

Criminalising Adolescent Sexuality: The Impact of POCSO Act on Consensual Relationships

THEME – HUMAN RIGHTS AND GENDER JUSTICE IN 21st CENTURY

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1. ABSTRACT

Protection of Children from Sexual Offences (POCSO) Act was enforced in 2012 to protect children from offences of sexual assault, sexual harassment and pornography. The act criminalizes sex with minors and holds the same as statutory rape. Consequently, it has resulted in criminalization of consensual sexual activities between adolescents leaving the POCSO Act prone to misuse whereby adolescents engaging in perfectly normative behavior might have to face criminal charges.

Criminalizing consensual relationships among minors has numerous negative effects on the rights of children. This research paper discusses such effects in detail. One such effect for example is the mandatory reporting provision which necessitates the involvement of the police whenever a minor approaches a registered medical practitioner for termination of her pregnancy and inevitably results in criminal prosecution against the partner of such minor even in situations where the minor does not want to prosecute her partner and the pregnancy was a result of completely consensual sex.

The aim of this research paper is to shed light on why there is a need to urgently decriminalize consensual sexual acts between minors. An urgent reassessment of the act is the need of the hour to ensure that minors aren't discouraged or prohibited from seeking safe termination of their pregnancies and those engaged in consensual sexual activity do not have to face criminal charges. The author of the paper discusses the pros and cons of a few solutions to the problem and identifies the best possible solution that ensures that minors are not punished by the same legislation that intended to protect them in the first place.

2. INTRODUCTION

Sex in general and Pre-marital sex in specific is taboo in India despite it being the most populated country in the world. It is a general notion that girls are socially and ethically obligated to refrain from having sex until being married. Judiciary too has on

certain occasions spoken against pre-marital sex. One such occasion was when an additional sessions judge in Delhi remarked that sex before marriage is immoral and against the tenets of every religion.¹ In

¹ *Judge's Rape Remarks Insensitive: Delhi High Court*, Times Of India (Jan. 7, 2014), <https://timesofindia.indiatimes.com/city/delhi/judge-s-rape-remark-insensitive-delhi-high-court/articleshow/28484760.cms>.

another judgment by the Madras High Court, It was decided that if an adult couple who are not married have sex, they will be regarded as married and can be referred to as husband and wife.² Despite such an environment, According to a National Institute of Health and Family Welfare survey, between 25% and 33% of India's youth engage in premarital sex. Premarital sex attitudes and beliefs are fast shifting. It is regrettable, though, that the legislation has not kept pace with the aforementioned shift.

POCSO Act was enforced in 2012 “to protect children from offences of sexual assault, sexual harassment and pornography.”³ The act criminalizes sex with minors and holds the same as statutory rape. Under POCSO, the age of consent has been set at 18 which is perhaps among the highest in the world.⁴ Consequently, it has led to the criminalization of consensual adolescent sexual behaviors in a society where premarital sex is more common than ever before because of shifting attitudes.

While the POCSO Act has been a huge step in protecting the children against sexual abuse and its stringent provisions have successfully acted as a deterrent, such blanket criminalization of consensual sex between minors has been in a legal grey area due to the fact that a minor is incapable of giving consent in the eyes of law.⁵

The mandatory reporting provision as provided in section 19 of the Act requires anybody who believes that an offence under the act has been committed to notify the local police or the Special Juvenile Unit which further complicates things by deterring minors from getting access to safe and legal abortions. Since any kind of sexual activity in which a minor is involved automatically becomes an offence that has to be reported, Registered Medical Practitioners who are approached by minors seeking abortions are left with no other choice but to report the same regardless of whether the act was a consensual act where both the parties were minors or not.⁶

² *Pre-marital sex equals marriage, says Madras HC*, Hindustan Times (June 19, 2013), <https://www.hindustantimes.com/india/pre-marital-sex-equals-marriage-says-madras-hc/story-o1GasqFSvY1KvsqNCfLQ4H.html>.

³ Protection of children from sexual offences act, 32 P.O.C.S.O. (2012).

⁴ *Ashik Ramjan Ansari v. The State Of Maharashtra And Anr*, (Bombay High Ct. 2023).

⁵ *Arhant Janardan Sunatkari v. The State Of Maharashtra*, (Bombay High Ct. 2021).

⁶ Centre for Reproductive Rights JGLS, *The POCSO Act and Adolescents' Access to Abortion in India: Heightened Vulnerabilities, Health risks and Impact on their Rights*, <https://reproductiverights.org/wp-content/uploads/2024/07/POCSO-Act-Adolescents-Access-to-Abortion-in-India-fact-sheet.pdf>.

Both of these aspects i.e. the criminalization of consensual relationships between minors and the mandatory reporting provision have a chilling effect on the rights of the adolescents to have uninterrupted access to reproductive services and their right to life and liberty. The next section of the research paper deals elaborately with such effects.

3. RESEARCH OBJECTIVES

- To examine the impact of criminalizing consensual sexual acts between minors on their rights and well-being, focusing on how it affects access to healthcare and personal freedoms.
- To explore the arguments for and against lowering the age of consent in order to determine whether such a change would be an appropriate solution to the problem.
- To assess whether judicial discretion, without any changes to the current law, can sufficiently protect the rights of minors involved in consensual sexual relationships.
- To analyze the implications of the POCSO Act's mandatory reporting provisions, and investigate how they affect minors seeking termination of pregnancy.
- To evaluate potential solutions to the legal challenges posed by the POCSO Act, focusing on the balance between protecting minors from exploitation and ensuring that they are not penalized for consensual acts.

4. REVIEW OF LITERATURE

- *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues* by Centre for Child and the Law at NLSIU – This study focuses on the functioning of Special Courts under the POCSO Act, 2012. It identifies systemic and procedural challenges, including issues arising from the criminalization of consensual adolescent relationships. Through empirical analysis across five states, the study exposes societal and legal complexities impacting such cases, including the framing of charges and judicial interpretation. Among other things, it was this study that highlighted that in at least 20 percent of the decided cases, the victim and the accused were in a consensual relationship.
- The study *"Legal Barriers to Accessing Safe Abortion Services in India: A Fact Finding Study,"*

authored by Aparna Chandra, Mrinal Satish, Shreya Shree, and Mini Saxena, examines the obstacles women face in obtaining safe abortion services in India. It highlights how legal ambiguities, restrictive interpretations of the Medical Termination of Pregnancy (MTP) Act, and societal stigma contribute to limited access. The study also discusses the negative impact of the mandatory reporting provision under the POCSO Act on minors seeking safe abortions. This study is a collaborative effort between the Centre for Constitutional Law, Policy, and Governance at National Law University, Delhi, and the Center for Reproductive Rights.

- *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, issued by the UN Committee on the Rights of the Child, provides guidance to States on ensuring the realization of adolescents' rights. It emphasizes that children are not a homogeneous group, highlighting the diverse experiences and challenges faced during adolescence. The document

emphasizes on the importance of recognizing adolescents' evolving capacities and autonomy, advocating for their active participation in decision-making processes that affect them. It also addresses the need for protective measures against discrimination and exploitation, ensuring access to education, healthcare, and justice. This comprehensive guidance aims to support States in creating environments where adolescents can fully exercise their rights and develop their potential.

5. EFFECTS OF CRIMINALIZATION OF CONSENSUAL SEX BETWEEN MINORS

A significant change brought in by the POCSO Act was that it increased the age of consent⁷ from 16 to 18.⁸ This had a huge impact on adolescents who were in consensual relationships who overnight

⁷ Age of Consent refers to the age at which a person becomes legally competent to consent to sexual acts.

⁸ *Law Commission of India report on the age of consent: Denying justice and autonomy to adolescents*, (Dec. 24, 2001), <https://ijme.in/articles/law-commission-of-india-report-on-the-age-of-consent-denying-justice-and-autonomy-to-adolescents/?galley=html>.

became criminals in the eyes of law, worthy of deserving harsh punishments.

Interestingly, The POCSO bill back in 2011 did propose the age of consent to be 16 years.⁹ It also took cognizance of consensual sexual relationships among minors between the age of 16-18. It did so by including a proviso to that effect to section 3 of the act. The proviso reads as follows-

*“Provided that where such penetrative sexual assault is committed against a child between sixteen to eighteen years of age, it shall be considered whether the consent for such an act has been obtained against the will of the child or the consent has been obtained by use of violence, force, threat to use force, intoxicants, drugs, impersonation, fraud, deceit, coercion, undue influence, threats, when the child is sleeping or unconscious or where the child does not have the capacity to understand the nature of the act or to resist it.”*¹⁰

Therefore, it can be stated that the legislature too initially did not want to peg the age of consent at 18 and hence, created an exception for the age group of 16-18 as

provided in the aforementioned proviso. However, the proviso was removed with the reason that such a proviso would have shifted the focus to the conduct of the victim during trial.¹¹

With the removal of such proviso and an increase in the age of consent, the growing instances of teenagers who were in a consensual non-exploitative romantic relationship falling victim to stringent provisions of POCSO has become a matter of concern. In a five-state study conducted by the Centre for Child and the Law, NLSIU, it was found that in at least 20 percent of the decided cases, the victim and the accused were in a consensual relationship.¹² The adolescent girl usually alleges rape due to her family putting her in pressure, fear of the society, or when there is a refusal by the boy to marry her.¹³

¹¹ Vinayak Chawla, *De-criminalising romantic adolescent relationships under the POCSO Act*, (May 10, 2024), <https://www.barandbench.com/columns/exposing-double-standards-of-law-towards-adolescents-de-criminalising-romantic-adolescent-relationships-under-pocso>.

¹² CCL NLSIU, *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues*, <https://ccl.nls.ac.in/wp-content/uploads/2021/10/8.-Implementation-of-the-POCSO-Act-2012-by-speical-courts-challenges-and-issues.pdf>.

¹³ *Rojalin Rout and Ors v. Odisha and Ors*, (High Ct. Orissa 2024).

⁹ *Criminalizing Teen Sex*, Vaishali Bhagwat <https://vaishalibhagwat.com/criminalizing-teen-sex.php>.

¹⁰ The protection of children from sexual offences bill § 3 (2011).

Following are the negative effects of criminalization-

- Treating minor boys as perpetrators of child sexual abuse and girls as victims

One of the major drawbacks of criminalizing consensual relationships among minors is that it forces the judiciary to treat the adolescent girl as a victim incapable of agency, maturity or understanding and their partners as “perpetrators of child sexual abuse”. They are subjected to criminal prosecution and their lives come to a halt trying to get themselves out of the entanglement. Needless to mention the impact it has on their mental wellbeing and their reputation. More often than not, they get labeled as ‘sex offenders’ and ‘rapists’ by the society regardless of their conviction or acquittal. The same was also pointed out in the case of *Vijayalakshmi v. State of Madras* in which it was observed that the use of POCSO act could cause “irreversible damage to the reputation and livelihood of youth whose actions were only a consequence of biological attraction”. The court questioned the wisdom of criminalizing such acts and stated that incidents where minors in consensual relationships are slapped with POCSO Act

form an issue that “brings much concern to the conscience of the court”.¹⁴

Boys are not the lone sufferers of such criminalization. The girls are almost always institutionalized in Child Care Institutions if they are not willing to live with their parents. This is justified by stating that such institutionalization is done keeping their best interest in mind in order to prevent untimely pregnancies, marriages or further ‘abuse’.¹⁵

- Mandatory Reporting Provision causing hindrances in getting access to reproductive health services

Section 19 of the act puts an obligation upon anyone who is apprehensive that an offence under the act has been committed to report the same to special juvenile police unit or local police.¹⁶ Failure to comply with this obligation is a punishable offence. The mandatory reporting provision necessitates the involvement of the police whenever a minor approaches a registered medical

¹⁴ *Vijayalakshmi v. State Rep*, (Madras High Ct. 2021).

¹⁵ Swagata Raha, *Criminalizing adolescent sexuality – The protection of children from sexual offences act and the rights of adolescents*, (Mar. 4, 2021), <https://p39ablog.com/2021/03/criminalizing-adolescent-sexuality-the-protection-of-children-from-sexual-offences-act-and-the-rights-of-adolescents/>.

¹⁶ Protection of children from sexual offences act, 32 P.O.C.S.O. § 19 (2012).

practitioner for termination of her pregnancy and inevitably results in criminal prosecution against the partner of such minor even in situations where the minor does not want to prosecute her partner and the pregnancy was a result of completely consensual sex.

The mandatory reporting requirement under the POCSO Act is broad and applies to the reporting of all sexual offences involving children below 18 years of age. This approach differs from practices in several other countries, where the obligation to report may vary based on the child's age.¹⁷

¹⁸In such jurisdictions, children are often categorized into different age groups to distinguish between very young children and adolescents or teenagers. For example, the obligation to report is typically absolute for very young children, such as those under the age of 13. However, for older children, like teenagers aged 13 to under 16, reporters may exercise discretion by evaluating factors such as the relationship between the victim

and the alleged perpetrator, the nature of the act, the age difference, and whether the interaction was consensual, coercive, or exploitative.

In India, however, no such flexibility exists. Reporters are required to report every instance of a sexual offence involving a child, regardless of any subjective considerations. Moreover, the POCSO Act does not acknowledge consent as a valid defence, deeming any sexual activity with a person under 18 years of age as an offence. Consequently, all such offences must be reported, even in cases where the sexual activity was consensual. This creates significant challenges, particularly for pregnant adolescents seeking medical termination of pregnancy, even when the pregnancy is the result of a consensual relationship rather than abuse or assault.

Medical professionals often face ethical dilemmas in such scenarios, as reporting may go against the best interests of the child or the wishes of the child and their guardians. Although the law allows a minor to terminate a pregnancy with guardian consent¹⁹, the mandatory reporting requirement under POCSO creates substantial barriers to accessing safe

¹⁷ *Provincial and territorial child protection legislation and policy - 2018*, <https://www.canada.ca/en/public-health/services/publications/health-risks-safety/provincial-territorial-child-protection-legislation-policy-2018.html>.

¹⁸ *Children and Young Persons (Care and Protection) Act 1998 No 157*, <https://legislation.nsw.gov.au/view/html/inforce/current/act-1998-157>.

¹⁹ Medical termination of pregnancy act § 3.

abortion services thereby impacting their right to bodily autonomy directly. This legal rigidity can drive individuals toward unsafe and unregulated abortion practices, including those performed by unqualified practitioners, thereby endangering the health and well-being of minors.²⁰

- Overburdening of Courts

Another major concern that arises due to criminalization of consensual relationships among minors is that it overburdens courts with cases against adolescents undeserving of punishments. As per a study conducted by Enfold Proactive Health Trust backed by UNICEF analyzing judgments of special courts in Assam, Maharashtra and West Bengal, cases where the relationship was termed consensual by the girls, their family members, or the court made up for 24.3% of the total cases under the POCSO Act.²¹ As per another 5-state study conducted by Centre for Child and the law, NLSIU as aforementioned in this research paper, it was

found that in at least 20 percent of the decided cases, the victim and the accused were in a consensual relationship.²² All of these cases take up the time and resources that could be used to deal with actual cases where exploitation and sexual violence were involved. The inclusion of such cases where relationship was consensual defeats the purpose of the POCSO Act. As held by various courts all over the country, the purpose of the act was never to criminalize consensual sexual relationships between adolescents but only to protect them from abuse.^{23 24 25}

As per Crime in India report for the year 2021, a staggering 92.6% of cases under the POCSO Act were awaiting disposal.²⁶ This number could be drastically reduced if consensual cases among minors are subtracted from it. To further substantiate the fact that consensual cases among minors

²⁰ Aparna Chandra et al., *Legal Barriers to Accessing Safe Abortion Services in India: A Fact Finding Study*, <https://www.nls.ac.in/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India.pdf>.

²¹ Ramakrishnan & Raha, "Romantic" Cases under the POCSO Act An Analysis of Judgments of Special Courts in Assam, Maharashtra & West Bengal, https://www.girlsnotbrides.org/documents/1951/Romantic-cases-under-the-POCSO-Act_wUNsbKC.pdf.

²² CCL NLSIU, *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues*, <https://ccl.nls.ac.in/wp-content/uploads/2021/10/8.-Implementation-of-the-POCSO-Act-2012-by-speical-courts-challenges-and-issues.pdf>.

²³ G Raghu Verma v. Karnataka, (Karnataka High Ct. 2024).

²⁴ Mrigraj Gautam @ Rippu v. U.P, (Allahabad High Ct. 2023).

²⁵ Probhat Purkait v. W.B, (Calcutta High Ct. 2023).

²⁶ National Crime Records Bureau; Ministry of Home Affairs, *Crime in India 2021*, <http://www.indiaenvironmentportal.org.in/files/file/crime%20in%20india%202021.pdf>.

are overburdening the courts, such cases have an abysmally high acquittal rate of 93.8%.²⁷

6. THE PROBLEM WITH JUDICIARY HAVING THE RESPONSIBILITY TO ACQUIT THE ACCUSED OR QUASH CASES OF CONSENSUAL ADOLESCENT RELATIONS -

The legislature leaves no doubt with its intention to criminalize anybody who has a sexual relation with a minor. In such circumstances, the courts have the responsibility to either acquit the accused person or quash the FIR against him in cases involving teenage romantic relationships. They regularly face petitions with prayers regarding the same.^{28 29 30} While entertaining such petitions, the courts have time and again expressed concern over the age of consent being too high in the country. A lower age of consent would decriminalize teenage romantic relationships. Even the ex-CJI of India Dr. DY Chandrachud advocated

for a lower age of consent while highlighting that the current position of law “poses difficult questions for judges across the spectrum”.³¹

Despite concerns flooding in from various courts, child right activists and even the then CJI himself, the government paid no heed and clarified that it had no intention to lower the age of consent. The 283rd Law Commission Report stated that it was not “advisable to tinker with the existing age of consent”.³²

Several arguments are often made against lowering the age of consent: (a) it could exclude many children, particularly girls over 16, from the protection offered by the law; (b) it may contribute to a rise in child marriages; (c) trials might shift focus to scrutinizing the victim’s behavior to establish consent, leading to their re-victimization; (d) it could facilitate child trafficking by enabling perpetrators to manipulate or groom children into giving consent; and (e) given the subjective nature

²⁷ Swagat Raha & Shruti Ramakrishnan, *Criminalising Consensual Relationships*, <https://www.thehindu.com/opinion/op-ed/criminalising-consensual-relationships/article66281782.ece>.

²⁸ Mrigraj Guatam v. UP, (Allahabad High Ct. 2023).

²⁹ Mr. Sujit Kumar v. State (Govt of NCT of Delhi) & Anr, (Delhi High Ct. 2024).

³⁰ ABC & State of Karnataka (Karnataka High Ct. 2024).

³¹ CJI DY Chandrachud pitches for relook at the age of consent under POCSO Act., (Dec. 12, 2022), <https://timesofindia.indiatimes.com/india/cji-dy-chandrachud-pitches-for-relook-at-age-of-consent-under-pocso-act/articleshow/96139041.cms>.

³² Amita Pitre & Sunita Sheel Bandewar, *Law Commission of India Report on the Age of Consent: Denying Justice and Autonomy to Adolescents*, 9 Indian Journal of Medical Ethics (2024).

of consent, the investigative discretion granted to the police could lead to misuse, even in legitimate cases of rape.

As a solution to the problem, the Law Commission agreed that consensual romantic relationships cannot be treated at par to other sexual offenses and held that where adolescents aged 16-18 are involved, courts can exercise ‘guided judicial discretion’ in sentencing after considering various factors.³³ Such recommendations offer no effective remedy to the problem and do not depart from the status quo as the courts already exercise their discretion in petitions for quashing of FIR or granting bail to the accused.

The best example of courts coming to the rescue of adolescent boys is when Madras High Court took it upon itself to carry on an exercise to quash criminal cases against minor boys for having consensual relationships with minor girls. It sought information on all the cases falling in the category of consensual relationship between minors out of the total 1274 cases in the state as of 2022. All of those matters were to

be quashed if the proceeding was ultimately going to be against the interest or future of the children involved or an abuse of process of law was found.³⁴

However, the judiciary exercising its discretion in trying to come to the aid of children is fraught with problems of its own.

The first major problem that arises is that provisions of POCSO generally apply squarely to the facts of cases. The existing framework leaves no uncertainty. Despite this, different courts, while interpreting the law, give different judgments for cases with similar factual metrics. On the one hand, there are courts who try to meet the ends of justice by interpreting the law purposefully and on the other hand, there are courts who believe that since the law leaves no uncertainty and provisions apply squarely to the facts, purposive interpretation is not possible. Consider the example of what happened in *State (NCT of Delhi) v. VS*, the victim made it clear in her statement recorded as per section 164 of CRPC that the relationship between the accused and her was consensual. However, the Delhi High Court speaking through justice Swarana

³³ Law Commission of India, *Report Number 283*, <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2023/09/20230929466194485.pdf>.

³⁴ *Kajendran v. Tamil Nadu*, (Madras High Ct. 2022).

Kanta Sharma held the following while proceeding to frame charges-

*“Therefore, though it may be desirable that the cases of teenage infatuation and voluntary living with each other, eloping with each other or maintaining relationship, such as the present case, are dealt with on a different footing, the Court's hands are tied as far as framing of charge is concerned till any amendment is carried out by the wisdom of the Parliament of this country, if deemed appropriate.”*³⁵

In the case of *Independent Thought v. Union of India*, marital rape was criminalized if the same had been committed against wives below the age of 18.³⁶ The Apex Court held that there is no question about the fact that a child is not capable of giving consent for sexual activities. This judgment has had adverse impact on consensual romantic relationship between minors. Using *Independent Thought* as a precedent, the Gujarat High Court in the case of *State of*

Gujarat vs Ashokbhai held that consent of minor is no consent in the eyes of law and increased the punishment of a 19 year old teenager engaged in consensual relationship from 7 years to 10 years in strict interpretation of provisions of the POCSO Act.³⁷

In another instance, the Meghalaya High Court acquitted an accused who was convicted by the special court despite the insistence of the victim that the act for which the accused was convicted was convicted.³⁸ Had this case not reached the High Court, it would have been another example of why judicial discretion is not the appropriate solution since discretion will always leave room for injustice even if it is against a few. Needless to mention, for judicial discretion to be exercised, the case will have to come to court first causing unnecessary hardships to the parties involved in terms of cost, time, resources and reputation.

The concerns raised about wide judicial discretion leading to arbitrariness and being exercised on gender stereotypes have also been noted by the Supreme Court in *Aparna*

³⁵ Nupur Thapliyal, *Teenage Relationships May Be Dealt On Different Footing But Hands Are Tied Till Law Is Amended: Delhi High Court*, (Mar. 10, 2023), [https://www.livelaw-in.svkm.mapmyaccess.com/news-updates/delhi-high-court-pocso-act-teenage-relationships-consent-law-amendment-required-223420](https://www.livelaw.in/svkm.mapmyaccess.com/news-updates/delhi-high-court-pocso-act-teenage-relationships-consent-law-amendment-required-223420).

³⁶ *Independent Thought v. Union of India*, (Supreme Ct. India 2017).

³⁷ *Gujarat v. Ashokbhai*, (Gujarat High Ct. 2018).

³⁸ *John Franklin Shylla v. Meghalaya*, (Meghalaya High Ct. 2023).

Bhat and Ors. v. State of Madhya Pradesh and Anr.³⁹ Law cannot discriminate between two similarly situated persons where one is breathing freedom while another is in prison – both for consensual sex with minors. Treating people unequally on the basis of judicial discretion infringes Art 14, 19 and 21 besides setting unreliable precedents for similar future cases.

Another major problem associated with judicial discretion in matters of consensual minor relationships is that even in cases where the courts have given weightage to the consent of minor in order to acquit the accused, virtually legitimizing their consent, they have done so without any sound legal framework. While dealing with such cases, the courts have held that the object of POCSO was never to criminalize consensual relationships. Therefore, by reading the object of the act along with the substantive provisions, the conclusion that was reached i.e. acquittal ignored the substantive provisions completely. Such legitimization of consent may prove detrimental in certain situations where consent of a minor is not completely clear.

For example, in the case of State v. Rupesh Banti Bajirao Mokal, the pregnancy of a child was a result of sexual violence. The reasoning behind the acquittal of the accused was that the girl was “mature enough to understand the consequences of her actions because she had attained puberty on the date of the incident”.⁴⁰

7. WHAT IS THE APPROPRIATE SOLUTION

Apart from the reasoning given by the law commission, reducing the age of consent from 16 to 18 also has one another major problem. It does not completely solve the problem of criminalization of consensual relationships. Though it might decriminalize most consensual relationships, some of them would still face the wrath of the law. For example, it would not decriminalize consensual sexual activities between minors where one minor is 17 years old and another is 15 years old.

If reducing the age of consent is not a viable option and the law commission has recommended against tinkering it and

³⁹ *Aparna Bhat v. Madhya Pradesh*, (Supreme Ct. India 2021).

⁴⁰ Prem Vinod Parwani, *REVISITING CONSENT UNDER POCSO*, <https://nujlawreview.org/wp-content/uploads/2023/12/16.2-Parwani-2.pdf>.

judicial discretion in such matters is fraught with problems of its own, the author of the paper puts forward an alternate solution to the problem.

The author argues that law has a double standard while dealing with minors. Children grow up in different phases with each phase accompanying with itself different biological, physical, and psychological changes. The Committee on the Rights of Child has also took cognizance of this fact and has stated that “the rights of adolescents differ significantly from those adopted for younger children”.⁴¹ However, with the blanket criminalization of all sexual activities of people below the age of 18, the legislature treats adolescents and younger children as a homogenous group.

It is not that the legislature is unaware of this distinction. The distinction between adolescents and younger children has also received statutory recognition. Consider the example of Juvenile Justice (Care and Protection of Children) Act, 2015. It can be inferred from provisions of the act that an adolescent aged between 16-18 years can be

treated and tried as an adult in cases of heinous crimes.^{42 43}

To ascertain whether such child should be treated as an adult or not, the legislature goes to the extent of empowering the Juvenile Justice Board (JJB) to assess the mental and physical capacity of such minor.

Another example of acknowledgment of this distinction can be seen in Indian Penal Code (IPC). Section 82 of the IPC states that a child under the age of 7 shall not be convicted of any offence he commits.⁴⁴ Section 83 further states that a child between the age of 7-12 can be convicted of any offence if he has attained sufficient maturity to understand the consequences of his actions.⁴⁵ In this way, IPC too reasonably differentiates between children of different age groups based on the level of their psychological development.

The examples above showcase the double standards used by the legislature in dealing with minors. When the state wants to prosecute them for heinous crimes, it is

⁴¹ *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, (Dec. 6, 2016), <https://www.refworld.org/legal/general/crc/2016/en/115419>.

⁴² Juvenile justice (care and protection of children) act J.J. § 15 (2015).

⁴³ Juvenile justice (care and protection of children) act J.J. § 18 (2015).

⁴⁴ Indian penal code, 45 I.P.C. § 82 (1860).

⁴⁵ Indian penal code, 45 I.P.C. § 83 (1860).

allowed to treat them as adults as seen in the example of Juvenile Justice Act. On the other hand, when the question of acknowledging their sexual agency arises, the same minors are all to be treated as children incapable of understanding the consequences of their consent even if the consent is given to a minor of similar age. Hence, all of them are rendered voiceless and their consent is no consent in the eyes of law.

It is high time legislature departs from its rigid stand of holding minors incapable of understanding the nature and consequences of their consent. This can be done by introducing close-in age gap exemption popularly called as Romeo and Juliet Laws. The close-in-age exemption is an exception to age of consent laws and it prevents the criminalization of consensual relationships between minors who are close in age, even if one or both parties are under the legal age of consent. It is designed to distinguish between exploitative relationships and those that are mutual and non-coercive.

By allowing a specified age difference—often a few years—the exemption ensures that typical teenage relationships are not unfairly criminalized. Apart from protecting

innocent minors who are criminalized unfairly, such a provision would ensure that no minor is discouraged from getting access to safe and lawful abortions due to the fear of getting her partner prosecuted or involvement of police and that the POCSO Act does not divert from its main objective i.e. to prevent children from sexual abuse and exploitation.

Close-in age gap exemption clause finds its place in laws of many countries such as USA, Canada, Sweden etc.⁴⁶ In most countries, the acceptable legally specified age difference is 3-4 years.⁴⁷ A PIL was also filed before the Supreme Court of India concerning a similar clause for India. Among other things, it requested the court to issue guidelines similar to the Vishakha Guidelines⁴⁸ for the protection of minors from the very act that was supposed to protect them.⁴⁹ The PIL advocated for

⁴⁶ Amita Pitre & Lakshmi Lingham, *Age of consent: challenges and contradictions of sexual violence laws in India*, (Feb. 22, 2021), <https://pmc.ncbi.nlm.nih.gov/articles/PMC8009025/>.

⁴⁷ Gyanvi Khanna, *Supreme Court Seeks Centre's Response On Plea To Decriminalise Consensual Sex By 16-18 Year Olds*, (Aug. 19, 2023), <https://www-livewlaw-in.svkm.mapmyaccess.com/top-stories/supreme-court-seeks-centres-response-on-plea-to-decriminalise-consensual-sex-by-16-18-year-olds-235623>.

⁴⁸ Vishaka and Ors. v. State of Rajasthan, (Supreme Ct. India 1997).

⁴⁹ Harsh Vibhore Singhal v. Union of India & Ors, (Supreme Ct. India 2023).

protection of minors on the lines that such a clause “*treats consensual sex partners as Romeo and Juliet on the lines of William Shakespeare’s play ‘Romeo & Juliet’ recognizing that there isn’t much difference in capacity, competence and maturity of a 16-17 year and a 20-21 year old.*” The Supreme Court proceeded to seek the opinion of legislature regarding this matter.

Perhaps, some cues can be taken from USA’s and Canada’s Romeo and Juliet laws. The age of consent in Canada is 16 years and close-in-age gap exemptions are enforced. The close-in-age gap exemptions as provided in Section 150.1 (1) of the Canada Criminal Code are as follows-

- i. Where the age of the complainant is above 12 years but less than 14 years – There can be presence of consent if the accused “is less than two years older than the complainant.”
- ii. Where the age of the complainant is above 14 years but less than 16 years – There can be presence of consent if the accused “is less than five years older than the complainant.”⁵⁰

⁵⁰ Canada criminal code, 46 C.C. § 150 (Minister of Justice 1985).

However, consent can only be present if the accused “*is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.*”⁵¹

Another excellent feature of Canada’s legislation is that though it has kept the age of consent at 16 years, the Law manages to protect minors in the age group of 16-18 years by keeping them in the category of ‘Young Persons’. Protection is provided against a person “who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person.”⁵²

In USA, age of consent differs state by state. Many states have a minimum age requirement along with age of consent. A person who meets such age requirement but has an age lesser than the age of consent can consent depending on the difference of age between defendant and complainant.

⁵¹ *Ibid.*

⁵² Canada criminal code, 46 C.C. § 153 (Minister of Justice 1985).

Consider the example of New Jersey. The age of consent is set at 16 years but a minor who is 13 years or older is capable of consenting to another person if the another person is less than 4 years older than the person consenting.⁵³

Similar laws could effectively be enforced in India to ensure that minors are not penalized for consensual sexual relations with each other and at the same time, perpetrators of abusive and exploitative relationship or conduct are not spared by law.

8. CONCLUSION

Laws like POCSO play a vital role in protecting children from sexual violence, yet the absence of a close-in-age exemption poses significant challenges to adolescents' autonomy over their sexuality. By treating all sexual activity among adolescents—whether consensual or not—as statutory rape, the Act unfairly penalizes young people engaging in consensual relationships. This not only places them at legal risk but also discourages them from seeking essential sexual and reproductive healthcare. Furthermore, the misuse of POCSO to prosecute consensual adolescent

relationships drains resources that could otherwise address cases involving actual harm. Introducing a close-in-age exemption would enable adolescents to access necessary healthcare safely and allow the legal system to focus on protecting those genuinely in need.

In conclusion, while POCSO remains essential for addressing sexual violence against children, its current form often criminalizes natural adolescent behavior and undermines their autonomy. By reforming the law to include a close-in-age exemption and addressing its systemic biases, the legislation can more effectively fulfill its purpose. Such changes would protect vulnerable individuals while ensuring that adolescents are not stigmatized or unjustly punished for consensual activities, paving the way for a more equitable and just system that genuinely serves those it aims to help.

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