
AGE OF CONSENT AND THE CRIMINALIZATION OF CONSENSUAL ROMANTIC RELATIONSHIPS OF ADOLESCENTS IN INDIA

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ABSTRACT

Exploring sexual aspects and engaging in sexual activities with a romantic partner are typical developmental stages for adolescents. However, in India, the concept of adolescent romantic relationships is heavily influenced by various sociocultural factors. This paper examines the socio-legal implications of India's Protection of Children from Sexual Offences (POCSO) Act 2012 and rape laws under Bharatiya Nyaya Sanhita (previously Indian Penal Code), particularly its impact on consensual romantic relationships among adolescents. While the law was designed to protect children from sexual abuse, its broad definition of "child" as anyone under 18 years has led to the unintended criminalization of consensual sexual activities between adolescents. This study discusses the tension between child protection and adolescent autonomy and proposes reforms to address these challenges.

1. INTRODUCTION

1.1 BACKGROUND AND CONTEXT

A child is someone who is not a legal major¹ and childhood is the phase of being a child. Children are vulnerable in nature and hence require special care and legal protection to protect them from any form of exploitation; therefore, they live in the custody of their parents or legal guardians till they become adults legally. As per the definition of United Nations Convention on the Rights of the Child (UNCRC), a child is every human being under the age of 18 years age which is the age of majority or any other age of majority set by the domestic country². In India too, 18 years is considered as the legal age to become an adult³. After turning 18 years only, a person will be recognized as a separate individual legal entity i.e., they will be eligible to vote, get a driver's licence, enter into legal agreements, consume alcohol in certain states, women can get married after 18 years and so on.

Adolescence refers to the period when a child goes through puberty, in which a child transforms from a child to an adult. So, an adolescent will still be a person who is not yet an adult, which means has not yet become 18 years of age, hence they are called a young-adults. Many physical and psychological changes take place in a child in this phase of their lives as they start becoming more mature. Adolescents also start exploring their sexuality during this period and indulge in romantic experiences and relationships.

Law and age are two topics that are intrinsically linked to one another. Law recognizes that a particular age group needs a certain special consideration and protection from the legal system. Age limits are set to determine eligibility for various activities like drinking, marriage, voting, and consenting to medical procedures. The purpose is to protect individuals from making potentially unwise choices, based on the understanding that societal prejudices can impede personal rights. Determining the significance of age in legal decisions and establishing suitable age limits is an intricate issue. Various legal perspectives, rooted in concepts like responsibility, autonomy, accountability, and protection.

¹ Child, MerriamWebster.com, 2023

² United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 1

³ Section 3, The Majority Act 1875 (Act 9 of 1875)

1.2 THE POCSO ACT 2012; OBJECTIVE AND INTRODUCTION

The Protection of Children from Sexual Offences (POCSO) Act, 2012⁴, is an Indian statute aimed at protecting children under the age of 18 from sexual exploitation. Based on 2011 census records, India has approximately 472 million children under the age of 18, making it one of the nations with the highest number of young people. The act was brought in order to address the increasing incidents of child sexual offences and exploitation in the country. It defines various sexual offences against children and outlines stringent provisions for their prevention, protection, and punishment.

1.3 CONSEQUENTIAL CRIMINALISATION OF ADOLESCENT ROMANTIC RELATIONSHIP

Under the POCSO Act, anyone under 18 years of age is classified as a child⁵ and any sexual activity involving a child is considered a criminal offense. Likewise, under the provision of the Bharatiya Nyaya Sanhita 2023⁶ (BNS), previously known as the Indian Penal Code 1860⁷ (IPC), any sexual penetration or insertion or oral sexual activity with a female below eighteen years of age constitutes rape, regardless of whether consent was given⁸. Given that the law prohibits any sexual behaviour with persons who have not reached 18 years of age, there remains no distinction between a consensual and a non-consensual act. With more than 10 years passing since the POCSO Act was passed which led to the change in age of consent law in India, many reports, as well as data, have shown how many cases of consensual sexual acts have also come under the scrutiny of the stringent penal provisions like rape and child sexual abuse. What needs to be kept in mind here is that this definition of ‘child’ as provided under the POCSO Act covers a substantial proportion of the adolescent population and these adolescents become sexually active during their teen years and tend to engage in consensual sexual activities also.

According to the data of National Family Health Survey 5⁹, approximately 39% of women had their initial sexual encounter before they became adults at age 18. However, current legal

⁴ Protection of Children from Sexual Offences Act 2012(Act 32 of 2012)

⁵ Protection of Children from Sexual Offences Act 2012, s 2(1)(d)

⁶ Bharatiya Nyaya Sanhita 2023 (Act 45 of 2023)

⁷ Indian Penal Code 1860 (Act 45 of 2023)

⁸ Bharatiya Nyaya Sanhita 2023, s 63(vi)

⁹ National Family Health Survey 2019-21

frameworks fail to acknowledge or accommodate the existence of voluntary and non-abusive sexual encounters among adolescents. Such consensual activities often lead to charges of rape under the BNS 2023, previously known as IPC 1860, and the POCSO Act, particularly when teenage girls run away to marry or conceive a child. Courts frequently express concerns regarding cases involving minors aged between 16 and 18, where they have eloped or engaged in consensual sexual activity, resulting in their prosecution under the POCSO and rape laws following complaints from the girl's parents. While these cases may not always end in the conviction of the minor boy, the application of these stringent law often leads to denial of bail and prolonged imprisonment. A study conducted by Enfold Proactive Health Trust and UNICEF-India¹⁰ revealed that in West Bengal, Assam, and Maharashtra, 25% of POCSO Act prosecutions involved situations where the victim and accused were in a mutually consensual romantic relationship.

2. THEORETICAL FRAMEWORK

2.1 THE CONCEPT OF CONSENT

Consent is one of the most crucial ingredients when it comes to rape and sexual assault. It is consent that decides if the victim was violated or not in the act. A woman is raped when the perpetrator sexually penetrates her without her consent. Hence, consent has always been the subject of much debate and discussion everywhere which has also led to many changes in the perception of the concept of consent in the society as well as the law over the years.

The majority of jurisdictions have a very similar definition of rape that is, it is when the defendant sexually penetrates the victim without taking her consent¹¹. So what constitutes consent became the next big question. There have been various sets of views and opinions about the meaning of consent in the context of the offence of rape and sexual assault.

Consent becomes consequential only when a wrong is done to an individual by another¹². It is not needed in unnecessary places and contexts where there is no justification of seeking such consent if the activity doesn't involve the other person in any way.

¹⁰ Shruthi Ramakrishnan & Swagata Raha, 'Romantic Cases under the POCSO Act An Analysis of Judgments of Special Courts in Assam, Maharashtra & West Bengal', 2021

¹¹ Jonathan Herring, 'Rape and the Definition of Consent' (2014) 26(1) NLSIR 62.

¹² *Ibid.*

As sex includes the physical and mental involvement of a woman, her consent to the act is of paramount importance. Any sexual act is wrong if no consent is given. Sexually penetrating another person is *prima facie* a wrong¹³ and it becomes a right only when the other person has consented to that act. The argument is not that sex is wrong and consent is an exception to it but the argument is that for having sex, the defendant must have a valid reason which is consent. If the very reason of consent is satisfied the act is justified and is not a wrong.

2.2 AGE OF CONSENT FOR SEXUAL ACTIVITIES

As we know criminal law prohibits and places restrictions on certain sexual acts. The law is framed in a such way that acts of sex have been categorised into two groups, that is acceptable sexual behaviour and unacceptable sexual behaviour. The state tries to regulate the unacceptable sexual behaviour category of activities.

According to legal definition, age of consent refers to the age at which a person becomes eligible to provide informed consent for a sexual act. The state assumes that the person under the age of consent is incapable of giving a valid consent for sexual acts because their age is quite low to give such consent and get involved in sexual acts. This rule is similar to the rule that doesn't allow minors to get into contracts because even though minors would like to contract, they do not have the complete mental ability to understand the consequence of getting into the contract. Not just for sexual acts and contracts but a legal age is set many other activities like voting, drinking alcohol, marrying etc. This is done with the intention of protecting young citizens so that they do not take certain rash and impulsive steps. Similarly, an age of consent is set because minors under that age are held as immature to make decisions in relation to sexual acts. When anyone below the age of consent gives consent for sexual acts then it is not considered valid consent, hence there is no value of that consent. Therefore, sexual intercourse between someone who has reached the age of consent and someone who has not is termed statutory rape.

The decision to set an age of consent by the state has always been a matter involving many complex and contrary set of views as it affects the legal competence of adolescents who are at an age where exploring and experimenting with their sexuality is quite normal. The state often in an attempt to protect the women and children of their jurisdiction frames very stringent laws

¹³ Jonathan Herring and Michelle Madden Dempsey, 'Why Sexual Penetration Requires Justification' (2007) 27(3) Oxford J Legal Studies 467.

in relation to the age of consent. Whether the age of consent for sexual acts should be set at a higher or lower age has been a topic of much debate. While one group of people is in favour of setting the age of consent at a higher age, others argue for lowering the age of consent. Depending upon the legally set age of consent in a particular jurisdiction, the debates and discussions revolve around whether the current position of the age of consent is right or not and if there is a need to bring further changes in that regard.

2.3 INCREASING AGE OF CONSENT: IN FAVOUR OF PROTECTION OF CHILDREN FROM EXPLOITATIVE SEXUAL ACTS

One of the foremost arguments in favour of maintaining a higher age of consent is the incapability of children to consent. It is said that the innocence of children makes them incapable and incompetent in making many decisions that's why they have their parents and guardians making those decisions for them. Similarly, it is believed that they are incompetent to consent to sexual acts because they do not have the mental capacity to understand the gravity and the repercussions of the sexual act, hence they must be forbidden from having sex until they become adults or of a particular age.

David Archard explains in his work *Sexual Consent*¹⁴ that the one thing through which sexual activity can be morally legitimized is consent. According to him when it comes to youth, the major factors that are taken into consideration are: age, the difference of age between the partners, the nature of the relationship and if there was affirmative consent involved in the sexual act. Archard understands that childhood innocence cannot go together with any type of sexualization. He states "A child is deemed incapable of offering real consent, and abuse is frequently defined in terms of an exploitation of that very fact."¹⁵ For this very reason, any type of act which includes sexual activity with a child is termed child sexual abuse without taking into consideration any other factor that might be involved. As per Archard, childhood is similar to mental incapacity as he feels that a child hasn't reached the appropriate mental capacity as an adult¹⁶. As children do not have this developed mental capacity, their consent cannot be considered as valid. But this mental capacity of children is temporary in nature as they develop this capacity slowly throughout their childhood and achieve it once they mature or grow up. Usually once they become adults, their capacity to consent is accepted as proper. While initially

¹⁴ David Archard, *Sexual Consent* (Routledge 1998).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

Archard gives primary importance to capacity to consent to sexual acts which focused on the incapacity of children to consent to sexual acts, he later on includes on other factors to be taken into account while discussing consent like age difference, nature of relationship and affirmative standard of consent which made the incapacity of children not the sole criterion but one of the criteria for establishing consent¹⁷. When partners are of different age, Archard says that the older person might be able to manipulate, pressurize or influence the younger person into the act¹⁸. As usually girls are the younger person in these relationships, they might agree to the sexual act just for seeking approval and attention from their older partner even though they do not actually want to engage in sexual acts, so their consent even though it appears voluntary is not exactly totally voluntary. Hence this involuntary consent is the reason why their capacity to consent is considered as underdeveloped. He further explained this by giving the example of some relationships where the power imbalance is institutionalized like uncle-nephew, teacher-student, coach-athlete etc. In these relationships where there is institutionalized difference in power the child doesn't even have a choice but to consent. Due to this Archard feels that even puberty is not the appropriate stage for a standard consent and what is an important consideration is whether the young person is aware and knowledgeable about their sexuality as well as the sexual act they are going to participate in. So Archard wants to convey that along with capacity one must understand the physical and mental consequences of having sex.

Michelle Oberman is also another scholar who puts forward her views that she is against the lowering of the sexual consent age¹⁹. She believes that young girls are placed in subordinate positions in sexual relations with boys hence reducing consensual age will further harm their current condition. She has cited studies which point out that young girls are often faced with pressure for sexual acts from their partners and also that their experience post having sex for the first time is of distress and regret. Young girls are often more vulnerable because of their lower self-esteem, insecurities relating to changing bodies, peer pressure etc so their consent is not very straight and simple which is borne out of attraction and want. Their consent is influenced by anxiety, confusion, manipulation and attention or approval from the opposite gender²⁰. Underlining the justice system's failure to protect young girls from coercive sex,

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Michelle Oberman, 'Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law' (1994) 85 J Crim L & Criminology 15.

²⁰ *Ibid.*

Oberman argues for such reforms in which a higher age of consent which should not be lower than sixteen, be kept in order to provide girls with appropriate legal protection in similar circumstances²¹. She also proposes that the victim's say must be taken into consideration while determining the action to be taken against the perpetrator. According to Oberman, legal measures should serve as a means of addressing societal imbalances related to gender, particularly concerning young individuals. Laws that previously treated girls as commodities should be reclaimed to ensure their safeguarding.

Therefore, the people who want to set a higher age of consent argue that children do not have the full understanding of the concept of consent and that's why they cannot provide valid consent. They are often easily persuaded or pressurized by an adult to engage in sexual activity even when they do not want to indulge in the said act. Young girls too are often exploited by adult males into various sexual acts. So taking into consideration all these issues, a lower age of consent cannot be set and it must be set at a higher age²².

2.4 LOWERING AGE OF CONSENT: IN FAVOUR OF ADOLESCENT SEXUAL RIGHTS AND BODILY AUTONOMY

In countries where the age of consent is considerably high, there has been a demand to lower this age of consent for sexual acts because this age is quite high for adolescents who start engaging in the sexual act much before reaching this formal or legal age of consent. A higher age of consent completely disregards the sexual autonomy of adolescents by criminalising their sexual experiences. The law of consent needs to be framed in such a manner that the practical ground realities are addressed instead of making it on moral standards of the society.

One of the arguments that has been for lowering the age of consent is in respect to the human rights of adolescents. Human rights are strongly associated with the concepts of freedom and dignity. Therefore, the human rights of adolescents must also be respected and steps must be taken to help achieve them by the state. The United Nations Convention on the Rights of the Child 1989 (UNCRC) in its Article 12 provides that the state is required to take measures to guarantee that children can freely express views as per their age and level of maturity²³. An individual can realize and enhance their personality fully only in an atmosphere that allows for

²¹ *Ibid.*

²² *Ibid.*

²³ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 12.

free expression and the establishment of relationships with others, particularly emotionally. The right to engage in consensual sexual activity and the entitlement to privacy encapsulate the broader right to the personal development of adolescents.

When this higher age of consent criminalises all sexual acts with and by people under this age of consent then it means that everyone under the age of consent who has consensual sex with another person who is also under the age of consent, commits a crime and these criminal charges are of severe kind like rape and child sexual abuse in which the accused has to face to very stringent bail, trial and punishment provisions. So, the law means that these people under the legal of consent are immature and incapable of giving a valid consent in sexual acts but they are mature and capable for facing such strict implications in form of tough trial procedures as well as punishments for doing an act which they are legally incapable to consent to, hence establishing different standards for maturity which is problematic while dealing with such a delicate situation. Similarly setting a very strict age of consent law without any exceptions for certain special types of circumstances also results in many seemingly illogical and unfair situations when the age of consent is set at 18 then any sexual act with a person who is 17 plus years is a crime but it suddenly becomes legal on the day this person turns 18. It perceives adolescents as incapable children when engaging in sexual activity but as deliberate, intentional adults when committing crimes.

Making sexual activity among minors a criminal offence condemns consensual sex rather than coercive sex, restricts the sexual autonomy of young individuals, and disregards their ability to make choices²⁴. If a markable population of youngsters engage in sexual activity before reaching the age of consent, our societal and legal responsibility should not involve punishing the act, which could hinder teenagers from reporting coercion²⁵. Instead, our focus should be on safeguarding the choices, desires, and safety of young people. We do not fulfil this responsibility when we make it a criminal offence for teenagers to engage in sexual activity. The societal and legal inclination in this context is punitive rather than protective.

Another view is that a romantic relationship between two people with age gap, that is when one person is very young and the other is older, then any sexual act between them is not always necessarily an exploitative or coercive sexual act²⁶. An age difference doesn't exactly indicate

²⁴ Joseph J Fischel, 'Per Se or Power: Age and Sexual Consent' (2010) 22 Yale JL & Feminism 279.

²⁵ *Ibid.*

²⁶ *Ibid.*

the older person has coerced the younger person into engaging into the sexual act with them. This bias against age difference cases only neglects the cases where both the partners may be of the same age but one might still coerce the other into a sexual act. In romantic and sexual relationships there are hardly ever partners who are always equal to one another in every sense. In relationships where both the partners are of age of consent also, one can be more powerful than the other so, not every sexual relationship between two consenting adults is not coercive or exploitative²⁷.

Thus, people supporting the lowering of the age of consent believe that adolescents are at an age where it is very natural for them to explore their sexuality. They become sexually active during this adolescent stage of their life, so instead of restricting their natural conduct, freedom and autonomy must be provided to them. The dignity and liberty of the adolescents must be respected and they must not be unnecessarily prosecuted. People who are legally under age of consent and engage in sexual activities are not always coerced and tend to participate in sexual activities out of their free consent many of the times. The arbitrariness in distinguishing the age of consent and the age of punishment for the violation of age of consent which is irrational is also pointed out by activists who advocate for reducing the age of consent.

3. AGE OF CONSENT LAW IN INDIA

The evolution of the age of consent in India has been quite remarkable. Age of consent was not always 18 years in India; it has gone through tremendous changes through the years to finally being set at a higher age of 18 years. The Age of Consent Bill of 1891²⁸, had first raised the age of consent for girls both married and unmarried to 12 years from what was set at 10 years previously. During that time, child marriages were highly prevalent in India, hence the age of consent and age of consummation were treated almost similarly. The Sarda Act, 1929²⁹ and then the Child Marriage Restraint Act³⁰ also raised the age of marriage for children to 15 years. By the 1940s, the age of consent was set at 16 years for girls in the IPC³¹. The age of 16 years as the age of consent remained constant till 2012 when POCSO was brought in by the Indian Legislature. Before the enactment of the POCSO Act 2012, there was no specific legislation or provisions of law to address the offenses against children in particular. At the same time,

²⁷ *Ibid.*

²⁸ Age of Consent Act 1891 (Act 10 of 1891)

²⁹ Sarda Act 1929 (Act 19 of 1929)

³⁰ Child Marriage Restraint Act 1929 (Act 19 of 1929)

³¹ Indian Penal Code 1860 (Act 45 of 1860), s 375

instances of child sex abuse were on the rise in India as per the National Family Health Survey 2011, thus there was an urgent need to bring a special law in order to protect children from sexual abuse. Thus, the POCSO Bill was brought in the year 2011 which got converted into the POCSO Act 2012 after incorporating different suggestions from both of houses of the parliament. However, an anomalous situation emerged as the Act defined the age for being categorized as a child is till 18 years of age, establishing it as the default "age of consent." This meant that once an individual subjected to a sexual act is a child (under the age of 18 years), consent becomes irrelevant for determining criminal liability under the POCSO Act. Following the enactment of POCSO, the age of consent under the IPC1860 was also raised to 18 years after the Nirbhaya Gang-rape case through the Criminal Amendment Act 2013³², and this provision has been retained in the Bharatiya Nyaya Sanhita 2023 as well. Thus, even though the act was consented by a person below the age of 18, it will be legally be considered as non-consensual as per our current legal framework.

4. CONTEMPORARY PROBLEMS ARISING OUT OF CRIMINALIZATION OF CONSENSUAL ROMANTIC RELATIONSHIPS OF ADOLESCENTS

The POCSO Act 2012, enacted with the intent of safeguarding minors from sexual exploitation and abuse, and stands as a cornerstone of child protection legislation in India. However, the strict provisions of rape and POCSO Act often intersect with the complex realities of adolescent romantic relationships, giving rise to a conflict between the law and the actual living experiences of young individuals navigating the terrain of intimacy and consent. While many of these relationships are consensual and based on mutual affection, the strict provisions of the POCSO Act cast forbids such unions, raising critical questions about the intersection of law, consent, and adolescent autonomy.

4.1 FAMILY AND SOCIETAL OPPOSITION TO ADOLESCENT RELATIONSHIPS

In India, societal and cultural norms heavily influence family involvement in adolescents' life choices, including selecting their life partners. Families commonly oppose adolescent romantic relationships, leading many young couples to elope with their partners in order to preserve their relationship. Unfortunately, this often results in legal consequences, as the POCSO Act 2012 and BNS 2023 set the legal age of consent at 18 years, prohibiting any form of sexual activity,

³² Criminal Law Amendment Act 2013 (Act 13 of 2013)

even within the context of a romantic relationship. Indian society is characterized by a rigid, hierarchical caste system that extends to almost all religious communities³³. This system categorizes individuals into different castes, with distinct relational hierarchies. The tradition of limiting marriage to members of the same caste is central to upholding this system³⁴. So, when young adolescents form romantic relationships with a partner of their choice who may belong to a different community from their own, they are often met with disapproval from their family and are forbidden from continuing it further or in worse cases, their marriages are arranged immediately with someone else just in order to break this consensual romantic relationship of their child.

But when the adolescents elope or marry their chosen partner on their own without the permission of their families matters escalate to turn into legal battles. Very often the families of the girl level allegations of kidnapping, rape, and POCSO charges against the boy with whom their daughter has eloped.

4.2 CHILD MARRIAGES

The Prohibition of Child Marriage Act (PCMA) 2006 sets a minimum marriageable age of 18 for girls and 21 for boys³⁵. While the law aims to prevent underage marriages before they occur, it does not automatically invalidate marriages solemnized while underage³⁶. However, such marriages can be annulled, particularly at the request of the underage party or their guardian within two years of reaching adulthood³⁷. Recent research examining the implementation of the child marriage law indicates that it is often invoked by parents whose daughters elope to marry against their wishes, aiming to prevent the marriage³⁸. In many cases, provisions of the Protection of Children from Sexual Offences (POCSO) and rape laws are also applied³⁹. For minors under 18 engaging in consensual sexual activities, marriage often seems like the only way to avoid facing a mandatory 10-year prison sentence under POCSO. These marriages frequently defy caste and religious boundaries. Strong disapproval of marriages across caste

³³ Dinesh Higde, 'Religious Minorities and Backward Class Constituency in Karnataka: An Interface' (2010) 71(4) Indian J Pol Sci 1201.

³⁴ Uma Chakravarti, 'Conceptualising Brahmanical Patriarchy in Early India' (1993) 28(14) Economic & Political Weekly 3.

³⁵ Prohibition of Child Marriage Act 2006 (Act 6 of 2007), s 2(a)

³⁶ Prohibition of Child Marriage Act 2006 (Act 6 of 2007), s 3

³⁷ Prohibition of Child Marriage Act 2006 (Act 6 of 2007), s 3(3)

³⁸ Madhu Mehra and Amrita Nandy, 'Why Girls Run Away to Marry: Adolescent Realities and Socio-Legal Responses in India' (SSRN, 25 March 2020)

³⁹ *Ibid.*

lines, even for young partners who have reached marriageable age, can lead to disastrous consequences. India witnesses nearly 1000 homicides annually, with 80% of the victims being women, often driven by notions of so-called honour when couples violate societal norms⁴⁰.

4.3 ADOLESCENT RIGHTS IN CONFLICT WITH PENAL MEASURES

A considerable number of adolescents aged 13 to 19 have indicated participating in sexual activity with their romantic partners⁴¹. However, from a legal perspective, such sexual activity is viewed as deviating from societal norms. Since children under the age of 18 lack the legal capacity to provide consent, they are automatically governed by the provisions outlined in the POCSO Act. The study conducted by the National Law School of India University's Centre for Child and the Law (CCL-NLSIU) found that the percentage of cases registered in the context of romantic relationships differed across five states. In Delhi, it was 21.58%, in Andhra Pradesh 21.21%, in Maharashtra 20.52%, in Assam 15.69%, and in Karnataka 5.45%⁴². However, it's important to note that this prevalence can vary across different studies.

Forming a romantic relationship requires mutual consent from both partners. However, despite the gender-neutral principle outlined in the act, it is often overlooked. In 2012, the Protection of Children from Sexual Offences (POCSO) Act was introduced, which classified all sexual acts with individuals under 18 as criminal offenses. For the first time, the age of consent for boys was set at 18, while for girls, it was raised from 16 to 18. Consequently, POCSO made all sexual activity, whether consensual or non-consensual, penetrative or non-penetrative, by both male and female children under 18 as illegal. In many cases, regardless of whether the boy is below or above 18 years old, legal action tends to be taken against him, while girls are typically perceived as the victims.

POCSO and rape provisions have made it illegal to engage in any sexual activity with individuals under 18 years old, regardless of the age of the person involved. This becomes particularly problematic when minors are prosecuted for rape, even in cases where they have consensual intercourse with a girl under 18, especially considering the rise in consensual sexual

⁴⁰ S Murugananthan, "'Honour Killing' the Menace: A Case Study in Tamil Nadu' (2014) 1(1) IJMRSS

⁴¹ G Sodhi, M Verma and PJ Peltó, 'Seeking Gratification: A Study of Sexual Behaviour Patterns of Adolescents in an Urban Slum' in MA Koenig and others (eds), *Reproductive Health in India: New Evidence* (Rawat Publications 2008) 303.

⁴² Centre for Child and Law and National Law School of India University, 'Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues' (CCL and NLSIU 2018).

activity among teenagers. The law criminalizes sexual conduct involving children up to the age of 18, leading to situations where two minors engaged in non-abusive sexual relationships can be prosecuted as criminals. It's argued that consensual sexual activity between two adolescents should not be considered an offense under rape or POCSO, as both individuals could face charges under the law otherwise.

Due to this reference were made by the High Courts of Karnataka and Madhya Pradesh to the Law Commission in relation to the frequent occurrence of cases under the POCSO Act, wherein the female involved is typically aged between 16 and 18 years and testifies to consensual sexual activity⁴³. What would have been lawful prior to the enactment of the POCSO Act in 2012 is now deemed a punishable offense, regardless of the girl's consent. The Criminal Law (Amendment) Act of 2013 exacerbated the situation by removing judicial discretion in sentencing for rape cases and establishing ten years as the minimum mandatory punishment, leaving courts with limited flexibility in delivering justice.

There have been various studies indicating the rise of romantic cases in sexual offense cases. Ramakrishnan and Raha observed that 24% of such cases in district-level POCSO courts in Delhi, Assam, Maharashtra, and West Bengal were disposed of between 2016 and 2020⁴⁴. Another study conducted in Lucknow supports this trend, revealing that 54% of such cases were consensual⁴⁵.

4.4 PRIVACY RIGHTS OF ADOLESCENTS

Right to Privacy has been recognized as a fundamental right in the Puttaswamy⁴⁶ Judgement. Privacy has no definite list of things it covers but facets such as bodily autonomy, personal freedom, control over personal information, and safeguarding against government monitoring are held as important aspects of privacy that are getting invaded when the state criminalizes the consensual romantic relationship of adolescents through the provisions of the POCSO Act. The state is not only entering the private space of the adolescents but criminally prosecuting them for it even though it is a consensual act. It is important that we ensure that a fundamental

⁴³ Law Commission of India, 283rd Law Commission Report (2023)

⁴⁴ Shruthi Ramakrishnan, Swagata Raha, 'Romantic Cases under the POCSO Act: An analysis of Judgements of Special Courts in Assam, Maharashtra and West Bengal.' Enfold Proactive Health Trust and UNICEF (2022)

⁴⁵ Neetika Vishwanath, 'The Shifting Shape of the Rape Discourse' (2018) 25(1) Indian J Gender Stud 1.

⁴⁶ Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors. AIR 2017 SC 4161

right that is available to all citizens must also be made available to the adolescents of the country.

The POCSO Act and the Criminal Law (Amendment) Act of 2013 mandate the obligatory reporting to police authorities of any instance of sexual offence or the awareness or suspicion thereof, by any individual, particularly by healthcare professionals and institutions. Additionally, the judgment in the Independent Thought case extended the ambit of the POCSO Act to include married women under the age of 18. Non-compliance with these reporting requirements can lead to legal repercussions⁴⁷.

The requirement for individuals to report any information they possess regarding an offense believed to have occurred under the Prevention of Child Sexual Offences Act raises significant concerns regarding medical ethics and the privacy of the victim. When the POCSO legislation was framed, it enforced the collective and collaborative work effort among various stakeholders so that the case gets concluded within the stipulated time and so that child-friendly procedures can be carried out smoothly for the survivors of Child Sexual Abuse. But one of the major contentions that has often been raised is the ethical dilemmas that the doctors are faced with while reporting these incidents when the victim herself doesn't want to disclose this. Not only doctors but anyone who knows about any such act even if consensual, that comes under the POCSO must report it according to the provisions of the POCSO Act. Informants in these cases are themselves part of the Indian Society and understand the intricate issues surrounding such incidents. They are often caught in the conflict between reporting as per the legal mandate of the POCSO Act and the moral and ethical obligation towards securing the girl's privacy. While maintaining confidentiality is essential to comply with laws, the mandatory reporting requirement places medical professionals in a challenging position.

4.5 REPRODUCTIVE HEALTH RIGHTS OF ADOLESCENT WOMEN

In practice, the mandatory reporting necessitates that healthcare providers report any medical termination of pregnancy (MTP) for underage girls, as well as requests for contraception, prenatal care, or treatment for sexually transmitted diseases. First Information Reports (FIRs) can be filed for each of these reasons. Consequently, underage girls in such situations may avoid seeking healthcare in order to protect their partners, thereby facing serious health

⁴⁷ Protection of Children from Sexual Offences Act 2012 (Act 32 of 2012), s 21

consequences, including mortality.

The Apex Court recently in *X vs The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr.*⁴⁸ did state that it's crucial to encompass adolescents and young women within the scope of Rule 3B of the MTP Rules. Additionally, the court clarified that the identity and personal information of minors can be withheld from disclosure in criminal proceedings at the request of the minor and their guardians. This exemption is intended to avoid conflicts between the statutory obligations of a Registered Medical Practitioner (RMP) under the Protection of Children from Sexual Offences (POCSO) Act and the privacy and reproductive autonomy rights of the minor girls under Article 21 of the Constitution. But despite the Supreme Court's decision in this case, the public, the doctors and police at local levels might not be aware of this and the old practices of mandatory reporting continues.

Mandatory reporting has posed a greater problem for young girls seeking medical help in relation to their reproductive health which they must be provided without other conditions as every woman and young girl must be given access to adequate reproductive health.

4.5 PERSISTENT GENDER BIAS

The situation can be particularly bleak when the male involved is also under the age of 18. The amendment to the Juvenile Justice (Care and Protection of Children) Act, 2000⁴⁹ in 2015⁵⁰, introduced the provision to try certain juveniles between the ages of 16 and 18 as adults. Subsequently, two paradoxes have been created. One is that girls below 18 have lost their agency under the justification of "protecting" them, even as males in the same age bracket are considered adults. The other is that while the POCSO Act is designed to be gender-neutral and treat all minors under 18 as victims, the practical application routinely identifies girls as victims and boys as aggressors.

4.6 EFFECT ON GENUINE CASES OF CHILD ABUSE

This criminalizing of consensual romantic relationships of adolescents under POCSO is

⁴⁸ *X v. Principal Secretary, Health and Family Welfare Dept, Govt. of NCT of Delhi & Anr.* Special Leave Petition (Civil) No 12612 of 2022

⁴⁹ Juvenile Justice (Care and Protection of Children) Act 2000 (Act 56 of 2000)

⁵⁰ Juvenile Justice (Care and Protection of Children) Act 2015 (Act 2 2015)

leading to an overall increase in the total POCSO cases. POCSO was framed specifically to address with the menace of child sex abuse and so it has provision for the finishing up of trial within a fixed period of time so that the perpetrator is punished quickly and the child is also protected from the mental trauma of prolonged trial procedures, but this criminalization of consensual romantic cases of adolescents has also had a negative impact on the genuine cases of cases of child sexual offences because they increase the load on the criminal justice system and effectively lead to a delay in the disposal of genuine cases which require urgent attention.

4.7 STRINGENT PROCESS AND PUNISHMENT EVEN THOUGH A CONSENSUAL ACT

Once the charges of POCSO and rape have been filed against the boy, he is immediately arrested by the police. As POCSO is a stringent law it is very difficult to get bail under it so they have to stay imprisoned for long periods even though the sexual acts were consensual in nature. The trials also take a long time to end so they spend a part of their youth in prison amongst criminals and have to live with the charges of committing sexual offences

Under Sections 29 and 30 of the POCSO Act, an individual charged with an offense is presumed guilty until they can demonstrate their innocence. Additionally, the court will assume that the accused possessed criminal intent, and the burden falls on the accused to prove beyond a reasonable doubt that they lacked such culpable mental state. Thus, both these sections place a very strict reverse burden of proof on the person accused. These are in opposition to the fundamental principles and closely protected aspects of criminal jurisprudence. So, in consensual romantic cases these provisions pose a big problem for the boys who are charged with POCSO Act.

When it is established that the girl is a child as per the definition and that sexual intercourse took place, the court must impose at least the minimum sentence. This creates a considerable challenge for judges, especially in cases where trial proceedings reveal that the relationship lacks exploitation, the girl willingly participated, and she wishes to remain with the male partner.

5. NECESSITY FOR LEGAL REFORM

Striking the right balance between safeguarding and acknowledging the growing autonomy of

adolescents is essential for serving their best interests. Yet, the existing legal system fails to maintain this equilibrium, as it wrongly treats normal consensual relationships between adolescents the same as cases of sexual abuse. Rather than protecting adolescents from exploitation, the law puts individuals in genuinely consensual and non-exploitative relationships at risk of criminal charges, thus contradicting the goal of child protection. The substantial volume of relationship-based cases in the criminal justice system also highlights concerns about over-criminalization and the excessive burden imposed on both criminal justice and child protection mechanisms by cases that do not involve actual rape or exploitation.

Section 42 of the POCSO Act states that in case of any contradiction between the provisions of POCSO and some other statute, the law with the more severe punishment would take precedence⁵¹. Given that the penalties under POCSO were harsher than those under the IPC, the norm was for POCSO to supersede the IPC in instances of sexual assault. Furthermore, Section 42A was added to the POCSO Act through this amendment, affirming that the regulations outlined in POCSO would take precedence over any conflicting regulations in other laws⁵².

This criminalization of consensual, unharmed, non-coercive sexual acts of adolescents places strict restrictions on the lives of adolescents who would want to live with freedom and dignity like any other citizen. This state interference and criminalization of romantic relationships of adolescents has posed many problems for such adolescents who were in a romantic relationship and later had sexual contact. These romantic and physical relationships are often opposed by the families of adolescents who bring in charges of POCSO and rape, just to break such relationships of their children. But all of this leaves a scarring impact on the lives of these adolescents who were not doing anything criminal in nature but just what comes to them naturally in the developmental phase of their lives.

The presence of mandatory reporting also makes matters worse for adolescent couples as it infringes their right to privacy and causes hindrances in seeking of medical help concerning their sexual health. This forces many young girls to go for unsafe means for the delivery of a baby which is born out of the consensual sexual acts of these adolescents but it will be reported to the police if they go for a registered doctor.

⁵¹ Protection of Children from Sexual Offences Act 2012 (Act 32 of 2012), s 42

⁵² Protection of Children from Sexual Offences Act 2012 (Act 32 of 2012), s 42A

Once criminal charges are made against the boy, he too has to go through an agonizingly long period of imprisonment even before he has been proven guilty as they do not even get bail easily. The trial is stretched over a very long time. So, individuals in these situations face a range of obstacles, including extended confinement for the male party, postponement of bail or sentencing for up to a decade, loss of job or income sources, the girl being obligated to live in a women's shelter or confronting homelessness, and additional hardships like assuming the role of a single parent.

The judiciary too has accepted about the gap in law when it comes to the criminalization of consensual Romantic relationships under the POCSO Act. Courts often adopt a lenient approach in consensual romantic cases falling under the jurisdiction of the POCSO Act. The high courts of many states have also asked the Parliament to consider the age of consent law in order to deal with these consensual cases.

While it is important to ensure that our children remain protected from sexual abuse and exploitation at the hands of sexual offenders it is equally important to ensure that the rights of adolescents who consensually engage in sexual acts also be protected instead of being prosecuted for it. It is necessary to acknowledge the presence of romantic relationships of adolescents which is consensual, non-exploitative and non-coercive in nature which is distinct from child sexual abuse for which the POCSO Act was brought in. Hence there is a need to reconsider the age of consent for sexual activities in India which is now regulated by the POCSO Act⁵³, so that the romantic consensual sexual acts of adolescents do not get criminalized.

6. SUGGESTIONS

6.1 DECRIMINALIZATION OF CONSENSUAL ROMANTIC RELATIONSHIPS OF ADOLESCENTS

The Central Government has been time and time again asked to reconsider the age of consent by many High Courts over the years due to the prosecution of consensual romantic relationships of adolescents⁵⁴. The Justice Verma Committee Report had also advised to lower

⁵³ *Id*

⁵⁴ Jagriti Chandra, 'No plan to revise age of consent, Centre tells Rajya Sabha' The Hindu (New Delhi, 22 December 2022)

the age of consent set out in the POCSO Act as the objective of the act is not to penalize consensual romantic relationships but to protect children from sexual abuse⁵⁵. However, the recent 283rd Law Commission Report of 2023 has advised against lowering the age of consent⁵⁶. This definition of children up to 18 years of age must truly be reconsidered keeping in mind the social realities of the times we are living in. Adolescents are not committing a crime when they are indulging in consensual sexual acts, it is natural in their developmental age to explore and sometimes engage in such romantic relationships. Therefore, such a high and strict definition of age of consent is creating more problems not only for the adolescents concerned but the criminal justice system also.

The most basic change that can be brought in this regard to solve this problem of prosecution of consensual romantic relationships is lowering the age of consent separately to 16 years of age minimum. The Act doesn't have to take away the protection given to children by completely changing the definition of child as someone below the age of 18 years but it can provide an exception for consensual acts engaged by people above the age of 16 years. This way the protection to every minor remains intact but the unnecessary criminalization of romantic relationships stops.

Another change that can be incorporated in the law is a "Romeo-Juliet" clause of sorts or a close age exception. This clause will protect couples having a close age gap between the boy and girl. Even when one party might be older than the other in the relationship, this provision will give equal protection to both parties of the romantic relationship so that the older person doesn't have to suffer all the consequences or be accused of sexually abusing the other person when the relation was actually consensual in nature.

Amendment to the POCSO Act and the BNS (previously IPC) is necessary to decriminalize consensual acts involving adolescents above the age of 16, while also ensuring that those between 16 and 18 years old are safeguarded against non-consensual acts under the POCSO Act. It may be advisable to introduce a distinct provision recognizing consent for individuals above the age of 16, while simultaneously criminalizing acts against them if performed against their will, without their consent, or under circumstances such as fear of harm, intoxication, or exploitation. Until such legal reforms are enacted the police, relevant statutory bodies, and may

⁵⁵ Justice JS Verma Committee, Report of the Committee on Amendments to Criminal Law (23 January 2013).

⁵⁶ Law Commission of India, 283rd Law Commission Report, 2023

exercise the discretionary powers granted to them under current laws to serve children's welfare. This strategy seeks to avoid or reduce the damage resulting from detaining, taking into custody, and confining teenagers and youth who are parties to mutually agreed situations.

6.2 IMPARTING SEX EDUCATION

Addressing concerns about adolescents making impulsive and ill-informed decisions can be effectively addressed by providing age-appropriate, evidence-based, comprehensive, and rights-focused sexuality education. This type of education serves to fill knowledge gaps, cultivate positive skills and attitudes necessary for making informed choices and navigating interpersonal relationships, and empower young people to prioritize their health, well-being, and dignity. Rather than promoting earlier sexual activity, comprehensive sexuality education has been shown to delay the onset of sexual behavior and encourage responsible conduct.

Under the POCSO Act and Rules, there is a mandate to raise awareness and instill gender sensitivity and equality. This aligns with the recommendation from the Committee on Rights of Child urging India to integrate sexual and reproductive health education into the compulsory school curriculum. The government's initiative to develop a curriculum focusing on the health and well-being of school-aged adolescents is a positive step toward promoting informed, responsible, and healthy behaviours among students. It is crucial to diligently monitor the implementation of this curriculum in schools nationwide, ensuring that the content related to sexual and reproductive health is comprehensive, rights-based, and includes relevant information on the legal framework. Efforts must also be directed towards providing knowledge, skills, and attitudes to vulnerable groups such as children with disabilities, those out of school, and those in tribal or conflict-affected areas. Grassroots workers, local authorities, and civil society organizations should collaborate to ensure that all children and adolescents have the necessary tools to make informed decisions and navigate the transition to adulthood successfully.

6.3 PROMOTION OF SAFE SEXUAL HEALTH FOR ADOLESCENTS

Government health initiatives like the Rashtriya Kishor Swasthya Karyakram emphasize the importance of ensuring that sexual and reproductive health information and services are easy to access. These programs advocate for educating adolescents about contraception and safe sex practices, and they mandate clinics to offer emergency contraceptives to adolescents. Efforts

should be made so that Adolescent Friendly Health Clinics are easily available and fully operational. Additionally, it is essential to ensure that mandatory reporting obligations under the POCSO Act do not obstruct the provision of services such as pregnancy care, abortion, and diagnostic services for HIV, STIs, and pregnancy at these clinics. Legal reforms may be necessary to make sure that healthcare providers are not unreasonably constrained and that young people can obtain such services and information confidentially and without obstruction and the Supreme Court's clarification on mandatory reporting, particularly concerning termination of pregnancies in POCSO cases, in *X vs Principal Secretary, Ministry of Health and Welfare*, is followed.

CONCLUSION

The enactment of the POCSO Act was a crucial step towards the protection of children. However there have been unintended consequences as a result of setting the age of consent strictly at 18 years. The POCSO Act and the rape provisions have now criminalized the consensual romantic relationships of adolescents also. This criminalization of consensual relationships of young people undermines the very protective intent with which law was introduced. Instead of recognizing the natural biological rights of adolescents the act is unintentionally punishing them for such relationships. Therefore, there is a need for immediate intervention of the legislature to recognise this criminalization of adolescent relationships and make necessary amendments regarding it. Reform should focus on creating a nuanced approach distinguishing between the protective and exploitative situations while acknowledging adolescent autonomy and development. This would be possible with the collaborative efforts from legislators, judiciary, child protection agencies, and the society to form an age-appropriate and context-sensitive policy.