

THE AGE OF CONSENT IN INDIA: UNDERSTANDING POCSO AND THE INTERPRETATION BY THE COURTS

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The Protection of Children from Sexual Offences Act, 2012 (POCSO), defines a child as a person below the age of 18 years. The Act provides that a child cannot consent for sexual intercourse. This criminalises any sexual activity with a person below 18 years of age. The objective behind this was to prevent the sexual exploitation of minors by adults by penalising the adult who engages in sexual intercourse with a minor. Further, the Act made it mandatory for any person having information about the perpetration of a sexual offence to report it to the police. On account of both these aspects, POCSO has made the consenting relationship vulnerable on the grounds of prosecution by families and society to prevent marriage outside the scope of caste, religion, and customs. The possible reasons why the judiciary is interpreting POCSO in such a manner might be to provide succour to consenting relationships. There is a need to understand the possible solutions that will recognize the sexual agency of adolescents without hampering the purpose of POCSO.

1.0 THE JUDICIARY BREAKING THE STRINGENCY OF POCSO

In the case of *G Vijayalakshmi v State*, the Madras High Court was faced with a situation where the victim and her family testified that the relationship was consensual and the victim had eloped willingly with the accused. Justice Venkatesh while quashing the First Information Report (FIR) held that adolescents who are yet to fully understand the nature of their actions and are under the control of their hormones should receive the support of both their parents and society. The strict application of POCSO can have severe consequences on the full life of the adolescent and thus the legislature must bring suitable changes to serve their needs.

All three of these cases are not exceptional cases and point to the general trend of the court finding themselves in deadlocks. A considerable number of the prosecutions under POCSO are related to adolescent relationships. To curtail the overzealousness of POCSO while regulating adolescent relationships a more comprehensive legal framework should be developed that recognizes the agency of the adolescent and accepts their maturity about their choice.

2.0 TRACING THE REASONS FOR JUDICIAL DISCOMFORT

Mr. Alok Prasanna argues that the conflict between the strict application and provisions of POCSO and the immature infatuation of adolescents is well-founded. As the Madras High Court judgement has pointed out that consensual sex among teenagers cannot be considered something “unnatural”. As per the fourth family health survey, 11 percent of adolescents had their first intercourse before 15 years and 39 percent had it before 18. The actions of adolescents who were eager to explore their sexuality should not be judged from the point of view of an adult or such a conception and instead, be viewed with empathy.

Further, India's health policies and programs for adolescents are significantly impaired by criminalising adolescent relationships. As a sizable number of adults engage in sexual union before being adults they require access to contraceptives, diagnosis, and treatment of Sexually Transmitted Diseases (STD), and access to safe abortion services. Owing to the fact that POCSO mandates that sexual activities below 18 must be reported, currently, teenagers detest availing of such services.

Mr. Prasanna through his analysis of cases brought about the fact that POCSO is being weaponized by parents and society to outlaw inter-caste and inter-religious marriage. Families often take recourse to POCSO when they find their teenage daughter eloping for marriage. This reinforces the deeply ingrained rigid social norms and prevailing morals with regard to sexual morality.

Another reason for the judicial discomfort with the prosecution of consenting adolescent relationships can be traced to the constitutional interpretation of fundamental rights which are witnessing an increased emphasis on privacy and individual autonomy. In *KS Puttaswamy and Anr. v Union of India* the Supreme Court of India held the right to privacy as part of the Fundamental right. Right to privacy among other things includes the preservation of consenting personal intimacies. Moreover, in the landmark judgement of *Navtej Singh Johar v Union Of India*, the Supreme Court decriminalised consenting homosexual relationships and gave a wider ambit to Article 21 by incorporating within it the autonomy to choose one's partner. The Supreme Court, in its verdict, held that consensual adult sexual relationships in private are a matter of personal choice and should not be subjected to criminalization. The court declared that Section 377, to the extent that it criminalized consensual sexual activities between adults, was unconstitutional.

3.0 CONCLUSION

The age of consent deserves a revisit in light of the object of the POCSO and India's obligation under the United Nations Convention on the Rights of the Child to prevent the inducement or coercion of a child to engage in any unlawful sexual activity. The National Commission for Protection of Child Rights (NCPCR), a statutory body formed to regulate the laws and policies regarding child rights, had recommended the age of consent at 16 be retained. NCPCR wanted to recognize the autonomy and evolving capacities of children as well as the need to ensure that children or adolescents engaging in consensual sexual exploration are not treated as children in conflict with the law. Further, it has also recommended adding an exception to POCSO to not consider consensual non-penetrative sexual acts between two children who are above or at least twelve years of age.

The judiciary's efforts to escape the rigours of POCSO while dealing with them can be a lesson for the legislature which should resolve this quandary of criminalising consensual adolescent relationships.

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