

CRIMINALISATION OF CONSENSUAL JUVENILE RELATIONSHIPS UNDER POCSO ACT: A DEFEATIST INTERPRETATION OF THE LAW

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ABSTRACT

The POCSO Act criminalizes all sexual activities for those under the age of 18 even if consent given by minors. The act defines minors as those below the age of 18 therefore the consent of minors is no consent at all. While the objective of Act was to protect children from sexual abuse inadvertently it has come to criminalize consensual romantic relationships of young adults. The High courts of various states have observed that penalising a young boy for entering a relationship with a minor girl by treating him as an offender under the POCSO act, was never the objective of the act. The courts have been granting relief to minors in such cases by observing that the definition of “ sexual assault “ under this act cannot be aid to include relationships of mutual affection between adolescents. The grey area comes into the situation when one takes into consideration the fact that child marriages are rendered invalid and not void under most personal laws. It is only under the Special Marriages Act that the child marriage if void whereas under the Hindu Marriage Act, a child marriage is valid. Therefore it becomes questionable that consensual relationships of minors are being criminalised under one law while child marriages are valid, though punishable under almost all personal laws. The point of law is also that the age of consent for a girl who is married is 15 years of age and that seems to find no relevance under POCSO to prove consensual relationships.

Thus through various case laws and judgments of courts (specially of the Assam, Meghalaya and Delhi), the paper seeks to lay out that application of POCSO act with a protectionist and patriarchal viewpoint of the lawmakers and investigative authorities has led to a criminalisation of normal relationships and led to far reaching consequences for those victimized through it.

Keywords: POCSO act, Consent, Age of, Criminalisation of minors.

Introduction

The Indian constitution recognises the concept of human dignity and freedom of expression. It is then inexplicable that freedom of sexual expression is left out of the definitions of freedom of

expression as it is a vital part of right of life and liberty. Personal autonomy and bodily autonomy are entangled with the concepts of human dignity and are cornerstones of human rights. The development of these concepts without due respect to concept of free expression is impossible. However it is baffling how one of the formative experiences of exploration and expression is stifled by stringent laws governing age of consent in Indian legal system. At a glance, India has probably the highest age of consent globally, which is 18 for both men and women as per POCSO act, and age of marriage being 21 for Men and 18 for women under the Prohibition of Child Marriage act, 2006. While age of consent is 14 years in Germany, Italy, Portugal and Hungary, it is 15 in France after a recent amendment to its penal code¹, 16 in London and Wales and as low as 13 in Japan. It was not always the case, as the age of consent was synonymous with age of puberty for much of history and even in Roman time it was as low as 12 or whenever a child reached puberty biologically. In Modern times nation states have been raising the age of consent significantly, in order to combat mental, physical and sexual abuse of children. Although in this endeavour age of consent has been divorced from biology thoroughly and can lead to negative effects on personal autonomy of young adults as well as their freedom of expression.

The POCSO act or Protection of children from Sexual Offences Act, 2012² was passed by the Indian legislature in November, 2012 as a stringent law to protect both male and female minors from sexual assault and other offences falling under child sexual abuse. Before passing of this legislation, mainly only IPC under sections 375 (Rape), 354 (Assault or criminal force to woman with intent to outrage her modesty), and 377 (Unnatural Offences), addressed sexual assault for women and children. These three sections of the IPC, are not specific to children and also leave out male children and adolescents from the ambit of meagre protection provided by these sections, additionally IPC is also restrictive in recognizing categories of abuse that can be perpetrated against a minor. The Convention on the Rights of the Child³, to which India is a signatory to and the rising awareness around Child sexual abuse led to the enacting of the Protection of children from Sexual Offences Act, 2012. It is however noteworthy that in Article 12 the CRC also makes it mandatory to protect a child's freedom of expression and exploration.

¹ Reuters (2021) 'France toughens age of consent laws to define sex with under-15s as rape', *The Guardian*, 15 April. Available at: <https://www.theguardian.com/world/2021/apr/15/france-toughens-sex-laws-on-sex-with-under-15s> (Accessed: 23 July 2023).

² The Protection of Children from Sexual Offences Act, 2012 No.32 of 2012

³ The Convention on the Rights of the Child was signed on 20 November, 1989 and India ratified the same on 11 December, 1992

The POCSO act is wide ranging and, aims to put up a framework for protection children and adolescents from Sexual abuse in all forms. The Act criminalises not only criminalizes child Sexual Assault in sections 3, 2 and 9, but also recognizes Sexual Harassment of children and Child Pornography as offences under sections 11 and 13 respectively. The Act also uses gender neutral language for both victim and offender; it covers both male and female minors. Additionally it provides for designation of special courts for hearing of cases under the eponymous act under section 28. All in all POCSO act, prima facie seems to answer all the anxieties of a society aspiring to protect its children from horrors of sexual abuse. As is the case with many legislations, the implementation of POCSO act brings many challenges with it, such as the conflict with MTP act⁴, the pitfalls of mandatory reporting provisions and the criminalization of consensual adolescent relationships.

The dilemma of legal age of consent and age of marriage

Section 2 (d) of the POCSO act defines “child” as any person below the age of 18.

The discussion on age of consent and consensual relationships must take into account the varied ages of consent for women. *The age of consent and marriage for women are two separate things and both are contentious issues in Indian legal system*, as there is some dichotomy regarding this across various legislations. With a cursory glance, a legal researcher has to acknowledge that the age of marriage under the Hindu marriage act for girls is 18⁵ and for boys is 21. The HMA also says that child marriage is illegal, but it does not say that child marriage is void; it is merely voidable at the option of the girl⁶. When interpreted by the courts, where the court observes that the guardian of an unmarried minor girl is her father but the guardian of a married minor girl is her husband⁷, it ipso facto accepts child marriage and that logic leads to acceptance of a age of consent and marriage for girls which is below 18 years of age. Similarly under the exception for Rape under section 375 IPC the Indian the age of consent for sexual relations is again 18 years

⁴ Medical Termination of Pregnancies Act, 1971, No 34, Act of Parliament, 1971(India), amended in 2021 by Medical Termination of Pregnancies (Amendment) Act, 2021, No. 8 of 2021

⁵ Section 5 (iii) of the Hindu Marriage Act, 1955 where it is stated that “the bridegroom has completed the age of (twenty one years) and the bride, the age of (eighteen) years at the time of marriage as one of the conditions of a valid Hindu Marriage

⁶ Section 13 (2)(iv) of the Hindu marriage act, 1955 provides for option of puberty and section 2 (vi) of the Dissolution of Muslim Marriage Act, 1939 also provides for the same. Both are valid grounds of divorce for wife.

⁷ Section 6 (c) of the Hindu Minority and Guardianship Act, 1961

for a girl, but 15 years in case the girl is married. Again it can be observed that age of consent and age of marriage is separate in many cases.

Now with the implementation of the POCSO act, many adolescents are finding themselves in conflict with the law as their consensual and normal relationships are criminalised under POCSO act. Since the consent of a child is immaterial and the definition of child is any person below 18 years of age, any sexual intercourse between minors is treated as Sexual Abuse. In such situations girls are recognized as victims while boys as perpetrators. The open and wide ambit of the act has led to misuse of its provisions and loss of sexual autonomy for teenagers.

In present times, High courts have been questioning the use of provisions of the POCSO act in dealing with consensual teenage relationships. In *Raj Kumar v State of Himachal Pradesh*⁸, the High court of Himachal Pradesh permitted an application filed by the father of the minor girl for quashing the POCSO case against his son in law claiming “if criminal proceedings are allowed to continue, the same will affect the married life of his daughter”.

Further in the case of *Rama @ Bande Rama v. State of Karnataka*⁹, the Karnataka High Court had to quash criminal proceedings against an accused of rape and kidnapping under the Indian Penal Code, and penetrative and aggravated penetrative sexual assault under the POCSO Act, 2012, initiated by the father of a 17-year-old girl against her 20-year-old partner. The girl declared in court that the sexual acts and relationship was consensual and she had married the accused after she had turned 18. The marriage was registered and a child was born to the couple. The Court observed that “if the court would shut its doors to the couple who are married and bringing up the child, the entire proceedings would result in miscarriage of justice.”

In a similar case in *Vijayalakshmi v. State Rep*¹⁰ the Madras High Court observed that, “punishing an adolescent boy who enters into a relationship with a minor girl by treating him as an offender, was never the objective of the POCSO Act” and while dismissing the petition suggested that the age of consent under the POCSO act can be reduced to 16 instead of 18 by

⁸ MANU/HP/0205/2022 *Raj Kumar vs. State of Himachal Pradesh* (21.03.2022 - HPHC) : MANU/HP/0205/2022

⁹ 2021

¹⁰ *Vijayalakshmi & Anr. V. State by Inspector* [Crl.O.P. No. 232 of 2021 dated 27.01.2021 (Madras HC)];

redefining the “child” under section 2(d). In *Skhemborlang Suting v. State of Meghalaya*¹¹, a duly married couple who had gone for medical checkup for the 17 year old pregnant wife got entangled with the provisions of the mandatory reporting under the POCSO act. Here also the High court dismissed the petition observing that POCSO is not be misused to destroy a family, leaving the prospective mother without any support if the husband is convicted under the POCSO act for having sexual relations with his own under age wife.

Justice Jasmeet Singh of Delhi High Court while hearing a petition based on a FIR filed by a father of a 17 year old remarked that the intention of the Protection of Children from Sexual Offences (POCSO) Act was to protect children below the age of 18 from sexual exploitation and it was never meant to criminalize consensual romantic relationships between young adults.¹² Recently also while framing charges on under the POCSO act despite the victim claiming entirely consensual sexual relationship, the Delhi high court through Justice Swarna Kanta Sharma had observed that “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 chare is concerned till ay amendment is carried out by the wisdom of the Parliament of this country, if deemed appropriate”¹³

The misuse of the provisions of age of consent are apparent through the above case laws and court observations, but the large scale of these aberrations have been observed in Assam where child marriage or marriage among young adults is the custom. Recently it has been noted and reported that through the mandatory reporting provisions crossed with the Prohibition of Child Marriage Act, 2006 leads to a peculiar situation specially in state of Assam where the pendency

¹¹ <https://www.livelaw.in/news-updates/pocso-act-meghalaya-high-court-quashed-proceedings-under-act-their-parties-were-consensual-physical-relationship-220619>

¹² https://epaper.thehindu.com/articleshare?articleurl=https%3A%2F%2Fepaper.thehindu.com%2Fccidist-ws%2Fth%2Fth_chennai%2Fissues%2F15348%2FOPS%2FGDEAGT7A9.1%2BGD9AGTPES.1.html

¹³ Thapliyal, N. (2023) *Teenage Relationships May Be Dealt On Different Footing But Hands Are Tied Till Law Is Amended: Delhi High Court While Framing POCSO Charges*. Available at: <https://www.livelaw.in/news-updates/delhi-high-court-pocso-act-teenage-relationships-consent-law-amendment-required-223420> (Accessed: 23 July 2023).

of cases under the POCSO act has increased triple fold, from 1211 in December 2020 to 3881 in December 2022.¹⁴

Most of these cases are of underprivileged Adivasis hailing from the Gudalar and Panda;ur talukas. In these Adivasi groups situated in the Nilgiris, early marriages are the norm and the couple generally gets in trouble when medical practitioners report the husband for Child Sexual Abuse under POCSO at the time of medical checkup when the girl becomes pregnant. Even though the marriages in such cases are legal and consensual, the medical practitioners have to report all such cases due to the mandatory reporting provisions of the POCSO act which make it illegal not to report child sexual abuse. K.T. Subramanian, the secretary of the Adivasi Munnetra Sangam and the ASHWINI-Gudalur Adivasi Hospital has pointed out this discrepancy of the law and said “that in many cases, the accused and the victim were from the same community, and were unaware of the laws.”¹⁵

The Conflict with MTP act

The POCSO act also comes in contravention of the Medical termination of Pregnancy Act 1971, amended in 2021. While section 19 of the POCSO act makes it mandatory for the medical practitioner to report a case of child sexual abuse to the police if the person seeking termination of pregnancy is below 18 years of age, automatically assuming that the pregnancy is a result of sexual assault. While the MTP act it is not obligatory to report or disclose the identity of the person seeking termination of pregnancy. The Apex Court has made great strides in setting the jurisprudence for Right to Privacy and bodily autonomy of women in the case of K. S. Puttaswamy v Union of India¹⁶. The Supreme Court aside from making general statements has also specifically pointed out in the case of X v the Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Ors¹⁷ that :

¹⁴ <https://timesofindia.indiatimes.com/city/guwahati/3881-pocso-cases-pending-in-assam-36-in-mizoram-till-2022/articleshow/97833688.cms?from=mdr#:~:text=While%20the%20pending%20cases%20in,disposed%20of%20the%20same%20year.>

¹⁵ https://epaper.thehindu.com/articleshare?articleurl=https%3A%2F%2Fepaper.thehindu.com%2Fccidist-ws%2Fth%2Fth_chennai%2Fissues%2F14811%2FOPS%2FGPNAG184D.1%2BGQVAG1RLV.1.html

¹⁶ (2018) SCC OnLine SC 1642

¹⁷ MANU/SC/1257/2022

“To ensure that the benefit of Rule 3B(b) is extended to all women under 18 years of age who engage in consensual sexual activity, it is necessary to harmoniously read both the POCSO Act and the MTP Act. For the limited purposes of providing medical termination of pregnancy in terms of the MTP Act, we clarify that the RMP, only on request of the minor and the guardian of the minor, need not disclose the identity and other personal details of the minor in the information provided Under Section 19(1) of the POCSO Act. The RMP who has provided information Under Section 19(1) of the POCSO Act (in reference to a minor seeking medical termination of a pregnancy under the MTP Act) is also exempt from disclosing the minor's identity in any criminal proceedings which may follow from the RMP's report Under Section 19(1) of the POCSO Act. Such an interpretation would prevent any conflict between the statutory obligation of the RMP to mandatorily report the offence under the POCSO Act and the rights of privacy and reproductive autonomy of the minor Under Article 21 of the Constitution. It could not possibly be the legislature's intent to deprive minors of safe abortions.”¹⁸

The above observations of the court are clear that although POCSO act is indeed a revolutionary enactment to combat Child Sexual Abuse, its implementation still needs to contend with social realities.

Conclusion: Law Reform Sought

In a significant and light shedding report by a nonprofit organization focused on Child sexual abuse and gender based violence¹⁹ of 1,715” cases of consensual adolescent relationships under the POCSO Act decided between 2016-2020 by Special Courts in Assam, Maharashtra, and West Bengal it was revealed that such cases constituted 24.3% of the total POCSO cases decided by the such special courts created for this purpose. 80 percent of the complainants were parents and relatives of the girls who went missing or who had eloped with their partners or when their pregnancy was discovered. The girl and the accused were married in 46.5 percent cases, and in 85.5 percent cases the girls claimed that the relationship was consensual. In fact the result of the case was acquittal in 93.8 percent cases.

¹⁸ Id

¹⁹ Enfold Proactive Health Trust, Bangalore

In summary the POCSO act is a step forward and a significant legislation to combat Child sexual abuse and to keep young adults safe. But in a society that lacks sex education coupled with very less knowledge of law and legal system, it is easy to misapply and misuse the provisions of POCSO act. Also in the age of information technology and social media where adolescents are maturing faster, it is unrealistic to curm their sexual autonomy. The Courts in various ways have urged the Parliament to reform the Law and decrease the age of consent from 18 to 15 under the POCSO act. Recently The Chief Justice of India Justice D.Y. Chandrachud while delivering the keynote for conference of National Stakeholders Consultation on the POCSO Act expressed his opinion that legislature should consider the growing concerns over age of consent under the POCSO act²⁰. Justice Lokur. Former Judge of the Supreme Court also expressed his opinion in the same vein while speaking at an event organized by the Delhi commission for Protection of Child Rights.²¹ The Madras High Court has expressed its inability to recognize consensual teenage relationships while opining that it eagerly awaits an amendment in the present law to safeguard such relationships.²² At the same time in December, 2022 the Indian Government has denied that there is any need for lowering the age of consent under the POCSO act

In the Indian Society where child marriage is if not prevalent, then tolerated, and the government's commitment to protecting children from child marriage and child sexual abuse, the above stated conflict of laws is apparent and will need constant judicial vigilance to hold at bay.

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²¹ <https://www.livelaw.in/news-updates/16-18-year-olds-in-romantic-relationships-know-what-theyre-doing-why-should-we-prosecute-them-justice-madan-lokur-215721>

²² Ravi vs. State and Ors. (18.11.2022 - MADHC) : MANU/TN/8562/2022

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