutrix or the age of the prosecutrix), as these are not ingredients of the offences of penetrative sexual assault or sexual assault defined in POCSO, and the sexual offences against children defined in the IPC. This means that the aspects of sexual offences which generally give rise to doctrinal or interpretative engagement are closed off by the language of the law.

Therefore, this thesis is in the nature of a critical reflection on the law in action. In undertaking this critical reflection, I adopt a feminist lens. As I mentioned in the Introduction to this thesis, I consider the gendered implications of the implementation of POCSO due to India's caste-based patriarchy, revealing its uneven impact on female minors despite its purported gender-neutrality.[4] In assessing the language and implementation of POCSO and the IPC, I also consider how the hegemonic institution of caste, and its norms of honour, purity and endogamy, are furthered by these laws, and the impact of this on the lived realities of females and those couples which are drawn into the criminal justice system.[5]

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[2] Chapter 3, n 57 and 59.

[3] This is not true only of de-facto consensual cases under POCSO, but of POCSO in general. Only two issues under the POCSO have been treated interpretatively by Indian Courts:
First, the meaning of 'touching with sexual intent'. For this, see *Attorney General v. Satish*, (2022) 5 SCC 545.
Second, whether downloading, but not making or distributing child pornography is an offence under the POCSO. For this, see, *Just Rights for Children Alliance v. S. Harish* (2024) SCCOnline SC 2611; *S. Harish v. Inspector of Police* (2024) SCCOnline Mad 2 (High Court of Madras).

[4] Uncovering the gendered implications of *prima facie* gender neutral laws forms part of 'asking the woman question', a method of doing feminist research in law. See, Katherine T. Bartlett, 'Feminist Legal Methods' (1990) 103(4) Harvard Law Review 829, 836.

[5] That marginalised identities as a whole, and not merely 'women', need to be the focus of feminist research was brought to the fore by intersectionality-based critiques of feminism. See, Kimberlé Crenshaw, 'Demarginalizing

Another essential aspect of feminist research is reflexivity, or the consideration of how one's positionality affects one's thoughts, methods and conclusions.[6] I came to be drawn to the law on sexual offences (perhaps even to criminal law in general) because of traumatic personal experiences which, from an early age, made me think about the worst things that human beings do to each other. Between the ages of three (the earliest I can remember) and ten, I was sexually assaulted on more than one occasion, by more than one person.[7] After I first spoke about my own experiences, I heard personal accounts of others amongst my friends and family who have had similar experiences, which made me realise how pervasive child sexual abuse in India (perhaps everywhere) is. In 2017-18, after completing my undergraduate law degree, I worked with the Centre for Child and the Law, National Law School of India University, Bangalore (CCL-NLSIU). I was the second lead researcher on three out of the five state studies on the functioning of Special Courts under the POCSO Act (Maharashtra, Andhra Pradesh and Karnataka). As part of these studies, I read hundreds of case reports of POCSO trials from across these states, and the phenomenon of de-facto consensual cases drew my attention. It seemed to me (and much of the discourse around child rights in India reflects this position) that the law unfairly punished minors and their partners even when their actions did not deserve it. But I did not think (for reasons upon which I elaborate in Chapter 7) that the solution to this unjust situation was simply to reduce the age of consent. This led me to read, and engage with, the available literature on the subject, and when I saw how little attention the topic received from the Indian legal academia, I decided to make it the topic of my Ph.D. research.

I return to the subject of positionality when detailing aspects of my field work, but it is also essential to consider it in the context of desk-based research,[8] notwithstanding its costs.[9] Aside

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the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 8 University of Chicago Legal Forum 139. Similar critiques have also been made by dalit feminists of mainstream Indian feminism**.** See, 'Introduction: Theorising Dalit Feminism' in Sunaina Arya and Aakash Singh Rathore (eds.), *Dalit Feminist Theory: A Reader* (Routledge, 2020).
This is now generally accepted (though perhaps poorly implemented) in mainstream feminism. See, Katherine T. Bartlett, 'Gender Law: After Twenty-five Years' (2020) 27(1) Duke Journal of Gender Law & Policy 1.

[6] Kim V. L. England, 'Getting Personal: Reflexivity, Positionality, and Feminist Research' (1994) 46(1) The Professional Geographer 80; Kelly F. Jackson and others, 'Positionality in Critical Feminist Scholarship: Situating Social Locations and Power Within Knowledge Production' (2023) 39(1) Feminist Inquiry in Social Work 5.

[7] As with most other survivors of child sexual abuse, my abusers were persons known to me, and not strangers. John R. Conte and June Simon, 'Sexual Abuse of Children' in Geffner and Others (eds.), *Handbook of Interpersonal Violence and Abuse Across the Lifespan* (Springer, 2022) 741, 854.
Mercifully my abusers were not from amongst my family.

[8] Thomas Peck, 'Interdisciplinary Methodological Approaches to Desk-based Socio-Legal Human Rights Research' (2023) Law and Method, doi: 10.5553/REM/.000069.

[9] Mark Fathi Massoud, 'The Price of Positionality: Assessing the Benefits and Burdens of Self-identification in Research Methods' (2022) 49 (Supplementary 1) Journal of Law and Society S64. The author argues, 'In some cases, scholars communicate painful memories to their research subjects, reviewers, and readers. Doing so may

from (partly) guiding my interest in the subject, my experience of child sexual abuse was, undoubtedly, always a factor in the way I approached my research. Aside from having to find ways to cope with the (sometimes disgustingly graphic) material that I sifted through, I had to be conscious and mindful of whether my response to an argument stemmed from an honest assessment of its merits or my 'gut response' to it. When I read the work of Stephen Kershnar, for instance, who argues that sexual interactions between adults and children (even pre-pubertal children) are not harmful to children per se but only become harmful because of societal taboos which stigmatise the relationship,[10] my first response was a flood of tears and anger. To ensure that my critique of his argument was not unfair and did not stem from these feelings alone, I had to step away from the work for a while, let the first wave of emotion pass and reconsider the work afresh on its academic merits. I still disagreed with his argument, but being reflexive about my feelings allowed me to develop critiques independently of these feelings.

Similarly, given the patriarchal nature of Indian society, and the recorded propensity of judges, police officers and others in the Indian criminal justice system to rely on rape myths and stereotypes, the 'solution' of deeming the consent of all minors to all sexual interactions legally irrelevant sometimes seemed sensible. If my fear of being doubted and shamed prevented me from sharing my experience with anyone for over a decade, should not those who had the courage to report their most traumatic experiences be protected from revictimisation through consent-assessment during a criminal trial? When plagued by these doubts, I had to force myself to think of the issue more deeply, in terms of whether deeming the consent of all minors legally irrelevant was indeed an effective solution to these problems. There are, undoubtedly, deep-rooted systemic issues with the Indian criminal justice system, and the reliance on rape myths and stereotypes is one of them. However, as I argue in Chapters 3 and 7, the deeming of minors' consent as irrelevant has not, in fact, prevented the use of rape myths and stereotypes in cases under POCSO, because if the minority of the prosecutrix cannot be proved (as is often the case), her consent becomes legally relevant again. A real, albeit long-term and more demanding, solution to this problem (as I argue in Chapter 7 and the Conclusion to this thesis) lies in larger societal changes, better and regular sensitivity training of the functionaries of the criminal justice system, greater scrutiny over and accountability of these functionaries within

cause discomfort...'. For me, reflecting on my positionality has meant a painful revival of repressed trauma and the feeling of being exposed to an almost voyeuristic interest in my worst experiences. And it is no argument to say that I could reflect on my positionality in other ways, without reference to my trauma. I could, but that would make this engagement with positionality performative, rather than honest or reflexive.

[10] Stephen Kershnar, *Pedophilia and Adult-Child Sex: A Philosophical Analysis* (Lexington Books, 2015).

and without their institutions, and ensuring that the procedural safeguards meant to ensure a 'child friendly' trial are scrupulously followed. I also had to think of the issue more holistically, being mindful of the rights of the accused. While it is important to be sensitive to the predicament of the prosecutrix, criminal law must also be fair to the accused whose liberty (sometimes life) hangs in the balance. A law that deems the consent of the prosecutrix irrelevant because consent assessment *may* at times (or even frequently) rely on rape myths and stereotypes throws the baby out with the bath water. I had to remind myself, in other words, that merely because I am unlikely, because of my privilege, to be drawn into the criminal justice system, doesn't mean that incursions into the rights of the accused should be taken lightly. Applying the feminist lens also enabled me to appreciate that where the accused person is the boyfriend or husband of the prosecutrix, a law that enables his imprisonment for engaging in a consensual sexual act, does no good to women and girls either. This exercise allowed me to see that what seems, *prima facie*, a quick and easy solution is not an effective one.

I also had to be conscious of my own socio-economic privilege when assessing these de-facto consensual relationships. As an upper-caste woman with the freedom to choose from a wide range of life-choices, it was easy for me to fall into the trap of viewing these relationships negatively because they tend to reinforce gendered forms of labour and burdens on adolescent women and often come at the cost of their education and independence. I found myself worrying that, being young, these girls may be entering into relationships (sometimes marriages) which they will subsequently regret. While these are genuine concerns, I had to check myself and recall that my research question was not whether these relationships were 'good' for those who were in them, but whether they deserved to be criminally punished, and whether criminally punishing these relationships served the aim of 'protecting children from sexual abuse and exploitation'.

The theoretical lens of feminism also encouraged me to challenge the self-sufficiency of law by rooting both my theoretical reflections and my recommendations on relevant lived experiences and on the knowledge generated by other disciplines.[11] These reflections, therefore, are built on insights from disciplines other than law and situated in the Indian social context. For instance, I use historical and sociological writings as well as ethnographic accounts to lay out the Indian social context in which these laws operate, and to flesh out socio-normative understandings of the life stages of childhood, adolescence, and adulthood in India. In

[11] Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 69.

discussing the cognitive capacities and the competence of adolescents to consent to sexual interactions, I rely on data from psychological, behavioural, and neuro-scientific studies. However, data on these points in the Indian context are significantly limited in important ways.[12] First, there are almost no studies in the Indian context on the decision-making, and cognitive, capacities of Indian adolescents, let alone studies comparing the relative capacities of adolescents and adults. This means that inferences have to be drawn about Indian adolescents from studies that are based (usually) in the Western context, which is a significant limitation. Second, the studies that exist (for instance on the nature and extent of sexual activity of Indian adolescents) often report solely on the sexual activity of older adolescents (sometimes placing them into the same category or age band as young adults), tend not to be representative (in terms of geography or caste/class identity), and focus overwhelmingly on heterosexual activity. They generally provide a breakdown of the sexual acts in which adolescents engage, correlating this with age, without considering other essential aspects such as how adolescents *feel* during and about these encounters, or their reasons for engaging in sexual activity. They also tend to take a somewhat positivistic approach to reporting the data collected in that there is little to no reflection on how far the data represent the reality of Indian adolescents' sexual experiences, given the stringent norms against pre-marital sexual activity that generally operate in the country. Consequently, the data on which I rely to draw conclusions about adolescent sexuality may be incomplete in crucial ways. As I acknowledge in Chapter 5, therefore, more and better studies are required in this area, and any conclusions I draw are necessarily subject to the limitations of the data on which they are based. This does not mean that the conclusions and recommendations are not sound, however, as they are based on the best evidence that *is* presently available.

My theory of sexual exploitation, detailed in Chapter 6 is specific to the Indian context, unlike other theories of exploitation and sexual exploitation, and seeks to reflect the lived experiences of women and socio-economically marginalised sections of Indian society. The moral significance and limits of adolescent consent are considered in view of literature drawn from moral philosophy and feminist writings. Finally, in assessing the operation of law and suggesting directions for reforms, I rely on evidence generated through legal, sociological, and civil-society research, and to a more limited extent, on insights from my field work.

[12] I consider these limitations in detail when discussing these studies in Chapters 4 and 5.

The following section describes the qualitative field work I conducted, outlining the purpose it serves in the thesis, and providing an overview of the ethical considerations, challenges and limitations of the field work. This field work played a crucial role in helping me appreciate and account for the operational constraints in the implementation of my proposed reforms, thereby acting as a bridge between theory and practice and informing my answers to questions (10) and (11) (see Part A above) on the recognition of adolescent sexual autonomy and the operationalisation of a concept of 'sexual exploitation' in Indian criminal law.

III. Field Work

Too often, purely 'legal' research fails to account for the feasibility of its theories and recommendations. Banakar calls this 'top-down' legal scholarship, which 'starts with the law, legislation, legal rules or legal decisions and examines them using the legal system's standards and principles.'[13] Large parts of my research are also, in this sense, top-down. Importantly, I do not seek to employ the methods of 'grounded theory' in developing the argument that adolescents have moral capacities that entitle them to greater recognition of their sexual decision-making, or in conceptualising what sexual exploitation is and why it is wrong even though this conceptualisation is specific to the Indian context. My field work was not meant to, and does not, inform other theoretical parts of the thesis either, including those in Chapter 7, such as the relevance of constitutional morality, its links with critical morality or its dissonance with Indian socio-normative conceptions of permissible sexual conduct, even though insights from the field work are used in other parts of Chapter 7.

However, my overall aim is to develop a set of workable proposals for reforming Indian criminal law's regulation of adolescent sexuality, and it was clear to me that in this aspect of the thesis, I needed to engage with, and develop, a good understanding of the priorities and concerns of those who would ultimately implement any reformed criminal law framework. When working on the three state studies at CCL-NLSIU (see above), I saw first-hand how fragmented a picture purely statutory or abstract considerations of the law provided.[14] Through my interviews with court staff I became aware of the practical challenges of conducting 'in-camera' proceedings. When I spoke to police officers, I realised that so-called 'Special Juvenile

[13] Reza Banakar, *On Socio-Legal Design* (Lund University, 2019) 4.

[14] This is a view widely taken in the literature on socio-legal research. See, for instance, Lisa Webley, 'The Why and How to of Conducting a Socio-Legal Empirical Research Project' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds.) *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge, 2020) 58, 59; Reza Banakar and Max Travers, 'Law, Sociology and Method' in Reza Banakar and Max Travers (eds.), *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005) 7, 12-13.

Police Units', where they existed, were frequently not investigating only cases under POCSO, and when I interviewed Special POCSO judges I learnt that some 'Special POCSO Courts' were simultaneously also trying terror-related offences. To get a similarly practical view of *my* proposals, I decided to conduct field work in the form of qualitative interviews with select functionaries of the child protection system (see details in sub-section C below).

A. Aims and Objectives of the Field Work

The limited aim of my field work was to get a grounded perspective on aspects of the two-pronged solution I propose in Chapter 7.[15] My objective in getting the views of the functionaries of the child protection system on these aspects of my proposal was two-fold. First, as I mentioned above, I hoped to examine the workability or feasibility of my proposals in the eyes of those who engage with the Indian criminal justice and child protection systems. Were they able to understand what I meant to convey by 'sexual exploitation'? How far did they agree that the conduct I sought to capture and describe as 'sexual exploitation' was distinct from the already recognised offence of 'rape'? What were their views on Indian criminal law's approach to adolescent sexuality? How did they understand some of the moving parts of my theory, such as 'vulnerability' and 'adolescence'? Second, I sought to understand the barriers that could arise in the implementation of my proposals, either through misgivings directly expressed by the functionaries I interviewed, or through their disagreements with, or confusion regarding, particular aspects of my proposals which would indicate practical challenges in implementing the legislative changes I suggest. For instance, what did they think would be the biggest pitfalls of recognising the consent of older adolescents to sexual activity? What were their suggestions, if any, to deal with these pitfalls? Did they believe that such a recognition would do more harm than good to adolescents? Were there problems with Indian criminal law's approach to adolescent sexuality that my proposals did not or could not address? What were their concerns about allowing government functionaries a greater degree of discretion in determining the treatment of de-facto consensual cases? Given the linguistic diversity of the country, were there challenges in translating the key components of my proposals to local languages? Could these challenges be addressed?

[15] My fieldwork was not ethnographic research in the sense that my aim was not to draw any generalisable conclusions about the functioning of the child protection system, or how its functionaries act, or shape or perceive the legal system. For work of this nature, see Shailesh Kumar, 'Access to justice and Sexual Violence against Children in India: An Empirical Study of the Reforms under the POCSO (Protection of Children from Sexual Offences) Act 2012' (Ph.D. Thesis, Birbeck, University of London, 2022).

While it would have been possible to formulate a set of recommendations without speaking to these functionaries, there were two reasons why I considered this engagement with practitioners' perspectives and reactions essential.[16] First, it was the failure appropriately to reflect the ground realities of adolescent sexuality and the views of the functionaries of the child protection system that, in part, led to the enactment of a law that serves not to protect children from sexual abuse and exploitation, but rather to channel them into marriage or punish them and their partners[17] for exercising their sexual autonomy and choice.[18] By consulting the functionaries of the child protection system, I hoped to avoid putting forward a proposal that would generate similar problematic side-effects. Second, my experience of engaging with functionaries of the child protection system taught me that recommendations which reflect a familiarity with the concerns of practitioners and seek actively to engage with them (even if these concerns do not necessarily change or shape the recommendations themselves) are more likely to be accepted by these functionaries. This is because such recommendations appear (and, at least to some extent, are) more realistic, as opposed to coming across as armchair criticism from an academic sitting in her ivory tower.[19]

B. Ethical Considerations and Method

I adopted a qualitative research method, in the form of semi-structured interviews, for the empirical part of this thesis because qualitative interviews allow greater flexibility and depth of engagement with interviewees,[20] which seemed ideally suited to the object of my field work,[21] that is, to seek the personal opinions and reflections of a range of people active in different roles in the child protection system about aspects of my proposed theory and reforms. I opted for semi-structured interviews to enable more follow-up questions, where required, and

[16] At a practical level, it was also important for me to assess how far these recommendations would be acceptable to these functionaries as they are likely to be the primary audience of my work. This does not mean that I altered my recommendations merely to make them acceptable to the functionaries of the Indian child protection system.
[17] As I explain in Chapter 3, their partners may be punished in the sense of a criminal sentence (if found guilty) or the deprivation of liberty during the trial, even in cases that end in acquittal. The adolescents themselves may be punished in the sense of being sent back to their family, who may inflict social punishment on them, ranging from getting them forcibly married to someone else to violent reprisal. Alternatively, they may be sent to a shelter home, with their lives, education and freedom being severely disrupted, until they reach adulthood.
[18] As I argue in Chapter 3.II, the brightline approach of POCSO is largely seen as being excessive by both child rights activists and the judiciary. This is also a view that was echoed by nearly all my interviewees.
[19] This is a common perception about academics amongst practitioners. Herod, for instance, mentions how he consciously attempted to distance himself from his academic credentials when attempting to conduct research with labour unions in the USA. See, Andrew Herod, 'Reflections on Interviewing Foreign Elites: Praxis, Positionality, Validity, and the Cult of the Insider' (1999) 30 Geoforum 313, 321.
[20] Uwe Flick, *An Introduction to Qualitative Research* (4th edn., Sage, 2009) 160-61.
[21] Jody Miler and Barry Glassner, 'The "Inside" and the "Outside": Finding Realities in Interviews' in David Silverman (ed.) *Qualitative Research: Theory, Method and Practice* (2nd edn., Sage, 2004) 125.

scope for adapting to what the interviewee was able to offer. Each interview was conducted in-person and lasted approximately one-hour.

While I was not interviewing vulnerable subjects, I had, nevertheless, to account for ethical considerations arising from conducting field work with human subjects, such as privacy, confidentiality and minimisation of harm. I applied for and received ethics approval from the Research Office of the Faculty of Law, University of Cambridge.[22] Given that my field work would be conducted in India, but my Ph.D. was otherwise located in the United Kingdom, I had to ensure that the laws and policies of both countries were duly followed. To comply with the General Data Protection Regulation,[23] I informed the interviewees of the purpose of the research, took steps to maintain the confidentiality of the private information given by my interviewees and gave them full control, through a consent form, over how their personal data would be stored and used.

Because most interviewees were reluctant to have the interview recorded, I took notes of the interviews in real time (sometimes requesting the interviewee to repeat what they had said so that I could get verbatim quotes). This was not the most efficient method of recording the interviews, as the laptop and my typing were physical barriers to the free and natural flow of conversation. However, this was the only way to record the interview faithfully without transgressing the permission granted by the interviewees. The transcripts of these interviews were then entered thematically into a spreadsheet (I did not use coding or anonymisation). Both the transcripts and the spreadsheet were stored on a laptop to which only I had access, and were not uploaded to the cloud in order to prevent the possibility of breach of data privacy on the University's (relatively) public network.

C. Sample Selection and Access

I conducted 41 semi-structured interviews with representatives of the government and of non-governmental organisations, as well as private lawyers and child psychologists working in child protection,[24] in eight cities across seven states in India.

[22] Ethics approval was received on 2.11.2022. The approved application is on file with the author. This application outlined the scope and purpose of my research, the manner and extent of interaction with human subjects, whether these subjects were vulnerable, whether I would be providing any compensation for the interviews, and the steps I would take to protect myself and prevent or minimise any harm caused to my interviewees.
[23] This regulation is implemented in the UK through the Data Protection Act, 2018.
[24] See Annexure 1 for the details of Interviewees. The details have been provided with due regard to the privacy of the interviewees.

One of my objectives in selecting the states and cities I visited was to make my sample as regionally diverse as possible. In doing this, I was also guided by cities where I knew people who could help me procure interviews (especially with government officials) and navigate the city. Thus, I selected New Delhi because it is the capital of the country and has a large and diverse population. It is situated in north-western India and has been my hometown for about 10 years. I selected Maharashtra because it is one of the largest states in the country and is situated in western India. Within Maharashtra I selected Mumbai because it is the state's capital and the financial hub of India, with several important non-governmental organisations and individuals working on child protection in the city. I selected Pune in Maharashtra because it is a relatively smaller city, adjacent to Mumbai where I had relatives who were able to put me in touch with police officers with experience in investigating cases under POCSO. Bangalore in Karnataka and Chennai in Tamil Nadu are in southern India and were selected both because I was able to find contacts in the police who were willing to give me their time and because of the research being done by non-governmental organisations in these cities on adolescent sexuality. I went to Bhopal in Madhya Pradesh because it is the capital of the central-most state in India and is part of the Hindi-speaking heartland which continues to be more orthodox and traditional. In the eastern part of the country, I visited Patna in Bihar (one of the poorest Indian states and also my erstwhile hometown) because I was able to secure permissions for interviews with police officers as well as POCSO judges currently presiding over cases. I also visited Kolkata in West Bengal, which neighbours Bihar, to include more people from the eastern part of the country in my sample. The map below gives a sense of where these cities are located and, therefore, of the reach of my field work.

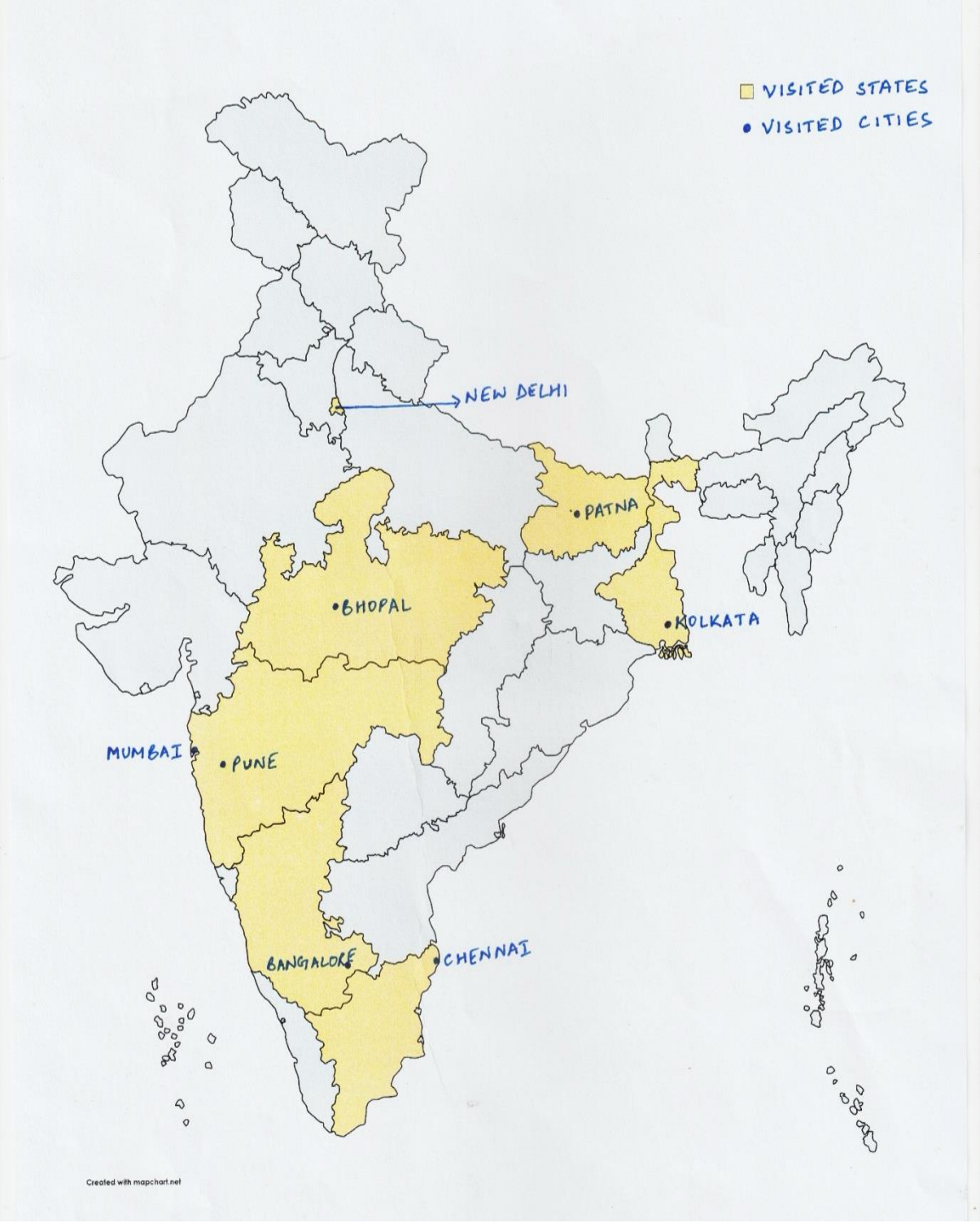


Figure 1: Cities where fieldwork was conducted

Interviewees from the government included police officers who are the first link in the criminal justice system, one public prosecutor, and judges who must finally adjudicate upon criminal offences. In addition, I interviewed representatives of non-governmental organisations working with children who have been sexually abused or simply caught in the net of the criminal justice

system, or conducting research and activism in the area of child protection, as well as private lawyers with experience in cases under the POCSO and psychiatrists and psychologists specialising in children.

I chose to speak to representatives from non-governmental organisations and from the government and justice system, working in child protection, rather than to de-jure victims and accused persons for two important reasons. First, there would be significant hurdles and difficulties in receiving permission to interview vulnerable subjects such as the de-jure victims/prosecutrices and accused (or even convicted) persons because of confidentiality requirements in the law.[25] Second, and in my view more importantly, my training and experience in conducting field work does not extend to interactions with vulnerable subjects. I would be unable, therefore, to minimise the risks, for instance of exacerbating their trauma, that might arise from the interview process.

Different methods were used for securing interviews with different subjects, depending on their accessibility. I selected representatives from non-governmental organisations (NGOs) based on the work done by them in the area of adolescent sexuality in particular or child protection in general. I became aware of these organisations and their research while I worked at CCL-NLSIU. I also studied some of the research published by them more recently for this thesis. Representatives of NGOs, child psychologists and private lawyers were contacted by email, with follow ups via whatsapp texts or phone calls where required. In most cases, I was able to secure interviews with these interviewees because I knew them personally, or they were aware of CCL-NLSIU and knew my senior colleagues from that organisation. In some cases, I had to take on the role of the supplicant,[26] stressing my dependence on them and emphasising the value of their knowledge and experience.

I had hoped to speak to the minister and/or secretary in charge of the Ministry of Women and Child Development when POCSO was enacted (2012) to get more information on why they enacted a blanket prohibition on sexual interactions with minors. This was meant to enable me to consider how best to address the concerns that were at play against having a lower age of consent or a more nuanced legal framework. I had also hoped to speak to the current minister and/or secretary in charge of the Ministry of Women and Child Development (MWCD) to get their feedback on my ideas and incorporate the same into Chapter 7. However, getting access

[25] POCSO Act, s. 23 and s. 33(7).
[26] England (n 7) 243.

to government officials, including not just ministers and administrators in the MWCD, but also judges and police officers (see below) proved to be incredibly challenging.

In Delhi, Patna, Kolkata, Bangalore, Chennai, Bhopal and Mumbai, I was able to secure interviews with police officers in-charge of investigating cases under POCSO because my father is a retired official of the Indian Police Service who was able to leverage his contacts in the police to secure the necessary permissions and introductions. Despite this, multiple follow-up calls and emails, and stubbornness in the face of brusque responses, were required finally to fix the time and place for the interviews. My interview with police officers in Pune was secured through an old police contact of my husband's, with whom he used to play volleyball in school. This contact was then able to put me in touch with the Deputy Commissioner of Police (DCP), Pune, who in turn introduced me to two police officers in charge of investigating cases under the POCSO.

The most difficult interviews to secure were those with Special Court judges. Because of the structure of the Indian judiciary, Special Court judges, who are part of the lower judiciary, are unwilling speak to anyone unless permitted to do so by the High Court of the state. I applied for permissions to interview judges in the High Courts of four out of the seven states to which I was going: Delhi, Madhya Pradesh, Bihar and Chennai. I selected these High Courts because I had personal contacts who could either put in a word with the relevant authorities or personally check on the progress of my application. Despite regular follow-ups with the registrar's office in the Delhi High Court, and the use of personal contacts to attempt to secure permissions in Madhya Pradesh, I was denied permission by both Courts. As the attached notices indicate, both refusals were made without giving any reasons.[27]

[27] A recent spontaneous conversation with a senior government official at a conference indicated that the denial might stem from the fear of being inundated by similar requests if permission is granted to one or a few researchers. Another reason, the official opined, might be misgivings about how interviews will be construed and reported and the fear that journalists, masquerading as researchers, will gain access to judges. A similar fear was also noted by Feeley during his study of criminal courts in New Haven, USA. See, Malcolm M. Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (Russel Sage Foundation, 1992). See also, Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (CUP, 2009) 39-40.

IN THE HIGH COURT OF DELHI: NEW DELHI

No. 7372 /DHC/Gaz/G-4/2022

From :

The Registrar General,
High Court of Delhi,
New Delhi.

To

Ms. Shraddha Chaudhary(3rd Year, Ph.D Student),
Faculty of Law,
University of Cambridge, United Kingdom
[Email redacted]

New Delhi, dated, the 17th December, 2022

Sub : Requesting permission for interviews with Judicial Officers dealing with POCSO.

Sir,

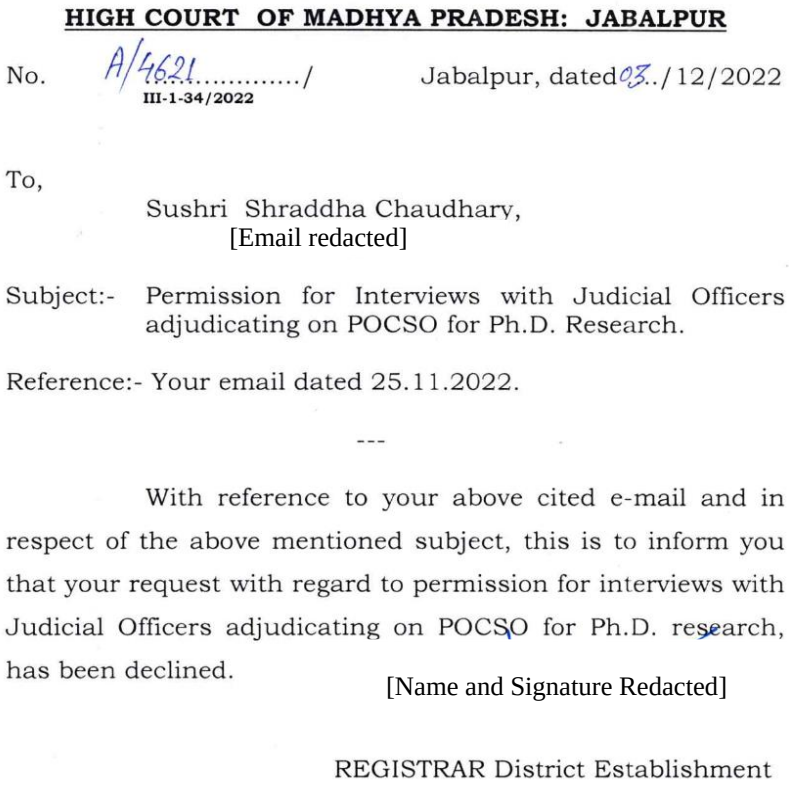
I am directed to refer to your e-mail dated 31.10.2022, on the above subject, and to say that your request to grant permission to interview Special Judges adjudicating matters under the Protection of Children from Sexual Offences Act, 2012 (POCSO) as well as Judges of the Children's Court and Magistrates assigned to the Juvenile Justice Board in Delhi for Ph.D research through Questionnaire, has not been acceded to.

Yours faithfully

[Name and Signature redacted]

Assistant Registrar (Gaz.IB)
for Registrar General

Figure 2: Order of the Delhi High Court rejecting permission for interviews



HIGH COURT OF MADHYA PRADESH: JABALPUR

No. A/4621...../ III-1-34/2022 Jabalpur, dated 03./12/2022

To,

Sushri Shraddha Chaudhary,
[Email redacted]

Subject:- Permission for Interviews with Judicial Officers adjudicating on POCSO for Ph.D. Research.

Reference:- Your email dated 25.11.2022.

With reference to your above cited e-mail and in respect of the above mentioned subject, this is to inform you that your request with regard to permission for interviews with Judicial Officers adjudicating on POCSO for Ph.D. research, has been declined.

[Name and Signature Redacted]

REGISTRAR District Establishment

Figure 3: Order of the High Court of Madhya Pradesh rejecting permission to interview judges

The difficulty of securing permissions to interview elite participants, especially judges, has been recorded by scholars around the world.[28] Given this difficulty, I was lucky to be able to secure access to two Special Court judges in Patna and one Special Court judge in Tamil Nadu. This, too, was only possible because of my father's contacts in the higher judiciary in Bihar, and in the police in Tamil Nadu.[29]

[28] Alan Paterson, *The Law Lords: How Britain's Top Judges See Their Role* (The Macmillan Press, 1982) 84-85; Arushi Garg, 'Understanding Rape Adjudication in Delhi Trial Courts' (D.Phil Thesis, University of Oxford, 2020); Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (OUP, 2014) 170.

[29] Baxi also describes using references from her father, perhaps the most eminent jurist in India, Professor Upendra Baxi, to get the relevant permissions for her studies in trial courts in Gujarat. See, Pratiksha Baxi, 'Out

In conducting these interviews, my own positionality as a researcher played a significant role. The following section reflects on the dynamics of positionality and power that influenced the research process, and how these factors shaped interactions with interviewees.

D. Positionality and Power

In the context of qualitative research, elite status comes from the possession of knowledge and prestige and the close proximity to power.[30] In that sense, all my interviewees were 'elites', and I constantly had to navigate my position relative to them, as someone who had gained access to them by being an 'insider' (as with the representatives of NGOs), or by knowing other elites (as with police officers and judges). While some researchers suggest that the best way to conduct interviews with elites is to take control of the interview,[31] I found that the 'correct' approach, if there can ever be such a thing, depended very much on the individual attributes of who I was interviewing. This required me to assess, and re-assess, based on what worked and what did not, the kind of person I was dealing with. Despite being an 'insider' with representatives of NGOs or private lawyers, I sometimes stressed my relative inexperience and willingness to learn from them (taking on the role of researcher-as-supplicant),[32] while at other times stressing my 'outsider' status as a Ph.D. researcher at an elite, foreign university of which everyone in India has heard, to establish my legitimacy as a researcher.[33] Similarly, in some situations I stressed my 'insider' status in terms of a shared language or regional identity. For example, while interviewing police officers in Patna, I downplayed my identity as someone who knew their bosses or someone who went to a 'fancy University' and emphasised my identity as someone who had been born and brought up in their city by speaking to them in Hindi, and using the accent and inflections commonly used in Patna. I even encouraged their view of me as a child from a police family who needed their help because this seemed to persuade them to open up to me. In other situations, my 'outsider' status was made evident to me in places where a language barrier made communication somewhat clunky and strained, for

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of Place in an Indian Court: Notes on Researching Rape in a District Court in Gujarat (1996–8)' in Lynette J. Chua and Mark Fathi Massoud (eds.) *Out of Place: Fieldwork and Positionality in Law and Society* (CUP, 2024) 119, 123.

[30] Harriet Zuckerman, 'Interviewing an Ultra-Elite' (1972) 36(2) Public Opinion Quarterly 159; Gareth Rice, 'Reflections on Interviewing Elites' (2010) 42(1) Area 70.

[31] See, Susan A. Ostrander, '"Surely you're not in this just to be helpful": Access, Rapport, and Interviews in Three Studies of Elites' (1993) 22(1) Journal of Contemporary Ethnography 7.

[32] England (n 7), 243.

[33] Hannah Mason-Bish, 'The Elite Delusion: Reflexivity, Identity and Positionality in Qualitative Research' (2018) 19(3) 263, 265. Mason-Bish emphasises that insider/outsider positionality may constantly change while interviewing elites. A similar observation is made in the context of non-elite interviews by Bukamal. See, Hanin Bukamal, 'Deconstructing Insider–Outsider Researcher Positionality' (2022) 49(3) British Journal of Special Education 327.

instance in Mumbai, where the police officers spoke Hindi, but preferred to speak in Marathi, a language I am generally able to understand, but which I do not speak.

One of the most difficult decisions, which often needed to be made spontaneously, was whether to be truthful about my own feelings on the subject and on the responses of my interviewees, or whether to feign or exaggerate agreement to make them comfortable enough to open up to me.[34] For instance, a police officer from Bhopal said that 'almost all' POCSO cases were actually de-facto consensual in nature ('*sab vahi hote hain*'). Data indicate that de-facto consensual cases are generally around 10-20% of the total cases filed under the POCSO.[35] While this is not an insignificant number, and it is possible that this particular police officer had, in fact, seen an extraordinary number of de-facto consensual cases, the considerable mismatch between his observation and the available empirical data on the subject made me doubt the veracity of his claim. Since I did not want to accept his assertion unquestioningly, but also didn't want to hurt his ego by citing the statistic, I gave him a chance to clarify by asking him why he thought so ('*Aapko aisa kyun lagta hai?*'). This gave him the opportunity to reflect on what he had said and clarify his answer. He responded, '*Mera matlab hai ki jahan bacche ki umra 15-16 saal ya usse upar hai, vahan zyada se zyada case mein ladki apni marzi se hi bhaagi hoti hai.*' (I meant that where the age of the child is around 15-16 years or more, the adolescent girl usually elopes/accompanies the accused willingly). This overlapped with other difficulties, such as maintaining the balance between showing respect to elite interviewees without becoming overly deferential, and appearing keen to benefit from their specialised knowledge without appearing completely incompetent (which, in some cases, might make the elite think they were wasting their time with a complete novice).[36] I wish I could say that I navigated these difficulties smoothly, but in truth, this was a process of trial and error and continuous course-corrections. For instance, a public prosecutor from Tamil Nadu was strongly against any recognition of adolescent consent to sexual activity. She said, 'See, I am a mother and a prosecutor. Teenagers commit mistakes, [which they] regret later. [The] law has to protect them, no?' My first response to this answer was, 'But Ma'am, sending

[34] Thankfully, I did not need to manage any feelings emerging from my own experience of child sexual abuse during my interviews, perhaps because the conversation never veered in the direction of very young children.
[35] Shraddha Chaudhary, '"Love", Consent and the POCSO' in CCL-NLSIU (ed.), *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues* (National Printing Press, 2018) 125, 133. Based on the five state studies conducted by CCL-NLSIU, it is observed, 'In Karnataka, six of the 110 (5.45%), in Delhi, 144 of 667 (21.58%) judgements analysed were 'romantic' cases, and in Assam, 27 out of 172 cases (15.69%) were 'romantic' in nature. The percentages in Maharashtra, and Andhra Pradesh were found to be 20.52% and 21.21% respectively."
[36] Mason-Bish (n 33), 268-273.

someone to jail for a consensual relationship, even if it is later regretted- is that fair?' She responded, '*Ma* [a generic term used for all women and girls in South India], you will understand when you become a mother. Children need to be protected. Think about the parents also. You are thinking like [a] lawyer. Someone takes your daughter, she is innocent, her life is ruined, no?'. This response made me realised that cool logic may not be the right approach here. So, I changed to a more informal, personal style, 'I understand Ma'am- I have seen the anxiety in my parents' eyes every time I leave the house. But Ma'am, the men who go to jail in these cases also have mothers. Shouldn't we think about those mothers?'. She took a long pause before responding, 'Yes. Yes, we should think.' But she doubled down on her stance that the law needed to protect children, particularly innocent girls. I moved onto my next question. In most cases, my interviewees were gracious enough to give me their time and engage meaningfully with my questions, sometimes even having lengthy debates with me.[37]

In some cases, the power of the elite was impressed upon me. I will briefly outline one such experience. Having received an email permitting me to interview the POCSO Special Judge in Patna, I arrived at the Patna District and Sessions Court Complex an hour in advance. It was a brisk February morning, and since most buildings in India are not internally heated, I wore my warm western clothes instead of traditional Indian attire. I was escorted to the chamber of the judge, attached to his courtroom, and having displayed the appropriate Court etiquette and deference, I thanked him for his agreeing to speak to me in what I hoped would be a segue to fixing up a time for the interview. He responded that he had not, in fact, agreed to speak to me, but had been ordered by the High Court to do so. Clearly aggrieved by such an order, and faced with the 'girl' who had occasioned the affront, he took the opportunity to assert his authority and set right the balance of power between us.

J: 'The High Court can say what it likes. If I don't wish to speak to you, I won't.'

S: 'Yes, sir.'

J: 'I don't know what makes them come up with such foolish ideas. If they wish to talk to you, they should do it themselves.'

[37] I nearly missed my onward flight because I got caught up in one such debate with a private lawyer in Mumbai. See Chapter 7 for some details of this discussion.

S: ‘Yes, sir. I’m sorry for the inconvenience, sir. Actually, I was the one who made the request to speak to you because ---’

J: ‘I don’t need to speak to you...’

After half a minute of silence,

J: ‘I will speak to you because you are a student, and I want to help you.’

S: ‘Thank you sir, I’m highly obliged.’

Emphasising how busy his docket was, the judge called me for the interview during his lunch hour. I thanked him and made to leave as he took his place at the bench. I had almost stepped outside his court when, from his raised seat, in open court, he called me back to ask me about my family. Upon learning that I was married, he asked me why I didn’t wear vermillion (married Indian women in some parts of India wear vermillion as a symbol of their married status). An exchange followed in which I tried to explain, without being terse or rude, that this was a personal choice and that, in any case, vermillion was not part of my husband’s culture, and he in turn emphasised that all married women should wear vermillion if they are in touch with their roots (I regretted my western attire). He then took about fifteen minutes to narrate an episode from the Hindu epic *Ramayana*, the upshot of which was that women wear vermillion to please their husbands. A number of angry retorts, mixed with humiliation, bubbled inside me. But I recalled that I only had permissions to interview three judges, and he was one of them. I swallowed my pride and shame. I thanked him for the lesson and, with his permission, left. I was lucky to have a few hours in the interim to calm myself. During our interview, I tried to project an aura of humility and calm. I think my voice shook, nevertheless. He insisted on giving me coffee, which I drank despite not liking coffee much. Once again, it was impressed upon me that he was in control, not I. To his credit, he was open and honest during the interview, perhaps even keen to prove that he was not afraid of the higher judiciary. As a final show of power, he refused to sign the consent form I offered him. ‘Do you want me to become a litigant against you in this Court?’, he asked. ‘No, sir.’, I responded. ‘You can quote me, but don’t use my name. I will not sign anything’, he rejoined. ‘Yes, sir, thank you, sir’, I said, packing my laptop. I left.

I never felt unsafe during my interaction with the judge, but I did feel powerless. Perhaps that was the idea. Neither the material I read in preparation for the interview nor my previous

experiences of interviewing Special Court judges, had equipped me to deal with this situation. When I revisited his interview before writing Chapter 7, I had to be careful not to let his behaviour towards me before and after the interview affect how I viewed his answers, not least because I didn't have that many judges in my sample to choose from. For instance, when he said judges would be able to distinguish a case of coercion or a case where the prosecutrix had been taken advantage of in some way from a consensual case, I had to remind myself not to dismiss his claim merely because of the gendered worldview he had (unwittingly) revealed to me, and instead, assess it based on the reasons he gave to back up the claim (see Chapter 7).

E. Limitations of the Fieldwork

Legal research is generally not empirical, probably because almost no law faculty teaches lawyers *how* to conduct empirical research. The first limitation of this research, therefore, is that it was conducted by a person with training in the law, rather than in the social sciences, by a lawyer, not a sociologist or an ethnographer. A related limitation is that my skills of qualitative research methods were learnt through my limited experience of conducting field interviews while working at CCL-NLSIU, attending a short course on qualitative research methods conducted by the School of Humanities and Social Sciences at Cambridge, and reading up on qualitative research methods.

Second, the sample of this fieldwork is limited in the following notable ways. For one, since I did not interview the prosecutrices or the accused persons in de-facto consensual cases, my assessment of these cases is necessarily reliant on second-hand information. Moreover, this information comes from interviewing elites, and is therefore positioned knowledge that can never be representative. For another, the sample is also not entirely regionally representative. I did not visit any state in the North-East of India, both because I was unable to find anyone in the police or judiciary to speak to me in any of the major cities of the region, and because I did not have any local contacts in the region, which would have made traveling there more risky. I also did not visit any states in the Indian hills, such as Himachal Pradesh or Uttarakhand, for the same reason. Though the cities selected represent the north, west, centre, south and east of India, they were all either metropolitan or capital cities, which cannot provide an insight into the conditions and practices in the more rural and underdeveloped parts of the country. Notwithstanding this, I chose to restrict myself to these cities due to paucity of time, and concerns around safety and accessibility, especially as a single woman traveling alone. Finally, within this sample, though I was able to interview police officers and members of non-

governmental organisations in all the cities I visited, I was only able to secure interviews with three judges from two cities, and one public prosecutor from one city.

Third, as can be seen on the map above, India is a large country, and my interviews were spread across different geographical regions. This also meant that I was interviewing people who did not always speak English comfortably, especially amongst police officers and judges. In some cases, therefore, my questions had to be translated into the local language (such as Marathi in Maharashtra, Tamil in Chennai, Kanadda in Karnataka and Bengali in West Bengal) by my local contacts. Concepts such as 'taking advantage of a person' did not always translate well into these local languages. Similarly, the difference between sexual assault and sexual exploitation were not always clear in local languages, including Hindi, which sometimes use the same term (*shoshan*) for both kinds of abuse. I return to this limitation in Chapter 7.

Notwithstanding these limitations, my field work was useful in formulating the different ways in which my tentative two-pronged proposal could be operationalised in Indian law, as well as the regulatory concerns that would arise in this operationalisation. As I mentioned above, some interviewees took the time to engage deeply with my questions and ideas and these interviews were, consequently, more insightful and have been relied upon more in Chapter 7. This was more often the case with interviewees from the private sector. For instance, both the private lawyers I spoke to (one in Delhi and one in Mumbai), could not understand why there should be a distinction between the offence of exploitation and the offence of rape if, in my view, adolescents could not consent to either. This conversation pushed me to think more deeply about the distinction between exploitation and rape, a subject to which I return in Chapter 7. Interviewees from the government were generally unable (because of their busy schedules) or unwilling (perhaps because they were doing the interview as a favour or because they had been commanded by a superior rather than because they had chosen to do it) to give me as much time, so their answers were often clipped and to-the-point, with fewer opportunities for follow-ups. Some interviews with government officials, notably with one police officer in Kolkata and one in Bangalore, were not very useful because the interviewees took a status quoist approach to avoid any potential controversy, despite my assurances that their responses (even if used) would remain anonymised. The insights they provided were, nevertheless, uniquely useful because of their experience of direct engagement with de-facto consensual cases under POCSO. I incorporate insights and quotes from these interviews in Chapter 7.

Conclusion

This thesis employs a range of different methodologies (outlined in Part II above) to develop a theory of sexual exploitation that is rooted in the Indian social context, and to formulate recommendations for reforming Indian criminal law's regulation of adolescent sexuality. These recommendations are informed by the lived realities of Indian adolescents, and seek to be mindful of the operational challenges of the Indian criminal justice system. The perspectives gathered through the field work, discussed in Part III above, provide context-specific insights, which allow the final recommendations of this thesis to be grounded in the pragmatic concerns likely to shape policy implementation.

The following chapter provides an examination of India's socio-historical and cultural context, particularly the norms of caste and honour, which shape and constrain the sexual behaviour and choices of Indian adolescents. This context is the foundation on which the theoretical insights and recommendations of this thesis are built.

CHAPTER 2: THE SOCIAL CONTEXT OF SEXUAL ACTIVITY IN INDIA

Introduction

In this Chapter, I provide an overview of the caste and honour-based nature of Indian patriarchy, one of the chief determinants of the socio-normative conditions in which sexual interactions take place in India. This is essential to understand and critique the laws discussed in Chapter 3. I then demonstrate how the enforcement of the norms of caste and honour has, over time, created a binary of legitimate and illegitimate sex mediated by hegemonised (compliant with the norms of caste and honour, or at the very least family approved) forms of marriage. This binary did not become the dominant narrative around sex in India until the 19th century, but the norms of caste and honour as well as the marriage-mediated binary of sex are accepted and strongly enforced in contemporary India. Compliance with these norms is essential to the social status and respectability of women and girls, as well as their families. This is the social background against which all sexual interactions, including with or between adolescents, take place in India. Understanding this background allows us to see how the family and caste community pose one of the most serious and insidious threats to the sexual autonomy of young people, especially girls and women, in India.

Home to over 1.4 billion people spread across varying degrees of socio-economic development, India is not an easy country to describe. According to the census of 2011, the population is divided into six major religious groups. Hindus form the majority at 79.80%, while Muslims are the largest minority at 14.23%. Other religious groups whose populations were measured include Christians at 2.30%, Sikhs at 1.72%, Buddhists at 0.70% and Jains at 0.37%. 0.66% of the population has also been categorised into 'other religion', which would include Parsis or Zoroastrians and Jews, among others, while for 0.24% of the population, no religion was stated.[1]

The World Bank's estimate for 2020 indicates that a vast majority of the Indian population (65%) still lives in rural areas, although the percentage has steadily decreased since the 1960s.[2] The arguments in this chapter are based mainly on ethnographic data, where available, and supplemented with anecdotal accounts and personal experiences on points which are widely accepted and discussed but not necessarily represented in such studies. I cannot claim to give

[1] Government of India Decennial Population Census (2011) <https://www.census2011.co.in/religion.php> accessed 13 May 2024. These are the latest census data available.
[2] The World Bank (IBRD-IDA), Data on Rural Population (% of total population)- India <https://data.worldbank.org/indicator/SP.RUR.TOTL.ZS?locations=IN> accessed 13 May 2024.

an account that is always representative of every geographical area, class, religion, caste, tribe, and gender of India, although I have attempted to provide an overview that accounts for these factors.

I. Gender and Caste in India

This section provides an overview of the institution of caste, and construction of gender within it, because the socio-normative conditions in which sexual interactions must take place are defined by India's caste-based patriarchy. Caste, a system of inherited social stratification, emerged amongst Hindus, but its practice has been noted amongst other religious groups as well.[3] This means that the rule of endogamy (marriage within a given social group) applies not just to religious groups (as in, that Muslims should marry other Muslims), but also within caste groups within religions (for instance, that *Brahmins*, a caste community amongst Hindus, should marry other *Brahmins*). Because the honour of the family and caste community are believed to reside in 'their' women, norms of honour and guardianship (explained below) also inform the socialisation of children, particularly post-pubertal females.

A. Understanding Caste

Caste is probably the most pervasive institution in India. The Constitution of India, 1950 (Constitution) seeks to address some of the wrongs of caste, for instance by abolishing untouchability,[4] and providing for caste-based reservations (quotas) in government jobs and educational institutions.[5] However, it continues to govern nearly all aspects of private life from food to worship, marriage, status, privilege, and opportunities. For those not familiar with the institution, I provide a brief (and by no means exhaustive) overview of caste in this section.

In the simplest terms, caste is a system of social stratification. It is different from class but not unrelated to it.[6] The system is informed by two inter-related concepts: *varna* and *jati*. According to Chakravarti, *varna* refers to a 'status-order system' within which there are

[3] Amit Thorat and Omkar Joshi, 'The Continuing Practice of Untouchability in India: Patterns and Mitigating Influences' (2020) 55(2) Economic and Political Weekly 36; Aseem Hasnain and Abhilasha Srivastava, 'Caste doesn't just exist in India or in Hinduism – it is pervasive across many religions in South Asia and the diaspora' (*The Conversation*, 27 April 2022) <https://theconversation.com/caste-doesnt-just-exist-in-india-or-in-hinduism-it-is-pervasive-across-many-religions-in-south-asia-and-the-diaspora-180470> accessed 13 May 2024.

[4] Constitution of India, 1950 ('Constitution'), Art. 17: '"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law.'

[5] Art. 16 of the Constitution of India provides the right to equality of opportunity in matters of public employment and prohibits discrimination on the grounds only of religion, caste, sex, descent, place of birth and so on. Clause 4 of Art. 16, however, allows the State to make special provisions for any backward class of citizens. Constitution, Art. 16.

[6] Uma Chakravarti, *Gendering Caste: Through a Feminist Lens* (Sage Publications, 2018) 9.

specific caste groups linked to occupation, called *jati*. She explains the system in the following terms:[7]

> 'Jati' refers to an endogamous unit within which one must marry; members of a jati are members of a descent group, traditionally assigned to a specific occupation… each jati also has its own cultural traditions with its own food habits, rituals, dress codes and even art forms…

There are four hierarchically arranged *varnas*: *Brahmans* (priests or teachers), *Kshatriyas* (warriors and kings), *Vaishyas* (traders) and *Shudras* (labourers). Each varna may have hundreds of *jatis* within it. For example, while '*Vaishya*' is a *varna* status signifier, '*baniya*' is a *jati* or caste within this *varna*, usually a caste of businesspeople.[8] The *varna* classification, and therefore status, of some *jati*s may vary regionally so that (for instance) it may be classified as *Shudra* in one part of the country and *Vaishya* in another.[9]

Chakravarti rightly argues that in the present day, caste hierarchy is determined by control of productive resources and power. Therefore, in modern India there are usually upper castes, who are highest on a scale of purity and pollution (explained below) and have highest status; middle castes who tend to be landowning and sometimes extremely wealthy, but are officially designated 'Other Backward Classes' (OBCs) because they have low social status compared to upper castes, though they are not considered polluting; and lower castes and tribal communities (officially called Scheduled Castes and Scheduled Tribes because they were first recognised by the British colonial government in lists or schedules)[10] who have low social status, lack access to productive resources and positions of power, and are considered polluting.[11]

Quoting Dr. B.R. Ambedkar, a visionary *Dalit* (a term, meaning downtrodden, used by parts of the untouchable community to refer to themselves) scholar and leader, Chakravarti explains,[12]

> [c]aste is a system of 'graded inequality in which castes are arranged according to an ascending scale of reverence and a descending scale of contempt'. That is, as you go up the caste system the power and status of a caste group increases; as you go down

[7] ibid.
[8] For a pictorial representation of the varna-jati matrix and the purity-pollution line, see:
Vani Kant Borooah, 'Caste and Regional Influences on the Practice of "Untouchability" in India' (2017) 48(4) Development and Change 746, 749.
[9] ibid, 748.
[10] Government of India Act, 1935: '"the scheduled castes" means such castes, races or tribes or parts of or groups within castes, races, or tribes, being castes, races, tribes, parts, or groups, which appear to His Majesty in Council to correspond to the classes of persons formerly known as "the depressed classes", as His Majesty in Council may specify'.
[11] Chakravarti (n 6).
[12] ibid, 7.

> the scale the degree of contempt for the caste increases as these castes have no power, are of low status and are regarded as dirty and polluting.

Therefore, status and power in both caste and class draw from the occupation of the person concerned. Castes are additionally stratified by perceived purity or pollution of their occupation.[13]

This means that to maintain caste purity, upper-castes do not typically interact with lower-castes: they do not eat out of the same vessels,[14] do not live in the same village areas,[15] and most importantly, do not intermarry. Ambedkar astutely noted that endogamy is the most important aspect to the maintenance of the caste system.[16] Untouchables are considered so impure that their touch, and in some regions, even their shadow could be 'polluting'.[17] Beyond this, the hierarchy also translates to differences in levels of education and access to employment opportunities, in ownership of land and property and levels of income.[18] These differences arise out of centuries of enforced adherence (through violence and internal divisions) to the exclusions of the caste system, meaning that lower-castes were typically not allowed to escape their ritually polluting occupations or to access education. Despite laws forbidding untouchability,[19] it is still common for members of untouchable castes to be barred from entering a village or temples, or from using common resources such as wells.[20] Education and

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[13] ibid, 9.

[14] See for example, Vijaysinh Parmar, 'Vibrant Gujarat? 98% Dalits have to Drink Tea in Separate Cups' *Times of India* (Ahmedabad, 8 December 2009) <https://timesofindia.indiatimes.com/india/vibrant-gujarat-98-dalits-have-to-drink-tea-in-separate-cups/articleshow/5312335.cms> accessed 13 May 2024; Harit Mehta, 'IG or IAS Officer, Dalit is Still an Untouchable' Times of India (Gandhinagar, 29 June 2004) <https://timesofindia.indiatimes.com/city/ahmedabad/ig-or-ias-officer-dalit-is-still-an-untouchable/articleshow/757291.cms> accessed 13 May 2024.

[15] In my father's village in the state of Bihar, different castes have their own 'tolas' or settlements and everyone is aware of the demarcation. Typically, people from untouchable castes are forced to live on the outskirts of the village. This tola system has also been discussed in an ethnographic study centred in Bihar. See, Jeffrey Witstoe, *Democracy against Development: Lower-caste Politics and Political Modernity in Post-Colonial India* (University of Chicago Press, 2013) 166.

[16] Bhimrao Ramji Ambedkar, 'Castes in India: Their Mechanism, Genesis and Development' (1917) in Pritchett (ed.) *Dr. Babasaheb Ambedkar: Writings and Speeches Volume 1* (Bombay Education Department, Government of Maharashtra, 1979) [11].

[17] Bhimrao Ramji Ambedkar, 'The Untouchables: Who Were They and How they Became Untouchables?' in Ministry of Social Justice and Empowerment, Government of India (ed.) *Dr. Babasaheb Ambedkar Writings and Speeches Vol 7(2)* (3rd edn., Dr. Ambedkar Foundation, 2020), 30-31.

[18] See: Vani Kant Borooah, 'Caste, Inequality and Poverty in India: A Reassessment' (2014) 1(1) Development Studies Research 279, 290; Raghavendra R.H., 'Literacy and Health Status of Scheduled Castes in India' (2020) 12(1) Contemporary Voice of Dalit 97, 101-109.

[19] See further, Constitution of India, Art. 46, The Protection of Civil Rights Act, 1955 and The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 specifically prohibits and criminalises several caste-based discriminatory acts against *Dalits* and tribals.

[20] Shura Darapuri, 'Why have we banished our own brethren?' *The Hindu* (New Delhi, 24 March 2012) <https://www.thehindu.com/opinion/open-page/why-have-we-banished-our-own-brethren/article3220750.ece> accessed 13 May 2024.

affirmative action in the form of reservation (i.e., quotas) in public employment and educational institutions have allowed some from the lower castes, including untouchables, to advance in terms of their economic status,[21] but this usually does not prevent discrimination and ostracization in the social sphere. Caste hierarchy does not simply apply between *varnas,* it also operates internally amongst the different *jati*s falling within the same *varna*. In fact, gradations exist even within castes or *jati*s. This means that caste distinctions and taboos are enforced not only between upper castes and lower castes, but also amongst lower castes[22] and, as previously stated, in non-Hindu communities.[23]

Two questions need answering at this stage for those unfamiliar with the operation of the caste system. First, how is the caste of a person known to others, and second, how is this system enforced when there are laws prohibiting such discriminatory practices?

As to the first question, since caste is so socially pervasive, most people know not only their own caste, but also the caste of their neighbours and contemporaries. This is evident from the fact that large parts of the Indian population openly admit to practising untouchability in the 21st century.[24] In close-knit communities (especially rural areas in which most of the country resides), a person's caste may be deduced from the area of the village in which she lives, from the caste of her relatives, or from the work she does. In semi-urban and urban areas where this information may not always be available, a person's caste or at least *varna* position can be deduced from their surname, although some surnames are caste neutral, and some surnames may be used by people of more than one caste or different castes depending on the region.[25]

As to the second question, caste rules are enforced by a parallel apparatus of enforcement (caste-based councils, known as *panchayats*) that operates outside the legal system and enjoys legitimacy from the public and tacit support from the state. Dominant castes in the village enforce rules against lower-castes through tactics of ostracization, social boycott or violence.[26]

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[21] 'Introduction' in Ghanshyam Shah, Kanak Kanti Bagchi and Vishwanatha Kalaiah (eds.) *Education and Caste in India: The Dalit Question* (Routledge, 2020) 18-19.

[22] Prem Chowdhry, *Contentious Marriages, Eloping Couples: Gender, Caste and Patriarchy in Northern India* (OUP, 2009) 19-20. Chowdhry writes, 'Denied any claims of honour in relation to higher castes, the lower castes therefore become hypersensitive in defending it within their own group.'

[23] Thorat and Joshi, (n 3).

[24] Borooah, 'Caste and Regional Influences on the Practice of "Untouchability" in India' (n 8), 752.

[25] In such cases, it is common to straightforwardly ask another's caste. As someone whose surname (Chaudhary) is used not only across caste, but also across region and religion in India (and even other parts of the Indian subcontinent), this is something I have frequently experienced myself.

[26] Chakravarti uses this example, '…soon after independence the *raegars*, a *dalit* caste in Rajasthan [a north-western Indian state], traditionally responsible for removing dead animals from the village decided that independence would have no meaning for them if they continued to perform work that was regarded as polluting. Accordingly, a *raegar* in Devisar village refused to remove the dead carcass of a buffalo calf from the

Even in semi-urban and urban areas, individuals who are embedded in their caste communities (through ties to their village, or close ties with their relatives) tend to follow caste rules to retain the support of their community.[27] This support is essential for carrying out business through informal channels of credit, for help in times of crisis and for finding suitable marriage partners for one's family members. To lose standing in one's caste community, then, is also to lose a vital system of support.

With this background in place, I now consider the interaction between caste and gender.

B. Girls and Women in a Caste-Based Patriarchal Society

As previously stated, one of the central aspects of the caste system is the maintenance of the purity of a caste group through endogamy. Consequently, the control of women's sexual and reproductive capacities becomes vital. This control determines how children, but especially girls, are socialised, as well as the rules that older women must follow. As Dube astutely points out, 'Caste, then, imparts a special character to the process of growing up female in Indian society.'[28]

Most parts of the country customarily follow rules of patrilineal succession.[29] Though property law for Hindus has been amended so that sons and daughters now legally hold equal shares in the properties of their parents,[30] this law is widely circumvented through family agreements by which women give up their legal shares in their ancestral property. This is because male children are usually seen as carriers of the family name and line, responsible for the care of the parents, and therefore the rightful successors to the family property. It is traditionally believed that a child is made by her father's seed, while the mother is only the ground in which the seed is planted. As Chowdhry puts it, 'male semen is perceived to create while the woman is seen as the passive recipient. According to this notion, the blood that flows in the child's veins comes from the father's seed and gives a child (particularly a male child) its identity as

house of a *brahmana* [the highest caste of priests]. The *brahmana* appealed to the leader of the dominant caste in the village, a *rajput* [a caste of the *Kshatriya* varna], as the pollution of his house would not end without the removal of the carcass. The dominant caste leader hit the *raegar* on the head with a staff and as he fell down all the other *rajputs* threatened to thrash him further. The *raegar* was forced to lift the carcass and that was the end of his resistance.' Chakravarti (n 6), 15.

[27] Chowdhry (n 22), 13-18; Chakravarti (n 6), 15.

[28] Leela Dube, 'On the Construction of Gender: Hindu Girls in Patrilineal India' (1988) 23(18) Economic and Political Weekly 11, 11.

[29] The Khasis of the north-eastern state of Meghalaya and the Nayars of the southern state of Kerala are some of the exceptional matrilineal communities currently in existence in India. See:
Vimal Kumar, 'Matrilineal Societies of India' (*Observer Voice*, 21 August 2021)
<https://observervoice.com/matrilineal-societies-of-india-442/> accessed 13 May 2024.

[30] Hindu Succession Act, 1956 as amended in 2005, s. 6.

belonging to the father's lineage.'[31] Therefore, if a woman marries outside her caste community, especially to a man belonging to a lower caste, her offspring are believed to carry the blood and the caste of the father. Such a union is seen to 'pollute' the woman's family and caste lineage.

Consequently, a girl or woman is regarded as the bearer of the honour (*izzat*) of the family and, by extension, of the caste community. As a daughter, she is the repository of the honour of her father's family, and as a wife and mother, the honour of her husband's.[32] While the purity or pollution of one's caste also corresponds with honour, it is possible to gain honour through money, property, and power, to maintain it by following caste norms, or to lose it by breaching caste norms.[33] Consequently, the behaviour of women can determine a family's honour and standing in the community. Therefore, controlling female sexuality is paramount in maintaining caste purity, family, and caste honour and patriliny.[34] Within this logic of caste and honour, women's rebellion against the norms of family arranged caste-endogamous marriage and their exercise of sexual autonomy is seen to result in a loss of honour greater than anything that can result from a man's actions. On this, Chowdhry notes:[35]

> Men, especially the youth, are considered to be *bagi*s (rebels) by nature. Their revolt may take different forms, even elopement. Their 'natural rebelliousness' is seen as a natural stage of life that must be allowed to pass. A woman's revolt is neither 'natural' nor accepted. It is taken as a direct attack on patriarchal power and must be crushed, controlled, and challenged.

The honour of a lower caste girl is viewed differently from that of an upper caste girl. A marriage or sexual union between an upper or intermediate caste man and a lower caste woman may not be condemned or punished to the same degree as sexual relationships between an upper or intermediate caste woman and a lower caste man and may even be accepted in rare cases. It is not, however, the socio-normative form of sexual interaction. The reason that it receives relatively less backlash is probably due to the belief, discussed above, that the father's caste matters more in determining the caste of the offspring. It is the sexual and reproductive capacity of the woman, therefore, that needs protecting in the name of honour. Relatedly, because upper and intermediate castes tend to have more power and influence, they are more capable of punishing apparent affronts to their honour (which lies in their women) than are lower caste

[31] Chowdhry (n 22), 16.
[32] Chakravarti (n 6), 143. Chakravarti points out that 'honour is one of the most valued ideals in the subcontinental patriarchies...'.
[33] ibid, 143.
[34] Chowdhry (n 22), 17.
[35] ibid, 10-11.

communities. The case of the lower caste woman also demonstrates how relative honour is. It has meaning only insofar as others from the same community as well as other communities in closely bound rural areas acknowledge it, and insofar as these honour-based norms are enforced by those (usually upper and intermediate castes) who have power within the village. Thus, while a lower caste woman has honour within her own caste community, she has none from the point of view of upper castes.[36]

At this point, it would be helpful to consider how religion interacts with these norms of caste. Rules of honour and endogamy, as previously stated, also operate in non-Hindu communities, but which amongst religious and caste identity becomes the basis of 'honour' may differ depending on the relationship between communities in a region, as well as the region's religious politics. For instance, the conspiracy theory of 'love-jihaad' has, in the last few years, gained currency amongst Hindus across the country. According to this theory, Muslim men marry Hindu women in a conscious and organised effort to convert them to Islam and have more Muslim children.[37] In the northern Indian state of Uttar Pradesh, the traction around this conspiracy theory has been utilised to enact a law which, though purportedly aimed at preventing 'forced conversions', has been used as a tool in the hands of disapproving family members to prevent and punish inter-religious elopements and marriages.[38] At the same time, in her study in the north-western state of Haryana, Chowdhry notes that in some cases, considerations of caste appeared to supersede those of religion. For instance, in one of the examples she discusses, the elopement of a Muslim girl with a *Dalit* man was seen to be objectionable not because of the difference in religion between the parties but because of the difference in caste and the subsequent loss of honour and caste purity associated with the union.[39]

To the extent that a family or community can afford it,[40] the honour that rests in the bodies of 'their' girls and women is maintained through strict rules regarding movement, the use of public

[36] Chakravarti (n 6), 147.
[37] Hannah Ellis-Petersen and Ahmer Khan, 'They Cut him to Pieces: India's 'love jihad' Conspiracy Theory turns Lethal' *The Guardian* (Belgaum, 21 January 2022) <https://www.theguardian.com/world/2022/jan/21/they-cut-him-into-pieces-indias-love-jihad-conspiracy-theory-turns-lethal> accessed 13 May 2024;
[38] The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020; Manish Sahu, '1 Month of UP 'Love Jihad' Law: 14 Cases, 49 in Jail, Woman 'victim' Complainant in only Two' *The Indian Express* (Lucknow, 9 January 2021) <https://indianexpress.com/article/india/love-jihad-law-up-police-7124001/> accessed 13 May 2024.
[39] Chowdhry (n 22), 165-67.
[40] Lester Andrist, Manjistha Banerji and Sonalde Desai, 'Negotiating Marriage: Examining the Gap between Marriage and Cohabitation in India' in Ravinder Kaur and Rajni Palriwala (eds.) *Marrying in South Asia: Shifting Concepts, Changing Practices in a Globalising World* (Orient Blackswan, 2014) 118, 122. The authors

spaces, and their interactions with the opposite sex. These rules apply most strictly to post-pubertal girls.[41] Chowdhry argues that the norm of guardianship operates within the overarching norms of caste and honour in establishing this regime of surveillance and control over the bodies, movements, and choices (especially sexual and reproductive) of women and girls. The norm of guardianship refers to the rule that girls and women must remain under the protection of a man. Before marriage, this would be the father or another male relative, and after marriage it would be the husband and his male relatives.[42] In other words, the family whose honour is linked to a woman or girl also has guardianship over her. In practical terms, this implies that guardian(s) may lay down rules regarding the clothing and movement of women under their protection, monitor their movements or accompany them in public, restrict their interactions with males and, importantly, determine with whom they have sex (and reproduce) by deciding whom they marry.

This appears to be the case in most of the northern regions of the country. The *purdah* (veil or face covering) system that operates in rural and semi-urban north India, especially, is an instantiation of the norms of guardianship meant to uphold family honour. Unless a family cannot afford to keep 'their' women behind closed doors (because of financial pressures that require them to do paid work, for instance), strict rules of modesty and segregation apply to women. This translates not only to norms regarding covering of the face and body,[43] but also staying indoors and out of the view of men, even of one's own family. Sen and Ghosh argue, in the context of West Bengal (an eastern Indian state), that the restrictions placed on women after puberty are on the wane. However, their claim that a combination of lack of sanitary facilities, unsafe roads, and *the fear of mixing between boys and girls* may still lead to girls dropping out of school soon after puberty,[44] indicates that the norms of caste and honour continue to be at play here, even if on the decline. In south India, the concept of *purdah* is nearly absent.[45] But while women in south India seem to have greater autonomy (than their northern counterparts) in choosing their life partners,[46] it should not thereby be concluded that inter-caste

argue: 'reification of women's modesty is the privilege of upper social classes, and higher caste status is often demonstrated though such reification. Lower-class and lower-caste women rarely have the privilege of secluding themselves.'

[41] Dube (n 28), 14.

[42] Chowdhry (n 22) 4.

[43] Sharmistha Basu and others, 'Learning to be Gendered: Gender Socialisation in Early Adolescence Among Urban Poor in Delhi, India and Shanghai, China' (2017) 61 Journal of Adolescent Health 24, 26.

[44] Samita Sen and Anindita Ghosh, 'Wives and Workers: Early Marriage in West Bengal' in Samita Sen and Anindita Ghosh (eds.) *Love, Labour and Law: Early and Child Marriage in India* (Sage, 2021) 166, 176.

[45] Andrist, Banerji and Desai (n 40), 120.

[46] A study which combined an initial quantitative phase and in-depth qualitative interaction found that 52% women in southern and western states compared to 91% in northern and eastern states had family-arranged

marriage, especially marriage between a *Dalit* man and an upper or intermediate caste woman, is seen as normal or acceptable.[47] Restrictions on movements and interactions with boys have also been seen to operate in these regions.[48]

Rules regarding the use of public spaces by women appear to become more liberal as one moves to more urban settlements and, in some cases, have loosened over time even in villages. It would be a mistake, however, to understate the continuing degree of acceptance and enforcement of the norms of caste and honour, and the related norm of guardianship, even in urban centres, especially amongst families (across the socio-economic spectrum) which remain embedded within their caste communities. The rules for girls and women are still notably different from those for boys and men in urban and semi-urban areas. Kumar, for instance, discusses the unspoken segregation imposed between boys and girls from around secondary school (broadly corresponding with the ages of puberty), and the marked difference in the way boys used public spaces such as streets (to loiter or play) and the way girls used them (for a specific purpose, such as to go home from school).[49] Institutions for higher education also frequently have more conservative rules and dress codes and earlier curfew times for women compared to men, even in metropolitan cities like Delhi, Mumbai, and Bangalore.[50] Moreover, I show in Part III.A.2 of this chapter, public spaces in urban centres are widely considered (and in several cases, they are in fact) unsafe for women and girls, thereby subtly enforcing the norms of caste, and honour. This works in two ways. First, the fear that public spaces are dangerous for women or that women are more vulnerable to sexual violence in these spaces has a chilling effect on women who want to access these spaces and constructs the home as a safer space for women. Second, the direct and indirect linking of sexual violence with the breach of the norms of honour and guardianship creates an incentive to follow these norms just to avoid trouble. Thus, even though the degree of surveillance and policing over the movement of girls reduces as one moves from

marriages. Shireen J. Jejeebhoy and others, 'Marriage-Related Decision-Making and Young Women's Marital Relations and Agency' (2013) 9(1) Asian Population Studies 28, 34.

[47] Tim Dyson and Mick Moore, 'On Kinship Structure, Female Autonomy, and Demographic Behaviour in India' (1983) 9(1) Population and Development Review 35, 44-45.

[48] Satyanarayan Ramanaik and others, 'Education, Poverty and "Purity" in the Context of Adolescent Girls' Secondary School Retention and Dropout: A Qualitative Study from Karnataka, Southern India' (2018) 13(9) PLoS One 10.1371/journal.pone.0202470.
This qualitative study of girls who dropped out of high school in Karnataka (south India) demonstrates the role of concern for honour and sexual purity, as well as the norms of guardianship, in leading to girls dropping out of school. Three out of the five girls who dropped out did so because of the norms of honour and guardianship.

[49] Krishna Kumar, 'Growing up Male' in Nandini Manjrekar (ed.) *Gender and Education in India: A Reader* (Routledge, 2021) 36, 36-7.

[50] Annie Zaidi, 'How Women at India's Colleges and Hostels are Winning Freedom' *India Spend* (Mumbai, 27 April 2019) <https://www.indiaspend.com/how-women-at-indias-college-hostels-are-winning-freedom/> accessed 13 May 2024.

relatively rural to more urban centres, restrictions on women's movements, especially on the interactions of adolescent girls and women with boys and men, continue to operate.

This framework of caste, honour, and guardianship, it should be remembered, is meant to ensure family and community control over women's sexual and reproductive capacities by restricting sexual activity to hegemonised marriage (compliant with the norms of caste and honour, and/or approved by the family). This means that when sex takes place outside this socially approved space, it poses a threat to the norms of caste, honour, and guardianship. Such sex is considered unacceptable and socially illegitimate and may be dealt with severely (see section III.A.3).

However, this binary was not always the dominant norm around sex in India. It emerged and became hegemonised due to the restrictive sexual morality that developed in the Indian subcontinent during the 19th century. As the next section demonstrates, this binary stripped relative freedom and high social status from women who had previously enjoyed it. It left only chaste girls and wives in hegemonised marriages with social respectability, itself often little more than a façade.

II. The Binary of Legitimate and Illegitimate Sexual Activity

Indian historians have established that women, and especially women's sexuality, became a subject of contestation in late 19th and early 20th century colonial India. Chatterjee argues that colonial rulers used the perceived (and sometimes real) oppression of women in the Indian subcontinent to cast the entire culture as backward, oppressive, and unfree.[51] Practices such as child marriage, the *devadasi* system (the practice of dedicating girls and women as temple dancers, discussed later in this section) and fluid practices of sexuality and marriage which gave women relative sexual autonomy and choice in terms of their sexual partners were taken together as signs of an inferior culture marked by sexual promiscuity and depravity and contrasted with the morally superior culture of the coloniser. This narrative was then used to justify colonial rule as an important civilising mission. Sinha demonstrates, for instance, how Mayo's *Mother India*, discussing the evil of child marriage in India, was essentially a polemic against the suitability of self-rule for Indians. She offers compelling evidence of the central role of the India Office (the department of the British state that took over from the East India Company in 1858) in the production of this polemic. In fact, 'the central idea of the book- the oversexed culture of the Hindus', Sinha establishes, came from an officer associated with the

[51] Partha Chatterjee, 'Colonialism, Nationalism, and Colonialized Women: The Contest in India' (1989) 16(4) American Ethnologist 622, 622.

India Office.[52] As regards the *devadasi* system, Srinivasan argues, '[t]he publication of the [*devadasi*] system as prostitution sought to advertise the moral grotesqueness of the subject population for political ends. For those who supported imperialism on the grounds of its "civilising" function, programmes of reform it must be remembered were not without their ideological rewards.'[53] Similarly, Nayars (a matrilineal community from Kerala) practiced a form of marriage called *sambandham*, under which women did not move to their husband's home, children inherited property from their mother, and dissolution was quick and easy.[54] However, as Kodoth demonstrates, it was precisely these features that made *sambandham* unworthy of being recognised as marriage in the eyes of colonial judges. Instead, it was seen as a form of concubinage, akin to prostitution.[55]

In response to this, the Indian national movement sought to demonstrate the superiority of Hindu civilisation to seek legitimacy in the eyes of the world and the colonial government for self-rule by Indians. Men from the Indian elite (usually the Bengali *bhadralok* or educated, upper-caste elite) as well as some social reform movements led by Indians, including Indian women,[56] projected the upper-caste, chaste Hindu woman as the ideal Indian woman[57] against whom the practices and lives of all other women were judged.

This idealised construct of the Indian woman *required* sexual activity to be channelled and contained within hegemonised marriage.[58] This channelling was done by likening all sexual activity outside hegemonised marriage with prostitution and by shaming and stigmatising sexual activities and relationships which, until then, had been considered normal or respectable. The equation of all categories of women who were paid or patronised for sex (usually along with other services) with the European view of the 'common prostitute' became the dominant

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[52] Mrinalini Sinha, *Specters of Mother India: The Global Restructuring of an Empire* (Duke University Press, 2006) 78-79.
[53] Amrit Srinivasan, 'Reform and Revival: The Devadasi and her Dance' (1985) 20(44) Economic and Political Weekly 1869, 1873.
[54] Praveena Kodoth, 'Courting Legitimacy or Delegitimizing Custom? Sexuality, Sambandham, and Marriage Reform in Late Nineteenth-Century Malabar' (2001) 35(2) Modern Asian Studies 349, 349.
[55] ibid, 365.
[56] For instance, Dr. Muthulakshmi Reddy, a former *devadasi* who joined the reform movement and 'introduced a resolution in the legislature to abolish devadasi tradition by claiming that it was immoral'. R. Nadadur Kannan, 'Gendered Violence and Displacement of Devadasis in the Early Twentieth-century South India' (2016) 12(2) Sikh Formations: Religion, Culture, Theory 243, 255.
[57] Tharu discusses the representation of the ideal Indian woman, Savitri, in Indo-Anglian literature, that is, literature written by Indians in English in the 19th and early 20th centuries, noting that chastity and modesty appear as recurring themes in these works. See, Susie Tharu, 'Tracing Savitri's Pedigree: Victorian Racism and the Image of Women in Indo-Anglian Literature' in Kumkum Sangari and Sudesh Vaid (eds.) *Recasting Women: Essays in Indian Colonial History* (Rutgers University Press, 1990) 254.
[58] Ratna Kapur, 'Post-Colonial Economies of Desire: Legal Representations of the Post-Colonial Economies of Desire- Legal Representations of the Sexual Subaltern' (2001) 78(4) Denver Law Review 855, 861.

narrative during the colonial period.[59] This binary between sex within hegemonic marriage, which is socially legitimate, and all sexual activity outside it, which is illegitimate and unacceptable had the effect of associating the social status and respectability of girls and women with the degree of their compliance with this social norm around sex. The wife in a hegemonised marriage was respectable, whereas every girl or woman who engaged in sexual activity outside the confines of hegemonised marriage was akin to a common prostitute, and therefore, unworthy of respect and degraded.

This binary became the dominant norm around sex and sexuality during the 19th century and continues to be accepted and enforced today (Part III). However, the example of the *devadas*i shows that it did not represent, but rather constructed, women's sexual reality. *Devadasis* enjoyed respect, independence, and some degree of power despite engaging in sexual relations outside the marital sphere. They were not seen as degraded or akin to prostitutes until this binary, enforced through law, robbed them of their high social status. The *real* position of wives in India similarly shows the superficiality of this binary. Despite the façade of respect given to sex within marriage and to wives, the dominant discourse around sex and marriage in India indicates that wives are treated as their husbands' property and might even be expected to perform sexual labour that is generally indistinguishable from the labour performed by sex workers.

A. *Devadasis*

Tambe rightly argues that comparing 'prostitution' in ancient, medieval, and colonial periods can be problematic, since it is far from clear that practices now described by morally charged terms like 'prostitution' or 'harlotry', were seen from that lens in other times.[60] In pre-colonial India, several categories of women now called prostitutes enjoyed a high social standing, owned private property and even received state support.[61] It was in the colonial period that sexual relations outside the sphere of hegemonised marriage suffered a fall from grace.

This process of change is exemplified by the history of *devadasis*. According to Eve Rebecca Parker, '[t]he term *devadasi* has come to be used as a collective categorical noun that

[59] Durba Mitra, *Indian Sex Life: Sexuality and the Colonial Origins of Modern Social Thought* (Princeton University Press, 2020) 7.
[60] Ashwini Tambe, *Codes of Misconduct: Regulating Prostitution in Late Colonial Bombay* (University of Minnesota Press, 2009) xx-xxi.
[61] See, Gayatri Chatterjee, 'The Veshya, the Ganika and the Tawaif: Representations of Prostitutes and Courtesans in Indian Language, Literature and Cinema' in Rohini Sahni, V. Kalyan Shankar and Hemant Apte (eds.), *Prostitution and Beyond: An Analysis of Sex Workers in India* (Sage Publications, 2008) 279.

incorporates different groupings of women who have been dedicated to deities.'[62] *Devadasis*, therefore, were girls and women who were dedicated (usually before or around puberty) to the village temple through marriage to its God or Goddess.[63] This gave them the status of *nityasumangali* or those possessing the permanent auspiciousness of the married woman who, by virtue of being wedded to the divine, could never be touched by the perceived inauspiciousness of widowhood.[64] Though they almost always belonged to lower-castes,[65] *devadasis* were in charge of important tasks within the temple complex, were trained in classical dance and performed during temple rituals.[66] They owned land and controlled its cultivation, and were considered an auspicious presence during festivals and joyous occasions.[67] Despite their dependence on 'that triad of men within the political economy of the temple, the priest, the guru and patron',[68] *devadasis* enjoyed status and privileges that neither ordinary women nor men from lower castes could claim.[69] Because they were married to the temple deity, *devadasis* could not marry (mortal) men, and their kinship relations were traced through the deity.[70] Inheritance and succession amongst *devadasis* was matrilineal,[71] they supported their families,[72] and even performed typically male tasks such as funeral rites.[73] *Devadasis* were usually patronised by the King or the landowning elite of the village, and though they had sexual relations outside the marital sphere, this did not lead to a loss of honour or status.[74] According to Ramberg,

> The conflation of the *devadasi* with the prostitute has a history in the colonial era standardization of marriage and emergence of the common prostitute. Multiple non-wife, precolonial categories, such as *veshya, sule, kanki, basavi, murli, jogini,* concubine, and courtesan, were socially and legally recognized in precolonial contexts across the Indian subcontinent. These terms referred to persons associated with a wide variety of domiciling and [labor] practices, sexual

[62] Eve Rebecca Parker, *Theologising the Sacred "Prostitutes" of South India* (Brill, 2021) 23.
[63] Srinivasan (n 53), 1869.
[64] Saskia C. Kersenboom-Story, *Nityasumangali: Devadasi Tradition in South India* (Motilal Banarsidas, 1987) 197.
[65] Kay K. Jordan, *From Sacred Servant to Profane Prostitute: The History of the Changing Legal Status of Devadasis in India, 1857-1947* (Manohar Publishers, 2003) 152.
[66] Srinivasan (n 53), 1869; Parker, *Theologising the Sacred Prostitutes of South India* (n 62), 29.
[67] Frédérique Apffel-Marglin, *Wives of the God-King: The Rituals of the Devadasis of Puri* (OUP, 1985) 40-41; Rekha Pande, 'Ritualised Prostitution: Devadasis to Jogins- a Few Case Studies' in Rohini Sahni, V. Kalyan Shankar and Hemant Apte (eds.), *Prostitution and Beyond: An Analysis of Sex Workers in India* (Sage Publications, 2008) 101, 102.
[68] Janaki Nair, 'The Devadasi, Dharma and the State' (1994) 29(50) Economic and Political Weekly 3157, 3161.
[69] ibid.
[70] Lucinda Ramberg, *Given to the Goddess: South Indian Devadasis and the Sexuality of Religion* (Duke University Press, 2014), 145.
[71] Srinivasan (n 53), 1869.
[72] Ramberg (n 70), 173.
[73] ibid, 169.
[74] Srinivasan (n 53), 1870.

> arrangements, and performative arts, a variety that the modern category and English term "prostitute" cannot convey... Within the context of reform these distinctions began to collapse into the figure of the prostitute. The common prostitute emerged in the context of colonial legal discourses and state practices that sought to regulate sexual commerce as a matter of public health and racial order.[75]

As with other categories of non-wives who performed sexual labour (with or without other functions), *devadasi*s were transformed, through legal and social reform, from highly skilled, reasonably wealthy and powerful, and well-respected temple dancers to 'common prostitutes'. This was done, first, by the use of criminal provisions regulating prostitution against *devadasis* by Anglo-Indian courts, particularly British judges in Anglo-Indian courts, thereby displacing the practice from the 'private' realm of religion and recasting it as an issue of public interest through criminalisation. Kannabiran argues that the practice of *devadasi* dedication was acceptable in private law, and the policy of the British colonial government was generally to allow the 'natives' to self-govern in matters of personal/religious laws and custom, but *devadasi* dedication was brought within the ambit of criminal law because it was seen as a transgression of a public nature.[76] Based on her analysis of judgments from British colonial courts, she observes,

> British judges generally felt they could ill-afford to turn a blind eye to the 'main purpose of the devadasis' profession – prostitution'. Although the issue in question related to religious services, 'it is still impossible to regard their religious services as disconnected from the other inevitable pursuit of their profession as devadasis.' Recognising custom, they felt, was giving sanction to "an association of women to enjoy a monopoly of the gains of prostitution, a right which on the score of morality alone, no court could countenance."[77]

Thus, despite being permitted in Hindu law and custom, the life of temple dancers, in particular, their practice of exchanging sex with their patrons, was seen as a being against the public interest. *Devadasis* were prosecuted under s. 372 and s. 373, IPC, which criminalise the buying and selling of minors for the purpose of prostitution,[78] and thereby equated with common prostitutes.

Second, and relatedly, the issue was taken up by Indian nationalists and reformers who sought to end practices which were used by colonialists to depict Hindu culture in a poor light. Reformers amongst both British colonialists and elite Hindus sought to 'purify Hinduism of

[75] Ramberg (n 70), 157.
[76] Kalpana Kannabiran, 'Judiciary, Social Reform and Debate on "Religious Prostitution" in Colonial India' (1995) 30(43) Economic and Political Weekly WS59, WS60.
[77] ibid, WS60-WS70.
[78] IPC, s. 372 and s. 373.

superstition'.[79] Simultaneously, as I argued at the beginning of this section, the Indian national movement sought to counter the image of the barbaric native and oversexed Hindu, generated by the British government, and by ideological proponents of colonialism, to legitimise colonial rule. It did so by forwarding an image of Hindus as a community of civilised, rational persons, capable of self-rule, by the metric of the West in general, and British colonialists in particular. Eve Rebecca Parker succinctly captures this contestation between British colonialists and Indian nationalists through her observation that, '[t]he campaign against British imperialism became interwoven with women's reform movements to the extent that the British used the so-called "modernisation" of the place and role of women within Indian society as a means of demonstrating their own universal moral agenda and legitimising their rule.'[80] Describing the impact of this contestation on *devadasis*, Soneji argues, 'Reform projects around *devadasis* also represented a persistent, middle-class altruism that was justified through a discourse of moral recuperation. Nonconjugal female sexuality represented a near-irrevocable moral degeneration, and it was in large part the responsibility of middle-class women to reform and neutralize its dangers by way of example.'[81]

Thus, it was the divergence of the *devadasi* from the norm of the chaste Hindu wife in a context where female sexuality was cast into a binary of legitimate (within marriage) and illegitimate (outside marriage) sex, that solidified her position as a common prostitute. In this context, Kunal Parker rightly notes, '[t]emple dancing girls were represented as "prostitutes" not as participants in a sex trade but in terms of Hindu legal norms according to which all female sexual activity outside marriage was designated "unchastity", "incontinence" or "prostitution".'[82]

In 1934, legislation was proposed and enacted in the colonial province of Bombay to criminalise the dedication of girls and women as temple dancers, and to enable the marriage of existing temple dancers to (mortal) men, something that was prohibited by tradition since *devadasis* were considered to be married already to deities. This served the dual purpose of

[79] Ramberg (n 70) 14.
[80] Parker (n 62), 30.
[81] Davesh Soneji, *Unfinished Gestures: Devadasis, Memory and Modernity in South India* (University of Chicago Press, 2012) 113.
[82] Kunal M. Parker, '"A Corporation of Superior Prostitutes": Anglo-Indian Legal Conceptions of Temple Dancing Girls, 1800–1914' (1998) 32(3) Modern Asian Studies 559, 563.

condemning and seeking to end the *devadasi* system through criminalisation, and of integrating former *devadasis* into the marriage-centric ideal of the Hindu woman.[83]

Therefore, along with other women whose sexual relations did not conform with the notion of the 'chaste' wife, the process of reform degraded and impoverished the *devadasi*.[84] Girls and women who are dedicated as *devadasis* today are widely represented in the literature as virtually indistinguishable from sex workers.[85] They are usually dedicated to propitiate the deity of a temple (for example, as a promise in exchange for saving a sick child). Based on her ethnographic study of *devadasis* in Karnataka, Ramberg observes, 'When *devadasis* describe how they came to be tied to *Yellamma*, they often detail being afflicted by terrible skin ailments, fever, persistent and inexplicable illness worsened by medical treatments, deaths in the family, loss of livestock, failure of crops, serious quarrelling within the family, and stubborn poverty.'[86] Sharma, similarly, notes that

> [p]arents, mostly of *Dalit* communities, still force their girls to become Devadasis: economic hardship pushes poor families to consecrate their daughters. The majority of Devadasis comes from poor landless families: many *Dalit* women are dedicated to the Goddess at a very young age by parents hoping to receive divine help to cure a disease or as an offering for the fulfilment of a wish.[87]

After being dedicated, *devadasis* trade sex with the temple priest as well as others in their village or town. As recorded in a policy brief on *devadasi* practice in modern India by the Centre for Law and Policy Research, a research and advocacy organisation in Bangalore, '*Devadasis* [are] expected to have sexual partnerships with men who could support them and their families, camouflaged as a long term socially sanctioned partnership akin to marriage.'[88]

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[83] ibid, 629-632; Mytheli Sreenivas, 'Creating Conjugal Subjects: Devadasis and the Politics of Marriage in Colonial Madras Presidency' (2011) 37(1) Conjugality and Sexual Economies in India 63, 75.

[84] Ramberg (n 70), 157. The author states, 'The conflation of the *devadasi* with the prostitute has a history in the colonial-era standardization of marriage and emergence of the common prostitute. Multiple non-wife categories such as *veshya*, *besya sule*, *kanki*, *basavi*, *bandi*, *murli*, *jogini*, concubine, and courtesan, were socially and legally recognised in precolonial contexts across the Indian subcontinent. These terms referred to persons associated with a wide variety of domiciling and labour practices, sexual arrangements, and performative arts. The categories both overlapped with and differed from that of devadasis, who were distinguished by their connection to temples and elaborate performing arts. In the context of reform, these distinctions began to collapse into the figure of the prostitute.'

[85] Bincy Wilson, 'Can Legislation Alone Protect Devadasi Girls from Child Sexual Abuse and Exploitation?' (2020) 29(5) Journal of Child Sexual Abuse 606, 608; Sankar Sen and P.M. Nair, *Trafficking in Women and Children in India* (Orient Longman, 2005).

[86] Lucinda Ramberg, 'When the Devi Is Your Husband: Sacred Marriage and Sexual Economy in South India' (2011) 37(1) Conjugality and Sexual Economies in India 28, 31.

[87] Manu Sharma, 'Divine Shadows: Indian Devadasis between Religious Beliefs and Sexual Exploitation' in Elisabetta Ruspini, Glena Tibe Bonifacio and Consuela Corradi (eds.) *Women and Religion: Contemporary and Future Challenges in the Global Era* (Bristol University Press, 2018) 79, 87.

[88] Jayna Kothari and others, 'Intersections of Caste and Gender: Implementation of Devadasi Prohibition Laws' (Centre for Law and Policy Research, 2019) [The study is on file with the author].

In some cases, they move or are trafficked to bigger cities to perform brothel-based sex work.[89] Ramberg, however, demonstrates that unlike other sex workers, even present-day *devadasis* perform some temple rituals and are marked as auspicious.[90] In that sense, their status appears to be somewhat better than sex workers who are not associated with divinity. Notwithstanding this, there is little doubt that they are deemed to be degraded by their association with sex work.

This brief (and inevitably limited) history of the *devadasi* demonstrates how the constructed binary between chaste wives and all other sexual women did not reflect the lived realities of women in the Indian subcontinent, but actively changed it. It re-categorised a previously high-status group of women as akin to prostitutes, degraded and unworthy of their high social status.

B. Wives

In contrast with degraded *devadasis*, this constructed binary saw wives in hegemonised marriages as respectable. However, the extent to which wives often did (and still do) perform sex as work (or labour) within marriage indicates that this respectability may, in many cases, be little more than a façade, and the real position of many Indian wives is indistinguishable from that of the prostitute who performs sex as work.

Sen and Ghosh argue that marriage, especially in the lower socio-economic strata of India, is the induction of girls into 'work' through domestic and reproductive labour inside the home and potentially manual labour outside the home.[91] To this I add that for women of all socio-economic backgrounds, marriage, being an unquestionably sexual institution, is also potentially the beginning of sexual labour. By this I do not mean that sex within marriage is or feels like work for all women all the time. But, in many cases, the experiences of women having sex within marriage and the experiences of women performing sex work or other forms of unpleasant (or even degrading) manual labour for a living appear to be similar.[92] Furthermore, the dominant view of sex and marriage in India indicates that husbands acquire a right over their wives' bodies and sexual capacities on marriage.

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[89] Bincy Wilson, Shruthi Raman and Anuroopa Gilliyal, 'A Qualitative Study of the Legal Dimensions of "Devadasi" Dedication Phenomenon' (Centre for Child and the Law, National Law School of India University, 2018) [The study is on file with the author].

[90] Lucinda Ramberg, 'When the Devi Is Your Husband' (n 86), 34.

[91] Sen and Ghosh, 'Wives and Workers' (n 43), 169.

[92] For instance, Kotiswaran argues that the spheres of marriage and sex work are neither as clearly delineated nor as mutually exclusive as they are often made out to be. Sex workers engage in marriage, wives engage in (overtly paid) sex work and wives often see and describe sex with their husbands as 'work' or labour. Prabha Kotiswaran, 'Wives and Whores: Prospects for a Feminist Theory of Redistribution' in Vanessa E. Munro and Carl Stychin (eds.) *Sexuality and the Law: Feminist Engagements* (1st edn., Routledge-Cavendish, 2007) 283, 284-286.

Indian criminal law, which does not recognise the possibility of rape within marriage for adult women (see Chapter 3), appears to affirm this position. In a recent split verdict on the marital rape exception in Indian criminal law (see Chapter 3), one of the judges of the Delhi High Court, distinguishing rape by a stranger and rape by a husband, observed:[93]

> Any assumption that a wife, who is **forced** to have sex with her husband on a particular occasion when she does not want to, feels the same degree of outrage as a woman raped by a stranger, in my view, is not only unjustified, but is *ex facie* unrealistic…. A husband may, on occasion, **compel** his wife to have sex with him, though she may not be inclined. Can it be said, with even a modicum of propriety, that her experience is the same as that of a woman who is ravaged by a stranger?

These views represent the dominant social discourse on sex within marriage in India.[94] During a podcast recording for a national newspaper, my co-panellist, a senior advocate (the equivalent of a barrister) in the Supreme Court of India, stated his view on the relationship between sex and marriage in India as, 'marriage is the price men pay for sex and sex is the price women pay for marriage.'[95] Given these views, I argue that marriage only casts a patina of legitimacy over sexual interactions. It does not thereby ensure that sex within marriage is not work or labour for girls and women or, in fact, grants them *real* respect. This is especially since (as discussed in Section III.A), most women have little say in whom they marry.

Ultimately, the binary between legitimate (within hegemonised marriage) and illegitimate (outside hegemonised marriage) sex, which became the dominant norm around sex during the colonial period upholds the norms of caste and honour by ensuring that female sexual and reproductive capacity remains within family approved arranged marriage. Its effect is to divide women into respectable wives, whose sexual activity is contained within socially sanctioned marriage, and fallen or degraded women, akin to prostitutes, a category which includes all women who do not conform to this norm. However, the examples of the *devadasi* and the wife show that this norm should not be taken to reflect the true nature of sexual interactions for women.

Nevertheless, the binary between legitimate and illegitimate sex exists even today, a natural extension of upholding and enforcing the norms of caste and honour. In the following section,

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[93] *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404, [563] (emphasis added).

[94] Pallavi Prasad, 'Why It's Still Legal for Indian Men to Rape Their Wives' (*The Swaddle*, 20 January 2020) <https://theswaddle.com/marital-rape-inda-decriminalized-crime/> accessed 13 May 2024.
The piece demonstrates the prevalence of the widespread approval of the marital rape exception evident in the arguments made to preserve it.

[95] I cannot name my co-panelist because he refused consent to air the discussion.

I discuss the extent to which this norm appears to be socially accepted and some of the methods by which it is enforced.

III. Women and Girls in the Framework of Caste and Honour: A Tale of Acceptance and Enforcement

The binary between legitimate sex (within hegemonised marriage) and illegitimate sex (outside hegemonised marriage) draws from and supports the norms of caste and honour. In this section, I argue that these norms are widely accepted, and socially enforced in direct and indirect ways.

A. Acceptance and Enforcement of Social Norms

Data on sexual intercourse and marriage in the country indicate that the norm of restricting sexual activity within marriage is, by and large, reflected in the experiences of most Indians, especially women and girls. According to the National Family Health Survey (NFHS)-4 (2015-16), conducted by the Indian Ministry of Health and Family Welfare, 97% women and 89% men who were never married also reported never having had sexual intercourse. This percentage decreased with age, as 98% of never-married women and 96% of never-married men aged 15 to 17 reported never having had sexual intercourse, while 95% of never-married women and 81% of never-married men aged 23-24 reported never having had sexual intercourse. [96] These data can be further contextualised through other population surveys.

Consider, for instance, the surveys of adolescents conducted by the Population Council in Bihar (an eastern Indian state, where interviews of 1821 boys and 3428 girls in the 15-19 age group were conducted)[97] and Uttar Pradesh (a northern Indian state, where interviews of 2064 boys and 4,338 girls in the 15-19 group were conducted).[98] The survey in Bihar found that 19.3% boys and 13.6% girls reported having a romantic partner, of which 64% boys and 43% girls reported kissing their romantic partner on the lips, and 41% boys and 17% girls reported engaging in sexual intercourse with their partner. This means that out of the total number of adolescents interviewed, only 7.9% boys and 2.3% girls reported having had sexual intercourse, and only 12.3% boys and 5.8% girls reported kissing their partners on the lips. The Uttar Pradesh survey found that about 26% boys and 16% girls reported having romantic

[96] Ministry of Health and Family Welfare (Government of India), National Family Health Survey (NFHS)-4 (2015-16) (December 2017), 422 <http://rchiips.org/nfhs/NFHS-4Reports/India.pdf> accessed 13 May 2024.
[97] K.G. Santhya and others, 'Understanding the lives of adolescents and young adults (UDAYA) in Bihar, India' (UDAYA Report-Bihar) (*Population Council*, 2016), 213-16 <https://www.projectudaya.in/wp-content/uploads/2018/08/Bihar-Report-pdf.pdf> accessed 13 May 2024.
[98] K.G. Santhya and others, 'Understanding the lives of adolescents and young adults (UDAYA) in Uttar Pradesh, India' (UDAYA Report-UP) (*Population Council*, 2015-16), 210-13 <https://www.projectudaya.in/wp-content/uploads/2018/08/UP-Report-pdf.pdf> accessed 13 May 2024.

relationships, of which 68% boys and 42% girls reported kissing their partner on the lips, while 42% boys and 18% girls reported having sexual intercourse with their partner. This means that out of the total number of adolescents interviewed, about 18% boys and 6.7% girls reported having kissed their partner on the lips while 10.9% boys and about 2.8% girls reported having sexual intercourse with their partner.

The results of the population surveys discussed above do not correspond exactly with those of NFHS-4, but they do indicate a rather low level of non-marital sexual activity amongst adolescents, with the reported rates of sexual intercourse being the lowest. It is possible, from a composite view of these numbers to say that sexual activity outside marriage is not socio-normative in India.

The apparent rarity of pre-marital sex in India is at least partly attributable to the fact that marriage is the only socially legitimate space for sexual expression in the country. It is also the only sexual relationship that is legally recognised and that gives parties legally enforceable rights and protections. The highly limited legal recognition of non-marital cohabitation is contingent on it being 'in the nature of marriage'.[99] It is not surprising, therefore, that marriage in India is, in social terms, compulsory and nearly ubiquitous.[100] According to the NFHS-4, only 1% women and 2% men in India had never been married by the age of 45-49.[101] Since caste-endogamous marriages arranged by the family continue to be the norm in India with only 5.28% inter-caste marriages,[102] it is reasonable to conclude that sexual (and reproductive) activity is largely contained within hegemonised marriages, that is, marriages which comply with the norms of caste and honour, or at the very least, are approved by the family.

In some instances, the need to work and support oneself and one's family might override the imperative to follow these norms. This is especially true of socio-economically marginalised

[99] The Protection of Women from Domestic Violence Act, 2005, s. 2(f): '"domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or **through a relationship in the nature of marriage**, adoption or are family members living together as a joint family' (emphasis added); The Supreme Court of India held that 'a relationship in the nature of marriage was akin to a common law marriage'. *D. Velusamy v. D. Patchaiammal*, (2010) 10 SCC 469 [31].
Similarly, in *Indira Sarma v. V.K.V. Sarma*, (2013) 15 SCC 755 [45], the Supreme Court held that a relationship in the nature of marriage could be identified using the factors listed in the Acts Interpretation Act, 1948 (Australia), which laid down the non-essential indicators for a 'de-facto' marital relationship.
[100] Mary E. John, *Child Marriage in an International Frame: A Feminist Review from India* (Routledge, 2021) 147.
[101] NFHS-4 (n 96), 155.
[102] Pralip Kumar Narzary and Laishram Ladusingh, 'Discovering the Saga of Inter-caste Marriage in India' 2019 54(4) Journal of Asian and African Studies 588, 590. The author's conclusions are drawn from the nationally representative, multi-topic panel survey of 42,152 households in 384 districts, 1,420 villages and 1,042 urban neighbourhoods across India, known as the Indian Human Development Survey.

women whose imperatives of livelihood do not allow strict adherence to these rules. Even for these women, however, the appearance of honour and in that sense the norms of caste and honour continue to be important considerations in the way they conduct themselves.

Shah's study of women engaged in sex as work (in various capacities)[103] shows that even in the context of street-based sex work and solicitation at *nakas* (street corners and intersections), girls and women do everything they can to hide from their caste communities that they are doing (in their words) 'bad work'. This is because the norms of caste and honour are expected to be followed by every community, and social acceptance within the caste community is necessary for survival due to continuing links with the village, as well as communal and co-dependent living in the city.[104] Therefore, girls and women must constantly balance the need to work (*paet ke liye* or 'for the stomach') with the need to maintain their honour in the community. Therefore, even when weighed against matters of livelihood and survival, norms of caste and honour cannot lightly be ignored or flouted.

Thus, from the discussion above, the ubiquitous control and influence exerted by the norms of caste and honour over the lives of girls and women in India becomes apparent. There are several reasons for this. One reason is that these norms are voluntarily accepted by several people for whom caste-endogamy and family-arranged marriage are preferable or convenient.[105] In part, this is because socialisation in India's caste-based patriarchy usually involves subliminal messaging about the desirability of marrying within the community and, especially, with the approval of the family. As I argue in Chapter 4, moreover, decision-making in consonance with (rather than in disruption of) collective structures is socio-normative in India. Another major reason, as I argue below, is that these norms are enforced in direct or indirect ways, especially by families which continue to be embedded in, and therefore dependent for status and support on, their caste communities. The following sub-sections discuss some of the methods through which the norms of caste and honour continue to be enforced in modern India.

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[103] See, Svati P. Shah, *Street Corner Secrets: Sex, Work and Migration in the City of Mumbai* (Duke University Press, 2014).
[104] ibid, 93.
[105] See, Madhurima Mukhopadhyay, 'Choice and Agency in Marital Decision: A Study among Hindu Bengalis across Class in Kolkata' in Samita Sen, Ranjita Biswas and Nandita Dhawan (eds.), *Intimate Others: Marriage and Sexualities in India* (Stree, 2011) 121. Though the study focuses on Hindu Bengalis in Kolkata, it reflects the experiences of most young people in the country, especially in urban and semi-urban centres; Rukmini S., 'Urban Indians still get married the way their grandparents did' *LiveMint* (New Delhi, 4 October 2018) <https://www.livemint.com/Politics/mnVzCfIEbqvzEu01LTxqLM/Urban-Indians-still-get-married-the-way-their-grandparents-d.html> accessed 13 May 2024.

1. Child Marriage

Data from the Government of India indicate that the mean age of marriage for women in India is 22.1 years, while the median age is 19 years. The mean age for marriage in rural areas is 21.7 years, while in urban areas it is 23.1 years.[106] There has been a steady decline in the rates of child marriage since the turn of the millennium. According to the National Family Health Survey (NFHS)-5 (2019-21), 4.8% of women currently aged 20-24 were married by the age of 15, and an additional 23.3% by the age of 18.[107] This shows a decrease in the rates of child marriage in this age-groups compared to the rates recorded in the NFHS-4 (2015-16), according to which 6.6% of women 20-24 age bracket at the time of the survey had been married by the age of 15, and an additional 26.8% by the age of 18. Amongst women in the 45-49 age group, 19% had been married by the age of 15 and 46% by the age of 18, as recorded in NFHS-4.[108] These data indicate a major change in the age of marriage in the last couple of generations, but early marriage (that is, marriage during adolescence) is still prevalent in large parts of the country.

There are several reasons for child marriage, and it is not my intention to explain the phenomenon. My limited argument is that marrying girls at a relatively young age, before they can endanger the honour of the family and the caste community by eloping with someone of their choice, is an easy way to maintain caste purity.[109] In that sense, the enforcement of the norms of caste and honour is *one* of the reasons for child marriage. This is true not just of India but all subcontinental patriarchies where marriage plays a central role in the maintenance of family honour through the control of female sexuality. Thus, in the context of Bangladesh it is argued that 'as soon as a girl reaches puberty it becomes the family's primary concern to protect her sexuality (virginity) until she is married, and thus also protect the family's reputation, by preventing her from engaging in premarital sex'.[110]

[106] Ministry of Statistics and Programme Implementation (Government of India), Women & Men in India: A Statistical Compilation of Gender Related Indicators in India (2019), 12 <https://www.mospi.gov.in/documents/213904/330820/Women_and_Men_31_+Mar_20201598854051312.pdf/d14e04e1-4fe9-6eb9-7a47-3f8ea66a96c7?t=1598856366935> accessed 13 May 2024.
[107] Ministry of Health and Family Welfare, Government of India, National Family Health Survey (NFHS)-5 (2019-21) (March 2022) 217<https://dhsprogram.com/pubs/pdf/FR375/FR375.pdf> accessed 13 May 2024.
[108] National Family Health Survey (NFHS)-4 (n 96), 165.
[109] Dube (n 28), 15; Biswajit Ghosh, 'Child Marriage, Society and the Law: A Study in a Rural Context in West Bengal, India' (2011) 25(2) International Journal of Law, Policy and the Family 199, 209.
[110] Kazi Nazrul Fattah and Suborna Camellia, 'Poverty, Dowry and the 'Good Match': Revisiting Community Perceptions and Practices of Child Marriage in a Rural Setting in Bangladesh' (2022) 54 Journal of Biosocial Science 39, 40.

2. Indirect Enforcement through Fear

Even where the norms of caste and honour may not be the professed reason for the restrictions placed on women, they are enforced insidiously through the fear generated by sexual violence against women. In other words, high rates of sexual aggression and violence against women (whether recorded or not), the everyday experience of such violence through minor or major incidents, and the hysteria generated by especially gruesome or notorious incidents, gives credence to the idea that public spaces in India are unsafe for women.

For instance, Jagori, a women's rights non-governmental organisation in New Delhi, conducted a study of women's safety in public spaces in the national capital. The study, which surveyed 3,816 women and 944 men, found that women of all classes faced harassment on the streets, in public transport and at bus stops, although school and college students in the 15-19 age group and female workers in the unorganised sector were found to be most vulnerable.[111] More than 80% women reported verbal harassment (through words), more than 70% reported visual harassment (that is, in the way they were looked at), and about 31% reported unwelcome sexual touching.[112] What is more, harassment is not a one-off event. A qualitative study based on discussions with 20 women from middle and upper-middle class families in Delhi indicated that they faced some form of sexual harassment 50-100% of the times they went out in public.[113] This is not only a problem in New Delhi, but also in Mumbai,[114] which is ordinarily considered one of the safest cities in India. The findings of these surveys are borne out by the everyday experiences of women, including myself, and such experiences create a pervasive sense of danger and risk in women's access to public spaces.

More severe forms of sexual violence against women are also widespread. In 2020, the National Crime Records Bureau (NCRB) noted that an average of 77 rapes were reported every day across the country.[115] Given the size and population of the country, this may not seem like a large number, but it is important to remember that the majority of sexual assault incidents go

[111] Jagori, 'Safe Cities Free of Violence against Women and Girls Initiative: Report of the Baseline Survey Delhi' (2011), xii <http://www.jagori.org/wp-content/uploads/2011/03/Baseline-Survey_layout_for-Print_12_03_2011.pdf> accessed 13 May 2024.
[112] ibid, xii-xiii.
[113] Megha Dhillon and Suparna Bakaya, 'Street Harassment: A Qualitative Study of the Experiences of Young Women in Delhi' (2014) Sage Open 1, 4.
[114] Shreya Bhandary, '76% women find public transport unsafe: Survey' *Times of India* (Mumbai, 4 September 2013) <https://timesofindia.indiatimes.com/city/mumbai/76-women-find-public-transport-unsafe-survey/articleshow/22273179.cms> accessed 13 May 2024.
[115] Asian News International, '80 Murders, 77 Rape Cases Daily in 2020: What Report Reveals about Crime in India' *NDTV* (New Delhi, 16 September 2021) <https://www.ndtv.com/india-news/india-records-80-murders-77-rape-cases-daily-in-2020-ncrb-report-2542736> accessed 13 May 2024.

unreported (some estimate nearly 99%)[116] and the actual numbers are likely to be much higher. Some instances of sexual violence stand out for their macabre gruesomeness and generate intense public outrage and profound fear amongst women. One of the most widely discussed incidents of rape in the last decade in India, for instance, was the December 2012 gang-rape of a 23-year-old paramedical student in a bus in New Delhi. The victim died of the severe injuries she sustained during the attack.[117] She was named *Nirbhaya* (the fearless one) because of her fortitude in assisting the police and other authorities, despite her grievous injuries. Violent incidents of rape like *Nirbhaya*'s, while always shocking, are not as uncommon as we might hope.[118] In a documentary on *Nirbhaya*'s gang-rape in December 2012 (co-produced by the BBC and directed by Leslee Udwin), the psychiatrist treating the accused men in the case mentioned that there were men in Tihar Jail (a prison in New Delhi) who had been convicted for 12 rapes but remembered committing about 200. The actual numbers, the psychiatrist speculated, may yet have been higher.[119] All such incidents, and perhaps more importantly, the knowledge of the prevalence of sexual violence against women, indirectly serve to enforce the norms of caste and honour, and the related norm of guardianship. By making public spaces less accessible to women, they ensure that more women prefer to stay within the confines of the home unless it is necessary to be out or prefer to leave home only during the day and/or only in the company of a guardian male such as a father, brother, or uncle.

In some instances, women's safety and the norms of caste, honour and guardianship are more directly linked when sexual violence is constructed as a response to the breach of such norms, or when the supposed breach of these norms is offered as a justification for sexual violence. It is common, therefore, to hear rapes and other acts of sexual violence or imposition being blamed on the clothes worn by women, on their being out at a time or place that is

[116] Pramit Bhattacharya and Tadit Kundu, '99% Cases of Sexual Assaults go Unreported' *Live Mint* (New Delhi, 24 April 2018) <https://www.livemint.com/Politics/AV3sIKoEBAGZozALMX8THK/99-cases-of-sexual-assaults-go-unreported-govt-data-shows.html> accessed 13 May 2024; Not all estimates are this high, but it is commonly noted in the literature that a vast majority of cases of sexual violence go unreported. Ravinder Barn and Ved Kumari, 'Understanding Complainant Credibility in Rape Appeals: A Case Study of High Court Judgments and Judges' Perspectives in India' (2015) 55 British Journal of Criminology 435, 438.
[117] India Today Web Desk, 'Nirbhaya Case: From December 16, 2012 to March 20, 2020: A Timeline' *India Today* (New Delhi, 20 March 2020) <https://www.indiatoday.in/india/story/nirbhaya-case-from-december-16-2012-to-march-20-2020-a-timeline-1657663-2020-03-20> accessed 13 May 2024.
[118] For a glimpse of the extent of the problem, see Dubey's journalistic account of rapes in India. Priyanka Dubey, *No Nation for Women: Reportage on Rape from India, the World's Largest Democracy* (Simon and Schuster, 2018).
[119] Leslee Udwin, *India's Daughter* (New Delhi, Assassin Films and BBC, 2015).

'inappropriate' or being accompanied by a man other than a guardian male.[120] This is not to say that the breach of norms *causes* sexual violence. In fact, sexual violence is frequently perpetrated by men who are supposed to be guarding the woman or girl's honour, such as husbands, fathers, brothers, and other male relatives.[121] Rather, these norms are used as a 'justification' for the violence, a way to shift blame onto the victim. In the aforementioned documentary on *Nirbhaya's* case, Mukesh Singh (one of the accused) emphasised that *Nirbhaya* was not a 'decent' girl because she was out of her home at 9 p.m, and therefore what happened was partly her fault.[122] In the same documentary, M.L. Sharma, the lawyer who defended the accused in this case also stated that when *Nirbhaya* left her house with a man who was neither her husband nor her brother, she left her morality in the house.[123] The implication of such a claim was that by breaching the norm of honour and guardianship, the victim 'had it coming'.

Therefore, whether or not sexual violence is in fact aimed at punishing a breach of the norms of caste and guardianship, the widespread fear that public spaces are unsafe for women, in combination with the narrative that a breach of these norms can lead to sexual violence, creates a chilling effect on girls and women as well as their families, who might prefer not to 'invite punishment'. Consequently, the prevalence of sexual violence against women becomes another justification for surveillance and control over their freedoms and choices. In this sense, the fear of sexual violence serves as an implicit enforcer of the norms of caste and honour.

3. Punishment by the Family or Caste Community

Various forms of punishment by the family or caste community can follow from a breach of the norms of caste and honour. These punishments perform two important functions: retribution, or teaching transgressors a lesson and deterrence, or ensuring future compliance through fear of reprisal. Chowdhry argues that most of the time, the breach of norms by a young couple is considered a private affair to be handled by their families.[124] For instance, where a couple whose union would be unacceptable according to the norms of caste and honour are discovered, the girl's family may respond by forcing her marriage with someone from their

[120] Sukriti Vats, 'Headlines on Rapes need to Change Before we point at People Blaming Phones, Chow, Jeans' *The Print* (New Delhi, 11 June 2021) <https://theprint.in/opinion/pov/headlines-on-rapes-need-to-change-before-we-point-at-people-blaming-phones-chow-jeans/675960/> accessed 13 May 2024.
[121] Per official data released by the government of India, 7.37% recorded rapes in 2022 were committed by family members, not including the marital rape of adult women, since this is exempted from prosecution. National Crime Records Bureau (Ministry of Home Affairs), 'Crime in India: Volume I' (2022), 229 <https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1701607577CrimeinIndia2022Book1.pdf> accessed 13 May 2024.
[122] Udwin, *India's Daughter* (n 119).
[123] ibid.
[124] Chowdhry (n 22), 12.

own caste, even if the prospective groom is not otherwise ideal (for instance, he might be significantly older). This is meant to conceal the girl's transgression from the community (where possible), signal the family's continued adherence to social norms, and punish the girl. Consider, for instance, a small, but detailed and insightful qualitative study by Partners for Law in Development (PLD), a Delhi-based research and advocacy group. This study of 15 minor girls who had been drawn into the child protection system because of their romantic relationships,[125] found that five of the girls were threatened with forced marriage when their romantic relationships became known to their parents or family members.[126] One of the adolescent girls who was interviewed stated that on discovering her relationship with a boy from her neighbourhood, her family arranged her marriage to a 35-year-old man who paid her family INR 3,00,000 (approximately £3000).[127]

In some cases, the punishment may extend to violence, even murder, to avenge the dishonour inflicted by the transgressing family member, usually an adolescent girl. Honour killing is not a distinct offence and by its nature remains severely under-recorded. In terms of direct empirical data, the NCRB recorded 28 cases of murder with the motive 'honour killing' in 2014, 251 in 2015 and 77 in 2016 across the country.[128] Estimates by non-governmental organisations (NGOs), however, paint a grimmer picture. It was reported, for instance, that Evidence, a NGO based in the southern Indian state of Tamil Nadu estimated in 2019 that there were 195 known cases of honour killings reported from that state alone in the previous five years.[129] The widespread and troubling nature of the practice can also be deduced from the fact that the 242nd Report of Law Commission of India suggested a special legal framework to address it.[130] The Supreme Court also issued guidelines to the Government of India to deal strictly with the practice, as well as to provide protection to couples in danger.[131]

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[125] The criminalisation of de-facto consensual sexual relationships with and amongst minors is discussed in Chapter 3.I.

[126] Madhu Mehra and Amrita Nandy, 'Why Girls Run Away to Marry: Adolescent Realities and Socio-Legal Responses in India' (*Partners for Law in Development*, 2019) 42. The study is on file with the author.

[127] ibid, 45.

[128] Press Release of the Ministry of Home Affairs, Government of India, 'Honour Killings' (31 July 2018) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1540824> accessed 13 May 2024.

[129] Special Correspondent, 'Enact Law to Stop Honour Killing: NGO' *The Hindu* (Madurai, 22 November 2019) <https://www.thehindu.com/news/cities/Madurai/enact-law-to-stop-honour-killing-ngo-madurai-nagapattinam/article30053623.ece> accessed 13 May 2024.

[130] Law Commission of India, 242nd Report on the Prevention of Interference with Freedom of Matrimonial Alliances (in the Name of Honour and Tradition): A Suggested Legal Framework (August 2012) <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081053-3.pdf> accessed 13 May 2024.

[131] *Shakti Vahini v. Union of India*, (2018) 7 SCC 192.

While it is difficult to estimate the exact numbers of honour killing, avenging loss of honour through violence is a well-known and openly discussed method of enforcing social norms. This is evident in the declaration made by one of the lawyers for the defence in *Nirbhaya*'s case, A.P. Singh, in the documentary on the *Nirbhaya*'s gang-rape incident (mentioned above). He stated that if his daughter or sister engaged in pre-martial sexual activities or acted in a way that tarnished her reputation, he would take her to his farmhouse, douse her in petrol and set her on fire in full view of his family.[132]

In the context of Haryana, where honour killing is common, Chowdhry argues that extreme steps by the family are meant to preserve their place within the caste community. Indian families tend to be strongly embedded in their caste communities, most commonly in rural and semi-urban areas (where, as mentioned in the Introduction to this Chapter, the majority of India's population still lives) but frequently also in urban areas. Consequently, they cannot be seen to be taking the norms of caste and honour lightly lest they fall in the community's estimation or lose its support.[133]

Where the family fails to deal with a transgression, it may become an issue for the caste community, which then handles the situation through caste councils or *panchayats* which, as I mentioned in section I.A of this Chapter, have no legal standing but tend to enjoy high levels of social legitimacy.[134] The precise method of dealing with the couple might vary depending on the specific caste combination of the couple. As Chowdhry rightly argues, '[a]lthough many caste groups and communities are involved in inter-caste marriages that defy customary norms and have no social acceptance, in the case of marriage between a *Dalit* and a non-*Dalit*, social wrath assumes especially virulent forms.'[135] Most people interviewed by Chowdhry in the north-western state of Haryana agreed that in cases where a lower-caste man was involved with an upper or dominant caste woman, both parties were almost invariably killed. In such cases, eliminating the woman who eloped is seen as the only way to salvage the honour lost by her actions and simultaneously reaffirm that the norms of caste and honour must be followed by everyone in society.[136]

That the transgression of the norms of caste and honour can have serious and sometimes violent consequences is common knowledge, and it can have a chilling effect on anyone wishing to

[132] Udwin, *India's Daughter* (n 119).
[133] Chowdhry (n 22), 18-19.
[134] Chowdhry (n 22), 12.
[135] *ibid*, 140.
[136] *ibid*, 142.

exercise their sexual autonomy in a manner that challenges these norms. Therefore, the fear of punishment from the family or caste community serves as a strong enforcer of the norms of caste and honour. It is in this context of strict control over female sexuality that romantic and sexual interactions and relationships take place.[137] Opportunities for interaction between adolescents of opposite sexes vary depending on the region of the country, the class and caste of the parties, and the extent to which the families of the parties are embedded in their caste-based communities. However, because of the social surveillance and control of female sexuality, sexual interactions with and amongst adolescents are relatively rare and can be dangerous to those who engage in them. Even in urban upper-class milieus where *romantic* relationships may be accepted, *sexual* interactions during adolescence are rarely socially approved.

Conclusion

In this Chapter, I argued that the norms of caste and honour create a system of surveillance and control over the sexuality of young people, especially of women and girls. The need to ensure caste purity through endogamy leads to segregation of boys and girls and a nearly-universally applicable norm of restricting sexual (and reproductive) activity to hegemonised marriage. Since these norms are enforced by the family and caste community, frequently through violence and even murder, the family and caste community are some of the most insidious threats to the sexual autonomy of young persons. The threat posed by them is insidious because while family and community enforcement of the norms of caste and honour is pervasive and effective, it is not acknowledged by law to be a threat to sexual autonomy (see Chapter 3).

The enforcement and acceptance of these norms, in turn, creates and sustains a binary construction of sex, and of the character and status of women who have sex, in Indian society. On the one hand is sex within hegemonised marriage, that is, marriage that is compliant with the norms of caste and honour or at least approved by the family, deemed socially legitimate, and on the other is sexual activity outside hegemonised marriage, considered socially illegitimate. In Chapter 4, I explain in detail how this binary of legitimate/illegitimate sex, and the strongly enforced and widely accepted norms of caste and honour, form the backdrop against which sexual activity takes place, and how the Indian social context renders adolescents vulnerable to being sexually exploited. Chapter 3 considers how the language, scope, and

[137] A detailed view of the romantic and sexual lives of Indian adolescents in this context is provided in Chapter 4, where it forms part of a larger discussion on socio-normative views of adolescence in India. See Chapter 4.III.A.

operation of Indian criminal law's regulation of sexual interactions with minors intensifies the threats posed by the norms of caste and honour, plays a role in channelling young couples into marriage, and even becomes a tool in upholding the norms of caste and honour discussed in this Chapter.

CHAPTER 3: INDIAN CRIMINAL LAW'S REGULATION OF SEXUAL INTERACTIONS WITH MINORS

Introduction

This chapter maps the socio-cultural and historical background provided in Chapter 2 onto the Indian criminal law's regulation of sexual interactions with minors. Though persons below the age of 18 are categorised as 'children' in the laws discussed in this chapter, I use the term 'minors' to refer to this age-group because, as I demonstrate in Chapter 5, older minors, or adolescents, are a distinct normative category.

The first part of this chapter critically evaluates the Protection of Children from Sexual Offences Act (2012) (POCSO) and the Indian Penal Code, 1860 (IPC), which deem the consent of a person under the age of 18, defined as a 'child', legally irrelevant. In effect, therefore, all sexual interactions with minors are criminally punishable. The IPC was recently replaced by the Bharatiya Nyaya Sanhita, 2023 (BNS), but BNS will start being implemented gradually (from July, 2024) as the functionaries of the Indian criminal justice system are trained.[1] For this reason, and because the BNS has not yet become part of the lexicon of the Indian legal community, I continue to refer to the IPC in this chapter, making specific reference to the BNS only where its position is different from the IPC.[2] These laws criminalise any and all sexual interactions with minors, thereby drawing even de-facto consensual sexual activity into the criminal justice system. The rules of criminal procedure give no formal discretion to the police and the prosecution in investigating and prosecuting cases under POCSO, and extremely limited formal discretion to judges in determining guilt and sentencing in POCSO cases. In Part II, I set out in detail the range of harmful consequences that arise from the way this legal framework is implemented. In Part III, I argue that the language, scope, and operation of POCSO, the IPC, and other Indian criminal statutes perpetuate the control of adolescents' sexual and reproductive capacities by the family and caste community.

The problematic nature and harmful consequences of these laws, in addition to the normative arguments I make in Chapter 7, indicate a need for reform. My own proposal for reform, presented in Chapter 7, is to allow (older) adolescents to consent to sexual interactions in line with their competence to do so, while protecting them from sexual exploitation. Therefore, in

[1] ET Bureau, 'New criminal laws to come into force from July 1: Govt notification' The Economic Times (New Delhi, 24 February 2024) <https://economictimes.indiatimes.com/news/india/three-new-criminal-laws-to-come-into-force-from-july-1-2024-govt-notification/articleshow/107964978.cms?from=mdr> accessed 13 May 2024.
[2] For a table of the sections in the Bharatiya Nyaya Sanhita, 2023 (BNS) corresponding with those in the Indian Penal Code, 1860 (IPC) discussed in this thesis, see Appendix 2.

Part IV, I consider provisions on 'sexual exploitation' and 'inducement to consent to sex' currently available in Indian law, arguing that due to their insufficiency and lack of clarity, these provisions cannot serve as effective safeguards against the sexual exploitation of adolescents.

I. Indian Criminal Law and the Sexuality of Minors

Before I turn to the substantive laws and their operation, it is essential to set out (briefly) the powers of the Indian higher judiciary in respect of the actions of the other two branches of government, the legislature and the executive. This will allow the reader to better comprehend some of the developments discussed in the following sections of this chapter and in Chapter 7. Actions of the Indian state, whether legislative or executive, must always be compatible with the 'basic structure'[3] of the Constitution. The higher judiciary has the power to ensure compliance with this rule. For instance, an enacted legislation or executive action which violates a fundamental right can be read down, reconstructed, or struck down in its entirety by a constitutional court. The High Courts of states and the Supreme Court of India are all constitutional courts and can, therefore, exercise such power. Frequently, such laws are challenged through writ petitions filed in public interest, or Public Interest Litigation (PIL),[4] where a private citizen or NGO (usually involved in the area through activism or research) approaches the constitutional court of jurisdiction on behalf of the public at large, or an aggrieved class thereof.

A. POCSO and the IPC: What is Criminalised and What is Not

1. Child Rape or Sexual Assault

The age of consent for sexual intercourse changed through the course of the history of the Indian subcontinent. Between 1940 and 2012, the age of consent for the purposes of all sexual offences was 16 years.[5] Until the enactment of POCSO, child rape was prosecuted only under the IPC, the general statute for substantive criminal law in India (from 1860 to 2023).

[3] This is a highly contested term to which I cannot do justice here. It includes the essential features of the Indian Constitution, such as individual fundamental rights, but has also been read to include other features such as secularism and federalism. For a glimpse into the contested nature of the subject, see: Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (OUP, 2009) 131-163.
[4] On the evolution of the PIL in India, see: Shyam Divan, 'Public Interest Litigation' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution* (OUP, 2016) 662.
[5] Amrita Pitre and Lakshmi Lingam, 'Age of Consent: Challenges and Contradictions of Sexual Violence Laws in India' (2021) 29(2) Sexual and Reproductive Health Matters 2.

In 2012, the Legislature enacted POCSO, empowered by Article 15(3) of the Constitution,[6] which allows the state to make special provisions for women and children, and in pursuance of India's obligation under the United Nations Convention on the Rights of the Child, 1989 (UNCRC),[7] ratified in 1992.[8] POCSO made significant changes to the framework of child sexual abuse law, the first of which was increasing the age of consent to 18. This was done by categorising any person under the age of 18 as a 'child'[9] and rendering the consent of a 'child' irrelevant in law by defining all sexual offences against children without reference to consent. The definition of the acts that constitute rape (penetrative sexual assault under POCSO) include not just penile-vaginal intercourse, but also oral-genital penetration, penile-anal penetration, and digital or object penetration of the vagina or anus.[10] Sexual assault is defined as any non-penetrative touching of a child with sexual intent,[11] and non-touch based unwanted (rather than non-consensual) sexual advances are recognised as sexual harassment.[12] POCSO is gender neutral.[13]

The IPC is not child-specific. Through the Criminal Law (Amendment) Act, 2013, s. 375, the IPC[14] was modified to define rape as non-consensual penetration of a woman's vagina, anus, or mouth by a man's penis, or penetration by a body part other than the penis, or object penetration of the vagina or anus, or application of the mouth to the vagina, anus, or urethra. The age of consent was also increased from 16 to 18 in the IPC, to bring it in line with POCSO.[15] Since the IPC is gender-specific, only men can be prosecuted for sexual offences and only women can be 'victims' of these offences. Together, the IPC and POCSO make any sexual interaction with a person under the age of 18 a criminal offence, notwithstanding the actual competence of the minor to consent to that sexual interaction.[16]

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[6] Constitution, Art. 15(3).
[7] POCSO, Statement of Objects and Reasons, (Introduction, n 5).
[8] 'India celebrates commitment to child rights with National Summit for Every Child in India at Parliament on World Children's Day' (UNICEF, 19 November 2019) <https://www.unicef.org/india/press-releases/india-celebrates-commitment-child-rights-national-summit-every-child-india> accessed 13 May 2024.
[9] POCSO, s. 2(d)
[10] POCSO, s. 3.
[11] POCSO, s. 7.
[12] POCSO, s. 11.
[13] This is attributable in part to a survey by the Ministry of Women and Child Development in 2007, according to which male children reported more experiences of child sexual abuse than female children. See, Ministry of Women and Child Development (Government of India), Report on the Study of Child Abuse (2007), 74 <http://www.indianet.nl/pdf/childabuseIndia.pdf> accessed 13 May 2024.
[14] IPC, s. 375.
[15] 'Child' has been defined as a person under the age of 18 in the Bharatiya Nyaya Sanhita, 2023 (BNS). BNS, s. 2(3).
[16] The age of consent for rape is 16 according to the Goa Children's Act, 2003, s. 2(d) proviso. However, the provisions in POCSO override any inconsistent provision in other laws. s. 42A, POCSO.

A significant amendment to the offence of rape (as concerns minors) was made by The Criminal Law (Amendment) Act, 2018 and the POCSO (Amendment) Act, 2019, which introduced the death penalty for the rape or gang-rape of minors under the age of 12, and imprisonment for the remainder of the accused persons' natural life for the rape or gang-rape of minors between 12 and 16,[17] as well as for 'aggravated penetrative sexual assault' under POCSO. Aggravated penetrative sexual assault includes a wide range of circumstances, such as the abuse of positions of power or authority or the use of deadly weapons in committing the offence, but also includes getting a minor girl pregnant because of the assault, or repeatedly committing penetrative sexual assault. Given that consent is irrelevant under POCSO and the IPC, de-facto consensual penile-vaginal (as well as other penetrative) intercourse would be considered 'penetrative sexual assault'. In de-facto consensual sexual relationships, sexual intercourse might plausibly take place repeatedly or, in the case of opposite-sex couples, result in pregnancy. In practice (as I discuss in Part II of this chapter), de-facto consensual cases tend to end in acquittals, so these highly punitive sentences are not likely to be frequent outcomes. Nevertheless, it is important to recognise that POCSO can cause serious injustice due to its high mandatory minimum sentences. For instance, in 2018, the Gujarat High Court held that de-facto consent was not a valid legal consideration and increased the sentence of a person convicted of sexual offences under POCSO in an allegedly de-facto consensual case from seven to 10 years.[18]

2. Marital Rape

While other forms of sexual interaction were criminalised where one or all parties were under the age of 18, marital rape was not recognised as an offence unless the wife in question was less than 15-years-old until 2017.[19] Thereafter, a division bench of the Supreme Court of India (Supreme Court) in *Independent Thought v. Union of India* (*Independent Thought*)[20] ruled that sexual intercourse with a girl under the age of 18 would be recognised as rape, regardless of the existence of any marriage between the perpetrator and the victim.[21] Consequently, the age of the wife under the marital rape exception in s. 375, the IPC was increased from 15 to 18.[22]

[17] BNS prescribes the death penalty for gang-rape of all persons under the age of 18. BNS, s. 70(2).
[18] *State of Gujarat v. Ashokbhai*, 2018 GLH 792.
[19] Exception 2, s. 375, IPC: 'Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape'.
[20] *Independent Thought v. Union of India*, (2017) 10 SCC 800 (*Independent Thought*).
[21] ibid, [100] and [107].
[22] This is now explicitly recognised by statute. BNS, s. 63, Exception 2.

One of the reasons this exception was read down was to strengthen the proscription against child marriage (see Part III.B.1 of this chapter).

Therefore, the position of Indian law at present is that husbands may be prosecuted for raping their minor wives but are exempt from prosecution for raping their adult wives. As I mentioned in Chapter 2.II.B, the marital rape exception as concerns adult wives was recently challenged in the Delhi High Court via PIL, on the ground that it violated married women's fundamental rights and created unreasonable classifications between married and unmarried women. The two-judge bench reached a split-verdict, meaning that the question remains unresolved.[23] The case is currently on appeal before the Supreme Court.[24]

3. 'Carnal Intercourse against the Order of Nature'

Cases of child abuse which involved sexual acts other than penile-vaginal intercourse were initially prosecuted under s. 377, the IPC,[25] because prior to the enactment of POCSO in 2012, no other provision in Indian criminal law recognised sexual acts other than penile-vaginal intercourse as a sexual offence. S. 377, the IPC criminalises forms of non-procreative intercourse, or intercourse other than penile-vaginal, such as oral-genital or anal, as 'carnal intercourse against the order of nature' regardless of the age of the parties concerned or their consent. The provision drew from the Buggery Act, 1553 (England), and its interpretation in India also centred largely on some form of penile penetration.[26] Aside from its use in child abuse cases, s. 377 was generally a sword against the LGBTQ community.[27] In a writ petition against the provision filed by five aggrieved petitioners, a five-judge bench of the Supreme Court unanimously decided that s. 377 violated sexual minorities' rights to life and personal liberty (Article 21) which encompasses the right to positive sexual autonomy, to equality (Article 14), and to freedom of speech and expression (Article 19(1)(a)). It was therefore read down such that non-procreative sexual acts between consenting adults of any gender are no longer criminally punishable.[28]

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[23] *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404.
[24] Legal Correspondent, 'Criminalisation of Marital Rape: Appeal filed in Supreme Court against Delhi High Court's Split Verdict' *The Hindu* (New Delhi, 17 May 2022). <https://www.thehindu.com/news/national/criminalisation-of-marital-rape-appeal-filed-in-supreme-court-against-delhi-high-courts-split-verdict/article65422270.ece> accessed 13 May 2024.
[25] IPC, s. 377.
[26] John Sebastian, 'The Opposite of Unnatural Intercourse: Understanding Section 377 through Section 375' (2017) 1(3) Indian Law Review 232, 243. In footnote 66, Sebastian argues, 'it is disputed whether S 377 covers acts that do not involve penile penetration in some way, and whether cunnilingus is covered is [also] disputed."'
[27] Jessica Hinchy, *Governing Gender and Sexuality in Colonial India* (CUP, 2019) 258-59.
[28] *Navtej Johar v. Union of India* (2018) 10 SCC 1.

B. Rules of Procedure

I demonstrated in the previous section that the IPC and POCSO take a brightline approach to criminalising the sexual activity of minors, including even de-facto consensual sexual interactions within the scope of the criminal law. Some of the rules of procedure in criminal trials in India have the tendency to exacerbate this problem. While the Code of Criminal Procedure, 1973 (CrPC) has been replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), the provisions discussed below have undergone no change. I continue to refer to the provisions of the CrPC because the BNSS, like the BNS (mentioned above), has not yet been implemented formally and has not replaced the CrPC in the lexicon of the Indian legal community.[29]

First, in the Indian criminal justice system, police[30] have little formal discretion in investigating a 'cognizable offence'.[31] In the southern state of Tamil Nadu, by a circular issued by the Director General of Police (the highest-ranking police officer in the state), police have been given the freedom to not *arrest* the accused in ongoing investigations under the POCSO.[32] This is meant to prevent unnecessary arrests in de-facto consensual cases. Even where it is not formally granted, it is widely known that the police find ways to exercise discretion. Belur, et. al.'s empirical study of the police forces of Delhi and Mumbai demonstrates the wide range of

[29] For a table of the sections in the Bharatiya Nagrik Suraksha Sanhita, 2023 (BNSS) corresponding with the ones under the Code of Criminal Procedure, 1973 (CrPC) discussed in this section, see Appendix 2.

[30] S. 154, Code of Criminal Procedure, 1973 (CrPC) gives no discretion to a police officer when it comes to registering (in writing) a cognizable offence of which they receive information. However, per s. 157, CrPC, police are not bound to start an investigation based on such information unless they have reason to suspect that a cognizable offence has been committed. After their investigation, police may file a report stating that no offence has been committed, or that the person accused did not commit the offence [CrPC, s. 173(2)(i)(d)]. This position was confirmed by the Supreme Court of India in *Lalita Kumari v. Govt. of U.P.*, (2014) 2 SCC 1, [111].
The magistrate to whom such a report, known in common parlance as a 'closure report', is submitted is not bound to accept it and may order further investigation. This is implied by s. 173(8), CrPC. Further, s. 190(1)(b), CrPC empowers a magistrate to take cognizance of an offence based on a police report, even if it is a closure report. On this point see the Supreme Court's judgment in *H.S. Bains v. The State (UT of Chandigarh)*, (1980) 4 SCC 631, [6-7].

[31] Offences for which a police officer is empowered to make arrests without a warrant. CrPC, s. 2(c).

[32] Express Web Desk, 'Don't rush to arrest POCSO accused in cases involving mutual romantic relationships: Tamil Nadu DGP' *The Indian Express* (Chennai, 5 December 2022) <https://indianexpress.com/article/cities/chennai/arrest-pocso-accused-cases-mutual-romantic-relationships-tamil-nadu-dgp-8306705/> accessed 13 May 2024.
The CrPC gives police such discretion in any case. See s. 41, CrPC, which states that a police officer *may* without an order from a Magistrate or without a warrant arrest a person where the conditions laid down in the section are fulfilled. However, the circular by the DGP of Tamil Nadu is significant because it allows police officers in the state to exercise their powers under the CrPC in de-facto consensual POCSO cases (which, prima facie, involve allegations of child sexual abuse) without fear of backlash from the public, the media, senior police officials, or politicians.

unofficial discretion exercised by the police in cases of alleged dowry deaths,[33] and though empirical evidence for this has not been collected, it is likely that similar discretion is exercised in the investigation of other criminal offences as well.

Similarly, prosecutors have almost no discretion as to which cases to prosecute. As per the CrPC, a prosecutor has limited discretion under s. 321 to withdraw a case at any time before a judgment is announced. This discretion can only be exercised with the consent of the court, and in some cases, with the consent of the central (federal) government.[34] This is in contrast with the system in England and Wales, for instance, where the Crown Prosecution Service should not prosecute an offence if they believe that it is not in public interest (taking into account a number of factors such as the harm caused to the victim, the seriousness of the offence, and whether prosecution would be a proportionate response to the conduct) or that the available evidence does not provide a realistic prospect of conviction.[35]

The lack of formal police and prosecutorial discretion means that every case registered under POCSO, being a cognizable offence, must be investigated and, where a chargesheet identifying an accused person is filed by the police, prosecuted. This significantly increases the impact and reach of a law that criminalises all sexual activity with all persons under the age of 18.

Second, unlike most other common law jurisdictions, India has not had trials by jury since 1973,[36] and both civil and criminal cases are heard by judges of relevant jurisdiction, with appeals available to senior judges of the lower judiciary (such as the Court of Sessions, if the case was heard by the Court of a Judicial Magistrate), as well as to the High Court (at the level of the state) and Supreme Court (at the national level). This means that the entire burden of alleged cases of child sexual abuse, including de-facto consensual cases, falls on judges of Special Courts established under POCSO at the district level.

II: Framing and Implementation Flaws

The blanket criminalisation of all sexual activity with minors, which draws even de-facto consensual relationships (with older minors) within the criminal justice system, was purportedly aimed at protecting minors from sexual abuse and exploitation, as well as from

[33] J. Belur and others, 'Police Investigations: Discretion Denied Yet Undeniably Exercised' (2015) 25(5) Policing and Society 439.
[34] CrPC, s. 321.
[35] The Code for Crown Prosecutors (2018) [4.1-4.14, The Full Code Test] <https://www.cps.gov.uk/publication/code-crown-prosecutors> accessed 13 May 2024.
[36] James Jaffe, 'After Nanavati' (2017) 52(32) Economic and Political Weekly 18.

being subjected to insensitive cross-examination during trial. However, as I demonstrate in this section, these aims are rarely achieved in practice. The problems with determining age with certainty make it difficult to establish the minority of the de-jure victim and the brightline approach of POCSO has not prevented insensitive consent assessment on the ground. Moreover, the implementation of the IPC and POCSO appear to channel adolescents who engage in de-facto consensual sexual interactions into marriage, which, as I argued in Chapter 2, is considered the only socially legitimate space for sexual expression in India.

A. A Bright Line Approach to the Age of Consent

Article 21 of the Constitution guarantees the fundamental right to life and personal liberty.[37] Over time, the Supreme Court has read this right broadly, to include other subsidiary rights which are essential for a 'good' life, or a life beyond animal existence,[38] such as the right to sleep,[39] the right to personal autonomy,[40] and recently also positive sexual autonomy.[41] The right to life and personal liberty is a 'vertical' fundamental right, meaning that it is enforceable only against the state (and not against private parties). Therefore, the implication of this broad reading of Article 21, at a minimum, is that the state cannot, through its laws or executive actions violate a person's right to life or personal liberty, although it can restrict the right in reasonable ways.[42]

Though the right to positive sexual autonomy, or the right to make one's own sexual choices,[43] in India has always been limited in its judicial articulation to adults, this does not preclude the *possibility* of a minor's right to sexual autonomy.[44] Given the blanket prohibition on all sexual activity with and amongst minors under POCSO and the IPC, it is clear that positive sexual autonomy is not presently legally recognised for any minor. When the Protection of Children from Sexual Offences (POCSO) Bill, 2011 was being considered by Parliament, the Parliamentary Committee of the Rajya Sabha (council of states) criticised a proviso in the proposed legislation which allowed some scope for children aged 16-18 to consent to sexual activity. The Ministry of Women and Child Development which had drafted the Bill sought to

[37] Constitution, Art. 21.
[38] Anup Surendranath, 'Life and Personal Liberty' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds.) *The Oxford Handbook of the Indian Constitution* (OUP, 2016) 760-61.
[39] *Ramlila Maidan Incident v. Home Secretary, Union of India*, (2012) 5 SCC 1.
[40] *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.
[41] *Navtej Johar v. Union of India* (n 28).
[42] *Justice K.S. Puttaswamy v. Union of India*, (2019) 1 SCC 1.
[43] Stuart P. Green, *Criminalizing Sex: A Unified Liberal Theory* (OUP, 2020) 21.
[44] In Chapter 7.I, I argue that a qualified right of positive sexual autonomy ought to be extended to (older) adolescents in India.

justify the provision on the ground that adolescents had become increasingly aware of and exposed to sexual activities.[45] The Parliamentary Committee, however, rejected this proviso, emphasising that since the UNCRC defined a 'child' as a person under the age of 18, there could be no question of a person younger than that age consenting to sexual activity.[46] However, this does not seem to have been the intent of the UNCRC. The Committee on the Rights of the Child, in its General Comment Nos. 20 and 24 on the UNCRC, specifically advises against the criminalisation of adolescent sexuality.[47] In any case, other signatories of the UNCRC, such as the UK,[48] South Africa,[49] and Germany,[50] among others, do allow persons under the age of 18 to consent to sexual activity.

The Parliamentary Committee also expressed concern at the idea of making the consent of some minors legally relevant on the ground that it would expose them to insensitive cross-examination by defence attorneys and shift the focus of the trial from the behaviour of the accused to that of the prosecutrix, as commonly observed in cases of the rape of adult women.[51] However, as I will show in Part II.B, the bright line approach of POCSO has not, in fact, shielded older children from the indignity of consent assessment by courts.

As I have argued elsewhere,[52] children's vulnerability to sexual abuse does not justify prohibiting them from consenting to *any* sexual activity by criminal law. Older minors, or adolescents, can and do consent to sexual activity to varying degrees (as discussed in Chapters 4 and 5), and a blanket criminal prohibition on the exercise of their sexual autonomy only serves to push sexual activity underground. The mandatory reporting provision of POCSO

[45] Department-Related Parliamentary Standing Committee on Human Resource Development, Parliament of India (Rajya Sabha), 'Two Hundred Fortieth Report on The Protection of Children From Sexual Offences Bill, 2011' (Parliamentary Committee Report on the POCSO Bill, 2011) (21 December 2021) [6.7] <https://prsindia.org/files/bills_acts/bills_parliament/2011/SCR_Protection_of_Children_from_Sexual_Offences_Bill_2011.pdf> accessed 13 May 2024.

[46] ibid, [6.8]

[47] Committee on the Rights of the Child, 'General Comment No. 20 on the Implementation of the Rights of the Child during Adolescence' (2016) CRC/C/GC/20, [40]; Committee on the Rights of the Child, 'General Comment No. 24 on the Implementation of the Rights of the Child during Adolescence' (2019) CRC/C/GC/24, [12].

[48] The age of consent in the UK is 16. See, Sexual Offences Act, 2003 (England and Wales), s. 9; Sexual Offences (Scotland) Act, 2009, s. 28; Sexual Offences (Northern Ireland) Order, 2008, s. 16.

[49] The age of consent in South Africa is also 16, though there are close-in-age exemptions, depending on the age of the partner, for persons between the ages of 12 and 16. See, Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2015, ss. 1, 2 and 3.

[50] The age of consent in Germany is 14. See, Strafgesetzbuch, 1871, s. 176.

[51] Parliamentary Committee Report on the POCSO Bill, 2011 (n 45), [6.9].

[52] Shraddha Chaudhary, 'Decriminalising Sexual Contact with Minors under POCSO Act? Notes for a Conversation' (*Project 39a*, 26 November 2021) < https://p39ablog.com/2021/11/26/decriminalising-sexual-contact-with-minors-under-pocso-notes-for-a-conversation/> accessed 13 May 2024.

places an obligation on *anyone* who comes to know of sexual activity with a minor. The failure to report such sexual activity is a criminal offence.[53] This prevents adolescents from accessing important information (regarding contraception or safe sex), contraceptives, or medical services such as abortions or treatments for sexual transmitted diseases, as well as psychological support services.[54] This was also observed in a recent judgment by the Supreme Court of India, *X v. NCT, Delhi*,[55] where the conditions under which women could seek an abortion between 20 and 24 weeks of gestation were reinterpreted. Chandrachud J. observed that the mandatory reporting requirement under POCSO would be a barrier for pregnant adolescent girls to access safe and legal abortions and carved out a limited exception to the requirement. Per the instructions of the Supreme Court, a registered medical practitioner may now provide abortion services to minors without reporting the matter to the police, or report the incident without revealing the identity of the adolescent, if requested by the adolescent or her guardian.[56] The mandatory reporting requirement under POCSO also prevents research into the ground realities of adolescent sexuality in India because a researcher who becomes aware of an adolescent sexual relationship is legally bound to report it to the police. This likely contributes to the fact that studies on adolescent sexuality in India are limited and outdated (see Chapter 4.III).

That this bright line approach of POCSO is excessive appears to align with the view of Indian child rights activists and the higher judiciary. For instance, the report of HAQ Centre for Child Rights, which presents findings based on an empirical study of a selection of cases under POCSO in Delhi and Mumbai between 2012 and 2015, notes that 'a large amount of court time is being spent on cases involving a romantic relationship… resulting in the child turning hostile and/or the prosecution being otherwise unable to prove the offence of 'penetrative sexual assault' or 'sexual assault'.[57] Similarly, the Delhi-based research and advocacy group Partners

[53] POCSO, s. 19 read with s. 21.
[54] Centre for Child and the Law, National Law School of India University, Bangalore (CCL-NLSIU), 'An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children' (15 June 2018) < https://feministlawarchives.pldindia.org/wp-content/uploads/Mandatory-Reporting-Paper-CCL-NLSIU-1.pdf?> accessed 13 May 2024.
[55] *X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Ors.,* 2022 SCC OnLine SC 1321.
[56] ibid, [84].
[57] HAQ Centre for Child Rights (Delhi), 'Implementation of the POCSO Act: Goals, Gaps and Challenges' (November, 2017) <https://haqcrc.org/wp-content/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf> accessed 13 May 2024; The pendency rate of cases under the POCSO in 2020 was 96.8%. See, National Crime Records Bureau (Ministry of Home Affairs), 'Crime in India: Volume I' (2020) 395 <https://www.thehinducentre.com/resources/article36608197.ece/binary/CII%202020%20Volume%201.pdf> accessed 13 May 2024.

for Law in Development (PLD, mentioned in Chapter 2.III.A.3) advised the Ministry of Women and Child Development (in a recommendation endorsed by 22 other child rights organisations across the country) to lower the age of consent to 16 'for non-exploitative, non-coercive, consensual sex between peers/persons of proximate ages.'[58]

The Centre for Child and the Law, National Law School of India University (CCL-NLSIU) conducted studies across five Indian states which analysed the judgments of Special Courts (in POCSO cases) available on the e-courts website from 2012 (when POCSO was enacted) until 2016 or 2017 (depending on when the report was released) for all five states.[59] The studies relied on quantitative and qualitative data from this judgment analysis and insights from interviews with functionaries in the child protections system. These functionaries included Special Court judges, police officers, prosecutors, social workers, child advocates, district, or state level administrative officials, among others. These studies indicated that in cases where the prosecutrix was alleged to be, or accepted that she was, in a romantic relationship with the accused or had married the accused, the percentage of acquittals was higher than the overall rate of acquittal (in all the cases tried by Special Courts which were analysed in the studies). For instance, the Andhra Pradesh Report observes that while the overall rate of conviction in POCSO cases was 11.19%,[60] the rate of conviction for de-facto consensual cases was only 5.55% of the cases in which it was alleged that the prosecutrix was in a romantic relationship with the accused.[61] This means that the rate of conviction in de-facto consensual cases was about half of the overall rate of conviction in POCSO cases.[62] The Maharashtra Report similarly observes that while the overall rate of conviction in the POCSO cases studied was

[58] Partners for Law in Development, Delhi (PLD), 'Recommendations for Protection of the Rights of Adolescents in the National Child Protection Policy (2018)' submitted to the Ministry of Women and Child Development, Government of India <https://pldindia.org/advocacy/submissions-to-domestic-and-international-bodies/recommendations-for-protection-of-the-rights-of-adolescents-in-the-national-child-protection-policy2018/> accessed 13 May 2024.

[59] CCL-NLSIU, 'Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi' (29 January 2016) (Delhi Report).
CCL-NLSIU, 'Study on the Working of Special Courts under the POCSO Act, 2012 in Assam' (13 February 2017) (Assam Report).
CCL-NLSIU, 'Study on the Working of Special Courts under the POCSO Act, 2012 in Karnataka' (8 August 2017) (Karnataka Report).
CCL-NLSIU, 'Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra (7 September 2017) (Maharashtra Report).
CCL-NLSIU 'Study on the Working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh' (28 November 2017) (Andhra Pradesh Report).
All Reports are on file with the author.

[60] Andhra Pradesh Report (n 59), 39.

[61] ibid, 67.

[62] ibid, 72.

19%,[63] the rate of conviction in de-facto consensual cases was only 9.15% of the cases in which it was alleged that a de-facto consensual relationship subsisted between the prosecutrix and the accused.[64] This means that the rate of conviction in de-facto consensual cases was again about half of the overall rate of conviction in the POCSO cases studied. In cases where the prosecutrix and the accused were married, the rate of conviction fell further to 0% in Assam and Andhra Pradesh, 1% in Delhi and 3% in Maharashtra.[65] These trends have been confirmed by a more recent study, conducted by UNICEF and a Bangalore-based child-rights non-governmental organisation, Enfold Trust, of 1715 decisions in de-facto consensual cases by Special Courts in Maharashtra, West Bengal and Assam. The study observes that acquittals were recorded in 93.8% of the cases studied, and the rate went up to 98.1% in cases where the accused and prosecutrix were married.[66]

Acquittals were also more likely in cases where the prosecutrix had become pregnant. This is despite the fact that DNA evidence from the foetus or child could conclusively prove sexual intercourse between the prosecutrix and the accused (to which, it should be recalled, the prosecutrix's consent is legally irrelevant), and therefore lead to conviction. These trends indicate the judicial opinion that the accused in such cases does not deserve to be criminally punished, whatever the text of the law might say. This opinion was expressed by a single bench of the Madras High Court (2021) which, ruling on a case in which a man in his early twenties had eloped with a minor girl at her invitation, informally married and consummated the marriage, observed, '[p]unishing an adolescent boy who enters into a relationship with a minor girl by treating him as an offender, was never the objective of the POCSO Act.'[67] Similar observations have also been made by the Delhi and Karnataka High Courts (2022).[68] Since the Ministry for Women and Child Development stressed the need to protect children from sexual abuse by their peers and by older children during the debate on the POCSO Bill, 2011,[69] it is by no means clear that the Madras High Court was correct in its opinion about the purpose of

[63] Maharashtra Report (n 59), 49.
[64] ibid, 85.
[65] Shraddha Chaudhary, '"Love", Consent and the POCSO' (Chapter 1, n 35) 134-35.
[66] Enfold Proactive Trust and UNICEF India (Enfold and UNICEF), '"Romantic" Cases under the POCSO Act: An Analysis of Judgements of Special Courts in Assam, Maharashtra and West Bengal' (December 2022) 23 and 35 <https://www.girlsnotbrides.org/learning-resources/child-marriage-research-action-network/crank-research-tracker/romantic-cases-under-the-pocso-act-an-analysis-of-judgments-of-special-courts-in-assam-maharashtra-amp-west-bengal/> accessed 13 May 2024.
[67] *Vijayalakshmi and Anr. v. State, Represented by the Inspector of Police & Anr.*, (2021) SCC OnLine Mad 317 [18].
[68] *Ajay Kumar v. State Govt. of NCT of Delhi & Anr.*, 2022 SCC OnLine Del 3705; *State of Karnataka v. Basavraj s/o. Yellappa Madar*, ILR (2023) Kar 1943.
[69] Parliamentary Committee Report on the POCSO Bill, 2011 (n 45), [5.3].

POCSO. Nevertheless, these views do evidence the judicial intuition that the prohibition under POCSO is too broad.

The sense that POCSO is too broad was echoed also by interviewees during my field work. Practitioners in the child protection system from across the country almost uniformly expressed the view that the approach of the POCSO was not correct, and that sexual activity during adolescence was normal. Aside from one public prosecutor from South India who did not wish to be identified by her personal details, most of my interviewees, both government employees and otherwise (40 out of 41), saw POCSO as over-reaching.

It is worth noting at this point that, in practice, the blanket prohibition on sexual interactions amongst adolescents and between adolescents and adults is frequently defeated by the fact that the definition of a child or minor is determined by age, i.e., a person must be under the age of 18 to qualify as a 'child' or minor. While this was meant to bring Indian legislation in line with UNCRC and to perhaps also to provide certainty in adjudication of cases under the POCSO, age-determination in fact frequently creates uncertainty as to the legal status of the complainant. The CCL-NLSIU studies note that birth certificates of prosecutrices are largely unavailable,[70] and school records are not always considered reliable since they are based on the oral statement of parents or guardians as to the age of the child, rather than on a birth certificate.[71] This means that Special Courts must rely on medical tests (dental examination or ossification tests) to determine age. These tests provide an age-range, rather than a precise age, and the CCL-NLSIU studies note that judges tend to add two years to the range provided, which often makes the prosecutrix an adult. For instance, if the medical test stated that the child was 14-16 years old, courts note that the tests have a margin of error of +/- two years, and add two years to 16, thereby deeming the 'prosecutrix' an adult.[72] The difficulties in proving the minority of the prosecutrix were experienced most frequently in de-facto consensual cases,[73] which enabled the consent of the prosecutrix to become legally relevant, thereby defeating the blanket criminalisation of sexual interactions with minors under the POCSO.

[70] Swagata Raha, 'Challenges Related to Age-Determination of Victims under the POCSO Act, 2012' in CCL-NLSIU (ed.), *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues* (National Printing Press, 2018) 81, 86-7.
[71] ibid, 89.
[72] ibid, 92-95.
[73] ibid, 91-92.

B. Consent-Assessment based on Rape Myths and Stereotypes

As I mentioned in Section A above, the Parliamentary Committee of the Rajya Sabha which examined the POCSO Bill, 2011 recommended that the consent of *all* minors be legally irrelevant under POCSO with the explicit aim of shielding minors from the indignity of insensitive consent-assessment. In this section, I demonstrate that in practice, this has not prevented Special Courts from undertaking consent assessment influenced by rape myths and stereotypes. This shows that one of the main aims of adopting a bright line approach in POCSO and making the consent of all minors legally irrelevant is not achieved, and thereby casts doubt on the wisdom of such an approach.

The amendment of the IPC in 2013 introduced a positive definition of consent. This definition explicitly states that lack of resistance to penetration would not signify consent, and that consent meant unequivocal, voluntary agreement to a specific sexual act.[74] Notwithstanding this, it is widely observed that consent-assessment in trials of rape where the prosecutrices are adults continue to rely on rape myths and stereotypes,[75] with a High Court judge going so far as to observe, 'Instances of [women's] behaviour are not unknown that a feeble "no" may mean a "yes"'.[76] In her groundbreaking analysis of the response of the criminal justice system in the USA to cases of rape, Estrich uses the term 'real rape' to describe cases, typically of forced sex on an 'innocent' (preferably white) victim by a stranger, which were more likely to be accepted, believed, investigated, prosecuted and punished as rape. This definition of 'real rape', Estrich argues, allowed the exclusion of cases that did not fit the ideal type, date rapes, or rapes within ongoing sexual relationships, and the rape of women who were not sexually innocent, among others.[77] The concept of a rape myth or stereotype builds on this idea of 'real rape'. Thus, rape myths or stereotypes are defined as 'beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify male sexual aggression against women.'[78] Common rape myths, including those prevalent in India, generally emphasize factors such as the victim's clothing, alcohol use, and

[74] IPC, s. 375, Explanation 2: 'Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.'
[75] Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (Chapter 1, n 28) 8-10; Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Routledge, 2005) 34.
[76] *Mahmood Farooqui v. State (NCT of Delhi)*, (2017) SCC OnLine Del 6378, [78].
[77] Susan Estrich, *Real Rape* (Harvard University Press, 1987) 13-14.
[78] Philipp Süssenbach, Friederike Eyssel, and Gerd Bohner, 'Metacognitive Aspects of Rape Myths: Subjective Strength of Rape Myth Acceptance Moderates Its Effects on Information Processing and Behavioral Intentions' (2013) 28(11) Journal of Interpersonal Violence 2250, 2252.

similar behaviours, aiming to reduce the credibility of the victim and depict her as promiscuous or dishonest.[79]

In his extensive study of adjudication and sentencing in rape cases in India, Satish demonstrates that Indian courts have developed their own stereotypes of the ideal rape victim and deployed it to legitimise or delegitimise the claims of prosecutrices before them. He argues, 'if the woman's sexual behaviour is inconsistent with dominant values and norms, her ability to use the law to protect the infringement of her sexual autonomy is weakened, if not completely lost.'[80] A similar argument is also made by Bajpai and Mendiratta based on a sample of judgments by the higher judiciary in India. The authors demonstrate that the rape myths and stereotypes relied upon by judges range from scrutinising the behaviour of the victim before and after the incident against what they consider 'normal' or 'correct' behaviour in those circumstances, invocations of the notions of honour, shame and purity, and assumptions of the falsity of rape cases.[81]

Reliance on rape myths and stereotypes in assessing the consent of prosecutrices in rape cases continues despite legal safeguards aimed specifically at curtailing it. In the prosecution of sexual offences, where the consent of the victim is an issue to be adjudicated upon, evidence of the character of the victim or of her previous sexual experience with any person is deemed legally irrelevant in determining the issue of whether consent was given, or of the quality of the consent given.[82] This means that a person accused of a sexual offence, or a judge adjudicating an alleged sexual offence, cannot rely on the past sexual experience of the prosecutrix (with the accused or any other person) in determining whether she consented or whether her consent was valid. Similarly, a person on trial for a sexual offence where consent is a relevant issue is prohibited from adducing evidence or cross-examining the prosecutrix as to her 'general immoral character' or previous sexual experience with any person for proving that the prosecutrix consented or in furtherance of any argument regarding the quality of her consent.[83] Notwithstanding these provisions (in the nature of 'rape shield laws'), the past sexual

[79] Ravinder Barn and Ráchael A. Powers, 'Rape Myth Acceptance in Contemporary Times: A Comparative Study of University Students in India and the United Kingdom' (2021) 36(7-8) Journal of Interpersonal Violence 3514, 3515; Mrunalini H. Damania and Ram Manohar Singh, 'An Exploratory Qualitative Analysis of Rape Myths in India' (2022) 22(3) Analyses of Social Issues and Public Policy 989, 997-1005.
[80] Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (CUP, 2016) 43.
[81] See, G.S. Bajpai and Raghav Mendiratta, 'Gender Notions in Judgments of Rape Cases' (2018) 60(3) Journal of the Indian Law Institute 298.
[82] Indian Evidence Act, 1872 (IEA), s. 53A.
[83] IEA, proviso to s. 146.

history of the prosecutrix, and assertions about her character, continue to be introduced by the lawyers of the accused, and to be accepted by judges.[84]

This tendency does not disappear in cases where the prosecutrix is a minor,[85] even though (as I mentioned at the beginning of this section) the very purpose of the blanket criminalisation of sexual activity with and involving minors through POCSO was to protect minors from insensitive consent assessment. The studies conducted by CCL-NLSIU find, for instance, that despite the irrelevance of a minor's consent under POCSO, Special Courts sometimes assess the consent of the minor prosecutrix where the accused alleges a romantic relationship between himself and the prosecutrix.[86] This is possible because the minority of the prosecutrix cannot always be proved (for reasons discussed in Part II.A of this chapter) and her consent, therefore, becomes a relevant legal question. The Maharashtra (2017) and Andhra Pradesh (2017) studies note that this consent assessment sometimes focused more on the conduct of the prosecutrix than that of the accused, and tended to acquit the accused whenever the prosecutrix and her behaviour did not fit the script of the 'ideal victim'.[87] While this is not the approach taken in every case,[88] it is clear that deeming the consent of minors legally irrelevant has not necessarily protected them from becoming the focus of the trial or from their behaviour being placed under the judicial microscope. The purpose of the Parliamentary Committee in making the consent of all minors to sexual activity irrelevant (see Part II.A), is defeated by such assessment.

C. Marriage as the End of Rape Trials

As I mentioned in Part II.A, the rates of conviction in criminal trials where the prosecutrix and accused were in a de-facto consensual relationship were lower than the overall rates of conviction, and lowest (almost negligible) in cases where the prosecutrix was married to the accused. Rape is, by statutory implication, a non-compoundable offence.[89] This means that, unlike in compoundable offences, a 'compromise' reached by the prosecutrix and the accused to settle an allegation of rape outside the formal criminal justice system cannot be recognised or validated by the adjudicating court. Indeed, the Supreme Court has ruled expressly against

[84] Nikunj Kulshreshtha, 'The contemporary status of rape shield laws in India' (2023) 27(1) The International Journal of Evidence and Proof 3, 5; See Neetika Vishwanathan, 'Ethnographic Study of Rape Adjudication in Lucknow's Trial Court' (2020) 16(2) Socio-Legal Review 56.
[85] Baxi, *Public Secrets of Law* (Chapter 1, n 28), 117-118.
[86] Assam Report, (n 59) 66-67; Karnataka Report (n 59), 66-67; Maharashtra Report (n 59), 81; Andhra Pradesh Report (n 59), 72.
[87] Mahrashtra Report (n 59), 56-57 and 81-82; Andhra Pradesh Report (n 59), 48-49 and 94-95.
In the context of rapes in the USA, Estrich referred to this script, or the socio-cultural expectation of what rape ought to look like as 'real rape'. See, Estrich, (n 77).
[88] Maharashtra Report (n 59), 78-79.
[89] CrPC, s. 320 refers to a list of compoundable offences, which does not include rape.

accepting compromises in cases of rape.[90] Despite this, it is not unheard of for Indian courts to recommend that the accused person marry the prosecutrix, or reach some other compromise, to bring criminal proceedings to an end.[91] With regard to minors in particular, the CCL-NLSIU studies observe that in POCSO cases, marriage between the minor prosecutrix and the accused tended to bring an end to the trial[92] usually because all the witnesses for the prosecution, including the prosecutrix herself, tended to turn hostile (i.e., refused to testify). In such cases, it did not appear from the judgments studied that Special Courts looked any further into the compromise or assessed whether the prosecutrix had agreed to the marriage under pressure or coercion.[93]

The motivation behind this attitude is not obvious. It is likely, however, as argued further in Part III, that this is in some part due to the belief that marriage negates or reduces the 'wrong' of rape or compensates for the wrong suffered by the prosecutrix. Such a belief would be in line with the social norm, discussed in Chapter 2, that creates a binary between legitimate and illegitimate sex. According to this norm, sex within hegemonised marriage is legitimate and women whose sexual activity is confined to marriage are worthy of respect. Sex outside these forms of marriage is illegitimate and women who do not comply with this norm are considered fallen, degraded or unworthy of respect. The actual sexual experience of women within marriage (mutuality, consent, desire, pleasure) is irrelevant to this norm. Therefore, it is possible that marriage tends to bring an end to POCSO trials as observed in the CCL-NLSIU studies because all the parties believed that marriage ameliorated the wrong of rape by bringing the sexual act within a socially legitimate relationship and allowed the prosecutrix to regain her respectability in society. Another reason could be that judges believe that interfering with a marriage would worsen the situation of the prosecutrix whose sexual indiscretions have at least been socially sanctioned through marriage, which, as argued in Chapter 2, is considered

[90] *Shimbhu v. State of Haryana*, (2014) 13 SCC 318 [19-20].
[91] Harshita Dixit, 'Marry your Rapist: An Unending Saga of Compromise in Rape Cases' (*The Criminal Law Blog, NLU Jodhpur*, 23 March 2021) <https://criminallawstudiesnluj.wordpress.com/2021/03/23/marry-your-rapist-an-unending-saga-of-compromise-in-rape-cases/> accessed 13 May 2024;
Naveed Ahmed, 'Over 1,100 Rape Cases Ended in Compromise after going to Court since 2014: NCRB' *The Print* (New Delhi, 4 April 2021) <https://theprint.in/opinion/over-1100-rape-cases-ended-in-compromise-after-going-to-court-since-2014-ncrb/633789/> accessed 13 May 2024.
[92] Michelle Mendonca, 'Factors affecting Acquittals in Special Courts' in CCL-NLSIU (ed.), *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues* (National Printing Press, 2018) 31, 33-34;
CCL-NLSIU, 'Child Marriage and the Protection of Children from Sexual Offences Act, 2012' (2013) 5 <http://odishapolicecidcb.gov.in/sites/default/files/pocso%20act.pdf> accessed 13 May 2024.
[93] Andhra Pradesh Report (n 59), 70-72.

the only socially legitimate space for sexual expression.[94] Their inaction could also be because they have no legal ground to look further into the matter once the prosecutrix states that she consented to the sexual interaction and to the marriage, especially when her minority is not conclusively proved because of the indeterminacy of age-determination in India (discussed in Part II.A).

Taken together, these practical realities demonstrate that the purported aim of the bright line approach of the POCSO and of setting the age of consent at 18 without exception (per the Parliamentary Committee's Report) is undermined by the reality of its implementation. Due to problems in age determination and the biases of the Indian judiciary, minors may nevertheless be treated as adults and must endure consent assessment based on rape myths and stereotypes. The rates of conviction in de-facto consensual cases are low and become almost negligible in cases where the accused and prosecutrix are (or get) married. The practical operation of POCSO primarily stigmatises adolescent sexuality and its mandatory reporting provision, in particular, deters adolescents from receiving essential sexual health services and information. Therefore, instead of protecting minors, these laws lead to a range of harmful consequences. In addition, as I argue in the Part III, Indian law furthers the control of the family and caste community over the sexuality of minors.

III: Family and Community Control of the Sexuality of Minors through Law

This part argues that though the purpose of the laws discussed in Part I is purportedly the protection of a minor's sexual autonomy and bodily integrity (implicit in the stated aim of protecting children from sexual abuse and exploitation),[95] a deeper analysis of the language, scope and functioning of these (and other) laws reveals that they serve different interests. One of the wrongs (sometimes even the primary wrong) punished by these laws is not coercive or exploitative sexual conduct, but rather sex outside marriage. As I demonstrated in Chapter 2, marriage arranged by the parents or families of the bride and bridegroom (same-sex marriage is not legally recognised) is most prevalent in India. This form of marriage upholds norms of caste and honour by ensuring control by the family or caste community over girls' and women's sexual and reproductive capacities. To the extent that Indian law enforces the norm that sex

[94] Ishita Chowdhury and Utsarjana Mutsuddi, 'Love and Law: Understanding Child Marriages in Rural West Bengal' in Samita Sen and Anindita Ghosh (eds.) *Love, Labour and Law: Early and Child Marriage in India* (Sage, 2021) 105, 113.
[95] POCSO, Statement of Objects and Reasons, (Introduction, n 5).

should only take place within marriage, therefore, it protects the interest of the family and caste community in controlling the sexual and reproductive capacities of female adolescents.

A. Rape Law as a tool to Channel Minors into Hegemonised Marriage

As I argued in Chapter 2, marriage in India is socially ubiquitous and, despite increasing sexual activity outside marriage, it continues to be the only socially legitimate space for sexual expression. The control of female sexuality, in order to maintain caste purity, has always been and continues to be achieved through hegemonised marriage. This norm of control over female sexuality is rigidly enforced, both through informal channels and the law.[96] Attempts by girls or women to exercise sexual autonomy outside these norms are frequently met with violent social reprisal. The laws discussed in Part I of this chapter serve as another method for family or community members to exercise control over the sexual, reproductive, and marital choices and behaviour of young persons. This is especially true of minors whose own consent is deemed irrelevant by the law, placing their parent or guardian in an even stronger position of control over them.

Rape law may frequently be used by the family or caste community to punish deviations from the norm of caste-endogamous arranged marriage and to bring young people back in line.[97] The CCL-NLSIU studies (the details of which were discussed in Part II of this chapter) found, for instance, that amongst cases in which it was alleged that the prosecutrix and the accused were in a romantic relationship the majority had been registered by the parents or relatives of the girls, after they had willingly eloped.[98] This trend has also been noted by other studies with regard to both the IPC and POCSO,[99] indicating that the might of the criminal justice system is used by the family and caste community to recover couples who elope, and to punish and thwart the exercise of sexual autonomy by adolescents.

As I mentioned in Part II.C, marriage between the accused and the prosecutrix tends to bring an end to rape trials (whether the case was de-facto consensual or not), usually because the prosecutrix as well as her family refuse to testify against the accused. Even if the family did

[96] See, Flavia Agnes, 'Controversy over Age of Consent' (2013) 48(29) Economic and Political Weekly 10.
[97] ibid, 11.
[98] Delhi Report (n 59), 65-69; Assam Report (n 59), 52; Maharashtra Report (n 59), 39; Andhra Pradesh Report (n 59), 33-34.
[99] See, Enfold and UNICEF, '"Romantic" Cases under the POCSO Act' (n 66), 11; Mehra and Nandy, 'Why Girls Run Away to Marry' (Chapter 2, n 126); Rukmini S., 'The Many Shades of Rape Cases in Delhi' *The Hindu* (New Delhi, 15 June 2016) <https://www.thehindu.com/data/the-many-shades-of-rape-cases-in-delhi/article6261042.ece> accessed 13 May 2024. A study by The Hindu, a leading national daily newspaper in India, found that 40% cases pending in Delhi trial courts were 'consensual' cases where charges of rape had been brought against the boy or man by the parents of the girl or woman.

not originally approve of the match, they may reach a compromise with the accused because a sexual relationship sanctified by marriage is socio-normatively better than an unmarried daughter who is known to have had a pre-marital sexual relationship (or got pregnant out of wedlock).[100] For the same reason, as a study of rural West Bengal shows, 'elopements are getting folded into the 'normal' marriage system of rural society'.[101] Echoing similar sentiments, the Indian judiciary has implied that marriage serves to undo, or compensate for, some (if not all) of the 'wrong' of a sexual offence, especially rape, by recommending marriage between the accused and prosecutrix as a just end to the trial.[102]

The legitimacy granted by marriage to sexual activity appears to override any other concerns regarding the experience or critically normative permissibility of sex within marriage. As I argued in Chapter 2, while wives are 'respectable' women according to the socio-normative binary of legitimate and illegitimate sex mediated by marriage, they are denied the right to refuse sexual contact within marriage and, in that sense, might actually be treated as their husband's property. Concerns around their consent, pleasure and self-respect are all subsumed by the social legitimacy of marital sex. It is in this social context that one must understand comments, by Indian judges, which deny or trivialise the possibility of rape within marriage, stating that sexual force or coercion by a husband is less traumatising or wrongful than that by a stranger because of the legitimacy of marriage.[103] Once a marriage takes place, consent to sex is deemed socially irrelevant for women, whose husbands may rape them with impunity. As regards adult women, this socio-normative view of sex is also reflected by the *law* which, as I mentioned in Part I.A.2 above, exempts marital rape from criminal prosecution. The idea that sex is a right of the husband or the duty of the wife in marriage is also driven home by civil remedies. Refusal to have sex with one's spouse 'without sufficient reason' has been held to be cruelty,[104] which is a ground for divorce. Spouses may also sue for restitution of conjugal

[100] In that sense, these marriages do not represent the ideal of hegemonised marriage but are nevertheless socio-normatively preferable to sex outside marriage, and still uphold the binary between legitimate and illegitimate sex.
[101] Chowdhury and Mutsuddi, 'Love and Law: Understanding Child Marriages in Rural West Bengal' (n 94).
[102] Srimati Basu, 'Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory' (2011) 37(1) Feminist Studies 185, 195-200. The author argues that judicial pronouncements often use marriage as compensation, echoing the rationale of damage to property, in rape cases; Annie Gowen, 'Why an Indian Judge Thinks Rapists Should Marry their Victims' *Washington Post* (Chennai, 9 July 2015) <https://www.washingtonpost.com/world/asia_pacific/why-an-indian-judge-thinks-rapists-should-marry-their-victims/2015/07/08/606f8998-23e5-11e5-b621-b55e495e9b78_story.html?tid=usw_passupdatepg> accessed 13 May 2024.
[103] *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404, [563].
[104] *Vidhya Viswanathan v. Kartik Balakrishnan*, 2015 (4) SCC (Civil) 148.

rights[105] to have a court decree that their spouse return to live with them. Though such a decree cannot force a person to have sex with their spouse, being forced to return to her husband and to her marital home may nevertheless render a woman vulnerable to sexual impositions. This is because a separated wife's refusal of consent to sex with her husband has meaning in criminal law,[106] but such a refusal by a wife who is sharing a marital home with him does not.

These legal provisions and judgments reinforce the binary, discussed in Chapter 2, between socially legitimate sex within marriage and socially unacceptable and illegitimate sex outside it, and give credence to (while simultaneously problematising) the dichotomy between the respectable chaste wife and degraded woman who has sex outside marriage.[107]

This binding of sex and marriage, through family and/or community control over sexuality, is reinforced in two further ways by Indian rape law. First, the only form of deceptive sex explicitly mentioned in the provision defining rape (s. 375, the IPC) is sex with consent which is obtained by a man who impersonates a woman's husband, knowing that her consent is given not to the impersonator but to the husband whom he is impersonating.[108] Second, s. 90, the IPC which provides that consent, where relevant to any provision of the IPC, would not be valid if it is induced by fear or a misconception of fact, and where the seeker of consent knows that the consent was given by such fear or misconception of fact,[109] could be used to prosecute any form of deceptive sex. But the form of 'rape by fraud or deception' most prosecuted by using s. 90 is obtaining consent based on a false promise to marry. A study of the cases of rape pending in Delhi trial courts in 2013 conducted by The Hindu, a leading national newspaper, revealed that these promise to marry cases formed 25% of the *entire* case load of pending rape cases.[110] A study of decisions in de-facto consensual cases under POCSO in three Indian states conducted by UNICEF and Enfold Trust (see Part II.A) also notes that in 49.3% of those cases where the girl was herself the complainant, the complaint had been filed on the ground of the breach of a promise to marry.[111] BNS has now introduced an additional offence of sexual

[105] Hindu Marriage Act, 1955, s. 9; Special Marriage Act, 1954, s. 22; Indian Divorce Act, 1869, s. 32. Muslims can sue to enforce this right as a form of specific performance of the marriage contract. See, *Moonshee Buzloor Ruheem v. Shumsoonissa Begum,* (Privy Council, Calcutta), (1867) 11 M.I.A. 551.
[106] IPC, s. 376B.
[107] That discourses of rape law reinforce dominant norms of gender and sexuality has previously been observed by Indian feminist scholars. See, Nivedita Menon, *Recovering Subversion: Feminist Politics Beyond the Law* (Permanent Black, 2004) 129-134.
[108] IPC, s. 375.
[109] IPC, s. 90.
[110] Rukmini S., 'The Many Shades of Rape Cases in Delhi' (n 99).
[111] Enfold and UNICEF, '"Romantic" Cases under the POCSO Act' (n 66), 8.

intercourse not amounting to rape for having sex with a woman 'by deceitful means'[112] or by making a promise to marry a woman without ever intending to fulfil the promise.[113] While this is a move away from the erstwhile marriage-centric nature of the law, it is unclear whether and to what extent the predominance of promise to marry cases will change under the new law criminalising 'deceptive sex'.

Furthermore, Garg's analysis of promise to marry cases in Delhi trial courts over a period of 12 months concludes that in adjudicating these cases, trial courts generate stereotypes of what a 'real' promise to marry would look like. In cases where the facts did not fit the stereotype, no fraud in obtaining consent was found. Only when the promised marriage aligned with hegemonic social constructions of what a marriage 'ought to be' would courts tend to believe that the prosecutrix's consent was obtained by fraud. Consequently, where there were caste, religious or ethnic differences between the prosecutrix and the accused, courts expected the prosecutrix to know or assume, based on these differences, that the promise to marry was disingenuous.[114] This suggests that the norms of caste and honour that are enforced by the family and community through arranged marriage or through violence or social sanction, are also enforced by courts when adjudicating promise to marry cases.

B. Poor Enforcement of Laws against Family and Community Approved Practices

The socio-normativity of family and community control over the sexual and reproductive capacities of minors is also reinforced by poor enforcement of laws which criminalise practices that are done or approved by the family and community. Consider, for instance, the approach of Indian law to practices such as child marriage (sub-section 1 below) and *devadasi* dedication (sub-section 2 below). In Chapter 7.II.A, I undertake a detailed discussion on whether and to what extent child marriage and *devadasi* dedication enable the sexual exploitation of adolescents with reference to the view of sexual exploitation that I develop in Chapter 6. Briefly, my argument is that commercial exchange of sex is generally an intrinsic part of a *devadasi*'s life after she is dedicated, and the *devadasi*'s family facilitates and benefits from this exchange. Similarly, child marriage can be an avenue for the sexual exploitation of the minor wife by her husband and/or by third parties, which may sometimes be facilitated by, and

[112] BNS, s. 69 Explanation: '"deceitful means" shall include inducement for, or false promise of employment or promotion, or marrying by suppressing identity.'
[113] BNS, s. 69.
[114] Arushi Garg, 'Consent, Conjugality and Crime: Hegemonic Constructions of Rape Laws in India' (2019) 28(6) Social and Legal Studies 737, 745-46.

benefit, those who arrange the marriage. Therefore, both practices can enable the sexual exploitation of minors.

Indian law criminally proscribes certain aspects of both practices. However, as I demonstrate in sub-sections 1 and 2 below, despite the history of legislation on both child marriage and *devadasi* dedication being intertwined with the sexual nature of these practices, the statutes which regulate them do not appear to recognise and acknowledge their sexual nature.

1. Child Marriage

In the late 19th century, the discourse around child marriage in India became intertwined with the move to increase age of consent, a highly contentious issue that was partially resolved by the tragic death of a child bride due to rape by her husband.[115] In 1890, Phulmoni Dasi, aged about 11 years, died as a result of violent sexual intercourse by her husband aged between 30 and 35 years. Since Phulmoni was technically over the age of consent, the act was legally not rape, but her husband was held guilty of causing her death by a rash and negligent act.[116] Even then, one of the crucial questions before reformers, doctors and government officials was where the line between childhood and womanhood ought to be drawn. In the 19th century, perhaps because of Phulmoni's case, the distinction largely relied on physical maturity and the ability of the body to withstand sexual intercourse.[117]

In contemporary India, the largest number of 'child' marriages now take place in the age bracket of 15-17 years,[118] indicating that it is an issue that relates more to adolescents than to children. Nevertheless, the marriage of any minor is labelled 'child marriage' in law. Child marriage is governed by the Prohibition of Child Marriage Act, 2006 (PCMA), which declares that child marriages are voidable at the instance of the party who was a minor at the time of the marriage (or both parties, where both were minors).[119] The petition for having the marriage

[115] Tanika Sarkar, 'A Prehistory of Rights: The Age of Consent Debate in Colonial Bengal' (2000) 26(3) Feminist Studies 601, 602. Sarkar argues, 'The death was a crucial event. It brought together and re-energised continuing debates on Hindu domestic norms and the need for legislative reform.'

[116] *Queen Empress v. Hurry Mohun Mythee*, Indian Law Reports, 18 Cal. 49.
See, Ishita Pande, 'Phulmoni's Body: The Autopsy, the Inquest and the Humanitarian Narrative on Child Rape in India' (2013) 4(1) South Asian History and Culture 9.

[117] Ishita Pande, *Sex, Law, and the Politics of Age: Child Marriage in India 1891-1937* (CUP, 2020) 33.

[118] Samita Sen and Anindita Ghosh, 'Introduction' in Samita Sen and Anindita Ghosh (eds.) *Love, Labour and Law: Early and Child Marriage in India* (Sage, 2021).

[119] Prohibition of Child Marriage Act, 2006 (PCMA), s. 3.
A state amendment by Karnataka has made child marriage *void ab initio*, rather than voidable, meaning that minors do not have the option to validate their marriage *post-hoc* in Karnataka. See, PCMA (Karnataka Amendment), 2016, s. 2.

declared void can be filed within two years of attaining majority.[120] This means that if a person who was married as a child does not wish to end the marriage, she may remain in the marriage, which will become valid after two years of her attaining majority. If she wishes to end it, she may petition the District Court to have it declared void before the two-year period lapses. Before the lapse of this two-year period after the child attains majority, or before a petition to have the marriage declared void is filed, the marriage remains voidable, effectively in something of a legal limbo. Promoting, permitting, or solemnising the marriage of a child is an offence,[121] and an adult male can also be punished for marrying a woman under the age of 18 years.[122] Thus, the criminal offences recognised in the statute are concerned with the act of marriage.

Pande demonstrates that from the early 20th century, especially between the two World Wars, the discourse on child marriage in India shifted from the physical maturity and bodily integrity of the child bride to the health of the race and the nation, population control, and development.[123] To this day, the policy considerations around child marriage in India are embedded in these issues.[124] As Sen and Ghosh argue, '[i]ts reform [is] associated with fertility rates, population growth and public policy',[125] framing child marriage as an issue of the nation's human development. This framing is re-emphasised by the 2021 proposal (cleared by the union cabinet) to increase the legal age of marriage for women from 18 to 21.[126] The proposal was based on the recommendations of a task force established specifically to look into issues of maternal health, such as ways to reduce maternal mortality and improve levels of nutrition.[127] It is clear therefore, that child marriage policy is based on the rationale that increasing women's age of marriage and reducing rates of child and early marriage would improve these indicators of human development.

[120] PCMA, s. 3(3).
[121] PCMA, s. 10 and 11.
[122] PCMA, s. 9.
[123] Pande, *Sex, Law, and the Politics of Age* (n 117), 77-78.
[124] Sen and Ghosh, 'Introduction' (n 118).
[125] Sen and Ghosh, 'Introduction' (n 118), xx.
[126] Esha Roy, 'Cabinet Clears Push to Raise Marriage Age of Women from 18 to 21' *The Indian Express* (New Delhi, 16 December 2021) <https://indianexpress.com/article/india/cabinet-clears-push-to-raise-marriage-age-of-women-from-18-to-21-7675201/> accessed 13 May 2024.
[127] Sanya Dhingra, 'Increase Women's Marriage Age to 21 for Health Benefits- Modi Govt. Task Force Recommends' *The Print* (New Delhi, 15 January 2021) <https://theprint.in/india/increase-womens-marriage-age-to-21-for-health-benefits-modi-govt-task-force-recommends/585519/> accessed 13 May 2024.

Child marriage is strongly correlated with early pregnancy, as well as poor maternal and infant health outcomes.[128] According to an analysis of NFHS-5 (2019-21) data, of women aged 15-49 who ever gave birth, 19.5% first did so between the ages of 10 and 17, and another 23% between the ages of 18 and 19.[129] NFHS-5 data also indicate that *only* married adolescents get pregnant, with the burden of pregnancy amongst unmarried adolescents being nil.[130] Given this, the human development focus of child marriage policy is entirely appropriate and understandable. My limited argument is that the law and discourse on child marriage should *also* be mindful of the sexual nature of child marriage. As I mentioned earlier in this section, the only criminal offence recognised by PCMA is marrying a minor girl or solemnising the marriage of one or more minors. This ignores the fact that marriage is a relationship in which sexual interactions are ordinarily expected and occur and that, consequently, child marriage has a sexual dimension which should not be overlooked within criminal law.

2. *Devadasi* Dedication

Devadasi dedication, or the dedication of a woman to a temple through 'marriage' to the deity of the temple is recognised as an offence by the laws in six states: Goa, Maharashtra, Karnataka, Tamil Nadu, Andhra Pradesh, and Telangana.[131] If the girl or woman who is so dedicated belongs to a scheduled caste or scheduled tribe, the dedication would also be an offence under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.[132] While most

[128] Anita Raj and others, 'The Effect of Maternal Child Marriage on Morbidity and Mortality of Children under 5 in India: Cross Sectional Study of a Nationally Representative Sample' (2010) 340 British Medical Journal doi: https://doi.org/10.1136/bmj.b4258. The authors specify that while child marriage is correlated with infant mortality, as well as poor maternal and infant health outcomes, the causes of these phenomena are socio-economic deprivations, such as poverty, poor nutrition, and lack of access to good medical care, which tend to be present in populations with the highest rates of child marriage.

[129] Priya Bhakat and Yatish Kumar, 'Adolescent Childbearing in India: Causes and Concerns' (2023) Women's Reproductive Health https://doi.org/10.1080/23293691.2023.2258874, 4.

[130] National Family Health Survey (NFHS)-5 (n 107), 134. This may be because no pregnant unmarried women were part of the sample, or pregnancies of unmarried adolescents were not revealed. There is no way of estimating the incidence of adolescent pregnancy outside marriage in India because studies on the subject are extremely rare and where they exist, have small sample sizes, are not regionally representative and are focused on the correlates of pregnancy and abortion. It does appear, however, that the focus of the literature is on adolescent pregnancy within marriage because, generally, the rate of pregnancy outside marriage in India is negligible. Shraboni Patra, 'Motherhood in Childhood: Addressing Reproductive Health Hazards among Adolescent Married Women in India' (2016) 13 Reproductive Health doi: https://doi.org/10.1186/s12978-016-0171-7, 2.

[131] See:
a) Tamil Nadu Devadasis (Prevention of Dedication) Act, 1947 (Tamil Nadu Act).
b) Karnataka Devadasis (Prohibition of Dedication) Act, 1982 (Karnataka Act)
c) Andhra Pradesh Devadasis (Prohibition of Dedication) Act, 1988 (Andhra Pradesh Act).
d) Telangana Devadasis (Prohibition of Dedication) Act, 1988 (Telangana Act).
e) Maharashtra Devdasi System (Abolition) Act, 2005 (Maharashtra Act).
f) Goa Children's Act, 2003, s. 2(n) and s.9(6) and (7).

of the statutes today do not punish the woman or girl who is dedicated as a *devadasi*, the Tamil Nadu Act, which has not been amended since January 1947 (that is, since before Indian independence), does.[133]

As with child marriage, legislations which prohibit and criminalise *devadasi* dedication, and in some cases the propagation of the practice,[134] say nothing of the sexual practices that necessarily follow dedication. This is somewhat inconsistent, given that the criminalisation of *devadasi* dedication resulted from its perceived links with sex and sexuality. As I argued in Chapter 2, the social norm of treating sex within hegemonised marriage as legitimate and treating sex outside this sphere as illegitimate, which became dominant during the 19th century in colonial India, reduced all women who breached this norm to fallen women or prostitutes. Laws which criminalised the dedication of *devadasis* and the propagation of the practice, were meant to put an end to a system which, from the lens of this social norm, was seen as prostitution in a sacred context *because* of the sexual relationships in which the *devadasis* engaged. It is unclear, therefore, why sexual practices within the system were not criminalised. By this I do not mean that women and girls who are *devadasis* should be punished. My limited point here is that since the commercial exchange of sex with the temple priest as well as other villagers is the purpose and the inevitable consequence of *devadasi* dedication, the failure of the law to recognise the sexual nature of *devadasi* dedication is a glaring omission.[135]

In addition to the failure of the PCMA and *devadasi* statutes to see the sexual nature of these potentially exploitative practices, the prohibitions that do exist (on solemnising a child marriage, marrying a minor or dedicating a woman as a *devadasi*) are poorly enforced. At the time of writing this thesis, the only publicly accessible official figures estimating the number of *devadasis* in India are found in a press release by the National Human Rights Commission (NHRC) of India, which states, 'reportedly, more than 70,000 women are leading their lives as Devadasi in Karnataka alone. A Commission constituted under the chairmanship of Justice Raghunath Rao had reportedly held that there are 80,000 Devadasis in the States of Telangana and Andhra Pradesh.'[136] Widely varying estimates have also been made by NGOs, private

[133] Tamil Nadu 1947, Explanation to s. 4(1).
[134] See:
a) Andhra Pradesh Act, s. 6.
b) Telangana Act, s. 6.
c) Maharashtra Act, s. 3(2).
[135] As I argue further in Chapter 7.II.A, recognising the sexual nature of *devadasi* dedication in contemporary India would enable the criminal punishment of those who sexually exploit girls through this practice.
[136] 'NHRC Notices to the Centre and State Governments of Karnataka, Kerala, Tamil Nadu, Andhra Pradesh, Telangana and Maharashtra over Continued Menace of Devadasi System Despite Laws Banning it; Gives Six

researchers and journalists. For instance, a report from 2018 by the Times of India (a leading national newspaper) estimates, based on the numbers recorded by municipal authorities in Karnataka, that the state only had about 10,000 *devadasis*.[137] Around the same time, Sharma, whose estimate is a composite of the numbers given in other sources, concludes that there are nearly 250,000 *devadasis* in India.[138] Whatever the actual numbers, however, it is clear that the *devadasi* prohibition laws are marked by their non-implementation.[139] In fact, Wilson's study observes that despite statutes criminalising the practice, *devadasi* dedications happen in public places, usually with the knowledge of the police.[140] Similarly, the *Akha Teej* festival in the state of Rajasthan sees mass child marriages take place in public, with the knowledge (and, arguably, complicity) of the police.[141] Reporting a child marriage can cause serious, and sometimes dangerous, social backlash. When the PCMA is successfully invoked and a child marriage is prevented or annulled, the girl and her family tend to be ostracised by their relatives and caste community.[142] Violent action against organisations or frontline workers who stop child marriages has also been seen. It is alleged that in 1992, when Bhanwari Devi stopped the marriage of a nine-month-old infant of the dominant Gujjar caste of Rajasthan, the entire Gujjar community first economically boycotted her and subsequently, as punishment, three Gujjar men allegedly gang-raped her.[143] There is no evidence on whether reporting the dedication of a *devadasi* elicits a similar response.

Weeks to Respond' (National Human Rights Commission, 14 October 2022) <https://nhrc.nic.in/media/press-release/nhrc-notices-centre-and-state-governments-karnataka-kerala-tamil-nadu-andhra> accessed 21 November 2024.

The reports to which this release refers are not publicly available. That these are the only official statics on *devadasi*s is perhaps also a comment on the lack of priority and importance accorded to the practice and its prevention/punishment. None of my interviewees mentioned anything about *devadasis*, probably because none of them have had any direct experience of working with them.

[137] TNN, 'How 10,000 Devadasis Live their Lives in Karnataka' Times of India (Bengaluru, 7 April 2018) <https://timesofindia.indiatimes.com/city/bengaluru/sexual-servitude-to-the-gods/articleshow/63660465.cms> accessed 21 November 2024.

[138] Sharma, 'Divine Shadows: Indian Devadasis between Religious Beliefs and Sexual Exploitation' (Chapter 2, n 87) 80.

[139] Jayna Kothari and others, 'Intersections of Caste and Gender: Implementation of Devadasi Prohibition Laws' (Chapter 2, n 88) 35.

[140] Wilson, 'Can Legislation Alone Protect Devadasi Girls from Child Sexual Abuse and Exploitation?' (Chapter 2, n 85) 606, 614.

[141] Mrinal Pande, 'Child Marriage: Some Whys and Wherefores' *Live Mint* (New Delhi, 23 March 2009), <https://www.livemint.com/Opinion/NVwI5xgMrL62xrC6woIwRK/Child-marriages-some-whys-and-wherefores.html> accessed 13 May 2024.

[142] Madhu Mehra, 'Grassroots Experiences of Using the Prohibition of Child Marriage Act' (*Partners for Law in Development*, 2019) 17 <https://bit.ly/ 2Veg9FA> accessed 13 May 2024.

[143] Sachin Saini, 'Bhanwari Devi: Justice eluded her, but she stands resolute for others', *Hindustan Times* (Bhateri, 17 September 2021) < https://www.hindustantimes.com/india-news/bhanwari-devi-justice-eluded-her-but-she-stands-resolute-for-others-101631811309362.html> accessed 13 May 2024.

Indian law, therefore, upholds the authority of the family and caste community and the norms of caste and honour in two important ways. First, the scope and language (what is recognised as a sexual offence and what is not) and the operation (what is punished as a sexual offence and what is not) of rape law upholds family or community control over young people's sexuality as dictated by the norms of caste and honour. Frequently, the wrong of rape appears to be that the sexual acts took place outside marriage and/or in defiance of the authority and control of the family and community, rather than that they took place without the consent of the woman or girl. This is true of cases where de-facto consensual elopement is prosecuted by the girl's parents as 'rape'. It is also evident in the fact that despite the neutral language and broad scope of s. 90, the IPC, the most commonly prosecuted cases of deceptive sex are 'promise to marry' cases, and that the only instance of deceptive sex that is explicitly recognised as rape in s. 375, the IPC is when a man obtains a woman's consent by impersonating her husband (seemingly usurping the sanction of marriage). In other cases, the status of marriage renders *lack* of consent irrelevant. This is true of the marital rape of adult women. Even in cases of rape by false promise of marriage, the most prominent form of rape by deception or fraud in India, judicial assessment of the promise (and therefore of fraud) is based on hegemonic constructions of marriage which embody norms of caste and honour which are typically enforced by the family or community. Second, the sexual nature of practices such as child marriage and *devadasi* dedication are not legally recognised despite the scope for the sexual abuse of minors within these practices (on which I elaborate in Chapter 7.II.A). Moreover, while aspects of both practices are criminally proscribed, these laws are so poorly implemented that the practices continue publicly and with impunity.

IV: Indian Criminal Law and Sexual Exploitation

The harmful consequences of Indian criminal laws regulating sexual interactions with minors (discussed in Parts I and II) and their insidious role in furthering the control of female sexual and reproductive capacities by the family and caste community (discussed in Part III), in addition to the normative arguments regarding simultaneous over- and underinclusiveness advanced in Chapter 7.II, suggest that Indian criminal law needs to be reformed to make it more nuanced.

In Chapter 7, I suggest a two-pronged proposal to achieve this aim: (a) allow adolescents to consent to sexual interactions in line with their competence to do so;[144] and (b) incorporate a

[144] The competence of adolescents to consent to sexual interactions is discussed in Chapter 5.

concept of 'sexual exploitation' into Indian criminal law to protect adolescents from interactions which do not amount to rape, but where there are good reasons to doubt the moral decisiveness of the consent given by an adolescent to a sexual interaction because of its exploitative nature. Other recommendations regarding the decriminalisation of adolescent sexual activity also provide the caveat that only non-exploitative sexual interactions should be permitted. For instance, a recent judgment of the High Court of Calcutta (in the eastern Indian state of West Bengal), which held that the purpose of POCSO was to protect all children from 'exploitative' sexual acts, and non-exploitative sexual acts should not be equated with rape.[145] The recommendation of the Delhi-based child-rights advocacy group, PLD, to the Ministry of Women and Child Development on adolescent sexuality (mentioned in Part II.A of this chapter), likewise suggests that *non-exploitative* sex be exempted from criminalisation.[146] I consider provisions of Indian law that deal with 'sexual exploitation' and the arguably sexually exploitative conduct of 'inducement to consent to sex' by abuse of a position of authority or a fiduciary relationship, demonstrating that these provisions cannot provide the necessary safeguard against the sexual exploitation of adolescents because they are either insufficient in their scope or unclear.

A. Sexual Exploitation

The term 'sexual exploitation' is used in the Immoral Traffic (Prevention) Act (ITPA), 1956 and in certain provisions of the IPC. ITPA does not make sex work criminally punishable per se, but it does make prostitution in a public place, as well as brothel-keeping and living off the earnings of a prostitute, punishable offences.[147] The law does not treat the prostitution of minors differently from that of adults, except that offences involving children attract a higher range of punishment.[148]

Though ITPA refers to sexual exploitation, the term has not been defined in the statute and its meaning must therefore be inferred from the contexts in which it is used. When so inferred, it appears that the term refers to prostitution or the commercial exchange of sex within the context of sex work or prostitution.[149] It is unclear what the wrong of 'sexual exploitation' is meant to

[145] *Probhat Purkait @ Provat v. The State of West Bengal*, 2023 SCC OnLine 3777 [26], [29]. There was nothing in the judgment to indicate what 'exploitation' would mean in this context.
[146] PLD, 'Recommendations for Protection of the Rights of Adolescents in the National Child Protection Policy (2018)' (n 58).
[147] Immoral Traffic (Prevention) Act, 1956 (ITPA), ss. 3, 4 and 7.
[148] For example, see ITPA, ss. 4 and 5.
[149] See:

be in this context or what it means to sexually exploit someone beyond paying her for a sexual interaction. This understanding of sexual exploitation fails to capture instances of sexual exploitation outside the commercial sex industry where a *commercial* exchange may not necessarily or inevitably be the salient feature of the exploitative interaction (although *some* exchange is likely to be involved). The use of the term 'sexual exploitation' in ss. 370 and 370A, the IPC,[150] which criminalise trafficking a person for the purpose of exploitation, including sexual exploitation, and sexually exploiting a trafficked person respectively, similarly does not suggest what wrongful conduct, precisely, is prohibited by it beyond paying someone for her sexual services.

B. Inducement to Consent to Sex

S. 376C, the IPC criminalises the abuse of a position of authority or a fiduciary relationship to induce or seduce a woman (with respect to whom the position of authority or fiduciary relationship is held) to have sexual intercourse, as a separate sexual offence not amounting to rape.[151] The punishment for this offence is significantly less (minimum of five years imprisonment, extendable to ten, compared to a minimum of ten years, extendable to life imprisonment) than the punishment for rape by a person in a position of trust or authority,[152] signalling that it is an offence less serious than rape. While the provision captures some sexual interactions that we might consider exploitative, it does not specify what is meant by the 'abuse' of a position of authority in this context, or by the terms 'induce' or 'seduce'. In fact, the only well-known case in which this provision has been used seems to include coercive behaviours within its scope. Thus, in a case where a student (adult, exact age unspecified) enrolled in an LL.M. degree alleged that she was sexually abused by the President of the Managing Committee of the college in which she was enrolled, and the accused was charged with s. 376C, the IPC, the High Court of Allahabad included within the scope of the provision sexual conduct

a) ITPA, s. 2(f): '"prostitution" means the sexual exploitation or abuse of persons for **commercial purpose**, and the expression "prostitute" shall be construed accordingly' (emphasis added)
b) ITPA, s. 6: 'Where a child or minor found in a brothel, is, on medical examination, detected to have been sexually abused, it shall be presumed, unless the contrary is proved, that the child or minor has been detained for purposes of prostitution or, as the case may be, has been sexually exploited for **commercial purposes**.' (emphasis added)

[150] IPC, ss. 370 and 370A.
[151] IPC, s. 376C.
[152] IPC, s. 376(2)(f).

performed due to blackmail and threat of violence towards the prosecutrix's family. It observed:[153]

> when she was taking her bath, the accused got it video recorded and thereafter her sexual exploitation began. She was not only raped but sexually exploited for over a year till she managed to escape. It is also stated that the victim was **forced to massage** the accused in a nude condition on a daily basis. It is stated that she was **sexually exploited under threat** that her family would have to face dire consequences as also that her bathing and rape videos would be made viral.

This shows that the meaning and scope of this provision is unclear. Even assuming that the wrong being criminalised is the abuse of a position of authority or a fiduciary relationship to induce a woman (by offering something that is only within the power of the authority figure to give) to consent to sex which she would not have consented to but for the inducement, the provision is not broad enough. Since it appears to include only official positions of authority or fiduciary relationships (within an institutional structure of some sort), it cannot capture instances of exploitation by the family.

Thus, there is no provision in Indian criminal law that provides a concept of sexual exploitation which can meaningfully be used as a safeguard if the laws discussed in Part I are amended to make the consent of competent minors legally relevant. In Chapter 6, I attempt to sketch out a concept of sexual exploitation that can serve as such a safeguard. In Chapter 7, I suggest directions for the operationalisation of this in Indian law.

Conclusion

This chapter sought to provide an overview of the scope, language, and operation of Indian criminal laws on sexual interactions with minors and map the conclusions drawn in Chapter 2 regarding the Indian social context onto the operation of these laws.

The first part of the chapter considered the sexual offences against minors recognised by the IPC and POCSO, explaining how these offences take a bright line approach to criminalising sexual interactions with and amongst minors, and how certain features of the rules of procedure that apply to the trial of these offences tend to aggravate their effects. The second part presented some of the harmful consequences of the framing and implementation of the laws discussed in the first part. POCSO makes any sexual interaction with a minor a criminal offence, without regard to the competence of the minor to consent to the interaction. This means that several

[153] *In Re Missing of An LL.M. Student at Swami Shukdevanand Law College*, Criminal Misc. Writ Petition No. 21181 of 2019 in the Allahabad High Court [Manoj Misra and Deepak Verma JJ.] (30.04.2020). (Emphasis added).

adolescents in de-facto consensual sexual relationships with other adolescents, or in some cases with adults, are caught in the net of the criminal justice system. Despite the consent of minors being made irrelevant under POCSO with the intent to protect children from insensitive consent assessment during trial, Special Courts do still assess the consent of the prosecutrix, sometimes falling back on harmful rape stereotypes in so doing. Furthermore, the mandatory reporting provision of POCSO serves to stigmatise adolescent sexuality and prevents adolescents from accessing essential medical information and services. In the third part, I argued that the scope, language, and operation of Indian criminal laws regulating sexual interactions with minors do not protect the sexual autonomy of young persons. Instead, they uphold the norms of caste and honour, and become another tool in the hands of the family and caste community to control the sexual and reproductive capacity of females.

The harmful consequences of these laws and their insidious role in furthering the control of the sexual and reproductive capacities of females by the family and caste community suggest the need for change. Recommendations for law reform, including the two-pronged proposal I present in Chapter 7, require that even if the consent of (some) minors is recognised in law, they remain protected from sexual exploitation. Therefore, in part four, I considered how 'sexual exploitation' and arguably related conduct like 'inducement to consent to sex' are currently understood by Indian law. I argued that the insufficiency and lack of clarity of these understandings makes them inapt as safeguards against sexual exploitation.

CHAPTER 4: INDIAN SOCIO-NORMATIVE CONCEPTIONS OF LIFE STAGES AND ADOLESCENT SEXUALITY

Introduction

In Chapter 3, I showed that Indian criminal laws which regulate sexual interactions with minors treat all persons under the age of 18 as 'children', and deem the consent of all children, so defined, legally irrelevant. Consequently, all sexual activity with or among minors is criminally punishable, whether the minor is aged seven or 17. As I establish in Chapter 5, this approach is incompatible with the moral competence of older minors, or adolescents, to consent to sexual interactions. In this chapter, I demonstrate how the law's characterisation of all minors as 'children' also fails to reflect the socio-normative conceptions and lived realities of childhood, adolescence, and adulthood in India. This makes the law unjustifiably paternalistic towards older adolescents whose emergent sexuality is socially recognised and who are a socio-normatively distinct category from children.

In this chapter, I consider what it means to be a 'child', an 'adolescent' and an 'adult' in India. I distinguish the socio-normative conceptions of childhood from adolescence, and adolescence from adulthood. This lays the foundation for the categorical critically normative distinction drawn in Chapter 5 between adolescence and adulthood when it comes to sexual decision-making. The socio-normative distinction between childhood and adolescence, which is based on the socially acknowledged emergent sexuality of adolescents, provides pragmatic reasons to exclude pre-pubertal children from the category of those whose consent may be morally decisive in sexual interactions. While Indian society recognises emergent adolescent sexuality, this does not imply socially recognised *competence* to make sexual choices. This is because, as the socio-normative distinctions between childhood and adolescence on the one hand, and between adolescence and adulthood on the other, indicate, adolescence and adulthood in India are not marked by the separation or individuation from one's natal family, as observed in the West, but rather by decision-making within collective and relational structures. Furthermore, the operation of the norms of caste and honour (discussed in Chapter 2) means that it is not sexual autonomy or the capacity to consent to sexual intercourse that determines which sexual behaviours are socially acceptable, but the legitimacy provided by marriage. Consequently, factors such as intelligence, or the ability to make one's own decisions and function autonomously, are not essential to the socio-normative conception of adulthood in India. This indicates that socio-normative conceptions of adolescence and adulthood cannot form the basis

of the categorical distinction between adolescents and adults when it comes to decision-making, a distinction essential in determining whether and to what extent adolescent consent to sexual interactions can be morally decisive. This categorical distinction, as I argue in Chapter 5, must therefore be critically normative rather than socio-normative.

In Part I, I argue that the dominant discourse around childhood in India frequently appears to construct childhood and adulthood as a binary. This is because childhood is understood in contrast to adulthood. While the former is seen as a time for play and freedom from responsibility, the latter is considered a time for work and the assumption of responsibility. However, the lived realities of children from the lower socio-economic classes problematise this binary. Financial needs may impose responsibilities and forms of productive labour typically associated with adulthood on children from the lower socio-economic classes. Nevertheless, children performing these forms of labour are *not* thereby considered socio-normative adults, indicating that the performance of adult forms of labour is not what marks the end of childhood, or the beginning of adulthood.

In Part II, I argue that adolescence acts as a bridge between childhood and adulthood, although the length of this life-stage tends to vary based on socio-economic class. The definitive end of childhood, and the beginning of adolescence, is marked by visible signs of maturity, usually associated with puberty, and socially interpreted as signals of emergent sexuality and reproductive capacity. This is because the domain of sexuality is considered socially inappropriate for pre-pubertal children, whereas the emergent sexuality of adolescents is socially recognised in different ways. Similarly, marriage and reproduction appear to be domains reserved only for socio-normative adulthood in the sense that it would be inappropriate for a socio-normative adolescent to be inducted into these domains. The end of adolescence and the beginning of adulthood is, therefore, marked by the perceived readiness to be inducted into these adult domains. There is no clear or universally applicable answer as to when a person might be considered by their family and community to be ready for marriage and reproduction. Amongst lower socio-economic classes where adolescents might already have been performing productive and household labour for several years, older adolescents who display visible signs of maturity may be inducted into these adult domains. This is borne out by available data on adolescent marriage and childbearing in India, phenomena largely

restricted to the lower socio-economic classes.[1] Data from the National Family Health Survey (NFHS)-5 (2019-21) show that while the incidence of child marriage has steadily declined, 28.1% Indian women aged 20-24 had been married by the age of 18 (see Chapter 2.III.A.1). Furthermore, 42.5% of Indian women aged 15-49 who have ever given birth, first gave birth between the ages of 10 and 19 (see Chapter 3.III.B.1). Amongst the middle and upper socio-economic classes, induction into the adult domains of marriage and reproduction may be determined by the completion of higher education, or a degree of financial independence attained through steady employment.[2] Notwithstanding when this stage is reached however, it is clear that the perceived readiness for marriage and reproduction mark the end of socio-normative adolescence and the beginning of socio-normative adulthood in India.

As I mentioned above, while the emergent sexuality of adolescents is recognised, this does not translate into a social recognition of their competence to make sexual decisions, and the social acceptability of sexual interactions (whether for adults or adolescents) is determined not by their capacity to consent to those sexual interactions, but by the legitimacy of those sexual interactions. This legitimacy, as I argued in Chapter 2, is based on whether or not the sexual interactions take place within hegemonised marriage, that is, marriage which complies with the norms of caste and honour. However, this norm is not universally accepted. As I demonstrate in Part III, evidence suggests that Indian adolescents rebel against this norm. While the recorded levels of sexual activity amongst Indian adolescents is lower than that of their Western counterparts, adolescent sexual activity represents an important counter-current to the majoritarian morality that seeks to contain sexuality within hegemonised marriage.

Before I delve into these substantive arguments, I must briefly explain the manner in which I use the terms ‘child’, ‘adolescent’ and ‘adult’ in this chapter, and the reasons why I ascribe particular meanings to these terms.

My use of the terms ‘childhood’, ‘adolescence’, ‘adulthood’ and their variants is intended to convey social constructions based in biological phenomena. In discussing the socio-normative conceptions of childhood and adolescence in India, I do not refer to the developmental phases of childhood and adolescence (based in biological phenomena) and the social understandings

[1] See, Manoj Kumar Jha, D.K. Ojha and Sunanda Mishra, ‘Socio-economic Correlates of Early Marriage of the Girl Child’ (2023) 58(50) Economic and Political Weekly 38.
Sen and Ghosh argue that in the literature on child marriage, this has led to child marriage being represented as a problem of the ‘other’, that is, as no longer the problem of the writer’s own socio-economic class. See, Sen and Ghosh, ‘Introduction’ (Chapter 3, n 118).
[2] These tend to be the general trend, and individual exceptions are always possible.

of these life stages in isolation. Rather, I treat the social and biological dimensions as necessarily linked and shaping each other.[3] Developmental phases linked to biological phenomena (or even the phenomena themselves) give meaning to social constructions of life stages, and these social constructions give specific context to the biological phenomena or life stages built around them. Consider, for instance, the ossification test (to determine chronological age based on the degree of fusion of various bones) done on prosecutrices in POCSO cases when documentary proof of their minority is unavailable or unreliable (discussed in Chapter 3.II.A). These tests are used to assign an age range to the victim which, in turn, places them in a developmental stage. If the age range is 12-14 years old, the victim would probably be characterised as an adolescent, whereas if it is 18-20 years old, she is likely to be characterised as an adult. In one sense these age-ranges are rooted in biological facts, since they are based in scientific understandings of the chronological development of a typical human skeleton. However, the characterisation of someone who is 12-14 years old as an adolescent or someone who is 18-20 years old as an adult is also a social act because the meanings of 'child', 'adolescent' and 'adult' are determined by context. Increasing height, or developing secondary sexual characteristics, the growth of facial hair, or the beginning of menstruation are biological phenomena which are ascribed social meaning. Whether they are signs of emerging adolescence, emerging adulthood, emerging sexuality, or none of the above depends on the social context in which they occur.

At the same time, society does not ordinarily ascribe meaning to nothing.[4] The social interpretations of biological phenomena may not be universally applicable and need not even be entirely factual. For instance, as I mention in Part II, certain biological processes associated with puberty, such as hormonal changes, tend to begin before the emergence of visible signs of puberty, but puberty is not understood to begin socially until it manifests visibly. Nevertheless, the link between menstruation and a female's ability to conceive children, and the link between sex and reproduction, is what leads to the social construction of menstruation as an indication of emergent sexuality. Furthermore, even though social constructions and meanings do not represent the complete biological picture, they have value because they shape

[3] Kathleen Mullan Harris and Thomas W. McDade, 'The Biosocial Approach to Human Development, Behavior, and Health Across the Life Course' (2018) 4(4) Russell Sage Foundation Journal of the Social Sciences 2, 3.
[4] James A. Holstein and Jaber F. Gubrium, 'Constructionist Perspectives on the Life Course' (2007) 1 Sociology Compass 1, 10.

the way individuals in that society understand themselves and others.[5] Consequently, the social and biological are not, and should not be seen as, mutually exclusive or unconnected.

Therefore, I use the term 'child' to refer to persons who have not yet experienced a socially significant marker of puberty, and the term 'adolescent' to refer to persons who have undergone a socially significant marker of puberty but are not yet adults. An 'adult' refers to a person for whom marriage, and sexuality and reproduction within marriage, are considered socio-normatively appropriate.

I. Conceptions of Childhood in India

According to Archard, to have a concept of childhood is to recognise that children might differ from adults in crucial respects, whereas a conception of childhood requires some defined view of what these differences are.[6] For instance, Ariès argued that the *concept* of childhood emerged in Europe around the end of the 15th century. He based this assertion on the observation that children's depiction in paintings before this time did not have any specialised ('child-like') features, such as distinct clothing, toys, or expressions. They were depicted as 'small adults'.[7] Critics of Ariès' argument dispute this claim by looking at other sources, such as scientific and medical literature that recognised physiological differences between children and adults, or legal sources which set different ages of criminal responsibility implying recognition of age-based differences in moral culpability.[8] The core of these criticisms was that, contrary to Ariès' claims, the *concept* of childhood as a distinct developmental phase pre-dated the 15th century, even in Europe. But, as Hendrick rightly points out in the context of Britain, different time periods have had different *conceptions* of childhood.[9] This part of the chapter seeks to explore contemporary conceptions of childhood in India, that is, the particular social meanings attached to being a 'child' or to the stage of 'childhood'.

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[5] Meredith Temple-Smith, Susan Moore and Doreen Rosenthal, *Sexuality in Adolescence: The Digital Generation* (Routledge, 2015) 85-100.
[6] David Archard, *Children: Rights and Childhood* (3rd edition, Routledge, 2015) 32.
[7] Philippe Ariès, *Centuries of Childhood: A Social History of Family Life* (Johnathan Cape Ltd., translated from French by Robert Baldick, 1965).
[8] Heather Montgomery, *An Introduction to Childhood: Anthropological Perspectives on Children's Lives* (Wiley-Blackwell, 2009) 32.
[9] Harry Hendrick, 'Constructions and Reconstructions of British Childhood: An Interpretative Survey 1800 to the Present' in Allison James and Alan Prout (eds.) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (3rd edn., Taylor and Francis, 2015) 29. This might explain why the depiction of children in pre-15th century European paintings did not align with Ariès' conception of childhood.

In section A, I explore the social constructions of childhood through public discourse and perceptions of this life stage in India. In section B, I contrast these understandings with the lived realities of pre-pubertal minors, or children, in India. I argue that childhood and adulthood are understood in the dominant discourse as being ideally defined by the spheres of activity considered socio-normative for each life-stage, such as play and/or education for children and productive work for adults. The lived realities of socio-economically marginalised sections of society problematise these ideals, since children from these sections perform forms of labour otherwise performed by adults from a very young age but are not thereby considered or treated as adults. A more accurate picture of who is (and who is no longer) a child is produced by accounting for perceptible physical or biological indicators of maturity which signal emergent sexuality and mark the definitive social end to childhood.

A. Childhood in Discourse and Public Perception

Discourses and perceptions of childhood, though not entirely unmoored from chronological age, conceptualise childhood in terms of 'spheres' that are considered socio-normatively appropriate for children. These discourses frequently see childhood as the absence of 'adult' traits or the 'opposite' of adulthood.[10] Because of this binary construction of childhood and adulthood, adolescence does not feature in these discourses, even though, as I discuss in Part II, adolescence is a socially relevant life-stage in India.

One such binary is visible in ideas that contrast childhood as a time of innocence and insouciant play with adulthood as a time of responsibility, or a child as someone who goes to school compared to an adult who goes to work. Regarding Indian discourses on child labour, Balgopalan argues that 'the hegemonic moral discourse on children idealises the bourgeois separation of the child from labour'.[11] Thus, child labour is often understood as a 'loss of innocence',[12] or a deprivation of childhood itself.[13] This is because the appropriate activity for childhood is considered to be schooling/education or play, and not productive labour. Implicit

[10] Chris Jenks, *Childhood* (2nd edn., Taylor and Francis, 2005) 87; Jonathan Herring, *Vulnerability, Childhood and the Law* (Springer Briefs in Law, 2018) 4.
[11] Sarada Balagopalan, 'Constructing Indigenous Childhoods: Colonialism, Vocational Education and the Working Child' (2002) 9(1) Childhood 19, 22.
[12] Shahana Purveen, 'Lost Innocence: A Case Study of Child Labour in the Indian Lock Industry' in Elena Xeni (ed.) *Explorations of Childhood* (Brill, 2016) 51.
[13] Claudette Bardin, 'Growing up too Quickly: Children who lose out on their Childhoods' (2005) 10(5) Paediatrics and Child Health 264.

in this idealised vision of childhood is the contrast of adulthood as a time of productive work and responsibility.

The prevalence of such domain and trait-based views of childhood and adulthood have also been observed in ethnographic studies in contemporary India. In her study of a government-run primary school in a village in north India, Sarangapani observes,

> Children were believed to be chiefly characterized by their playfulness. It was common to describe all their activities as 'play'. Adults would exclaim indulgently: "children keep playing all the time. When they start playing they forget everything." Children also said this of themselves: "We are children, we will play."[14]

Similar findings appear in Kaur's qualitative study of 24 children (aged 7 to 11) from 'upper, middle, and lower class' (referring to socio-economic divisions) backgrounds in Delhi. The children were observed in the milieu of family life, and Kaur sought their views, as well as the views of six parents and six grandparents on childhood and adulthood. She notes, 'a common metaphor that parents and grandparents used for describing childhood was "a time for enjoyment"… being carefree and away from tensions, worries and responsibilities.'[15] In the sample studied by Kaur, boys from the lower social class viewed their 'responsibility' to supplement the family income by finding employment as a transition into adulthood,[16] demonstrating the view that productive work or labour is the proper domain of adulthood.

Another example of the domain or trait-based binary division between childhood and adulthood emerges from the conceptual development of childhood for females (or 'girlhood') in 19th century India as a period of innocence that needed to be protected from the adult sphere of *sexuality*.[17] In analysing how the experience of colonisation shaped the contours of childhood in India, Mary E. John argues that 'girlhood' was 'invented' through the contestations around the age of consent, and in that sense, around the domain of 'sexuality' and its interaction with childhood.[18] The use of the term 'invented' in this context is justified to the extent that female childhoods are marginalised in the pre-colonial records available to us.[19] This is true of Hindu

[14] Padma M. Sarangapani, 'Childhood and Schooling in an Indian Village' (2003) 10(4) Childhood 403, 410.
[15] Ravneet Kaur, *Constructions of Childhood in India: Exploring Personal and Socio-Cultural Contours* (Routledge, 2022) 28.
[16] ibid, 36.
[17] Mary E. John, *Child Marriage in an International Frame* (Chapter 2, n 100), 26.
[18] ibid.
[19] Uma Chakravarti, 'Did Girls have a Childhood in the Past?: Mythologies, Ideologies, Histories' in T.S. Saraswathi, Shailaja Menon and Ankur Madan (eds.) *Childhoods in India: Traditions, Trends and Transformations* (Routledge, 2018) 44.

shastras (scriptures) which prescribed the ideal stages of life,[20] as well as courtly literature from the period of the Mughals (Muslim rulers of northern India) and their successors,[21] both of which focused on male children. In that sense, the colonial period brought girls and women into focus. Before the gruesome details of 11-year-old Phulmoni Dasi's death due to forced sexual intercourse by her husband (discussed in Chapter 3) became public, the innocent, cherubic image of the Hindu child-bride had been exalted by nationalists who viewed child marriage as an essential part of Hindu culture. As Sarkar convincingly demonstrates, it was Phulmoni's death, and the subsequent outburst of information about other such cases, that rendered the beauty of the child-bride perverse.[22] As I mentioned in Chapter 3, the contestations around child marriage in India initially tied in with the issue of the age of consent because of Phulmoni's case. Central to the concerns around increasing the age of consent, in this context, were the physical safety of the child and, echoing the Victorian sentimentality that surrounded understandings of childhood in the colonial metropolis at the time,[23] the need to protect the 'child' in the bride from a domain (sexuality) that endangered childhood innocence.

Thus, childhood as a phase of life tends socially to be constructed as a time for relative freedom from responsibility and as a period of innocence, education, and play, and understood in contrast with adulthood, which is associated with productive work, responsibility, and sexuality. Furthermore, this construction of childhood is idealised and, as I demonstrate in section B, does not represent the lived realities of minors from socio-economically marginalised classes of society.[24]

B. Lived Realities, Transitions and Continuities

The previous section outlined discourses which see childhood in binary opposition to adulthood, with the adult domains of productive work/labour and sexuality being seen as marking the end of childhood. However, the lived realities of socio-economically disadvantaged children demonstrate that the induction of children into wage labour outside the home and household labour does not, in fact, bring childhood to an end because children who perform these kinds of labour are nevertheless considered children. Instead, it is the domain of sexuality that appears to be socio-normatively antithetical to childhood. It does not

[20] Mary E. John, *Child Marriage in an International Frame* (Chapter 2, n 100), 13.
[21] Ruby Lal, *Coming of Age in Nineteenth Century India* (CUP, 2013) 32.
[22] Tanika Sarkar, *Hindu Wife, Hindu Nation: Community, Religion and Cultural Nationalism* (Indiana University Press, 2001) 49-50.
[23] Archard (n 6) 51.
[24] Kaur (n 15), 47.

automatically signal social 'adulthood', but marks the beginning of adolescence, which serves as a bridge between childhood and adulthood. I also argue that some of the western markers of the transition out of childhood, such as increasing individualisation, in the sense of a separation from the collective or a physical, emotional, or even financial 'separation' from one's natal family, are not (in adolescence or adulthood) socio-normative in India. This has two implications, which I discuss later in this chapter and in Chapter 5. First, social adulthood does not necessarily translate into the freedom to make all self-concerning decisions, especially if these decisions go against established social norms. Second, the expectations of obedience within family and community structures (discussed below) are inculcated during childhood and continue into adolescence, and possibly even into adulthood.

Kaur observes that children from upper and middle-class families enjoy relatively more freedom to play and are not expected to take up the financial responsibilities of the family, although there is significant pressure on them to achieve good grades.[25] By contrast, boys from lower-class families are expected to contribute to the family income through productive labour outside the home. The education of boys in these families is also valued instrumentally, as a means for upward mobility.[26] Kaur concludes on this basis that children have greater economic value amongst the lower classes, and greater psychological value in upper and middle-class families. This conclusion seems overstated. As Kaur herself notes, even middle-class parents expect their children to care for them in their old age, which includes the expectation of financial support.[27] She also observes that some parents from middle-class families value girls' education only insofar as it would allow them to marry more educated grooms,[28] which in turn is aspirational because of the perceived relationship between education and earning potential. Therefore, it is possible to have economic or other expectations from one's children and still value them affectively and it is difficult, if not impossible, to measure which aspect has more value, especially on a scale as broad as socio-economic class.

However, socio-economic class does determine how soon adult responsibilities have to be undertaken by children. In Indian law, the legal state of minority, and the normative state of

[25] Kaur (n 15), 153.
[26] ibid, 121.
[27] ibid, 154.
[28] ibid, 131; A qualitative study of 124 adolescent girls between the ages of 12 and 18 and their mothers in the north-western state of Haryana also found that the value of education for lower-middle class girls was seen to be that it would help them be better mothers, wives and homemakers. Priya Nanda, Priya Das, and Nitin Datta, 'Education, Sexuality, and Marriageability: Overlapping Tropes in the Lives of Adolescent Girls in Haryana, India' (2022) 70 Journal of Adolescent Health S28, S32.

'childhood' that is signified by it, ends for everyone at the age of 18. Amongst middle and upper classes, increasing uptake of higher education, and the consequent delay in employment and/or marriage, means that responsibilities associated with adulthood are not assumed until much later into legal adulthood.[29] The financial constraints experienced by lower-classes which require the assumption of 'adult' responsibilities well before the legal age of 18,[30] explain why the life-stage of adolescence is less visible in this segment of society.[31] Montgomery argues that in the modern West, children are seen as economically unproductive and even when they work, their earnings are 'pocket money'.[32] This is not the case in India, where male children of the lower classes in India are frequently expected to contribute financially to the household before legal adulthood. Female children also contribute through household labour and (less frequently) wage labour outside the home.[33]

Importantly, children who enter the workforce do not thereby stop being children, although they do not enjoy the freedom from responsibility that, as I demonstrated above, appears to characterise childhood in the dominant discourse. This means that even amongst classes or cultures where children perform the types of labour associated with adulthood, children performing those types of labour may nevertheless be treated differently from adults (older members of the community). As Hughes rightly argues, 'even if/when children do *what* adults do, we may not consider them as doing *as* adults do'.[34] Thus, (going by observed patterns of gendered labour amongst children in India) a 10-year-old boy who performs economically productive work outside the home, or a 10-year-old girl who takes care of her younger siblings, may still be treated as a child in other important ways, both in terms of the care and attention they receive from adults in the household and community and their dependence on such adults. Most importantly, their assumption of adult responsibilities and performance of adult labour

[29] T.S. Saraswathi, 'Adult-Child Continuity in India: Is Adolescence a Myth or an Emerging Reality?' in T.S. Saraswathi (ed.), Culture, Socialisation and Human Development (Sage, 1999) 213, 221.
[30] Child labour statistics from India indicate that 10.1 million (3.9%) children between the ages of 5 and 14 are child labourers. See, ILO, 'Fact Sheet- Child Labour in India) (2017) <https://www.ilo.org/newdelhi/whatwedo/publications/WCMS_557089/lang--en/index.htm#:~:text=As%20per%20Census%202011%2C%20the,14)%20years%20is%20259.6%20million.> accessed 13 May 2024; The incidence of child labour has been found (in a study of four Indian states) to be a feature of low socio-economic class. See, Suresh Chand Aggarwal, 'Child Labour and Household Statistics in Selected States: Estimates from NSS 5th Round' (2004) 39(2) Economic and Political Weekly 173, 185.
[31] ibid, 219.
[32] Montgomery (n 8), 67.
[33] Sabiha Hussain, 'A Lost Childhood in the Aroma of "Agarbatti": The Case of Female Child Labour in North India' (2015) 41(1) International Journal of Sociology of the Family 31, 35.
[34] Judith Hughes, 'Thinking About Children' in Geoffrey Scarre (ed.) *Children, Parents and Politics* (CUP, 1989) 36, 44.

does not make it appropriate for them to be inducted into *all* adult realms, especially marriage and reproduction.

This indicates that the performance of adult forms of labour or the assumption of some adult responsibilities is not what signals the socio-normative end of childhood. This end is marked, rather, by socially perceptible signs of puberty, which indicate emergent sexuality and reproductive capacity, and signal the beginning of adolescence. I consider signs of emergent sexuality and reproductive capacity rather than cognitive maturity as marking the end of childhood and the beginning of adolescence because, generally speaking, cognitive maturity is not significant to the acquisition of socio-normative adulthood in India. As I argue further in Part II, a person becomes a socio-normative adult in India when she is perceived by her family and community (that is, those who would typically have the responsibility of finding her a spouse through arranged marriage) as being ready for marriage and reproduction. A child who is intellectually or cognitively advanced will not be considered an adult until she is viewed socially as competent to marry and reproduce, to which sexuality and reproductive capacity is more pertinent.

That cognitive and intellectual maturity are not central to dominant socio-normative conceptions of adulthood in India might also be explained by the fact that socio-normative adulthood in India is not marked by the ability to make independent decisions, as in the West, but rather the competence to perform one's role within the collective social scheme. In the West, the autonomy of adulthood is generally viewed in terms of physical (moving away from the home) and emotional (decision-making that is 'individual' in nature) separation from parents and the natal family. In the European context, Galland contends that adulthood is characterised by distinct tendencies towards independent living and autonomy marked by separation from the family and world of childhood.[35] This has likewise been noted in other sociological literature which treats 'leaving the nest' in this sense as one of the main markers of the transition from childhood to adulthood.[36] Perceptions in the West which see adults who

[35] Olivier Galland, 'Adolescence, Post-Adolescence, Youth: Revised Interpretations' (2003) 44 Revue Française de Sociologie 163, 181.
[36] Melanie J. Zimmer-Gembeck and Andrew W. Collins, 'Autonomy Development during Adolescence' in Gerald R. Adams & Michael D. Berzonsky (eds.) *Blackwell Handbook of Adolescence* (Blackwell, 2003) 175, 193; Richard A Settersten, 'Becoming Adult: Meanings and Markers of Adulthood for Young Americans' in Mary C. Waters and others (eds.) *Coming of Age in America: The Transition to Adulthood in the Twenty-First Century* (University of California Press, 2011) 128; Francis Goldscheider and Calvin Goldcheider, *The Changing Transition to Adulthood: Leaving and Returning Home* (Sage, 1999) xiv; Adriana Galván, *The Neuroscience of Adolescence* (CUP, 2018) 6.

continue to live with their parents as 'losers', or those who have not succeeded in achieving this adult landmark, also exemplify this view.[37] This is not the case in India. Adulthood is not characterised by any necessary separation from one's family or by the solidification of individual identity as separate from parents and family. Rather, it is marked by finding one's place within the collective structures of the family. This understanding of adulthood also shapes how children are typically brought up in Indian families and the values that they are expected to inculcate.

In his psychosocial study of Hindu (the majority socio-religious community in India) childhood, Kakar found that the growth and development of the child is oriented towards integration into the values of the family and community.[38] This is especially true of children who grow up in joint families,[39] although even nuclear families maintain strong ties with their kin and caste-based community networks.[40] Indian families are marked by a hierarchy governed by age and sex. The eldest male in the family is usually, though not always, the head of the family and younger members are expected to respect and obey their elders, even if the age difference is not significant. Sex can subvert this hierarchy[41] in the sense that an elder brother would have greater authority over younger siblings of both sexes compared to elder sisters, whose authority over their younger brothers would decrease with time. Similarly, though fathers always have authority over their children, mothers may (after the death of the father, and in the absence of elder male members) be subjected to the guardianship (in the sense of protection in order to maintain the norms of caste and honour, discussed in Chapter 2) of their sons. This is the context in which Kaur's observation that '[w]ithin the families, children were almost always considered at the lower end of the power structure in the family hierarchy'[42] should be read. It does not imply that children are not loved or cherished, but that obedience is expected of them and respect and deference towards elders is taught and ingrained

[37] Melanie Hamlett, 'Why do we still shame adults who live with their parents?' (*The Guardian*, 28 February 2018) <https://www.theguardian.com/commentisfree/2018/feb/28/michael-b-jordan-live-with-parents-millennials-shame> accessed on 13 May 2024.
[38] Sudhir Kakar, *The Inner World: A Psychoanalytical Study of Childhood and Society in India* (4th edn., OUP, 2012) 11-12; Durganand Sinha and Rama Charan Tripathi, 'Individualism in a Collectivist Culture: A Case of Coexistence of Opposites' in T.S. Saraswathi (ed.), *Cross-cultural Perspectives in Human Development: Theory, Research and Applications* (Sage, 2003) 192.
[39] An extended family that includes kin beyond a (typical) nuclear family consisting of a couple with children. The family may be a household with three or more generations (usually traced through a common male ancestor), or brothers of the same generation living together with their wives and children. For a discussion of the Indian (mainly Hindu) joint family, see: S. Chandrasekhar, 'The Hindu Joint Family' (1943) 21(3) Social Forces 327.
[40] Sudhir Kakar, *Culture and Psyche: Selected Essays* (2nd edn., OUP, 2006).
[41] Kakar, *The Inner World* (n 38), 141-42.
[42] Kaur (n 15), 166.

within the family structure. It is learnt at a young age and may carry on into adolescence and sometimes even into adulthood.

This hierarchical structure and expectation of obedience extends beyond the family[43] to elders in the community, who are often referred to by terms meant for kin, even if they are not related by blood or marriage,[44] as well as other authority figures. Illustratively, Sarangapani's study in a north Indian government primary school (discussed above) found that teachers in school expect unquestioning obedience of their students, much like parents would of their child.[45] Bisht's qualitative study with seven teachers in Lucknow (Uttar Pradesh) found that though participants observed that relationships between themselves and children as well as between parents and children were democratising, obedience and control were still considered necessary for the children's proper upbringing.[46] While differences based on gender, caste, class and region, as well as individual differences, are always likely, this is the general cultural blueprint of how children are raised in India. The focus on inculcating values of obedience and deference towards elders and learning to integrate into, rather than separate from, the structures and values of the family and community are attributable to the fact, mentioned above, that socio-normative adults are expected to find their place within these structures and uphold these values rather than separate from them.

The difference between the Indian and western social views of transitioning out of childhood also affects the social *implications* of the emergent sexuality of adolescents. To this I now turn in Part II.

II. Conceptions of Adolescence in India

In this part, I discuss the socio-normative conceptions of adolescence and the lived realities of adolescents in India. In discussing adolescence, I refer to the life stage that begins with a socially significant marker of puberty and ends at 'adulthood', which is marked by the propriety of induction into domains that are reserved for adults, namely marriage and reproduction. In section A, I argue that the social conception of adolescence in India is shaped by emergent sexuality because the beginning of adolescence (and the end of childhood) is marked by visible

[43] Kakar, *The Inner World* (n 38), 142; Mattison Mines, 'Indian Transitions: A Comparative Analysis of Adult Stages of Development' (1981) 9(2) Ethos 95, 103.
[44] Sylvia J. Vatuk, 'A Structural Analysis of the Hindi Kinship Terminology' (1969) 3(1) Contributions to Indian Sociology 94, 96.
[45] Sarangapani, (n 14), 406.
[46] Rachita Bisht, 'Who is a Child?: Adult Perspectives within Adult-Child Relationship in India' (2008) 2(2) Interpersona 151.

or perceptible physiological changes associated with puberty and social norms around sexuality are increasingly applied to adolescents, especially females. In section B, I turn to the experiences and lives realities of adolescents, and consider the role played by socio-economic factors such as class and gender in the duration of adolescence. I argue that in Indian society, a person transitions from adolescence into adulthood when marriage and reproduction, are considered socio-normatively appropriate for her. Finally, in section C, I explain the difference in the social consequences of transitioning from adolescence to adulthood in India compared to the West, arguing that the transition is embedded in the dominant Indian social structure, which emphasises collective living and interdependence instead of individuation and separation.

A. Socially Significant Signs of Puberty and the Beginning of Adolescence

Physical and hormonal changes associated with puberty begin towards the end of the biological stage of 'childhood', around 8 or 9 years of age.[47] But the social interpretation of puberty is associated with *visible* physiological changes,[48] such as the development of breasts and the beginning of menstruation for females, the appearance of facial hair or a deepening voice for males, as well as changes in height and weight for both sexes. These visible changes associated with puberty (which tend to appear around 11-13 years)[49] constitute the beginning of socio-normative 'adolescence' in India. The association of visible pubertal changes and adolescence was noted in Kaur's ethnographic study, which showed that the age of 12 was considered a turning point in the life of a child by the parents she interviewed. This age was considered as marking the beginning of adolescence, a phase that signified the end of childhood innocence and preparation for the ways of the adult world.[50] It is for this reason that I characterise adolescence as a bridge between the life-stages of childhood and adulthood.

With the changes that occur during adolescence, a person is viewed differently by their social community than she was as a child.[51] These visible changes are culturally interpreted as signs of emergent sexuality and the reproductive capacity that is implied by it. I argue that this

[47] Galván, (n 36) 20-21
[48] Cheryl L. Sisk and Russell D. Romeo, *Coming of Age: The Neurobiology and Psychobiology of Puberty and Adolescence* (OUP, 2019) 145; Philip Graham, *The End of Adolescence* (OUP, 2004) 122.
[49] Graham, (n 48), 30.
[50] Kaur (n 15), 35.
[51] Montgomery (n 8), 203.

emergent sexuality and its cultural interpretation mark the definitive end of childhood and the beginning of adolescence. This is for three reasons:

First, as I argued in Part I of this chapter, it is possible for children to participate in adult domains such as productive or household labour, without this participation marking the end of childhood. However, sexuality (even emergent sexuality) is considered the end of childhood because the participation of a child in the 'adult' domain of sexuality is not considered socially appropriate. The literature on adolescent sexuality (largely from the West but also from India) indicates that even though it is not fully developed, it marks a contrast with the normative sexual innocence of childhood. Studies have found that adolescents discover and engage with their own sexuality through masturbation, and sexual fantasies are more common during adolescence.[52] They also spend more time with, and thinking about, sexual and/or romantic partners compared to their family.[53] Romantic and sexual relationships with peers, especially amongst older adolescents are common. These relationships differ from childhood friendships because adolescents are aware of and seek a sexual and/or romantic component within them. Adolescent relationships also differ from adult relationships in that they tend to be (though they are not necessarily) idealised.[54] On the flip side, social perception of emergent sexuality can play a role in how an adolescent perceives her own sexual self. In this regard, Coleman argues that adult attitudes about sex and access to television and media content about sex have an important role to play in when and how adolescents begin behaving sexually.[55] In the Indian context, Dube observes that menstruation marks a moment of transition for adolescent girls, '[r]eferences to full-grown body, becoming a 'woman', becoming 'big', becoming 'mature' and 'knowledgeable' all express the fact of her changed status.'[56] Similarly Kaur argues that 'post puberty, [a girl] changes from pure and non-sexual to potentially polluting and sexual.'[57]

[52] Graham (n 48) 121; Judith Kotiuga, Maya A. Yampolsky and Geneviève M Martin, 'Adolescents' Perception of Their Sexual Self, Relational Capacities, Attitudes towards Sexual Pleasure and Sexual Practices: A Descriptive Analysis' (2022) 51 Journal of Youth and Adolescence 486, 494; J. Dennis Fortenberry, 'Puberty and Adolescent Sexuality' (2013) 64(2) Hormones and Behaviour 280, 282-83; Vinit Sharma and Anuragini Sharma, 'The Guilt and Pleasure of Masturbation: A Study of College Girls in Gujarat, India' (1998) 13(1) Sexual and Marital Therapy 63, 66-67.
[53] Heather A. Bouchey and Wyndol Furman, 'Dating and Romantic Experiences in Adolescence' in Gerald R. Adams & Michael D. Berzonsky (eds.) *Blackwell Handbook of Adolescence* (Blackwell, 2003) 313, 316.
[54] Michella Templeton and others, 'A Systematic Review and Qualitative Synthesis of Adolescents' Views of Sexual Readiness' (2017) 73(6) Journal of Advanced Nursing 1288, 1294.
[55] John C. Coleman, *The Nature of Adolescence* (Routledge, 2011) 138.
[56] Dube, 'On the Construction of Gender' (Chapter 2, n 28), WS-13.
[57] Kaur (n 15), 37.

It is for this reason, as I argued in Chapter 2, that adolescent girls' movements, clothes and, most importantly, their interactions with the opposite sex are strictly controlled in India.

Second, the bio-social markers that signal maturity or growing up are closely linked to the development of reproductive capacities and therefore to emergent sexuality.[58] The development of secondary sexual characteristics (such as the development of breasts or growth of facial hair) and reproductive capacity (amongst females, marked by menstruation) are, therefore, seen as a transition from sexual innocence to emergent sexuality. Third, it is not until a person is considered ready for marriage and reproduction (whether or not she is actually married or have children) that the transition into social adulthood is complete. This potential for reproduction is signalled by the sexuality that emerges during adolescence.

Sexuality appears to have been prominent also in the development of the socio-legal conception of adolescence in India. At the beginning of the 20th century, a girl who underwent puberty was usually considered old enough to be married, and implicitly, to perform the sexual and reproductive responsibilities and functions associated with marriage. Perhaps this is why the legal age of marriage at the time was 12 years.[59] In 1904, Hall first expounded the idea of continuous development, including the development of sexuality, from childhood to adulthood starting with puberty instead of an adult/child dichotomy marked by puberty.[60] Tambe demonstrates that this idea was used by the Indian social reform movement in the 1920s to further the claim that physical (or physiological) maturity did not translate to sexual maturity, and especially the ability to deal with the possible consequences of early sex. The Child Marriage Restraint Act, 1929 (CMRA)[61] built upon these (among other) arguments to increase the age of marriage from 12 to 14,[62] marking the beginning of the recognition of something akin to adolescence for females in India. Over time, the age was increased to 18 and, as I mentioned in Chapter 3.III.B.2, is now set to be increased further still to 21.

In contemporary India, society's acknowledgement of the emergent sexuality that marks adolescence can be seen in the restrictions placed on adolescent girls. As I discussed in Chapter 2, girls' dress, movement, and interaction with males is strictly controlled only after puberty,

[58] Archard (n 6), 147.
[59] Ashwini Tambe, *Defining Girlhood in India: A Transnational History of Sexual Maturity Laws* (University of Illinois Press, 2019) 43.
[60] Louise Jackson, 'Childhood and Youth' in H.G. Cocks and Matt Houlbrook (eds.) *Palgrave Advances in the Modern History of Sexuality* (Palgrave Macmillan, 2006) 231, 234.
[61] The Indian statute on child marriage before the PCMA. The PCMA was discussed in Chapter 3.III.B.1
[62] Tambe (n 59), 43.

even though rules of guardianship apply to women throughout their lives. Since these controls are aimed at maintaining caste purity through hegemonised marriage, they would not be necessary but for society's acknowledgement of the emergence of sexuality and reproductive capacity during adolescence.

Thus, the definitive end of childhood (which is also the beginning of adolescence) is marked by socially significant markers of puberty because they signal emergent sexuality and potential reproductive capacity. However, the duration and end of adolescence (or beginning of adulthood) is contingent on socio-economic position.

B. The Duration and Experience of Adolescence as Mediated by Class and Gender

According to Saraswathi, sociological literature highlights the class and gender-based contingency of the nature and duration of the developmental stage of adolescence in India.[63] Females from all classes are trained, from an early age, to be wives and mothers and, as discussed in Chapter 2, the rules and restrictions of womanhood begin to apply with the advent of adolescence. In the middle and lower classes, they must perform household work, and amongst the lower classes may engage in paid labour outside the home even before marriage. Amongst males as well, the nature of adolescence is determined by the family's financial capacities and requirements.[64] As I argued in the Introduction of this chapter, persons from these classes are also inducted relatively early into marriage and reproduction.

Compared to the socio-economically disadvantaged sections of Indian society, persons in the middle and upper classes are likely to have a more visible period of adolescence before the onset of 'adult' responsibilities in terms of productive labour and the expectation marriage, and reproduction. Therefore, longer periods of education, parental support during career development, increased mobility, and opportunities for interaction with peers in relatively unsupervised environments mark this phase for the upper and middle classes.[65] Generally, adolescent boys enjoy greater freedom and autonomy, both in how they spend their leisure time

[63] Saraswathi, 'Adult-Child Continuity in India' (n 29), 214.
[64] ibid, 214-19.
[65] ibid, 221-25.

and in terms of personal choices, such as romantic relationships.[66] Girls' freedom (of dress, movement, and interaction) is curtailed during adolescence.[67]

Thus, the duration and experience of adolescence, as an intervening period between childhood and adulthood, depends on a person's socio-economic position. The end of adolescence and the beginning of socio-normative adulthood, I argue, are marked by having reached a life-stage where marriage and reproduction are considered socially appropriate. This may be preceded by induction into or performance of adult forms of productive and/or household labour which might aid the perception of readiness for the domains of marriage and reproduction, especially amongst adolescents from the lower socio-economic classes. In the case of persons from the middle and upper classes, marriage and reproduction may not be considered socially appropriate until the completion of higher education or the acquisition of some degree of financial security signified by a regular income. While the signifiers of this readiness may vary (and it is not always possible to specify what may be considered a signifier), the socio-normativity of marriage and reproduction definitively signals the end of adolescence and the beginning of adulthood in Indian society.

That marriage is the transition into social adulthood for Indian females seems an uncontroversial position. For instance, Tambe argues that the link between marriage and adulthood for women is driven home by the fact that Indian women who are legal adults tend to be treated and referred to as 'girls' until they get married and in some languages, such as Marathi (spoken in the western state of Maharashtra), the word for woman and wife (*baiko*) are the same.[68] Similarly, Arnot and others observe, '[b]eing married is an important watershed in a woman's life: she ceases to be a girl and becomes a woman, normally moving to her husband's place of residence to live out her adult roles and responsibilities.'[69] However, when it comes to Indian males, it is sometimes argued that the relevant marker of adulthood is engagement in productive labour. Thus, in his anthropological analysis of transitions into adulthood in India, Mines argued that the tasks involved in these transitions are the beginning

[66] Suman Verma and Deepali Sharma, 'Cultural Dynamics of Family Relations among Indian Adolescents in Varied Contexts' in Kenneth H. Rubin and Ock Boon Chung (eds.), *Parental Beliefs, Parenting, and Child Development in Cross-cultural Perspective* (Psychology Press, 2006) 185-205.
[67] T.S. Saraswathi and Ranjana Dutta, *Invisible Boundaries, Grooming for Adult Roles* (Northern Book Centre, 1988) 165; Dube, 'On the Construction of Gender' (Chapter 2, n 28), WS-14; Dyson and Moore (Chapter 2, n 47), 44; Kabita Chakraborty, 'The Good Muslim Girl: Conducting Qualitative Participatory Research to Understand the Lives of Young Muslim Women in Kolkata' (2009) 7(4) Children's Geographies 421, 422.
[68] Tambe (n 59), 18.
[69] Madeleine Arnot and others, 'Schooling and Domestic Transitions: Shifting Gender Relations and Female Agency in Rural Ghana and India' (2012) 48(2) Comparative Education 181, 188.

of adult work for men, and marriage and the beginning of parenting for women.[70] This binary does not appear to be made out by the lived realities of Indians. As I argued in Part I of this chapter, participation in forms of productive labour by male children is insufficient for them to be considered social adults, even when the income from their labour forms a significant chunk of the family earnings. Had 'adult' labour been the marker of adulthood, every 8-year-old working side by side with 30-year-olds in brick kilns would be considered an adult. But this is not the case because it would not be socio-normatively appropriate for these children to be inducted into the adult domains of marriage and reproduction. Therefore, it is the perceived readiness for marriage and reproduction that, in fact, marks the beginning of socio-normative adulthood for both males and females.

This view of the transition to adulthood should not be taken to mean that a person who is not married would not be considered a social adult. My point is that marriage and reproduction will be considered socio-normative for anyone who is socially perceived as an adult, and a person will not qualify as an adult in India unless it is considered socio-normative for her to marry and have children. How early or late in life a person is considered ready to acquire the status of a social adult through marriage and reproduction depends on her socio-economic position. Girls across socio-economic classes may be expected to marry earlier than boys in the same socio-economic class. Similarly, a person from a higher socio-economic class may remain in social adolescence longer because of higher education or the expectation of a stable career before marriage, whereas a person from a lower socio-economic class may be considered ready for marriage and reproduction, and therefore be viewed as a socio-normative adult, relatively earlier because they are likely to have been fulfilling adult responsibilities and performing productive and/or household labour for several years. However, across socio-economic class, as I discuss in Part II.C below, the consequences of social adulthood are not the same in India as they are in the West. Therefore, markers such as 'making your own decisions without any regard to your family or community' and 'establishing a nest away from the natal family' are not useful metrics of judging whether or not a person is socio-normatively an adult in India.

C. The Meaning of the End of Adolescence in India

In Part I.B, I referred to the fact that adulthood and adolescence in India are not marked, at least not to the same degree, by the distancing and individuation that marks the lives of

[70] Mines (n 43), 103.

adolescents in the West.[71] Adulthood is not defined by a separation from the family or individualisation in the sense of a break from family and kinship communities, and thus adolescent rebellions against parental control do not mark the beginning of this separation or break. This is because, as Kakar's detailed analysis shows, structures of the immediate and extended family, as well as one's larger community, provide economic support and give meaning to social status.[72] Thus, it is entirely normal for Indians to continue living with their parents even after reaching adulthood and (in the case of males) getting married. Financial resources of the entire family may draw from a family business or enterprise to which each member contributes, or where sources of income are disparate for earning members, part or all of the income may be pooled for collective living. Similarly, based on three decades of anthropological research, Seymour argues that the self in India is developed not through differentiation with others but interdependence with them.[73]

Thus, decision-making in line with family values and in consultation with the elders of the family is the social norm in India.[74] As Kapadia observes, '[t]he expectation of active presence in each other's lives and a lifelong relationship of reciprocity between parents and children are characteristic in Indian families.'[75] The development of the self during adolescence in India is focused on the articulation of individual and personal goals within this cultural context of relationality. It reflects the larger interplay of tradition and modernity within which the contemporary Indian middle and upper classes are shaped.[76] As I discussed in Chapter 2.III, even the choice of marriage partner, when such a choice is available, is determined not just by personal preferences, but also what would be acceptable to the family. This is a natural consequence of the culture of hierarchy and obedience, discussed in Part I.B of this chapter, in which children are raised. The norms of deference and obedience towards elders do not disappear during adolescence and may continue during adulthood, although these hierarchies may not affect adults to the same extent as they affect children or adolescents (especially when financial independence enables them to assert themselves more). This means that authority

[71] See, Reed Larson, Suman Verma, Jodi Dworkin, 'Adolescence without Family Disengagement: The Daily Family Lives of Indian Middle-class Teenagers: Theory, Research and Applications' in T.S. Saraswathi (ed.) *Cross-cultural Perspectives in Human Development: Theory, Research and Applications* (Sage, 2003) 258.
[72] Kakar, *The Inner World* (n 38), 145.
[73] Susan Christine Seymour, *Women, Family and Childcare in India: A World in Transition* (CUP, 1999).
[74] Norman Sundberg and others, 'Family Cohesiveness and Autonomy of Adolescents in India and the United States' (1969) 31(2) Journal of Marriage and Family 403, 404-05.
[75] Shagufta Kapadia, *Adolescence in Urban India: Cultural Construction in a Society in Transition* (Springer, 2017) 144.
[76] ibid, 156-57.

figures, both within the family and community and in larger society, have significant power over children and adolescents. The expectation of compliance and obedience, in combination with other characteristics of childhood and adolescence (see Chapter 5) makes them vulnerable to sexual exploitation through the misuse of such authority, a point to which I return in the following chapters.

The interdependencies of collective living do not entirely preclude individual autonomy and rebellion against collective decisions.[77] But the space and scope for rebellion may be circumscribed by gender. As discussed in Chapter 2.I.B, across classes, men's rebellion from the norms of caste and the control of the family and community is tolerated and even considered natural, whereas women's is not. With increasing emphasis on girls' education, especially (though not exclusively) amongst the middle and upper classes, the ability of girls to challenge and rebel against prescribed gender roles frequently clashes with pressures towards continuing gendered socialisation.[78] Kapadia's mixed-design study (including quantitative survey, qualitative interviews and focus group discussions) of a significant sample of 16-18 year old adolescents and their parents in the western Indian city of Baroda provides a contemporary view of middle-class adolescence in India. The study found that adolescence was viewed as a time of transition, but also a time of vulnerability, characterised by a 'lack' of social and emotional maturity. Though the relationship between parents and their adolescent children was seen by the participants to be akin to friendship, parental control over adolescents, justified by their lack of maturity, continued to be visible.[79] This control was not accepted uncomplainingly by adolescents, who expressed dissatisfaction through overt rebellion, demanding greater flexibility, as well as through covert forms of dishonesty and manipulation. Unsurprisingly, one such site of adolescent rebellion in India is romantic and sexual relationships.

III. Romantic and Sexual Lives of Indian Adolescents

This part presents the evidence available on the romantic and sexual lives of adolescents in India. This evidence should be considered in light of the social norm of containing sexuality within marriage, which is enforced in direct and indirect ways (see Chapter 2.III.A). In section A, I argue that adolescent sexual activity in India, though less frequent and widespread than in the West, is not insignificant. For one, the extent of sexual activity may be underrepresented in

[77] Mattison Mines, 'Conceptualizing the Person: Hierarchical Society and Individual Autonomy in India' (1988) 90(3) American Anthropologist 568.
[78] Kapadia (n 75), 21-24; Nanda, Das and Datta (n 28), S34.
[79] Kapadia (n 75), 140-4.

the data for a range of reasons discussed in the section. For another, the rates of adolescent sexual activity may be lower because the norm that sexuality and reproduction ought to be contained within hegemonised marriage, enforced through social punishment or the fear of such punishment, has a chilling effect. Therefore, lower rates of sexual activity should not be taken to mean that more adolescents do not *desire* sexual activity. Furthermore, these acts of rebellion are meaningful because they represent a counter-current against majoritarian morality. In section B, I argue that despite the social recognition of emergent sexuality in adolescence, and the participation of Indian adolescents in romantic and sexual activity, the sexual competence of Indian adolescents is not socially recognised. This is because consent (and competence to consent) is secondary to Indian socio-normative determinations of permissible sexual conduct which are focused, instead, on whether sexual conduct is socially legitimised by marriage.

A. Evidence of Adolescent Sexual Activity in India

As I argued in Chapters 2 and 3, Indian society is marriage-centric. For a large majority of the population, dating and marriage tend to converge because of societal expectations, the legitimacy granted by marriage as well as the operation of law. Because of a culture that is arranged-marriage oriented and not sexually open, dating and romances occur across the country under varying degrees of secrecy, and the recorded incidence of sexual activity outside marriage is low. The study by the Delhi-based child rights advocacy group, Partners for Law in Development (PLD) (discussed in Chapter 2.III), though limited in its sample size of 15 minor girls who had already been drawn into the criminal justice system because of de-facto consensual relationships, sheds light on how relationships are initiated amongst the urban poor and lower-middle classes. It observes:[80]

> Most of the girls met their boyfriend in the neighbourhood, a local market, a tuition, or coaching class (outside school), a wedding or through a friend. For example, Shashi fell in love with her neighbour. It was with him that she encountered the first taste of freedom by going out to eat or watching a film. She would meet him after she finished college classes for the day.

These relationships are nurtured through phone-calls and text messages on mobile phones.[81] Meeting frequently is difficult because of restrictions on the girls' or women's movement and

[80] Mehra and Nandy, 'Why Girls Run Away to Marry' (Chapter 2, n 126), 27.
[81] See, Suchi Bansal and others, 'Understanding Adolescents Experiences with Gender-Based Norms in India through a Participatory Storytelling Game' (2021) 26(1) International Journal of Adolescence and Youth 12.

the secrecy necessitated by the taboo around mingling with the opposite sex.[82] Where meeting frequently is possible, the study by PLD notes, great efforts are taken to prevent discovery:[83]

> Eighteen-year-old Geetha and her boyfriend lived in the same Delhi slum colony, so they had to sneak away to meet. Their venue was an abandoned house by the railway track that bordered the slum. Although they would manage to meet three to four times a week, their encounters had to be rushed and short. Geetha would leave home without informing anybody and had to hurry back so that her absence was not noticed.

Rural and semi-urban centres have few spaces where young, unmarried couples can meet and spend time, and it certainly is not *common* practice to take a boyfriend or girlfriend home. From my own experiences of being an adolescent in the 2000s and early-2010s in Patna, a city with the ethos of a small town in the eastern Indian state of Bihar, I recall couples meeting in isolated corners of public parks, in parked cars, cinemas and on the (shared) terraces of apartment buildings. This was and continues to be a risk because public displays of affection are not encouraged in India.

As I demonstrated in Chapter 2, romances are not looked upon kindly by families (whether urban or rural) that are rooted in their caste-communities, and marriage is the only space for socially legitimate expression of sexuality. Frequently, therefore, couples who wish to have a sexual relationship have little choice but to get married and where the union does not conform with the rules of caste endogamy, the couple must elope to get married. This is not to suggest that all eloping couples who marry do so only to have their sexual relationship socially legitimised, or that love and affection have no role to play in such marriages, but only to stress that the social stigmatisation of their sexual union has a major role to play in channelling them into marriage.

Based on their ethnographic study in six districts of West Bengal, Chowdhary and Mutsuddi report that once an eloping couple is discovered (by the family or the police) or voluntarily returns, they are likely to be accepted by the family and formally married.[84] But in most other parts of India, particularly the north and north-west, this is not the case. As was shown in Chapter 2, typically, when couples from regions where people are still embedded in their caste-communities elope, they are likely to face punishment (sometimes extending to violence or death) from their family and/or caste communities. Alternatively, they may be drawn into the

[82] ibid, 28.
[83] ibid.
[84] Chowdhary and Mutsuddi, 'Love and Law: Understanding Child Marriages in Rural West Bengal' (Chapter 3, n 94) 107.

net of the criminal justice system. The blanket criminalisation of sexual activity with any person under the age of 18 in India means that when a couple elopes, the girl's family tends to register a case of kidnapping and/or rape against the boy or man, thereby engaging the might of the police to find and bring them back.[85] As I demonstrated in Chapter 3.III, in such cases the Indian criminal justice system does not, in fact, protect the sexual autonomy and integrity of the eloping couple, but instead becomes another tool for the control of female sexual and reproductive capacity in the hands of the family and caste-based community.

The culture in larger (especially large metropolitan) cities is more relaxed, although problems with finding spaces in which to be intimate are also noted in Chowkhani's qualitative study of sexual activity by adolescents and young adults in Mumbai.[86] Iyer's study of middle-class students aged 15-17 across three secondary schools in Delhi demonstrates young people's strategies in forming opposite-sex friendships as well as romantic relationships despite the gender segregation imposed within co-educational schools. According to the adolescents interviewed in the study, opposite-sex relationships could be classified as brother-sister relationships (also called *rakhi* relationships),[87] friendships, and girlfriend-boyfriend relationships.[88] While *rakhi* relationships were the only relationships allowed and encouraged by schools and by society in general, students themselves preferred friendships, which were seen as more modern and therefore more desirable.[89] The boundaries of these relationships were fluid, with *rakhi* relationships transforming over time into, or working as a cover for, romantic or even sexual relationships.[90] This trend was also noted by Chakraborty in the *bustees* (slums) of Kolkata in eastern India, where she observed that Muslim girls used the cover of brother-sister relationships to maintain the appearance of honour while using these relationships to have friendships with boys, and even having secret sexual relationships with boys who were 'brothers' in public.[91] Similar observations have also been made in the context of slums in Mumbai by Abraham.[92] In

[85] Chowdhry, *Contentious Marriages, Eloping Couples* (Chapter 2, n 22), 173; Chakravarti, *Gendering Caste* (Chapter 2, n 6), 144.
[86] See Ketaki Chowkhani, '"Nothing much happened": Rethinking Heterosexual middle-class Adolescent Boys' Romance in Mumbai' in Krishna Kumar (ed.) *Sexuality, Abjection and Queer Existence in Contemporary India* (Taylor and Francis, 2022) 60.
[87] This is because it is customary in North India for sisters to tie a thread, called a *rakhi*, on their brothers' wrist to mark the brother's duty to protect his sister.
[88] Padmini Iyer, 'From Rakhi to Romance: Negotiating 'Acceptable' Relationships in Co-educational Secondary Schools in New Delhi, India' (2018) 20(3) Culture, Health, and Sexuality 306, 313.
[89] ibid, 314.
[90] ibid, 315.
[91] Chakraborty, 'The Good Muslim Girl' (n 67) 9.
[92] Leena Abraham, 'Bhai-behen, True Love, Time Pass: Friendships and Sexual Partnerships among Youth in an Indian Metropolis' (2002) 4(3) Culture, Health and Sexuality 337, 345.

her Delhi-based study, Iyer also notes that despite proscriptions against 'dating', boyfriend-girlfriend relationships were commonplace.[93] The author remarks that unlike the relationships observed by Chakraborty in Kolkata, these relationships were mostly romantic, but not sexual.

The views of Indian adolescents about the morality and propriety of pre-marital sex do not appear to be uniform. In Iyer's study, sexual interactions within girlfriend-boyfriend relationships were condemned by peers as being morally wrong. The normative ideal of the students in the study was waiting until marriage and imposing physical limits within the relationship, which marked respect and 'true' love.[94] Another study from a low-income area of Delhi which specifically sought the attitudes of adolescents on pre-marital sex in a low-income community had similar findings. The study interviewed 583 males and 475 females in the 15-19 age group. It observed that 96% females and 92% males thought that, ideally, only married people should have sex, while 14% females and 33% males thought that it was okay for two people in love to have pre-marital sex.[95] This is different from Joshi's findings in her study of older adolescents and young adults in Mumbai (see below). She notes, '[a]lmost half the boys and one fourth of the girls in our sample believed that love was not essential for sex... [a]lmost half the boys and 40% of the girls felt that premarital sex was not immoral.'[96]

Generally, empirical studies on adolescent sexual practices in India appear to be sparse, with a marked absence of country-wide or regionally representative studies. There are few studies that differentiate between sexual practices and experiences of adolescents in different age groups (early, middle, and late adolescence), usually covering only older adolescents and, in some cases, young (legal) adults. As I mentioned in Chapter 3, the mandatory reporting requirement under POCSO is an obstacle to research on adolescent sexuality (especially with adolescents who have not already been drawn into the criminal justice system) because it requires anyone with knowledge of sexual interactions with a minor to report it to the police. Therefore, some of the studies cited in this section pre-date the enactment of POCSO. Furthermore, it is possible that the effect of the mandatory reporting requirement and the social taboo against pre-marital sexual interactions affected how honestly adolescents reported sexual experiences in the studies cited herein. The latter would also have affected studies pre-dating POCSO. Finally, even if

[93] Iyer, 'From Rakhi to Romance' (n 88), 314.
[94] ibid, 314-315.
[95] Jaya and Michelle J. Hindin, 'Premarital Romantic Partnerships: Attitudes and Sexual Experiences of Youth in Delhi, India' (2009) 35(2) International Perspectives on Sexual and Reproductive Health 97, 101.
[96] Priyanka Dhirendra Joshi, 'Indian Adolescent Sexuality: Sexual Knowledge, Attitudes, and Behaviours Among Urban Youth' (2010) 55(3) Psychological Studies 181, 185.

the numbers provide an accurate picture of adolescent sexual activity in India, the low rates of sexual activity (especially compared to data from western countries, discussed below) must be contextualised in view of the strong and pervasive social taboo against sexual activity outside hegemonised marriage. In other words, a plausible reason why fewer adolescent sexual relationships take place in India compared to western countries is that the social norm against such relationships, often enforced through violent social reprisal or the fear of such reprisal, makes them dangerous to undertake.

As I argued in Chapter 2, sex outside marriage is not socially accepted in India, even though society is rapidly becoming less orthodox. According to nationally representative data collected by the government of India in NFHS-5 (2019-21), 97.9% of never-married women and 96.1% of never-married men aged 15 to 17 reported never having had sexual intercourse, while 95.3% of never-married women and 77.2% of never-married men aged 23-24 reported never having had sexual intercourse.[97] Analysis of data collected by UDAYA in the northern and eastern states of Uttar Pradesh and Bihar,[98] discussed in Chapter 2, found the following rates of sexual interaction amongst the adolescents interviewed:[99]

State / Type of Interaction	Bihar	Uttar Pradesh
Sexual Intercourse (Boys)	7.9%	10.9%
Sexual Intercourse (Girls)	2.3%	2.8%
Other Sexual Interaction (Boys)	12.3%	18%
Other Sexual Interaction (Girls)	5.8%	6.7%

A quantitative (survey-based) study with 586 students from classes 9 to 12 (generally, 14 to 18 year-olds, although the age range of participants is not specified in the study) in two co-

[97] National Family Health Survey (NFHS)-5, (Chapter 2, n 107).
[98] These data are based on interviews of 1821 boys and 3428 girls in the 15-19 age group in Bihar and 2064 boys and 4,338 girls in the 15-19 group in Uttar Pradesh. K.G. Santhya and others, UDAYA Report-Bihar (Chapter 2, n 97); K.G. Santhya and others, UDAYA Report-UP (Chapter 2, n 98).
[99] All the studies discussed in this section show a marked discrepancy between male and female respondents when it comes to rates of reported sexual activity. I consider possible explanations for this discrepancy later in this section.

educational schools in Pune (a city in the western state of Maharashtra) by Shashikumar and others found, similarly, that 6.31% boys and 1.31% girls reported having had sexual intercourse, while about 30.08% boys and 17.18% girls reported having had other forms of sexual contact. Mean age at first sexual contact for those who reported it was 13.72 years and 14.09 years for boys and girls respectively, while mean age at first sexual intercourse for those who reported it was 15.25 years for boys and 16.66 years for girls.[100] Along the same lines, a cross-sectional review of literature on adolescent sexuality by Jejeebhoy and Sebastian observes, 'fewer than 10 per cent of young women reported premarital sexual experience, while a higher range (15–30 per cent) was observed among young males.'[101]

These studies do not provide further details of the reported sexual contact, such as whether it was one-off, whether and to what extent adolescents were having regular sexual interactions, and if so, whether these interactions took place with the same partners, the age of the partners and so on. Some of this information is reported in a study conducted in Ghaziabad (in northern India), which administered structured questionnaires to 750 students, aged 10-19 and containing equal numbers of males and females mostly from the middle and upper classes, selected from multiple schools in the city.[102] The study found that 34.7% of the boys and 18.9% of the girls had ever engaged in sexual interactions. Of these, 52.3% males and 23% females had only had one sexual partner with whom they had regular sexual contact. The age of those who reported having had sexual contact, and the nature of the contact was not presented in the study. According to the literature review by Jeejebhoy and Sebastian (see above), data on sexual activity suggest that it tends to progress from non-penetrative sexual interactions to sexual intercourse,[103] based on the fact that (a) a higher number of respondents report non-penetrative sexual activity, compared to those who report penetrative sexual activity and (b) non-penetrative sexual activity is reported to begin at lower ages, compared to the age of initiation of penetrative sexual activity. These trends also appear in the study by Shashikumar and others, discussed above. Similarly, Joshi, in her study of 182 Mumbai-based adolescents and young adults in the age range 17-21 found that 59% boys and 32% girls in the sample had kissed someone on the lips, 36% boys and 7% girls reported having touched sex organs of the

[100] R. Shashikumar and others, 'A Cross-sectional Study of Factors Associated with Adolescent Sexual Activity' (2012) 54(2) Indian Journal of Psychiatry 138, 139.
[101] Shireen J. Jejeebhoy and Mary Phillip Sebastian, 'Actions that Protect: Promoting sexual and Reproductive Health and Choice among Young People in India' (*Population Council: South and East Asia*, 2003) 3-4.
[102] Ashok Maan and others, 'A Study on Sexual Behaviour Practiced by the Adolescent and its Source of Inspiration' (2021) 8(4) International Journal of Community Medicine and Public Health 1911, 1914.
[103] Jejeebhoy and Sebastian (n 101).

opposite sex, 12% boys and 5% girls had engaged in mutual masturbation and 11% boys and 1% girls reported having had sexual intercourse.[104] That said, in the absence of direct data on the typical trajectory of sexual interactions, no definitive conclusion can be drawn about this.

Analysis of data collected by the Population Council in the UDAYA studies (mentioned above) also shows that nearly 47% adolescent boys and only 6% adolescent girls viewed pornography. Pornography viewing increased with age, as 58.8% and 64.3% of boys aged 18 and 19 reported having viewed pornography. Pornography viewing was more prevalent amongst the respondents from wealthy families (51.7% boys and 8.2% girls),[105] perhaps because of better access to mobile and computer devices and internet services. Information on the age at which pornography viewing typically began was not available.

Gender-based differences in reporting of pre-marital sexual activity are visible across studies. In the studies referenced so far, more men than women reported pre-marital sexual activity. One explanation for these differences is social norms prescribing sexual chastity and modesty for females combined with a male tendency to exaggerate sexual experience.[106] Such differences in reporting are not unique to India, having been observed in survey results from other parts of the world as well.[107] They have been attributed to a combination of factors, from problems in survey design (such as judgemental undertones to questions), differences in attitude amongst males and females (with females adopting a conservative attitude towards revealing sexual partners, and males exaggerating sexual experience), as well as the tendency amongst females to count and amongst males to estimate.[108] It is possible that similar factors explain the gaps in data in the Indian context as well, but in the absence of studies exploring the effects of these factors, the precise reason for the gaps remains unclear.

[104] Joshi (n 96), 183-84.
[105] Shobhit Srivastava and others, 'Exposure to Pornographic Content Among Indian Adolescents and Young Adults and Its Associated Risks: Evidence from UDAYA Survey in Bihar and Uttar Pradesh' (2023) 52 Archives of Sexual Behaviour 361, 365.
[106] Joshi (n 96), 182; Lekha Subaiya, 'Premarital Sex in India: Issues of Class and Gender' (2008) 43(48) Economic and Political Weekly 54, 57-59.
[107] Catherine H. Mercer and others, 'Changes in Sexual Attitudes and Lifestyles in Britain through the Life Course and Over Time: Findings from the National Surveys of Sexual Attitudes and Lifestyles (Natsal)' (2013) 382 The Lancet 1781, 1784; J. Todd and others, 'Reported Number of Sexual Partners: Comparison of Data from Four African Longitudinal Studies' (2009) 85(Suppl 1) Sexually Transmitted Infections i72, i73.
[108] Kirstin R. Mitchell and others, 'Why Do Men Report More Opposite-Sex Sexual Partners Than Women? Analysis of the Gender Discrepancy in a British National Probability Survey' (2019) 56(1) The Journal of Sex Research 1, 7.

Indian law and society are also overwhelmingly heteronormative. 'Unnatural sex',[109] encompassing everything other than penile-vaginal intercourse, was decriminalised only in 2018. This, in practice, also meant the decriminalisation of homosexuality. Until it was declared unconstitutional and decriminalised by the Supreme Court of India in *Navtej Singh Johar v. Union of India*, s. 377 (discussed in Chapter 3) was a tool of persecution against the LGBTQ community.[110] Though the decriminalisation of s. 377 was certainly a step in the right direction, studies have found that stigma, harassment and even violence is still part and parcel of being non-heterosexual or gender non-conforming in India.[111]

The social taboo around homosexuality, in combination with the fact that it was criminal to engage in 'carnal intercourse against the order of nature' until 2018 might explain why data on homosexual interactions and relationships are either unavailable or do not provide a detailed picture, usually being hyper-focused on 'risky' behaviour or disease. One survey-based study with 100 gay and bisexual men in Mumbai reported that 59% of those surveyed had had sexual intercourse for the first time between the ages of 15 and 19, while 25% had done so between 10 and 14 years of age. 32% of the first sexual partners were female, while 68% were male. The study does not provide a break-down of ages in relation to the sex of first sexual partners and the ambit of 'sex' or 'sexual intercourse' used in the study is not explicitly defined, though it appears to be limited to vaginal or anal penetrative sexual intercourse.[112]

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[109] IPC, s. 377.

[110] Hinchy, *Governing Gender and Sexuality in Colonial India* (Chapter 3, n 27), 258-59: '[S]ection 377 has created a space for extra-legal policing measures against people whom police consider sexually deviant, including Hijras [the male-to-female transgendered community in India]. The "enforcement" of section 377 against Hijras has usually taken the form of so-called 'preventative' measures such as stopping Hijras in the street, keeping Hijras under surveillance, arbitrarily arresting Hijras on the pretence of a section 377 offence and raids of Hijras' houses. Such "preventative" policing has often involved violence.'
A study by the Tata Institute of Social Sciences in 2003 documented the harassment and persecution of lesbians using this provision. See, Bina Fernandez and Gomathy N.B, The Nature of Violence Faced by Lesbian Women in India (*Tata Institute of Social Sciences*, 2003) 47-77 <http://download.tiss.edu/fap/RCI-VAW/RCI-VAW_Publications/The_Nature_of_violence_faced_by_Lesbian_women_in_India.pdf> accessed 13 May 2024. The interviews and stories of the women recorded in these pages indicate the direct and indirect violence and harassment faced by lesbians because of s. 377; On the harassment faced by gay men as a result of the state-sanctioned homophobia of s. 377, see, People's Union for Civil Liberties Karnataka (PUCL-K), Human Rights Violations against Sexual Minorities in India: A PUCL-K Fact-finding Report about Bangalore (February 2001) <http://feministlawarchives.pldindia.org/wp-content/uploads/sexual-minorities.pdf> accessed 13 May 2024.

[111] International Commission of Jurists (ICJ), Living with Dignity Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work, and Public Spaces in India (June 2019) <https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf> accessed 13 May 2024.

[112] See, A.V. Ravikumar and K. Anil Kumar, 'Sexual Behaviour and its Determinants among Homosexual and Bisexual Men in Mumbai, India' (2011) 57(2) The Journal of Family Welfare 12.

The data discussed so far focus only on adolescent sexual activity in India. Literature on this subject from the UK, Europe and North America, helps place these data in a relative and global context. The limitations of the available data on adolescent sexual activity in India are thrown into sharp relief by the significantly more comprehensive data from the West which provide information over and above the acts being engaged in and the sexual knowledge of adolescents. Western studies consider, for instance, experiences and feelings of adolescents in sexual relationships, the age-distribution and ordinary trajectory of sexual activity and differences in the sexual activity of younger and older adolescents. More (and better) information is also available on non-heteronormative sexual interactions. An analysis of these data shows that pre-marital sexual activity during adolescence is less prevalent in India compared to the West, especially for females.

Graham observes, '[i]n most westernized countries the average age when boys and girls first start to kiss and get involved in sexual activity falling short of intercourse is around 13 years. By 14 or 15 years, many will have moved on to mutual masturbation, with some form of oral sex occurring....'[113] and '[i]n the UK and much of the westernized world most young people have full sexual intercourse during their mid and late teenage years'.[114] Analysis of data from the National Survey of Sexual Attitudes and Lifestyles (I, II and III) in the UK reveals that 30.9% of respondents in the 16-24 age group reported having had heterosexual intercourse before the age of 16.[115] A more recent study based on a large representative UK population–based survey, the Millennium Cohort Study on over 11,000 participants aged 14 years, found that 58% of the sample had engaged in 'light' intimate partnered activity, encompassing hand-holding, kissing and cuddling, 7.5% had progressed to genital touching or fondling ('moderate' activity) and 3.2% had engaged in oral or penetrative intercourse ('heavy' activity).[116] When it comes to homosexual males, a study of 424 men of diverse ethnic origin from New York City, United Stated of America (USA) revealed that the mean age of engagement in consensual homosexual activity varied depending on the activity, with the mean age of mutual masturbation being around 14.86 years and of anally penetrative sex being over 16 years.[117] Another study of sexual identity milestones (one of which was age of first same-sex intimate

[113] Graham (n 48), 125.
[114] ibid, 127. This trend has been confirmed by reliable empirical data. Temple-Smith, Moore and Rosenthal, *Sexuality in Adolescence* (n 5) 9.
[115] Mercer and others, (n 107) 1784.
[116] Yvonne Kelly and others, 'Partnered Intimate Activities in Early Adolescence: Findings from the UK Millennium Cohort Study' (2019) 65 Journal of Adolescent Health 397, 399.
[117] Perry N. Halkitis and others, 'Age of Sexual Debut among Young Gay-identified Sexual Minority Men: The P18 Cohort Study' (2021) 58(5) Journal of Sexual Research 573, 576.

sexual relationship), which included 396 lesbian women and bisexual men and women from New York City, USA, found that in the 18-29 year age cohort, the age of first same-sex sexual initiation was about 16.6 years.[118] Another survey-based study of 2832 girls aged 13-18 years in the USA, of whom 13% identified as lesbian and 16% as bisexual, found that mean first age of experience of digital penetration of vagina/anus and of oral sex for lesbian girls was 14.3 years and for bisexual girls was 14.8 years and 15 years respectively.[119]

Data from the UK indicate that exposure to online pornography can begin much earlier. A three stage mixed methods (surveys and focus groups) study of 1072 adolescents aged between 11 and 16, recruited from across the UK, found that 48% adolescents had seen online pornography, of whom 56% were males and 40% were females (the study does not provide the gender identification of the remaining 4% of the respondents). Of those who had seen online pornography, 47% had actively searched for it while the rest came across it unwittingly, with the gender distribution of those who actively searched for pornography being 59% male and 25% female (6% of the respondents preferred not to say how they came across online pornography). The study also observed that older respondents were more likely to have seen pornography (65% of 15 to 16-year-olds; 46% of 13 to 14-year-olds, and 28% of 11 to 12-year-olds), and 46% of those who had ever seen pornography being exposed by 14 years of age.[120] A study of 10,930 adolescents (5211 males and 5719 females) from the ninth and tenth grades (14 to 17-years-old) selected across six European countries (Greece, Iceland, Poland, Romania, Spain and the Netherlands) showed that 59% of the respondents had viewed pornography in the last 12 months. 76% of the male respondents reported having viewed pornography in this time frame (40% viewed it at least once a week) and 42.9% of the female respondents reported having viewed pornography in the last 12 months (8.9% viewed it at least once a week). There did not appear to be much variance based on age groups (14 to 15-year-olds and 16 to 17-year-olds) in exposure to pornography or frequency of viewing.[121]

[118] Alexander Martos, Sheila Nezhad and Ilan H. Meyer, 'Variations in Sexual Identity Milestones Among Lesbians, Gay Men, and Bisexuals' (2015) 12 Sexuality Research and Social Policy 24, 28.
[119] Michelle L. Ybarra and others., 'Sexual Behaviors and Partner Characteristics by Sexual Identity Among Adolescent Girls' (2016) 58 Journal of Adolescent Health 310, 313.
[120] Elena Martellozzo and others, 'Researching the Affects that Online Pornography has on U.K. Adolescents Aged 11 to 16' (2020) 10(1) Sage Open 1, 4.
[121] Elisabeth K. Andrie and others., 'Adolescents' Online Pornography Exposure and its Relationship to Sociodemographic and Psychopathological Correlates: A Cross-Sectional Study in Six European Countries' (2021) 8(10) Children (Basel) 925, 929-30.

Thus, the salient difference between the evidence from India and the West is that pre-marital sexual interactions and activity during adolescence appear to be less prevalent in India compared to the West (with lower percentages of adolescents engaging in such behaviours), most markedly for females. As previously mentioned, this may be due to limitations in reporting and recording of adolescent sexual activity in India. These include the social norm that prohibits sex outside marriage, the fear of social reprisal for breaching this norm, as well as the legal and ethical difficulties in gathering data on adolescent sexuality given the mandatory reporting requirement of POCSO. Furthermore, even if the available data present an accurate picture of adolescent sexual activity, lower rates of such activity may not necessarily be because adolescents themselves do not approve of or desire pre-marital sex, but rather because they do not want to risk the negative social and legal consequences of adolescent sex outside marriage in India. In the absence of information on the age at which Indian adolescents first begin to view pornography, it is not possible to undertake a comparison with the age of exposure to pornography in the UK, but it is evident that a large chunk of the male adolescent population (and some of the females) do access pornography in India. These behaviours indicate that at least some Indian adolescents seek to exercise their sexual autonomy and discover and develop their sexual selves in ways that are similar to their western counterparts. That they do this in a social context where expressing sexuality in ways that are not socially approved can lead to severe consequences is perhaps also an indicator of how important a goal this is to them.

B. The Limits and Relevance of Socio-Normative Conceptions

The discussion in Parts II and III.A of this chapter shows that Indian society recognises the emergent sexuality of adolescents, and Indian adolescents also appear to engage in sexual interactions, though perhaps not as widely as their western counterparts. Therefore, POCSO, which fails to recognise the emergent sexuality of adolescents in any way, equating them legally and normatively with pre-pubertal children, is at odds both with Indian socio-normative conceptions of adolescence and the lived experiences of Indian adolescents.

Notwithstanding that adolescents are viewed as sexual beings and tend to engage in sexual activity, their competence to make their own sexual decisions is not socially recognised in India. By this I mean (as I mentioned at the beginning of this Part) that there is neither social approval nor general social tolerance of adolescent sexual activity outside hegemonised marriage. Parents, family, and community members who accept adolescent pre-marital sexual

activity are exceptional in the Indian context and are generally limited to a small minority of the urban, upper-class population. This lack of social recognition of adolescent competence in sexual decision-making is not based in concerns about the capacity of adolescents to consent to sexual activity, but in the fact that consent is irrelevant within the Indian social understanding of permissible sex.

As I argued in Chapter 2, the legitimacy granted by marriage is what determines the social permissibility of a sexual interaction. This represents public or majoritarian morality which is based in and furthers the norms of caste and honour. It clashes with critical as well as constitutional morality (explained in Chapter 7) according to which consent (and the capacity to consent) would be the appropriate determinant of permissible sexual conduct. Furthermore, the romantic and sexual activity of Indian adolescents, which takes place despite the threat of punishment, signifies a counter-current against this majoritarian morality, and shows that it is not *universally* (even if largely) accepted. Therefore, Indian social perceptions of what is permissible sexual conduct for adolescents cannot be the basis of critically normative and legal determinations of permissible adolescent sexual conduct which ought to (and generally do) centralise meaningful consent (see Chapters 6 and 7).

This should not be taken to mean that the socio-normative conceptions discussed in this chapter are entirely irrelevant to normative or legal discussions. The social recognition of emergent sexuality in adolescence *can* ground the critically normative and legal classifications we make when considering whose consent ought to be meaningful. As I argue in Chapter 5, the socio-normative conception that the emergent sexuality of adolescence marks the end of childhood provides a good pragmatic reason for excluding pre-pubertal children from the category of minors whose consent to sexual activity may be morally decisive.

Conclusion

This chapter provided an overview of the socio-normative conceptions of childhood, adolescence, and adulthood in India, arguing that socio-economically situated needs determine how far and how accurately dominant discourses of these life-stages and the transitions between them apply to a person. While the assumption of responsibilities and the performance of productive labour are considered ‘adult’ activities, I argued that they are not definitive markers of social adulthood because younger children who perform these types of labour are not thereby considered social adults.

Perceptible physiological signs of maturity, which socially signal the beginning of sexual and reproductive capacities, indicate the transition into adolescence and the end of childhood. Adolescence, which serves as a bridge between childhood and adulthood, is defined by emergent sexuality. This emergent sexuality is also socially recognised, especially for female adolescents, through restrictions on movement and interactions with the opposite sex after puberty (aimed at regulating reproductive capacity in compliance with the norms of caste and honour). The end of adolescence and the beginning of adulthood for both men and women is marked by perceived socio-normativity of marriage and reproduction at that stage in life. The transition into adulthood in India does not have the same meaning or implications as it does in the West. It is generally defined by social embeddedness and the overarching imperative of collective, relational living, instead of individuation and separation from one's family. Given this social context, obedience and conformity are taught to, and inculcated by, children from an early age, and may continue into adolescence and possibly also adulthood. In combination with the other vulnerabilities of adolescents, on which I elaborate in Chapter 5, this social conditioning can make adolescents vulnerable to sexual exploitation through misuse of authority by elders and authority figures, both within the family and outside it.

Finally, I presented available evidence on the sexual and romantic lives of Indian adolescents, comparing it to evidence from western countries. I argued that lower rates of adolescent sexual activity in India compared to the West should not be taken to imply that adolescent sexual activity in India is insignificant. It represents the desire of adolescents to discover and develop their sexual selves, and the strength of this desire can be gauged from the fact that it is pursued despite the high risk of social and legal punishment. In that sense, it is a counter-current to the majoritarian morality according to which sexual activity outside marriage is socially impermissible. I also argued that the non-recognition of adolescent sexual competence by Indian society is insufficient and inappropriate to determine whether adolescent sexuality ought to be morally and legally permissible because moral and legal permissibility of sex (ought to and usually do) focus on consent, whereas social validity in the Indian context is grounded in marriage-based legitimacy.

Given this, in Chapter 5, I develop critically normative conceptions of adolescence and adulthood and ground the distinction between adolescence and adulthood in the capacities and vulnerabilities of critically normative adolescents when it comes to (sexual) decision-making.

CHAPTER 5: SEXUAL DECISION-MAKING BY ADOLESCENTS: CAPACITIES AND VULNERABILITIES

Introduction

In Chapter 4, I argued that Indian society acknowledges emergent sexuality during adolescence, but this does not imply social recognition of the sexual 'competence' of adolescents, at least insofar as sexual competence denotes the capacity to make autonomous sexual decisions. This is because the socio-normative permissibility of sexual activity in India is determined by the legitimacy provided by marriage, rather than the consent of the individuals engaging in sexual activity (see Chapter 2). However, the moral and legal assessment of whether (and to what extent) adolescent sexuality ought to be permissible must be based (for reasons on which I elaborate in Chapters 6 and 7) on consent instead of majoritarian standards of what is permissible sex. To that end, this chapter assesses whether adolescents (relative to adults) have the capacity to consent to sexual activity and whether they have vulnerabilities because of which their token of consent to sexual exploitation might not be meaningful.

My focus in this chapter is on adolescents, and not pre-pubertal children. This is because, as I argued in Chapter 4, in the Indian context, emergent sexuality marks the end of 'childhood', and a person's sexuality is acknowledged only after a socially significant event, such as menstruation or the appearance of facial hair, marking puberty. Consequently, excluding pre-pubertal children from the ambit of those who can give meaningful consent would not be socially, morally, or legally contentious in India. In any case, at a normative level, I am unconvinced by arguments in favour of 'childhood sexuality'.[1] Attributing sexual capacity to an infant or a young child is fallacious, even if she feels sensual (that is, arising from the senses) pleasure which adults interpret as sexual, for instance by self-stimulation of her genitals. This is because in most (if not all) such cases, a pre-pubescent child does not recognise as sexual the potential or actual sensation arising from genital touch, even if it is pleasurable.[2]

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[1] For an example of the argument that young children too may feel sexual pleasure or desire, see Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (Palgrave Macmillan, 2005) 24.

[2] John H. Gagnon and William Simon, *Sexual Conduct: The Social Sources of Human Sexuality* (2nd edn., Routledge, 2017) 27. The authors argue that the meanings attached to sexuality are understood by the majority of young people only after the beginning of puberty; Stevi Jackson, *Heterosexuality in Question* (Sage, 1999) 38. Jackson emphasises that if sexual motivations are to be imputed to certain actions, it is essential for the actor to understand and intend those actions to be sexual.

That childhood sensual pleasure or exploration ought not to be equated with adult sexuality has also been noted elsewhere with respect to arguments against paedophilia. See, Igor Primoratz, 'Paedophilia' (1999) 13(1) Public Affairs Quarterly 99, 106-08; Ben Spiecker and Jan Steutel, 'Paedophilia, Sexual Desire and Perversity' (1997) 26(3) Journal of Moral Education 331, 332-34.

In Chapter 4, I used the terms 'child', 'adolescent', 'adult' and their variants in their socio-normative sense to signify life-stages or those experiencing the life-stages. In this chapter, the terms 'adolescent', 'adult' and their variants are used in two different senses. Studies discussed in this chapter, which provide evidence of adolescents' capacity to make sexual decisions, use the terms 'adolescent', 'adult' and their variants to refer to chronological life stages. Thus, 'adult' usually refers to a person above the age of 18, and 'adolescent' usually refers to a post-pubertal minor who is not yet 18 years old, although some studies include 19-year-olds in the 'adolescent' category. In Part II.A, I argue that when it comes to decision-making, 'adult' and 'adolescent' are also critically normative categories distinguished by psychosocial maturity. In other words, notwithstanding chronological age, a critically normative adult is someone who is psychosocially mature, whereas a critically normative adolescent is someone who has not yet attained psychosocial maturity. These critically normative categories are deployed in Chapter 6.III when discussing consent to sexual exploitation. For the purposes of this chapter, unless prefaced by 'normative', the terms 'adult' and 'adolescent' refer to chronological life stages.

In Part I of this chapter, I lay down the capacities necessary to be considered competent to make sexual decisions. I then discuss the evidence available on the decision-making capacities of adolescents relative to adults. This review of literature demonstrates that the cognitive capacity of older adolescents (16 to 18-year-olds) to receive, understand, and process relevant information (capacities essential to the competence to make rational decisions) is generally indistinguishable from those of adults. However, this does not mean that the decision-making competence of adolescents is, in all respects, the same as that of adults.

In Part II, I consider the different ways in which adolescents are vulnerable to being taken advantage of,[3] in view of the moral theory of sexual exploitation I develop in Chapter 6, which sees sexual exploitation as a kind of sexual use by taking advantage of a person's vulnerabilities. Evidence on adolescent decision-making indicates that notwithstanding their cognitive capacities, they are constrained in their capacity to make decisions in their long-term interests because psychosocial maturity does not fully develop until after the age of 18, usually sometime in the 20s. This capacity constraint makes adolescents inherently vulnerable to being taken advantage of. Additionally, as I discussed in Chapter 4, the experience of childhood and

[3] This part discusses three kinds of vulnerability: inherent, pathogenic, and situational. The meaning of these terms and their effect when it comes to sexual exploitation will be discussed in Part II of this chapter and developed further in Chapter 6.

adolescence in India makes Indian adolescents especially vulnerable to being taken advantage of within relationships where obedience and deference are expected of them (pathogenic vulnerability).[4]

Finally, I argue that there may be aggravating and mitigating factors that affect how much a situational vulnerability affects a person. On the one hand, adolescents, who are observed to be relatively less resilient than adults (though by no means lacking resilience in an absolute sense), may be left worse-off than adults by situational vulnerabilities. On the other hand, the experience of living in constrained circumstances may allow a person to better navigate those circumstances, regardless of age. However, I argue that in acknowledging the strategies employed by people (including adolescents) to survive constrained circumstances, we should not lose sight of the morally problematic nature of these circumstances, a point on which I built in Chapter 6.III.A.

I. Adolescents' Competence to make Sexual Decisions

This part undertakes a preliminary examination of adolescents' competence to make sexual decisions. In section A, I consider which elements ought to comprise such competence. I argue that to be considered competent to make sexual decisions, a person must have (a) a sexual self-concept upon which the right to positive sexual autonomy may be based, and (b) a set of capacities to actually make sexual decisions. In section B, I consider the available evidence (from India and the West) of the development of a self-concept and sexual self-concept during adolescence. I argue that the emergent sexual self-concept of adolescence *can* serve as the basis of a right to positive sexual autonomy. I then review evidence of the decision-making capacities of adolescents (general and sexual), which shows that in terms of the capacity for rationality, information processing, and general cognitive ability, there is no significant difference between older adolescents and adults. This implies that the ability of older adolescents to make rational decisions is generally the same as that of adults, and that these adolescents have the underlying cognitive capacities necessary for the moral capacity to consent to non-wrongful sexual activity, to which the active weighing of risks and benefits is not central. I argue, however, that these studies do not provide a complete picture of adolescent decision-making, since they tell us nothing about the psychosocial maturity of adolescents which bears on their ability to make

[4] In Chapter 6, I build on the findings of this chapter to argue that those normative adolescents who have the competence to do so can consent meaningfully to non-wrongful sexual activity, but their token of consent to exploitative sexual activity would not be morally decisive in determining its permissibility because they are not psychosocially mature. At that stage, I also explain why psychosocial maturity is relevant to the competence to consent to sexual exploitation, but not to the competence to consent to non-wrongful sexual activity.

decisions (such as whether to consent to sexual exploitation) to which the weighing of perceived benefits and risks and understanding one's long-term interests are central.

A. Competence to make Sexual Decisions: Meaning and Scope

Discussions on the competence to make decisions, and the moral capacities of the decisionally competent have largely taken place in the context of medical decision-making. My concern here is the competence to make sexual decisions. I argue that competence to make sexual decisions requires (a) a sexual self-concept, based on which sexual autonomy may be exercised, and (b) the moral capacity to consent to sexual interactions. Similar to the requirements usually applicable to medical consent, Green lays down the following requirements for a more general capacity to consent:[5]

> [T]he ability to (1) understand the facts involved in a given decision, (2) appreciate the nature and significance of the decision with which one is faced, (3) reason, in the sense of being able to weigh risks and benefits and evaluate possible consequences, and (4) express or communicate such intended decision.

The ability to understand the facts involved in a given decision, to appreciate the nature and significance of the decision with which one is faced, and to communicate one's decision, are undoubtedly essential to the moral capacity to consent to non-wrongful sexual acts. However, the ability to 'reason' should not, in the context of sexual decision-making, be understood as being able to 'weigh risks and benefits' because sexual decision-making does not *ordinarily* require or involve an active weighing of risk and benefit in the way that medical decision-making does.[6] Thus, in deciding whether to consent to an appendix removal, it is expected that the patient should and would weigh the benefit of having their appendix removed (forestall the risk of a burst appendix and therefore of a potentially fatal event, end pain, probably improve overall health, etc.) against the risks of surgery (the side-effects of anaesthesia, the pain of surgery, the inconvenience of the post-surgery recovery period, etc.). But in deciding whether to engage in, say, penile-vaginal sexual intercourse, it is neither required nor expected nor usual for a person to actively weigh the risk of pregnancy or contracting a STI against the possibility of sexual pleasure. Therefore, in the context of sexual decision-making, it would be more pragmatic to interpret the ability to 'reason' as the ability to understand that the possibility of harmful consequences (such as pregnancy or STIs) may provide reasons to avoid the sexual interaction (in this case, penile-vaginal sexual intercourse).

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[5] Green, *Criminalizing Sex: A Unified Liberal Theory* (Chapter 3, n 43), 139.
[6] However, as I argue in Chapter 6, decisions about sexual exploitation do require such weighing.

In sub-section A.2, I expand on these requirements of the moral capacity to consent as they apply to sexual activity. My purpose in doing this is not to explain each requirement in the abstract, or to provide an overview of the wide-ranging literature on sexual consent and the different ways in which consent may be vitiated (for instance, through deception or coercion). I assume that the sexual interactions being referred to in this Part are not pro-tanto wrongful.[7] Instead, I seek to ground these requirements in the Indian context.

1. Sexual Autonomy and Sexual Self-Concept

Green argues that autonomy in the normative sense refers to the right to act in accordance with one's own desires with only the freedom of others as a valid restraint.[8] Sexual autonomy, or self-governance in the sexual sphere, may be of two kinds: negative sexual autonomy, or the right not to engage in a particular sexual interaction, and positive sexual autonomy, or the right to engage in sexual interactions of one's choice without unreasonable restriction.[9]

In this section, I argue that an essential condition of sexual autonomy, which forms the normative base for the capacity to consent, is the sexual self. According to Winter, sexual self refers to 'an individual's evaluation of his or her own sexual thoughts, feelings and actions.'[10] To have positive sexual autonomy or the right to make her own sexual choices a person must, first, see herself as a sexual being. This means interpreting certain desires and actions as sexual, having personal sexual preferences, and relating to (or trying to relate to) oneself and others sexually. This includes an appreciation of one's sexual desires and the qualities that inspire those desires, as well as other feelings around and about sex such as anxieties and fears, confidence, and desire.[11] A sexual self-concept is essential to positive sexual autonomy because it generates values according to which such autonomy may be exercised. This does not mean that one's sexual self-concept must be completely developed and stable for one to have positive sexual autonomy. Even an emergent sexual self-concept can ground the right to positive sexual autonomy because it makes self-motivated sexual choices possible. Once there is the possibility of positive sexual autonomy, it must be seen whether it can be exercised, that is, whether there is the moral capacity to consent.

[7] See Introduction, n 6 and Chapter 6, n 1.
[8] Green, *Criminalizing Sex: A Unified Liberal Theory* (Chapter 3, n 43), 19.
[9] ibid, 21.
[10] Laraine Winter, 'The Role of Sexual Self-Concept in the Use of Contraceptives' (1988) 20(3) Family Planning Perspectives 123, 124.
[11] The awareness or suspicion that one does not have *any* sexual desires or that one is asexual is part of this.

2. Consent to Sexual Interactions

The competence to make sexual decisions requires, in addition to positive sexual autonomy, the moral capacity to consent.[12] This capacity to consent to sexual relations is generally act-specific. A person may, for instance, have the capacity to consent to a kiss or mutual genital fondling, but may not (yet) have sufficient understanding and/or awareness (for instance, of the additional risks of pregnancy and STIs) to consent to penile-vaginal or penile-anal intercourse. To be capable of consenting to a particular sexual interaction, a person must therefore be aware of, and capable of appreciating, the nature and mechanics of the sexual acts taking place in the interaction. She must also be aware of, and capable of understanding, the usual and likely consequences of the sexual acts that take place, including (but not limited to) the fact that penile-vaginal intercourse can lead to pregnancy, and that various forms of penetrative sex can lead to STIs.

In the Indian context, there are two additional consequences of which a person must be aware, and capable of understanding, to have the capacity to consent. First, that sex outside marriage can lead to serious reputational damage for females, and second, that sex may (depending on her socio-economic position) create significant social pressure on a person to marry her partner (discussed in Chapter 2). This is not to say that these circumstances should solely determine when and with whom people choose to have sex, but that these are consequences as important and potentially life-changing as pregnancy or STIs, and therefore a person who is not aware of, or cannot understand, that such consequences are possible (and even likely) does not have the capacity to consent to sexual activity in the Indian context. As I argued in Chapter 2, a female who has sex outside marriage in India risks being considered unworthy of respect and degraded, a reputation that could potentially affect her stature in her family and community as well as her future prospects of marriage and possibly even employment. A person who is compelled to marry by social pressure or the threat of legal action may have to enter a relationship before she is ready for it and/or with a person whom she would not have wanted to marry. Such a marriage would be difficult to exit because of the lack of social approval and support for divorce. These consequences may affect people differently based on gender and socio-economic position, but they are relevant to everyone.

[12] The ability to gauge one's partner's consent or lack thereof, while desirable, is not a *necessary* component of competence in this context. This is because, in my view, the capacity to engage in sexual interactions ought to be self-regarding. It need not include concerns for the well-being and safety of others. Such concerns, though important, are not appropriately classified as 'capacity' concerns.

Finally, a person looking to engage in sexual relations should be capable of understanding that she has the moral right to refuse any sexual interaction that is unwanted, both in terms of the sexual acts and the partner(s) involved. A woman who is incapable of appreciating this and *believes*, for instance, that she must agree to every sexual interaction that her husband demands, would lack a crucial element of capacity because she would be *incapable* of saying no to those unwanted sexual acts.[13]

Further information, such as the preventive or protective effects of the use of condoms or hormonal birth control, or a detailed appreciation of the physical, financial, and emotional toll of pregnancy (or even marriage), while desirable, should not be a *requirement* of capacity. This is because if the standard of capacity is not kept at a basic minimum level, a large proportion of the Indian population would be considered incapable of making their own sexual decisions, marking a serious and unnecessary incursion into personal autonomy. Consider, for instance, that information on safe sex in India is sparse and a large part of the Indian population does not appear to engage in safe sexual practices. Studies have noted that young people in India do not have information about the prevention of STIs and pregnancy,[14] or otherwise labour under myths surrounding condom use, STIs, and pregnancy.[15] Data from the National Family Health Survey (NFHS)-5 (2019-21) on contraceptive use and information on Human Immunodeficiency Virus Infection and Acquired Immune Deficiency Syndrome (HIV/AIDS) is also illuminating in this regard. It records that only 58.5% of people (of all ages) in urban areas and 55.5% in rural areas use any modern methods of contraception, and only 28.6% and 37.5% of urban women and men respectively (of all ages) and 18.2% and 27.1% of rural

[13] As I mentioned in Chapter 3.I.A.2, marital rape is not a criminal offence in India, and it is also widely believed that non-consensual or even forced sex by a husband with his wife does not amount to rape. In this social context, it is possible that some women hold the moral belief that they cannot refuse consent to have sex with their husbands. While it is not possible to consider this in detail within the scope of this thesis, I argue that the effect of such a belief depends on how it shapes the woman's decision-making process. If such a belief is so strong that it makes the woman genuinely *incapable* of refusing consent to her husband, that is, she does not even understand that she *can* say no, her *capacity* to engage in sexual interactions with him is questionable. However, if she understands that she *can* say no, but thinks that saying no will lead to adverse consequences or will not make any difference to the husband's decision to have sex with her, and therefore does not think saying 'no' is a real or practical option for her, she cannot be said to lack *capacity* to have sexual intercourse with her husband. That said, our assessment of the moral decisiveness of her consent ought to take these coercive background conditions into account.

[14] Joshi, 'Indian Adolescent Sexuality' (Chapter 4, n 96), 183; Shelah S. Bloom and others, 'What Husbands in Northern India know about Reproductive Health: Correlates of Knowledge about Pregnancy and Maternal and Sexual Health' (2000) 32(2) Journal of Biosocial Science, 237; Vineet Kaur Ahuja and others, 'Perceptions and Preferences Regarding Sex and Contraception amongst Adolescents' (2019) 8(1) Journal of Family Medicine and Primary Care 3350, 3352.

[15] Joshi, 'Indian Adolescent Sexuality' (Chapter 4, n 96), 184; Leena Abraham, 'Redrawing the *Lakshman Rekha:* Gender Differences and Cultural Constructions in Youth Sexuality in Urban India' (2001) 24(1) Journal of South Asian Studies 133, 138.

women and men respectively (of all ages) have comprehensive knowledge of HIV/AIDS.[16] These data indicate that a large percentage of both adults and adolescents in India lack information about the prevention of pregnancy and STIs. Therefore, it would be too onerous and impractical a requirement that awareness of such information be essential to the capacity to consent to sex. It does, however, indicate a need for sex education (discussed in the Conclusion of the thesis).

A high standard for the information required to be considered decisionally competent also raises another pragmatic concern by enabling the state to shape capacity through its action/inaction. For instance, in 2017 the government of India banned the broadcast of condom advertisements between 6 a.m. and 10 p.m. on the ground that the advertisements were indecent for children.[17] If such information were considered so essential an element of a person's competence to make sexual decisions that without it, she would be deemed morally and legally incapable of consenting to sex, the state's power to control people's sexual lives would increase significantly. The state could determine, for instance, who would be considered legally capable of consenting to sex by controlling who had the necessary information to be considered competent. This concern is especially relevant in India where, as I argued in Chapter 3.III, the state often enables and furthers (even if not intentionally) the control of the family and caste-community over female sexuality through the criminal law and criminal justice system.

Thus, to recap, to be considered competent to exercise sexual autonomy, a person must have the capacity to consent to that sexual interaction. This includes the capacity to understand the nature and mechanics of the particular sexual act(s) that are part of the interaction, as well as to be aware of, and capable of understanding, the most obvious physical, biological, and social consequences of those acts. It also includes the ability to appreciate that there is a right to refuse unwanted sexual interactions, whether it is the particular sexual act, or any sexual act with a particular person, that is unwanted. These requirements should be applied to a basic and uncomplicated standard to prevent undue interference with personal autonomy.

B. Decision-Making in Adolescence: General and Sexual

Green rightly observes that in most discussions (section A above is no exception), competence is seen as a binary: either it exists, or it does not. However, the capacities of which competence

[16] NFHS-5 (Chapter 2, n 107).
[17] Indo-Asian News Service, 'Govt bans condom ads from 6 a.m. to 10 p.m. because they are "indecent"' *The Hindu* (New Delhi, 12 December 2017) <https://www.thehindu.com/news/national/govt-bans-condom-ads-from-6-am-to-10-pm-because-they-are-indecent/article21461765.ece> accessed 13 May 2024.

is comprised are scalar, meaning that they are likely to exist to different degrees rather than being present or absent.[18] As this and the following section demonstrate, neurotypical human beings tend to acquire capacities incrementally from childhood, with some (such as cognitive capacities) plateauing in late adolescence (16-18 years) and others, such as psychosocial maturity usually becoming stable sometime in the 20s, and generally not before the age of 18. That most capacities are developmentally scalar, however, does not justify a conclusion that the 'end product' of this developmental process is a completely rational, infallible person. Decades of research show that even the decisions of older, mature adults are prone to a wide range of cognitive biases.[19] Therefore, I do not seek to demonstrate that adolescent capacities meet an abstract threshold requirement for rational decision-making. Instead, I consider evidence on the decision-making capacities of adolescents relative to adults. As I mentioned in the Introduction to this chapter, in this discussion the terms 'adult' and 'adolescent' refer to chronological life stages rather than critically normative categories, unless otherwise specified.

In this section I argue that it is possible for adolescents to have normative sexual autonomy because it is clear that a sexual self-concept emerges and develops throughout adolescence. Then I provide an overview of the literature demonstrating how cognitive capacities mature throughout adolescence. These data indicate that when it comes to cognitive capacities central to rational decision-making (the ability to receive, understand and use information correctly) older adolescents (16 to 18-year-olds) are indistinguishable from adults, including older adults. Studies also show that adolescents become more functionally autonomous (or capable of making decisions independent of others). Therefore, I argue, while the moral capacity to consent will differ from one individual to the next, older adolescents in general do have the underlying capacities necessary for the moral capacity to consent.

However, a very small proportion of the empirical data used below report on the capacities and experiences of adolescents in India because very few Indian studies look into the decision-making capacities of adolescents, and fewer still consider sexual decision-making in a holistic manner. Studies that say anything about sexual decision-making do so obliquely. Furthermore, there are no studies comparing the decision-making capacities of adults and adolescents in the Indian context. As I mentioned in Chapter 4.III, this gap in the data might partially be explained by the chilling effect of social norms and by mandatory reporting requirements under POCSO,

[18] Green, *Criminalizing Sex: A Unified Liberal Theory* (Chapter 3, n 43), 29-30. Alexander makes the same argument regarding deontic judgements. See, Larry Alexander, 'Scalar Properties, Binary Judgements' (2008) 25(2) Journal of Applied Philosophy 85.
[19] Sarah Conoly, *Against Autonomy: Justifying Coercive Paternalism* (CUP, 2012) 21-23.

which make it ethically and legally fraught to conduct primary research on the sexual lives of adolescents in India. Whatever the reasons, this is a serious limitation, because socio-cultural context is an important determinant of cognitive development.[20] In the analysis that follows, I try to contextualise conclusions on adolescent capacities wherever possible. But since data on a number of crucial respects are unavailable, the analysis must be read in light of this limitation.

1. Self-Concept in Adolescence: General and Sexual

It has been noted that adolescence is a time for the development of self-concept, including sexual self-concept. According to Fortin, 'it is the older adolescents' ability to conceptualise, to think about the meaning of their experiences and to establish concepts about themselves as distinctive persons that marks out adolescence from the earlier years of life'.[21] A detailed review of existing evidence in combination with original empirical research by Harter and Williams finds that while self-concept begins to emerge in early adolescence, the self-concept of early and middle adolescence is neither coherently organised nor internally consistent. In late adolescence (around 17 to 19 years), however, there is greater consolidation and abstraction in thinking, and better ability to understand and integrate apparent contradictions (for instance, introversion and extroversion or different moods) in the self.[22]

The development of self-concept during adolescence extends also to the sexual domain, no doubt due to the emergence and development of sexuality during adolescence.[23] Fortenberry argues that 'the essential elements of adult sexuality are identifiable in early adolescence and are relatively continuous through the sexual lifespan'.[24] As I discussed in Chapter 4.II.A, adolescence is the phase of life when people start thinking about sex, looking for romantic and sexual experiences and having their first autoerotic and partnered sexual activities. A study of 387 middle and late adolescent (aged 14 to 17) girls, most of whom were African American, in the USA, collected information on sexual self-concept and behaviour through a questionnaire. The study found that sexual self-concept (understood in terms of sexual self-esteem, sexual openness, and sexual anxiety) developed in complex ways through adolescence and had a reciprocal relationship with sexual behaviour. In other words, the participants' sexual

[20] Suparna Choudhury and Nancy Ferranti, 'The Science of the Adolescent Brain and its Cultural Implications' in Anca Gheaus, Gideon Calder and Jurgen De Wispelaere (eds.) *The Routledge Handbook of the Philosophy of Childhood and Children* (Routledge, 2018) 33, 37.
[21] Jane Fortin, *Children's Rights and the Developing Law* (CUP, 2012) 84.
[22] Jeffrey Arnett, *Adolescence and Emerging Adulthood: A Cultural Approach* (Pearson, 2013) 152.
[23] Emily A. Impett and Deborah L. Tolman, 'Late Adolescents Girls' Sexual Experiences and Sexual Satisfaction' (2006) 21(6) Journal of Adolescent Research 628, 630.
[24] Fortenberry, 'Puberty and Adolescent Sexuality' (Chapter 4, n 52), 281.

behaviour both shaped and was shaped by their sexual self-concept.[25] Similarly, without overstating the role of one factor (in this instance, age) or underplaying the role of others such as the nature of sexual experiences or exposure to abuse, it is notable that research with 1584 adolescents between the ages of 14 and 18 from Quebec (Canada), where information on self-esteem and anxiety related to sex was collected through a questionnaire, indicates that adolescents become more confident and self-assured about their sexual capabilities, and begin to have a strong sexual self-concept as they grow older.[26]

There are no direct studies of self-concept in the Indian context. But studies on gender or other socio-economic differences in self-concept (not in a sexual sense) provide an indirect insight into the development of self-concept amongst Indian adolescents,[27] in that these enquiries into the correlates of self-concept rely on the foundational assumption that such a self-concept exists during adolescence. The emergence of a sexual self during adolescence, though not directly studied, may be evidenced by sexual activity during adolescence and adolescents' feelings about such activity. As previously mentioned, studies which collect such information in the Indian context are scarce. Available studies do not provide a complete picture of adolescent sexual activity, and few record adolescents' reflections about their sexual experiences.

Nevertheless, as I demonstrated in Chapter 4.III.A, despite strong social taboos against sex outside (hegemonised) marriage, Indian adolescents do engage in a wide range of partnered sexual behaviours. In addition to the evidence discussed in Chapter 4, there is also information on masturbation during adolescence. The most comprehensive (in terms of sample size and information gathered) Indian study on masturbation during adolescence was conducted more than three decades ago in an urban district in the western state of Gujarat with 530 female participants in the 17-19 age range (76% being 17 years old). Approximately 30% of the participants reported that they masturbated, and amongst them the mean age for first masturbation was 13.74 years and the median age was 15 years. The study also found that those who admitted to masturbating reported experiencing sexual pleasure from masturbation, but also grappled with feelings of guilt, anxiety, and shame.[28] A study conducted in a low-income area of Delhi (discussed in Chapter 4) considered the feelings of adolescents on receiving

[25] Devon J. Hensel and others, 'The Developmental Association of Sexual Self-concept with Sexual Behavior among Adolescent Women' (2011) 34 Journal of Adolescence 675.
[26] Kotiuga, Yampolsky and Martin, 'Adolescents' Perception of Their Sexual Self' (Chapter 4, n 52), 495.
[27] See, Kavita Pauriyal, Seema Sharma and Jatinder Gulati, 'Developmental Trends in Self-concept of Urban Adolescents: Gender Differentials' (2010) 1(2) Journal of Psychology 113; Hemlata Chand and Ritu Singh, 'Role of Gender and Environs in Crystallizing Adolescents' Self-concept' (2017) 59(1) Human Ecology 54.
[28] Sharma and Sharma, 'The Guilt and Pleasure of Masturbation' (Chapter 4, n 52) 66-67.

interest from the opposite sex. 63% females and 84% males reported that the interest made them feel good, but 84% females and 77% males also reported that their 'good' feelings came mixed with fear. This might be attributable to the fear created by the social norms prohibiting sex outside marriage in India, but could also simply be the outcome of adolescent confusion.[29] The study notes a similar ambivalence regarding feelings after having sex. Amongst those who reported having premarital heterosexual sex, 82% of males and 62% of females reported feeling good after the experience, but 13% of males and 10% of females reported feeling both good and bad after the experience.[30] In any case, this study shows that adolescents begin showing sexual interest, noticing when others show them sexual interests and assessing how these developments make them feel. Another (more recent) study that (indirectly) reports sexual feelings was conducted with 445 school-going adolescents in a semi-urban city (Hubli) in the southern state of Karnataka. It found that being the 'crush' (assessed in terms of being considered attractive, popular, and wanted) of other-sex peers had a positive psychological effect, relieving social anxiety over time.[31] Notwithstanding the weakness of the available data, therefore, there does appear to be evidence of the development of sexual self-concept during adolescence in India.

Thus, it appears that sexual self-concept begins to emerge and evolve during adolescence, meaning that it is possible for adolescents to have positive sexual autonomy in a normative sense, that is, the moral right to positive sexual autonomy. This is not to suggest that the sexual self-concept of adolescents is completely developed or stable. But, as I mentioned in section A.1 of this Part, this is not essential for the possibility of a right to sexual autonomy. Values, preferences, and desires might change at any age or stage of life, not just during adolescence. But as long as a sexual self-concept exists, there will be values and preferences against which sexual decisions may be made, and consequently, normative sexual autonomy is possible. Therefore, the emergent and developing nature of adolescent sexual self-concept need not preclude the right to sexual autonomy.

2. Adolescent Decision-Making

Certain cognitive abilities, such as the ability to perform tasks that require logical reasoning, encompassing the ability to receive, understand and use information correctly, are essential to

[29] Jaya and Hindin, 'Premarital Romantic Partnerships' (Chapter 4, n 95), 100-101.
[30] ibid, 100.
[31] Julie C. Bowker and others, 'Being an Other-Sex Crush During Early Adolescence in India: Investigating Socio-Behavioral and Psychological Concomitants' (2020) 80 Journal of Adolescence 115, 122.

the capacity to make rational decisions. Research shows that cognitive capacities, including the ability to concentrate for longer periods and ignore irrelevant stimuli, memory power, the speed of processing information and finishing tasks, planning and thinking about the future, as well as abstract reasoning (including metacognition),[32] all increase with age.[33] Studies (primarily from the USA, but in some cases presenting data from other countries as well) indicate that the cognitive ability of adolescents, especially their ability to make 'rational decisions' based on an evaluation of likely consequences, develops over time, increasing significantly during early and middle adolescence and then plateauing[34] so that older adolescents (16-18 years) have cognitive abilities generally indistinguishable from those of adults,[35] including older adults in their late 20s.[36]

Studies have also found evidence of increasing functional autonomy (or independent decision-making) during adolescence. Zimmer-Gembeck and Collins' review of research concludes that autonomy increases during middle and late adolescence and adolescents' decisions and opinions are less likely to be influenced by peer attitudes and opinions during this stage compared to early adolescence. Other studies have also shown that parental influence over adolescents' decision-making decreases with age and while peer influence increases from childhood to adolescence, it peaks around mid-adolescence and begins to decline towards later adolescence.[37] This means that older adolescents exercise greater autonomy in decision-making compared to younger adolescents and children (although this does not indicate how the functional autonomy of adolescents compares with that of adults).

When it comes to India, data on the cognitive capacities per se of adolescents are extremely limited, as studies usually focus on the link between factors such as gender, education, or nutrition on the one hand and cognitive capacity on the other. Only one study deals directly with adolescent decision-making. A mixed-sex sample of 177 older adolescents (aged 17 to

[32] See, Cheryl Ormond and others, 'A Metacognitive Analysis of Decision-Making in Adolescence' (1991) 14 Journal of Adolescence 275.
[33] Coleman, *The Nature of Adolescence* (Chapter 4, n 55), 43-45
[34] Grace Icenogle and others, 'Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a "Maturity Gap" in a Multinational, Cross-Sectional Sample' (2019) 43(1) Law and Human Behaviour 69, 73; Laurence Steinberg and others, 'Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"' (2009) 64(7) American Psychologist 583, 586-87.
[35] Elizabeth Cauffman and Laurence Steinberg, 'The Cognitive and Affective Influences on Adolescent Decision-Making' (1995) 68 Temple Law Review 1763.
[36] Icenogle, and others, 'Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity' (n 34), 80.
[37] Cauffman and Steinberg, 'The Cognitive and Affective Influences on Adolescent Decision-Making' (n 35), 1777.

19) from urban and rural areas in colleges in the city of Surat in the western state of Gujarat, using a General Decision-Making Style (GDMS) questionnaire, found that 76.9% of the participants displayed 'good' decision-making skills (indicated by critical-thinking, problem solving, and creative thinking).[38] There are no studies that have tested the comparative decision-making abilities of adolescents and adults in India, and therefore it is not possible to make observations concerning such comparative data from the West.

As I argued in Chapter 4, for Indian adolescents and adults, collective, relational decision-making is likely to be more socio-normative than the individual and separate decision-making that typically marks (social) adulthood in the West. Therefore, the autonomy exercised by Indian adolescents and adults is also generally more relational. In this social context, women of all ages in India have been found to be less autonomous (defined as having less control over their own lives, over resources, and over decisions concerning themselves and their families, less freedom of choice and movement as well as less access to information) than Indian men, as well as men and women in other regions of the world.[39] Adolescent women who are married have been found to exercise less autonomy in decision-making about the household than older married women. Adolescent married women in India also seem to have less say than their husbands in decisions relating to sex, contraception, and abortion.[40] This is an unsurprising finding given that, as I mentioned in Chapter 2, the movements and decisions of females are generally strictly monitored and controlled in India. This should not be read to mean, however, that female adolescents in India are not capable of making autonomous decisions. It shows only that they are not allowed to do so.

Thus, these data indicate that older adolescents' ability to make rational decisions is indistinguishable from that of adults, and their functional autonomy generally increases with age. Whether or not a particular adolescent has the moral capacity to consent to a sexual act will depend, as I discussed in Section A.2 of this Part, on that adolescent's awareness of and ability to understand the nature and the ordinary physical, biological and social and consequences of the sexual act sought to be engaged in, and of her right to refuse that sexual interaction. But the evidence discussed in this section indicates that adolescents have the underlying cognitive capacities necessary for the moral capacity to consent. Based on the

[38] Rutu Sanjaybhai Buch and others, 'Decision-Making Skills: An Assessment among Adolescents in Surat City' (2021) 46 Indian Journal of Community Medicine 195, 196.
[39] Shireen J. Jejeebhoy and Zeba A. Sathar, 'Women's Autonomy in India and Pakistan: The Influence of Religion and Region' (2001) 27(4) Population and Development Review 687.
[40] K. G. Santhya and Shireen J. Jejeebhoy, 'Sexual and Reproductive Health Needs of Married Adolescent Girls' (2003) 38(41) Economic and Political Weekly 4370, 4373-74.

findings in this Part, I argue in Chapter 6 that to the extent that (older) adolescents have an emergent sexual self-concept, and the competence to consent to non-wrongful sexual activity, (a) their moral right to positive sexual autonomy should be recognised and (b) their consent to non-wrongful sexual activity should be decisive to determining its moral permissibility.

That said, data on adolescent decision-making, including those derived from western contexts, are limited in the sense that they consider cognitive abilities, but do not provide insight into psychosocial factors which affect adolescent decision-making.[41] These factors include the ability to appropriately evaluate the benefit, to correctly weigh perceived benefits against likely risks, to delay gratification, to reduce risks while pursuing gratification, and to make rational decisions even in emotionally charged circumstances or in the company of, or when being observed by, peers. In Part II, I demonstrate that adolescents' lack of psychosocial maturity explains our ordinary intuition and everyday observation that adolescents, more frequently than mature adults, make decisions that do not align with their long-term interests. I analyse the typical shortcomings of adolescent decision-making by discussing the internal and external constraints that operate on the capacity and autonomy of adolescents to make decisions. In Chapter 6, I build on the foundational discussions of adolescent capacities and vulnerabilities in Part II of this chapter to argue that psychosocial maturity, rather than just adult levels of cognitive capacity, is essential to the capacity to consent to sexual exploitation and explain why psychosocial maturity is essential to the capacity to consent to sexual exploitation but not to the capacity to consent to non-wrongful sexual acts.

II. Vulnerabilities of Adolescents: Internal and External Constraints on Decision-Making

Relying on a layered framework of vulnerability, this Part considers factors that render adolescents vulnerable to being taken advantage of by constraining their capacity or, as the case may be, autonomy to make decisions. The objective of this discussion is to provide a holistic view of the decision-making competence of adolescents. Its larger aim is to lay the foundation for the discussion in Chapter 6, which considers whether and to what extent the consent given by a normative adolescent to sexual activity may be considered morally meaningful.

[41] Elizabeth S. Scott, N. Dickon Reppucci and Jennifer L. Woolard, 'Evaluating Adolescent Legal Contexts' (1995) 19(3) Law and Human Behaviour 221, 229-232; Cauffman and Steinberg, 'The Cognitive and Affective Influences on Adolescent Decision-Making' (n 35), 1772-74; Laurence Steinberg and Elizabeth Cauffman, 'Maturity of Judgement in Adolescence: Psychosocial Factors in Decision Making' (1996) 20(3) Law and Human Behaviour 249, 251.

Vulnerability is commonly understood as susceptibility to something harmful or undesirable. But the specific connotation of vulnerability varies with context, so that the term may be defined differently in medicine than in disaster management. In biomedical research, Schroeder and Gefnas conceptualise vulnerability as having internal and external elements. For them, '[t]o be vulnerable means to be exposed to the possibility of harm while being substantially unable to protect oneself.'[42] It is common to confuse vulnerability with weakness or to understand vulnerability (like competence) as something binary when, in fact, vulnerability is a matter of degree. Accounts which conceptualise vulnerability as ontological help us appreciate this. According to these accounts, vulnerability is essential to the human condition, rather than special to certain phases of life, such as childhood or old age, or to specific conditions, such as disability.[43] However, these accounts can sometimes over-emphasise the generality or universality of vulnerability. The consequent blurring of specific vulnerabilities makes ontological vulnerability an impractical concept to operationalise in real terms. Kohn's criticism of ontological vulnerability theory captures this problem. In critiquing Fineman's work, she demonstrates how, despite arguing for the recognition of universal vulnerability in law, policy and discourse, Fineman's practical application of the theory resorts to identity-based particularity, singling out old persons as especially vulnerable, and therefore, deserving of protection.[44] Rao contends that while shared ontological vulnerability can become a ground for greater relationality, the reality of our material existence is that the same vulnerabilities have significantly different effects on people with varying capabilities.[45] In that sense, we are fundamentally unequal in the way our shared vulnerabilities affect us. Luna argues that the notion of universal vulnerability can have the effect of naturalising it, so that avoiding or protecting from vulnerability no longer seems necessary.[46] In that sense, though ontological vulnerability aims to centralise the vulnerable subject, its effect can sometimes be to render her invisible by universalising vulnerability.

[42] Doris Schroeder and Eugenijus Gefenas, 'Vulnerability: Too Vague or Too Broad?' (2009) 18(2) Cambridge Quarterly of Healthcare Ethics 113, 116.
[43] For an overview of the accounts of ontological vulnerability, see: Eva Feder Kittay, *Love's Labour: Essays on Women, Equality and Dependence* (Routledge, 2019) 93-106; Martha Albertson Fineman, 'Vulnerability and Social Justice' (2019) 53(2) Valparaiso University Law Review 341, 342; Jonathan Herring, *Vulnerability, Childhood and the Law* (Chapter 4, n 10).
[44] Nina A. Kohn, 'Vulnerability Theory and the Role of the Government' (2014) 26(1) Yale Journal of Law and Feminism 1, 11-12.
[45] Rahul Rao, 'Response: The Terror of Invulnerability' in Victoria Browne, Jason Danely and Doerthe Rosenow (eds.) *Vulnerability and the Politics of Care: Transdisciplinary Dialogues* (OUP, 2021) 78, 81.
[46] Florencia Luna, 'Elucidating the Concept of Vulnerability: Layers not Labels' (2009) 2(1) International Journal of Feminist Approaches to Bioethics 121, 128.

Notwithstanding that vulnerability is a shared feature of humanity (in fact, of all living things), the particular vulnerabilities of adolescents merit discussion when considering their competence to make decisions for themselves. This is because, as the sections below demonstrate, there are ways in which adolescents tend generally to be more vulnerable than adults.

For the discussion that follows, as well as in developing my concept of sexual exploitation in Chapter 6, I rely on the concept of vulnerability advanced by Rogers, Mackenzie and Dodds. They propose three sources of vulnerability: inherent, pathogenic, and situational. Inherent vulnerability takes into account, without naturalising or generalising, vulnerabilities arising from inescapable human conditions such as corporeality, affectivity, needs and social living. Situational vulnerability accounts for situation-specific vulnerabilities, such as those arising from socio-economic position, natural disasters or other special events, and may be immediate, intermittent or enduring. Pathogenic vulnerability refers to vulnerabilities that arise from dependent relationships that turn abusive or dysfunctional, or from ameliorative responses that have a paradoxical effect.[47] The advantage of this approach, succinctly described by the authors, is that, '[b]y identifying the different sources and states of vulnerability, this taxonomy acknowledges the ontological vulnerability that is inherent in the human condition while at the same time enabling the identification of context-specific forms of vulnerability.'[48]

In section A, I argue that while adolescents, especially older adolescents, are capable of making rational decisions on par with mature adults, their lack of psychosocial maturity means that they have a widely observed tendency to make decisions that are not in their long-term interest. This makes them inherently vulnerable to being taken advantage of, and also serves as an internal constraint on their decision-making *capacity*. Psychosocial maturity, then, is what marks normative adulthood when it comes to decision-making. In section B, I consider the pathogenic and situational vulnerabilities faced by adolescents. Like inherent vulnerabilities, the pathogenic vulnerabilities of adolescents (especially Indian adolescents, who are likely to be particularly pathogenically vulnerable) can be taken advantage of to sexually exploit them. Furthermore, like adults, adolescents are also susceptible to situational vulnerabilities, and the effect of these vulnerabilities on adolescents may be aggravated by their relatively lower capacity for resilience compared to adults, or arguably mitigated to some degree by their

[47] Catriona Mackenzie, Wendy Rogers and Susan Dodds, 'Introduction' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds.), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP, 2014) 1, 7-8.
[48] Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Requires a Concept of Vulnerability' (2012) 5(12) International Journal of Feminist Approaches to Bioethics 11, 24-25.

specific experience of navigating constrained circumstances. Pathogenic and situational vulnerabilities function as an external constraint on decision-making, reducing the *autonomy* of adolescents to make decisions because deference and obedience are expected within these relationships.[49]

A. The Quality of Adolescent Decision-Making: An Inherent Vulnerability and a Constraint on Capacity

Generally speaking, adolescents have been observed to be more prone to taking risks than adults, without having similar abilities to appropriately assess the nature and consequences of the risks being taken. This may explain why harmful and addictive behaviours such as drinking alcohol and smoking often begin during adolescence. For instance, a review of the literature on alcohol consumption found that the mean age for initiation of drinking in India (reported by approximately 33 studies) ranged from 14.4 years to 18.3 years.[50] Similarly, analysis of the data from a nationally representative survey on tobacco consumption found that smoking is most commonly initiated in the 15-18 quartile, with the median age being 17 years.[51]

This is not explained by lower cognitive ability amongst adolescents because, as I demonstrated in Part I.B.2 of this chapter, the cognitive capacities of older adolescents, essential to rational decision-making, are not significantly different from those of adults. However, as I stressed at the end of Part I of this chapter, this assessment is based on studies in cool laboratory

[49] In this thesis, I use the term **autonomy** to mean the freedom that a person has to make her own choices and pursue options that are compatible with her personal goals and values. Therefore, when I say that pathogenic and situational vulnerabilities are external constraints which reduce a person's autonomy, I mean that they reduce the set of options or choices available to the person, and therefore affect an essential condition of the exercise of autonomy. The person is still self-governing, but the exercise of her autonomy is constrained by reducing the range and quality of options open to her.
On the importance of options and choices to autonomy, see, Joseph Raz, *The Morality of Freedom* (OUP, 1988), 373-375; Susan Dimock, 'Personal Autonomy, Freedom of Action and Coercion' in Samantha Brennan, Tracy Isaacs and Michael Milde (eds.) *A Question of Values: New Canadian Perspectives in Ethics and Political Philosophy* (Rodopi Press, 1997) 65, 76-78.
I use the term **capacity** to refer to the internal ability to make a decision, the necessary underlying requirements for which differ depending on the decision to be made. Thus, when I say that the lack of psychosocial maturity acts as an internal constraint on the capacity of adolescents to make certain decisions, I mean that adolescents do not possess the requisite degree of the abilities of which psychosocial maturity is comprised, to make those decisions.
See, Catriona Mackenzie and Wendy Rogers, 'Autonomy, Vulnerability and Capacity: A Philosophical Appraisal of the Mental Capacity Act' (2013) 9(1) International Journal of Law in Context 37, 39; Jonathan Herring and Jesse Wall, 'Autonomy, Capacity and Vulnerable Adults: Filling the Gaps in the Mental Capacity Act' (2018) 35(4) Legal Studies 698, 704. The focus of the authors is on the meaning of the term 'capacity' in the context of the Mental Capacity Act, 2005 (England and Wales).

[50] Abhijit Nadkarni and others, 'Alcohol Use Among Adolescents in India: A Systematic Review' (2022) 9 Global Mental Health 1, 3-4.

[51] Shekhar Grover and others, 'Tobacco Use Among the Youth in India: Evidence from Global Adult Tobacco Survey-2 (2016-2017)' (2020) 13 Tobacco Use Insights 1, 3.

conditions. In emotional or 'hot' contexts, studies have noted a difference between the capacities of adults and adolescents, especially when it comes to cognitive control,[52] or the ability to defer rewards or resist instant gratification. Different theories have been forwarded to explain why adults are more capable than adolescents of cognitive control in such contexts. The under-development of the pre-frontal cortex, the part of the brain responsible for top-down control over urges, was initially considered responsible for impulsive behaviour during adolescence.[53] More recent theories attribute such behaviour to a combination of limitations in impulse control and an intensification of thrill-seeking, and chasing novel and rewarding experiences due to earlier maturation of subcortical systems of the brain.[54] In other words, adolescent brains begin seeking new and exciting experiences before they are able to control urges or impulses. Sensation or thrill seeking, importantly, implies the inability to *appropriately* weigh risks against their potential consequences, or to minimise risk when novelty or sensation itself is the reward that justifies it. Such behaviour has been found to increase from late childhood to mid-adolescence, to peak during late adolescence and to gradually decline during young adulthood.[55]

Sensation-seeking amongst adolescents is also sometimes linked to the 'invulnerability' thesis, or the idea that adolescents believe that they are invulnerable to the risks that might befall others. According to Rodham et al., however, studies show that this sense of invulnerability is not unique to adolescents, and affects risk-taking by adults as well. Furthermore, their qualitative study of health-related decision-making by adolescents (aged 16 and above) from four schools in England found that it was more the lack of life experiences than a feeling of invulnerability that made adolescents unable to properly weigh the risks and benefits involved in making a particular decision.[56] Interestingly, comparative questionnaire-based quantitative research on risk-assessment by adolescents (in the fifth, seventh and ninth grades) and young

[52] Catherine A. Hartley and Leah H. Somerville, 'The Neuroscience of Adolescent Decision-Making' (2015) 5 Current Opinion in Behavioural Sciences 108, 114. The authors observe, 'in arousing or exciting situations where outcomes are directly experienced, adolescents are less influenced by their explicit knowledge of the probabilities of potential negative outcomes, and are more willing to take risks to obtain potential rewards.'
[53] Laurence Steinberg and Jason M. Chein, 'Multiple Accounts of Adolescent Impulsivity' (2015) 112(29) Proceedings of the National Academy of Sciences 8807.
[54] See, B.J. Casey, Rebecca M. Jones and Leah H. Somerville, 'Braking and Accelerating Adolescent Brain Development' (2011) 21(1) Journal of Research on Adolescence 21; Adriana Galván, 'The Teenage Brain: Sensitivity to Rewards' (2013) 22(2) Current Directions in Psychological Research 88.
[55] See, Willibald Ruch and M. Zuckerman, 'Sensation Seeking in Adolescents' in Jürgen Raithel (ed.), *Risikoverhaltensweisen Jugendlicher: Erklärungen, Formen und Prävention* (VS Verlag für Sozialwissenschaften, 2001) 97-110.
[56] Karen Rodham and others, 'Adolescents' Perception of Risk and Challenge' (2006) 29 Journal of Adolescence 261, 269-70.

adults (between the ages of 20 and 30) in the USA generated robust evidence that teenagers tend to overestimate risk, both compared to adults and in relation to the probability of those risks actually manifesting. One of the explanations for this overestimation, according to the authors, is that adolescents might actually feel *more* vulnerable, rather than labouring under a false sense of invulnerability.[57] However, this does not make adolescents risk averse because they may nevertheless overlook important long-term consequences. Thus, an adolescent may overestimate a risk in the abstract, but underestimate the chance that they will personally face that consequence. Furthermore, adolescents only overestimate risks with which they are already familiar (for instance, those that have been discussed in school or at home), and may continue underestimating or ignoring unknown risks. While this is also true of adults, adolescents are generally less likely to be aware of as wide a range of risks as adults are, simply by virtue of having had less life experience. And finally, despite overestimating risks, adolescents may engage in risky behaviour because the prospect of short-term pleasure or gratification bear more heavily on adolescent decision-making than do the perceived risks.[58] In 1988, a survey-based study of 234 females and 91 males in the 14-19 age group attending an adolescent health clinic in western USA found that despite knowing the link between unprotected sex and STIs, both males and females in the sample expressed their intention not to use or have their partners use condoms.[59] This example demonstrates that adolescents may continue to engage in a risky activity despite their awareness of its likely adverse or harmful consequences.

These psychosocial circumstances of decision-making explain the widely observed difference between the decisions of adolescents and adults. In other words, adolescents make impulsive decisions that lead to poor consequences not because they lack the capacity to understand and process the information given, but because of the way they value risk and reward, their tendency towards instant gratification, and the likelihood of impaired capabilities of decision-making in emotionally charged contexts, or in the company or under the influence of peers. These conclusions are now supported by robust data.

[57] Susan G. Millstein and Bonnie L. Halpern-Felsher, 'Judgements about Risk and Perceived Invulnerability in Adolescents and Young Adults' (2002) 12(4) Journal of Research on Adolescence 399, 414-5.
[58] Valerie F. Reyna and Frank Farley, 'Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy' (2006) 7(1) Psychological Science in the Public Interest 6.
[59] Susan M. Kegeles, Nancy E. Adler and Charles E. Irwin, 'Sexually Active Adolescents and Condoms: Changes Over One Year in Knowledge, Attitudes and Use' (1988) 78(4) American Journal of Public Health 460, 461.

In a multimodal study with 934 participants in the age range 10-30 years (representative of different life-stages), Steinberg and colleagues found that:[60]

> [I]n situations that elicit impulsivity, that are typically characterized by high levels of emotional arousal or social coercion, or that do not encourage or permit consultation with an expert who is more knowledgeable or experienced, adolescents' decision making, at least until they have turned 18, is likely to be less mature than adults.

These findings were largely confirmed in an international study encompassing 11 countries (of which India was one) from different parts of the world, with a similar age-group distribution. While there were differences in the rates of development of cognitive and psychosocial maturity in different countries, the study found that across the board, cognitive abilities comparable to adults were achieved before the age of 18, but psychosocial maturity did not reach the level of the adults until later in life, often during the 20s.[61]

Steinberg also finds that starting around puberty and peaking around mid-adolescence, minors show a strong proclivity towards sensation- and reward seeking, a tendency that is heightened in the presence of peers.[62] Adolescents tend to prefer an immediate reward to delayed gratification, although an age-based reduction in this tendency has been noted, especially between childhood and adolescence.[63] Additionally, poor adolescent performance relative to adults in laboratory-based tests of sensitivity to reward during decision-making indicates that adolescents are worse than adults at loss-aversion when reward-seeking.[64] Evidence gathered through lab-based behavioural tests in hot (emotional) and cold (unemotional) settings shows that emotionally charged situations or peer attention can significantly increase the risks taken by adolescents compared to adults.[65] It is also worth considering that 'reward' may mean something very different for adolescents and adults. As our perceptions of adolescent decision-making in ordinary life indicate, adolescents might value popularity amongst and approval of

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[60] Steinberg and others, 'Are Adolescents Less Mature than Adults?' (n 34), 592-93.
[61] Icenogle and others, 'Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity' (n 34), 79-83.
[62] Laurence Steinberg, 'A Social Neuroscience Perspective on Adolescent Risk-Taking' (2008) 28(1) Developmental Review 1, 13; Anna C.K. van Duijvenvoordea and others, 'What Motivates Adolescents? Neural Responses to Rewards and their Influence on Adolescents' Risk Taking, Learning, and Cognitive Control' (2016) 70 Neuroscience and Behavioural Reviews 135, 138-39.
[63] Sarah-Jayne Blakemore and Trevor W. Robbins, 'Decision-Making in the Adolescent Brain' (2012) 15(9) Nature Neuroscience 1184, 1184-5.
[64] Laurence Steinberg, and others, 'Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task' (2010) 46(1) Developmental Psychology 193.
[65] See, Ashley R. Smith, Jason Chein and Laurence Steinberg, 'Impact of Socio-emotional Context, Brain Development, and Pubertal Maturation on Adolescent Risk-Taking' (2013) 64(2) Hormones and Behaviour 323; Bernd Figner and others, 'Affective and Deliberative Processes in Risky Choice: Age Differences in Risk Taking in the Columbia Card Task' (2009) 35(3) Journal of Experimental Psychology 709.

peers far more than adults, even though adults are not insensitive to the rewards of being liked and accepted. In other words, a typical adolescent tends to be willing to give up, or do, a lot more to be liked than a mature adult because the former assesses the value of the reward (popularity or peer approval) to be much higher than the latter typically does. This is supported by neurological changes which indicate that adolescence sees the peak of neuro-behavioural sensitivity to social stimuli,[66] meaning that adolescents show a more heightened response to being observed, especially by peers, compared to both children and adults.[67]

Thus, evidence on neurobiological and social development indicates that while adolescence is a stage of cognitive, intellectual, and emotional growth and development, adolescents' decision-making process and capacity is constrained by characteristics usually not seen in (especially older or mature) adults. These include poor weighing of risks vis-à-vis benefits, inclination towards sensation-seeking, instant gratification, and impulsive decision-making without accompanying capacity for impulse control, especially in emotionally charged circumstances. Thus, adolescents are constrained in their capacity to make decisions that are in their long-term interest, especially in circumstances which are difficult or emotionally charged. The tendency to make risky, ill-considered decisions which are not in their long-term interest (or to put it simply, not 'good' for themselves), caused by a lack of psychosocial maturity, makes adolescents inherently vulnerable to being taken advantage of.

The findings of the studies in this section have related to the attainment of psychosocial maturity by chronological age. As the foregoing discussions in this section illustrate, while these studies do not provide a precise age when a person does become psychosocially mature, they show uniformly that psychosocial maturity is *generally not* attained before the age of 18. This is because many of these studies are situated in the context of discussions on juvenile justice and the criminal responsibility of legal minors vis-à-vis legal adults, which anchors their findings around the legal age of majority or adulthood. However, the legal distinction between minor (a category that includes adolescent) and adult, which is based on chronological age, does not map neatly onto psychosocial maturity. Even if it is generally the case that psychosocial maturity is not attained before the age of 18, it is possible for a person under the age of 18 to be psychosocially mature. Also, as these studies show, the attainment of psychosocial maturity continues after the age of 18, usually (though not always) plateauing

[66] Dustin Albert, Jason Chein and Laurence Steinberg, 'The Teenage Brain: Peer Influences on Adolescent Decision Making' (2013) 22(2) Current Directions in Psychological Science 114, 115-16.
[67] See, Leah H. Somerville, 'The Teenage Brain: Sensitivity to Social Evaluation' (2013) 22(2) Current Directions in Psychological Science 121.

during the 20s, meaning that some young adults may not be psychosocially mature. However, psychosocial maturity can, and in my view does, serve as the basis for a normative distinction between an 'adolescent' and an 'adult' when it comes to decision-making. A person who is not psychosocially mature is constrained in her capacity to appropriately weigh risk and reward and to make decisions in her long-term interest, and therefore cannot make mature or 'adult' decisions. This means that, as concerns decision-making, a person would be a normative adult if she is psychosocially mature, and a normative adolescent if she is not, notwithstanding chronological age and legal status. It is this critically normative categorical distinction between adolescents and adults that I deploy in Chapter 6.III.

B. Pathogenic and Situational Vulnerabilities: Constraints on Autonomy

Inherent vulnerabilities may be reduced by structures of support which serve as a safety net, but in some instances, structures and institutions meant for care, support and protection can themselves become sites of vulnerability. In talking about the normative differences between 'childhood' and 'adulthood', Giesinger argues that the structures and relationships of care meant to fulfil the needs that children are not able to meet themselves, make them pathogenically vulnerable within those relationships. Because children are unable to meet these needs themselves, it is significantly more difficult for them to escape or walk away from these relationships than it would be for someone with the resources and the ability to meet their own needs.[68] In acknowledging that older children, or adolescents, may be capable of exercising autonomy in specific circumstances, and in that sense, may be allowed sites of 'local' autonomy while still remaining within the special status of 'childhood', Giesinger appears to include adolescents within this understanding of childhood.[69]

At least when it comes to adolescents in India, structures and institutions of care such as the family, community and other relationships of trust and authority, are important sites of pathogenic vulnerability. This is because, as I argued in Chapter 4, even when adolescents from the lower socio-economic strata of society work and make money, they do not thereby become critically normative (or even socio-normative) adults. Adolescents across the socio-economic spectrum in India continue to be dependent on structures of family and community to meet their basic material and non-material needs,[70] even though the degree of their dependence is

[68] Johannes Giesinger, 'Vulnerability and Autonomy- Children and Adults' (2019) 13(3) Ethics and Social Welfare 216, 221.
[69] ibid, 223.
[70] The meaning of material and non-material needs and the role they play in explaining vulnerability is clarified in Chapter 6.

less than that of pre-pubertal children, and reduces over time even within the life-stage of adolescence. Indian adolescents (and even adults) remain embedded within the family and kinship structure which is hierarchical and built upon obedience and integration, rather than individualism and independence. Obedience is similarly expected in other hierarchical relationships with authority figures, such as with teachers, employers and other adults or even older adolescents. This means that Indian adolescents tend to be extremely pathogenically vulnerable, with the adolescent girl probably most vulnerable because of the low status of her sex in the hierarchical scheme of society.[71] Though adults may also experience pathogenic vulnerability, the extent of vulnerability would depend on their ability to survive and sustain themselves meaningfully, that is to have their material and non-material needs met, outside these relationships. The expectations of obedience and deference towards elders and authority figures, though still applicable to adults, is likely to be lower than what is expected of adolescents, especially as adults ascend the social hierarchy and become authority figures themselves.

In the context of sexual exploitation, the pathogenic vulnerability of adolescents within relationships of care and trust, which bring dependence and hierarchical authority with them, is a relevant factor. It constrains their autonomy, though not their capacity, to make decisions by making it difficult to walk away from or escape the relationship within which their material or non-material needs are being met. This is because, for person whose needs are being met within such a relationship, the option to do without the relationship either does not exist or is too undesirable to contemplate. Accordingly, it would be difficult for an adolescent to refuse consent out of deference and an ingrained sense of obedience to authority. Similarly, an adolescent might be unable to disclose ongoing sexual exploitation because of her dependency and the overarching cultural imperative to find her place within these structures of the family and larger community instead of breaking away from them.

Situational vulnerability includes conditions such as precarious living, being lost, suffering a natural disaster or some form of displacement, being in a war situation, having unmet basic needs of food, water, protective clothing or shelter, medicines and/or urgent health care and precarious employment, among others. Whether these conditions relate to the adolescent or to a person for whom they care and/or feel responsible, situational vulnerability can make the

[71] Khanna and Kakoty argue that this vulnerability may be intensified by socio-economic marginalisation. 'The Last Girl is the most vulnerable of all human beings that we know. She is a poor, female, a low-caste teenager.' Tinku Khanna and Juanita Kakoty, 'Linking Child Marriage and Prostitution' in Samita Sen and Anindita Ghosh (eds.) *Love, Labour and Law: Early and Child Marriage in India* (Sage, 2021) 203, 210.

adolescent vulnerable to being taken advantage of. This is because situational vulnerabilities act as a constraint on the autonomy of the adolescent. They reduce the range of options available to the adolescent and can render her desperate or needy enough to make a choice that she would not have made but for her situational vulnerability.

Inherent, pathogenic and situational vulnerabilities should not be considered independent variables, but layers of capacity and autonomy constraints that operate on adolescents. For instance, normative adolescents may overestimate the perceived benefit of consenting to their own sexual exploitation because of a combination of internal constraints on their capacity and external constraints on their autonomy. Diminished capacity to weigh risk against perceived benefit, or the inability to avoid harmful or dangerous behaviour despite understanding the consequences in view of perceived reward (inherent vulnerability), can work in tandem with situational and/or pathogenic vulnerabilities to make a proposal involving the adolescent's sexual exploitation seem like a good deal, even when it is not. Gladman and Heal's research with young survivors of sexual exploitation in the UK shows that adolescents' perceptions may sometimes be so distorted by the failure of the structures of care in their lives that sexual exploitation may appear to them neither costly nor wrong. For instance, Chloe (one of the survivors interviewed by the authors), who grew up being abused by her father and his friends, viewed the exchange of cigarettes for sex as obtaining something 'for free'. Sexual abuse was such a normalised part of her life, the authors comment, that getting something for it was viewed by Chloe as a bonus.[72]

The effect of situational vulnerabilities may be aggravated or mitigated by other factors. One factor likely to aggravate the effect of situational vulnerabilities on adolescents is that adolescents are also at a disadvantage, compared to adults, in their capacity to cope with negative life events. By this I mean that a combination of limited life experience, their material and developmental circumstances as adolescents (limited earning potential, relatively lower educational or skill certification, etc.) mean that, almost universally, adolescents are likely to be worse affected by negative life events than are adults who face the same consequences.

The ability to adapt positively to significant adversity is referred to in the literature as 'resilience'. It is beyond the scope of this thesis to consider the different ways in which resilience can be and has been measured,[73] as well as the exact role it plays (that is, whether

[72] Gladman and Heal, *Child Sexual Exploitation After Rotherham* (Introduction, n 7) 75-76.
[73] See, Suniya S. Luthar, 'The Construct of Resilience: A Critical Evaluation and Guidelines for Future Work' (2000) 71(3) Child Development 543.

resilience is compensatory or protective).[74] My interest in resilience is limited to the evidence on the correlation, if any, between age and resilience. Intuitively, since life experience (and with it, practice of coping with adversity) and external capabilities such as earning capacity increase with age, adults should also be more capable than adolescents of dealing with unfavourable consequences or other negative life events. Evidence of qualitative studies suggests that within similar cohorts of subjects, older subjects seemed to have greater resilience than younger ones. A study of resilience amongst 269 survivors of child sexual abuse, between 10 and 18 years of age, selected from 13 government-funded institutional care facilities in the southern state of Kerala in India found that older subjects were more resilient than younger ones, with the greatest difference existing between residents aged between 10 and 12, on the one hand and between 16 and 18, on the other.[75] Similarly, a self-reported survey-based study of 382 students in higher education in Portugal which measured qualities such as perseverance, life purpose, serenity, self-sufficiency and self-confidence in the face of negative life events such as physical or sexual abuse, physical or psychological negligence, health problems, and dysfunctional family environment among others, found that older students had significantly higher levels of resilience compared to younger students, especially when it came to perseverance and total, or overall, resilience.[76] As concerns comparative resilience of adolescents and adults, a comprehensive study of 377 South African girls and women between the ages of 15 and 24 specifically compared resilience between adolescents and adults using a 10-point resilience scale found to be well-suited to the South African population. A round of survey-based analysis was followed up with qualitative interviews. The study found that adolescent girls (aged 15-17) considered themselves less resilient than older women (aged 18-24). The participants themselves conceptualised resilience as something that developed over time with experiences of adversity, as well as enhanced capabilities, for instance, through education.[77] Thus, it appears that there is an inherent, age-related quality to resilience, so that

[74] David M. Fergusson and L. John Horwood, 'Resilience to Childhood Adversity: Results of a 21-Year Study' in Suniya S. Luthar (ed.) *Resilience and Vulnerability: Adaptation in the Context of Childhood Adversities* (CUP, 2012) 130, 146.
[75] Tissy Mariam Thomas and others, 'Predictors of Resilience Among Survivors of Child Sexual Abuse in Institutional Care in Kerala, India' (2022) 18(1) Journal of Indian Association for Child and Adolescent Mental Health 54, 58.
[76] Amadeu Matos Gonçalves and others, 'Negative Life Events and Resilience in Higher Education Students' (2017) 19 The European Journal of Social and Behavioural Sciences 2381, 2387.
[77] Ashleigh LoVette and others, 'From Resilient Girls to (more) Resilient Women: A Mixed-Methods Study Examining Narratives of Resilience among South African Young Women' (2023) 18(2) Vulnerable Children and Youth Studies 218, 222.

older people are overwhelmingly likely to be more resilient than similarly placed younger people.

In arguing that the capacity of adolescents to cope with negative life events is lower than that of adults, it is not my intention to trivialise the efforts of adolescents in dealing with difficult circumstances or to cast them as helpless or lacking agency in such situations. In some instances, adolescents who have experienced constrained circumstances early in life are likely to be better at navigating those circumstances than adults who encounter such experiences only later in life. In the context of medical decision-making, Alderson argues, based on her research with young children with experience of chronic diseases or embodied conditions (such as skeletal disorders), that children show high levels of maturity in dealing with those conditions, and may even be better equipped than adults without such experience in making informed, rational decisions in such situations.[78] Similarly, Shah, Mullainathan and Shafir demonstrate that resource scarcity creates a change of mindset,[79] leading to more consistent and internally generated framing of value. Therefore, experience of resource scarcity allows more rational economic decision-making, notwithstanding external conditions. In other words, experience of resource scarcity makes people focus on trade-offs and evaluate a deal based solely on the balance of cost and benefit, while ignoring other (economically irrelevant) stimuli.[80] Thus, it is possible to argue that specific experience of certain circumstances may equip a person to better deal with such circumstances (their age notwithstanding), and in that sense, serve as a mitigating factor against the situational vulnerability created by those circumstances. I return to these points in Chapter 4.III.

Nevertheless, accounts of people (whatever their age or moral/legal status) performing hazardous and degrading forms of labour should not become a basis for accepting as normative, or valorising, the hard choices that they must make. The agency exercised by persons in such constrained circumstances provides a nuanced view of their actions, and is therefore valuable. But it should not cause us to lose sight of the limitations of this agency, especially as compared to choices which are not constrained by poverty or other situational vulnerabilities. That is,

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[78] See, Priscilla Alderson, *Children's Consent to Surgery* (Open University Press, 1993); Priscilla Alderson, 'Competent Children? Minors' Consent to Healthcare Treatment and Research' (2007) 65 Social Science and Medicine 2272; Priscilla Alderson, Katy Sutcliffe and Katherine Curtis, 'Children's Competence to Consent to Medical Treatment' (2006) 36(6) The Hastings Centre Report 25.

[79] See, Anuj K. Shah, Sendhil Mullainathan and Eldar Shafir, 'Some Consequences of Having Too Little' (2012) 338 Science 682.

[80] Anuj K. Shah, Eldar Shafir, and Sendhil Mullainathan, 'Scarcity Frames Value' (2015) 26(4) Psychological Science 402, 410.

simply because there are children and adolescents who have few better options than performing such labour, who believe (and sometimes rightly so) that it might be the easiest way for them to earn money or fulfil their family obligations,[81] or who accept such work and circumstances as their lot in life,[82] does not mean that it should be normatively acceptable for them to do so. Without undervaluing the resilience demonstrated by adolescents who find ways to survive the difficult circumstances in which they find themselves, it is important to recognise that the fact that people, and especially children and adolescents, must make such choices to survive is tragic. Therefore, it behoves us to be circumspect in evaluating whether, and to what extent, the choices made by adolescents in constrained circumstances reflect their agency and autonomy.

Conclusion

This chapter provided an overview of the competence of adolescents to make decisions as well as the vulnerabilities that constrain the capacity and autonomy of adolescents to make decisions, and render them vulnerable to being taken advantage of.

In the first part of the chapter, I considered what elements constitute the competence to make sexual decisions, and how far, based on evidence on adolescent development, adolescents seem to possess the necessary capacities to make their own sexual decisions. I argued that the development of self-concept, including sexual self-concept, during adolescence creates the possibility of positive sexual autonomy, even though an adolescent's sexual self-concept is by no means unchanging or entirely stable. Evidence on adolescent decision-making indicates that when it comes to capacities which inform decision-making, such as rationality, cognition and information-processing, older adolescents have been found to be indistinguishable from adults. This means that adolescents have the underlying capacities necessary for the moral capacity to consent. However, this evidence does not explain our ordinary intuition, that adolescents make risky, poorly thought-out decisions that do not appear to be good for them. This is because it does not account for psychosocial conditions of decision-making.

[81] Heather Montgomery, 'Working with Child Prostitution in Thailand: Problems of Practice and Interpretation' (2007) 14(1) Childhood 415. The author describes how child prostitutes did not feel the shame usually associated with bodily professions, but instead saw prostitution as a means to an end, as the way for them to fulfil their filial obligations and be good sons and daughters. The children, their peers and even parents, tended to underestimate or laugh off the physical repercussions of prostitution, such as vaginal or anal tears and bleeding, and did not believe that any lasting psychological damage could be done in activities that took 'only one hour'.

[82] Kate Brown, *Vulnerability and Young People Care and Social Control in Policy and Practice* (Bristol University Press, 2022) 135. '...the young people instead saw their social worlds as mundane and everyday'.

The second part of the chapter turned to the vulnerabilities of adolescents, using a layered framework of inherent, pathogenic and situational vulnerability. Evidence indicates that adolescents are less mature than adults when it comes to psychosocial factors such as appropriate evaluation of reward, accurate weighing of risk against reward, correct understanding of the likelihood of actually facing an undesirable consequence and cognitive control. When it comes to decision-making, a person cannot be considered a normative adult until she is psychosocially mature, and therefore persons who are not psychosocially mature are normative adolescents. Normative adolescents are inherently vulnerable to being taken advantage of because of their lack of psychosocial maturity. This inherent vulnerability acts as a constraint on the decision-making capacity of normative adolescents. Adolescents, especially in India, are also pathogenically vulnerable. Structures and institutions of care tend to become sites in which they are vulnerable to being take advantage of due to their continued dependence on their families and communities, and because of the expectation of obedience and deference to authority with which they are brought up. This means that adolescents are unable to walk away from, and refuse consent within, these relationships, which also constrains their autonomy to make decisions. Finally, adolescents may face situational vulnerabilities, such as poverty, natural disasters, medical emergencies, war and other similar conditions which make them amenable to choices which, but for their vulnerability, would not have been acceptable to them. Situational vulnerabilities also constrain the autonomy of adolescents to make decisions. While situational and pathogenic vulnerabilities may also constrain the autonomy of normative adults, inherent vulnerability (being linked to psychosocial maturity) applies only to normative adolescents.

The effect of such vulnerabilities on adolescents may be aggravated by relatively lower capacity for resilience (which is the ability to respond constructively to negative life events) is compared to adults. The experience of navigating constrained circumstances may, on the flip side, have a mitigating effect on situational vulnerability by equipping adolescents to better respond to those circumstances. Thus, it is important to recognise the agency exercised by those, including adolescents, who find themselves in difficult circumstances. But this should not make us blind to the fact that the choices made in constrained circumstances (especially by normative adolescents) are a lot less ‘free’ than those exercised in less constrained circumstances, and must be evaluated in light of the inherent vulnerabilities of normative adolescents.

This discussion of the decision-making capacities of adolescents and the layered vulnerabilities they face serve as a foundation for establishing in Chapter 6 whether, and to what extent, normative adolescents' consent to sexual interactions may be morally decisive.

CHAPTER 6: ADOLESCENT CONSENT TO SEXUAL ACTIVITY AND THE MORAL WRONGFULNESS OF SEXUAL EXPLOITATION

Introduction

Chapter 5 considered the competence of adolescents to make sexual decisions, and their capacities and vulnerabilities in that regard. I argued that the categorical critically normative distinction between adults and adolescents, as regards decision-making, is the attainment of psychosocial maturity. Based on this distinction, I generally use the terms 'adolescent' and 'adult' in this chapter to refer to the critically normative categories, distinguished by psychosocial maturity. When referring to the life-stages represented by the terms, I specify the distinct meaning.

I argue in Part I of this chapter that, sexual activity per se, without additional factors such as coercion, deception, or exploitation, should not be considered wrongful merely because of its potentially harmful consequences. Adolescents' consent to such non-wrongful sexual activity[1] should, to the extent that they have the competence to consent to it, be considered morally meaningful.

In Part II, I argue that sexual exploitation is the use of B's sexual labour by A in exchange for some benefit to B. This use is pro-tanto wrongful[2] when and because (i) A plays for advantage against B's vulnerabilities and (ii) A fails to treat B with the respect due to her as a human being by having her perform degrading sexual labour. The degrading nature of the sexual labour performed by B draws from two factors. First, that sexual labour (by any gender) is viewed as dirty work and that sex in patriarchy, especially India's caste-based patriarchy, always carries the possibility of degradation because of its widespread association with, and use for, the instrumentalisation and subordination of women. Second, that the sexual acts involved in sexual exploitation are unwanted as sex, but consented to because of B's

[1] As I mentioned in the Introduction to this thesis, I use this term to mean sexual conduct that is not potentially wrongful by virtue of being coercive, deceptive or exploitative (Introduction, n 6).

[2] I use this term to refer to wrongfulness which does not disappear in the face of a justification, even if reasons not to perform the pro-tanto wrongful act are defeated by the said justification. In other words, an act that is pro-tanto wrongful continues to be wrongful despite it being justified on an all-things-considered account. John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP, 2007) 145; Kate Greasley, 'Sex, Reasons, Pro Tanto Wronging, and the Structure of Rape Liability' (2021) 15 Criminal Law and Philosophy 159, 160-61.
Some authors, such as Dempsey and Herring (n 10), use the term '*prima facie* wrong' to refer to conduct that I call pro-tanto wrong. However, I use the term pro-tanto wrong to avoid ambiguity since, as Greasley explains, *prima facie* wrong is sometimes understood to mean wrongfulness which, 'on closer inspection, turns out to be illusory'.

vulnerabilities. The advantage of this theory is that it applies to instances of commercial sexual exploitation as well as to sexual exploitation within the family or in intimate relationships where a commercial transaction may be neither obvious nor necessarily significant.

Finally, in Part III, I consider the moral effect of consent on the pro-tanto wrongfulness of sexual exploitation. I argue that adults can license or permit their own sexual exploitation, though reasons against engaging in sexual exploitation continue to apply to potential exploiters. The consent of adolescents to sexual exploitation, however, cannot be morally decisive to its permissibility. This is because even those adolescents who have the necessary underlying cognitive capacities for the moral capacity to consent to non-wrongful sexual acts are not yet psychosocially mature. This implies that they do not have the ability to (among other things) appropriately weigh the perceived benefit against the potential risks or negative consequences of the exchange of degrading and unwanted sexual acts for some perceived benefit proposed by the exploiter. The sexual exploitation of adolescents is, therefore, all-things-considered wrong.[3]

I. Adolescent Consent to Sexual Activity

In this section, I consider the normative validity of adolescents' consent to non-wrongful sexual activity, that is, sexual activity which is not potentially wrongful by virtue of being coercive, deceptive or exploitative. It is possible to argue that some forms of sexual conduct may be wrongful because of the high likelihood of injury built into them, for instance, sado-masochistic acts like fisting, or the use of sharp objects or of fire, or practices such as asphyxiation. I cannot answer this question meaningfully within the scope of this thesis. All I can say is that whether or not a person's consent to a particular kind of sexual act is meaningful should depend on her capacity to consent to it. In terms of the criterion laid out in Chapter 5.I.A, a person can be said to have the capacity to consent to a particular sexual act only if she understands: (a) the nature and mechanics of the act, (b) the ordinary physical, biological and social consequences of the act, and (c) that she has the right to refuse to perform a particular sexual act or engage in any sexual interaction with a particular person. Whether a person's consent to a potentially injurious sexual act is valid can be measured against this criterion.

In section A, I argue against Indian socio-normative standards of distinguishing adolescents from adults as well as of determining the permissibility of sexual interactions. I argue, instead,

[3] The wrongfulness of exploitation, as I argue in Part III.B, is distinct from the wrongfulness of rape. A sexual interaction would qualify as rape due to lack of capacity only if the lack of capacity pertains to the sexual acts to be performed.

for the use of critical morality in making both these determinations. Based on this argument, I explain why the categorical critically normative distinction between adolescents and adults ought to be based on psychosocial maturity, rather than the propriety of marriage and reproduction, and why the validity of adolescents' consent ought to be contingent on their competence to make sexual decisions. In section B, I argue that sexual activity per se should not be considered wrongful, notwithstanding its potentially harmful consequences and, with reference to the discussions in Chapter 5.I.A.2, I explain why adolescent consent to such non-wrongful sexual activity ought to be morally decisive in determining its permissibility.

A. Competence as the Basis for Assessing the Validity of Adolescent Consent

In Chapter 4, I demonstrated that the socio-normative distinction between adolescents and adults in India is that marriage, as well as sexuality and reproduction within marriage, is considered socially appropriate for adults, but not for adolescents. I also established that while the sexuality of adolescents is socially acknowledged, this does not imply a recognition of the competence of adolescents to make sexual decisions. This is because such competence is not relevant within the Indian social understanding of sex, where permissibility depends on the legitimacy granted through marriage, especially hegemonised (compliant with the norms of caste and honour or at least approved by the family, see Chapters 2 and 3) marriage, rather than on consent. This understanding of adulthood and of the permissibility of sex represents what Indian courts of law have referred to as public or majoritarian morality.[4] Public or majoritarian morality is similar to Devlin's 'positive morality'[5] in the sense that it draws from widely accepted social norms. However, it has never been suggested that to qualify as public morality, the norms must be so vital that society would disintegrate without them, and therefore, the standard of what qualifies as public morality seems to be less rigorous than positive morality.[6] In any case, as I argued in Chapter 4.III, the social norm that sexual activity is only permissible within marriage is not universally accepted even within Indian society, since adolescent sexual activity (though seemingly less prevalent than in the West) represents a counter-majoritarian morality. In Chapter 7, I argue that this public morality contradicts the values of the Indian Constitution, especially as they have recently been interpreted by the Supreme Court of India.

[4] Discussed in detail in Chapter 7.I.
[5] Devlin's conception of morality was called 'positive morality' by Hart. Hart, *Liberty, Law and Morality* (Introduction, n 16) 17-20.
[6] Patrick Devlin, *The Enforcement of Morals* (OUP, 1965) 13.

In this chapter, I argue that it is also in conflict with critical morality, and therefore, inappropriate.

According to Hart, critical morality refers to values which society (and law) *ought to* hold and protect, and which can be used in the criticism of the existing norms of society.[7] In other words, critical morality refers to core values and norms that ought to apply universally, with which all persons are obligated to comply and violations of which merit moral condemnation.[8] Norms which determine the permissibility of sexual conduct based on the legitimacy granted by marriage conflict with critical morality because, as I argued in Chapter 2, they serve the interests of caste-based patriarchy in controlling the sexual and reproductive capacities of females and maintaining caste-purity through endogamy, rather than the interests of Indian girls and women in individual freedom, self-governance, and equality. These norms, therefore, are inappropriate for a moral assessment of the permissibility of sexual conduct.

It is neither possible nor necessary, given the scope of this thesis, to engage with or resolve the debates in the literature on what makes sexual conduct (im)permissible in general terms. As I discussed in Chapter 3.I, unlike sexual offences against legal adults, sexual offences against minors in India criminalise the very act of having a sexual interaction with a minor. So, POCSO and the IPC (as it relates to minors) lay down strict liability offences. It is plausible that, like most statutory sex offences,[9] the rationale of strict liability, statutory sex offences under POCSO and the IPC is the presumptive incapacity of all minors to give sexual consent. As I argue in Chapter 7, moreover, the Supreme Court of India has held that the legal (im)permissibility of sexual interactions *ought to be* determined by the presence or absence of (valid) consent, rather than by any other consideration. Therefore, I make consent, and the capacity to give morally meaningful consent, the focus of my discussion of the moral permissibility of sexual conduct. The moral capacity to consent to non-wrongful sexual activity is rooted, as I argued in chapter 5.I.A, in underlying cognitive and rational decision-making capacities, and *not* in psychosocial maturity. Therefore, I argue in the next section that adolescents need not be psychosocially mature to validly consent to such non-wrongful sexual activity.

[7] Herbert Lionel Adolphus Hart, *The Concept of Law* (3rd edn, OUP, 2012) 183; Hart, *Liberty, Law and Morality* (Introduction, n 16), 19-20.
[8] Igor Primoratz, 'Sexual Morality: Is Consent Enough?' (2001) 4(3) Cultivating Emotions 201, 214.
[9] Green, *Criminalizing Sex: A Unified Liberal Theory* (Chapter 3, n 43), 155.

This does not mean that psychosocial maturity is irrelevant to decision-making competence. As I argued in Chapter 5.II.A, adolescents' lack of psychosocial maturity implies that they are unable to appropriately assess the value of a perceived benefit, to weigh perceived benefits against likely adverse consequences or risks, to delay gratification and to avoid losses while pursuing benefits. In short, lack of psychosocial maturity constrains the capacity of adolescents to make decisions in their long-term interest. The socio-normativity of marriage and reproduction, however, tell us little about decision-making capacities, especially given that (as I argued in Chapter 4), marriage-related decisions, including when and whom to marry, are frequently made by family and community elders in India. Thus, the categorical critically normative distinction between adolescents and adults should not be based on the socio-normativity of marriage and reproduction during their life-stage, but on their psychosocial maturity. This means, as I argued in Chapter 5.II.A, that a person who is psychosocially mature would, in terms of decision-making competence, be a normative adult, and a person who is not yet psychosocially mature would be a normative adolescent, notwithstanding her chronological age.

In the next section, I explain why sexual activity per se (which is not potentially wrongful by virtue of being coercive, deceptive or exploitative) should not be considered wrongful, merely because certain harmful consequences may follow from it. Relying on the discussions in Chapter 5.I.A, I then argue that since the competence to make decisions about such non-wrongful sexual activity does not depend on psychosocial maturity, but on other capacities, anyone (including an adolescent) who has those capacities can meaningfully consent to non-wrongful sexual activity.

B. Adolescent Consent to Non-Wrongful Sexual Activity

Dempsey and Herring propose the unorthodox view that the penetration of a woman's vagina or anus by a man's penis is *prima facie* wrong, and consent to such sexual acts is a justification for doing what is *prima facie* wrong.[10] Their argument is two-pronged. First, that such sexual penetration carries the risk of non-trivial physical harm, through the 'force' required for penetration as well as the possibility of harmful consequences like STIs or pregnancy. It also carries the risk of psychological harm to women because of pervasive rape culture. Second,

[10] Michelle Madden Dempsey and Jonathan Herring, 'Why Penetration Requires Justification' (2007) 27(3) Oxford Journal of Legal Studies 467. For a similar argument, see Jesse Wall, 'Justifying and Excusing Sex' (2019) 13(2) Criminal Law and Philosophy 283.

that these forms of penetrative sex are *prima facie* wrong because they carry a negative social meaning.

The second argument is partly valid. I too consider the role of social meaning in the pro-tanto wrongfulness of sexual exploitation (see Part II). Dempsey and Herring's claim, however, seems unclear. One may ask, why are only vaginal and anal penetration by the penis considered *prima facie* wrong when negative social meaning extends also to other forms of sexual contact? As I argue in Part II of this chapter, in the Indian context, any sexual activity (whether penile penetrative or not) may carry a negative social meaning. Even in the Anglo-American context to which Dempsey and Herring restrict their argument, the penetration of a woman's mouth by a man's penis, and even certain kinds of sexual touching may arguably carry the same kind of negative social meaning. Surely, when Donald Trump said '[y]ou can do anything…grab 'em by the pussy',[11] it conveyed as much objectification and patriarchal domination of women as when someone uses 'screwed' to convey both having penetrative sex and being tricked or harmed in some way. As for the first argument, it seems disingenuous to say that 'force' is used to penetrate a woman's vagina or anus. In a purely physical sense, some force is necessary to manipulate a woman's internal musculature to achieve penetration of the vagina or anus, but it is not clear why *that* makes the act wrong in a morally relevant way. Force may similarly be used when someone digitally penetrates another person's vagina or anus, or even when two people kiss. But Dempsey and Herring do not claim that these acts are also *prima facie* wrong. Furthermore, it seems a mistake to equate the possibility of consequences such as unwanted pregnancy and STIs, which are indeed harms, with the nature of the act itself. In other words, that some harmful consequences *may* result from an act is insufficient to characterise the act itself as wrong. As Greasley rightly argues, these potential harms may constitute reasons weighing against these acts (rational remainders), but they do not make the acts wrong in the sense that there is a general duty to avoid them (moral remainders).[12] Therefore, I am unconvinced that sexual acts, themselves, are *prima facie* wrong or that consent is therefore required *as a justification*.

The 'orthodox' view, that the lack of consent is constitutive of most sexual offences, and that consensual sex is *generally* morally neutral, seems more convincing. According to this view, as against acts (such as punching someone) which are pro-tanto wrong, there are no general

[11] 'Transcript: Donald Trump's Taped Comments About Women' *New York Times* (New York, 8 October 2016) <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html> accessed 13 May 2024.
[12] Greasley, 'Sex, Reasons, Pro Tanto Wronging, and the Structure of Rape Liability' (n 2), 165-70.

reasons or duties (as between the parties) not to engage in consensual sexual interaction, nor are there reasons that need to be set aside or justified through consent.[13] Therefore, though consent does not make sex morally good or ideal, and there may be factors other than consent that are sometimes relevant to the complete moral picture of a sexual interaction,[14] meaningful consent is definitive of morally permissible sex. Consensual sex, therefore, is not even pro-tanto morally wrong.

It is to this non-wrongful sexual activity that I argue the consent of normative adolescents, who are not yet psychosocially mature, may be morally meaningful. This is because a person who is not yet psychosocially mature may nevertheless have the competence to make sexual decisions. As I argued in Chapter 5.I.A, to have the competence to make sexual decisions, a person must have: (a) a sexual self-concept, which forms the basis of normative sexual autonomy and (b) the moral capacity to consent to sex. The latter, in turn, requires a person to be aware of, and capable of understanding: (i) the nature and mechanics of the act in which she seeks to engage, (ii) the most likely physical, biological, and social consequences of engaging in that act, and (iii) that she has the right to refuse an unwanted sexual interaction. These capacities depend on cognitive abilities, that is, a person's ability to receive, understand and process information to make rational decisions. They do not depend on psychosocial maturity. To understand why, consider what psychosocial maturity implies. A psychosocially mature person has abilities such as correctly valuing a perceived benefit and appropriately weighing perceived benefit against adverse consequences or risks, avoiding risks while pursuing reward, delaying gratification, and so on. As I argue in Part III, these abilities are essential to a person's capacity to consent to the exchange proposed by a potential sexual exploiter, since consenting to this exchange requires an active weighing of the perceived benefit of the proposed exploitative interaction against its likely adverse consequences. These abilities are *not*, however, essential to the capacity to consent to non-wrongful (especially non-exploitative) sexual interactions because, as I argued in Chapter 5.I.A, decisions regarding non-wrongful sexual acts (in contrast to decisions regarding exploitative sexual interactions) do not ordinarily involve an active weighing of benefits against risks.[15] Rather, they require only the ability to

[13] Victor Tadros, *Criminal Responsibility* (OUP, 2005) 106.

[14] Radical feminists have objected to the centralisation of consent in understanding the wrong of sexual violation because it does not give sufficient weight to the unequal conditions of male domination and female subordination in patriarchy. In these conditions, women's consent to sex is not necessarily or always as transformative as it is made out to be. See, Catherine A. Mackinnon, *Toward a Feminist Theory of State* (Harvard University Press, 1989) 113; Andrea Dworkin, *Intercourse* (Basic Books, 2006) 163-164.

[15] This is not to say that the underdevelopment of certain abilities of which psychosocial maturity is comprised may not affect the *quality* of the decision an adolescent makes about non-wrongful sexual interactions as well.

understand that the negative consequences possibility attendant on a particular sexual act may be a reason to say no to that act.[16] Therefore, cognitive capacities, and not psychosocial maturity are relevant to the competence to consent to non-wrongful sexual activity, and anyone who has these capacities, an adolescent included, should be able to consent meaningfully to non-wrongful sexual activity.[17]

Before turning to the requirements and implications of morally meaningful consent (or lack thereof) to *sexual exploitation*, I set out my reasons for characterising sexual exploitation as pro-tanto wrongful sexual conduct. In Part II, I argue that sexual exploitation is essentially a form of sexual labour which involves the exchange of sexual acts for some perceived benefit to the exploitee. It is wrong because the exploiter breaches two duties: (a) the duty not to take advantage of another in situations where it would be wrong to do so and (b) the duty to treat others with the respect due to them as human beings, which implies a duty not to degrade them.

II. Sexual Exploitation

Sexual exploitation is comprised of the exchange or sale of sexual services or labour. **It is pro-tanto wrongful sexual conduct characterised by A (the exploiter) taking advantage of B (the exploitee)'s vulnerability to induce B to perform sexual labour that degrades B in exchange for some perceived benefit**.

The wrong-making factor of exploitation draws, as Goodin argues,[18] from the duty of A not to take advantage of another in a situation where he should not (in this case, a situation in which B would be degraded), and, as Sample argues,[19] the duty of A to treat others with the respect they deserve as human beings, which implies a duty not to degrade them. I argue that the reason why such conduct degrades B is because at one level, the performance of sexual labour (i.e.,

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For instance, the inability to delay gratification may lead to *hasty* decisions about sex. However, this does not make the adolescent *incapable* of consenting to a non-wrongful sexual interaction. By contrast, the inability to correctly value reward, to appropriately weigh adverse consequences against perceived benefit and to avoid losses while pursuing a risky option, goes to the heart of the decision on sexual exploitation, since this decision directly engages these abilities in requiring the decision-maker to actively weigh the perceived benefit of being sexually exploited against engaging in degrading and unwanted sex.

[16] An additional, pragmatic, reason in favour of keeping the standard for the moral (and legal) capacity to consent at a basic minimum standard, as I argued in Chapter 5.I.A is to reduce the scope for unjustified interference with a person's sexual choices, which is a particularly important consideration in the Indian context where the family, caste-community (enabled by the state) have an interest in controlling the sexual choices of females.

[17] In Chapter 5.I.B, I argued that persons in the life-stage of adolescence generally have an emergent sexual self-concept and older persons in this life stage (16 to 18-year-olds) also have the underlying cognitive and rational decision-making capacities to enable them to have the moral capacity to consent to sex on par with persons in the life-stage of adulthood.

[18] Robert E. Goodin, 'Exploiting a Situation and Exploiting a Person' in Andrew Reeve (ed.), *Modern Theories of Exploitation* (Sage, 1987) 166, 185-188.

[19] Ruth Sample, *Exploitation: What it is and Why it's Wrong* (Rowman and Little, 2003) 56-96.

sex as labour) by any gender is considered 'dirty work', which is stigmatising. At another level, exploitative sex is degrading because, for women, sex itself is always laden with the possibility of degradation in India's caste-based patriarchy where it is associated with, and used for, the instrumentalisation and subordination of women. This does not mean that sex necessarily or always degrades a person. A person is degraded only when she (a) performs unwanted sex as work, or (b) consents to an unwanted sexual interaction, because of her vulnerabilities, given the social context described above. With the essentials of my proposal in place, sections A and B further unpack its elements.

A. Sexual Exploitation as Exploitative Labour

My first argument is that instances of sexual exploitation are essentially instances where B performs sexual acts *as labour* for A, or where A uses B's sexual services in exchange for some perceived benefit on the part of B. This may also take the form of cases where A's use of B's sexual services is facilitated by C for some benefit on the part of both C and B. But the wrongness of sexual exploitation is not explained by the very fact that sex is exchanged for something, or that it is *sex* that is exchanged. As I argue in this section, sexual exploitation in the form of the sale of sexual services, which involves allowing others sexual access to and use of one's body, is not wrong in a way that is distinct from the exchange of other forms of degrading labour, solely by virtue of being sexual.

Pateman argues that a prostitute does not simply sell her sexual services, but in a very real sense, sells herself.[20] Sexuality, in her view, differs from other forms of labour because it embodies and expresses the self in a way that other forms of labour do not. Its commodification is, therefore, distinctly objectionable. This connection between sexuality and the self, moreover, means that a prostitute must distance herself from her self-use for her own protection. In that sense, prostitution is said to be uniquely alienating as well.[21] Nussbaum takes the opposite view. She locates these objections against the sale of sex or erotic displays of the female body for money in a historical discourse beset by irrationality: aristocratic class prejudice against earning wages, and anxiety surrounding the display of the body or of passions, especially by females.[22] This discourse has, at different times, prohibited or objected to activities which are now considered perfectly normal, such as opera singing or professional acting.[23] Since there is no

[20] Carole Pateman, *The Sexual Contract* (1st edn, Stanford University Press, 1988) 207.
[21] ibid, 203-07.
[22] Martha C. Nussbaum, 'Whether from Reason or Prejudice: Taking Money for Bodily Services' (1998) 27(2) The Journal of Legal Studies 693, 697.
[23] ibid, 699.

rational basis to this aristocratic prejudice, and since the anxiety surrounding the female body is sexist, Nussbaum argues that continuing to see the use of sexual labour as *uniquely* objectionable is problematic, and only furthers the control of female sexuality.[24]

But this does not completely answer Pateman's objection to the characterisation of prostitution as labour. The problematic historical associations of this objection do not mean that current objections are also similarly unreasonable or problematic. My opposition is not to Pateman's assertion that sexuality is self-expressive but to the claim that it is the only embodied capacity that is so. A person's capacity to dance, and to play sport, are also intrinsically connected to her body and to her human capacity (in that, presumably, dancing robots or androids skilled at cricket would not be literal substitutes for human dancers and cricketers even if they do serve as functional substitutes) and may certainly be avenues of self-expression. A related criticism of the commercial exchange of sex is that the dominance or control of the patron over its performance makes the performance clinical or mercenary rather than self-expressive. Moreover, the client values sex as a self-expressive act, and therefore, sex workers must feign self-expression under conditions of control. Gauthier rightly recognises the unfair and sexist bias inherent in this objection.[25] The detachment characterised above as being 'mercenary' is frequently required in a range of professions we might consider embodied and self-expressive, and which may in fact be considered the essence of professionalism. Feigning self-expression is also not unique to prostitution. It is emotional labour[26] that is central to several professions such as nursing, therapy, or being a flight attendant.

Another objection to characterising instances of sexual exploitation (such as prostitution) as sexual labour is that such a view commodifies a human capacity (sexuality) that ought not to be commodified. According to Sandel, monetisation of something that ought not to be monetised amounts to degradation because the monetised good is subjected to a lower mode of valuation than is appropriate to it.[27] In the case of sexual labour, however, it is not always clear that monetisation itself leads to degradation. The charge of degradation attaches to instances of prostitution, but not to marriage where the girl's family accepts a bride price. In India (and other parts of the subcontinent), payment of dowry by the family of the bride to the family of the groom is *never* seen as the sale of the groom or his sexual labour. In all these cases, payment

[24] ibid, 707-708.
[25] Jeffrey Gauthier, 'Prostitution, Sexual Autonomy and Sex Discrimination' (2011) 26(1) Hypatia 166, 171-172.
[26] Arlie R. Hochschild, *The Managed Heart: Commercialisation of Human Feeling* (3rd edn, University of California Press, 2012) Preface.
[27] Michael Sandel, *What Money Can't Buy: The Moral Limits of Market* (Allen Lane, 2012) 32.

of money is central to the arrangement in that the marriage would not take place without it. If the payment of money does not degrade marriage (which surely ought not to be monetised either) but only prostitution, it does not seem convincing that there is something inherently degrading about monetisation.

Another question that arises in considering the monetisation argument is, what is degraded? From Sandel's analysis, it appears that the good that is monetised, in this case sex that is sold and bought, is itself degraded in the sense that it is of a worse moral quality than sex that is not bought.[28] Even if this were true, why should *we* be concerned that a client is having 'degraded' sex? Surely, the quality of purchased sex vis-à-vis sex that is not purchased is relevant only to the people engaging in it. The other aspect of commodification arguments is that when goods that ought not to be commodified are commodified, those goods are distorted and devalued for all, and the non-monetised value of the good is crowded out for everyone.[29] In other words, allowing sex to be monetised would threaten the intimacy and love in other women's sexual relationships with men as well.[30] A similar, though more limited, argument is made by Radin. She argues that though there are good pragmatic reasons not to prohibit the commodification of sexuality in its current form (prostitution), if commodification is given free rein in the domain of sexuality, such commodification could infect the very discourse around sexuality so that all sexuality begins to be conceived as commodified. In particular, her concern is that market-specific behaviours such as advertisement of sexual services could potentially lead to a view of *all* sexuality (especially that of women, who most commonly sell sexual services) as fungible and render non-commodified sexuality impossible.[31] These claims are difficult, if not impossible, to verify and seem *prima facie* implausible. It is unclear why the way that some people choose to have sex, even if we don't think that is the best way, should impact how we experience it, or why seeing some people advertise their sexual services should make us see all sexuality as commodified, especially to an extent where we can no longer enjoy non-monetised sharing of sexual relations. In any case, as Radin herself notes, these objections assume that sexuality, in particular female sexuality, is not already commodified and objectified, an assumption that is challenged by feminists who see sexual relations in conditions of patriarchy as inherently unequal and frequently commodified.[32]

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[28] ibid, 78.
[29] Elizabeth S. Anderson, 'Is Women's Labour a Commodity?' 19(1) Philosophy and Public Affairs 71, 92.
[30] Elizabeth S. Anderson, *Value in Ethics and Economics* (Harvard University Press, 1993) 155.
[31] Margaret J. Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things* (Harvard University Press, 1996) 132-33.
[32] ibid, 133-34.

The validity of commodification claims has also been called into question by Panitch, whose contention that 'we commodify things all the time which do not thereby lose their non-instrumental value'[33] is convincing. Furthermore, as Panitch rightly argues, the corruption charge (in this form) is absolutist. It assumes that everyone who sells services that 'should not be monetised' shares this understanding of the service's nature or value, when that is not necessarily the case.[34] It also wrongly assumes, consequently, that the experiences of all those who commodify themselves or their services would be the same, or would be equally wrong, or even wrong in the same ways.[35]

The commodification argument is also concerned with the inequality perpetuated by monetisation, though this is usually secondary to the corruption argument discussed above. When previously non-monetised goods or services are monetised, the powers and privilege of the rich expand while increasing the burden on the poor and the marginalised to provide those goods and services.[36] This is an important objection, but it is misdirected. The problem of inequality and unequal burdens arises from the very existence of haves and have-nots, and of stratified societies. Thus, market values cause inequalities even when they are restricted to the market, which in turn indicates that the problem is not *caused* by the monetisation of previously non-monetised goods or services.

The next objection that needs examination is that the sale or exchange of sex is uniquely objectionable because it tends to be more dangerous or risky than other forms of labour. Nussbaum addresses this concern by comparing the dangers and risks in prostitution with those in other forms of labour that are *not* typically considered objectionable or harmful because of the risks inherent to them. These include providing domestic service, working at a massage parlour or as a plucker at a chicken factory, working as a colonoscopy artist (actors who serve as models for medical students to learn how to perform internal exams), among others. The risks and dangers faced by a prostitute overlap in significant ways with those that affect others who perform such bodily services: the invasion of privacy or bodily integrity, poor and/or irregular sources of income, the threat of violence, the threat of disease and low social status.[37] These comparisons further support the argument that there is nothing about the *sexual* nature

[33] Vida Panitch, 'Exploitation and Intimate Labour' in Monique Deveaux and Vida Panitch (eds.), *Exploitation: From Practice to Theory* (Rowman and Littlefield, 2017) 123.
[34] ibid, 121.
[35] ibid, 122; Rajeswari Sunder Rajan, *The Scandal of the State: Women, Law and Citizenship in Post-colonial India* (Duke University Press, 2003) 117, 138-142.
[36] Sandel (n 27), 11-12.
[37] Nussbaum (n 22), 701-707.

of sexual labour that causes risks or dangers which would make it uniquely objectionable. It is also not the very existence of risk or danger to which these objections tend, for several well-respected professions, such as the armed forces, police or fire-fighters, have a much higher risk of injury or death. In fact, it is often the bravery associated with taking on these risks that serves as a (though not the only) source of respect for these professions.

There is, however, one significant way in which prostitution and other exchanges of sexual labour differ from most other labour transactions: the special stigma attached to it,[38] and the significance of this stigmatising nature of sexual labour forms an important part of the discussion in the following section. However, this does not reduce the force of the argument made in this section. Instances of sexual exploitation are essentially instances of the performance of sexual acts as labour.[39] Sexual labour is not exploitative or wrong simply by virtue of being sexual. Even outside the organised setting of prostitution, instances of sexual exploitation are essentially instances of unwanted sexual labour being extracted from the vulnerable.

B. The Pro-tanto Wrongfulness of Sexual Exploitation

Before discussing what makes sexual exploitation pro-tanto wrongful, I deal with wrongs that are commonly attributed to sexual exploitation and explain why they do not adequately or accurately explain why sexual exploitation is pro-tanto wrong.

First, sexual exploitation is not pro-tanto wrong solely because sexual acts are performed for reasons other than sexual desire (that is, that they are performed for some benefit), although the unwantedness of exploitative sex qua sex is an important part of what makes it wrong. As Wertheimer says, there is no reason to believe that mutual sexual desire is morally *superior* to other motivations for sex.[40] Admittedly, this is an oversimplification in that, as Cahill rightly argues, giving weight to one's partner's sexual desires is essential to an ethical sexual interaction.[41] However, interactions which fail to do so are not sexually exploitative (although they may be morally wrong for other reasons). Thus, though an 'exchange' of a sexual interaction for something in return is essential to sexual exploitation, and is frequently its most

[38] ibid, 707.
[39] Through her fieldwork with sex workers in Kolkata (a city in eastern India) and Tirupathi (a city in Southern India), Kotiswaran demonstrates that sex-workers in India understand their own occupation as work/labour as well. Prabha Kotiswaran, '*Dangerous Sex, Invisible Labour: Sex Work and the Law in India* (Princeton University Press, 2011) 204.
[40] Alan Wertheimer, *Consent to Sexual Relations* (CUP, 2010) 137.
[41] Ann J. Cahill, 'Unjust Sex vs Rape' 31(4) Hypatia: A Journal of Feminist Philosophy 746, 750.

recognisable marker, it does not *explain why* sexual exploitation is wrong. An understanding of the wrongfulness of sexual exploitation that is based in exchange must necessarily rely on the 'unfairness' or 'non-standard terms' of the exchange. However, as I now demonstrate, such an understanding is both impractical and would lead to some counter-intuitive judgements.

Unfair distributional outcomes are an impractical metric to understand why sexual exploitation is pro-tanto wrong. This is because it isn't entirely clear on what basis we would consider a distributional outcome 'unfair' when a transaction appears mutually advantageous (in the sense that both parties are better off compared to a non-interaction baseline), especially when the weaker party may have a stronger interest in the transaction being concluded than the stronger party. Wertheimer argues that in a typical exploitative transaction, the exploitee *needs* the transaction a lot more than the exploiter. This is what makes her prone to exploitation. Her weaker bargaining position arises precisely from the great utility she would get from the transaction. From the *ex-ante* baseline of the exploitee, then, her gain is greater (sometimes significantly so) than that of the exploiter.[42]

Wertheimer himself identifies a distributive outcome as unfair, and a transaction as exploitative, when it does not align with a hypothetical market price.[43] Sample rightly criticises this account for failing to indicate why a non-standard exchange should be morally objectionable, why the fairness of the exchange should be based in the workings of a market, or where one might realistically find the kind of hypothetical market that is not propped up on historical injustice or beset by the externalities which typically skew the 'fair' rate of exchange.[44]

Furthermore, locating the pro-tanto wrongfulness of sexual exploitation in unfair exchange leads to counter-intuitive judgements. If the only problem with sexually exploitative interactions were that one party gained unfairly, this could be amended by correcting the imbalance in gain between the parties. Surely that is not plausible, for it suggests that there is a fair 'price' at which sexual interactions may be bought without being morally objectionable. This is not to suggest that an unfair price for sexual exploitation is not additionally wrong. My contention is only that unfair price is not *the* wrong-making factor of sexual exploitation.

Another problem with understanding wrongful sexual exploitation in these terms is that it allows the conclusion that B (whom we would typically consider the exploitee) exploited A

[42] Wertheimer, *Consent to Sexual Relations* (n 40).
[43] Alan Wertheimer, *Exploitation* (Princeton University Press, 1996) 296-298.
[44] Ruth Sample, 'Exploitation and Consequentialism' (2016) 54(S1) The Southern Journal of Philosophy 66, 69.

(who would typically be considered the exploiter) because she 'gained' *more* than A. This may be because, perhaps, the sexual satisfaction gained by A was overshadowed by guilt or was not as satisfying as A had expected, whereas B ended up getting an extraordinary amount of money or material goods out of the interaction.[45] Such a conclusion is inappropriate because it does not capture our ordinary intuitions about sexual exploitation and the typical conditions in which people are sexually exploited, and in that sense, does not enable moral blame to be directed correctly.

The wrong of sexual exploitation is also frequently located in the difference of 'power' between the parties. If power refers to the typical lines of social influence, determined by socio-economic status, the presence or absence of disability and so on, the power dynamics in a particular sexual interaction may be murky. While one party may have greater financial need, the other may face marginalisation by ethnicity or disability. Alternatively, as is frequently the case with institutional prostitution, the working-class prostitute's vulnerability can be taken advantage of by a working-class pimp or john. In circumstances such as these, the interplay of different axes of power may complicate the determination of 'power dynamics'. Moreover, not all instances of sex between two parties with a disparity in social status and power *need* be wrongfully exploitative, although we may be inclined to look more closely at such interactions to ensure that the consent of the weaker party (if she can be identified) was genuine and not manufactured by the influence of the powerful party. This implies that there is nothing about the very nature or existence of a difference of power, so understood, that *transforms* an otherwise normal sexual interaction into a sexually exploitative one.

However, if power refers to the fact that one party has a better range of options than the other and is, therefore, more able to walk away from the interaction compared to the other, then a difference in power does have a role to play in understanding what makes sexual exploitation pro-tanto wrong, although it does not fully explain the wrong. As I discuss in sub-section 1 below, the fact that a person has few (and bad) options can render her susceptible to sexual exploitation by reducing the range of options available to her, and consequently constraining her autonomy to make decisions. Therefore, this is a relevant factor in understanding the wrong of sexual exploitation, but it does not by itself, encompass the wrong of sexual exploitation.

[45] For a rejection of exploitation-based objections to paedophilia (where exploitation is seen as unfair exchange) on just these grounds, see, Kershnar (Chapter 1, n 10), 4.

I argue that sexual exploitation is pro-tanto wrong because (i) A plays for advantage against B in a situation where A should not and (ii) A degrades B. This conception of the wrong of sexual exploitation draws from Goodin's and Sample's accounts of what makes exploitation morally bad. However, since these accounts aimed to lay down general theories of exploitation, more work needs to be done to explain the unique wrong of sexual exploitation. Deveaux and Panitch astutely observe that different context-specific conceptions of exploitation might be required to understand the phenomenon in different spheres.[46] With that in mind, I explain below what vulnerability, unwantedness and degradation signify in my understanding of sexual exploitation, and how their interplay helps us make sense of the pro-tanto wrongfulness of sexual exploitation.

1. Vulnerability

Goodin's idea of vulnerability is premised on *some* need, and the capacity of A (to whom B is vulnerable) to meet that need.[47] Sample on the other hand defines vulnerabilities in terms of basic human needs, although her understanding of 'basic' needs goes beyond requirements of bare survival to encompass what people need for a good, flourishing life. Nussbaum's list of capabilities, which beyond the basics of food, water and shelter includes bodily health, bodily integrity, practical reasoning, affiliation with others, play and so on, is used to give content to these needs.[48] This understanding of vulnerability is more specific than Goodin's, but still quite broad because it is meant to align with our common intuitions about exploitation in general. Logar criticises Goodin's and Sample's vulnerability-based wrongful use accounts of exploitation on the ground that vulnerability is a slippery and insufficiently robust concept on which to base a theory of exploitation.[49] In Goodin's account, the understanding of vulnerability becomes too vague when he says, 'people who are relevantly vulnerable to exploitation are those whose interests are strongly affected by others' actions and choices.'[50] Logar criticises the role of vulnerability in Sample's account of exploitation on the ground that Sample allows only genuine need-based vulnerabilities rather than people's imagined needs or their desires, to

[46] Monique Deveaux and Vida Panitch, 'Introduction' in Monique Deveaux and Vida Panitch (eds.), *Exploitation: From Practice to Theory* (Rowman and Littlefield, 2017) 11.
[47] Goodin, 'Exploiting a Situation and Exploiting a Person' (n 18), 187.
[48] ibid, 78.
[49] Tea Logar, 'Exploitation as Wrongful Use: Beyond Taking Advantage of Vulnerabilities' (2010) 25 Acta Anal 329.
[50] Goodin, 'Exploiting a Situation and Exploiting a Person' (n 18), 187.

be the basis of exploitation. According to Logar, greed, desire and even virtues may make people susceptible to exploitation.[51]

Since my remit is not to provide an account of vulnerability that would be relevant to all kinds of exploitation, but only to sexual exploitation, I think vulnerability does have something to offer. Sample's account of vulnerability, while useful as a starting point, requires greater elaboration and some modification because in its current form, it is too broad in some respects and too restrictive in others. While I do not think the exploitee's greed or virtue should be considered relevant vulnerabilities for understanding sexual exploitation, Sample's standard of *genuine* vulnerability may be too restrictive.[52]

In Chapter 5.II, I argued, relying on Rogers, Mackenzie and Dodds, that vulnerability may take three forms: inherent, pathogenic and situational. Vulnerabilities may operate as external constraints on a person's autonomy by reducing the choices or options available to her and thereby make her more susceptible to sexual exploitation (Chapter 5.II.B). In the case of adolescents, their lack of psychosocial maturity operates as an internal constraint on their capacity to consent to the exchange proposed by a potential exploiter (see Part III of this chapter), thereby making them inherently vulnerable to sexual exploitation (Chapter 5.II.A). The exploiter should be aware of the exploitee's vulnerability, because 'taking advantage' of someone vulnerable is a conscious act, which necessarily requires awareness of the vulnerability of which advantage can be taken.

Vulnerabilities are closely linked to needs. Situational and pathogenic vulnerabilities, in particular,[53] may arise from certain material needs for food, water, shelter, medical care, or essential living expenses for oneself or one's dependent(s), the need to escape a war zone, natural disaster, or certain institutional contexts, such as prostitution, where B may need to make payments to a pimp. A person might also be rendered vulnerable by drug addiction or alcoholism, which makes them *need* their next fix. In such cases, even though the need is not 'genuine' in the sense that it is not required for a good or flourishing life, it does affect the person's decisional autonomy by reducing the range of options available to them. Here I am not

[51] Logar (n 49), 340-341.
[52] In talking about prostitution, Sample does not restrict herself to this idea of vulnerability. She includes drug addiction and mental illness in her list of what might make a person vulnerable to sexual exploitation. It is not clear how she reconciles this with her original theoretical understanding of vulnerability. Ruth Sample, 'Sexual Exploitation and Social Contract' (2013) Supplementary 28 Canadian Journal of Philosophy 189, 214-215.
[53] The inherent vulnerability of adolescents to being taken advantage of, which as I argued in Chapter 5.II.A acts as a constraint on their capacity to make decisions in their long-term interest, arises from their lack of psychosocial maturity.

referring to a state of being intoxicated which renders a person incapable of giving genuine consent, but an addiction which reduces a person's autonomy because doing without alcohol or drugs does not feature as an acceptable option for her. Providing an account of what qualifies as basic non-material needs, which are subjective, is far more difficult compared to basic material needs. Love, care, companionship, fun, attention, acceptance (or a sense of belonging), friendship and approval, among others, are all important needs that most human beings tend to share. But which of these is basic, in that a person cannot do without it, is a more complicated question. It seems most accurate, therefore, to see these needs as subjective: some people may be able to do without the approval of their peers, for instance, whereas for others it might be so important that they would be willing to give up more to get it. These non-material needs would also reduce a person's autonomy to make decisions, by reducing what they consider to be the options available to them, and thereby make them vulnerable to exploitation by another. Vulnerabilities engendered by non-material needs might not be as obvious to others as those generated by material needs or institutional contexts, but it is possible for someone to learn of them over time and capitalise on them. Once the vulnerability comes to light, it can be taken advantage of.

Since the effects of vulnerabilities caused by material needs are relatively predictable, A (an exploiter) need only be aware that B (the exploitee) has such a vulnerability-generating need (which A can meet), to be able to take advantage of them. But since the effect of non-material needs are not predictable in an abstract sense, and depend on the importance B places on a particular need, A would need to be personally aware that the particular non-material need, of which A intends to take advantage, is important enough to render B vulnerable to being sexually exploited by A.

2. Unwantedness

By reducing B's autonomy (or in the case of the inherent vulnerability of adolescents, capacity) to make decisions, vulnerability so understood makes B amenable to choices that are unwanted. This does not mean that B is acting non-consensually, but rather that had it not been for the vulnerabilities constraining B's options, she would not have made the choice.[54] Given the

[54] It may be argued that in both coercion and exploitation, B (the coercee or exploitee)'s limited options lead her to accept an unwanted choice. The distinction between coercion and exploitation requires greater elaboration than is possible within the scope of this thesis. However, my limited argument is that while a coercer actively manipulates B's choice architecture to have her do what he wants her to do, an exploiter merely takes advantage of B's existing choice architecture to induce her to do what he wants her to do. See, David Zimmerman, 'Coercive Wage Offers' (1981) 10(2) Philosophy and Public Affairs 121, 144-145.

alternatives available to B, the unwanted choice may still be her best one, and therefore a rational choice in the circumstances.[55] Consider the example of the socio-economically marginalised women (discussed in Chapter 2.III.A), who have sex for money or work at construction sites, at the *nakas* (intersections and street corners) of Mumbai. They understand and acknowledge that this is something they do 'for their stomachs'. That is, in light of the vulnerability (hunger and poverty) created by their need for food and employment/money, sex with contractors and middlemen, despite being unwanted, is their least objectionable alternative to starvation or a day without earnings.

In Part II.B.3, I argue that exploitative sex, which is central to sexual exploitation, is degrading because of two factors: (a) sex as work is widely considered dirty work, or because all sex is imbued with the possibility of degradation in Indian patriarchy and (b) that sex in this context actually becomes degrading because of its unwantedness. This is a view of degradation in the context of sexual exploitation which, as I mentioned in Part II.B.1 of this chapter, entails sexual labour which is agreed to by the exploitee because of their vulnerability. In this context, unwanted sex means sex that does not represent the exploitee's sexual desire but is wanted for some other perceived benefit and agreed to because of the exploitee's vulnerabilities. This does not mean that every instance of unwanted sex (even in a context where the possibility of degradation is always built into sex) is automatically also exploitative. Consider, for instance, one of Wertheimer's examples of non-reciprocal sex:

'**Love**. A and B are married. A proposes that they have intercourse. B is not "in the mood," but she knows that it's "been a while" and wants to show her love for A and so agrees.'[56]

In this circumstance, sex with A is unwanted for B as sex, although it is wanted as a way to show her love for A. Such unwanted sex is not degrading in a way relevant to sexual exploitation because it is not agreed in order to meet a basic material or non-material need, or because of a vulnerability. There is no suggestion that B's agreement to sex stems from the fear that if she does not consent, A will stop loving her or will leave her. Even if we assume that B needs the marriage to continue because she has no good options outside the marriage or because she has children who are best looked after within the marriage, her motivation to agree to sex

[55] Stephen Wilkinson, *Bodies for Sale* (Introduction, n 26), 120. In the context of medical decision-making and especially offers of life-saving treatment, Wilkinson argues that the choice to accept such treatment may appear unfree because the chooser has no option but to accept the offer as a means of achieving their fundamental life goals (such as staying alive). However, this does not rule out autonomous choice of treatment because the choice is in line with the chooser's fundamental life goals.
[56] Wertheimer, *Consent to Sexual Relations* (n 40), 135.

with A was not to sustain these benefits from the marriage, but rather to show her love for him. This is an example of unwanted sex that need not be exploitative.

3. Degradation

The unwantedness of sexual labour does not completely explain why it is degrading or why it amounts to a failure to treat B with respect. Unwanted sexual labour that is chosen because of B's vulnerability receives its degrading connotation and content from the meaning of sex in society, especially India's caste-based, patriarchal society.

At one level, the performance of sexual labour in most societies, including India, is seen as 'dirty work'. This term was coined by Hughes to describe either parts of an occupation (such as handling garbage in the case of a janitor) or the occupation itself (such as those who handle dead bodies at cremation grounds in India) which might generally be perceived as either physically disgusting or morally degrading. Such work is typically relegated, in most societies, to those on its margins.[57] Ashforth and Kreiner argue that perceptions of being physically unclean or disgusting, socially stigmatised and morally dubious together make up the sphere of dirty work.[58] Sexual labour, whether within the institutional context of prostitution or outside it, tends to suffer from all three forms of taint. That is, in most sexual interactions where sex is work for one of the parties, such work is generally socially seen as 'dirty'. In Part I.A, I argued that though sexual labour is not wrong merely by virtue of being sexual, there is a special stigma attached to such labour. The discussion of the common objections to sexual labour in the form of prostitution in Part I.A demonstrated that it is considered physically unclean and even dangerous, and is socially stigmatised. It is worth stressing, as Ashforth and Kreiner do, that the taint associated with such work is purely socially constructed. That is, there is nothing inherently degrading about its performance. Notwithstanding this, the general repugnance of people towards such labour is visceral, and the view that it is 'dirty work' has real consequences for those performing it.[59] Consequently, the stigmatisation of sexual labour as 'dirty work' makes the performance of sexual labour degrading to the person, male or female, who performs it.

[57] Everett Cherrington Hughes, 'Work and the Self' in John H. Rohrer and Muzafer Sherif (eds.), *Social Psychology at the Crossroads* (Harper and Brothers, 1951) 313.
[58] Blanke E. Ashforth and Glen E. Kreiner, '"How can you do it?": Dirty Work and the Challenge of Constructing a Positive Identity' (1999) 24(3) The Academy of Management Review 413, 414.
[59] ibid, 415.

This discussion might give the impression that sexual labour is only degrading when it is perceived as 'dirty work', thus exempting sexual labour within marriage which, as I argued in Chapter 2, tends to have a veneer of respectability. In other words, because a socially constructed binary appears to operate in Indian society, according to which sex within marriage is considered respectable, and sex outside marriage is judged to be akin to prostitution, it is possible to argue that sex within marriage is not degrading, even when it is sexual labour (usually, in the Indian context, for women). It is in response to such an argument that the other level of sex as degradation becomes relevant.

Mackinnon argues, 'sexuality is to feminism what work is to Marxism, that which is most one's own, yet most taken away'.[60] Similarly, according to Millet, the sexual relationship between men and women in patriarchy is characterised by domination and subordination.[61] This characterisation of sex and sexuality in patriarchy may not describe every sexual encounter, but it does seem a compelling description of how sex is widely understood or perceived in patriarchal societies. Consider, for instance, the pervasive understanding of sex as something men do *to* women, rather than something that two (or more) people do together, or especially something in which a woman's agency and personhood are respected.[62] In the Indian context, this understanding is also reflected and reinforced by the law, for instance when (as discussed in Chapter 3.I.A.2) it exempts the marital rape of (adult) women from criminal prosecution, implying that it is not a woman's consent or bodily integrity that is relevant to the wrong of rape, but a man's right over her body,[63] or when women's claims of sexual violation are disregarded because they did not conform to the ideal of the sexually innocent victim, that is, for expressing their sexual desires or owning their sexuality or for having a sexual history.[64] It

[60] Mackinnon, *Toward a Feminist Theory of State* (n 14), 3.
[61] Kate Millet, *Sexual Politics* (University of Illinois Press, 2000) 24-25.
[62] Stevi Jackson, *Heterosexuality in Question* (Chapter 5, n 2), 48; N. Tatiana Masters and others, 'Sexual Scripts among Young Heterosexually Active Men and Women: Continuity and Change' (2013) 50(5) Journal of Sex Research 409, 410; Mackinnon, *Toward a Feminist Theory of State* (n 14) 128.
[63] Rebecca M. Ryan, 'The Sex Right: A Legal History of the Marital Rape Exemption' (1995) 20(4) Law and Social Inquiry 941. This may seem like an outdated issue in the West, but there are still 36 countries in the world where husbands cannot be criminally prosecuted for raping their (adult) wives, and India is one of them.
[64] Baxi, *Public Secrets of Law* (Chapter 3, n 75), 92; Rupal Oza, *Semiotics of Rape: Sexual Subjectivity and Violation in Rural India* (Duke University Press, 2023) 39. Based on her ethnographic studies of rape in rural Haryana (in North-western India), Oza demonstrates how the exercise of sexual autonomy by women in India, far from confirming their sexual subjectivity, in fact casts them as responsible for her own violation. She argues, '…consent here plays the role of discrediting women as corrupt. A woman who consents to a sexual relationship is stigmatized as unvirtuous and unreliable, rather than respected as a sovereign person exercising her right to choose how she expresses her sexuality.'

can be seen in widespread sexual double standards, when women are shamed for the same conduct for which men are celebrated or rewarded.[65]

The perceived link between sex and degradation is also evident from what Dempsey and Herring call the negative social meaning attached to sexual acts. Words synonymous with sex, even consensual sex, also express harm or humiliation (getting 'fucked' or 'screwed').[66] The most important indicator of the link, however, is that in patriarchy, especially caste-based patriarchy, sexual acts can be (and frequently are) used as punishment[67] or as enforcement of subordination.[68] In this regard, Mackinnon's observation on the eroticisation of women's subordination is poignant: 'the degradation and violation and domination of women is eroticized, indeed defines the social meaning of female sexuality in societies of sex inequality.'[69]

Thus, sex in patriarchy, especially India's caste-based patriarchy, is intimately linked with the instrumentalisation and subordination of women, and tends to have the possibility of degradation built into it. Sen argues that the general experience of women (across class divisions) in India suggests that instead of communication and mutuality, control and appropriation is the dominant form of sexual interaction, both in private and public spaces. She states, '[t]o the extent that male control of a woman's body is the dominant aspect (as opposed to the reciprocity inherent in communication), the sexual act is itself intrinsically linked to the transformation of woman into sexual object, not subject.'[70] In Chapter 2.II, I argued that the dominant norm around sex in India creates a binary between legitimate and illegitimate sex, mediated by hegemonised marriage. The binary upholds norms of caste and honour by containing female sexuality within marriage, and divides women into respectable wives and degraded others (akin to prostitutes). Thus, to have sex or appear sexual in India is always to risk being treated as, or viewed as, fallen and degraded. This is not to say that it is not possible

[65] Joyce J. Endendijk, Anneloes L. van Baar, Maja Deković, 'He is a Stud, She is a Slut! A Meta-Analysis on the Continued Existence of Sexual Double Standards' (2020) 24(2) Personality and Social Psychology Review 163.
[66] Robert Baker, 'Pricks and Chicks: A Plea for Persons' in Robert Baker and Frederick Elliston (eds.), *Philosophy and Sex* (Prometheus Books, 1984) 263.
[67] Irina Astashkevich, *Gendered Violence: Jewish Women in the Pogroms of 1917 to 1921* (Academic Studies Press, 2018) 38-39; '100 Women 2014: Raped for punishment in Pakistan' BBC News Asia (29 October 2014) <https://www.bbc.co.uk/news/world-asia-29661011> accessed 13 May 2024.
[68] Consider the case of Bhanwari Devi (discussed in Chapter 3.III.B.2), a lower-caste woman from Rajasthan, India, who was raped for reporting the child marriage of a nine-month-old girl by the Gujjar community, a powerful, land-owning caste in the state.
[69] Catherine A. Mackinnon, 'Reflections on Sex Equality under Law' (1991) 100(5) The Yale Law Journal 1281, 1302.
[70] Gita Sen, 'Subordination and Sexual Control: A Comparative View of the Control of Women' (1984) 16(1) Review of Radical Political Economics 133, 138.

to have sex in this context without being degraded but that the binary of respectable and degraded women is deeply interwoven into the social understanding of sex in India. Furthermore, as I argued in Chapter 2.II.B, even the sexuality of wives, though purportedly respectable, is not their own, but instrumentalised for their husbands. In that sense, marriage does not ensure real dignity in sex, but only casts a patina of social legitimacy over an experience that may nevertheless be degrading. This is because wives may need to perform unwanted sexual labour, or engage in sex as work, in a social context in which subordination and instrumentalisation are built into sex and where, therefore, sex always carries the potential for degradation.

In this second sense, it is the inducement, enabled by vulnerability, to perform unwanted sexual labour in a social context where sex is associated with subordination and instrumentalisation of women, that degrades the chooser at an individual level, as a human being, even if she does not specifically *feel* degraded. Thus, the possibility of degradation built into sex is an objective condition, though the unwantedness of the sex is a subjective condition. This level of degradation operates in addition to the first kind of degradation discussed in this sub-section, that is, the degradation that attaches to 'dirty work'. While the perception of sex work as dirty work is restricted to spheres that are not considered socially respectable (in the Indian context, sex outside marriage), the subordination and instrumentalisation of women through sex also operates within marriage, thus making sexual labour within marriage degrading even if it is not socially perceived to be so.

Because I have restricted my analysis to sexual labour, it might seem that I am reverting to the idea that there is something inherently and uniquely degrading about *sex*. This would be a mischaracterisation. Any structural power relation marked by the subordination of one class of persons by another would similarly have degradation built into the labour of the subordinated class. Consider, for instance, the caste system in India in which (as I explained in Chapter 2.I.A) persons are segregated along an imposed scale of purity and pollution maintained by caste endogamy and based on the forms of labour performed by the castes. In this context, degradation and subordination are also built into the performance of labour traditionally relegated to untouchables who are considered the most polluting class and consequently

ostracised,[71] for instance the disposal of dead bodies or animal carcasses, or manual scavenging (the practice of clearing excrement by hand).

Sexual labour, therefore, is one (but not the only) kind of labour imbued with the potential for degradation. Every performance of sex acts has the potential to degrade the person performing it because of a social context in which sex as work is considered dirty work (for all genders), and sex is associated (for women) with subordination and instrumentalisation. However, sex does not automatically and inevitably degrade the performer. Additional conditions confirm or complete the performer's degradation. In the case of exploitation, this additional condition is the unwantedness of the sexual labour, when the choice to perform it is made because of a vulnerability. It is in this sense that degradation is a wrong of sexual exploitation.

This understanding also gives specific content to the other wrong of sexual exploitation, which is taking advantage of someone when one should not. Goodin acknowledges that it is not always wrong to take advantage of someone who is vulnerable to us, meaning that it is not vulnerability alone that explains this moral wrong. In the case of sexual exploitation, taking advantage of a vulnerable person is wrong *because* it is done to use her sexual labour in a context where such sexual labour degrades her. Since it is wrong to degrade another person, it is also wrong to take advantage of a person's vulnerabilities in order to do so.

Thus, degradation is key to understanding what makes sexual exploitation pro-tanto wrongful sexual conduct. I argued in this section that sexual exploitation is wrong because A (the exploiter) takes advantage of B (the exploitee)'s vulnerabilities to induce her to perform unwanted and degrading sexual labour in exchange for some perceived benefit. Thus, sexual exploitation is wrong for two reasons, both of which have to do with the degrading nature of the sex performed in sexual exploitation. First, A failed to treat B with the respect due to her as a human being by having her perform degrading sexual labour. The degrading nature of the sexual labour, I argued, draws from the fact that sex as work is considered dirty work, and the very understanding of sex in patriarchy, especially India's caste-based patriarchy, is strongly associated with subordination and instrumentalisation of women, and therefore, any performance of sexual labour in this social context has the potential to be degrading. In this

[71] Ambedkar noted, "The Hindu Social Order is based upon a division of labour which reserves for the Hindus clean and respectable jobs and assigns to the Untouchables **dirty and mean jobs** and thereby clothes the Hindus with dignity and heaps ignominy upon the Untouchables." (emphasis added)
Vasant Moon (ed.), *Dr. Babasaheb Ambedkar: Writings and Speeches Volume 5* (Education Department, Government of Maharashtra, 1989) 258; Meena Gopal, 'Ruptures and Reproduction in Caste/Gender/Labour' (2013) 48(18) Economic and Political Weekly 91, 93-94.

context, when B performs sexual acts which are unwanted as sex (though wanted for other reasons) because of her vulnerabilities, she is in fact degraded. Second, because A took advantage of B's vulnerability which is wrong *because* A did so to use B in a way that would degrade B.

In Part III, I consider whose consent to sexual exploitation ought to be considered morally meaningful, and what the impact of such consent would be.

III. Sexual Exploitation: The Implications of Consent

Consider the following scenario.[72] B, a 17-year-old girl, runs away from home. A, a 40-year-old man who is distantly related to B has often shown sexual interest in her, though B does not wish to have sex with him. One night after having run away from home, B comes to the office of A, and tells him that she came there because she was 'tired, dirty, and hungry' and it was the only place she felt she could get help. Once they are alone in the office, A offers B INR 500 (approximately £5) to buy food but, reminding her that there are 'no free lunches in this world', asks her to perform oral sex on him in return for his help. B accepts, performs oral sex on A, takes the promised money and leaves.

A's offer is a proposed exchange of sex which is unwanted but chosen due to B's vulnerability (and therefore degrading) for some benefit (money for food) for B, that is, a proposal entailing B's sexual exploitation by A. There are two distinct components of A's proposal: first, that B agrees to perform certain sexual acts for A, and second, that in exchange for these sexual acts, B receives some perceived benefit. To consent to A's proposal of sexual exploitation, therefore, B must have the capacity to consent to (a) the sexual acts that must be performed and (b) the exchange (of degrading and unwanted sex for some benefit) that is proposed. Only where B has both capacities should her consent to her own sexual exploitation be considered meaningful. If B lacks either of these capacities, her consent to A's proposal of sexual exploitation would be invalid.

Thus, three relevant combinations of capacity will be discussed in this Part. First, where B has both the capacity to consent to sex, and the capacity to consent to the degrading exchange

[72] These facts are a modified version of JM's interaction with Terence K. in *R v. Kirk*, [2000] 4 All ER 698. In *Kirk*, the 14-year-old JM, who had a history of sexual abuse by the two appellants, Peter K. (her uncle) and Terence K. (Peter K.'s brother), had run away from home because her brother had been bullying her about this sexual abuse. After having slept on the streets or sometimes in the homes of her friends, she returned to Terence K's minicab office out of desperation and hunger. She waited until Terence K. was the only one in the office, then consented to sexual intercourse with him. After the sexual intercourse, Terence K. paid JM £3.25, which she used to buy food. Terence K. was found guilty of rape.

proposed by A. In sub-section A, I argue that normative adults (psychosocially mature) who have the moral capacity to consent to the sexual acts involved, can validly consent to sexual exploitation, even when their autonomy to make decisions is to some degree constrained. This is because, as I argued in Chapter 5.II, while pathogenic and situational vulnerabilities constrain a person's autonomy by limiting the range and quality of options available to them, these vulnerabilities do not affect the person's decision-making *capacity*. I then argue that the impact of adult consent to sexual exploitation is to permit this pro-tanto wrongful conduct. The second combination is where B has the capacity to consent to the relevant sexual acts, but not to the exchange of unwanted and degrading sexual labour for some benefit that is proposed by A. This combination is represented by normative adolescents, who are not psychosocially mature but do have the capacity to consent to the sexual act. In sub-section B, I argue that such normative adolescents do not have the necessary underlying abilities (to correctly value the proposed benefit, to appropriately weight the proposed benefit against the adverse consequences or potential risks, to delay gratification, avoid losses while pursuing reward, and so on) which are essential to the capacity to consent to the exchange (of unwanted and degrading sex for money) proposed by A. As I argued in Chapter 5.II, this lack of psychosocial maturity functions as an inherent vulnerability which constrains the *capacity* of adolescents to make decisions in their long-term interests. Therefore, normative adolescents cannot validly consent to sexual exploitation. This lack of valid consent can make the sexual exploitation of adolescents look like rape (which is also defined by the absence of valid consent). However, I argue that there are good reasons not to equate the sexual exploitation of adolescents (who have the necessary underlying cognitive capacities essential to the moral capacity to consent to the sex acts) with rape. These reasons are strengthened when we consider a third combination, where B is neither psychosocially mature (and therefore does not have the capacity to consent to the degrading exchange proposed by A), nor has the moral capacity to consent to the sex acts.[73]

A. Valid Consent to Sexual Exploitation: Constrained Autonomy

The claim that B, an adult, may validly consent to being sexually exploited is based on the more fundamental principle of personal autonomy, which includes the right to make self-regarding

[73] It is beyond the scope of this thesis to discuss whether a person may be psychosocially mature but lack the cognitive capacities necessary for the moral capacity to consent to sexual acts. However, since it is this moral capacity to consent to sexual acts that is essential to determining the permissibility of those sexual acts (as I argued in Part I of this chapter), were such a person (B) to exist, A's sexual interaction with her would amount to rape, notwithstanding the other elements (the exchange of money for the sexual act, etc.).

decisions, even when these decisions may not be objectively 'good'.[74] This right is extended to adults because, as I argued above, while their situational and pathogenic vulnerabilities constrain their autonomy, their *capacity* (unlike that of adolescents, who are not yet psychosocially mature) to make decisions in their long-term interest is not affected by an inherent vulnerability. Thus, even where they make decisions that might appear to be bad for them, or which may not align with an objective assessment of what is good for them (where this is possible), these decisions deserve respect (or at least non-interference) because their *capacity* to make decisions that are good for themselves is not in doubt.

The situational and pathogenic vulnerabilities of adults, which constrain their autonomy to make decisions, are not irrelevant. As I argue below, it is essential to take account of these background injustices when assessing how free choices made in constrained circumstances can be, and to seek to remedy them as far as possible. Notwithstanding this, the existence of limited options and difficult (or even tragic) circumstances ought not to negate the possibility of agency or meaningful choices, especially in our imperfect world.

According to Lacey, the liberal notion of autonomy and consent ignores the effects of material circumstances on the ability to make meaningful choices.[75] In the context of sex work, O'Neill similarly recognises that consent in transactions between prostitutes and their clients may be more apparent than real, considering the coercive institutional context of prostitution.[76] While some individuals are able to meet their needs (or sometimes even their wants or aspirations) through sexual labour, the vast majority of sex trade may appear harmful in a way that arguably outweighs the 'good' of respecting the 'choices' of a prostitute uncritically as an exercise of her autonomy.[77] Therefore, in my view, there is certainly a case for intervening to remedy background injustices that enable sexual exploitation.

These background injustices should also play a role in our assessment of the validity of consent at an individual level. Raz identifies the availability of a number and variety of 'good' or morally acceptable choices as an essential component of autonomy (adequacy of options).[78] For Raz, where a person does not have a choice of goods and must choose instead between a good

[74] Joel Feinberg, *The Moral Limits of Criminal Law (Volume 3): Harm to Self* (OUP, 1989) 62.
[75] Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (OUP, 1998) 117.
[76] Onora O'Neill, 'Between Consenting Adults' (1985) 14(3) Philosophy and Public Affairs 252, 268-269.
[77] This conflict between the individual and systemic views is not new and continues to be a contested position within feminism. See, Sunder Rajan (n 35) 117, 144; Laurie Sharge, *Moral Dilemmas of Feminism: Prostitution, Adultery and Abortion* (Routledge, 1994) 99.
[78] Joseph Raz, *The Morality of Freedom* (Chapter 5, n 49) 373-375 and 379.

and an evil (and by extension, between two evils), she is not truly autonomous.[79] There is no doubt that difficult circumstances limit a person's autonomy, and it is important to be alive to this limitation when considering the effect that consent can have in such circumstances. But it would be unrealistic, given the nature of the world, to say that constrained circumstances nullify the normative power of consent altogether.

Beauchamp's theory of autonomy, which focuses on three characteristics of choosers, intentionality, understanding and the absence of controlling influences,[80] helps us think through this problem. Though focused on medical ethics, the theory applies to all forms of decision-making, and is particularly useful for explaining the autonomy value of constrained choices. According to Beauchamp, intentionality is not overridden by undesirability or unwantedness. An act may be unwanted but necessary for other acts or consequences which *are* wanted, and in that sense, would be part of the intentionality of the actor.[81] As regards the understanding requirement, Beauchamp states that what matters in most cases is an awareness of the material facts.[82] O'Neill's theory of consent, which states that consent is required for the deeper, more fundamental aspects of the proposal to which consent is sought, clarifies this requirement. It follows from her view that an autonomous decision can only be made when the decision-maker understands the fundamental, morally significant, aspects of the proposal before them.[83] The third requirement of autonomy, the absence of controlling influences, is particularly relevant to sexual exploitation. In speaking of constraints, such as structural deprivations which might close the range of options available to a person, Beauchamp argues that decisions made under these constraints may be relatively less voluntary than those made without such constraints, but they are not non-voluntary.[84] In other words, constraints may limit autonomy, but they do not negate it, and therefore B's consent should still be taken to reflect B's will.

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[79] ibid, 379.
[80] Tom L. Beauchamp, 'Autonomy and Consent' in Franklin Miller and Alan Wertheimer (eds.) *The Ethics of Consent: Theory and Practice* (OUP, 2009) 55, 65.
[81] ibid, 66-67.
[82] ibid, 68.
[83] O'Neill (n 76), 258.
In practice, disagreements might exist as to what the fundamental, morally significant aspects of a proposal entailing exploitative sex may be, given the fact that it is not always clear what these aspects are even in non-exploitative sexual interactions. For instance, see *R v. Lawrance* [2020] EWCA Crim 971 [37]-[41]. In this case, the Court of Appeal held that even though the defendant had lied about his vasectomy and the complainant had only agreed to have unprotected sex with him because of this fact, his deception would not be sufficient to vitiate the complainant's consent. According to the Court, the fertility of the defendant was a 'circumstance surrounding' the performance of the sexual act, and not a fact closely connected to it.
[84] Beauchamp (n 80), 73-74.

However, the fact that consent was given in conditions of constrained autonomy should bear on our assessment of the moral effects of that consent. Consent does not (by itself) turn what is morally bad into something morally good.[85] As a defence, consent is generally understood as providing permission or justification to do what it is pro-tanto wrong to do.[86] Within such a view, consent makes the pro-tanto wrongful conduct not wrong on the whole, or on an all-things-considered view, but the wrong-making factors of that conduct still serve as moral reasons not to engage in that conduct.[87]

With this in mind, let us return to the scenario laid out at the beginning of Part III. B is a 17-year-old girl. If she understands the nature, mechanics, and ordinary physical, biological, and social consequences of oral sex, and that she has a right to say no to A, she has the moral capacity to consent to the sexual act proposed by A. If she is psychosocially mature, she is also a normative adult. This implies that she has the underlying abilities necessary to evaluate and consent to the exchange of degrading and unwanted sex for some perceived benefit that is proposed by A. Her consent to A's offer entailing her sexual exploitation is valid. Consequently, it permits A to engage in pro-tanto wrongful sexual conduct, and renders A's action not wrong, all-things-considered.

However, the pro-tanto wrongfulness of sexual exploitation still serves as a reason for A (or anyone else) not to engage in it in the first place. To the extent that this wrongfulness derives (as I discussed in Part II) from B's constrained circumstances (of which advantage was taken), they are also part of the reasons against sexually exploiting B. In addition, as I argued in Chapter 5.II.B, while the agency exercised in constrained circumstances should be recognised as part of a nuanced analysis of B's actions, it should not be romanticised or valorised. Since B consented to A's proposal of exploitative sex (which is unwanted and degrading) only because of her situational vulnerability arising from her hunger and need for money to buy food, our assessment of the normative value of B's consent ought to be different than if consent

[85] David Archard, 'Teaching Good Sex: The Limits of Consent and the Role of the Virtues' (2022) 56(5) Journal of Philosophy and Education 645, 647-48; Victor Tadros, *Wrongs and Crimes* (OUP, 2016) 214.
[86] Gardner, *Offences and Defences* (n 2), 106; Michelle Madden Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7(1) Criminal Law and Philosophy 11, 21; Richard Healey, 'Consent, Rights, and Reasons for Action' (2019) 13(3) Criminal Law and Philosophy 499, 510.
[87] Kenneth Campbell, 'Offence and Defence', in I.H. Dennis (ed), *Criminal Law and Justice: Essays from the W.G. Hart Workshop* (Sweet & Maxwell, 1987) 81; Greasley, 'Sex, Reasons, Pro Tanto Wronging, and the Structure of Rape Liability' (n 2), 160-161.

were given in the absence of such vulnerability and was not unwanted,[88] when for that reason, it would not be degrading.

B. Invalid Consent to Sexual Exploitation: Constrained Capacity

Unlike adults, the consent of adolescents (who are not psychosocially mature) to sexual exploitation should not be considered valid or morally meaningful. As with adults, the consent of adolescents is also induced by taking advantage of their vulnerabilities. However, as I argued in Chapter 5.II.A, the inherent vulnerability of adolescents (their lack of psychosocial maturity) constrains not only their autonomy but also their capacity to make decisions in their long-term interest. Robust evidence on adolescent decision-making indicates that they are prone to making impulsive decisions (they lack cognitive control), to sensation-seeking and overvaluing reward, and that they are unable to appropriately balance the perceived benefit of an action against the risk of its harmful consequences. Thus, the capacity of adolescents to make decisions that are in their long-term interest (or decisions that are 'good' for themselves) is constrained until they become psychosocially mature (that is, for the purposes of this analysis, until they become adults).

As I discussed in Chapter 5.II.B, there is some evidence to suggest that external factors (such as experience of particular kinds of hardship) may bolster the decision-making competence of adolescents, but there are good reasons not to let this evidence affect our assessment of adolescent capacity when it comes to sexual exploitation. In the context of medical decision-making, some research has shown that children and adolescents who have experienced certain diseases for prolonged periods tend to be better informed about those conditions and also better able to make more rational decisions about their treatment compared to adults who do not have such experience.[89] That said, medical decision-making generally involves a situation where children and adolescents are supported in their decision-making by medical professionals and family members who are looking out for them. While it may not always be the case that an adolescent's doctor or parent wants what is *best* for her, they are not in a morally comparable position to a person who seeks to sexually exploit another. Furthermore, in medical decision-making, it is possible to seek and receive information about one's present condition as well as one's alternatives and to receive an honest answer because doctors are legally and

[88] Feinberg too recognises that the relatively lower voluntariness of consent given to exploitative proposals should bear on our assessment of the moral character of such proposals. Feinberg, *Harm to Self* (n 74) 260-61.
[89] Alderson, *Children's Consent to Surgery* (Chapter 5, n 78); Alderson, 'Competent Children?' (Chapter 5, n 78).

professionally obligated to provide them. A potential sexual exploiter is under no such obligations, and in fact will ordinarily seek to use any gaps in the exploitee's knowledge to his advantage. Additionally, it is not clear how poverty and deprivation affect the psychosocial elements of adolescent decision-making. While research on the effect of poverty and deprivation on decision-making (discussed in Chapter 5.II.B) shows that those who have experienced, or currently experience, poverty are more likely to focus on the cost-benefit trade-off involved in a decision, and thereby make more economically rational decisions,[90] the subjects of this research were adults and similar information on adolescents is unavailable. Therefore, the decision of adolescents to permit pro-tanto wrongful sexual conduct against themselves should not be considered valid. The capacity of adolescents, unlike that of adults, to make decisions in their long-term interest, *is* in doubt and adolescents are inherently vulnerable to being taken advantage of.

An additional consideration regarding the decision-making capacities of adolescents is that, as I argued in Chapter 5.II.B, the inherent vulnerability of adolescents can aggravate their situational or pathogenic vulnerabilities, making what is offered by a potential exploiter appear more valuable than it actually is, or making it impossible to recognise the high cost of engaging in unwanted and degrading sex as against what is offered.

Let us consider the scenario sketched out at the beginning of this Part in light of this discussion. Assume that B, a 17-year-old girl, has the capacity to consent to the oral sex proposed by A, but that she is not yet psychosocially mature. That is, she is a normative adolescent. She would not have the capacity to consent to the degrading exchange proposed by A because she would be unable to *appropriately* weigh the proposed benefit against what is being asked of her. Therefore, B's consent to sexual exploitation would not be valid and would not justify A's pro-tanto wrongful conduct. If A proceeds to sexually exploit B, based on B's consent which is invalid because B lacks the capacity to consent to the exchanged proposed by A, A's act would not just be pro-tanto wrong, but all-things-considered wrong.

Given this formulation where the adolescent B's consent to her sexual exploitation by A is not morally meaningful in the sense that it cannot permit A to sexually exploit B, the wrong that occurs can look similar to rape because, *prima facie*, A engages in oral sex with B without B's

[90] Shah, Mullainathan and Shafir, 'Some Consequences of Having Too Little' (Chapter 5, n 79).

'valid consent'.[91] The wrong of sexual exploitation and rape might appear to occupy the same moral ground in such cases, especially since B's reason for consenting to exploitative sex is closely linked to the exchange proposed (to which she is incapable of consenting). The sex was unwanted for B as sex, but agreed to as a means of obtaining the benefit offered by A. However, the wrong of sexual exploitation is not *identical* to rape because the invalidity of B's consent to sexual exploitation is due to B's lack of psychosocial maturity, which makes her incapable of consenting to the proposed exchange of degrading and unwanted sexual acts for some perceived benefit, rather than any cognitive incapacity that calls into question her moral capacity to consent to the sexual acts to be performed. Lack of 'capacity to consent' turns sex into rape only when the consenter lacks the moral capacity to consent to the sexual acts, which is not the case here.

This conclusion is strengthened when we consider a modified version of the hypothetical set out earlier in this Part. Imagine that B is not a 17-year-old girl, but a 7-year-old girl. She ran away from home and after a few rough nights, found her way to A's office and informed him that she was 'hungry, tired and dirty.' A then offered to buy B all the food she wants if she would be nice enough to take his penis in her mouth in return. B agrees. Here too, B's token of consent to A's proposal would be invalid. However, if A proceeds to have oral sex with B based on B's invalid consent in this situation, A will not only have sexually exploited B, but also raped her. This is because in addition to lacking psychosocial maturity, and therefore the underlying abilities necessary for the capacity to consent to the degrading exchanged proposed by A, B, being a pre-pubertal child, does not have the cognitive capacities necessary for the moral capacity to consent to the sexual act involved. In other words, she does not have the necessary underlying capacities to understand the nature and ordinary physical, biological, and social consequences of oral sex or that she has the right to say no to A. This is the third combination of capacity discussed at the beginning of this Part. If A's conduct was also considered rape in the case where lack of capacity pertained *only* to the degrading exchange that was proposed and not to oral sex, there would be no difference between the effect of B's consent in the two cases, even though 7-year-old B lacks both the capacity to consent to the sexual acts and the capacity to consent to the degrading exchange proposed by A. This, surely, would not be an accurate characterisation of the two situations. Therefore, where A has exploitative sex with B based on B's consent, which is not morally meaningful because B lacks

[91] I say *without* B's 'valid consent' because while B's invalid consent in this instance concerns the degrading and unwanted exchange proposed by A, its effect is that B's consent to being sexually exploited is not morally decisive in determining the permissibility of the sexual interaction as a whole.

only the capacity to consent to the degrading exchange proposed by A (the case of the 17-year-old normative adolescent B), the wrong that occurs is not identical to the wrong of rape.

My argument that adolescent consent to sexual exploitation (a pro-tanto wrongful sexual conduct) cannot make it morally permissible may appear paternalistic, but that would be a mischaracterisation. My argument is not that adolescents should not be allowed to permit their own sexual exploitation simply because it is not good for them (although that may well be the case).[92] It is, instead, that adolescent consent should not be considered morally decisive in permitting their sexual exploitation because adolescents, who are not yet psychosocially mature, do not have the necessary underlying abilities essential to the capacity to consent to the degrading exchange proposed by a potential sexual exploiter. If and to the extent that adolescents have the cognitive capacities necessary for the moral capacity to consent to sexual acts, I argue that they should be allowed to do so, and their valid consent to those sexual acts should be morally decisive in determining their permissibility. Therefore, my approach does not try to override the choices of adolescents in view of what is good for them, it merely seeks to track the capacities and vulnerabilities of adolescents in determining when and to what kinds of sexual activity their consent should be considered morally meaningful.

Conclusion

Relying on the arguments and conclusions of Chapters 2-5, I sought to consider two questions in this Chapter: (a) should adolescent consent to non-wrongful sexual activity be considered morally meaningful, and (b) why should adolescent consent to sexual exploitation, which is pro-tanto wrongful sexual conduct, not be considered morally meaningful?

I argued, first, that the permissibility of sexual conduct, and the categorical critically normative distinction between adolescents and adults (when considering the capacity to consent to sexual exploitation), should be based on decision-making competence, instead of Indian socio-normative conceptions of the two categories. This is because Indian socio-normative conceptions of the permissibility of sexual conduct represent public or majoritarian morality, and are not situated in consent or the capacity to consent, even though by the standards of critical morality consent (its presence, absence and validity) ought to determine the

[92] Sexual exploitation is wrongful sexual conduct. Being a degrading sexual activity which is unwanted though chose due to a relevant vulnerability, it is undoubtedly a negative sexual experience. In Chapter 5.II.B, I discussed evidence indicating that the capacity for resilience (or the ability to respond positively to adverse life events) is correlated with age. Consequently, sexual exploitation would probably affect those in the life-stage of adolescence more profoundly than it would affect those in the life-stage of adulthood.

wrongfulness of sexual conduct. Next, I argued that sexual interactions (which are not coercive, deceptive or exploitative) ought not to be considered morally wrongful, merely because of the potentially harmful consequences that might sometimes attend them. Therefore, adolescent consent to such non-wrongful sexual activity should be treated as morally meaningful because adolescents have an emergent sexual self-concept, and the rational decision-making capacities of adolescents are indistinguishable from adults, meaning that they, like adults, have the moral capacity to consent to sexual acts.

However, sexual exploitation, which is pro-tanto wrongful, should be treated differently. In Part II, I argued that sexual exploitation is pro-tanto wrongful because the exploiter breaches: (a) the duty not to take advantage of a person's vulnerabilities in a situation when it would be wrong to do so (b) the duty to treat a person with the respect that is due to them as a human being, which implies the duty not to degrade them. The degradation in sexual exploitation draws from two factors: (i) that sexual labour is considered 'dirty work' and is therefore socially stigmatised, and sex is always laden with the possibility of degradation for women, whose instrumentalisation and subordination is built into the meaning of sex (ii) that the exploitee consents to unwanted sex because of her vulnerability in this social context.

Finally, I argued that the consent of adults (who are psychosocially mature and therefore not constrained in their capacity to make decisions that are in their long-term interest) to sexual exploitation should be considered morally meaningful. The effect of this consent is to permit the pro-tanto wrongful sexual conduct that is sexual exploitation. Though the reasons not to engage in such conduct remain, it is not wrong, all things considered. By contrast, the consent of adolescents (who are not psychosocially mature and are therefore constrained in their capacity to make decisions that are in their long-term interest) to sexual exploitation should not be considered morally meaningful. The sexual exploitation of adolescents is wrong, all-things-considered, though its wrongfulness is distinct from that of rape or sexual assault.

In the following Chapter, I rely on the normative arguments developed in this Chapter to consider how Indian law's approach to adolescent sexuality can be reformed, to allow the recognition of adolescent sexual autonomy in accordance with their capacity to consent to non-wrongful sexual interactions, while protecting them from sexual exploitation.

CHAPTER 7: INDIAN CRIMINAL LAW'S REGULATION OF ADOLESCENT SEXUALITY: A TWO-PRONGED SOLUTION TO BALANCE AUTONOMY AND VULNERABILITY

Introduction

The aim of this thesis is to consider how Indian criminal law can recognise the sexual autonomy of adolescents in accordance with their capacity to consent to sexual interactions while still protecting them from sexual exploitation. Indian criminal law defines all persons under the age of 18 years as 'children' and criminalises all sexual interactions with children, so defined. This leads to adolescents and their partners being drawn into the criminal justice system for de-facto consensual, non-wrongful sexual conduct which, I argue in this Chapter, they should have a legal right to engage in. This criminalisation, in turn, intensifies family control over the sexuality of females, particularly adolescent girls. The mandatory reporting provision under POCSO exacerbates this effect and also prevents adolescents from obtaining essential sexual, reproductive, and mental health services. At the same time, the law does not adequately capture and punish the sexual exploitation of adolescents within practices approved by the family and/or caste community such as child marriage and *devadasi* dedication. In this Chapter, I build on the discussions of the previous Chapters of this thesis to propose a tentative two-pronged solution that addresses this simultaneously over- and underinclusive character of Indian criminal law's regulation of adolescent sexuality and discuss the options for its operationalisation in Indian criminal law.

To this end, in Part I, I argue that (a) the permissibility of sexual conduct in Indian criminal law should, in line with constitutional morality, be determined by consent and that therefore, (b) the fundamental right to positive sexual autonomy should be extended to those adolescents who are competent to consent to ordinary sexual conduct. It is worth explaining at this stage why an argument grounded in constitutional morality, against the current approach of Indian law towards the regulation of adolescent sexuality, matters above and beyond the critically normative argument against it in Chapter 6.

A critically normative argument against determining the permissibility of sexual conduct based on Indian socio-normative conceptions is not a persuasive *legal* argument in the Indian context unless it maps on to constitutional morality. This is because, as I demonstrate in the following paragraphs, it has repeatedly been held by the Supreme Court of India that the legal validity of criminal law must be tested against constitutional morality. True, this formulation does not explicitly preclude critical morality in the way that it precludes popular, public or majoritarian

morality.[1] However, the ambit of critical morality is much broader than that of constitutional morality, since the former can draw on an unrestricted range of moral reasons, whereas the latter is based solely in the values of the Indian Constitution. Thus, while a critically normative argument about the wrongness or otherwise of X may be drawn from, say, social contract theory, an argument that X is or ought to be legally permissible or impermissible in the Indian context can draw only from the values of the Constitution of India and must therefore be an argument based in constitutional morality. Indu Malhotra J.'s observation in *Joseph Shine v. Union of India* (discussed in Part I below) captures succinctly the distinction between the respective realms occupied by critical and constitutional morality. In considering whether s. 497, the IPC, which criminalised adultery, was constitutionally valid, she observed, '[A]dultery undoubtedly is a moral wrong qua the spouse and the family.'[2] Despite this, she found the criminalisation of adultery unconstitutional on the ground that it conflicted with the right of persons to live with dignity and the right to equality before law. Her decision indicates that what is morally wrong may not be legally wrong, and what might be a good reason to consider something morally wrong may not be an adequate reason to consider it legally wrong. This does not mean that critically normative arguments can never be relevant in the Indian legal context. As I mentioned above, it means only that to make considerations grounded in critical morality legally relevant in the Indian context, they must be mapped onto constitutional morality. In that sense, constitutional morality is the essential link between critical morality and the law. Without it, the two remain disconnected.[3]

Hence, in Part I, I establish the framework set by constitutional morality for sexual conduct, identifying also the extent to which it reflects critical morality. In Part II, I make normative arguments grounded in the values of the Indian Constitution to demonstrate that the current approach of Indian criminal law to adolescent sexuality is both over- and underinclusive. I then propose a tentative two-pronged solution to this simultaneous over-and-underinclusive approach: (i) the recognition of the positive sexual autonomy of those adolescents who are competent to consent to ordinary sexual conduct, and (ii) the operationalisation of a broader concept of sexual exploitation to protect adolescents from exploitative sexual interactions.

[1] In the judgments discussed below, the Supreme Court of India has explicitly held that popular, public or majoritarian morality *cannot* ground decisions on the constitutional validity of law.
[2] *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (*Joseph Shine*), [281]- [281.4].
[3] This argument is not normative. I make no claims on whether this is how it ought to be or what might happen if constitutional morality conflicts with critical morality. In that sense, I make no comment on the vexed issue of the separation between law and morals. My (admittedly descriptive) claim is that this is how things stand in the Indian legal context today, and an argument addressed to Indian law must account for this reality.

Without proposing a particular model law, I discuss the strengths and weaknesses of a number of different options available for the implementation of this guiding framework. In doing so, I incorporate insights from my fieldwork, described in Chapter 1.C.

I. Considerations in Constitutional Law

In this Part, I first demonstrate that recent decisions of the Supreme Court have held that the permissibility of sexual conduct in criminal law must be determined by constitutional morality, derived from the values of the Indian Constitution, rather than by majoritarian morality.[4] The right to positive sexual autonomy has also been recognised in the Supreme Court's decisions as an essential component of the right to life and personal liberty in India. I argue that it follows from this that the legal permissibility of sexual conduct must be determined based on the presence or absence of valid consent, and that constitutional morality requires that a (qualified) right to positive sexual autonomy be recognised for those adolescents who are competent to consent to non-wrongful sexual conduct.[5]

As I mentioned in Chapter 3.I, Indian constitutional courts (the Supreme Court of India and all High Courts at the state-level) are empowered to assess the validity of legislative and executive action to ensure that they are compatible with the Constitution of India, and particularly with fundamental rights. In considering the validity of provisions of Indian criminal law against fundamental rights, the source of 'morality' has remained an important question.

Whereas in 1965, 'morality' was read to mean 'public morality', which was interpreted to be the mores or standards of the community,[6] more recently, the Supreme Court appears to have moved away from this standard of public morality, relying instead on 'constitutional morality' when determining the limits of criminalisation and the permissibility of sexual interactions.[7]

The term 'constitutional morality' was first used in the Indian context by Dr. B.R. Ambedkar (Chairman of the Drafting Committee of the Indian Constitution) in the Constituent Assembly Debates (1949) to refer to an internalised fidelity to the Constitution. For Dr. Ambedkar,

[4] As shown in Chapter 4, Indian socio-normative conceptions of the permissibility of sexual conduct are concerned with the legitimacy of sexual interactions, based on marriage, rather than with the presence or absence of (valid) consent and therefore represent such majoritarian morality.
[5] As I explained in Chapter 6, this means sexual conduct that is not wrongful by virtue of being coercive, exploitative or deceptive.
[6] *Ranjit Udeshi v. State of Maharashtra*, 1965 SCR (1) 65, [21]-[29].
[7] That constitutional morality could serve as a limit to criminalisation was suggested by Vashist. See, Latika Vashist, 'Rethinking Criminalisable Harm in India: Constitutional Morality as a Restraint on Criminalisation' (2013) 55(1) Journal of the Indian Law Institute 73, 87-92.

constitutional morality was a feeling which was essential to restrain the subversion of the values of the Constitution.[8] In recent years, however, the term has been read substantively as a *type* of morality, rather than a feeling amongst the people or a culture of reverence towards the Constitution. While the precise content of constitutional morality is unclear,[9] Chandrachud rightly argues that the term has generally come to be interpreted in two ways: (a) to refer to a counter-majoritarian and transformative morality drawn from the values of the Constitution and opposed to popular morality, and (b) to refer to the 'spirit' or 'conscience' of the Constitution.[10]

As I discussed in Chapter 3, in 2018, s. 377, IPC, which criminalised 'carnal intercourse against the order of nature' and disproportionately affected the LGBTQ community, was struck down in *Navtej Johar v. Union of India* (*Navtej Johar*).[11] The Supreme Court affirmed that where the validity of a law is determined with reference to morality, public or majoritarian morality, to the extent that it is exclusionary and discriminatory, cannot be the relevant standard. The relevant morality is constitutional morality, drawn from the values of the Constitution.[12] Similarly, in the 2019 judgment of *Joseph Shine v. Union of India* (*Joseph Shine*),[13] in which the Supreme Court struck down the provision criminalising adultery,[14] Chandrachud J. held that even if sexual infidelity was considered morally wrong by the standards of public morality, it would not qualify for criminalisation unless it was also wrong by the standards of constitutional morality. He observed, '[c]riminal law must be in consonance with constitutional

[8] Constitutional Assembly Debates Volume 7 (4 November 1948) <https://www.constitutionofindia.net/debates/04-nov-1948/> accessed 17 November 2024.
[9] *Kantaru Rajeevaru v. Indian Young Lawyers Association*, (2020) 2 SCC 1, [5] (majority opinion). See also, Nakul Nayak, 'Constitutional Morality: An Indian Framework' (2023) 71(2) The American Journal of Comparative Law 354.
[10] Dr. Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (2020) <http://dx.doi.org/10.2139/ssrn.3521665> 2.
[11] *Navtej Johar v. Union of India, (2018) 10 SCC 1.* This case was previously discussed in Chapter 3.
[12] ibid, [599].
[13] The provision was struck down for being contrary to Article 14 (the right to equality). This was because (a) the sexual infidelity of wives, but not husbands, was criminalised (b) the offender was the wife's paramour, rather than the wife, and (c) the real 'wrong' appeared to be that the paramour interfered with the husband's ownership of his wife, since the consent or connivance of the husband would excuse the offence. *Joseph Shine* (n 2), [104]-[105].
[14] IPC, s. 497: 'Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.'

morality… [b]eing antithetical to the constitutional guarantees of liberty, dignity and equality, section 497 does not pass constitutional muster.'[15]

The recent jurisprudence of the Supreme Court with regard to the constitutional validity of sexual offences also emphasises the right to sexual autonomy, the importance of non-interference by the state (especially through criminal law) in the exercise of this autonomy and the centrality of consent in the determining the legal permissibility of sexual conduct. In both *Navtej Johar* and *Joseph Shine*, the Supreme Court's conclusion was based, in part, on the recognition of positive sexual autonomy, or the normative entitlement to govern one's own sexual life,[16] as an essential facet of the right to personal liberty under Article 21. Thus, in *Navtej Johar*, Misra J. observed: '[t]he sexual autonomy of an individual to choose his/her sexual partner is an important pillar… of individual liberty.' In the same case, Chandrachud J. linked the right to positive sexual autonomy and privacy to the state's recognition of an individual's capacity to make her own choices, observing that '[i]n a liberal democracy, recognition of the individual as an autonomous person is an acknowledgment of the State's respect for the capacity of the individual to make independent choices.[17] Similarly, in *Joseph Shine*, the Supreme Court emphasised that in line with constitutional morality, within which positive sexual autonomy is a facet of individual liberty, personal choice ought to be the relevant marker of legally valid or permissible conduct.[18] The freedom to choose one's own partner (in marriage) has also been affirmed as a fundamental right under Art. 21 in other cases.[19]

Thus, constitutional morality, as formulated by the Supreme Court of India, gives primacy to sexual autonomy and individual choice expressed through consent, with the right to positive sexual autonomy being recognised as a fundamental right. To that extent, critical morality has been incorporated into constitutional morality. In Chapter 6, I argued that Indian socio-normative conceptions of permissible sexual conduct conflict with critical morality. The permissibility of sexual conduct within this socio-normative conception is determined by the legitimacy granted by hegemonic marriage, rather than by consent. Personal choice, sexual autonomy, and the competence to make one's own decisions are irrelevant on this view. In fact,

[15] ibid, [219]. These views were also echoed by Malhotra J. *Jospeh Shine* (n 2), [281]-[281.4].
[16] Green, *Criminalizing Sex: A Unified Liberal Theory* (Chapter 3, n 43), 21.
[17] *Navtej Johar* (n 11), [474].
[18] *Joseph Shine* (n 2), [211]-[212].
[19] See, *Shakti Vahini* v. Union of India (2018) 7 SCC 192, [45]; *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 409, [84].

this conception is embedded in social norms (discussed in Chapter 2) which seek to control female sexual and reproductive capacity with a view to maintaining caste purity through endogamy. In contrast, from a critically normative perspective, the permissibility of sexual interactions should be determined by whether consent has validly been given by a person who has the capacity to consent to that sexual interaction. Likewise, by the standards of constitutional morality discussed in the preceding paragraphs, positive sexual autonomy is an essential component of the right to life and personal liberty, and consequently, the legal permissibility of sexual conduct should be determined by personal choice, exercised through consent. It cannot be determined by whether the conduct is considered socially 'good' or 'bad', or deemed socially right or wrong. Indian socio-normative conceptions are a kind of majoritarian or public morality, and should, therefore, be set aside to the extent that they conflict also with constitutional morality. This conclusion is supported by Bhatia's argument that one of the founding goals of the Constitution of India was the transformation of social practices steeped in inequality and discrimination through law.[20] Therefore, sexual autonomy and personal choice, exercised through valid consent, must be the determining principles in law and policy decisions on permissible sexual conduct. The blanket criminalisation of all adolescent sexual activity conflicts with this principle. By assuming that the consent of all minors is legally irrelevant, it denies the right to positive sexual autonomy even to those minors (that is, older adolescents) who have the moral capacity to consent to sex.

Whilst the articulation of a right to positive sexual autonomy by Indian constitutional courts has been limited to adults, there are three good reasons why Indian law should recognise such a right for adolescents who are competent to consent to non-wrongful sexual conduct.[21]

First, as I argued in Chapter 6, from a critical morality standpoint, it is possible for adolescents to have normative sexual autonomy as well as the moral capacity to consent to non-wrongful sexual conduct. Adolescents should be allowed to make their own sexual decisions about such sexual conduct, in line with their competence to consent. This is because: (a) as I argued in Chapter 6.I, sexual conduct per se is not inherently wrongful, notwithstanding the potentially

[20] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins, 2019) xxv-xxxviii; Kanad Bagchi, 'Transformative Constitutionalism, Constitutional Morality and Equality' (2018) 51(3) Law and Politics in Africa, Asia and Latin America 367, 373-375.

[21] That a right to positive sexual autonomy should be extended to some minors in India in accordance with their competence to consent has also been stated elsewhere. See, Lina Acca Mathew, 'Right to Sexual Autonomy of Children—Implications of the UNCRC upon the Indian Law on the Age of Consent' (2019) 8(2) International Journal for Crime, Justice and Social Democracy 121, 132.

harmful consequences that may attend it, (b) adolescents have an emergent sexual self-concept which can form the basis of normative sexual autonomy and (c) the capacity of older adolescents to make rational decisions is generally indistinguishable from that of adults, meaning that these adolescents have the underlying cognitive capacities necessary for the moral capacity to consent to non-wrongful sexual acts. Therefore, there exists a normative foundation for the legal recognition of older adolescents' (qualified) right to sexual autonomy.

Second, Article 12 UNCRC,[22] which India has signed and ratified (see Chapter 3.I.A.1), emphasises the need to involve children in decisions concerning them in accordance with their evolving capacities. For adolescents, Lansdown rightly argues that this should also mean sexual decisions in accordance with their developing sexual autonomy, and within the bounds of the protections necessary for them.[23] Thus, India's obligations in international law also provide support for recognising the right of adolescents to govern themselves in the sexual sphere, in accordance with their competence to do so.

Third, adolescents are not currently prohibited from making other decisions regarding their lives, such as which subjects to study or which sports to play, even though these decisions may have long-term (and potentially harmful, in terms of the likelihood of injury) consequences. Indian law even permits adolescents, defined in labour law as persons aged between 14 and 18 years, to make decisions regarding paid employment.[24] True, the law does not explicitly recognise adolescents' *right* to work, or use the language of decision-making. But the fact that adolescents, unlike children, are not prohibited from being employed except in hazardous occupations[25] implies that their competence to decide to engage in non-hazardous labour is

[22] United Nations Convention on the Rights of the Child (UNCRC), 1989 Art. 12(1): 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

[23] Gerison Lansdown, 'The Evolving Capacities of Children' (2005) 132-35 <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> accessed 13 May 2024.
See also, UNCRC Committee on the Rights of the Child General Comment No. 4, Adolescent Health and Development in the Context of the Convention on the Rights of the Child (CRC/GC/2003/4, 1 July 2003) 3 <https://www.refworld.org/legal/general/crc/2003/en/18641> accessed 13 May 2024.

[24] Under the Constitution of India, only the employment of persons *under* the age of 14 in factories mines or hazardous employment is prohibited by the fundamental right against exploitation. See, Constitution, Art.24.

[25] Employment of children, except as child artists or sportspersons and within their own family enterprise, is generally prohibited. See, The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 (CLA), s. 3. Adolescents, however, are only prohibited from being employed in hazardous occupations or process. CLA, s. 3A: 'No adolescent shall be employed or permitted to work in any of the hazardous occupations or processes set forth in the Schedule.'
18 occupations and 65 processes are listed as 'hazardous' in Parts A and B of the Schedule in CLA. See, ILO, 'Hazardous Work List- India' <https://www.ilo.org/newdelhi/areasofwork/child-labour/legal-framework/WCMS_486746/lang--en/index.htm> accessed 13 May 2024.

legally recognised. Since, as I argued in Chapter 6.I.B, sexual interactions per se are not wrongful by their very nature merely because of the potentially harmful consequences that may sometimes follow, a positive right to sexual autonomy, or the right to make one's own sexual decisions, can similarly be recognised for those adolescents who have the moral capacity to consent to these non-wrongful sexual interactions. The recognition of such a right would allow competent adolescents to make their own sexual choices, and would create a legal obligation to protect their choices regarding non-wrongful sexual conduct from undue interference (for instance by disapproving parents).

Thus, I have argued in this part that (a) the legal permissibility of sexual conduct should be determined by using constitutional morality which, like critical morality (discussed in Chapter 6), centralises valid consent, and (b) there are good reasons to legally recognise a (qualified) right to positive sexual autonomy for those adolescents whose rational decision-making competence is on par with adults. In Part II, I turn to arguments on why Indian criminal law needs amendment to balance the sexual autonomy of adolescents with their continuing need for protection, and the normative and regulatory concerns around the ways in which this can be done.

II. Considerations Regarding Criminal Law

Chapter 3 provided a detailed overview of how Indian criminal law deals with adolescent sexuality, demonstrating that all sexual interactions with persons under the age of 18 are criminalised without formal discretion at any stage of the criminal justice system, or exceptions that would account for the developing competence and autonomy of adolescents. I argued that this system fails to protect adolescents from exploitative sexual interactions sanctioned by the family and/or caste community, because these interactions (such as child marriage and *devadasi* dedication) are not recognised as sexual offences. While they are recognised as non-sexual criminal offences, they are so poorly implemented as to be commonplace in society. At the same time, adolescents who make the decision to have sexual interactions outside hegemonised marriage tend to be drawn into the criminal justice system, which reinforces family and community control over the sexuality of females, especially adolescent girls. In this Part, I outline a two-pronged recommendation as a tentative and admittedly partial solution to these drawbacks.

In section A, I argue that the current approach of Indian criminal law to adolescent sexuality is normatively both overinclusive and underinclusive, and therefore, requires amendment. In

Section B, I argue that to balance the recognition of adolescents' sexual autonomy and their continuing need for protection from sexual exploitation, the law should: first, recognise as legally valid the consent of competent adolescents to non-wrongful sexual conduct. Second, recognise a concept of sexual exploitation (broadly tracking the moral theory discussed in Chapter 6) as a form of sexual conduct to which any token of consent given by adolescents is not valid.

A. Normative Arguments against the Present Approach of Indian Criminal Law to Adolescent Sexuality

While the purpose of laws like POCSO in criminalising all sexual interactions with persons under the age of 18 is purportedly to protect minors from sexual abuse and exploitation,[26] the language and operation of these laws renders adolescents worse-off for reasons discussed in Chapter 3, as well as in the Introduction to this Chapter. Furthermore, as I argue below, this approach is both overinclusive and underinclusive.

Indian criminal law's approach to adolescent sexuality is overinclusive because it criminally prohibits conduct which ought to be protected by the right of competent adolescents to positive sexual autonomy.[27] The right to positive sexual autonomy is not unfettered in that it must inevitably be subject to the negative sexual autonomy of others.[28] However, an unnecessary curtailment of positive sexual autonomy (not required to protect the negative sexual autonomy of another) should be avoided because, as Green convincingly argues, the right to make one's own sexual choices without undue interference by the state is essential to the ability to live a

[26] POCSO, Statement of Objects and Reasons, (Introduction, n 5).

[27] It is also possible to make an argument regarding Indian criminal law's over-inclusiveness based in the theories of criminalisation. However, given the wide divergences in the literature on wrongfulness and its role in criminalisation, it would not be possible to do justice to such a discussion within the limited scope of this thesis. Furthermore, the rights-based normative framework of the Constitution of India has, so far, largely defined the approach of Indian constitutional courts considering issues of criminalisation and decriminalisation. Consequently, as I have argued elsewhere, Indian jurisprudence on this issue is also rooted *mainly* in this rights-based framework. See, Shraddha Chaudhary, 'A Critical Examination of the Discourse of Indian Courts on (De)criminalisation' in Shruthi Vidyasagar and Others (eds.), *Constitutional Ideals: Development and Realisation through Court-led Justice* (Oakbridge Publishing, 2023) 265.
It seems more apposite, therefore, to undertake this analysis of Indian criminal law with reference to the right of adolescents to positive sexual autonomy.

[28] As Green puts it, A's right to choose to have sex with B would be defeated by B's right to choose not to have sex with A. Green, *Criminalizing Sex: A Unified Liberal Theory* (Chapter 3, n 43), 24.

dignified and meaningful life.[29] This has also been recognised explicitly in Indian constitutional jurisprudence.[30]

The operation of law may have the effect of unfairly limiting positive sexual autonomy. Green posits that this may be the case with laws which criminalise specific forms of sexual conduct, such as homosexuality,[31] or it might alternatively be the consequence of a law that seeks to protect negative sexual autonomy but is overbroad in its formulation.[32] POCSO and the IPC, which purportedly aim to protect minors from sexual exploitation and abuse but criminalise *all* sexual interactions with all minors, including non-wrongful sexual interactions with adolescents who are competent to consent to those sexual interactions, seem perfectly to exemplify the latter category. It is in this sense that I argue that Indian criminal law's regulation of adolescent sexuality is overinclusive.

At this stage, it might be argued that since the positive sexual autonomy of minors has not, so far, been recognised in Indian constitutional jurisprudence, a criminal law that curtails this right to protect the negative sexual autonomy of minors is not appropriately described as overinclusive. Such an argument assumes that only explicitly articulated or listed rights deserve protection and would, therefore, be misplaced. In arguing that the 'rights of others' provide the appropriate limits of criminal law in a constitutional liberal democracy, Hörnle clarifies that the rights in question are not limited only to explicitly recognised rights, but include 'right-claims', that is what 'should be acknowledged as a right'.[33] Such a rights-claim, she explains, would pertain to a sphere of liberty within which a person ought to be able to make her own

[29] ibid, 22-23.
[30] In *Navtej Johar*, Chandrachud J. observed that '[c]onsensual sexual relationships between adults, based on the human propensity to experience desire must be treated with respect. In addition to respect for relationships based on consent, it is important to foster a society where individuals find the ability for unhindered expression of the love that they experience towards their partner. This "institutionalized expression to love" must be considered an important element in the full actualisation of the ideal of self-respect.' *Navtej Johar* (n 11), [482].
[31] In *Navtej Johar*, one of the primary reasons why the Supreme Court of India struck down s. 377, the IPC, was that (as I mentioned in Chapter 3) the provision criminalised even consensual sexual intercourse between adult homosexuals, thereby violating the right to positive sexual autonomy recognised under Article 21 (the right to life and personal liberty). This is evident in Malhotra J.'s observation that '[s]ection 377 insofar as it curtails the personal liberty of LGBT persons to engage in voluntary consensual sexual relationships with a partner of their choice, in a safe and dignified environment, is violative of Article 21.' *Navtej Johar* (n 11), [640.2.6]
[32] Green, *Criminalizing Sex: A Unified Liberal Theory* (Chapter 3, n 43), 24.
[33] Tatjana Hörnle, ''Rights of Others' in Criminalisation Theory' in A.P. Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds.), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing, 2004) 169, 183; Tatjana Hörnle, 'Theories of Criminalization' in Mark D. Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law* (OUP, 2014) 679, 691.

choices.[34] Thus, whilst competent adolescents' right to positive sexual autonomy has not yet been recognised, it qualifies as a 'right-claim' in that it ought to be recognised, and therefore deserves to be free from undue state interference.

As I argued in Chapters 5.I.B and 6.I, it is possible for some (mainly older) adolescents to be competent to consent to non-wrongful sexual acts. This is because they have an emerging sexual self-concept and the underlying abilities (to make rational decisions) necessary for the moral capacity to consent to non-wrongful sexual acts. In Part I of this chapter, I argued that this competence, India's international obligations under Article 12, UNCRC, and the position of other areas of Indian law, which allow adolescents to make their own decisions about what they study, what sports they play, and what forms of employment they undertake (provided it is not categorised as hazardous), are good reasons for recognising a (qualified) right of competent adolescents to positive sexual autonomy. Consequently, the positive sexual autonomy of those adolescents who are competent to consent to non-wrongful sexual activity, which ought to be recognised as a fundamental right, deserves to be free from undue interference by the state. The criminalisation of all sexual activity with minors notwithstanding their consent amounts to such undue interference, and therefore, Indian criminal law's regulation of adolescent sexuality is overinclusive.

Indian criminal law's approach to adolescent sexuality also creates concerns around fair labelling, which refers to the principle that criminal law should appropriately signal the nature and degree of the wrongfulness of an offence.[35] Fair labelling is important to ensure that the conduct-types covered by an offence receive the response (in terms of censure and punishment within the criminal justice system and outside it) that is due to them in light of their wrongfulness, both by appropriately describing the wrongful conduct and by distinguishing it from wrongs that are different in nature or severity.[36] The Indian criminal law, being overbroad in its regulation of adolescent sexuality, fails to ensure fair labelling. Within this legal framework, as I mentioned in the Introduction to this thesis, a de-facto consensual sexual relationship between an 18-year-old and a 16-year-old is signalled to be deserving of criminal punishment and censure in the same way as coercive sexual intercourse by an 18-year-old with

[34] Like Green, Hörnle sees sexual autonomy as having two dimensions: 'the right to decide freely about one's sexual preferences and practices' and freedom from unwanted interference in this sphere of liberty. Hörnle, ''Rights of Others' in Criminalisation Theory' (n 33), 184-85.
[35] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn., OUP, 2013) 78.
[36] James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) Modern Law Review 217, 238-39.

a 16-year old, or sexual exploitation of a 17-year-old girl by her 40-year-old relative in exchange for money to buy food (the example discussed in Chapter 6.III).

At the same time, the Indian criminal law is underinclusive because it fails to comprehensively identify and punish sexual offences against minors. As I argued in Chapter 3, Indian criminal law fails to recognise as sexual offences, and to effectively prosecute and punish as non-sexual criminal offences, those forms of sexual exploitation which are approved by, and occur at the behest of, the family and caste-based community.[37] Thus, *devadasi* dedication involves the dedication of an adolescent girl, usually around puberty, to the local temple in return for a promise to a deity, or with a view to obtaining spiritual benefit. This is inevitably followed by the sale of the dedicated girl's sexual services to the local priest and other members of the village in exchange for payment to the girl's family. Even though this exchange of sex for payment is at the heart of the *devadasi* system as it operates today, it is not recognised as a sexual offence. Though sexual interactions with a minor are criminalised under POCSO and the IPC, and the dedication of a person to a temple is also criminalised through various state legislation (see Chapter 3.III.B.2), it has been observed that in the rare cases where *devadasi* dedication is reported and investigated by the police, offences under POCSO are seldom registered.[38] Similarly, though arranging and conducting a child marriage or marrying a minor are recognised as criminal offences, they are so rarely enforced that child marriage continues to be widespread in India (see Chapter 3.III.B). Even though marriage is undoubtedly a relationship within which sex is expected, and, as I argued in Chapter 2, marriage is frequently the induction of females into sexual and reproductive labour in India, the sexual component of child marriage is rarely acknowledged, except insofar as all sex with a minor wife is de-jure rape (because all sex with any minor is de-jure rape).

[37] In Chapter 6, I argued that unless a person is psychosocially mature, she does not have the underlying abilities necessary for the capacity to consent to the exchange that is part of a proposal for sexual exploitation even she does have the moral capacity to consent to the sexual acts that would be involved. The consent of a person who is not yet psychosocially mature (a normative adolescent), therefore, is not morally decisive in determining the permissibility of her sexual exploitation which remains, despite her consent, all-things-considered wrong. Consequently, I argue in Section B of this Part that the consent of adolescents to sexual exploitation should not be legally recognised. Their positive sexual autonomy should not extend to permitting their own sexual exploitation because they do not have the underlying abilities necessary for the capacity to consent to the exchange involved in sexual exploitation. Moreover, since sexual exploitation is unwanted sexual conduct to which adolescent cannot meaningfully consent, it is a kind of sexual conduct from which they should be protected (even though the conduct would not be rape).

[38] Wilson, 'Can Legislation Alone Protect Devadasi Girls from Child Sexual Abuse and Exploitation?' (Chapter 2, n 85).

Devadasi dedication and child marriage are practices through which adolescents, especially adolescent girls, may be sexually exploited.[39] Since the life of a *devadasi* after her dedication necessarily involves the exchange of sex for money, it is not difficult to see that the person who pays for sex with the adolescent girl sexually exploits her. The family members who receive the payment, like pimps or middlemen in the commercial sex industry, also sexually exploit the adolescent girl by facilitating the use of her sexual labour in exchange for some benefit. In Chapter 6, I argued that sexual exploitation involves the exchange of sexual services for some perceived benefit to the exploitee and (where applicable) the person facilitating her exploitation, the sexual acts to be performed are unwanted and both the exploitee and the exploiter or facilitator are aware of the unwantedness of these acts. When it comes to *devadasi* dedication, these conditions are met not only for the person who pays to have sexual acts with the dedicated minor but also for those, typically the minor's parents, who perform the dedication. First, although the dedication may, ostensibly, be intended as expiation for sins, for spiritual benefit, or in gratitude for a perceived divine blessing, the material benefits sought and gained by those who dedicate the minor cannot be ignored. As I mentioned in Chapter 3.III.B.2, dedicated *devadasi*s almost always begin exchanging sex, with a network of patrons in the village, for money. Most *devadasis* belong to socio-economically marginalised sections of society, meaning that their dedication is meant to, and does, supplement the family's income through sex work. In this case, therefore, the family of the *devadasi* benefit directly and materially from her sexual exploitation. Second, since the life of a *devadasi* necessarily involves the routine exchange of sexual acts for some benefit to the family and, as I argued in Chapter 3.III.B.2, the practice is widely perceived as being akin to prostitution, it is reasonable to conclude that those who dedicate the *devadasi* are aware, or have reason to believe (and even expect), that she will be engage in sexual acts that are unwanted as sex. Any token of consent given to these acts arises from the *devadasi*'s situational (arising from poverty, hunger or other needs) or pathogenic (because of her inability to walk away from her relationship with those who dedicated her because her material and/or non-material needs are being met within it) vulnerabilities. For these reasons, *devadasi* dedication meets all the requirements of sexual exploitation as outlined in Chapter 6. It is, therefore, a practice within which adolescents are

[39] Adult women may also be exploited as *devadasis* or within marriage in the same ways as adolescents. However, I limit my discussion in this section to adolescents because I am concerned here with the scope of Indian criminal law's regulation of adolescent sexuality.

sexually exploited, both by those who have sex with them in exchange for payment, and by those who facilitate their sexual exploitation through their dedication.

Similarly, where marriage is a façade for the sale or trafficking of an adolescent girl into prostitution,[40] and family members who arrange the marriage receive payments, or the 'husband' acts as a pimp for his 'wife', their role as sexual exploiters is straightforwardly discernible. Even where the marriage is not a façade for sex trafficking, however, an adolescent may be sexually exploited within it. For instance, the adolescent's husband, being aware that the adolescent wife has no alternative but to stay in a marriage (since divorce is not a real option for most women in India, especially the financially dependent) may take advantage of this vulnerability to induce the adolescent to perform unwanted sexual labour. The adolescent, in turn, would agree to perform unwanted sexual labour in exchange for the perceived benefit of sustaining the marriage outside of which she has no good options for survival. It is essential, however, that the husband be aware of or suspect that the sexual interactions are unwanted for the adolescent wife and are agreed to only because of her vulnerability.[41] This would be an instance of sexual exploitation within marriage. This is not to say that child marriage always or necessarily entails sexual exploitation, but to highlight the scope for sexual exploitation within child marriage.

Whether parents or family members who arrange the child marriage behave like pimps or middlemen, and therefore sexually exploit the adolescent whose marriage they arrange, is a question that needs engagement. Where child marriages are arranged by the family members of adolescents, adolescents may find themselves unable to say no to the marriage because of their pathogenic vulnerability within these family relationships, that is, because of their inability to walk away from or do without these relationships within which their basic material and non-material needs are being met. Because of the cultural expectation of deference and obedience towards elders with which Indians are brought up (explained in Chapter 4.II.B), it may not even be considered necessary to seek consent from the adolescent, especially the female, whose marriage is arranged. Given this background, and the expectation of sex within

[40] Ghosh, 'Trafficking in Women and Children in India' (Chapter 2, n 109), 723.

[41] This is because, as I argued in Chapter 6.II.B, 'taking advantage' of the exploitee's vulnerability to induce her consent to unwanted sexual acts is an essential element of sexual exploitation. Since 'taking advantage' is a conscious act, this requirement would not be made out if the exploiter was unaware of the vulnerability of which advantage was taken, nor would such advantage taking be conceptually compatible with a person who is not aware or does not suspect that the sexual acts are unwanted for the exploitee. See Section B.2 below.

marriage, it is possible to argue that those who arrange the marriage also sexually exploit the adolescent, even though they do not have sexual relations with the adolescent themselves.

However, on deeper examination, this does not seem an accurate characterisation. The conditions for sexual exploitation mentioned above (the exchange of sexual services or acts for some perceived benefit to the exploitee and/or the facilitator of sexual exploitation, unwantedness of the sexual acts, and the awareness on the part of the exploitee and exploiter/facilitator of the unwantedness) do not apply neatly to the facilitators of child marriage. The benefit that accrues to those who arrange the marriage (family members or elders of the wider caste-based community) in a typical case of child marriage is either the satisfaction of having performed what they perceive to be their duty towards the adolescent girl in getting her 'settled' in life, or the control of her sexual and reproductive capacity by containing it within hegemonised marriage, usually with the aim of ensuring caste purity through endogamy (see Chapter 2). Thus, while the sexual interactions that take place within the marriage are an ancillary part of the benefit that accrues to those who facilitate the marriage (in that it furthers their goal of maintaining caste purity), the benefit does not arise directly from, or in exchange for, the sexual interactions that take place. Even if no sexual interactions took place within the marriage, the perceived benefits mentioned above would accrue to those who facilitate the marriage, as long as the adolescent girl's sexual and reproductive capacity is not utilised (by herself or anyone else) outside the marriage. Furthermore, in most cases of child marriage it cannot be said that the adolescent and those who arrange her marriage are aware of or suspect that unwanted sexual labour would need to be performed by the adolescent. At best, it may be said that those who arrange the marriage do so without due consideration to the (often strong) likelihood that such labour might be expected, because, within the worldview of those arranging the marriage, the wantedness of sex is secondary to its legitimacy through marriage (see Chapter 4). It would be a stretch, therefore, to say that parents, family members or community elders who arrange the marriage of an adolescent sexually exploit her.

Notwithstanding this, as I have discussed in the foregoing paragraphs, there is scope for sexual exploitation in both child marriage and the *devadasi* system. A commercial exchange of sex is generally an intrinsic part of a *devadasi*'s life after she is dedicated,[42] and child marriage can function as a façade for sex trafficking or an avenue for the husband to sexually exploit his

[42] Even when the sexual acts were exchanged for some non-commercial benefit, this concept of sexual exploitation would be capable of capturing it.

wife. Therefore, their non-recognition as sexual offences makes Indian criminal law's approach to sexual practices involving adolescents underinclusive. This is in contrast to the criminalisation of de-facto consensual sexual relationships, which is overinclusive because it fails to respect the normative sexual autonomy of those adolescents who are competent to consent to non-wrongful sexual acts. In other words, Indian criminal law fails to recognise the sexual autonomy of adolescents when it comes to sexual conduct to which they are competent to consent while also failing to protect them from sexually exploitative conduct which approved by the family and/or community.

In the following section, I propose a tentative solution to these shortcomings, and consider the normative and regulatory concerns surrounding the different ways in which that solution might be implemented.

B. Operationalising Sexual Exploitation within Indian Criminal Law: A Tentative Solution

In this section, I outline a two-pronged proposal as a tentative solution to the simultaneously over- and underinclusive nature of Indian criminal law's regulation of adolescent sexuality. First, I propose that the sexual autonomy of those adolescents whose competence to make rational decisions is no different from that of adults, and who therefore have the moral capacity to consent to non-wrongful sexual conduct, ought to be accommodated by recognising their consent to such non-wrongful sexual conduct as legally relevant. This means that, as in the case of adults, some adolescents would be presumed competent to consent, and establishing a sexual offence would require proof that the adolescent did not consent, or that her consent was invalid. This gives rise to the possibility that the consent of the competent minor would become a contested issue during trial. A presumptively competent minor's 'token' of consent could be relied upon by the defendant to claim that no sexual offence is made out because the competent minor consented to the sexual acts.[43]

The consent of any person (regardless of her age) who is presumed competent to consent, may be proved invalid if the person is not, in fact, capable of consenting to non-wrongful sexual acts. As I discussed in Chapters 5 and 6, a person can only be considered capable of consenting to a particular sexual act if she understands (a) the nature and mechanics of the particular act, (b) the ordinary physical, biological, and social consequences of that sexual act, and (c) that she has the right to refuse any particular sexual act or sexual interactions with any particular

[43] I argue below in this section that the presumption in favour of the competence of an adolescent above the legally prescribed age threshold ought to be rebuttable.

person. Where a person is found not to meet this criterion, her consent would be invalid. Even if a person is unquestionably competent, the validity of the ostensible consent given by her can, in any event, be challenged in Indian criminal law on specified grounds of coercion and deception (see Chapter 3.III on rape and deceptive sex in Indian criminal law).

The second part of my proposed solution is that, when it comes to adolescents, Indian criminal law should incorporate a concept of 'sexual exploitation' that can operate outside the commercial sex industry as well. As I discussed in Chapter 3.IV, Indian law's recognition of sexual exploitation in the Immoral Traffic (Prevention) Act (ITPA), 1956 and the IPC is limited to the commercial exchange of sex, usually by sex workers, and the criminalisation of inducement to consent to sex by abuse of position of authority or fiduciary relationship under s. 376, IPC appears to refer only to the abuse of official positions of authority or fiduciary relationships within specific institutional structures. This means that incidents of sexual exploitation outside this context, for instance within practices approved by the family and/or community, fail to be captured as sexually exploitative. The introduction of a broader concept of 'sexual exploitation' would facilitate the protection of adolescents (who may be competent to consent to sexual acts but would nevertheless lack the underlying abilities necessary for the competence to consent to the exchange proposed by the exploiter) from sexual exploitation even if they ostensibly consented to being sexually exploited. By enabling the recognition of sexual exploitation of adolescents within practices approved by the family and/or community, this second prong could potentially address Indian criminal law's blind spot when it comes to such practices. To that extent, this two-pronged proposal provides a more holistic solution to the normative issues raised by the current approach of Indian criminal law to the regulation of adolescent sexuality, compared to simply reducing the age of consent. This is also recognised by some child-rights organisations, which suggest incorporating offences punishing sexual interactions capturing an abuse of position.[44]

In the following sub-sections, I consider some ways in which the two-pronged proposal mentioned above could be operationalised in Indian criminal law.

[44] Enfold Proactive Health Trust, UNFP and UNICEF (Enfold, UNFP and UNICEF), 'Implication of the POCSO Act in India on Adolescent Sexuality: A Policy Brief' (2022) 17-18 <https://www.girlsnotbrides.org/documents/1951/Romantic-cases-under-the-POCSO-Act_wUNsbKC.pdf> accessed 13 May 2024. This policy brief provides no reasons as to why such offences might be required, how they would work or what purpose they would serve.

1. Accommodating Adolescent Sexual Autonomy in Indian Criminal Law

In this sub-section, I first consider certain methods (suggested by, or discussed with, interviewees in my fieldwork) that can be used to recognise the positive sexual autonomy of adolescents in Indian criminal law and the concerns that the interviewees raised about these methods. I then attempt to distil the workable options that emerge and present my own conclusions about them.

Reducing the age of consent to 16 is often suggested as a first or interim step by child-rights activists.[45] For instance, the head of an organisation engaged in research and activism on adolescent sexuality in Delhi, whom I interviewed, stated

> The age of consent does need to go down... 18 is too high, you know? I'm not saying 16 is old enough to handle everything, but [16-year-olds are] quite capable of being sexually curious and active. We have seen this in the adolescents we work with.... of course, these things begin before the age of 16, but if you keep the age at 16, at least these cases will not get criminalised.

A POCSO Special judge from Tamil Nadu, speaking of her colleagues, echoed similar sentiments,

> I don't agree with this, but if you talk to most POCSO judges, my colleagues, they will tell you informally that [the] age [of consent] should be reduced to 16. This way, most of these eloping cases would not come into the criminal justice system, they will get married. Formally we cannot say like that, it is difficult.

This suggestion reflects assumptions which merit further discussion. First, as these quotes also indicate, it is assumed that reducing the age of consent to 16 would remove most of the de-facto consensual cases from the ambit of criminal law. The evidence on this is mixed. While some studies support this conclusion,[46] others suggest that the age of the prosecutrix in de-facto consensual cases under POCSO is frequently contested.[47] The difficulty of ascertaining age, as I discussed in Chapter 3.II.A, is one of the reasons why many of these cases end in acquittals under POCSO.

[45] ibid; Abhinay Lakshman, 'Should the age of consent be revised in India?' (The Hindu, 4 August 2023) <https://www.thehindu.com/opinion/op-ed/should-the-age-of-consent-for-sex-be-revised/article67154438.ece> accessed 13 May 2024.

[46] CCL-NLSIU, Maharashtra Report (Chapter 3, n 59) 39. The study noted that in 60% of de-facto consensual cases, the de-jure victims were in the 16-18 age group; Enfold and UNICEF, '"Romantic" Cases under the POCSO Act' (Chapter 3, n 66), 17. Though the study claims that the de-jure victims were 16-18 years old in a 'vast majority' of cases, the report indicates this to have been in the case in 46.5% cases, which is less than the majority.

[47] CCL-NLSIU, Andhra Pradesh Report (Chapter 3, n 59) 35; CCL-NLSIU, Assam Report (Chapter 3, n 59) 44.

The second proffered reason is that 16 was the age of consent in India 'from 1940 to November 2012 [until] the POCSO Act came into force.'[48] An academic from Kolkata, with decades of experience in child-rights activism and empirical research, expressed such an opinion, '...if you look at the IPC, the age of sexual consent was 16. What was wrong with that? I think there was no specific need for raising the age of consent under POCSO.' That a practice or rule is longstanding seems, on its own, a poor reason in favour of continuing (or, in this case, reviving) it. Ever since the introduction of the IPC in 1860 until 2018, homosexuality was a criminal offence, and to this day, marital rape is exempted from criminal prosecution. But it would be absurd to argue that the longevity of these provisions is a good argument for their continuance or, indeed, for a return to them. A third argument in favour of reverting to 16 as the age of consent, made in a joint report by Enfold Proactive Trust (a non-governmental organisation working on issues of child rights in Bangalore) and UNICEF on de-facto consensual cases under POCSO, is that it is the age of consent in a particular set of countries identified in the report. Given the significant diversity across countries on the rules around statutory rape (including the age of consent), it is unclear why *these* jurisdictions (identified by the report) should serve as the model for Indian law instead of other jurisdictions with different ages or rules or why *any* country's legal standard should be so uncritically adopted. This is not to say that I am, in principle, against reducing the age of consent. My objection is to the reasons (outlined in the preceding paragraphs) given for the suggestion that it should be reduced to 16.

Aside from reducing the age of consent to 16, the most common suggestions I received from interviewees during my fieldwork about how adolescent sexual autonomy can be accommodated in Indian criminal law favoured retaining the legal age of consent at 18 but giving discretion to certain functionaries of the criminal justice system to decide whether or not a particular sexual interaction deserves to be brought into the criminal justice system or punished. For instance, a child-rights activist and researcher from Bangalore said, '...the age of consent can remain 18, but for 16- or 17-year-olds, there should be some scope for an exception. Tamil Nadu has started a great system that gives the police discretion not to arrest in these "romantic" cases.' Another child-rights activist from Chennai mentioned, 'The age can remain 18, but if an older teen[ager] says she consented, the judge, or even the Magistrate at

[48] Enfold and UNICEF, '"Romantic" Cases under the POCSO Act' (Chapter 3, n 66), 17.

the stage of the [s.] 164 [CrPC] statement, should be able to record that and use that as a reason to acquit. The law can provide for this.'[49]

The reason for suggesting that the age of consent be retained at 18 appeared to be that, compared to adults, a more protectionist legal approach would not only be justified but also necessary for adolescents, who were no longer 'children' but were still more vulnerable than adults. In fact, regardless of their stand on whether the current approach of Indian law's regulation of adolescent sexuality or their views on what the approach ought to be, almost every interviewee expressed the view that the characteristic features of adolescence rendered adolescents more vulnerable than adults, with most interviewees stressing characteristics such as impulsivity and an inability to consider the possible consequences of their actions.[50] While it is not possible to present the views of all my interviewees on this point, the quotes that follow provide a snapshot of the common themes in their responses. A child psychologist from Pune characterised the particular vulnerability of adolescents in the following terms, '[A]dolescents think they know a lot... a lot more than they actually know. They are so very impulsive... they engage in rash behaviours, in thrill seeking. They want to rebel, they want instant gratification, if they are not properly supervised, they can be a danger to themselves and to others.' A police officer from Patna said of adolescence, '*Madam, ye behekne ki umar hai. Is umar mein bachche ghalti karte hain, kisi ki baatoen mein aa jaate hain. Dheeraj se, dimaag se kaam nahi laete.*' (This is the age when people get carried away. Teenagers make mistakes, they are gullible. They don't use their brains [rationality], they are not patient). In answering my follow-up question on what made adolescents different from adults, a police officer from Mumbai painted me a vivid picture,

> *Aap Mumbai ke local mein gaye kya? Udhar dekha ye 14/15/16 saal ke chhokre kaise train se latak ke khade hote hain? Uske Ma-baap ko tension hai. train mein bade hain usko bolenge,* "*aat chal*"*... samjhe na? Kitne girke marte hain, train ke neeche. Lekin inko koi darr nahi. Yahi baat hai is umra ki, samajh nahi aata. Adventure chahiye...*

[49] CrPC, s. 164 provides that a Metropolitan or Judicial Magistrate may record any statement or confession in the manner prescribed in the provision. It is standard procedure to get statements of prosecutrices recorded under s. 164, CrPC in cases where an allegation of a sexual offence has been made.

[50] It should be noted that not all responses to this question were as serious as the discussion makes it appear. One of the lighter responses I got was from a child rights researcher in Patna who said, '*sabse achha time hota hai.. hai ki nahi? Kabhi lautkar nahi aata*.' ([Adolescence] is the best stage of life, isn't it? [Alas] it never comes back). He then sang a couple of lines from an old Hindi film, '*sapne suhane ladakpan ke, mere naino mein dole bahaar ban ke*' (sweet dreams of my youth now dance/sway in my eyes like the spring). Unfortunately, however, this quote was not particularly useful in answering the questions with which this thesis is concerned.

> (Have you been in a local train in Mumbai? Did you notice 14/15/16 year-old boys hanging out of the open train doors in moving trains? Their parents worry about them, the adults in the train tell them "come inside"... you understand? So many people fall out of trains and die. But these boys feel no fear. That's what defines this age [adolescence], people don't understand. They just seek adventure.)

Another child-rights activist from Bhopal mentioned, '...teenagers are very emotional compared to adults... moody... one day in love, the next out [of love], heartbroken. Quite confused. This also makes them gullible, susceptible to suggestion. Uniformly they are impulsive and highly emotional- whether it is anger or sadness or happiness, nothing [is] in moderation.' A representative from an NGO engaged in rescuing and rehabilitating children trafficked into sex work and child labour in Patna and Varanasi (a city in Uttar Pradesh in North India) noted,

> Adolescents are on the path to maturity. They are more mature than children in every way, whether biologically or sexually or mentally or emotionally, but they are not as mature as adults, though they will often think they are. *Unko kuch chahiye toh abhi chahiye. Unke dost kuch kar rahe hain toh unhe bhi karna hai. Jhat se khayal aayega, phat se kuch kar jayenge, phir baad mein pachhtayenge.*
>
> (if they want something, they want it now. If their friends are doing something, they want to do it too. One moment they have a thought or an idea, the next they act on it and subsequently regret it.)

For one private lawyer from Mumbai, whatever the age of consent, the special rules of procedure and evidence, laid down under POCSO for trials involving minor victims (discussed below in this sub-section), must continue to apply to all persons under the age of 18. She stated, 'Ultimately, I believe the procedural protections have to continue until 18, whatever be the age of consent. Because you don't want them to be questioned by the defence attorneys and face character assassination and revictimisation in court. That is most important.'

Amongst those respondents who were in favour of granting discretion to functionaries in the criminal justice system, the suggestion that India might adopt a system of prosecutorial discretion for POCSO cases along the lines of the system in England and Wales did not find favour. As I mentioned in Chapter 3.I.B, the Crown Prosecution Service in England and Wales has the authority to decide not to prosecute specific criminal incidents if, having regard to a holistic range of factors, prosecution is not considered in the public interest or the evidence available appears insufficient to secure a conviction. Only two (one private lawyer from Delhi and one child-rights researcher from Patna) interviewees agreed that a similar system could be feasible and effective in the Indian context, and only with caveats (such as oversight by a judge, and written reports open to public scrutiny). Thus, in response to the question whether the

prosecutor's office could be given such discretion, the private lawyer after a long and thoughtful silence said,

> This might be a good proposition; it certainly seems like a sensible way to weed out some cases which should not be criminally punished or where it is clear the victim [prosecutrix] will turn hostile later. But it will only work of the public prosecutor's office is strengthened. You know the state in which it is now, the people who are appointed, their incentives. There is no trust in the PP [public prosecutor].

The private lawyer was right. Other interviewees were extremely sceptical of the office of the public prosecutor, seeing it as largely corrupt or ineffective. One representative of an NGO working in child-rights research and activism in Chennai responded in the following stark terms to my question about the possibility of giving discretion to public prosecutors, 'No way! They are political appointees, lazy, incompetent, corrupt. I would never trust them with the slightest discretion.' Most respondents anticipated that giving discretion to public prosecutors could increase the scope and chances of the abuse of authority and corruption in cases involving the potential sexual abuse of minors and concluded that discretion could not safely be given to public prosecutors.

Comparatively, responses to the idea of police discretion were more mixed. Interviewees across regional and professional backgrounds seemed uncertain of the wisdom of giving wide discretion to the police to decide whether to register or investigate offences. One police officer from Pune gave the following reason in *Marathi* (the language spoken in the western state of Maharashtra), '*zar policeanvar sodla tar pharach kami case dakhal hoti*... mandatory reporting *asalyamule jasta case darja hotayet ani changli goshta aahe, asa mala vaatata*' (if you leave it to the police, very few cases will end up getting registered... mandatory reporting has ensured that a greater number of cases get registered, which is a good thing in my opinion).[51] The judges interviewed in Patna were most vehement in their doubts about police discretion. The junior, female judge declared, '...nobody but courts can be given any discretion by the law. Where the police have the tiniest bit of discretion, they misuse it. You know it, I know it, the world knows it.' A private lawyer from Delhi stated, '...the problem is that the police are lazy. They don't want to work. They will label everything a "romantic case", even if it is actually abusive and

[51] This particular interviewee switched between Hindi and Marathi. My husband, who is a native Marathi speaker translated the interview for me in real time when the interviewee spoke in Marathi, and later helped me transcribe the parts of the interview that were given in Marathi.

close the case, or encourage some kind of out-of-court compromise.'[52] The concern expressed by a child rights activist in Bhopal was that this would encourage corruption. 'Give them discretion and they will start taking money to write or not write FIRs [the first information report, or the first report of a criminal offence given to the police], to file or not file chargesheets.' However, there appeared to be less doubt about limited discretion, for instance, of the kind seen in the southern state of Tamil Nadu. Based on a circular from the Director General of Police (the head of the police force in the state), the police in Tamil Nadu may decide not to arrest, without further investigation, a person against whom a report of an offence under POCSO is made if it appears to be a de-facto consensual case.[53] One of the police officers I interviewed in Chennai explained the safeguard built into the discretion granted by the circular,

> The power is good because it is limited. It is only to not arrest [the accused] in a "love case". [The] boy's life is not ruined. He can still work, or study. [The] pressure is still on us. If we don't arrest, and he runs away, we will be answerable to court, our jobs will be in danger, so we have to be careful.

Representatives of NGOs (usually the first to criticise the police) were also in favour of it. One representative from Delhi acknowledged,

> For years we have fought to make it mandatory for the police to register FIRs, to investigate... all this time the fight has been that the police should not get discretion. *We* have fought that fight. Now we see the drawback of a law that completely chokes out police discretion. It's doing more harm than good. We need a middle ground, and the Tamil Nadu solution seems to be a good place to start.

Representatives from Chennai (the capital city of Tamil Nadu) also gave uniformly and overwhelmingly positive feedback on the working of the system. One of them observed,

> I think this is a brilliant system... it's a way of recognising the sexual autonomy of adolescents and of not criminalising these relationships without jeopardising their safety, because the police still have to investigate and file a chargesheet,

[52] This view is strengthened by evidence indicating a high degree of rape myth acceptance by the police in India. See, Damania and Singh (Chapter 3, n 79), 1005. It should be noted, however that the study considered rape myth acceptance amongst 'legal actors', a group comprising of police officers and lawyers. It is not clear, therefore, how rape myth acceptance amongst the police in India relates to rape myth acceptance amongst other functionaries of the criminal justice system, notably judges whose tendency to rely on rape myths and stereotypes is widely recorded in the literature (see Chapter 3.II.B). It may well be, therefore, that the police in India are no more prone to rape myth acceptance than judges.

[53] As I mentioned in Chapter 3.I.B, despite the CrPC already granting this power to the police, the circular by the DGP of Tamil Nadu is significant because it allows police officers in the state to exercise their powers under the CrPC in de-facto consensual POCSO cases (which, *prima facie*, involve allegations of child sexual abuse) without fear of backlash from the public, the media, senior police officials, or politicians. (Chapter 3, n 32).

> there is still going to be a judicial verdict on the case. It just means nobody rots in jail while these processes are ongoing.

Most respondents stated that the judiciary would be the ideal functionary to be granted discretion because judges are better trained than police officers and their decision-making, being more in the public domain than that of the police, is likely to be more accountable. Echoing the view of most respondents that judges should have discretion to acquit or discharge the accused in de-facto consensual cases, one child-rights activist from Delhi opined,

> A judge has been trained, and by necessity has been educated in law and, at least in Delhi, trained in gender sensitivity. They may not be doing a great job of it, but the probability that a judge will exercise discretion appropriately seems much higher than the police or the prosecution. It also helps that they have to give reasons in writing for the decisions they make. You can appeal those decisions, you can hold them accountable. You can expect more [from judges].

All three judges whom I interviewed agreed that judges would generally be able to distinguish cases which were de-facto consensual from those which were not. When this assertion came from the senior, male, POCSO judge in Patna whose gendered worldview had become apparent in the personal and somewhat inappropriate line of questioning to which he subjected me (see Chapter 1.III.D), my first instinct was to be deeply sceptical. However, when I considered the methods that he claimed to use in making this determination, his assertion did not seem so far-fetched. He explained,

> Ideally, the law should set out guidelines so that we, as judges, don't have to deal with allegations of bias. But there are ways to ascertain the nature of the case. We examine the girl in-chambers, away from the accused, away from her family. She should feel no pressure. We let her take her time. We ask her many times, on different days. And girls these days are not timid like in our time. They tell us straight to our faces, "I asked him to come and pick me up, or I asked him to meet me at such and such place", they tell us they wanted to get married. We also consider the 164 statements,[54] what did she say then? Are there any discrepancies between that and what she is saying now? Did she file the case or was it filed by the parents? Did she give a statement to the police?

If these methods are followed, judges may, indeed, be able to distinguish cases that are de-facto consensual from coercive cases, or those in which the sexual interaction is wrongful for other reasons. I admit the possibility that these methods are not consistently followed, and/or the judge quoted above may merely have claimed to follow them so that he didn't look bad in the

[54] A statement or confession recorded by a magistrate. See note 49 above.

interview. It has been observed in empirical studies of POCSO cases,[55] that where victims turn hostile and refuse to testify during trial, despite having claimed to have been raped or sexually assaulted before the police, judges seem to make no effort to ascertain why the prosecutrices turned hostile. It should be noted, however, that these observations are made based on the analysis of judgments (case reports), which may not reflect the conversations that judges have with prosecutrices.

The suggestion that judicial discretion might provide a solution to the Indian criminal law's overinclusive approach to adolescent sexuality received a lukewarm response from one child psychologist and two representatives of NGOs from Pune, and one private lawyer from Delhi. This was not because they were opposed to judicial discretion, but because it appeared to them an incomplete solution. The representative of a child-rights NGO in Pune told me,

> I'm concerned that by the time the matter comes before the judiciary, at the stage of trial or earliest at the stage of framing of charge, it is already too late. The accused has been arrested, is rotting in jail or if he is a juvenile, in an observation home, for months, sometimes years, before the plea of his innocence is even heard. How can we take personal liberty so lightly?

This concern seems particularly pressing in view of how lengthy the trial process, including under POCSO,[56] tends to be in India. An empirical study of POCSO cases spanning nearly a decade (November 2012-February 2021) from 486 districts of 28 Indian states found, in respect of cases that end in acquittal, that only 40.1% of trials were completed in less than a year. 29.92% of trials that ended in acquittal took between one and two years, 16.02% took between two and three years, and 13.35% took more than three years.[57] This means that even in a de-facto consensual case which eventually ends in acquittal, an accused person may be held in pre-trial detention for anywhere between one and three years.[58]

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[55] Chaudhary, '"Love", Consent and the POCSO' (Chapter 1, n 35) 135. A similar observation has also been made about alleged cases of rape in which the prosecutrix is an adult. See, Pratiksha Baxi, '"Carceral Feminism" as Judicial Bias: The Discontents around State v. Mahmood Farooqui' (Interdisciplinary Law, Issue 3, Council for Social Development, Hyderabad, 2016) 7 <https://www.academia.edu/29104002/_Carceral_Feminism_as_Judicial_Bias_The_Discontents_around_State_v_Mahmood_Farooqui> (19 November, 2024).

[56] This is the situation despite the statutory mandate to complete all cases under the POCSO within a year. POCSO, s. 35(2).

[57] VIDHI Centre for Legal Policy, JALDI and the World Bank, 'A Decade of POCSO: Developments, Challenges and Insights from Judicial Data' (November 2022) 79-80 <https://vidhilegalpolicy.in/research/a-decade-of-pocso-developments-challenges-and-insights-from-judicial-data/> accessed 13 May 2024.

[58] While this is not necessary, it is widely known that pre-trial arrest and detention is the norm in cases where there is an allegation under POCSO.

The Law Commission of India (LCI), which recently considered arguments for and against lowering the age of consent in India, also suggested that though the age of consent should not be reduced, judges should be given the discretion to assess whether or not the consent given by a prosecutrix between the ages of 16 and 18 was 'genuine'.[59] In its extensive report, the LCI recommended that this assessment be based on a wide range of factors, some of which need clarification. For instance, it is suggested that the genuineness of the consent of prosecutrices between 16 and 18 may be assessed by judges, but it is not clear why 16 is chosen as the cut-off for this determination. Similarly, while this assessment is only recommended in cases where the age difference between the de-jure victim and the accused is no more than three years, there is nothing to justify why this particular age-difference has been selected.[60] A bigger problem with this report, however, is its recommendation that even where the consent of the prosecutrix to the sexual acts is adjudged to be genuine, its effect should only be to grant the judge discretion to impose a sentence lower than the statutory minimum.[61] This recommendation seems untenable without further explanation. The wrong of offences under POCSO, as it currently stands, is sexual interaction with a person whose consent to the sexual acts, by virtue of her age, is irrelevant in law. But if the consent of the prosecutrix to the sexual acts is legally relevant and it is found to be genuine, more needs to be said to justify the conclusion that a reduced sentence, rather than an acquittal, should follow. Therefore, without further refinement, the recommendations of the LCI cannot provide a roadmap for allowing some positive sexual autonomy to adolescents through judicial discretion.[62]

Concerns motivating the suggestion that the age of consent should be retained at 18 have merit and deserve further engagement. I argued in Chapters 5 and 6 that adolescents occupy a life-stage between childhood and adulthood, marked by several capacities which may be on par with adults but also given to inherent vulnerabilities which make them susceptible to sexual exploitation. As I mentioned above, most of my interviewees also expressed the view that adolescents were more vulnerable than adults for a variety of reasons, many of which (impulsivity, a tendency towards instant gratification, giving inordinate value to the opinions and approval of peers, the inability to regulate emotions) are attributes that make adolescents

[59] Law Commission of India (LCI), 283rd Report on Age of Consent under the Protection of Children from Sexual Offences Act, 2012 (September 2023), 116 and 119 <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2023/09/20230929466194485.pdf> accessed 13 May 2024.
[60] ibid, 117 and 119.
[61] ibid, 117 and 119.
[62] For a more detailed engagement with the LCI's suggestions, see, Shraddha Chaudhary, 'Law Commission of India and the Debate on Age of Consent' (2024) 59(6) Economic and Political Weekly 21.

less psychosocially mature than adults, and in that sense, inherently vulnerable to being taken advantage of. I argue that, consequently, adolescents may need to be protected from a wider range of sexual conduct compared to adults. However, this can be achieved even if the age of consent is lower than 18. In England and Wales, for instance, while the age of consent is 16,[63] persons under the age of 18 are protected from sexual conduct based on the abuse of a position of trust,[64] sexual conduct with a family member,[65] and sexual exploitation.[66] One representative of an NGO, engaged in child-rights and sexual health research and activism in Bangalore, specifically mentioned that these provisions could be used to protect adolescents from sexual exploitation, although she stressed (and rightly so) that some of these provisions might need to be adapted to the Indian context. For instance, sexual conduct with some family members, currently prohibited under the Sexual Offences Act, 2003, such as with cousins or uncles,[67] may be perfectly acceptable in some Indian cultures where cousin or uncle marriage is common.

Drawing from the suggestion of the private lawyer from Mumbai whom I interviewed (see above), special rules of procedure and evidence, which allow more sensitive consent-assessment without eroding the rights of the accused, can also continue to apply to all minors, even if the consent of some adolescents to some sexual conduct is considered legally valid. This *may*, to some degree, shield adolescents from practices such as victim-blaming or reliance on rape myths and stereotypes when assessing their consent.[68] As I discussed in Chapter 3.II.B, the insensitive nature of consent-assessment typical in rape trials in India was one of the reasons why the Parliamentary Committee (Rajya Sabha) rejected the option of allowing the consent of minors between the ages of 16 and 18 to be legally valid as an exception to the blanket criminalisation under POCSO. Procedural safeguards under POCSO, if properly applied, would partly address this concern. These procedural safeguards are as follows:

i. Trials under POCSO are to be conducted in child-friendly courts called 'Special Courts', which are presided by 'special judges'[69] who are of the rank of Sessions judges

[63] Sexual Offences Act, 2003 (England and Wales), s.9.
[64] Sexual Offences Act, 2003 (England and Wales), ss. 16-24.
[65] Sexual Offences Act, 2003 (England and Wales), ss.25-29.
[66] Sexual Offences Act, 2003 (England and Wales), ss. 47-51.
[67] Sexual Offences Act, 2003 (England and Wales), s. 27(2).
[68] Arguably, all prosecutrices in sexual offences should be protected from such practices. However, I cannot delve into this argument within the scope of this thesis.
[69] POCSO, s. 28.

(the highest ranked judges at the district level), and trials are conducted by 'special public prosecutors'.[70]

ii. Police are required to take the statement of a 'child victim' (that is, any complainant who is a minor) at a location less intimidating than a police station, such as the minor's home or another place of the minor's choosing.[71]

iii. The trial is also sought to be made easier on the minor by having a parent or guardian present with her throughout the trial if the minor wants them to be,[72] by providing the assistance of translators or special educators if the minor is disabled,[73] by ensuring that the minor does not have to face the accused,[74] by taking the testimony of the minor through audio-visual means, or by providing a physical barrier, such as a single-visibility mirror or curtain,[75] and by allowing the minor frequent breaks (as needed) throughout their testimony and cross-examination.[76]

iv. All questions (from the prosecutor or the defence attorney) meant for the minor are to be posed to them through the Special judge, who can ensure that the questions do not revictimise or humiliate the minor.[77]

As with protections against the introduction of evidence of, or cross-examination by the accused on, the prosecutrix's 'immoral character' and past sexual history under the Indian Evidence Act, 1872 (IEA)[78] it is unlikely that these procedural safeguards will always work. In her analysis of 1635 case reports of rape trials between 2013 and 2018 from trial courts of Delhi, Dash demonstrates that the reformatory measures introduced by the Criminal Law (Amendment) Act, 2013 have had little impact on rape adjudications, with the same grounds being relied upon to acquit persons accused of rape in cases registered before and after the amendment. She argues, based on this finding, that legal reform without accompanying policy and social change is largely ineffective.[79] Admittedly, therefore, the mere existence of the procedural safeguards of POCSO, however comprehensive and well-meaning, is no guarantee against reliance on rape myths and stereotypes or insensitive consent-assessment. As I mention

[70] POCSO, s. 32.
[71] POCSO, s. 24(1).
[72] POCSO, s. 33(4).
[73] POCSO, s. 38(2).
[74] POCSO, s. 36(1).
[75] POCSO, s. 36(2).
[76] POCSO, s. 33(3).
[77] POCSO, ss. 33(2) and 33(6).
[78] These protections were discussed in detail in Chapter 3.II.B.
[79] See, Preeti Pratishruti Dash, 'Rape Adjudication in India in the Aftermath of Criminal Law Amendment Act, 2013: Findings from Trial Courts of Delhi' (2020) 4(2) Indian Law Review 244.

in Part III of the Conclusion to this thesis, there are problems with the functioning of the Indian criminal justice system which cannot be addressed meaningfully by legal reform alone. A more comprehensive and long-term solution to the reliance on rape myths and stereotypes in the adjudication of sexual offences (whether against minors or otherwise) would include additional policy measures, such as extensive training and sensitisation of the functionaries of the criminal justice system and initiatives that encourage socio-cultural change.[80] Until such a solution takes effect, however, efforts to implement faithfully the safeguards that do exist in law may help mitigate the problem.

In any case, although procedural and evidentiary safeguards may not fully prevent the use of rape myths and stereotypes in rape case adjudications, eliminating consent assessment altogether is not an appropriate alternative. As I argued in Chapter 3.II.B, the attempt of the legislature to prevent consent assessment in POCSO cases by imposing a blanket criminalisation has not worked. Special POCSO judges do still engage in consent assessment where the minority of the victim cannot be conclusively proved, and rely on rape myths and stereotypes in doing so. Moreover, no legal system can prevent *all* questioning, probing or cross-examination of a prosecutrix in a sexual offence trial without completely undermining the right of the accused to a fair trial.[81] It cannot be the case, in other words, that our sympathy for the prosecutrix makes us blind to the fact that the liberty (and perhaps life) of the accused is also on the line. Therefore, as I have argued elsewhere,[82] the aim should be to ensure through systemic changes that such questioning and probing takes place without resorting to rape myths and stereotypes and without intimidating or intentionally humiliating the prosecutrix, regardless of her age.

Neither of these arguments represents a stand either for or against retaining the age of consent at 18. My view is only that Indian law should allow those adolescents who are competent to do so to consent to non-wrongful sexual conduct. To do this, some presumptive age of consent would need to be specified in the law. Not all adolescents have the competence to consent even to non-wrongful sexual acts but assessing the capacity of every adolescent at an individual level before certifying her competent to consent to a particular sexual act would be an onerous and unfeasible alternative to an age of consent. Archard's convincing arguments regarding the

[80] A discussion of such policy measures is beyond the scope of this thesis.
[81] This is recognised as an essential part of the right to life and personal liberty under Article 21, Constitution of India.
[82] Shraddha Chaudhary, 'Reforms to the Legal Framework of Child Sexual Abuse in India: Legislative Band-Aids on Systemic Wounds' (2023) 44(1) Statute Law Review https://doi.org/10.1093/slr/hmaa007.

preferability of an age of competence to individualised competence tests explain why.[83] He argues, first, that such tests would be 'impossibly expensive and cumbersome', with every single person having not only to take the test once to prove competence, but to retake it periodically (either to prove continuing competence, or to disprove a challenge to competence). Second, these tests would be susceptible to the human tendency of corruption, where a person might cheat or enable another to cheat at the test to further some end of her own. This scope for corruption and misuse is especially relevant with regard to the right to positive sexual autonomy. Individual assessment of competence in this context would enable a dangerous degree of interference by the state in one of the most private spheres of a person's life, that is, the sphere of sexual choice. As I demonstrated in Chapter 3.III, by having a high age of consent and taking a bright line approach to the criminalisation of adolescent sexuality, the Indian state enables the control of female sexual and reproductive capacity through the criminal law and criminal justice system. If allowed to determine and certify, at an individual level, whether a person is competent to consent to a particular sexual act, the state's ability to gatekeep the right to positive sexual autonomy would increase even further. As I argue later in this sub-section and the next, an age criterion for competence is not foolproof either, especially in the Indian context where accurate age-determination is often challenging. However, it is less prone to the problem of corruption.[84] Finally, Archard rightly argues that 'the use of age as a criterion induces stable expectations on the part of a society's citizens'.[85] This is because an age of consent serves as a presumptive, and reasonably reliable, indicator of competence to consent to others.[86] A person above that age may, unless there is evidence to the contrary, be presumed competent to consent, and a person below that age may similarly be presumed incompetent to consent. In a jurisdiction which specifies the age of consent, a person looking to engage in sexual interactions with another may rely on his partner's age as a marker of the partner's competence to consent. This eliminates the need for each person to make his own determination of whether his partner is competent to consent, thereby preventing vastly divergent and subjective determinations of competence, and enabling uniformity and predictability.

[83] Archard, *Children: Rights and Childhood* (Chapter 4, n 6) 85-86.
[84] As Archard succinctly puts it, 'it is always possible to cheat at examinations; it is not so easy to manipulate one's age.' ibid, 85.
[85] ibid, 86.
[86] I argue below that a person accused of committing a sexual offence on the ground that he acted on the ostensible consent given by a person who was below the age of consent may defend himself by arguing that he had a reasonable belief that his partner was of or above the age of consent.

Precisely what the age of consent should be, cannot decided within the scope of this thesis. However, as the age of consent acts as a proxy for the competence to consent, an age of consent that tracks competence to consent, as far as possible, is less likely to be arbitrary.[87] The competence to make a sexual decision requires, as I laid out in Chapter 5, a sexual self-concept, the awareness and capacity to understand the nature and ordinary consequences of the particular sexual act, and the capacity to understand that there exists the right to say no to a particular person or to a particular sexual act. These capacities are scalar, that is, they are usually acquired over time, meaning that there is unlikely to be one particular age at which a person becomes completely competent against some abstract threshold. Therefore, the threshold of competence should be set relatively against those, for instance legal adults, who are generally presumed competent to consent.

Studies from the West (discussed in Chapter 5.I.B.2) show that the cognitive and rational decision-making capacities of older adolescents (16 to 18-years-old) are generally indistinguishable from those of mature adults, indicating that these adolescents have the underlying cognitive capacities necessary for a moral capacity to consent to non-wrongful sexual acts. Studies also find that adolescents have an emergent sexual self-concept, and their functional autonomy (or the ability to make independent decisions) increases with age, meaning that the functional autonomy of older adolescents is likely to be greater than that of children and younger adolescents, although there are no data to say how it compares with adults. As I mentioned in Chapters 1 and 5, the evidence from India on these points is sparse and often of poor quality. The limited evidence that exists, however, supports most of the findings from the West. One point on which evidence from India seems to diverge is that adolescent girls have not been found to exercise much functional autonomy in India. However, as I pointed out in Chapter 5, this does not indicate that adolescent girls in India do not have the capacity to make autonomous decisions, but rather that they are generally not allowed to do so. Thus, there is some supporting evidence to reduce the age of consent for sexual decision-making to 16. But more studies on the relative competence of adolescents vis-à-vis adults, especially in sexual decision-making, are required to bolster this conclusion.

[87] Archard, *Children: Rights and Childhood* (Chapter 4, n 6).

Given their use in the laws of several different jurisdictions, including South Africa,[88] Canada,[89] and some states in the United States of America,[90] and Australia,[91] an argument is sometimes made for the use of close-in-age exemptions or 'Romeo and Juliet' clauses in addition to, or as an alternative to, reducing the age of consent. Typically, these clauses and exemptions serve as exceptions to statutory rape law, permitting adolescents to engage in consensual sexual interactions with partners who are no more than *n* years older than them (the age-range differs by jurisdiction and sometimes by act-type). When asked whether they thought the age of consent should be reduced in India, and if so to what, some respondents suggested the use of similar clauses in India, instead of a simple reduction in age. One representative of a research centre engaged in child-rights advocacy in Bangalore said, 'I am personally against the age of consent being reduced. But there can be close-in-age exemptions which would prevent de-facto consensual cases from being prosecuted.' However, to my follow-up question on what the age-brackets should be, the respondent seemed less confident. She said, '... maybe if the partner is between 18 and 21 and the adolescent is around 16-17, it shouldn't be a criminal offence... but I don't know why, it's like a gut feeling.' Others, from across regional and professional backgrounds, expressed doubts about the efficacy of these exceptions. One of them was a representative from an NGO engaged in child-rights activism and sexual health research in Bangalore, who has conducted empirical studies on the implementation of POCSO in a number of Indian states, and has more than a decade of experience in child-rights activism. She expressed the concern that the problems with age-determination already evident in POCSO cases (discussed in Chapter 3.II.A) are likely to be compounded with close-in-age exemptions, observing, '[there is already] so much uncertainty because of [problems with] age-determination when the victim's age is a crucial issue in the case. Close-in-age exemptions will double these problems. The age of the accused will also become a central issue in the case.' A representative of a child-rights research and advocacy NGO in Delhi mentioned, 'I wouldn't go so far as to say that age-gap is irrelevant. It's possible that older partners may be physically, mentally or emotionally abusive, or that the relationship may be toxic and controlling, but this is not necessary.' She added, jokingly, 'My own husband is 10 years older than me! So, what

[88] Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2015, ss. 1, 2 and 3.
[89] Criminal Code (R.S.C.), 1985 (Canada): s. 150.1(2) and (3).
[90] For a list of states in the USA which have such laws and the relevant provisions, see: David M. Bierie and Kristen M. Budd, 'Romeo, Juliet, and Statutory Rape' (2018) 30(3) Sexual Abuse 296, 300-302.
[91] For an overview of close-in-age exemptions in different Australian territories, see: Criminal Defence Lawyers Australia, 'Legal age of consent in each State and Territory of Australia' (Mondaq, 10 August, 2022) <https://www.mondaq.com/australia/crime/1215504/legal-age-of-consent-in-each-state-and-territory-of-australia> accessed 13 May 2024.

now... call the police?' A child psychologist from Pune pointed out that, conversely, there is no guarantee that a peer or close-in-age partner would not be abusive in similar ways. He mentioned, 'I see it in my patients. Peers can bully, harass, torture, and yes of course, sexually abuse as well. Relationships with peers can start out harmless but become abusive later. A hard and fast rule on age-gaps will not serve the purpose [of protecting adolescents from sexual abuse and exploitation].' Ultimately, therefore, close-in-age exemptions or Romeo and Juliet clauses do not sufficiently address concerns around the sexual exploitation or abuse of adolescents, and their utility as a solution to the current over-inclusiveness of Indian criminal law is doubtful.

Notwithstanding what the age of consent is, as I mentioned above, it should be a presumptive threshold. In other words, the age of consent should create a rebuttable presumption that those who are above it are competent to consent, and those who are below it are incompetent to consent, rather than serving as an absolute indicator of competence. This is because an absolute (rather than presumptive) age threshold is inevitably arbitrary, being both overinclusive and underinclusive. Regardless of whether the age of consent is 18, 16 or 15, some minors who are not yet competent to consent would be deemed competent, while others who are competent to consent would be deemed incompetent. Furthermore, as I discussed in Chapter 3.II.A, age is not always reliably determinable in India. Birth records are unavailable for large swaths of the Indian population, and the age entered at the time of school admissions (where the minor was enrolled in school) has often been found to be unreliable because the entry was based on an oral representation by a parent or guardian rather than on documentary evidence or government records. Additionally, age-determination through medical processes such as dental examinations or ossification tests are unable to provide a precise age because of the margin of error inherent in these tests. Treating the age of consent as a rebuttable presumption of competence instead of an absolute indicator of competence can, as I explain below, go some way in addressing this uncertainty and arbitrariness.

If the age of consent is reduced, it will no longer be the case that all sexual interactions with persons under the age of 18 qualify automatically as criminal offences. In these circumstances, when A engages in a sexual interaction with B (a person of the reduced age of consent, say 16, but below the age of 18), a judge will be required to adjudicate whether this sexual interaction amounts to a sexual offence. In doing so, the judge will necessarily have to determine whether or not the prosecutrix consented. The discussions in Chapter 3.II.B and earlier in this section

indicate that this gives rise to concerns regarding the use of rape myths and stereotypes leading to insensitive consent assessment. However, as I argued above, faithful implementation of the procedural and evidentiary safeguards of POCSO and the IEA, and the application of these safeguards to all minors regardless of the age of consent, may go some way towards addressing these concerns. Moreover, as one my interviewees pointed out regarding judicial discretion, all judicial decisions must be reasoned and recorded in writing, judges are more likely to be educated and trained, and their judgments are subject to scrutiny by higher courts and the public. These factors serve as additional safeguards against poorly exercised judicial discretion.

A presumptive age threshold would allow the judge to look beyond the presumptive age of consent where there is good reason to do so. For instance, where B's age cannot reliably be determined but evidence suggests that she was on the boundary of the age of consent, and A argues that B was competent to consent, the judge should adjudicate whether B was competent to consent to the sexual conduct in question. Thus, if the age of consent for non-wrongful sexual conduct is reduced to 16 and an ossification test indicates that the prosecutrix is aged 14-16, instead of simply dismissing the case on the ground that the prosecutrix 'may be' above the age of consent, or presuming that she was below the age of consent, the judge should assess whether or not the prosecutrix was actually competent to consent to the sexual acts that took place. Guidelines can be provided within the law to anchor decisions on this point, based on the criterion for the moral capacity to consent to sex. This would account for the suggestion by the POCSO Special Judge from Patna (see above) that judicial discretion should be accompanied by legislative guidelines. An adolescent whose age cannot reliably be determined, but is found to be on the cusp of the presumptive age of consent may be held competent or incompetent to consent by assessing whether she understood: (a) the nature and mechanics of the sexual act, (b) the ordinary physical, biological, and social consequences of the act, and (c) that she had the right to refuse to engage in that particular sexual act or in any sexual act with the accused. In making this assessment, judges could additionally enlist the help of qualified professionals, such as child psychiatrists/psychologists.

While this helps address, to some degree, the arbitrariness of an age of consent and the uncertainty that arises from the difficulty of reliably determining age in India, it does so only at the stage of trial. A presumptive age of consent signals who is competent to consent, but that still leaves unanswered the question of *how* a person seeking to have a sexual interaction may know whether his partner is, in fact, above the age of consent. One way to address this is to

have an 'unreasonable belief' requirement in the law, along the lines of that contained in the Sexual Offences Act, 2003 (England and Wales).[92] In other words, if it is shown that B was below the age of consent, A could still defend himself by showing that he reasonably believed that B was above the age of consent.[93] It is not possible, within the scope of this thesis, to consider what, precisely, such a reasonable belief would entail, although certain circumstances, such as which year-group (grade, class or form) B was in at school (assuming she went to school) and whether A was aware of these circumstances, might help determine whether the belief held by A was reasonable. For instance, if B was in a year-group in which students are usually between ages of 10 and 12, the belief that she was 16 or older would not be reasonable (without further evidence to support such a belief). This places upon any person seeking to engage in a sexual interaction with another the burden to make reasonable efforts to ascertain that his partner is above the age of consent. It also sends a clear message that if B's age *cannot* be ascertained by A or is unknown to A at the time of the interaction, A risks criminal punishment by proceeding to engage in sexual activity with B as he cannot, in such cases, defend himself on the ground that he had a reasonable belief that B was of or above the age of consent.

Thus, I have argued so far that the problems of the over- and underinclusiveness inherent in an age-based threshold can be addressed, to some degree by having a presumptive age threshold, which enables judges to adjudicate the competence of the prosecutrix where there is a good reason to do so, for instance, where her age cannot be conclusively proved, and allows the accused to defend himself by showing that he had a reasonable belief that the prosecutrix was of or above the age of consent (even when she wasn't). It is not my claim that this would create a perfect system or comprehensively remedy arbitrariness. It is possible, even likely, that the operationalisation of this suggestion on the ground will be flawed and will sometimes lead to undesirable consequences. My limited claim is that a presumptive age threshold and an age of consent that tracks competence to consent are more capable of capturing the complexities around the competence to consent and the determination of age in India than an absolute age threshold. They also better reflect the competence of older adolescents to consent to non-

[92] Sexual Offences Act, 2003 (England and Wales), s. 9(1).

[93] A's reasonable belief must be as to the age, rather than the competence, of B. This is because while it is B's competence to consent to sexual acts that matters from a normative perspective, her age serves as the proxy for this competence in law. One of the main purposes of such a proxy, as I argued earlier in this section, is to serve as fair warning for A when he seeks to engage in a sexual interaction with B, and to avoid the subjectivity inherent in A making his own determination of B's competence. If A's reasonable belief of B's competence, rather than her age, served as a defence, the very purpose of having an age of consent would be defeated.

wrongful sexual acts, and are, therefore, more promising than the present approach of Indian criminal law, which creates a blanket prohibition against sexual interactions with all persons under the age of 18.

Additionally, limited discretion to investigate without arresting the accused person unless necessary, as presently exercised by the police in Tamil Nadu, ought to be extended to police forces in the rest of India to prevent unnecessary curtailment of the liberty of the accused in de-facto consensual cases. Such discretion provides minimal scope for abuse and, like all powers of investigating officers, is also subject to the oversight of senior police officers. This also does not disregard the concerns expressed by interviewees, which were about police discretion in registering information about the offence, investigating it or filing a report on it, that is, about very broad police discretion, because its scope is limited. Despite this discretion, the police would be statutorily obligated to register any information they receive of an offence having taken place, investigate it in accordance with the requirements of procedural law, and submit their report on the offence to the Special Court.

Finally, the mandatory reporting provision of POCSO requires reconsideration. The purpose of the provision, to ensure that incidents of child sexual abuse are not supressed, is salutary. But, as discussed in Chapter 3.II, it also creates hurdles in delivering essential sexual, reproductive, and other health services to adolescents. In *X v. NCT Delhi*,[94] (see Chapter 3.II.A) the Supreme Court of India created an exception to the mandatory reporting provision of POCSO, allowing registered medical practitioners to prioritise the provision of safe abortion services to adolescents over reporting adolescent sexual activity. If the (qualified) right of competent adolescents to positive sexual autonomy is recognised in law, it would be possible for all health care providers to provide essential health and medical services without the need to report an offence under POCSO if the sexual contact was consensual, or if no sexual abuse is suspected. As I argued in Chapters 3, 4 and 5, mandatory reporting may also be affecting the ability to research adolescent sexual activity in India and contributing to the gaps in data on this subject. Such research may be incentivised in the absence of a mandatory reporting requirement for apparently consensual cases.

[94] *X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Ors.*, 2022 SCC OnLine SC 1321.

In addition to these steps to recognise the qualified right to positive sexual autonomy of competent adolescents when it comes to non-wrongful sexual acts, it is necessary to provide safeguards against sexual exploitation.

2. Safeguards against Sexual Exploitation

Courts and child rights activists in India have often suggested that the recognition of the sexual autonomy of older adolescents must be accompanied by some kind of safeguard against exploitation, but there is nothing in the literature on how this might be done. Addressing this gap in the literature, in this sub-section, I consider how the moral concept of sexual exploitation that I developed in Chapter 6 may be operationalised and the normative and regulatory or pragmatic concerns that arise in doing so.

In Chapter 6, I argued that sexual exploitation is an exchange of unwanted and degrading sex for some perceived benefit on the part of the exploitee and, where applicable, the facilitator. The sex performed by the exploitee is unwanted as sex, though wanted as a means of receiving the perceived benefit. In this view, sexual exploitation is a pro-tanto moral wrong because the exploiter violates two duties: (a) the duty to treat a person with the respect due to them as a human being, which implies the duty not to degrade them, and (b) the duty not to take advantage of another in a situation where it would be wrong to do so, in this case, a situation where the exploitee must perform unwanted and degrading sex. Sexual exploitation is not *non-consensual*, even though the sexual acts to be performed are unwanted. The exploitee typically consents to performing unwanted sexual acts for some perceived benefit and, I argued, the consent of adults to sexual exploitation should be considered morally meaningful despite being given in constrained circumstances. Consequently, the sexual exploitation of adults is permissible, all things considered.[95] However, the consent of adolescents to sexual exploitation should not be considered morally decisive in determining the permissibility of their sexual exploitation because while adolescents who are competent to do so can consent to the sexual acts that are involved in sexual exploitation, their inherent vulnerability (lack of psychosocial maturity) renders them *incapable* of consenting to the degrading exchange that is proposed by the exploiter. As a result, the sexual exploitation of adolescents is not just pro-tanto wrongful, but all-things-considered wrong and impermissible.

[95] I do not comment here on what the position of criminal law (or other laws) should be on the sexual exploitation of adults. It is a complex subject to which I cannot do justice within the scope of this thesis. My only stipulation on this point is that when consented to by a normative adult, sexual exploitation is a permissible wrong.

I propose incorporating *this* concept of sexual exploitation into Indian criminal law because it is broad enough to capture sexual exploitation in a wide variety of settings, including but not limited to practices approved by the family and/or community, such as child marriage and *devadasi* dedication. It can, therefore, be operationalised as a safeguard against sexually exploitative conduct in any context. But how would this admittedly abstract moral concept be operationalised within Indian law?

The purpose of operationalising a concept of 'sexual exploitation' would be to provide an additional avenue of enquiry for the police as well as the Special Court judge where it is alleged that the adolescent consented to the sexual act. Thus, where an accused person disputes that a sexual offence occurred on the ground that the prosecutrix (who, let us assume, is competent to consent to non-wrongful sexual conduct) consented, and it is shown that a token of consent (not vitiated by coercion, deception or any other factor that affects the validity of consent given to the sex act) *was* given by her, the offence of rape or sexual assault would not have occurred. However, the police and/or Special Court judge may nevertheless investigate whether a different offence, that of sexual exploitation, was committed against the prosecutrix. For instance, if A is charged with committing penetrative sexual assault against B (an adolescent who is competent to consent to non-wrongful sexual acts), and it is shown that B consented to penetrative sex with A, investigating police and/or the Special Court judge should enquire further into the matter if there are reasons to suspect that A sexually exploited B. This may be the case if it appears, for example, that B is homeless and agreed to penetrative sex with A in return for shelter on a cold winter's night. Consider, for instance, the *Anchorage Case*, in which Duncan Grant and Allan Waters were convicted of sexually assaulting boys in shelter homes run by them in Mumbai.[96] The complainants (adolescent boys of different ages) in this case were generally from poor households, had little to no income and were sleeping on the streets in Mumbai when the accused persons offered them a place to stay in their shelter homes. Despite the sexual (and physical) abuse inflicted by Grant and Waters on the complainants, they remained in, or returned to, the shelter homes because they had food, shelter, and sometimes got work through which they could earn some money. Regarding the evidence given by one of the boys, the court notes, 'He also explained the reason for his stay at Anchorage was that on many days, he had no earnings, and he was starving. After staying at Anchorage, he used to work in a garage and [got] Rs. 10/- or Rs. 20/- a day.'[97] At the time when this case was

[96] *Childline Foundation v. Allan John Waters & Ors.*, (2011) 6 SCC 216.
[97] ibid, [36].

decided, POCSO had not been enacted and the sexual assault of a male (of any age) was punishable only under s. 377, IPC (carnal intercourse against the order of nature). In the future, if POCSO is amended to recognise the consent of older adolescents, it would be possible for accused persons in cases like the one described above to argue that the complainants had 'consented' on the ground that they remained at the shelter homes or kept returning 'voluntarily' to the shelter homes. Referring to this case, the private lawyer from Mumbai explained, 'everytime they were sexually abused, they would leave. But they would go back when they got hungry, or when it started raining... they were going back because they needed food and shelter.' That the boys remained in, or returned to, the shelter homes is insufficient to conclude that they consented to the sexual acts, but my proposal is that even if there is evidence that they gave a token of consent, and if, therefore, rape or sexual assault cannot be proved, the accused should be tried and (where the offence is proved) punished for sexual exploitation. If 'sexual exploitation' is to function in this manner, as a safeguard against potential misuse of any token of consent given by adolescents, it must be operationalised within criminal law. This raises some further questions with which I now engage.

First, should sexual exploitation be recognised as a sexual offence different from rape/sexual assault? Based on the moral distinctions between rape/sexual assault and sexual exploitation sketched out in Chapter 6.III, I argue that it should. As I mentioned in Chapter 1, the responses of two private lawyers (one in Delhi and one in Mumbai), and especially my detailed conversation with the private lawyer in Mumbai, allowed me to appreciate some of the arguments against this position.[98] Both lawyers expressed the view that where a person has sex with an adolescent by taking advantage of her vulnerability, any token of consent she gives is 'not genuine'. The accused person, in their view, should be convicted of an existing sexual offence such as penetrative sexual assault (rape) or sexual assault, depending on the sexual acts that took place. The private lawyer from Delhi stated, 'if she consents only to get something, how can such consent be good in law? That "yes" is just a word, it doesn't really reflect what she wants to do. That's why I think we should stick to thinking of it in terms of consensual sex or rape.'

[98] I frame these as arguments 'against' my position at the time of writing this thesis when, after having considered the issues raised by them and thought further on the subject, I have decided to argue that rape and sexual exploitation should be distinct offences. At the time of the interviews, these were neutral points of view with which I engaged purely for the joy of talking to someone who was interested in my idea.

Prima facie, there is some merit to this position. Recall that, in Chapter 6, I considered whether the sexual exploitation of adolescents amounted to rape given my argument that adolescent consent to sexual exploitation cannot be morally decisive in determining its permissibility. I concluded that since it was the adolescent's incapacity to consent to the degrading exchange proposed within sexual exploitation rather than her incapacity to consent to the sexual acts themselves, the wrong of sexually exploiting an adolescent was distinct from the wrong of rape. However, since the exchange that is proposed motivates consent to the sexual acts that take place, it is possible to see how sexual exploitation *may* possibly look like rape. This also seems to be the thought expressed by the private lawyer above.

As I argued in Chapter 6.III, though sexual exploitation is similar to rape in some respects, the distinction between the two wrongful sexual acts is worth maintaining. The fact that the exploitee has the capacity to consent to the sexual *acts*, and that her incapacity relates only to the degrading exchange that is proposed, should not be ignored. In such a case, the sexual interactions between the exploiter and exploitee would be wrong, but not for the same reasons or in the same way as it would be if the prosecutrix was not even competent to consent to the sexual acts. The distinction between these two situations underlines the distinction between rape and sexual exploitation and, in my view, this distinction is as worth maintaining in criminal law as in moral theory.

Contrary to the opinion expressed by the private lawyer, moreover, distinguishing between rape and sexual exploitation actually reflects what the prosecutrix wants to do better than the consensual sex/rape binary. The vulnerable situation of most people who consent to being sexually exploited (for instance, the complainants in the *Anchorage Case*, mentioned above) can make their consent *appear* manufactured by their vulnerability or meaningless because of the limited choices available to them. However, as I argued in Chapter 6.II.B.2, the sexual acts that are performed by the exploitee are unwanted as sex, but they are wanted as a means to other ends. The choice to consent to be sexually exploited is, undoubtedly, difficult. But it may nevertheless be the best one available to the exploitee. As Wertheimer rightly argues, sexual exploitation leaves the exploitee better off compared to a non-interaction baseline,[99] which is certainly not the case with rape.

[99] Wertheimer (Chapter 6, n 42).

Another concern about distinguishing between the two offences, expressed by the private lawyer from Mumbai, is that since the offence of sexual exploitation is predicated upon the existence of a token of consent (as I discussed in Chapter 6, sexual exploitation consented to, even if unwanted), it will cause judges to acquit the accused. In her own words, 'the moment you accept that she said "yes", or she agreed, that will be the end of the case. Nobody is bothered about the reasons motivating consent.' In a system that only recognises the offence of rape, which (as I argued in Chapter 6.III) is usually defined by the absence of valid consent, this is certainly a grave problem. However, recognising the offence of sexual exploitation does not exacerbate this problem and might, in fact, be something of a solution to it. If it appears to the judge that the prosecutrix consented to the sexual acts, an offence of rape would not be made out regardless of whether the offence of sexual exploitation exists. Where the offence of sexual exploitation is recognised, proof that the prosecutrix consented will *not* automatically lead to the acquittal of the accused if there are reasons to believe that he sexually exploited the (minor) prosecutrix. In that sense, sexual exploitation provides an additional path of inquiry for the police, prosecutors and judges.

The third concern expressed by the private lawyer from Mumbai was a practical one. She said, 'if you have sexual exploitation... assuming it will be a lesser offence than rape, you know lower punishment... this will become an incentive for accused persons to try to enter into out-of-court compromises and settlements with the prosecutrix to have the charge/allegation changed from rape to sexual exploitation.' My follow-up to this was, 'Don't compromises happen already? If there is scope for compromise, whether they're threatening the girl or her family or whether they're offering hush money or whatever the method, why would the end game be reduction of charge? Wouldn't they just do it to have them turn hostile and get acquitted?' After some contemplation, she responded, 'Maybe... I don't know.' Undoubtedly, corrupt practices by the functionaries of the criminal justice system and private citizens alike have the potential to thwart any suggested law reform, and careful thought needs to be given to the avenues of misuse before making any proposals for reform. There is no guarantee that the problem foreseen by the private lawyer from Mumbai, about out-of-court settlements to reduce a charge of rape to a charge of sexual exploitation, will not come to pass, nor does there appear to be a way to prevent such corruption through the law alone. It does not seem to me, however, that this makes the situation worse than it currently is. As my response to the private lawyer during our conversation indicates, out-of-court settlements and compromises take place despite their prohibition in law and the directions of the Supreme Court of India against

accepting such out-of-court settlements in cases of rape.[100] There is nothing to suggest that the introduction of an offence of 'sexual exploitation' will increase such out-of-court settlements in rape trials.

Having considered the arguments from both sides, I propose that the operationalisation of sexual exploitation within Indian criminal law take the form of a separate sexual offence, instead of being another path to a finding of rape. Notwithstanding this 'new' criminal offence, the operationalisation of sexual exploitation would actually reduce the overall level of criminalisation when it comes to adolescent sexuality.[101] At present, *all* sexual interactions with minors are criminally punishable. My proposals are aimed at amending Indian criminal law so that only a subset of sexual conduct with adolescents would be criminally punishable. But would the introduction of a separate criminal offence be justified?

As I mentioned in section A of this chapter,[102] I cannot engage with the wide-ranging requirements of criminalisation theories within the scope of this thesis, nor is this one of my aims. My argument regarding the justifiability of introducing a separate offence of sexual exploitation, therefore, is limited to showing that the incorporation of the broader concept of sexual exploitation I sketched out in Chapter 6 into Indian criminal law would not be baseless criminalisation. The right of (older) adolescents to positive sexual autonomy must necessarily be a qualified right. It does not include a right to consent to their own sexual exploitation. This is because even those (critically normative) adolescents who have the competence to consent to non-wrongful sexual acts, do not have the underlying capacities (due to their lack of psychosocial maturity) necessary to consent to the degrading exchange proposed by the exploiter. As I argued above, this lack of competence to consent to the degrading exchange proposed by a potential sexual exploiter makes the sexual exploitation of adolescents all-things-considered wrong and impermissible. Therefore, adolescents must be protected from such wrongful and morally impermissible interferences with their sexual autonomy by sexual exploiters.[103] In this regard, Hörnle argues that the recognition of a right to sexual autonomy

[100] Chapter 3.II.C.

[101] None of my interviewees expressed any concerns about potential overcriminalisation when asked about introducing a new offence of sexual exploitation. This may be because they recognised that the proposal sought actually to reduce the overall level of criminalisation, or because they do not necessarily see overcriminalisation as a problem.

[102] See, n 27 above.

[103] Since sexual exploitation in the broad sense that I define it here is not currently recognised as a criminal offence, there is no explicit recognition that sexual exploitation amounts to a violation of the right to life and personal liberty under Art. 21, Constitution of India. Although, the right against exploitation through forms of forced labour is recognised as a fundamental right. Constitution, Art. 23: '(1) Traffic in human beings and *begar* and other

'goes hand in hand with strong condemnation for unwanted interferences' with such autonomy.[104] Similarly, speaking of the rights recognised in the European Convention of Human Rights, as well as other international treaties, Ashworth argues that such rights can create positive obligations on the state to create criminal offences aimed at protect the rights adequately. He observes: '[t]he nature of the positive obligation is that all states should have in place criminal laws that protect individuals against sexual violation by other individuals.'[105] Consequently, I argue that whilst the sexual exploitation of adolescents is not wrong for the same reasons as rape (that is, the absence of valid consent), it is an unwanted and degrading sexual act that amounts to a wrongful interference with sexual autonomy by requiring the exploitee to have sex that she would wish to avoid qua sex. Therefore, the criminalisation of the sexual exploitation of adolescents is supported by considerations pertaining to their negative sexual autonomy.

The second and even more complex consideration is, what form should the operationalisation of sexual exploitation in Indian criminal law take? In answering this question, I shall not attempt to set out the particulars of the provision and only propose the elements that any such provision should include, as well as the normative and pragmatic concerns that would arise in operationalising it. The offence of sexual exploitation ought to capture the elements of (a) the exchange of sex for perceived benefit (material and/or non-material), (b) the awareness of the vulnerability of the exploitee on the part of the exploiter, (c) the unwantedness of the sexual acts on the part of the exploitee and (d) the awareness of both parties of this unwantedness. Where any of these elements are not present, sexual conduct would not be exploitative. The reason for the inclusion of (d) is that taking advantage of vulnerability is a conscious act which would not be possible unless the exploiter is aware, or at least suspects, that such a vulnerability existed. Furthermore, such advantage-taking aimed specifically at inducing the exploitee's consent is conceptually inconsistent with a person who is not also aware of or suspects that the sex is unwanted. Had sex been wanted qua sex (rather than because of the exploitee's

similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.'
However, it can plausibly be argued that wrongful and impermissible sexual exploitation amounts to undue interference with a person's right to sexual autonomy. This is because the Supreme Court of India **has** recognised that sexual offences, including sexual harassment which consists of making 'unwelcome' advances and physical contact rather than engaging in a non-consensual sexual interaction, violate the right of the prosecutrix under Art. 21 to live with dignity. See, *Shri Bodhisattwa Gautam v. Subhra Chakraborty* (1996) 1 SCC 490, [10]; *Union of India v. Mudrika Singh*, (2021) SCC OnLine SC 1173, [47].
For the definition of the offence of sexual harassment, see, IPC, s. 354A.

[104] Hörnle, ''Rights of Others' in Criminalisation Theory' (n 33), 185.

[105] Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing, 2013) 200.

vulnerability), there would be no reason to take advantage of such vulnerability to induce consent to sex. A requirement that the exploitee have *felt* degraded should not be included even though sexual exploitation entails a degrading exchange because, as I argued in Chapter 6, the wrongfulness of degradation is not dependent on the feelings of the exploitee. Unlike unwantedness, which is a subjective condition, degradation is made out by having to perform due to a vulnerability, unwanted sexual acts as work, or unwanted sexual acts in a society where sex always carries the possibility of degradation.

Some of the potential hurdles and complications in incorporating an offence with these elements into Indian criminal law emerged during my fieldwork. First, the same term is often used to denote sexual exploitation and the umbrella term sexual 'abuse' (which includes specific acts like sexual assault) in some local Indian languages. For instance, in both Hindi and Marathi, the term '*shoshan*' can refer to a wide range of wrongful sexual conduct. Specifically conveying what amounts to exploitation in non-commercial settings may, therefore, be difficult. During my fieldwork, I found myself having to give examples of what might amount to sexual exploitation or use other terms such as 'taking advantage of' to convey my meaning. When interviewing police officers in Patna, this led to some confusion. When I used the Hindi/Urdu term for 'taking advantage of' ('*fayda uthana*'), the police officers took this to mean taking advantage of a girl's naivete and responded with examples of 'promise to marry' cases, that is, cases where men persuade women to have sex by promising marriage without ever intending to fulfil the promise.[106] However, this need not have been a confusion caused by language. For instance, when I asked the POCSO Special judge in Patna (who could speak and understand English without a problem) what came to his mind when I said, 'taking advantage of someone's vulnerability', he too mentioned (among other things) a false promise to marry. Similarly, a police officer in Pune, when asked the same question, understood it to mean taking advantage of the helplessness of a very young child and gave the example of coercive sex with a 5-year-old. A child-rights activist from Bangalore, who was also fluent in English, said that the terms exploitation, or 'taking advantage of a person's vulnerability' brough to mind 'forced' sex by a father with his child. It is likely, therefore, that the confusion is caused partly by problems of translation and partly by the ambiguity inherent in the concept of exploitation itself. Even native English speakers writing on exploitation seem frequently to conflate coercion, deception and exploitation. Thus, in her ethnographic study of adolescents

[106] As I discussed in Chapter 2.III, promise to marry cases are the most commonly prosecuted cases of deceptive sex in India.

who had experienced sexual exploitation in the UK, Hallett observes, 'Young people may nevertheless be **manipulated and coerced into exchanging sex**, but they were understood to be staying in these relationships because it was a way of meeting their needs. Yet **this aspect of sexually exploitative relationships** is barely recognised within policy guidance and practice discourse.'[107]

The lack of clarity amongst my interviewees about what 'sexual exploitation' means and the kind of conduct it would encompass is concerning, but this is not an unsurmountable issue. Both problems can be addressed, first, by defining the provision clearly, emphasising in particular that 'sexual exploitation' is meant to cover sexual acts which are unwanted but consensual, and not acts which are coercive or deceptive, and second, by training the functionaries of the criminal justice system to recognise the elements of sexual exploitation (mentioned above). As concerns the language issue in particular, it should be noted that there are no specific terms for molestation or non-penetrative sexual assault in the common parlance in most Indian languages. Technical legal translations of all offences have been provided in statutes, and functionaries in the criminal justice system are trained to appreciate the conduct these translated terms are meant to capture. A similar approach would help elucidate the concept of sexual exploitation.

I acknowledge that, practically, this may be easier said than done. A police officer in Delhi expressed this concern in the following terms, '*agar ladki dabaav mein aakar raazi hoti hai, phir kaise pata chalega ki ladke ne fayda uthaya ya balatkaar kiya ya kuch bhi nahi?*' (where the [adolescent] girl agrees due to pressure, how would one find out whether the boy [the accused] took advantage of her or raped her or neither?) This concern highlights that in some situations, notably, where the exploiter takes advantage of a non-material vulnerability, the lines between these types of conduct may be extremely fine. As with the problems created by India's linguistic diversity, however, this is not a unique problem. There are other aspects of Indian criminal law that are fairly complex and distinguishing one kind of criminal conduct from the other is a problem that the functionaries of the Indian criminal justice system (perhaps of criminal justice systems everywhere) simply have to deal with. When it comes to judges, at least, parsing out the technicalities of law is a large part of their expertise (and job description). Thus, I acknowledge that this is an operational hurdle, but it is not one that renders the proposal

[107] Hallett (Introduction, n 7) 91.

unworkable, and appropriate training of the functionaries of the criminal justice system is likely to increase its workability over time.

Moreover, it is not as though the formulation of sexual exploitation as taking advantage of a person's vulnerability to induce consent to sexual acts which are unwanted as sex was uniformly confusing. The private lawyer from Mumbai found the language of taking advantage of vulnerability clearer than the word 'exploitation'. She said, 'when I hear "exploitation", I think of something more institutional and structured... like prostitution or trafficking of different kinds. But when I think of "taking advantage of vulnerability", I think of something like the *Anchorage Case* [discussed above]. Those boys kept going back because they were so vulnerable.' Similarly, a child psychologist from Pune found the characterisation of these sexual interactions as 'unwanted, but consensual' helpful. She observed, 'Some of my patients seem to be describing something like this... what you said... unwanted, but consensual. They don't want to have sex, but they are getting something from the relationship- money, freedom, a better lifestyle- and they understand that sex is the price they have to pay for it.'

A second concern relates to the meaning of 'vulnerability' and how the law can capture it. It is essential to limit the scope of vulnerability to ensure that its role as a wrong-making factor of sexual exploitation is not lost. I mentioned in sub-section 1 that every interviewee I spoke to considered adolescents to be more sexually vulnerable than adults. The reasons mentioned by my interviewees for this vulnerability (impulsivity, tendency towards instant gratification, the inability to appreciate long-term consequences, inordinate need for approval by peers) overlapped with the factors that, I argued in Chapter 5, make adolescents inherently vulnerable to being taken advantage of. These factors, which make adolescents less psychosocially mature than adults include poor impulse control, trouble delaying gratification and sensation seeking and inability to appropriately weigh risks against benefits because of a tendency to overvalue benefits and underestimate the likelihood of actually facing risks. The inherent vulnerability or lack of psychosocial maturity of adolescents need not be explicitly incorporated into the law, since it is reflected in the fact adolescents' consent to sexual exploitation is invalid.

When asked whether there might be factors that rendered some adolescents more vulnerable than others, most answers referred to situational vulnerability (based both in material and non-material needs) in some cases, to pathogenic vulnerability. A majority of interviewees mentioned factors such as extreme poverty and associated conditions such as an insecure living

situation, or unmet material needs, and a violent and/or unstable home environment from which the adolescent might want to escape. For instance, a police officer from Kolkata told me,

> Mostly children on the street, or living in slums, they have very difficult lives. No money, no food, no shelter. Sometimes they have no parents or family to protect them or care for them. You see them at road signals, they will beg for money, wipe your car and ask for money, or sell some book or small item for money. When all this does not work, what will they do? They do this [exchange sex for money].

A representative of an NGO in Mumbai observed, 'the lives of children in *jhuggis* [slums] is Hobbesian- "nasty, brutish and short". Physical and sexual abuse is so normal for them. When you have seen nothing else since childhood, is it strange to start doing it for money or food or a mobile phone?' Another representative of an NGO working in the rescue and rehabilitation of trafficked children observed,

> *aise toh kisi ke saath bhi ho sakta hai... lekin hum zyadatar dekhte hain gareeb ghar ke bachche, dalit bachche,* migrant community *ke bachche jaise Bangladeshi ya Nepali, kuch bachche jo beghar ho jaate hain. Kabhi kabhi Ma-baap khud hi bachchon ko bech daete hain kyunki ghar mein paise chahiye, koi beemaar hai, badi behen ki shaadi karani hai... aisa sab humne dekha hai.*
>
> (This [sexual exploitation] can happen to anyone... but we mostly find that it happens to children from poor households, dalit children, children from migrant communities like those from Bangladesh or Nepal, some homeless children. Sometimes the parents sell their children [into exploitation] because they need money, for medical treatment or to get the child's elder sister married... we have seen these things)

These need-based vulnerabilities mentioned by interviewees (poverty, homelessness or precarious living situations, hunger and so on) are a good starting point for understanding and interpreting 'vulnerability' in the context of sexual exploitation. Other sources of situational vulnerability, such as medical emergencies, disasters/calamities, or immediate needs arising from being lost or stranded without a means for escape should also be included for a more comprehensive recognition of situational vulnerability in the law.

A large number of the respondents also referred to non-material basic needs, such as love and attention. For instance, the head of an NGO, engaged in research and advocacy on child rights, with a focus on adolescent sexuality, in Delhi, explained,

> A lot of times these relationships start because there is something wrong at home. Parents are physically or sexually abusive, freedoms are severely restricted, they want to get her married to someone she does not like... this triggers her attachment

> to a boy who represents freedom. Sometimes there is no problem with this. But sometimes, he gives her freedom, takes her out, pays for her to have a good time... and then the demands for sex start. She may not want to, but she can't say no because she is afraid that he will leave her and the situation at home is worse.

Vulnerability arising from non-material needs is more difficult to capture through a list. As I argued in Chapter 5, however, they should inform what we understand as 'vulnerability' because their effect may be no different from the vulnerability created by material needs, and if the exploiter is aware of such a basic non-material need, it can be taken advantage of. Building on the example given in the quote above, consider the following situation. A (a boyfriend) asks B (his adolescent girlfriend), whom he is aware to be emotionally dependent on him (for example, for love, attention, and self-esteem), to have group sex with him and his friends. B tells A that she does not want to do this, and the idea makes her deeply uncomfortable and unhappy. A then responds, 'I love you so much and I've never hesitated to do anything for you. I've been taking you out for rides on my motorcycle, taking you to parties and paying your mobile bill, and you can't even do this for me in return? I didn't think you were so selfish.' B feels she owes A for everything he has done for her and is afraid to lose the love and support she feels he gives if she refuses (even though he has not threatened to leave her). So, she consents to unwanted group sex with him and his friends. This would be an example of a person taking advantage of an exploitee's non-material basic needs to sexually exploit her.[108]

Some respondents, largely representatives of NGOs, researchers and private lawyers, but also one public prosecutor and one police officer, mentioned that adolescents were more likely to be vulnerable *to* certain people, for instance those in positions of power and authority (against whom the adolescent may be too afraid to speak) or those in a position of trust and care (to whom the adolescent may feel that they owe reciprocity or a duty to obey). They mentioned, in particular, parents, older siblings (including cousins) and relatives, neighbours and family friends, and teachers and principals in schools. One representative of an NGO in Bhopal narrated the story of an adolescent who was being sexually exploited by an older boy who came to her house to take remedial tuition classes for her. He persuaded her to have sex with him and she was unable to say no or reveal the exploitation because the exploiter's father was her father's boss. These are examples of pathogenic vulnerability. Pathogenic vulnerability tends

[108] This example corresponds with Gladman and Heal's 'Boyfriend Model' of sexual exploitation, in which '[t]he young person's compliance is driven by feelings of love for their abuser, of not wanting to lose them, not wanting to displease them and the certainty that the abuse must in some way be normal or acceptable because they believe their abuser loves them and would not intentionally hurt them.' Gladman and Heal, (Introduction, n 7), 84.

to arise in relationships of power and authority or of trust and care. For example, A (a mother) requests B (her daughter) to have sex with a neighbour in exchange for money (which the mother would keep). B is reluctant and finds the idea abhorrent, but A gently reminds B that it is B's duty to A and the family, who need the money. B, who has grown up believing this and being expected to obey her elders, agrees. A is aware that B does not want to have sex with the neighbour, and she would not be able to say no to A, her mother. This is an example of A taking advantage of B's pathogenic vulnerability to sexually exploit her. Pathogenic vulnerability can be captured through a non-exhaustive list of relationships within which it is most likely to arise, or through a generally worded provision that would cover such relationships without specifying any. Either way, it would be essential to ensure that the pathogenic vulnerabilities arising within relationships with parents, older family members (including siblings), and other authority figures outside the family such as elders of the caste community or the village council, teachers, and so on, are captured.

The examples discussed in the foregoing paragraphs lead me to the third concern. Sexual exploitation may frequently involve a third-party facilitator, who may not have sexual interactions with the exploitee but does benefit from their exploitation. Is it appropriate to say that these facilitators are also sexual exploiters when they have neither engaged in sexual acts with the exploitee nor derive any sexual pleasure from it? I argue that it is. When A takes advantage of B's vulnerability to induce B's consent to have unwanted sex with C, A still does everything that makes sexual exploitation wrong. He takes advantage of B's vulnerabilities in a situation where it is wrong for him to do so, and he fails to treat B with the respect due to her as a human being, by having her engage in unwanted, degrading sex. Thus, it is right to say that A sexually exploits B in such situations in the same way that it would be right to say that A sexually coerces B when A points a gun at B's head and makes B have sex with C.[109] Parents who dedicate their adolescent daughters as *devadasis* may, therefore, be punished for sexual exploitation (provided the elements of the offence are proved against them).

A fourth and final concern has to do with how an adolescent is to be defined in operationalising sexual exploitation.[110] In Chapter 6, I made a categorical critically normative distinction between adults and adolescents as regards sexual exploitation, concluding that sexual

[109] IPC, s. 376.

[110] The interviews were not very helpful on this point because interviewees either had no suggestions, or mentioned age groups (for instance, that an adolescent is a person between the ages of 11 and 19). Therefore, I do not refer to interview responses in discussing this concern.

exploitation is all-things-considered wrong only when it comes to adolescents because they, unlike adults, are incapable of consenting to sexual exploitation. This categorical distinction was based on the fact that adults are psychosocially mature, whereas adolescents are not, and this makes adolescents inherently vulnerable to being taken advantage of. While psychosocial maturity marks the critically normative distinction between adolescents and adults when it comes to the moral competence to consent to sexual exploitation, it does not work well as a legal distinction. As with the determination of the competence to consent to non-wrongful sexual conduct, it is not feasible for a legal system to categorise persons as adolescents and adults based on individual assessments of psychosocial maturity. Some other form of categorical distinction between whose consent to sexual exploitation is legally valid and whose is not would also be necessary to provide a clear signal to a potential exploiter, especially since all-things-considered wrongful sexual exploitation would be criminally punishable.

The clearest proxy for competence to consent to sexual exploitation would be a presumptive age threshold. It was shown in Chapter 5 that studies on acquisition of psychosocial maturity, including a comparative study of 11 countries of which India was one, found that 'adult' levels of psychosocial maturity generally appear in the 20s.[111] However, there are significant distinctions in the trajectory and timing of development of psychosocial maturity across the different countries studied,[112] and no further data on the comparative psychosocial maturity of adolescents and adults in India are available. Consequently, I cannot suggest a particular age that would best serve as the proxy for competence to consent to sexual exploitation. Future research on the subject may help guide this policy decision. All that it is possible for me to say at this stage is that since all available studies conclude that adult levels of psychosocial maturity are generally *not* acquired until the age of 18 (see Chapter 5.II.A),[113] the presumptive age of consent for sexual exploitation should be no lower than 18. This does not preclude a higher age of consent for sexual exploitation, provided the chosen age tracks psychosocial maturity.

As with the age of consent for non-wrongful sexual activity, I suggest that the age of consent for sexual exploitation should be a presumptive, rather than absolute, age threshold to prevent

[111] Icenogle and others, 'Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity' (Chapter 4, n 34), 77.
[112] ibid, 82.
[113] As I mentioned in Chapter 4.II.A, since these data emerged in the juvenile justice context, this conclusion is anchored in the legal of age of majority, which happens to be 18 in most countries. In other words, it is possible that if the legal age of majority were 19, the conclusion would have been that adult levels of psychosocial maturity are not acquired until the age of 19, especially since it is clear that psychosocial maturity develops well into the 20s. This is not to suggest that these studies are unreliable, but to account for their context.

a slide into arbitrariness and to circumvent the problems with age-determination in India. A person accused of sexually exploiting someone below the presumptive age of consent for sexual exploitation should be able to defend himself by showing that he reasonably believed that the prosecutrix had attained the *age* of consent.[114] But the accused cannot claim a reasonable belief that the prosecutrix was of or above the age of consent for sexual exploitation simply because he was unaware of her age and/or incapable of ascertaining it.

Where the age of the prosecutrix cannot be reliably determined during trial, and it is alleged by the accused that the prosecutrix was over the age of consent for sexual exploitation, judges should determine whether or not the prosecutrix was competent to consent to the degrading exchange proposed by the accused. In doing this, judges would need to determine, in cases of alleged or suspected sexual exploitation, whether the prosecutrix was sufficiently psychosocially mature to consent to the degrading exchange proposed. This assessment can be based on the factors of which psychosocial maturity is comprised, such as the ability to delay gratification and control impulses, the ability to appreciate the actual likelihood of facing a consequence, and to appropriately value a perceived benefit, both in itself and when weighed against the likely adverse consequences of permitting one's sexual exploitation. As with the age of consent for non-wrongful sexual conduct, judges may enlist the help of psychologists/psychiatrists in making this assessment. However, there is no ready or straightforward test or criterion to determine psychosocial maturity. Studies which evaluate psychosocial maturity usually do so through laboratory-based tests, which may not be feasible to conduct while a trial is ongoing. To some degree, the problem may be mitigated by developing guidelines for the determination of psychosocial maturity through psychiatric and behavioural examination, a list of questions and tasks that can provide an insight into the prosecutrix's level of maturity.

Treating the age of consent as a presumptive threshold in this manner allows the age of consent for sexual exploitation, and the assessments of the validity of consent to sexual exploitation, to be tethered to the actual competence of the consenter as far as possible. It also makes the system more flexible and capable of handling the complications around age-determination in India. Admittedly, these assessments would make cases of sexual exploitation more cumbersome,

[114] The reasonable belief should be as to age rather than psychosocial maturity because the age of consent for sexual exploitation, like the age of consent for non-wrongful sexual acts, is meant to serve as an objective indicator of competence and to prevent subjective determinations of competence by the accused. To allow the accused to defend himself on the ground of a reasonable belief as to competence rather than age would defeat the very purpose of setting an age of consent.

and a presumptive rather than absolute age of consent would also make the entire system more complex and contingent. However, the increased complication and burden imposed by this system would only arise in limited cases, where there are good reasons to look beyond the prescribed age of consent, rather than being a routine matter. It is also worth noting that at least insofar as the need for this complicated determination of the competence to consent to sexual exploitation arises because of the uncertainty surrounding age-determination in India, it may be short-lived. Once the age of the prosecutrix can generally be ascertained reliably, judges would not need to engage in the complex determination of psychosocial maturity outlined above, at least for reasons of difficulties in age-determination. This may happen sooner rather than later, since evidence indicates that the registration of births in India is steadily increasing,[115] meaning that far more adolescents are likely to have official birth certificates in the future. These complications notwithstanding, as I argued earlier with regard to the age of consent for non-wrongful sexual interactions, a presumptive age of consent and competence adjudication by judges where necessary would be less arbitrary than the current system and would go some distance towards addressing its simultaneously over- and underinclusive nature.

Conclusion

In this chapter I argued that, as per recent decisions of the Supreme Court of India, the permissibility of sex within Indian criminal law must be determined in accordance with constitutional morality, and not majoritarian morality. By this standard, the permissibility of sex ought to be determined by valid consent. Given this, I argued that there are good reasons for extending a (qualified) right to positive sexual autonomy, which is currently limited to legal adults in the Indian context, to adolescents who are competent to consent to non-wrongful sexual conduct. I then argued that Indian criminal law's current approach to adolescent sexuality is both overinclusive and underinclusive. It is overinclusive because it criminalises all sexual contact with all minors and therefore amounts to an unjustified incursion into the (qualified) right of competent adolescents to positive sexual autonomy. At the same time, it fails to recognise the scope for sexual exploitation in practices approved by the family and/or community, such as child marriage and *devadasi* dedication. Therefore, it does not adequately

[115] According to data produced by the Vital Statistics Division of the Office of the Registrar General and Census Commissioner, registration of births in India increased from 82.4% in 2011 to 92.7% in 2019. Ministry of Home Affairs, Government of India, 'Civil Registration System' <https://censusindia.gov.in/census.website/node/180> accessed 13 May 2024.

protect adolescents from some kinds of unwanted and wrongful interferences with their sexual autonomy. This makes it underinclusive.

I offered a two-pronged proposal as a tentative solution to this simultaneously over- and underinclusive approach of Indian criminal law. First, to legally recognise the right to positive sexual autonomy of those adolescents who are competent to consent to non-wrongful sexual conduct, thereby tethering the criminalisation of sexual conduct with adolescents to consent. Second, to operationalise a broader concept of sexual exploitation within Indian criminal law to safeguard against the misuse of adolescent consent, and to address the lacuna in Indian criminal law relating to sexual exploitation in practices approved by the family and/or community. While no model legislation or specific provision was suggested, I discussed a range of different options through which this two-pronged proposal could be implemented. Incorporating insights from my fieldwork with practitioners in the Indian child protection system, I also considered the pros and cons of these options.

As I discuss in the Conclusion to this thesis, this two-pronged solution is neither a perfect nor a complete solution to the problems identified in this thesis, but it is an important first step towards making Indian criminal law's regulation of adolescent sexuality nuanced, and appropriately safeguarding the rights of adolescents.

CONCLUSION

Through this thesis, I aimed to critique Indian criminal law's regulation of adolescent sexuality and make normative prescriptions towards reform aimed at striking a balance between the developing sexual autonomy of adolescents and their continuing vulnerability to sexual exploitation.

I. The Problem

Indian criminal law makes all sexual interactions with all persons under the age of 18 criminally punishable, without exceptions, and with high mandatory minimum sentences. The lack of discretion given to the functionaries of the Indian criminal justice system (police, prosecutors and judges) in cases under POCSO, in conjunction with the mandatory reporting requirement, which makes the failure to report any sexual contact with a minor a criminal offence, draws several de-facto consensual sexual interactions with minors into the criminal justice system. At the same time, Indian criminal law fails to capture instances of the sexual exploitation of adolescents in practices approved by the family and/or community, such as child marriage and *devadasi* dedication, which rarely get punished despite being criminal offences. Therefore, I argued in Chapters 3 and 7, Indian criminal law's approach to adolescent sexuality is simultaneously over- and underinclusive.

This simultaneous over- and underinclusiveness must be understood in the Indian social context where the permissibility of sex is socio-normatively determined by the legitimacy granted by marriage, preferably hegemonised marriage, rather than by consent. This is because containing sex within hegemonised marriage is essential to the maintenance of caste purity through caste endogamy. It allows the family and caste community to control the sexual and reproductive capacities of women and girls. The scope, language and operation of Indian criminal law, to the extent that it fails to recognise and punish the potentially sexually exploitative practices approved by the family and/or caste community, and overcriminalises consensual sexual expression, upholds and furthers the control of female reproductive and sexual capacity by the family and caste community. In these respects, therefore, Indian criminal law does not, in fact, protect minors from sexual abuse. Additionally, the law also leads to harmful consequences of its own. As I argued in Chapter 3.II.A, the mandatory reporting provision of POCSO creates barriers for adolescents looking to access essential sexual and medical health services and impedes essential research which could facilitate efforts to understand and meet the needs of adolescents. Furthermore, due to unreliable age

determination in India, the blanket criminalisation of POCSO has not shielded minors from consent assessment based on rape myths and stereotypes, contrary to the expectations of the Parliamentary Committee's Report on the POCSO Bill.[1]

II. Contributions of the Thesis

Against the stated aim of making suggestions aimed at reforming Indian criminal law's regulation of adolescent sexuality, this thesis makes the following notable contributions to the literature:

First, this thesis locates the simultaneous over- and underinclusiveness of Indian criminal law's regulation of adolescent sexuality in the Indian social context where the norms of caste and honour serve as the background to all sexual activity. By doing this, it reframes the abstract and seemingly gender-neutral issue of the 'sexuality of adolescents' as an issue of the operation of Indian criminal law within the larger social context of family control over female sexual and reproductive capacities.

Second, this thesis is the first to explore the particularities of sexual autonomy and vulnerability during adolescence in the Indian context, basing the discussion on the available research on the capacities and vulnerabilities of adolescents when it comes to decision-making, both from the West and from India. This thesis also explains *why* the analysis of the types of sexual conduct that adolescents should be legally permitted to engage in should be based on their competence to consent after reviewing Indian socio-normative conceptions of permissible sex against critical and constitutional morality.

Third, as I mentioned in Chapters 3 and 7, a frequent suggestion that emerges in the discourse on Indian criminal law's regulation of adolescent sexuality is that Indian adolescents' consent to non-exploitative sexual interactions should be legally recognised. However, nothing in the literature on the subject in India explains what exploitation should mean in this context or why adolescents need to be protected from it. This thesis, therefore, is the first to address a significant gap in the literature by proposing a moral theory of sexual exploitation that is uniquely tailored to the Indian social context. It conceptualises sexual exploitation as pro-tanto wrongful sexual conduct characterised by A (the exploiter) taking advantage of B (the exploitee)'s vulnerability to induce B to perform unwanted sexual labour that degrades B in exchange for some perceived benefit. Since normative adults have both the capacity to consent

[1] Parliamentary Committee Report on the POCSO Bill, 2011 (Chapter 3, n 45), [6.9].

to the sexual acts involved in sexual exploitation and the capacity to consent to the exchange that is proposed by the exploiter, their consent is morally decisive in determining the permissibility of their sexual exploitation. However, since normative adolescents (who are not psychosocially mature) do not have the necessary capacity to consent to the exchange proposed by the exploiter even when they do have the moral capacity to consent to the sexual acts involved, their consent cannot permit their sexual exploitation. The sexual exploitation of normative adolescents is, therefore, all-things-considered wrong and impermissible. This theory draws from the literature on the general concept of exploitation, as well as feminist accounts of sex and sexual labour, but remains specific to sexual exploitation in the Indian context in two important ways.

One, the theory's understanding of what makes sexual exploitation degrading draws from Indian perceptions of sex as dirty work (regardless of the gender of the performer), and the Indian context of caste-based patriarchy, in which sex always carries the possibility of degradation for women. In that sense, the theory accounts for the social norms around sex in India (discussed in Chapters 2 and 3).

Two, the understanding of pathogenic vulnerability is also contextualised against the collectivist and hierarchical upbringing of Indian children, because of which children and adolescents (and sometimes even adults) internalise attitudes of deference and obedience towards elders in the family as well as other authority figures in society, which in turn renders them susceptible to being sexually exploited within these relationships.

Fourthly, and most importantly, it offers a solution to the simultaneously over- and underinclusive approach of Indian criminal law towards adolescent sexuality. This is a crucial, though tentative, step towards balancing the sexual autonomy and vulnerability of adolescents in Indian criminal law. The thesis also considers how this solution can be operationalised within Indian criminal law, and provides an overview of the normative and regulatory concerns, grounded in the views of practitioners working in child protection in India, that would arise in this operationalisation.

The challenges of operationalising my normative framework of the competence of adolescents to make sexual decisions and their capacity to consent to sex, as well as the particular vulnerabilities of adolescents, arise when translating this moral theory into workable legal standards. The competence of adolescents is not easy to identify and lay down in practice, especially since, in doing this, the law must remain intelligible and predictable, and provide a

clear signal of what is and is not criminally prohibited and punishable. This process of translating normative theory into legal regulation is messy and imperfect, especially in India where, in addition to the universal problem that normative capacities and vulnerabilities don't map neatly onto age, the very determination of age is unreliable. I address this issue by proposing an age of consent that, as far as possible, tracks relevant capacities, so that the criminal law can be clear and predictable. At the same time, I suggest that this age of consent should be presumptive, rather than absolute, to overcome (to some degree) the inherent arbitrariness of age-lines and the unreliability of age-determination in India.

Another difficulty arising specifically in the Indian context, which emerged during my interviews with practitioners, is that there is no common understanding of the term 'exploitation' in India. Translations of the term in local languages often had the same meaning as 'abuse', and 'taking advantage of a person's vulnerabilities' was often confused with instances of coercion or with deceptive sex ('promise to marry' cases). This is not a problem unique to exploitation since other terms such as 'sexual assault' or 'molestation' or 'harassment' also don't necessarily have distinct translations into local Indian languages. It does, however, indicate that if a broader concept of exploitation is operationalised within Indian law (as I suggest it should be), functionaries of the criminal justice system would need to be trained to understand its meaning and scope.

More generally, 'vulnerability' is difficult to inscribe into law. While certain forms of vulnerability, arising from material needs may still be incorporated through non-exhaustive lists, vulnerability arising from non-material needs would be particularly difficult to codify.

Finally, the form in which the concept of exploitation is included in Indian law would require some consideration. Contrary to the suggestions of some of my interviewees and despite some conceptual overlap between rape and sexual exploitation, I argued that a new offence of sexual exploitation would be required to track the moral distinction between the two types of sexual offences. This is because the deficiency of adolescent consent to sexual exploitation, I argue, relates not to the sexual acts (as with rape), but to the degrading exchange proposed by the exploiter.

III. Limitations of the Thesis and Directions for Further Research

Notwithstanding these contributions, the thesis cannot and does not present a complete or perfect solution to the problems with Indian criminal law's regulation of adolescent sexuality. The discussions in Chapters 2 and 3 demonstrate how some of the harmful consequences of

Indian criminal law are attributable to the social norms and practices of India's caste-based patriarchy. The two-pronged proposal put forth in Chapter 7 can only address the problems in the language and scope of the law. In other words, features of the law which prohibit or inhibit the exercise of sexual autonomy by competent adolescents, and which ignore the potential for sexual exploitation in practices approved by the family and/or community can be changed by adopting the reforms proposed in this thesis. But the law can do little about the social conditions shaped by the norms of caste and honour that serve as a barrier to the exercise of sexual autonomy, or about the biases of the functionaries of the criminal justice system. In this regard, my hope is that this thesis and future works in this area will draw attention to these extra-legal problems and motivate social conversation and reform.

Similarly, while this two-pronged solution is a step towards balancing the sexual autonomy and vulnerability of adolescents, further policy-based measures are necessary to build the capacities of adolescents to make informed and autonomous decisions. One such measure is comprehensive sex education, which equips adolescents with essential information about sex and sexuality. This is especially important in light of the evidence (discussed in Chapter 5.I.A.2) indicating that both adults and adolescents in India do not use modern methods of contraception and generally do not have comprehensive knowledge about HIV/AIDS. Another is conducting and enabling further research on adolescent sexuality. As I argued in Chapters 4 and 5, there are significant gaps in the research on adolescent sexuality in the Indian context, which impede a robust and context-specific understanding of sexual decision-making by Indian adolescents. Addressing these gaps would create a more reliable repository of evidence through which to understand and conceptualise the capacities and vulnerabilities of Indian adolescents in sexual decision-making.

Given these limitations, the two-pronged solution proposed in this thesis is a tentative one. But it is a valuable addition to the legal and policy discussions around adolescent sexuality and the age of consent in India. It can inform policy decisions as well as advocacy on the subject by flagging the essential points of concern and contention, as well as providing actionable directions for reform.

APPENDIX 1: LIST AND DETAILS OF INTERVIEWEES

1. **Delhi**

Sl. No.	**Name of the Organisation/Department**	**Position**	**Date**
1.	Delhi Police	Inspector, Special Juvenile Police Unit	10.03.2023
2.	Delhi Police	Sub-Inspector, Special Juvenile Police Unit	04.04.2023
3.	N/A	Private Lawyer	20.12.2022
4.	N/A	Private Lawyer	18.02.2023
5.	Partners for Law in Development (NGO)	Head	20.01.2023
6.	HAQ Centre for Child Rights (NGO)	Head	23.12.2022

2. **Pune, Maharashtra**

Sl No.	**Name of the Organisation/Department**	**Position**	**Date**
1.	Pune Police	Sub-Inspector, Special Juvenile Police Unit	04.01.2023
2.	Pune Police	Sub-Inspector, Special Juvenile Police Unit	05.01.2023
3.	Muskaan Foundation for Child Protection (NGO)	Head	04.01.2023
4.	Muskaan Foundation for Child Protection (NGO)	Head	04.01.2023

5.	Muskaan Foundation for Child Protection (NGO)		04.01.2023
6.	Independent	Child Psychologist	05.01.2023

3. **Mumbai, Maharashtra**

Sl No.	**Name of the Organisation/Department**	**Position**	**Date**
1.	Mumbai Police	Inspector, Special Juvenile Police Unit	09.01.2023
2.	N/A	Private Lawyer	11.01.2023
3.	NGO Working with at-risk Youth, no consent to name organisation	Director, Social Justice	09.01.2023
4.	Arpan (NGO)	Head	10.01.2023

4. **Bangalore, Karnataka**

Sl No.	**Name of the Organisation/Department**	**Position**	**Date**
1.	Bangalore Police	Sub-Inspector, Special Juvenile Police Unit	15.02.2023
2.	Bangalore Police	Sub-Inspector	16.02.2023
3.	Centre for Child and the Law, National Law School of India University	Special Public Prosecutor	13.02.2023
4.	Enfold Trust (NGO)	Research Head	18.02.2023
5.	Enfold Trust (NGO)	Research Consultant	18.02.2023

5. **Chennai, Tamil Nadu**

Sl No.	**Name of the Organisation/Department**	**Position**	**Date**
1.	POCSO, Special Court, Chengalpattu	Special Judge	22.02.2023
2.	POCSO, Special Court Chengalpattu	Special Public Prosecutor	22.02.2023
3.	Chennai Police	Sub Inspector	21.02.2023
4.	Chennai Police	Inspector	21.02.2023
5.	TULIR (NGO), Chennai	Head	21.02.2023
6.	TULIR (NGO), Chennai	Researcher	21.02.2023
7.	TULIR (NGO), Chennai	Researcher	21.02.2023
8.	Indian Police Service	Retired Officer	23.02.2023

6. **Kolkata, West Bengal**

Sl. No.	**Name of the Organisation/Department**	**Position**	**Date**
1.	Kolkata Police	Sub-Inspector	24.01.2023
2.	Centre for Child Rights, West Bengal National University of Juridical Sciences, Kolkata	Head	25.01.2023

7. **Patna, Bihar**

Sl No.	**Name of the Organisation/Department**	**Position**	**Date**
1.	Patna Sessions Court	Special Judge	01.02.2023
2.	Patna Sessions Court	Special Judge	01.02.2023

3.	Child Rights Centre, Chanakya National Law Univesity	Head	31.01.2023
4.	ASTHA Mahila Bal Vikash (NGO)	Head	02.02.2023
5.	Bihar Police (Patna)	Sub-Inspector	30.01.2023
6.	Bihar Police (Patna)	Sub-Inspector	30.01.2023
7.	Bihar Police (Patna)	Constable	30.01.2023

8. **Bhopal, Madhya Pradesh**

Sl No.	**Name of the Organisation/Department**	**Position**	**Date**
1.	Bhopal Police	Sub-Inspector	06.05.2023
2.	Bhopal Police	Constable	06.05.2023
3.	NGO Working in Trafficking and Child Rights (No consent to reveal name)	Coordinator	09.05.2023

APPENDIX 2: COMPARATIVE TABLES OF THE OLD AND NEW INDIAN CRIMINAL LAW STATUTES

Indian Penal Code, 1860 and Bharatiya Nyaya Sanhita, 2023

Sl No.	Provision in the Indian Penal Code, 1860	Provision in the Bharatiya Nyaya Sanhita, 2023
1.	s. 90	s. 28
2.	s. 292	s. 294
3.	s. 354A	s. 75
4.	s. 370	s. 143
5.	s. 370A	s. 144
6.	s. 375	s. 63
7.	s. 376	s. 64
8.	s. 376B	s. 67
9.	s. 376C	s. 68

Code of Criminal Procedure, 1973 and Bharatiya Nagarik Suraksha Sanhita, 2023

Sl. No.	Provision in the Code of Criminal Procedure, 1973	Provision in the Bharatiya Nagarik Suraksha Sanhita, 2023
1.	s. 2(c)	s. 2(g)
	s. 41	s. 35
3.	s. 154	s. 173
4.	s. 157	s. 176
5.	s. 164	s. 183
6.	s. 173	s. 193
7.	s. 190	s. 210
8.	s. 320	s. 358
9.	s. 321	s. 360

Indian Evidence Act, 1872 and Bharatiya Sakshya Adhiniyam, 2023

Sl No.	Provision in the Indian Evidence Act, 1872	Provision in the Bharatiya Sakshya Adhiniyam, 2023
1.	s. 53A	s. 48
2.	Proviso to s. 146	Proviso to s. 149

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