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**EXPLORING THE LEGAL DIMENSIONS OF
CONSENSUAL ROMANTIC RELATIONSHIPS:
UNDER THE AMBIT OF PROTECTION OF
CHILDREN FROM SEXUAL OFFENCES ACT, 2012**

AUTHORED BY- SANSKRITI KHANDELWAL
AMITY UNIVERSITY

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LIST OF ABBREVIATIONS

S. No.	Abbreviations	Full Form
1.	§	Section
2.	&	And
3.	AIR	All India Reporter
4.	Art.	Article
5.	PCMA	Prevention of child Marriage Act, 2006
6.	Anr.	Another
7.	IPC	Indian Penal Code, 1860
8.	POCSO	Protection of Children from Sexual Offences Act, 2012
9.	JJ	Juvenile Justice (Care and Protection of Children) Act,2015
10.	CrPc	Code of Criminal Procedure, 1973
11.	MTP	Medical Termination of Pregnancy Act, 1971
12.	HC	High Court
13.	NCRB	National Crime Records Bureau
14.	SCC	Supreme Court Cases
15.	V.	Versus
16.	Ors	Others

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16.	<i>Marimuthu v. The Inspector of Police</i>	2016 SCC OnLine Mad 10175
17.	<i>Ms. N v. State & Anr.</i>	CRL.M.C.-3399/2023
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CHAPTER 1
EXPLORING THE LEGAL DIMENSIONS OF CONSENSUAL ROMANTIC
RELATIONSHIPS: UNDER THE AMBIT OF PROTECTION OF CHILDREN FROM
SEXUAL OFFENCES ACT, 2012

1.1 Introduction

The POCSO Act, 2012 is a comprehensive legislation that safeguards children from sexual assault, sexual harassment, and pornography. It ensures that the child's welfare is given primary consideration during the legal proceedings by incorporating child-friendly methods of reporting, collecting evidence, conducting investigations, and expediting trials through dedicated Special Courts. Furthermore, Article 15 of the Constitution of India 1950 requires the state to enact specific legislation for women and children. Also Article 39 of the Constitution of India 1950, stipulates that the State is responsible for protecting children from abuse at a young age, protecting them from exploitation, and providing opportunities for healthy development in a free and dignified environment.

According to the POCSO Act, 2012, a **"child" is defined as a person below the age of eighteen**. This Act was designed to protect children from sexual assault, sexual harassment, and pornography, and to ensure that the child's best interests are served at all stages of the legal process. This act penalizes six types of sexual offenses. It prescribes appropriate punishment for the same: Penetrative Sexual Assault¹, Aggravated Penetrative Sexual Assault², Sexual Assault³, Aggravated Sexual Assault⁴, Sexual Harassment⁵, and Using Child for Pornographic Purposes.

On December 11, 1992, the Government of India ratified the Convention on the Rights of the Child, which was enacted by the General Assembly of the United Nations and established a set of requirements for all State parties to follow in ensuring the child's welfare as the main goal. The main objective of the POCSO Act, 2012 is to align with constitutional goals, primarily Article 39(f) of Constitution of India 1950 which, is a Directive Principle of State Policy, emphasizes the State's responsibility to ensure children's healthy development, freedom, and protection against exploitation. After that Article 15(3) of Constitution of India 1950, which talks about empowerment of the State to make laws for children. The reason behind legislation of POCSO Act, 2012 is rooted in India's international commitments,

¹ Section 3 of The Protection of Children from Sexual Offences Act, 2012

² Section 5 Of The Protection of Children from Sexual Offences Act, 2012

³ Section 7 Of The Protection of Children from Sexual Offences Act, 2012

⁴ Section 9 Of The Protection of Children from Sexual Offences Act, 2012

⁵ Section 11 of The Protection of Children from Sexual Offences Act, 2012

particularly the “Convention on the Rights of the Child, 1989, which was signed by India in December 1992”. The preamble of the POCSO Act, 2012 explicitly reflects these constitutional and international principles.⁶ The Legislation was essential for the children's normal development since their right to privacy and confidentiality must be respected by all people at all times and stages of the legal process involving the child. The POCSO Act, 2012 intends to ensure the child's best interests and well-being are prioritized at all stages, ensuring the child's healthy physical, emotional, intellectual, and social development.

According to the POCSO Act, 2012, it is the primary duty of state parties to implement necessary measures at national, international, measures to prevent: a) compulsion or enticing a child to participate in any illegal sexual activity; b) exploiting children for prostitution or other unlawful sexual practices; and c) using children in pornographic films and content in a harmful way.

The POCSO Act of 2012 was passed in response to an increase in crimes against children, particularly in cases of sexual offences, as shown by data from the National Crime Records Bureau and the Ministry of Women and Child Development's "**Study on Child Abuse: India 2007**"⁷. Prior to the POCSO Act of 2012, crimes against children as well as crimes against adults were punished equally under the IPC Act, 1860, which proved to be inadequate in combating child abuse. There instances when due to a lack of specific laws for child sexual assault, perpetrators often went unpunished.

*“The POCSO Act, 2012 was introduced to fill this legal gap, providing stringent measures to combat child sexual abuse. Its significance is underscored by India's substantial child population, with over 400 million individuals below the age of 18, constituting about 36.7% of the total population”*⁸

Crimes such as sexual exploitation and abuse of children are terrifying and they need to be addressed effectively. The basic principle of the POCSO Act, 2012 is quite dynamic in comparison to previous thoughts on child protection expressed in previous laws. The Act is

⁶ 22nd Law Commission On Age Of Consent Under The Protection Of Children From Sexual Offences Act,2012, https://Lawcommissionofindia.Nic.In/Report_Twentysecon, Last Visited 12 April 2024

⁷ Kacker, Loveleen, Kumar, Pravesh, Varadan, Srinivas, Study on Child abuse: India 2007, Ministry of Women and Child Development, New Delhi, <https://resourcecentre.savethechildren.net/pdf/4978.pdf/>

⁸ Social Statistics Division Central Statistics Office Ministry of Statistics and Programme Implementation Government of India, CHILDREN IN INDIA 2018 - A Statistical Appraisal,

https://www.mospi.gov.in/sites/default/files/publication_reports/Children%20in%20India%202018%20%E2%80%93%20A%20Statistical%20Appraisal_26oct18.pdf

gender-neutral and highly significant in this sense. The Act includes a number of child-friendly practices to ensure that children's interests are protected throughout and at all stages.

The critical issue of cases of consensual romantic relationships being prosecuted under the POCSO Act, 2012 has attracted considerable judicial attention, with different High Courts rendering varied decisions on the matter. Certain High Courts have acknowledged their inability to interpret the statute beyond its literal meaning and, as a result, have found the accused guilty in situations where they engaged in a consensual sexual relationship with an minor girl⁹. However, other High Courts have taken a different approach in implementing an interpretation that goes beyond the immediate boundaries of the POCSO Act, 2012. The courts have interpreted the provisions of the POCSO Act, 2012 in a broad and abstract manner, going beyond the exact definition.¹⁰ They have expressed the view that the Act was never intended to penalise young men who engage in a consensual sexual relationship with minor girls.

In the case of *Ajay Kumar v. State (NCT of Delhi)*¹¹, the Delhi High Court held that the primary goal of the POCSO Act is to protect persons below the age of 18 from sexual exploitation. The Act was not designed to criminalise consensual romantic relationships between young adults.

On the other hand, taking a different viewpoint in *Ravi v. State, the Madras High Court*¹² decided that in situations under the POCSO Act, the consent of the child is immaterial, stating that:

"Whereas, the law defines that the person who has not completed the age of 18 years, is a child. This Court, being on Appellate Court, is a final fact finding Court and cannot traverse beyond the statute. This Court also eagerly is waiting for the amendment in the Legislature as expressed by my learned brothers. In the case on hand, this Court finds that the victim was a minor and the appellant took the custody of the minor without the knowledge or consent of her natural guardians and had committed penetrative sexual assault on her and

⁹ *Ravi v. State, Madras High Court*, Criminal Application No . 627 of 2021; State (NCT of Delhi) 'Vipin Sharma 2023/DHC/001668.

¹⁰ *Sabari @ Sabarinathan v. The Inspector Of Police*, reported in 2019 SCC Online Mad 18850 (2019), xxxxx v. *State Rep by Inspector of Police in Crl.O.P.(MD)No.18064 of 2019 Vijayalakshmi and Another v. State Rep. By The Inspector of Police and Another reported in 2021 SCC OnLine Mad 317, Marimuthu V. The Inspector of Police reported in 2016 SCC OnLine Mad 10175*

¹¹ BAIL APPLN. 2729/2022

¹² *Supra Note 9*

hence, the offence committed by the appellant falls under Section 5(l) which is punishable under Section 6 of the POCSO Act, 2012”.

Therefore, there is growing concern about the increasing number of cases where minors are being punished under the POCSO Act, 2012, for engaging in sexual intercourse as a result of romantic relationships. Various high courts and POCSO special courts have taken suo moto cognizance to deal with these concerns. Generally the POCSO Act, 2012 pronounce the male accused guilty even though the female took a clear stand that the Act was consensual sex. The reasoning behind this is that the Act was never meant to cover cases of consensual sex with minors, so the male accused stands to be convicted.

The prevalence of consensual romantic relationships has overwhelmed the judicial system, leading to diverse stances from the courts. Thus, the High Courts have established guidelines for trial courts to examine while evaluating bail applications and writ petitions or quashing FIR proceedings.

The POCSO Act,2012, does not address certain gaps while addressing cases of Consensual Romantic Relationships. These gaps include the ages of the accused and victim, their relative ages, and whether or not they were innocent at the time of the incident. It also disregards the familial relationship between the victim and accused, the conduct of the accused after the alleged Act, the social position of the accused and victim, any claims of witnesses being harassed or intimidated, whether the offender does any act involved intimidation, harassment, or violence, and whether there is an implied consent from the victim, even if not legally consenting.¹³The High Courts have also underlined the need to analyse each case based on its particular facts and circumstances.¹⁴

In addition, when it comes to discussing bail in POCSO cases, trial court judges generally decline to grant bail or exercise any discretion, even if it is alleged that the relationship between the victim and the offender was consensual. Under the POCSO Act, 2012 the trial judge does not have any discretion when it comes to punishment. The High Courts have the authority to examine and evaluate the decisions given by the Trial Court & Special Courts in POCSO Cases

¹³ Dharmender Singh v. State (NCT of Delhi (2020) 275 DLT 49; Ajay Kumar v. State A'CT of Delhi),Delhi High Court, Bail Application 272912022, order dated 20.10.2022, Sunil Mahadev Patil v. The State of Maharashtra, 2015, 3, AIR Bom R CrI 494

¹⁴ Mahesh Kumar v. NCT of Delhi, 2023 DHC 3151

based on the grave nature of the offences involved. Granting bail without sufficient reasons¹⁵ or imposing a lighter sentence by the Special Court is not allowed under the provisions of the POCSO Act 2012. Such actions might culminate in condemnation from the High Court¹⁶.

Considering the factors mentioned above, it is evident that the courts must thoroughly evaluate the increasing cases of adolescent love, considering all aspects and striving to achieve the greatest possible balance. Ensuring the safety of children from any form of sexual abuse or exploitation must be the primary and most crucial focus in this endeavour.

1.2 Recent Developments in POCSO Act, 2012 With Reference to Cases of Consensual Romantic Relationships

The Special Courts & Trial Courts are flooded with false cases, specifically those arising from consensual romantic relationships, filed by family members who oppose such relationships, or cases that come to light as a result of mandatory reporting requirements under the law. In several cases, the High Courts have determined that the POCSO Act, 2012 never meant to criminalize consensual romantic relationships between young adults, which are usual in today's world. It has been observed that consensual sex between minors is a legal grey area because consent from a minor is not consent in the eyes of the law.

In the Case of *Arhant Janardan Sunatkari V. State Of Maharashtra*¹⁷, the Hon'ble Mr. Justice A.D. Jagdish Chandira of Madras High Court conversed on the hormonal changes take Place in the developmental age of Adolescence and also attempts to describes love.

“18. Because of the inquisitive nature of an minor child which develops due to the inherent hormonal changes taking place in their body instigates them to grasp any piece of information available in their circumambience regarding sexual behaviour, which may include social media, movies, web series, family surroundings, peer knowledge etc. This causes a gush of fondness towards the opposite/same sex. When they sense a similar feeling reciprocating, both tend to enter ecstasy which is a very natural act called love.”

¹⁵ Ms. N v. State & Arr., Delhi High Court CRL.M.C.-3399/2023

¹⁶ Rodu Bhaga Wagh v. The State of Maharashtra & Anr. High Court of Bombay Criminal Appeal No. 833 of 2022, order dated 15.09.2023.

¹⁷ Criminal Revision Case No.877 of 2021

The age of consent pertaining to Consensual romantic relationships among 16 to 18 year- old is also another uncertain area while examining POCSO Act, 2012. In order to lessen the harm and suffering that is inevitably caused to male accused who engage in consensual sexual relations with female children and are later prosecuted due to the mandatory reporting condition under the law or at the pursuant of the girl child's family who oppose of such a relationship, various High Courts in the country have echoed the opinion that either the age of consent be reduced to 16 years or the trial judge be given some kind of discretion while trying such cases.

While analysing cases brought under the POCSO Act, 2012, the Hon'ble High Courts of Madras, Karnataka, Madhya Pradesh, Delhi, Bombay, and other places have emphasised the necessity of lowering the victim's consent age from 16 to 18 years old when it comes to a romantic relationship with the accused.

Ultimately, the purpose and goal of POCSO Act, 2012 is to safeguard the minor children from sexual exploitation and it is evident that minors are incapable of giving consent. However still there is lot of disagreement on the most effective approach for addressing this problem. While some individuals support reducing the age of consent for consensual sexual relationships to 16 years, as it was before the implementation of the POCSO Act, others propose implementing "close-in-age" exemptions, similar to those in the USA and Canada. Another suggestion is to introduce judicial discretion in sentencing, without lowering the age of consent under any circumstances. The issue of romantic relationships with individuals who are under the age of consent or with someone who is underage is a complex one that necessitates thoughtful examination of POCSO Act, 2012.

1.3 Statement of Problem

In recent times, there are multiple cases where minor girls who are above the age of 16 are falling in love or eloped and having sexual intercourse with person above her age.; *this is a legal grey area with respect to the applicability of Consensual Romantic Relationships under POCSO Act, 2012* Secondly, There is a big concern to rethink *the age criteria to consider the ground realities*. Consent given by a girl aged 16 years or above should be taken into consideration, even if the act constitutes an offense under the Indian Penal Code,1860, and the Protection of Children from Sexual Offences Act, 2012.

Some issues related to the quantum of punishment also need to be examined, such as when the prosecutrix is below the age of consent but de facto consent is apparent. Still, the sentence which can be imposed is imprisonment extended up to twenty years, which can be harsh & unfair punishment in cases where there is no coercion or force & the relationship is consensual. Then, in that scenario, there ought to be a minimum sentence. For that, discretion must be given to the Special Court to impose a sentence per the facts and circumstances of the case.

Also, this research will help us study cases where the prosecutor is below the age of consent. And circumstances where the relationship has culminated in marriage (with or without children), if there is any need to impose any sentence of imprisonment, or How much powers should be given Special Courts to impose alternate correctional methods like community service, etc."

1.4 Literature Review

After the study of the perusal of the existing and developed laws and policies under POCSO Act,2012 an attempt has been made to understand the practical aspect of the issue by building foundations and to show logical reasoning behind the study. It is emphasized that no legal research work can be completed without relying on the latest bare provisions. The Literature Review is not only important to avoid restatement or duplication but also provide better comprehensibility of the notion.

To understand the Legal Dimensions of Consensual Romantic Relationships Under Protection of Children from Sexual Offences Act, 2012 there are various research articles as well as the pro-active approach of judiciary through judicial activism and pronouncements plays an important role along with the law reports and commissions.

Firstly, “**the Justice Ritu Raj Awasthi (Former Chief Justice of High Court of Karnataka) Chairperson, Law Report no.283 by Government of India Law Commission of India on Age of Consent Under The Protection of Children from Sexual Offences Act,2012, September 2023**” examines the need of certain amendments that need to be brought in the POCSO Act to resolve the cases wherein there is tacit approval in fact though not consent in law on part of the child aged between 16 to 18 years. This report also review the Judicial Determination of Consensual Romantic Relationships Under POCSO Act, 2012.

After that the research paper written by **Syed Raiyyan, 2023** highlights the present problems with the POCSO Act's 2012 implementation while examining the Act's history and original intent”. This research article tries to find a balance between adolescent autonomy and child safety guaranteed under POCSO Act, 2012 which aims to achieves its original intent without endangering teens.

Furthermore Swagata Raha, Shruthi Ramakrishnan,2022 delves into the background and enactment of the Protection of Children from Sexual Offences (POCSO) Act, 2012, addressing the prevalent issues of child sexual abuse in India. This Article also highlights the historical context, societal challenges, and the significant role of the POCSO Act, 2012 in providing legal protection to children.

After analyzing the historical background and challenges under POCSO Act, 2012 and role of POCSO Act, 2012 safeguarding the children now there is a need to discuss the societal norms and cultural barriers surrounding romantic relationships analyzed by **Anchan V, Janardhana N, Kommu, 2020** and emphasizing on the conflicts between legal age restrictions under the POCSO Act, 2012 and adolescents' developmental needs. The research paper critiques the act's impact on sexual rights and calls for a detailed discussion on consensual sexual acts within a legal framework.

Lastly, the article “**Romantic relationships: the case of special courts under POCSO Act of 2012**” written by **Shivam Pandey & Somabha Bandopadhyay, 2018** discuss upon the probable solutions which can be adopted by the state machineries to resolve the cases prosecuted under POCSO Act, 2012 such as the need to examine the cases fairly at the initial stages of the cases i.e. at the time of investigation after reporting of FIR or at framing of the charge-sheet. There is an requirement to have more strict laws for analysing the genuine for cases under POCSO Act,2012. Also, there should be sufficient reasons for complaint & must be of the nature which shall be cogent to that fact to augment further proceeding with that case.

Law Reports

The Policy Brief titled "**Implication of the POCSO Act in India on Adolescent Sexuality**" provides a comprehensive analysis of the impact of the Protection of Children from Sexual Offences (POCSO) Act on adolescent sexuality in India. The authors, Swagata Raha and Shruthi Ramakrishnan, published this brief in 2022. The document includes insights from various experts and stakeholders in the field, highlighting the challenges and opportunities in addressing issues related to adolescent sexuality within the legal framework of the POCSO Act. The literature review in the brief synthesizes existing research and perspectives to offer a nuanced understanding of the implications of the Act on adolescent sexual health and rights in India.¹⁸

The Report on the "**Romantic Cases under the POCSO Act: An Analysis of Judgments of Special Courts in Assam, Maharashtra & West Bengal**", 2022¹⁹ provides a detailed examination of cases falling under the category of "romantic" within the framework of the Protection of Children from Sexual Offences (POCSO) Act, 2012. The author of this paper **Shruthi Ramakrishnan & Swagata Raha**, delves into existing complexities on the implementation of the POCSO Act, judicial interpretations of "romantic" cases, and the challenges faced in adjudicating such cases. This paper also discuss the legal and ethical considerations surrounding cases involving minors and the nuances of consent and coercion in relationships involving adolescents. Additionally, the review the role of specialized courts in handling cases under the POCSO Act, 2012 and the need for sensitivity and expertise in dealing with such sensitive matters.

1.5 Research Objectives

- 1.** To Understand the applicability of the POCSO Act, 2012 with respect to consensual romantic relationships with the help judicial case laws and in-depth study of provisions of the Act.
- 2.** To analyze the age trends of offender & victim under POCSO Act, 2012 with special attention to age of consent.
- 3.** To Examine the application of quantum of punishment and sentencing under POCSO Act, 2012 concerning consensual romantic relationships.

¹⁸ Raha & Ramakrishnan, Implication of the POCSO Act in India on Adolescent Sexuality: A Policy Brief (Enfold Proactive Health Trust, UNFPA & UNICEF 2022).

¹⁹ Ramakrishnan & Raha, "Romantic" Cases under the POCSO Act Enfold Proactive Health Trust: 2022

4. To understand psychological & emotional implications on both victim & offender under POCSO Act, 2012
5. To make suggestions and amendments to reduce the gray areas with respect to consensual romantic relationships under POCSO Act, 2012.

1.6 Research Questions

1. Whether the POCSO Act, 2012 which was introduced to protect innocent children, has deviated from its prime objective by becoming a tool for the abuse of the process of law concerning consensual romantic relationships?
2. Whether the age of consent has a significant role in the conviction or acquittal in cases of consensual romantic relationships?
3. How are the prescribed punishments and sentencing laws under the POCSO Act, 2012 applied in cases involving consensual romantic relationships, and what reforms may be needed to ensure proportionate sentencing in such cases?
4. What are the long-term psychological and emotional implications experienced by victims of sexual abuse and their offenders after cases prosecuted under the POCSO Act, 2012?
5. What suggestions or amendments can be made to reduce the legal grey area with respect to Consensual Romantic Relationships under POCSO Act , 2012 ?

1.7 Research Methodology

The research methodology for this analytical study on Legal Dimensions of Consensual Romantic Relationships: Under the Ambit of Protection of Children from Sexual Offences Act, 2012 will involve a combination of doctrinal analysis and quantitative research. The research would analyse the framework, standards, and legal principles, Statutes, Supreme Court precedents, and High Court rulings form the essential data for the analysis.

Secondary sources such as journals, international conventions, newspapers, magazines, and websites will be used to understand the social and political analysis of a statement, decision, law reports on the law relating to POCSO Act, 2012 in order to gather the necessary data and information for the research. In this Research the main source is secondary resources such as precedents of different Courts and law reports on the law relating to POCSO Act, 2012 in order to gather the necessary data and information for the research. The Deductive form of reasoning is applied while doing this research as it includes to research on the laws and statutes which already exist and then from that study has analysis and conclusion will be made on the

applicability and effectiveness of POCSO Act, 2012 with respect to Consensual Romantic Relationships.

1.8 Limitation of the Study

This research is purely based upon the precedents given by the court of law. In the research, romantic consensual relationships mean cases under the POCSO Act, 2012 in which any of the following conditions exist:

- The "victim" explicitly accepts of having an romantic relationship or being in love with the accused, or has given consent to engage in sexual practice with the accused, or has happily married the accused.
- Family members of the "victim" or other witnesses for the prosecution agree to the fact that the victim was in a romantic relationship with the accused at the commission of the offence.
- The Special Court is of the opinion that the "victim" was involved in a love affair with the accused or was in a mutually consenting relationship at the time of the commission of the offence.
- This research does not address cases the where the accused and victim has a romantic relationship and the accused is child in conflict with law and the case was before the Juvenile Justice Board while, while the case of abetment by the adult accused persons was before the Special Court.
- There are many cases that comes in the preview "romantic nature" relationship which resulted in the elopement or marriage between the accused and the victim, however all these cases are excluded from this research because of the absence of an express reference to the romantic relationship in the text of the judgment.

Additionally, the following types of cases were excluded:

- Cases where only the accused asserted to be in a romantic relationship with the victim, but the victim, victim's family, the prosecution, or the Special Court did not agree that it was consensual.

1.9 Chapterization Following are the Chapters:

1. Introduction

This chapter lays down the foundation regarding the exploration of legal dimensions of Consensual Romantic Relationships with reference to POCSO Act, 2012. This chapter delves literature review used as well as including the research methodology and limitation of the study.

2. Role of Age of Consent under POCSO Act, 2012 with regards to conviction or acquittal in the cases of Consensual Romantic Relationships.

This Chapter talks about the brief overview of the role of Age of Consent under POCSO Act, 2012 and the Rate of conviction or acquittal of the offender and the Interpretation of NCRB Data from 2018 to 2022 related to POCSO Act, 2012 and lastly it talks about the global perspective on age of consent.

3. Examination of the Quantum of Punishment & Sentencing under the POCSO ACT, 2012, concerning consensual Relationships.

This Chapter deals with the study of different types of punishments and nature of offences on which punishment is given and various judicial interpretations.

4. Psychological & Emotional Implications on both victim & offender under POCSO Act, 2012

This chapters talks about the psychological and emotional implications on both victim and offender of the prosecution under POCSO Act. After this will deal with the standard framework and legal background related to challenges and problems faced by young people in the cases of consensual romantic relationships.

5. Conclusions & suggestions to amendments to reduce the gray areas with respect to consensual romantic relationships under POCSO Act, 2012.

Lastly, this chapter suggest some solutions and recommendations which can be made to decrease the legal gaps or grey area under POCSO Act, 2012 with relation to consensual romantic relationships.

CHAPTER 2

ROLE OF AGE OF CONSENT UNDER POCSO ACT, 2012 WITH REGARDS TO CONVICTION OR ACQUITTAL IN THE CASES OF CONSENSUAL ROMANTIC RELATIONSHIPS

2.1 Legal Background

The age of consent refers to the minimum age at which an individual is legally recognised as being able to give consent for marriage or engaging in sexual intercourse. Laws legally determine this age. Currently, the minimum age at which individuals are legally allowed to engage in sexual intercourse is 18 years, as mandated by the Protection of Children from Sexual Offences (POCSO) Act, 2012.²⁰ Before the POCSO Act's implementation, no specific age of consent was mentioned. Instead, the age of consent was determined by Section 375 of the IPC,²¹ which deals with the definition of "rape". Since the definition of rape is a crime that may only be committed against women, the age at which a woman can give consent for sexual relations is also specified only for women. In this case, consent is given regardless of age, and any sexual activity is considered statutory rape.

Conversely, there was no legal age at which males were considered capable of giving consent. Neither the Indian Penal Code (IPC), 1860 nor the General Clauses Act, 1897 clearly define the term "child". In addition, the age of consent for women, as specified by Section 375 of the IPC, 1860 which deals with the crime of "rape", has changed over time. The age was set at ten in 1860, but it has since been raised to 18 years.

The age of consent for women in 1860 was ten years. In 1891, the legal age at which a woman was considered capable of giving consent was increased to 12 years under Section 375. This change was initiated by the widespread outrage following the Phulmoni case.²² Phulmoni, an eleven-year-old girl, suffered from fatal bleeding due to a vaginal rupture inflicted by her husband during non-consensual sexual intercourse. The husband was convicted for inflicting serious injury through a rash and negligent act that endangered life and was sentenced to one year of rigorous imprisonment. Subsequently, the legal age at which an individual is considered capable of giving consent was increased to 14 years in 1925 and again elevated to 16 years in 1940. Before the enactment of the POCSO Act in 2012, the age of consent for women was 16

²⁰ Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (India).

²¹ Indian Penal Code, 1860, § 375.

²² *Queen Empress Huree v. Muhyum Maythee* (1891) ILR 18 Cal 49

years, but there was no set age of consent for men. Nevertheless, the minimum age for women to get married was 18 years, while for men, it was 21. The marital rape exception in Section 375 has undergone revisions over the years, increasing from a duration of 10 years in 1860 to 15 years in 2012.

2.2 Law commission Reports related to age of consent

In its 84th Report titled "Rape and Allied Offences- Some Questions of Substantive Law, Procedure and Evidence",²³ the Law Commission proposed that the age of consent, as stated in the fifth clause of Section 375, should be raised to 18 years. This recommendation was made because the minimum age for marriage of a girl was already set at 18 years under the previous Child Marriage Restraint Act, 1929 (amended in 1978). Nevertheless, in its wisdom, the Parliament deemed it appropriate to maintain the age of consent at 16 years.

In its 156th Report on the Indian Penal Code, 1860,²⁴ the Law Commission agreed with the National Commission for Women's suggestion to raise the age of consent to 18 years. As a result, the Law Commission recommended increasing the age specified in the sixth clause of Section 375 to 18 years. Nevertheless, despite the Parliament's recommendation, the age of consent remained at 16 years until 2012, when the Protection of Children from Sexual Offences (POCSO) was implemented. It was only in 2013 when Section 375 of the Indian Penal Code (IPC), 1860 was revised, that the age of consent was finally increased.

2.3 Age of Consent Under POCSO Act, 2012

“The Protection of Children from Sexual Offences Act, 2012 expanded the definition of “rape” under the Indian Penal Code, 1860 to include not only penile-vaginal penetration but also penetration by other body parts or objects into defined orifices of the child. This definition has been referred to as “penetrative sexual assault”. Apart from expanding the extent of sexual offenses, the legislature found it fit to raise the “statutory age of rape,” which is “the minimum age for consent to sexual intercourse”, from sixteen years to eighteen years, and to bar the

²³ Law Commission of India, "84th Report on Rape and allied offenses-some questions of substantive law, procedure and evidence" (April, 1990) available https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022108/20220805_44.pdf (last visited 6th may, 2024).

²⁴ Law Commission of India, "156th Report on Indian Penal Code, 1860- 161 (August, 1997) available at https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022109/20220923_29.pdf (last visited 6th may, 2024)

court from subjecting an offender to a sentence that is less than the minimum sentence prescribed in the statute.

Although child rights activists appreciated broadening the definition of penetrative sexual crime, they were debates over the recommendation to increase the age of consent. In 2019, The POCSO Act, 2012 was amended and imposed a minimum mandatory sentence of ten years and twenty years in respect of penetrative sexual assault and the aggravated penetrative sexual assault, respectively.

The POCSO Act, 2012 was enacted ten years ago so, with coming years it is imperative to analyse the consequences of increasing the "age of consent" and determine whether the implementation of the POCSO Act,2012 has led to a rise in the reporting of sexual offences against children and improved the rate of conviction. The NCRB data indicates that the rise in the age of consent has led to an increase in cases where the criminal court system is burdened by "romantic relationships". At the national level, 52% of the cases reported under the Protection of Children from Sexual Offences (POCSO) Act involved victims aged between sixteen and eighteen years²⁵.

It may be expected that a romantic relationship between the "victim" and the "accused" would be considered as a factor that reduces the gravity of the crime. However, the police reports and charges indicate that situations with a romantic relationship are classified as more grave forms of penetrative sexual assault under Section 5(l) of the POCSO Act. These crimes were classified as "aggravated" under Section 6 of the POCSO Act, which carries a sentence of "rigorous imprisonment for a term which shall not be less than twenty years." Criminalising "romantic relationships" between the ages of sixteen and eighteen perpetuates gender discrimination because it treats male adults and male children as suspects or minors in conflict with law even though the sexual activity is consensual and the offence is gender-neutral. It is noteworthy that in 2019, 77% of juveniles apprehended under the POCSO Act for engaging in criminal activities were aged between sixteen and eighteen years. Among these, only 0.4% were female.²⁶

²⁵ Crime in India 2019, Table 4-A.9

²⁶ Crime in India 2019, Table 5-A.3.

Further, because of the high volume of POCSO cases being filed, the Special Courts are unable to promptly record the child's statement and complete the trials within the designated time frame specified in the POCSO Act, 2012. The national backlog of cases under Section 4 and 6 of the POCSO Act, as of the conclusion of 2019, stood at 88.8%.²⁷ The establishment of Special Courts aimed to expedite the resolution of cases. However, in 2011, when regular criminal courts handled cases of "child rape," the national conviction rate was lower at 48%. The greater incidence of disposal in 2011, when the age of consent was sixteen years and there were no Special Courts, suggests that the POCSO Act has not achieved its purpose of "speedy disposal".

2.4 The need to reconsider the age of consent

Various authorities and expert bodies have deliberated on the topic of the "age of consent". The Justice Verma Committee Report proposed that the age of consent under the POCSO Act should be lowered to sixteen years, in accordance with the interpretation of Article 34 of the United Nations Convention on the Rights of the Child. The report emphasised that the primary objective of the POCSO Act is to safeguard children from sexual assault and abuse, rather than to criminalise consensual sexual activity between individuals below the age of eighteen.²⁸

The High Courts have also noted that the "age of consent" should be re-evaluated. The Madras High Court acquitted the accused in a case²⁹ involving a seventeen-year-old girl who did not support the prosecution's case. The court stated that such a relationship would automatically be considered a crime under the POCSO Act, subjecting the boy to a minimum imprisonment of 7 or 10 years.

The court also suggested that the legislature should consider redefining the definition of "Child" under Section 2(d) of the POCSO Act to be 16 instead of 18, taking into account the practical realities of the situation.³⁰

²⁷ Crime in India 2019, Table 4-A.5

²⁸ The Justice Verma Committee was constituted by the Government of India "to review the present Laws so as to provide for speedier justice and enhanced punishment in cases of aggravated sexual assault" [Notification No. SO (3003) E dated 23-12-2012 published by the Ministry of Home Affairs, Government of India], and submitted its Report on 23-12-2013 to the then Prime Minister, Dr Manmohan Singh.

²⁹ Sabari v. State of T.N., 2019 SCC OnLine Mad 18850.

³⁰ Atul Mishra v. State of U.P., 2022 SCC OnLine All 420

In a recent elopement case,³¹ the Allahabad High Court granted bail to the accused and made an observation regarding the applicability of legislative laws. The court stated that this applicability cannot be determined using mathematical formulas or theorems. When the law courts invoke these provisions, we must exercise caution regarding the potential outcome. If the execution of certain provisions in a certain set of facts leads to a disastrous and catastrophic outcome, it is the responsibility of the courts to mitigate the severity of those provisions in order to produce a more meaningful and easily acceptable application of the provision in the specific circumstances of the case.

“18. ... if these teens decided to enter into nuptial knot and now they have baby out of this relationship, certainly rigors of POCSO Act would not come in their way. The girl is not sexually abused or no sexual assault was made upon her, nor has she been sexually harassed by the applicant, as contemplated by the object of POCSO Act”.

In addition, in order to protect the well-being of the girl and secure the future of the child, the Allahabad High Court issued a directive for the husband/father to provide a bank draft amounting to INR 5,00,000 in favour of the wife/child. Internationally, domestic legislations universally incorporate the provision of the "age of consent," which establishes the legal age for engaging in sexual behaviour. The rationale behind establishing a fixed age of consent is to safeguard the unique essence of childhood and protect children from being exploited or morally corrupted by adults. This is based on the belief that engaging in sexual activities below this predetermined age can have detrimental physical and psychological effects. The determination of the "age of consent" should take into account the notion of a child's developing abilities. General Comment No. 20 (2016) by the Committee on the Rights of the Child discusses the concept of "evolving capacities"³² and emphasises that when determining the legal age for sexual consent, State parties should consider the importance of balancing protection and the developmental abilities of adolescents. It also suggests establishing a minimum age that is deemed acceptable. States should refrain from making it a crime to engage in consensual and non-exploitative sexual conduct amongst young people of similar ages.

³¹ *Ibid*

³² Clause 18 of General comment No. 20 (2016) on the implementation of the rights of the child during adolescence “The Committee defines evolving capacities as an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights.” <https://www.ohchr.org/en/treaty-bodies/crc#:~:text=The%20Committee%20on%20the%20Rights,Child%20by%20its%20States%20parties.>

2.5 Legal age of consent in different jurisdictions

According to the UNCRC,³³ a child is defined as an individual who is under the age of 18 years. Nevertheless, the legal age at which an individual is considered capable of giving consent varies from 13 to 18 years worldwide.

a. Canada

It is important to mention that the legal age at which a person can give consent in Canada was changed from 14 to 16 years in 2008 due to a rise in cases of youngsters being lured online. Below is an explanation of the Canadian legislation regarding the sexual exploitation of minors. According to the Canadian Criminal Code, the legal age at which a person can give consent is 16 years. Nevertheless, the statute includes provisions for close-in-age exceptions. There are specific situations where consent cannot be given, particularly when the accused holds a position of trust, the complainant is dependent on the accused, and the relationship between them is exploitative. Section 150 of the Canadian Criminal Code³⁴ addresses the same matter.

The close-in-age exemption is classified as follows:

- *If the complainant is between 12 and 14 years old, consent may be considered if the accused is less than two years older.*
- *If the complainant is between 14 and 16 years old, consent may be considered if the accused is less than five years older.*

In both of the situations mentioned above, it is crucial that the accused person does not hold a position of trust or authority over the complainant, is not someone upon whom the complainant depends, and is not engaged in a relationship with the complainant that takes advantage of their vulnerability. In addition, individuals who are 12 or 13 years old are not subject to prosecution for acts outlined in Sections 151, 152, or 173(2) of the Criminal Code, unless the accused has a position of trust or authority, there is a relationship of dependency, or the relationship is exploitative in nature. It is important to note that although the legal age of consent is 16 years old, the law also safeguards against sexual exploitation of "young persons" by individuals who hold positions of trust or authority over them, are in a dependent relationship with them, or engage in exploitative relationships with them.

³³ United Nations Convention on the Rights of the Child. 1989. art. I

³⁴ Criminal Code of Canada, sec. 150.

The word "young persons" is defined as an individual who is at least 16 years old but not yet 18 years³⁵ old. In addition, Section 153 of the Criminal Code outlines specific conditions or elements that a court may use to deduce instances of sexual exploitation.

“The text of the provision is as follows:

“Section 153 pertains to the act of sexual exploitation.

A judge can deduce that a person is involved in an exploitative relationship with a young person based on various factors, including:

- (a) the age of the young person;*
- (b) the age difference between the person and the young person;*
- (c) the development of the relationship; and*
- (d) the level of control or influence exerted by the person over the young person”.*

b. United States of America

The age at which an individual is legally considered capable of giving consent for sexual activities differs among different states in the United States. According to federal legislation, the legal age at which an individual can give consent is 18 years.³⁶ In numerous jurisdictions, apart from the age of consent, there exists a minimum age criterion. Engaging in sexual intercourse with someone who is above the minimum age requirement but below the age of consent can be considered a criminal offence, depending on the age difference between the two individuals and/or the age of the accused. For example, in the state of New Jersey, the legal age at which an individual is considered capable of giving consent is 16 years. An individual who is at least 13 years old can legally give consent to engage in sexual behavior with another individual who is no more than 4 years older than the minor.³⁷

The "Romeo and Juliet Laws" are alternative terms used to describe the minimum age requirement or close-in-age exception. Additionally, numerous states have laws that establish a minimum age for defendants, below which individuals cannot be charged with the crime of engaging in sexual intercourse with minors.

³⁵ Criminal Code of Canada, sec. 153

³⁶ United states Code, sec. 2251

³⁷ The New Jersey Code of Criminal Justice, sec. 2C:14-2

In Nevada, the age of consent is 16 years, however, engaging in sexual intercourse with a person under the age of 16 would be considered a sexual assault crime only if the perpetrator is at least 18 years old.³⁸ Additionally, there exists a legal exception known as the Romeo-Juliet exception, which applies when the offender is 18 years or older and the victim is between the ages of 14 and 15, with a minimum age difference of 4 years between them.³⁹

c. Australia

The age of consent in Australia ranges from 16 to 17 years, depending on the specific State or territory. Additionally, in most states, engaging in sexual activity with a person aged 16 or 17 who is under the special care of someone in a supervisory role is considered a criminal offence. This would encompass situations where individuals in positions of power, such as educators, guardians, and healthcare professionals, engage in sexual interactions with individuals who are underage or under their responsibility and oversight. Several states include close-in-age exemptions as a legal defence where there is consensual sexual activity between two individuals who are below the age of consent.⁴⁰

d. Japan

In Japan, the age of consent was 13 years⁴¹ until 2023. The age of majority is 20 years,⁴² while the minimum age for marriage is 18 years for men and 16 years⁴³ for women. Additionally, a person who is under the legal age of adulthood must obtain the permission of their parents in order to enter into a marriage.⁴⁴ The Japanese criminal law dealing with sexual offences has faced significant criticism from various groups due to its retention of a low age of consent and inadequate penalty, which has been constant since 1907.

These concerns, along with others, have plagued the legislation. Considering this, the Japanese Parliament recently enacted a set of laws that overhauled the legal regulations pertaining to sexual offences, including the increase of the age of consent to 16 years.⁴⁵

³⁸ Nevada Revised Statutes. sec. 200.366.

³⁹ Id. sec. 200.364.

⁴⁰ Australian Institute of Family studies, "Age of consent laws in Australia: CFCA Resource sheet - May 2021" (May, 2021) available https://aifs.gov.au/sites/default/files/publicationdocuments/2104_age_of_consent_resource_sheet_0.pdf visited 6th may, 2024).

⁴¹ Penal Code of Japan, 1907, art. 177.

⁴² Civil Code of Japan, 1896, art.4.

⁴³ Article .731.

⁴⁴ Article 738,

⁴⁵ Sayantani Biswas, "Japan raises age of consent from 13 to 16 after over a century" Live Mint, June 16, 2023, (last visited 6th may, 2024).

2.6 Interpretation of National Crime Bureau Data from 2018-2022 on POCSO Act, 2012

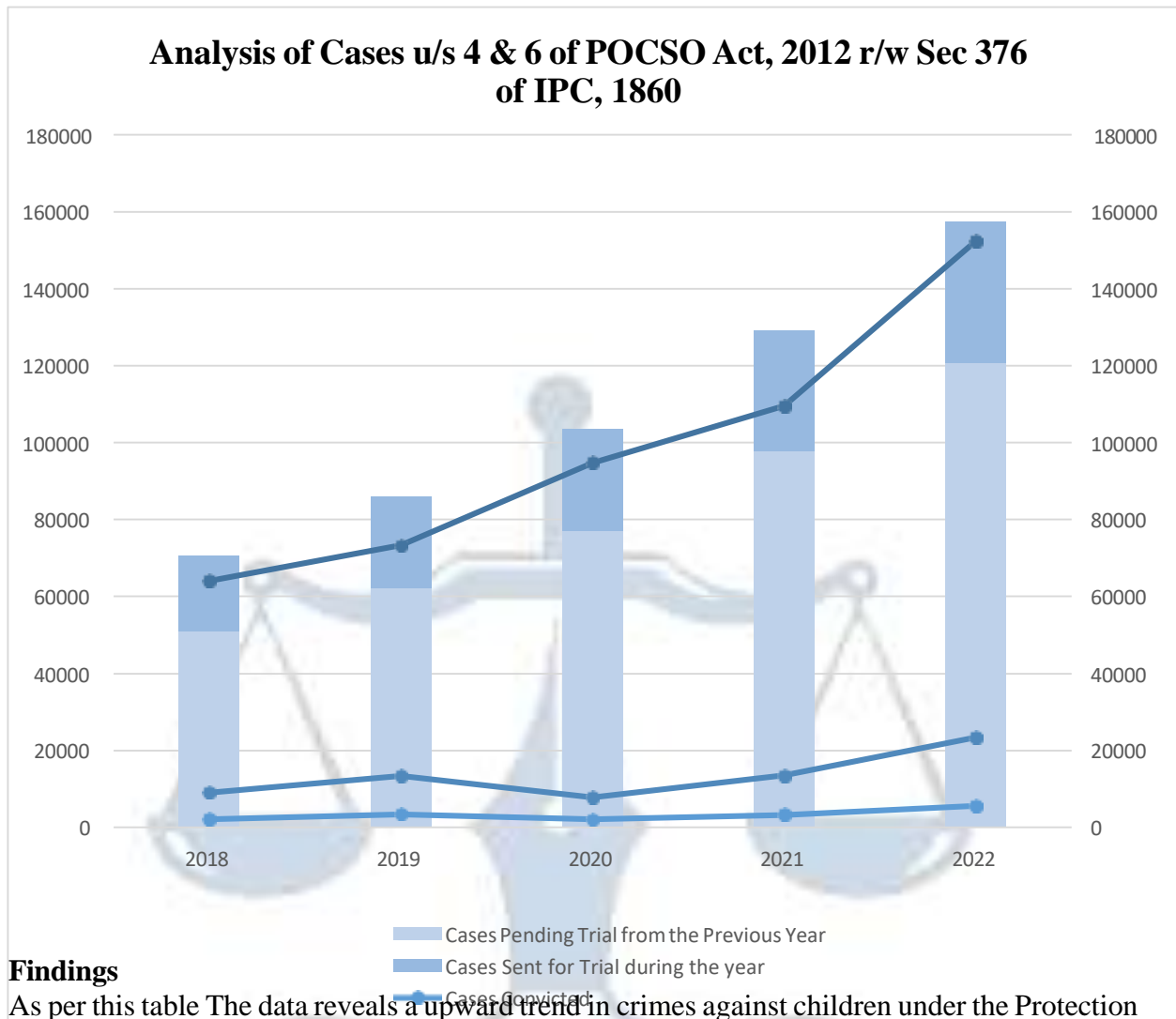
Before interpreting the data given by NCRB from 2018- 2022 it is important to know that There is no separate record maintained of cases wherein romantic relationship is alleged and all cases irrespective of factual consent or absence thereof are treated as offences and collated as such in the data.

TABLE 1

Court Disposal Of Crime Against Children (Crime- Head Wise) 2018-22 Under Protection of Children from Sexual Offences Act, 2012 under section 4&6 of POCSO Act read with section 376 IPC with respect to girls.

Years {1}	Cases Pending Trial from the Previous Year {2}	Cases Sent for Trial during the year {3}	Total Cases for Trial (Col.3+ Col.4) {4}	Cases Abated by Court {5}	Cases Withdrawn from Prosecution {6}	Cases Compounded or Compromised {7}	Cases Disposed of by Bargaining {8}	Cases Quashed {9}	Cases Disposed Without Trial (Col.5+Col.6+Col.7+ Col.8+ Col.9) {10}	Cases Stayed Sent Record Room {11}
2018	51080	19544	70624	20	0	53	3	18	94	1
2019	62209	23884	86093	42	1	79	5	35	162	10
2020	77306	26286	103592	40	0	72	6	18	136	6
2021	97816	31371	129187	53	2	195	2	25	277	8
2022	120647	36683	157330	134	5	192	1	57	389	16

Cases Convicted Out of Cases from Previous Year {12}	Cases Convicted Out of Cases during the Year {13}	Cases Convicted (Col.12+ Col.13) {14}	Cases Discharged {15}	Cases Acquitted {16}	Cases in which Trials were Completed (Col.14+ Col.15+ Col.16) {17}	Cases Disposed of by Courts (Col.10+ Col.17) {18}	Cases Trial at End the Year (Col.18) {19}	Pend
1835	345	2180	249	4465	6894	6988	63636	
2984	444	3428	442	6016	9886	10048	76045	
1853	281	2134	279	3227	5640	5776	97816	
2846	424	3270	297	6660	10227	10504	118683	
5095	500	5595	413	11841	17849	18238	139092	



Findings

As per this table The data reveals a upward trend in crimes against children under the Protection of Children from Sexual Offences Act from 2018 to 2022. There was a consistent year-over-year increase in cases pending trial from the previous year, new cases sent for trial, and the total cases pending trial at the end of each year. While the number of cases disposed of without trial and convictions fluctuated, they too showed an overall increase over this period.

The data paints a grim picture of the rising number of crimes against children under the Protection of Children from Sexual Offences Act from 2018 to 2022. The cases pending trial from the previous year saw a staggering increase of 136% from 51,080 in 2018⁴⁶ to 120,647 in

⁴⁶ "Crime in India 2018 - Volume 1," National Crime Records Bureau (NCRB), https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1653734481_Crime%20in%20India%202018%20-%20Volume%201_3_0_0.pdf (last visited 6th May 2024).

2022. Similarly, the cases sent for trial during the year increased by 87.6% from 19,544 in 2018 to 36,683 in 2022. Consequently, the total cases for trial more than doubled, rising by 123% from 70,624 in 2018 to 157,330 in 2022.

While the cases disposed of without trial fluctuated, they witnessed an overall increase of 313.8% from 94 in 2018 to 389 in 2022. The number of convictions also surged by 156.7%, from 2,180 in 2018 to 5,595 in 2022.⁴⁷ However, the cases in which the accused were discharged or acquitted also saw a significant rise, with discharges increasing by 65.9% (from 249 to 413) and acquittals spiking by 165.1% (from 4,465 to 11,841) during the same period.

The total cases disposed of by courts exhibited a concerning upward trajectory, rising by 160.8% from 6,988 in 2018 to 18,238 in 2022. Consequently, the cases pending trial at the end of the year nearly doubled, increasing by 118.6% from 63,636 in 2018 to 139,092 in 2022, highlighting the judiciary's struggle to keep pace with the growing caseload of crimes against children.

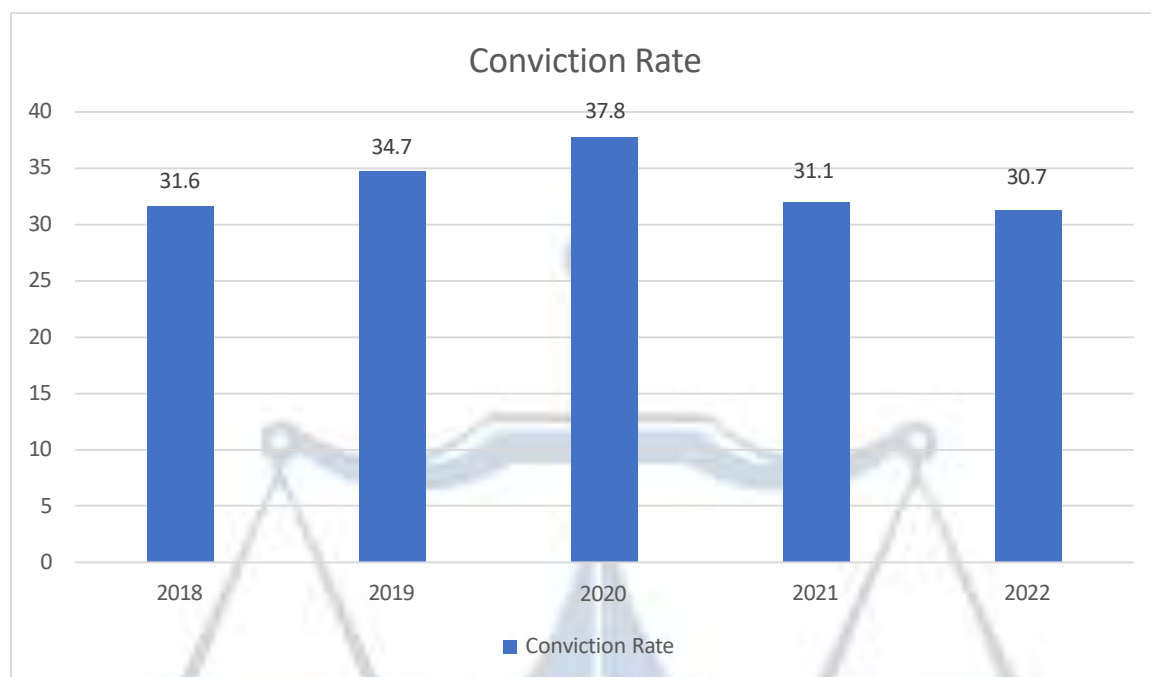
The data reveals an increasing trend in the number of cases where the accused was either acquitted or discharged in crimes against children under POCSO Act, 2012. Acquittals surged by a staggering 165.1%, from 4,465 cases in 2018 to 11,841 in 2022, indicating potential issues with evidence or prosecution or any romantic relationship between offender & accused. Similarly, discharges rose by 65.9%, from 249 in 2018 to 413 in 2022, albeit with some fluctuations.

On the other hand, the cases compounded or compromised saw an overall increase of 262.3%, from 53 in 2018 to 192 in 2022, suggesting some cases were settled outside the court. The number of cases withdrawn from prosecution, though relatively small, increased from zero in 2018 to 5 in 2022..

The significant rise in acquittals and discharges tell us about the lack of evidence and proof of guilt beyond reasonable doubt by the prosecution. Simultaneously, the increase in compounded or compromised cases could indicate victims or families agreeing to settlements, potentially due to rise in cases of “Consensual Romantic Relationships”. These trends underscore the need

⁴⁷"Crime in India 2022 - Book 1," National Crime Records Bureau (NCRB), <https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1701607577CrimeinIndia2022Book1.pdf> (last visited 6th May 2024).

for the justice system's response towards the consensual relationships in the cases of POCSO Act, 2012 and ensure fair trials and appropriate dispositions.



Findings, The conviction rate in cases disposed of by courts under the POCSO Act exhibited a fluctuating trend from 2018 to 2022. After an initial increase from 31.6 % in 2018 to 34.7% in 2019⁴⁸, the conviction rate further improved to 37.% in 2020, marking the highest rate during this period. However, this positive trajectory was reversed in the subsequent two years, with the conviction rate declining to 31.1% in 2021⁴⁹ and further dipping to 30.7% in 2022 – the lowest rate in the given timeframe. While the conviction rate showed a 5.8 percentage point improvement from 2018 to its peak in 2020,⁵⁰ the following two years witnessed a 6.3 percentage point decrease, reflecting the judiciary's interpretation while dealing with the cases

⁴⁸ Crime in India 2019 - Volume 1," National Crime Records Bureau (NCRB), https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1653730573_CII%202019%20Volume%201.pdf (last visited 6th May 2024).

⁴⁹ Crime in India 2021 - Volume 1," National Crime Records Bureau (NCRB), <https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1696831798CII2021Volume1.pdf> (last visited 6th May 2024).

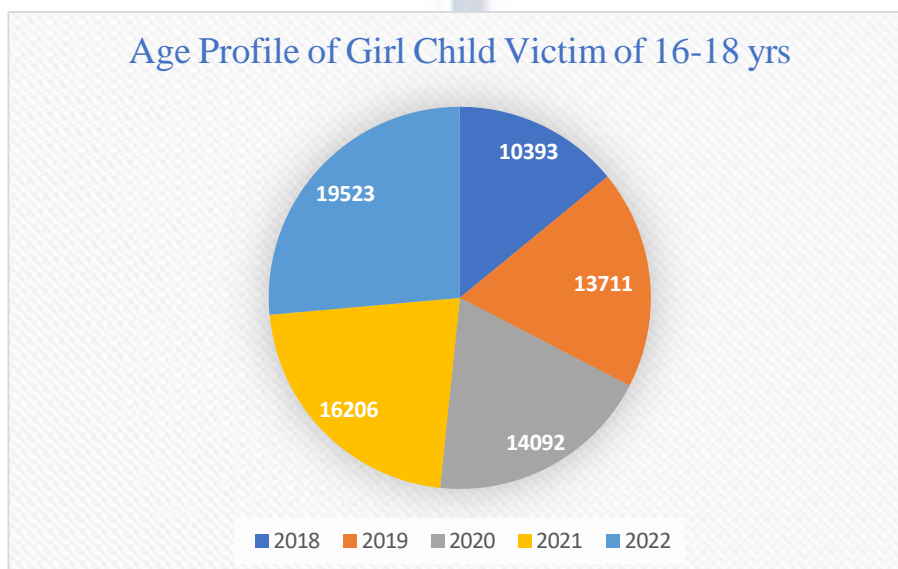
⁵⁰ Crime in India 2020 - Volume 1," National Crime Records Bureau (NCRB), <https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/post/16959885631653645869CII2020Volume1.pdf> (last visited 6th May 2024).

under POCSO Act, 2012. This declining conviction rate tell us about varied interpretation given by court based upon the facts and circumstances of each case.

TABLE -2

Age Profile of Girl Child Victim of Protection of Children from Sexual Offences Act, 2012 (State/UT-wise)-2018-2022

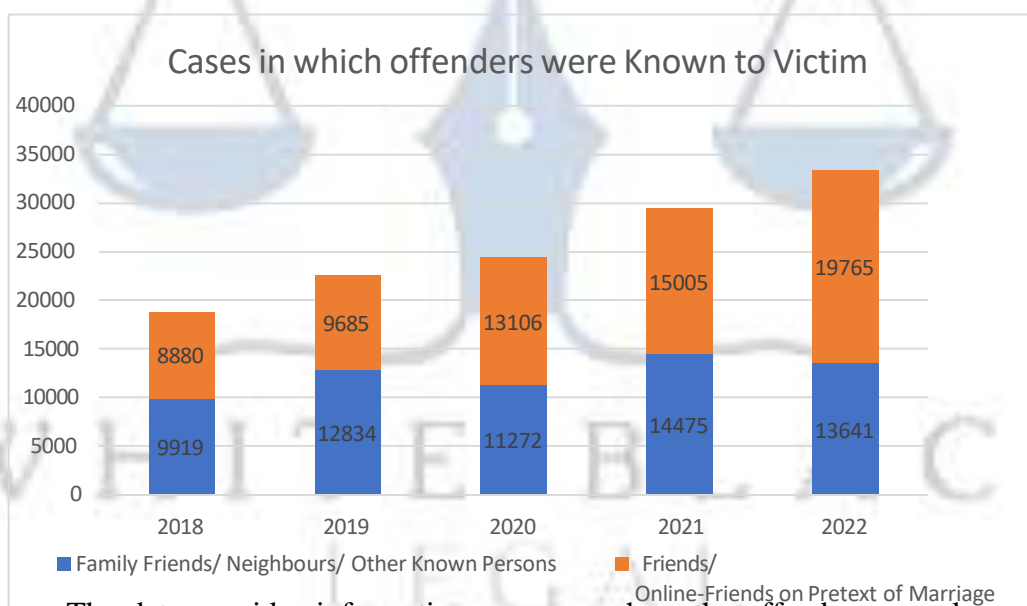
S.NO	Years	Age	All India
1.	2018	16-18 years (Girls)	10393
2.	2019	16-18 years (Girls)	13711
3.	2020	16-18 years (Girls)	14092
4.	2021	16-18 years (Girls)	16206
5.	2022	16-18 years (Girls)	19523



Findings, The data present an increase in the number of girl child victims aged 16-18 from 10,393 cases in 2018 to 19,523 cases in 2022 under the Protection of Children from Sexual Offences (POCSO) Act in India from 2018 to 2022. This Data also infers on the fact that the young adolescents from the age of 16-18 engage more in the sexual relationships with young men and this can be due to many factors such as biological changes, development of the body and it might indicate that there is a need for change in the age of consent among young people with respect to POCSO Act, 2012.

TABLE – 3
Offenders Relation to Child Victims Of POSCO Act (Section 4 & 6)-2018-2022- Cases in which offenders were known to victim all over India including State & Union Territories.

Years	Cases known to Victim (Total) (Col.2+Col.3)	Offender Neighbours/ Other Persons	Family Friends/ Friends/ Online-Friends on Pretext of Marriage	Percentage Share of Persons Known Cases to Total Cases
S.no	1	2	3	4
2018	18799	9919	8880	94.9
2019	22519	12834	9685	94.2
2020	24378	11272	13106	96.0
2021	29480	14475	15005	97.1
2022	33406	13641	19765	96.8



Findings, The data provides information on cases where the offenders were known to the victims, including family members, friends, neighbours, and online friends.

- a) In 2018, out of the total 18,799 cases, 9,919 cases involved family members, friends, neighbors, or other known persons, accounting for 94.9% of the known offender cases.
- b) In 2019, out of 22,519 cases, 12,834 cases involved family members, friends, neighbors, or other known persons (94.2% of known offender cases).

- c) In 2020, out of 24,378 cases, 11,272 cases involved family members, friends, neighbours, or other known persons (96% of known offender cases).
- d) In 2021, out of 29,480 cases, 14,475 cases involved family members, friends, neighbours, or other known persons (97.1% of known offender cases).
- e) In 2022, out of 33,406 cases, 13,641 cases involved family members, friends, neighbours, or other known persons (96.8% of known offender cases).
- f) The data highlights that a significant proportion of offenders in cases under POCSO Act (Section 4 & 6) were known to the victims, including family members, friends, neighbours, and online friends.

TABLE -4
Police Disposal Of Crime Against Children (Crime- Head Wise) 2018-2022
Under section 4&6 of Protection OCSO Act read with section 376 IPC committed against girls.

Years	Cases Investigation from Year {1}	Pending Previous year {2}	Cases Reported during the year {3}	Cases Reopened for Investigation {3}	Total Cases for Investigation Col {4}	Cases not Invested Under Section 157(1) (b) CrPc {5}	Cases Transferred to other State or Agency {6}	Cases Withdrawn by the Govt during investigation {7}	Cases Ended as FR Non Cognizable {8}	Cases Ended Final Report False {9}
2018	7761	21401	2	29164	1	48	0	5	191	
2019	8975	25934	66	34975	1	72	0	8	275	
2020	9852	27807	36	37695	2	78	1	19	299	
2021	10405	33036	22	43463	1	104	0	9	371	
2022	11232	37511	157	48900	0	165	1	2	680	

Cases Ended as Mistake of Law or Civil Dispute {10}	Cases True but Insufficient Evidence or Untraced or No Clue {11}	Cases Abated during Investigation {12}	Total Cases Col 8+9+10+11+12 {13}	Cases Charge-sheeted {14}	Total Cases Disposed by Police Col 5+6+13+14 {15}	Cases Off at Investigation Stage {16}	Cases Quashed at Investigation Stage {17}	Cases Stayed at Investigation Stage {17}	Cases Pending at End of the Year Col= 4-7-15-16 {18}	Pendency Percentage Col= 17/4 {19}
219	360	42	817	19544	20410	13	14	8741	30.0	
188	602	20	1093	23884	25050	12	55	9913	28.3	
132	424	30	904	26286	27270	11	2	10413	27.6	
248	478	40	1146	31371	32622	8	62	10833	24.9	
221	557	23	1483	36683	38331	63	10	10505	21.5	

Findings, Overall the number of cases pending investigation at the end of the year (Column 18) has fluctuated over the years but showed an overall increasing trend. In 2018, 8,741 cases were pending investigation. This number increased to 9,913 in 2019, 10,413 in 2020, and 10,833 in 2021, but decreased slightly to 10,505 in 2022.

After that in relation to case disposals, the number of cases ended as false (final report false) has increased from 191 in 2018 to 680 in 2022. However, the cases ended due to mistakes of fact, law, or civil disputes showed a slight increasing trend from 219 in 2018 to 221 in 2022. Similarly, cases closed due to insufficient evidence, being untraced, or lack of clues increased from 360 in 2018 to 557 in 2022.

Lastly, The total number of cases disposed of by the police saw a significant increasing rate, from 20,410 in 2018 to 38,331 in 2022 - an increase of around 88%. Overall, the data tries to highlight the increasing trend in false cases, cases closed due to insufficient evidence, being untraced, under POCSO Act, 2012 and this might indicate the fact that there are false cases filed against the male accused by the family members or relatives in the case of consensual relationship between the accused and the victim.

TABLE-5
Disposal Of Persons Arrested For Crime Against Children (Crime Head-Wise) 2018-2022

Under section 4&6 of Protection of Children from Sexual Offences Act,2012 read with section 376 Indian Penal Code, 1860 committed against girls.

Years	Persons Arrested (Male)	Persons Charge sheeted (Male)	Persons Convicted (Male)	Persons Discharged (Male)	Persons Acquitted (Male)
2018	25641	23673	3037	356	5333
2019	30653	764	28865	4282	7223
2020	33745	31671	2525	362	4061
2021	39908	37194	3821	327	7951
2022	45159	44029	6405	466	13848

Findings, In 2018, 25,641 males were arrested, while this figure escalated to 45,159 in 2022. Similarly, the number of males charge-sheeted increased from 23,673 in 2018 to 44,029 in 2022. The data also indicates fluctuations but an overall increase in the number of convictions,

with 3,037 males convicted in 2018 and 6,405 in 2022. But most importantly the number of persons acquitted showed a significant increasing rate, rising from 5,333 in 2018 to 13,848 in 2022 - an increase of over 159%. In contrast, the number of convictions increased at a slower rate, from 3,037 in 2018 to 6,405 in 2022 - an increase of around 111%. This disparity between the rates of acquittals and convictions in the POCSO Act, 2012 shows the liberal approach taken by the courts these days in relation to the dynamics of changing society and its structure. It can also be observed that there is a need to amend the POCSO Act, 2012 with regards to consensual relationship and also there should be an thorough examination on the issue of age of consent under POCSO Act, 2012.

2.7 Conclusion

The legislative framework should revisit the "age of consent" provision under the POCSO Act, 2012,⁵¹ to prevent unnecessary criminalization of adolescents, whether as victims or accused, for exploring their sexuality, which is a natural part of their development. It is crucial to recognize that experimentation with sexuality is a trait of adolescence, and adolescents should not be penalized for this.

The Kerala High Court has acknowledged that sexual activity among young individuals is often a result of relationships that go beyond platonic love. Prosecuting and sentencing an individual found to have engaged in consensual sexual intercourse with a 16 or 17-year-old to a minimum sentence of 10 or 20 years violates the principle of proportionality, which should be considered not only during sentencing but also while enacting substantive criminal legislation.

The Kerala High Court observed that the statute fails to distinguish between the traditional concept of "rape" and "sexual interactions" arising from pure affection and biological changes. The laws do not consider the biological inquisitiveness of adolescence and treat all "intrusions" on bodily autonomy, whether consensual or not, as rape for certain age groups of victims.

Legislators need to recognize that the successful enforcement of criminal laws depends on their acceptance by society; otherwise, those for whose supposed protection such laws were enacted may justify defying them.

⁵¹ *Supra note 1*

Since the "age of consent" fixed by the POCSO Act, 2012, is arbitrary, determining an appropriate age is a difficult task. Two factors should be considered: firstly, allowing sexual freedom to young, physically mature individuals while protecting young, psychologically immature individuals from harm and exploitation; secondly, basing the age on evidence and scientific rationality through detailed deliberations among relevant professionals, rather than being guided by emotions. Legal provisions should address extraordinary situations, not ordinary ones. A law that criminalizes normal behavior and activities arouses public sympathy towards the accused instead of condemning their conduct.

The NCRB data from 2018-2022 interprets the disposal of cases by courts and police under the POCSO Act, 2012 considering factors such as false cases, withdrawn cases, disposed cases, and quashed cases. It also discusses the age profile of victims aged 16-18 and the rates of conviction and acquittal in POCSO cases. This data indicates the need to reform or amend the laws related to the age of consent under the POCSO Act, 2012.

Until the "age of consent" is thoroughly discussed, it is hoped that courts will come to the rescue of adolescents in consensual romantic relationships and protect them from the harsh consequences of the POCSO Act, 2012.



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CHAPTER 3

EXAMINATION OF THE APPLICATION OF QUANTUM OF PUNISHMENT & SENTENCING UNDER THE POCSO ACT, 2012, CONCERNING CONSENSUAL ROMANTIC RELATIONSHIPS

3.1 Introduction

Under Protection of Children from Sexual Offences Act, Child means any person below the age of 18 years. There are three broad classifications of sexual offences indictable under POCSO Act, 2012: Sexual Assault, Sexual Harassment and using child for pornography. Sexual assault has various degrees based upon the nature of offence committed.

Now after the coming of Criminal Law Amendment Act, 2013 the POCSO Act, 2012 has expanded the definition of "penetrative sexual assault" to include penetration of a child's anus/vagina/mouth by a penis, fingers or other objects. The POCSO Act, 2012 also mandated stricter punishments with minimum mandatory sentences.

There is no provisions under POCSO Act, which covers the issue or problems revolved around Consensual Romantic Relationships but based upon the interpretations given by different court and changes in the society led to the study of current act with regarding to application of quantum of punishment imposed with same degree with reference to consensual romantic relationships.

Section 3 of the POCSO Act, 2012 defines Penetrative Sexual Assault is more grave offence than sexual assault which includes any person:

- Who is penetrating his penis to any extent into the vagina, mouth, anus or urethra of the child or makes the child to do with him or any other person.
- Inserting any object or body part into a child's vagina, mouth, anus or urethra. Or forcing the child to do this act with the perpetrator or another person.
- Using one's mouth on a child's vagina, mouth, anus or urethra. Or forcing the child to do this act with the perpetrator or another person.
- If the perpetrator manipulates the child's body in order to forcibly penetrate the child's vagina, urethra, anus or any other part of the child's body, or forces the child to do this act with the perpetrator or another person.⁵²

⁵² The Protection of Children From Sexual Offences Act, 2012, Section 3, Act No. 32 Of 2012

Section 4 of the POCSO Act, 2012 provides punishment for penetrative sexual assault which says that whoever commit the offence of penetrative sexual assault on child, will be imprisoned for minimum 7 years which may be extended life imprisonment and shall also be liable for fine.⁵³

After discussing the punishment of penetrative sexual assault under section 4 the act under Section 5, describes the situations where the crime of sexual assault is perpetrated by certain persons or in certain situation then the offence is said to be aggravated i.e., it becomes graver and punishment is much greater. Further, the offence of Sexual Assault committed by any of the persons or in any of certain circumstances listed below, then it turns out to be the case of aggravated sexual assault.⁵⁴

In following cases, the offence of penetrative sexual assault becomes aggravated:

- By a police officer, member of armed/security forces, public servant while on duty
- By jail staff on an inmate child
- By hospital staff on a child patient
- By educational/religious institution staff on a child in the institution
- Gang penetrative assault on a child
- Using deadly weapons/fire/corrosive substances
- Causing grievous harm/injury to the child
- Leading to pregnancy, HIV/life-threatening disease, or mental/physical incapacitation of the child
- Taking advantage of the child's disability
- Repeated assaults on the same child
- On a child below 12 years
- By a relative/family member/person in a position of trust
- During communal/sectarian violence
- By a repeat offender
- Forcing the child to parade naked⁵⁵

Section 6 of the POCSO Act, 2012 provides punishment for aggravated penetrative sexual assault is rigorous imprisonment of at least 10 years, which can extend to life imprisonment,

⁵³ The Protection of Children From Sexual Offences Act, 2012, Section 4, Act No. 32 Of 2012

⁵⁴ The Protection of Children from Sexual Offences Act, 2012, Section 5, Act No- 32 of 2012

⁵⁵ Ibid 3

plus a fine.⁵⁶ Further under the POCSO Act, 2012 reporting offenses against children is mandatory. Any person can file a report, whether the crime has already occurred or if there is an apprehension that such a crime may take place. Even the child victim themselves can directly report the offense.⁵⁷ Failing to report offense under POCSO Act, 2012 is punishable. For ordinary individuals, not reporting can lead to up to 6 months in jail and/or a fine. For those in charge of institutions, failing to report an offense by their subordinates can result in imprisonment of up to 1 year and/or a fine.⁵⁸

This mandatory reporting obligation extends to certain professional domains as well. Those working in media, hospitality services, healthcare facilities, clubs or studios must inform authorities if they come across any sexually exploitative material involving children, such as pornography or obscene depictions.⁵⁹ The media houses or professionals need to report any such instances to the Special Juvenile Police Unit or the local police station. The overarching principle is that POCSO offenses or prospective offenses against minors must be reported, with legal consequences for non-reporting. However, the POCSO Act, 2012 provides protection to those who report offenses against children in good faith. It specifically states that an individual cannot face civil or criminal liability for providing information about the occurrence of a sexual offense against a child or the potential likelihood of such an offense, as long as it is done in good faith.⁶⁰ The term "good faith" is defined in Section 52 of the Indian Penal Code as acting with due care and attention. This means the person reporting must have exercised proper care and diligence before notifying the police about the child sexual offense. However, this exemption from liability only applies if the matter is reported directly to the police. Informing a superior or any other authority besides the police does not provide protection from potential liability under the POCSO Act, 2012.

While discussing the issues related to Mandatory reporting, combined with a lack of recognizing adolescent sexuality, creates major barriers and a hostile environment for adolescents trying to access confidential sexual and reproductive health services⁶¹. For example, in some cases girls fear that their partners may get reported to the police, this fear

⁵⁶ The Protection of Children From Sexual Offences Act, 2012, Section 6, Act No. 32 Of 2012

⁵⁷ The Protection of Children from Sexual Offences Act, 2012, Section 19, Act No-32 of 2012

⁵⁸ The Protection of Children from Sexual Offences Act, 2012, Section 21, Act No- 32 of 2012

⁵⁹ The Protection of Children from Sexual Offences Act, 2012, Section- 20, Act No-32 of 2012

⁶⁰ The Protection of Children from Sexual Offences Act, 2012, Section 19(7), Act No-32 of 2012

⁶¹ CL-NLISU, "An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children" (2018), p.14-15 <https://feministlawarchives.pldindia.org/wp-content/uploads/Mandatory-Reporting-Paper-CCL-NLSIU.pdf>; Aparna Chandra, et.al, Legal Barriers to Accessing Safe Abortion Services in India: A Fact Finding Study, (2021) 140-142; <https://www.nls.ac.in/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India.pdf>, last visited on 20 April 2024

deter them from seeking professional help in medical emergency like abortions and all of this led them to use unsafe protection options⁶². Evidence shows the risk of death from abortion complications is highest among underage girls aged 15-19 in India.⁶³ It also affects adolescents needing diagnostic tests for pregnancy, STIs or HIV, as they cannot access these confidentially. This legal regime goes against the UN's recommendation to India to ensure adolescents have effective access to confidential sexual/reproductive health information and services like contraception, as well as access to legal abortions for girls.⁶⁴

The article from the Centre for Child and the Law at NLSIU Bangalore tries to⁶⁵ examined the implications of mandatory reporting involving consensual sexual relationships between adolescents under POCSO Act, 2012 .In this article the researcher has conducted Interviews with doctors which revealed that POCSO does not provide any exceptions for reporting in cases of consensual relationships between adolescents or exempt sex within child marriages from criminal liability. Also, one of the doctor while giving the interview stated that while sex education is important, teenagers over 16 engaging in voluntary sex cannot be treated as criminals. Another doctor explained that often children come for abortions and want to move on without legal entanglement. In consensual cases, they fear being forced into unwanted marriages if reported.

A counsellor felt the best approach for consensual adolescent relationships would be open discussions involving all stakeholders to provide support and guidance, without moral judgment or criminal proceedings. However, POCSO currently does not allow for this approach. The crux is that POCSO's mandatory reporting currently does not differentiate between consensual adolescent relationships and child sexual abuse cases, creating challenges for medical professionals.

⁶² Vrinda Grover, "Criminalisation of even consensual sex between adolescents obstructs access to safe abortion for girls," Times of India, 19 October 2019, <https://timesofindia.indiatimes.com/blogs/toi-edit-page/criminalisation-of-even-consensual-sex-between-adolescents-obstructs-access-to-safe-abortion-for-girls/>, last visited on 20 April 2024

⁶³ Aparna Chandra, et.al, Legal Barriers to Accessing Safe Abortion Services in India: A Fact Finding Study, (2021) 140-142; Supra n.14; International Planned Parenthood Federation, <https://www.nls.ac.in/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India.pdf>, Last visited on 20 April 2024

⁶⁴ UN Committee on the Rights of the Child (CRC), Concluding observations on the consolidated third and fourth periodic reports of India, CRC/C/IND/CO/3-4, 13 June 2014, <https://www.refworld.org/policy/polrec/crc/2014/en/101384> , last visited on 20 April 2024, Para 66(b). Committee on the Rights of the Child, General Comment No.3, 'HIV/AIDS and the rights of the child', CRC/GC/2003/3, [17 Mar 2003].

⁶⁵ Centre for Child and the Law at NLSIU Bangalore ,An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children, 15 June 2018,pg14-15, <https://feministlawarchives.pldindia.org/wp-content/uploads/Mandatory-Reporting-Paper-CCL-NLSIU.pdf>

In another case *X v. Principal Secretary case, Health & Family Welfare Department*⁶⁶ the Supreme Court there is a conflict between the POCSO Act, 2012 & doctor-patient privacy under the Medical Termination of Pregnancy Act, 1971 and the reproductive autonomy of minors. The Hon'ble Court observed that cases where minors below 18 are engaged in consensual sexual activity and seek an abortion, the Court said that if requested by the minor and their guardian, the registered medical practitioner (doctor) does not need to disclose the minor's identity or personal details when reporting under POCSO's Section 19. The doctor will also be exempt from revealing the minor's identity in any criminal proceedings arising from their report under Section 19. The Hon'ble Court in its guidelines aims to ensure that minors can access abortion services, cases where adolescents in a consensual relationship wish to continue the pregnancy will likely still get reported by doctors. So in summary, it allows some privacy for minor abortion cases if requested, but does not cover cases of adolescents in a consensual relationship who wish to retain the pregnancy will continue to be reported.

The POCSO Act, 2012 cast reverse burden of proof on the accused to prove his case beyond reasonable doubt, generally in criminal justice system this duty is on the prosecution to prove the accused person guilty.

Under Section 29 of the Protection of Children from Sexual Offences Act, 2012, there are certain presumptions that apply in grave offences like penetrative sexual assault (Section 3), aggravated penetrative sexual assault (Sections 5 & 9), and sexual assault (Section 7). For these offenses, the Special Court shall presume that the accused person has committed, abetted or attempted to commit the alleged offense, unless the contrary is proved by the accused.

This means the burden of proof is reversed, and it is presumed the accused is guilty unless they can rebut the presumption and prove their innocence.

A conflict arises regarding the position of romantic relationships between minors under adult person under POCSO Act, 2012 because the presumption of guilt placed on the accused. In the cases where both parties engaged in consensual acts without any coercion, it becomes difficult to adjudicate fairly because the burden of proof lies on the accused to rebut the presumption.

⁶⁶ Civil Appeal No 5802 of 2022, decided by the Supreme Court on 29.09.22.

The POCSO Act, 2012 was enacted with the commendable goal of protecting children from sexual abuse, incorporating victim-friendly prosecution provisions, ensuring victim safety, and enabling accessible reporting mechanisms, certain aspects require reconsideration. Thus, presumption of guilt and the shifting of the burden of proof, though intended to motivate reporting, has given rise to calls for a consistent and effective implementation policy by amending the provisions like Sections 29 (presumption as to certain offenses) and 2(d) (definition of a child as anyone below 18. As these provisions embarks fear on the child from reporting abuse based upon the apprehension of being prosecuted or having their partners prosecuted for consensual acts.

After discussing the burden of proof earlier the Section 30 of the act deals with the presumption of a culpable mental state required to commit offenses under POCSO.

In any prosecution requiring proof of a culpable mental state like intention, motive, knowledge or belief on part of the accused, the Special Court shall presume the existence of such a culpable mental state. However, it is a valid defence for the accused to prove that they did not possess the required culpable mental state for the alleged offense.

The presumption of a culpable mental state only stands rebutted when the Special Court believes beyond reasonable doubt that the accused did not have the required mental state, not just when raised on a preponderance of probabilities. So in essence, these sections reverse the burden to the accused to disprove the presumptions related to the commission of certain child sexual offenses and their required mental state. Hence, to encourage reporting of abuse without fear, some provisions, including those mentioned, under section 19, 29, 30 of the POCSO Act, 2012 may require reconsideration by policymakers. A balanced approach that protects children while not criminalizing consensual romantic acts between adolescents is needed through a carefully examined and consistent implementation framework.

3.2 Factors which affect the nature of punishment given in cases of consensual romantic relationship.

The following are the case laws from various High Courts in India to depict the nature of offences under POCSO Act, 2012 and how some factors affect the nature of punishment given in the cases of consensual romantic relationships. It is pertinent to note that in certain cases, criminal proceedings against the accused have been quashed by invoking Section 482 of the

*Code of Criminal Procedure 1973 (CrPC).*² Further, the Code of Criminal Procedure, 1973 lays down the general factors to determine punishment for prosecution of offenders with a specific hierarchy of criminal courts that applies uniformly across every state.³

In the case of *Yunusbhai Usmanbhai Shaikh v State of Gujarat*⁶⁷, a 16-year-old girl had married the accused according to Muslim rites. The accused was 12 years older than her. He was charged with kidnapping, abducting, inducing a woman for marriage, and rape under the Indian Penal Code (IPC). However, the girl admitted that she had accompanied the accused of her own free will. It could not be proven that she received any promises, assurances or tempting offers from the accused to force or entice her to leave her parental home. Hence, the accusations of kidnapping and rape could not be established against him, and the pending criminal proceedings were likely to be quashed. The Court stated that the Prohibition of Child Marriages Act 2006 was enacted to curb the menace of child marriages, which is most prevalent among the Muslim community and in rural areas.

“Factors like poverty, culture, tradition, patriarchal norms, low education levels of girls, lower status of girls, financial burden considerations, and social customs lead to girls being imprisoned in marriage without consent. However, in this specific case, no offenses as charged could be proven against the husband under the circumstances presented”.

In the case of *Sunil Mahadev Patil v The State of Maharashtra*,⁶⁸ a 15-year-old girl and a 20-year-old man eloped and performed a marriage ceremony, living together at a relative's home. The girl's father charged the man with rape, kidnapping, procuring a minor for sexual acts under the Indian Penal Code (IPC), and penetrative/aggravated sexual assault under POCSO.

The High Court stated that biologically, when a child reaches puberty, they begin to understand their sexual needs. Some religions/sects acknowledge this and allow early marriages to regulate sexual behavior in the community. Due to these social and biological factors, lawmakers set 15 as the age of consent for marriage. ***While examining the cases involving consenting minors in relationships, the court said trial judges should have liberal approach while granting bail, by taking into account:***

⁶⁷ MANU/GJ/0876/2015

⁶⁸ MANU/MH/3141/2015

- a) Age of the minor prosecutrix
- b) Whether violence was involved
- c) If the offender has prior offenses
- d) Likelihood of the offender repeating the act
- e) Risk of threats/intimidation if released
- f) Chances of tampering with witnesses
- g) That young men in their 20s deserve a chance to plan their future

The court allowed bail, stating these factors should guide judges in dealing with cases of consenting romantic relationships involving minors.

In another case of *Shambu Thilak v State of Kerala*⁶⁹, the petitioner and the third respondent were teenage schoolmates in love. When the third respondent (a girl) was 17 years old, she went missing and was found to have engaged in sexual intercourse with the 20-year-old petitioner. Her mother filed a case against him for rape under IPC and penetrative sexual assault under POCSO. However, when both attained majority at 18, they got married. ***“The Court opined this was a case of elopement against her family's wishes, not one involving extreme depravity or cruelty with serious societal impact. It was a long-term love affair between two young people that culminated in marriage. The High Court exercised its extraordinary powers under CrPC Section 482 to quash the criminal proceedings against the petitioner.***

This was considering the hardship on the third respondent if her husband was prosecuted further, especially since she did not want to pursue the case and chances of an ultimate conviction were remote given the circumstances.

This case reflects a trend in Indian High Court decisions to favour non-criminalization of sexual acts when the child involved is mature enough to understand the implications, even if the female is a minor. Judges seem disinclined to criminalize such cases between consenting mature individuals”.

⁶⁹ MANU/KE/0043/2017

In the case of *Imran Iqbal Shaikh v. The State of Maharashtra*⁷⁰, the applicant, a young boy of 22 years, was facing trial under the POCSO Act and the Indian Penal Code for alleged sexual offenses involving a minor girl. The victim, considered a child under the POCSO Act, had left her home and stayed with a friend before being allegedly sexually assaulted by the applicant. The court considered the circumstances of the case, including the consensual nature of the relationship as indicated by the first informant.

“It needs to be noted that the POCSO Act has been enacted to protect children from offences of sexual assault, sexual harassment etc., and contains stringent penal provisions as to safeguard the interest and the well-being of the children. The object is certainly not to punish minors in romantic or consensual relationship and brand them as criminals”. Ultimately, the court granted bail to the applicant on specific terms and conditions, including a cash bail amount, regular reporting to the police station, non-interference with witnesses, and cooperation with the trial proceedings. This case highlights the delicate balance between protecting minors from sexual offenses and ensuring fair treatment for young individuals involved in such cases.

The acquittals in POCSO cases often occur on grounds such as - the victim could not recall their age at the time of sexual intercourse, a valid marriage took place and prosecution failed to prove sexual acts before 18 years of age, lack of evidence of forcible intercourse, the victim did not identify the accused, or the victim was found to be above 18 when the sexual act occurred. One would expect that if the relationship between the victim and accused was romantic in nature, it would be treated as a mitigating factor. However, the data shows that in a significant number of romantic relationship cases (54% in Greater Mumbai and 56% in Dindoshi), the charges framed were under Section 5(1) of POCSO Act, 2012 for "aggravated penetrative sexual assault."⁷¹ Consequently, the romantic cases are treated as "aggravated" offenses under Section 6, of POCSO Act, 2012 attracting the stringent mandatory minimum punishment of 20 years of rigorous imprisonment. Despite the relationship being consensual between the individuals, the tendency is to prosecute such romantic cases as aggravated sexual assaults carrying the harsh & rigorous sentences, rather than considering the consensual romantic relationship as a mitigating factor. This strict approach raises concerns about whether the implementation aligns with the principles observed in some high court judgments, which

⁷⁰ BAIL APPLICATION NO. 997 OF 2022

⁷¹ Maharukh Adenwalla and Prakriti Shah, "Age of Consent" Under the POCSO Act , Published on March 12, 2023, <https://www.scconline.com/blog/post/2023/03/12/age-of-consent-under-the-pocso-act/>

favour non-criminalization of consensual sexual acts between individuals mature enough to understand the implications, even if one party is a minor.

In the legal matter of *Smti. Ephina Khonglah Vs. State of Meghalaya*⁷² the High Court of Meghalaya reviewed a bail application for , Shri Silvester Khonglah, accused of being in a romantic relationship with a minor. ***“The Hon’ble Court observed that the accused being a teenager, is incapable of understanding the consequences of his action and keeping him incarcerated with other inmates, some of whom may be harden criminals will have an impact on his future career”***. It is submitted that the POCSO Act has been enacted to prevent cases of sexual assault on children, however, the Act does not contemplate punishment of teenagers who are involved in romantic love. The court carefully considered various aspects, including the nature of the alleged offense, the relationship dynamics between the accused and the victim, and the provisions outlined in the Protection of Children from Sexual Offences (POCSO) Act. The court acknowledged the primary objective of the POCSO Act to safeguard children from sexual offenses but stressed the importance of examining the specific circumstances of each case, particularly when it involves young individuals in a romantic relationship. The court emphasized the necessity for a nuanced approach in such situations, taking into account the age and comprehension levels of the individuals involved. Additionally, the court considered the duration of the accused person's detention and the stipulation within the POCSO Act for cases to be resolved within a year. These factors were carefully weighed in determining whether the accused individual should be released on bail, potentially subject to certain conditions. Hence, the court's decision to grant bail to the accused individual, Shri Silvester Khonglah, reflects a thoughtful approach that considers the specific details and legal frameworks applicable in such instances.

The Hon’ble Supreme Court in this case touched upon the sensitive issues related to Romantic Consensual Relationships where the court discuss ***scope or ambit, cases of teenagers involved in romantic relationships are concerned.***

“As rightly recognized by the Learned Single Judge of this Court in Sabari’s Case (cited supra), incidences where teenagers and young adults fall victim to offences under the POCSO Act being slapped against them without understanding the implication of the severity of the enactment is an issue that brings much concern to the conscience of this Court.

⁷² BA. No. 14 of 2021

A reading of the Statement of Objects and Reasons of the POCSO Act would show that the Act was brought into force to protect children from offences of sexual assault, sexual harassment and pornography, pursuant to Article 15 of the Constitution of India, 1950 and the Convention on the Rights of the Child. However, a large array of cases filed under the POCSO Act seems to be those arising on the basis of complaints registered by the families of adolescents and teenagers who are involved in romantic relationships with each other. The scheme of the Act clearly shows that it did not intend to bring within its scope or ambit, cases of the nature where adolescents or teenagers involved in romantic relationships are concerned.

nd In the present case, the 2nd Petitioner who was in a relationship with the 2nd Respondent who is also in his early twenties, has clearly stated that she was the one who insisted that the 2nd Respondent take her away from her home and marry her, due to the pressure exerted by her parents. The 2nd Respondent, who was placed in a very precarious situation decided to concede to the demand of the 2nd Petitioner. Thereafter, they eloped from their respective homes, got married and consummated the marriage. Incidents of this nature keep occurring regularly even now in villages and towns and occasionally in cities. After the parents or family lodge a complaint, the police register FIRs for offences of kidnapping and various offences under the POCSO Act. Several criminal cases booked under the POCSO Act fall under this category.

As a consequence of such a FIR being registered, invariably the boy gets arrested and thereafter, his youthful life comes to a grinding halt. The provisions of the POCSO Act, as it stands today, will surely make the acts of the boy an offence due to its stringent nature.

An adolescent boy caught in a situation like this will surely have no defence if the criminal case is taken to its logical end. 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.

An adolescent boy and girl who are in the grips of their hormones and biological changes and whose decision-making ability is yet to fully develop, should essentially receive the support and guidance of their parents and the society at large. These incidents should never be perceived from an adult's point of view and such an understanding will in fact lead to lack of empathy. An adolescent boy who is sent to prison in a case of this nature will be

persecuted throughout his life. It is high time that the legislature takes into consideration cases of this nature involving adolescents involved in relationships and swiftly bring in necessary amendments under the Act. The legislature has to keep pace with the changing societal needs and bring about necessary changes in law and more particularly in a stringent law such as the POCSO Act.”

3.3 Conclusion

The Protection of Children from Sexual Offences (POCSO) Act, 2012, was enacted with the noble intention of safeguarding children from sexual exploitation and abuse. However, the strict provisions of the Act, particularly the mandatory reporting requirement and the presumption of guilt, have raised concerns about their application in cases involving consensual romantic relationships between adolescents.

While the Act aims to protect minors, it fails to differentiate between instances of sexual abuse and consensual relationships between adolescents who are mature enough to understand the implications of their actions. The presumption of guilt under Section 29 and the reversal of the burden of proof place an unfair burden on the accused in such cases, where both parties may have engaged in consensual acts without coercion.

Several High Court judgments have recognized the need for a nuanced approach when dealing with cases involving consenting mature individuals, even if one party is a minor. These judgments highlight the importance of considering factors such as the age of the parties, the absence of violence, the presence of a long-term relationship, and the ultimate culmination of the relationship in marriage.

The Supreme Court, in its observations, has acknowledged the complexities surrounding adolescent romantic relationships and the potential for misuse of the POCSO Act's stringent provisions. The Court has emphasized the need for legislative reforms to address cases involving adolescents in relationships, recognizing that the Act's objective was never to criminalize such relationships.

While the protection of children from sexual abuse remains paramount, there is a growing recognition that a balanced approach is needed to ensure fair treatment for young individuals involved in consensual relationships. The presumption of guilt and mandatory reporting

requirements may require reconsideration to encourage reporting of abuse without fear of prosecution for consensual acts.

Additionally, raising public awareness about the nuances of the POCSO Act and its intended scope is crucial to prevent misuse and ensure its effective implementation. Provisions like the definition of a child as anyone below 18 years of age (Section 2(d)) and the presumption of certain offenses (Section 29) may need to be revisited to align with the principles observed in some High Court judgments and the Supreme Court's observations.

Ultimately, a consistent and carefully examined implementation framework is needed to protect children while avoiding the criminalization of consensual romantic acts between mature adolescents. This framework should strike a balance between safeguarding the well-being of minors and ensuring fair treatment for young individuals involved in consensual relationships, taking into account the specific circumstances of each case.

In Conclusion, this chapter underscores the extensive critical analysis of the provisions of the POCSO Act, 2012 with reference to the degree of quantum of punishment imposed on the offender in the cases of consensual romantic relationship and also discuss some important factors that affect the nature of punishment with the help of precedents.



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CHAPTER 4

PSYCHOLOGICAL & EMOTIONAL IMPLICATIONS ON BOTH VICTIM & OFFENDER UNDER POCSO ACT, 2012

4.1 Introduction

The Protection of Children from Sexual Offences Act (POCSO Act) was established by India in 2012 to enhance legal protections for minors against sexual violence, improve investigative and trial processes with a child-centric approach. This legislation was influenced by various factors such as advocacy by civil society groups, government data revealing high rates of child sexual abuse⁷³, Supreme Court directives⁷⁴, and India's obligations under the Constitution and the United Nations Convention on the Rights of the Child from 1989.

India possesses the largest adolescent population worldwide, comprising 253 million individuals in this demographic⁷⁵. Data from national health surveys indicates a notable portion of Indian teenagers engage in sexual activity.⁷⁶ The National Family Health Survey-5 (2019-21) reported that 10% of women aged 25-49 had their first sexual experience before 15, while 39% had physical relationship before turning 18.⁷⁷ Despite the enactment of the Protection of Children from Sexual Offences (POCSO) Act in 2012, which does not recognize consensual sexual interactions involving older adolescents above 16, studies have shown a significant presence of "romantic" cases⁷⁸ within the legal system. By analysing judgments from Special Courts under the POCSO Act in five states revealed that cases involving relationships between the victim and the accused constituted a substantial portion of total cases, ranging from 15.6% to 21.8% across different states.⁷⁹

⁷³ Ministry of Women and Child Development, Study on Child Abuse: India, 2007, p.74, <http://www.indianet.nl/pdf/childabuseIndia.pdf>

⁷⁴ Sakshi v. Union of India, AIR 2004 SC 3566 at para 35.

⁷⁵ Census of India, 2011, Table C13, available at http://www.censusindia.gov.in/2011census/Age_level_data/Age_level_data.html

⁷⁶ International Institute for Population Studies, 'National Family Health Survey (NFHS-5) 2019-21: India' (Ministry of Health and Family Welfare, Government of India) 210 (NFHS-5); Swagata Yadavar, Why India is unprepared for its gathering teen sexual revolution,

⁷⁷ NFHS-5, p.210.

⁷⁸ A case was considered to be a "romantic" case where the victim, her family members or any prosecution witness states that the relationship with the accused was romantic in nature. It also includes cases where the court concluded that the relationship was romantic or consensual.

⁷⁹ Centre for Child and the Law (CCL) National Law School of India University (NLSIU) With support from Tata Trusts ,February 2018 Implementation of the POCSO Act 2012 by Special Courts: Challenges and Issues Based on CCL-NLSIU's Studies on the Working of Special Courts in Five States , <https://feministlawarchives.pldindia.org/wp-content/uploads/Implementation-of-the-POCSO-Act-2012-by-special-courts-challenges-and-issues-1-1.pdf> , Last Visited 24 April 2024

Moreover, a separate study focusing on "romantic cases" adjudicated by Special Courts in Assam, Maharashtra, and West Bengal during 2016-2020 found that such cases represented 24.3% of the total cases resolved in that period.⁸⁰In recent times, certain High Courts in India have raised doubts about whether the Protection of Children from Sexual Offences (POCSO) Act was designed to govern adolescent sexual behavior, advocating for legal revisions in this context.

In the case of *Vijayalakshmi v. State Rep. the Inspector of Police*,⁸¹ the Madras High Court expressed concerns that applying the POCSO Act could harm the reputation and livelihood of young individuals whose actions stemmed from "biological attraction," questioning the rationale behind criminalizing such behaviours.

Likewise, in the case of *Sabari v. Inspector of Police*,⁸² the Madras High Court recognized that relationships among teenagers or with slightly older individuals are not abnormal but rather a consequence of natural biological inclinations. The court suggested lowering the age of consent to 16 years.

These observations and suggestions from the High Court's underscore a growing apprehension regarding the potential misapplication of the POCSO Act in cases involving consensual relationships among adolescents, emphasizing the necessity for legal reforms to address this issue.

4.2 Legal Background

The evolution of age of consent laws has been shaped by changing perceptions of childhood, adolescence, and adulthood, as well as advancements in women's and children's rights discourse and socio-cultural influences. Initially reflecting a colonial and patriarchal perspective that viewed females as properties of their fathers or husbands,⁸³ these laws have undergone significant transformations over time.

⁸⁰ Ramakrishnan & Raha, "Romantic" Cases under the POCSO Act, p.6, Enfold Proactive Health Trust: 2022., https://www.girlsnotbrides.org/documents/1951/Romantic-cases-under-the-POCSO-Act_wUNsbKC.pdf, Last visited on 24 April 2024

⁸¹ *Vijayalakshmi v. The State Rep. the Inspector of Police* CrI.O.P.No.232 of 2021 [Madras High Court], decision dated 27 January 2021

⁸² *Sabari v. Inspector of Police*, Criminal Appeal No.490 of 2018, decided on 26.04.2019 [High Court of Madras]

⁸³ Dr. Matthew Waites, *The age of consent: young people, sexuality and citizenship* Basingstoke: Palgrave Macmillan (2009), p.62, Last Visited on 24 April 2024
https://www.researchgate.net/publication/309822512_The_age_of_consent_Young_people_sexuality_and_citizenship/citation/download, Last Visited on 24 April 2024

In India, the age of consent was initially tied to the age of marriage, with social reformers advocating for an increase in the legal age for marriage. The Indian Penal Code of 1860 established the age of consent at 10 years for both married and unmarried girls.⁸⁴ However, a tragic incident where a 10-year-old girl died due to her older husband's attempt to consummate the marriage⁸⁵ urged the age to be raised to 12 in 1889 to safeguard children from premature sexual activities.⁸⁶ Subsequent revisions saw the age of consent raised to 14 in 1925, age 16 in 1940, and ultimately to age 18 in 2012 with the introduction of the Protection of Children from Sexual Offences (POCSO) Act, which implemented a gender-neutral age of consent for all children.⁸⁷ Initially, the POCSO Bill acknowledged the possibility for consensual sexual activity between 16-18 years provided that there was no force, coercion, or other influencing factors. However, concerns about potentially shifting the focus onto the victim's behavior during trials led to the removal of this provision.⁸⁸ Despite suggestions to lower the age of consent to 16, subsequent amendments in 2013 raised it to 18 years under the Indian Penal Code. While child marriages remain legally recognized under personal laws, sexual intercourse within such marriages is now classified as rape or aggravated sexual assault under the POCSO Act.⁸⁹ In response to severe incidents of sexual violence against children in 2019, amendments to the POCSO Act, 2012 were made to increase the minimum punishment for penetrative sexual offenses and introduce the death penalty for aggravated penetrative sexual assault.⁹⁰

⁸⁴ Government of India, Report of the Age of Consent Committee, 1928–1929, Central Publication Branch, 1929, <https://indianculture.gov.in/rarebooks/report-age-consent-committee-1928-1929> Last Visited on 24 April 2024

⁸⁵ Subhashri Ghosh, “Coming of Age in Colonial India: The Discourse and Debate over the Age of Consummation in the Nineteenth Century” in: K. Moruzi and M. J. Smith, ed., *Colonial Girlhood in Literature, Culture and History, 1840–19* https://www.academia.edu/22215240/Coming_of_Age_in_Colonial_India, Last Visited on 24 April 2024

⁸⁶ Government of India, Report of the Age of Consent Committee, 1928–1929, Central Publication Branch, 1929, <https://indianculture.gov.in/rarebooks/report-age-consent-committee-1928-1929>, Last Visited 24 April 2024

⁸⁷ The Protection of Children from Sexual Offences Bill, 2011, as introduced in the Rajya Sabha.

⁸⁸ The proviso to Clause 3 on penetrative sexual assault of the POCSO Bill, 2011 stated: “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.

Explanation I.— For the purposes of this section,— (a) “consent” means the unequivocal voluntary agreement where the person has by words, gestures, or any form of non-verbal communication, communicated willingness to participate in the act referred to in this section; (b) “unequivocal voluntary agreement” means willingness given for specific and be limited to the express act consented to under this section.
Explanation II.— A child, who does not offer actual physical resistance to penetrative sexual assault is not by reason only of that fact, to be regarded as consenting to the sexual activity.”

⁸⁹ *Independent Thought v. Union of India and Anr*, Writ Petition (Civil) No. 382 Of 2013

⁹⁰ POCSO (Amendment) Bill, 2019, Statement of Objects and Reasons.

4.3 Social and Emotional Implication of Criminalisation on the rights of young people⁹¹in cases of consensual romantic relationships

The failure to acknowledge consensual romantic relationships among young people has led to their automatic criminalization, blurring the distinction between consensual and non-consensual acts. Although all children and young people deserve protection from sexual exploitation and violence, the approach taken under the POCSO Act leaves people having consensual relationship vulnerable to criminal prosecution. This chapter explores the implications of such criminalization on their rights to dignity, personal liberty, privacy, health, and their best interests, as well as the impact on the justice system.

In essence, the lack of recognition for consensual romantic relationships among young people in the POCSO Act has resulted in their actions being treated as criminal offenses, even when consensual. This disregards the differences between consensual behavior and non-consensual exploitation/violence. While the intent is to protect minors, this approach actually undermines fundamental rights of young people and well-being by subjecting them to criminal proceedings for normative sexual behaviour. This chapter also discusses the gaps in implementation of POCSO Act, 2012 in examining the detrimental consequences of this approach on rights & development of both victim & offender and the overburdening of the justice system.

a) Undermine Right to dignity & Privacy

The natural and normative aspect of sexual behavior, navigate from puberty to transition in adulthood, is widely acknowledged. It is recognized as an integral part of their development, where all individuals, including children, have rights to dignity and privacy that encompass their personal relationships⁹². However, when the law overlooks adolescent development, social contexts, and cultural acceptance of adolescent sexuality, it disproportionately affects adolescents engaged in consensual and non-exploitative relationships, leaving both accused and victim susceptible to legal prosecution. By categorizing consensual romantic relationships as rape or (aggravated) penetrative sexual assault, the law undermines the dignity and bodily autonomy of both people involved in that relationship. It fails to distinguish between normal

⁹¹ WHO defines 'Adolescents' as individuals in the 10-19 years age group and 'Youth' as the 15-24 year age group. While 'Young People' covers the age range 10-24 years. <https://www.who.int/southeastasia/health-topics/adolescent-health>

⁹² *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

consensual sexual exploration as part of development and exploitative or non-consensual behaviours. Consequently, fundamental rights of both the parties, right to privacy, dignity, and self-governance over their bodies and relationships are compromised.

In the case of *Anoop v. State of Kerala*,⁹³ the High Court of Kerala addressed the alarming rise in sexual offences involving school children. Hon'ble Justice Bechu Kurian Thomas highlighted the need for awareness and education on the legal provisions related to sexual offences, especially among teenagers and adolescents. The court emphasized the importance of creating awareness about the Protection of Children from Sexual Offences Act, 2012, and the amendments to the Indian Penal Code, 1860. Hon'ble Justice Thomas noted that while ignorance of the law is not an excuse, the focus should not only be on punishing offenders but also on preventing such crimes through education and awareness. The Court also remarked that POCSO Act, 2012 does not confer any demarcation between forced non-consensual relationships and consensual relationships arising out of pure affection and biological changes. ***“The POCSO Act, 2012 does not acknowledge the biological meddlesomeness of adolescence and treat all ‘intrusions’ on bodily autonomy, whether by consent or otherwise, as rape for certain age group of victims.”*** The criminal investigation and trial hierarchy under the POCSO Act, 2012 has a stigmatic and dreadful impact on the development, employment and education of child it also led to the low self-esteem and problems in their family life.

In the case of *Teddy Bear Clinic for Abused Children & Anr. v. Minister of Justice and Constitutional Development & Anr*⁹⁴, the constitutional court of South Africa held that the law provisions criminalising consensual sex among young people violate with their right of dignity, even though they are not enforced. The Hon'ble Court stated that “If ones conscious sexual choices are not recognized by the society, but are criminalised, then the sense of self-worth will inevitably be belittled. Furthermore, “the existence of statutory provision that reprimands the forms of sexual expression that inflicts a state of degrade on adolescents.”⁹⁵

In the case of India, the blanket criminalisation on consensual sex among young people has significant control on their sexual development, bodily integrity, and independency for having the normal relationships and attachments that undermines their fundamental right to life, privacy and dignity.

⁹³ B.A. No.3273 of 2022

⁹⁴ (CCT 12/13) [2013] ZACC 35

⁹⁵ *Prokhat Purkait @ Provat V..The State of West Bengal, CRA (DB) 14 OF 2023*

b) Lack of Liberty

While the prime objective of the POCSO Act 2012 is to protect all children below 18 years from sexual exploitation, the law's unpremeditated effect has been the lack of liberty of young people in consensual relationships. Although convictions in "Consensual Romantic" cases are an exception⁹⁶, the accused male and boys are primarily charged with non-bailable offences such as rape under section 376 of the Indian Penal Code 1860 and penetrative sexual assault under section 4 of the POCSO Act, 2012.⁹⁷ As per the report based upon the study in three states, in 15.2% of the romantic cases the accused remained in Judicial custody until the completion of the trial.⁹⁸

In the case of *Rama @ Bande Rama v. State*,⁹⁹ the 20-year-old accused in a "romantic" case remained in judicial custody for 18 months. While quashing the case, the Karnataka High Court observed that the criminal process inflicted pain on the parties. Despite an acquittal, "the sword of crime would have torn the soul of the accused." In these cases the Court generally follow the strict interpretation that a minor's consent is irrelevant, coupled with a lack of sentencing discretion, and resulted in the imposition of high mandatory minimum sentences, such as ten years, for engaging in consensual sex. With the 2019 amendment, such cases will attract an even higher minimum sentence of 20 years if they involve repeated sexual acts or result in a pregnancy.¹⁰⁰ This case highlights the severe consequences adolescents can face, including prolonged incarceration and the psychological trauma of criminal proceedings, even in consensual romantic relationships. The lack of clarity in the law and the imposition of stringent mandatory sentences undermine the principles of proportionality and fairness, potentially causing unnecessary harm to young individuals exploring their sexuality consensually.

⁹⁶Ramakrishnan & Raha, "Romantic" Cases under the POCSO Act, p.6, Enfold Proactive Health Trust: 2022., https://www.girlsnotbrides.org/documents/1951/Romantic-cases-under-the-POCSO-Act_wUNsbKC.pdf, Last visited on 24 April 2024, Pg no 6

⁹⁷ *Supra* Note 96 pg. 44

⁹⁸ *Supra* Note 96 pg. 44

⁹⁹ Crim. Pet. 6214 of 2022, decided by the Karnataka High Court on 2.08.2022.

¹⁰⁰ State of Gujarat v. Ashokbhai, 2018 GLH 792 [Gujarat High Court

The law takes a one-dimensional view of adolescent girls, portraying them solely as "victims" without acknowledging their choice or ability to enter into relationships or choose their partners consensually. It renders them voiceless by failing to consider their outlooks and experiences. On the other hand, the law discriminates against adolescent boys by treating them as children in conflict with the law,¹⁰¹ even allowing them to be tried as adults in some instances. This differential treatment based on gender perpetuates stereotypes and undermines the identities and experiences of both adolescent girls and boys. The law's narrow framework on the rights of adolescent girls violates the identity of a victim, by denying them the autonomy to make choices about their relationships and sexuality. Conversely, it unfairly criminalizes adolescent boys' sexuality, subjecting them to the harsh consequences of the criminal justice system intended for adults.¹⁰² This case outlines the workings of the current legal framework by adopting an overly simplistic, paternalistic view of Consensual Romantic Relationships, which ends up disempowering young people of all genders and undermining their evolving capacities, autonomy, and rights.

Lastly, The POCSO Act, 2012 restricts the freedom of adolescent girls who are labelled as "victims" as they face institutionalization in Children's Homes even when they willingly refuse to return to their parents and wish to remain with their partners. A study on their plight reveals that these girls are shamed, humiliated, and stigmatized for their consensual actions. They are alienated from their partners and society and, at times, are not released from these homes even after turning 18. Such institutionalization harms their physical and mental health, as well as overall development, and they have little to no recourse to challenge or seek review of these decisions. Administrative confusion over whether courts or Child Welfare Committees have the authority to release them further prolongs their detention, even after attaining a majority. Pregnant adolescents or those who have given birth are compelled to reside in these Children's Homes, where access to sexual and reproductive health services and familial care is limited. This deprives them of essential support during a crucial phase.

¹⁰¹ ICCW, Children apprehended under POCSO Act for Elopement in Tamil Nadu (2017), UNICEF, p.40.

¹⁰² Raha, Mehendale, et.al., Girls Involved in "Romantic Cases" and the Justice System: A Study Based on the Experience of Girls in Child Care Institutions in Bihar, Enfold Proactive Health Trust (2021) 223., Last Visited on 24 April 2024

It's Saddened to see how the law, instead of protecting them, ends up curbing the personal liberty, autonomy and well-being of adolescent girls in consensual relationships through prolonged institutionalization and limited access to healthcare and support systems.

c) The principles of best interests and growing autonomy are undermined.

The POCSO Act takes a one-size-fits-all approach by implicating together all individuals below 18 years of age, disregarding their developing sexuality, evolving decision-making capabilities, and the potential negative impact of criminalization on their overall well-being and best interests. It fails to strike an appropriate balance between protecting adolescents from sexual abuse and acknowledging their normative sexual behaviours as part of natural development.

As a consequence, a law intended to address child sexual abuse is instead being weaponized against adolescents themselves, especially adolescent girls, to restrict their sexual expression and preserve perceived family honour and reputations.¹⁰³

The POCSO Act, 2012, instead of having a balanced approach that safeguards against exploitation while respecting normal sexual exploration, the statute ends up being a tool to control and criminalize adolescent sexuality, particularly that of girls, to uphold regressive notions of family honour rather than their best interests.

An analysis found that in 80.2% of the "romantic" cases examined, the complainants who filed the cases were parents and relatives of adolescent girls. These complaints were lodged after the girl had eloped or her pregnancy was discovered.¹⁰⁴ Notably, It was also revealed that in 21.8% of these romantic cases, the girls themselves disputed the claims made by their families that they were minors at the time.¹⁰⁵

Recent Studies reveal that laws like the Prohibition of Child Marriage Act (PCMA) are disproportionately used to target adolescents in romantic relationships or self-arranged marriages rather than addressing arranged child marriages or the root causes of such elopements. The PCMA,2006 is invoked twice as often against elopements compared to

¹⁰³ Geeta Ramaseshan, Control & Freedom: Women & The Age of Sexual Decisions, AALI (2012), p.32.

¹⁰⁴ CCL NLSIU, Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra, (2017) p.76.

¹⁰⁵ Supra Note 96, pg-18

arranged marriages, with parents, particularly of girls, lodging complaints when their daughters elope.¹⁰⁶

This legal approach renders young couples in inter-caste and inter-faith relationships especially vulnerable to harm and criminalization. Rather than prosecuting unlawful arranged marriages, the law becomes an oppressive tool in the hands of those opposed to such relationships, enforcing patriarchal norms over individual choice of partners.¹⁰⁷

Research indicates that primary reasons for girls leaving home include parental disapproval of relationships, forced arranged marriages, unreasonable restrictions on mobility and social life, and domestic violence. Structural factors like poverty, uneven development, discrimination against girls, and lack of meaningful educational opportunities exacerbate these issues, prompting elopements driven by hopes for a better future.¹⁰⁸

All of this suggests that the law intended to prevent child marriages is now being abused by parents or family members to file cases against the accused with the police and inter-caste/faith relationships, and girls' autonomy is trapped between the regressive mindsets that promote the practices they seek to curb.

d) Adverse impact in the administration of justice

An analysis of 1715 judgments in "romantic" cases by Special Courts in Maharashtra, West Bengal, and Assam reveals a gap between the law and practical realities. Acquittals were the norm, occurring in 93.8% of such cases.¹⁰⁹ In 87.9% of the 1715 romantic cases, the victim admitted to having a romantic relationship with the accused, whereas in 81.5% Victim said anything against the accused. In contrast, in 46.5% of the romantic cases, the victims were married with accused and in these cases generally the Special Courts convict the accused which results in issues in their marital life.¹¹⁰

¹⁰⁶ Partners for Law in Development, Who uses the Prohibition of Child Marriage Act 2006 (PCMA) Most and Why?, p.6.

¹⁰⁷ Vivek Kumar @ Sanju and Anjali @ Afasana v. the State, CrI.M.C No 3073-74/2006, decided by the Delhi High Court on 23.02.2007.

¹⁰⁸ Madhu Mehra & Amrita Nandy, Why Girls Run Away To Marry: Adolescent Realities And Socio-Legal Responses in India (2019), p.37.

¹⁰⁹ Supra Note 96, pg. 28

¹¹⁰ Supra Note 96, pg. no 12

Also, some courts are of the view that convicting the accused would not be in the best interest of the victim in cases where there is consensual romantic relationship and the acquittal rate is very high 98.1 % in the cases where both the parties are married. Furthermore, the offender's lack of men's rea in cases of sexual abuse is an essential factor in the conviction and acquittal of the accused. Other studies also revealed similar patterns, which were observed in "consensual romantic" cases where the victim was "mature enough to understand the nature and consequences of her actions."¹¹¹

In a few romantic cases, the Special Courts recognized elements of exploitation and misrepresentation, particularly when the victim was under 16 years old. Taking into account the likelihood of exploitation and grooming in such situations, the courts convicted the accused. Overall, the evidence strongly points to the Special Courts acknowledging the social realities of teenage sexuality.

As a result, romantic cases have become an unnecessary burden on the already overburdened criminal justice system, consuming significant time and resources from the judiciary, police, child protection agencies, and medical practitioners. For instance, in 2021, 92.6% of cases under the POCSO Act were pending in courts awaiting resolution¹¹². Another study showed that only 11.4% of cases were disposed of within one year of the FIR being filed. Conversely, 60.7% of cases took between one to four years to be resolved.¹¹³

These cases have also taken up the time of the higher judiciary, which has been overloaded with appeals and petitions for the dismissal criminal proceedings, habeas corpus petitions, bail applications, and petitions from couples seeking protection from their families in romantic relationships cases. Involvement of these factually consensual and non-exploitative activities with minors undermines the POCSO Act's aim by diverting time, resources, and energy away from investigating and prosecuting true cases of sexual assault and exploitation.

¹¹¹ CCL-NLSIU, Report of Study on the working of Special Courts under the POCSO Act, 2012 in Maharashtra (2017), 81 citing *State v. Akshay Balu Bacchav*, Sessions Case No. 338 of 2015, Decided on 03.09.2016 (Nashik).

¹¹² NCRB, Crime in India 2021, Table 4A.5, Court Disposal of Crime against Children (Crime Head-wise) 2021, p.357.

¹¹³ *Supra Note 96*, pg. 27-28

4.4 Standard Framework for Decriminalization of Adolescent Sexuality

Under Constitution of India, 1950 recognises that children need special protection and the state has a duty to safeguard the children's from sexual exploitation and must be given opportunity to develop and grow in a healthy manner.¹¹⁴ Subsequently, the POCSO Act, 2012 was enacted to fill the legislative loophole in addressing sexual abuse. Under the Constitution of India, 1950 all children in are entitled to fundamental rights such as right to equality, right against discrimination and right to freedom & expression and right to life & personal liberty¹¹⁵ . The National Policy for Children 2013, recognises that all children have different needs that require different responses and not all children belong to homogenous group.¹¹⁶





UN treaty bodies and other organisations including the World Health Organisation, have consistently recognised adolescence as a progressive developmental stage characterised by physical, behavioural, emotional, and neurological changes, as well as the need to have an equilibrium between the protection needs & bodily autonomy¹¹⁷.

¹¹⁴ Articles 15(3) and 39(e) under Constitution of India, 1950

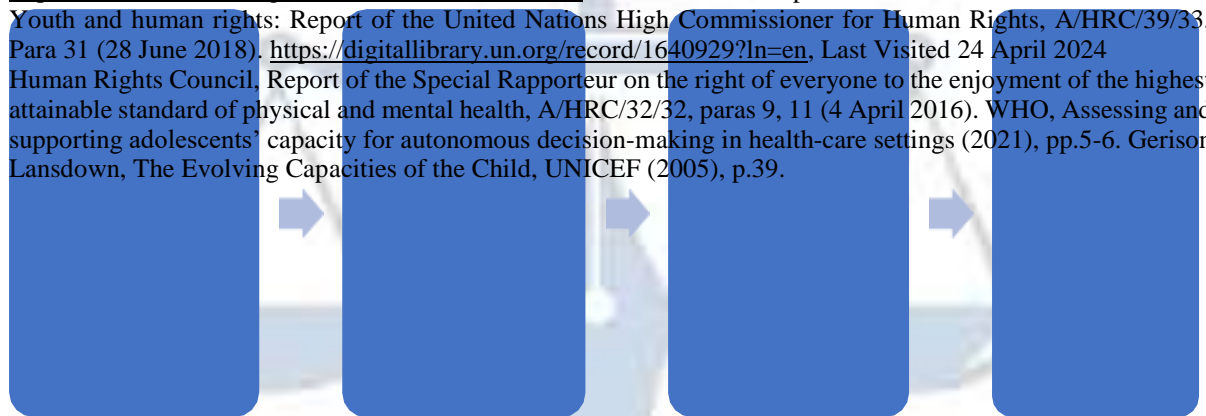
¹¹⁵ Article 14, 15, 19, 21A, 23, 24 of The Constitution of India 1950

¹¹⁶ National Policy for Children, 2013, para 2.1, https://wcd.nic.in/sites/default/files/npcenglish08072013_0.pdf, Last Visited – 24 April 2024

¹¹⁷ Committee on the Rights of the Child, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, 6 December 2016, paras 3, 9, 20 (GC 20) <https://www.refworld.org/docid/589dad3d4.html>. Last Visited - 24 April 2024

Youth and human rights: Report of the United Nations High Commissioner for Human Rights, A/HRC/39/33, Para 31 (28 June 2018). <https://digitallibrary.un.org/record/1640929?ln=en>, Last Visited 24 April 2024

Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/32/32, paras 9, 11 (4 April 2016). WHO, Assessing and supporting adolescents' capacity for autonomous decision-making in health-care settings (2021), pp.5-6. Gerison Lansdown, The Evolving Capacities of the Child, UNICEF (2005), p.39.



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The WHO and several UN agencies have emphasised the importance of comprehensive sexuality education, stating that "a lack of high-quality, age- and developmentally appropriate sexuality and relationship education may leave children and young people vulnerable to harmful sexual behaviours and sexual exploitation."¹¹⁸In General Comment No. 20 on the implementation of children's rights during adolescence, the UN Committee on the Rights of the Child (CRC) urged Member States to strike a balance between protecting children from sexual exploitation and abuse and respecting their evolving autonomy.

It has recommended:

"When deciding the legal age for sexual consent, states parties should consider the need to balance protection and evolving capacities, as well as establish an appropriate minimum age. States should avoid criminalising adolescents of similar ages for sexual conduct that is voluntary and non-exploitative".

It is also reprimanded that " general policies designed for children or young people often fall flat to consider the fact that these policies are not adequate to handle young people with their diversity and are insufficient to guarantee the realization of their rights. ¹¹⁹Thus, International Human Rights law structure acknowledges adolescents or young people sexuality and encourages States to maintain a balance amid protection and developing autonomy by guaranteeing that consensual sexual activity among adolescents or young people is not criminalized.

In the case of *Agavai v. the State, the Madras High Court*¹²⁰ dealt with a situation where the petitioner, a 15-year-old child in conflict with the law, had entered into a sexual relationship with a 17-year-old girl. The court observed that the issue of consensual sexual activity between minors remains a legal grey area in India that lacks clear guidelines. The court concluded that "punishing the minor boy who enters into a relationship with a minor girl, when they are experiencing hormonal and biological changes which are a normative part of development in children, goes against the principles of upholding the best interests of the child."

In the case of *Skhemborlang Suting v. State of Meghalaya*¹²¹, the petitioners were a married couple. A criminal case was initiated after a medical examination revealed the wife's pregnancy. The High Court of Meghalaya quashed the proceedings, on the basis that the sexual

¹¹⁸ UNESCO, UNAIDS, UNFPA, UNICEF, UN-Women, & WHO, International technical guidance on sexuality education- An evidence-informed approach (2018), p.18, https://www.unaids.org/sites/default/files/media_asset/ITGSE_en.pdf

¹¹⁹ GC 20, para 3.

¹²⁰ Criminal Revision Case No. 877 of 2021, Decided by the Madras High Court on 29.04.2022. 87 CrI. Petn. No. 63 of 2021, decided by the High Court of Meghalaya on 23.03.2022

¹²¹ CrI. Petn. No. 63 of 2021, decided by the High Court of Meghalaya on 23.03.2022

act could not be termed an "assault" since there was no evidence of threat or attempt to inflict offensive physical or bodily harm on the minor wife. In many cases, several High Courts have taken a liberal approach in cases of consensual romantic relationships by quashing the cases under POCSO Act, 2012 as it is important to note that sexual behaviour is developing during adolescence and relationships not always lead to marriages. This truth strikes to reconsider the legal age of consent.¹²²

4.5 Moving Forward: Legal, Educational, and Policy Reforms

*"Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions."*¹²³

a) Comprehensive Sexual Education

Apprehensions about adolescents being susceptible to making impulsive and ill-informed decisions, particularly around sexuality, but these issues can be effectively addressed by providing them with age-appropriate, evidence-based, comprehensive, and rights-focused sexuality education programs¹²⁴. Such holistic sexuality education initiatives help bridge knowledge gaps, foster positive skills and attitudes necessary for informed decision-making, and equip adolescents to navigate interpersonal relationships responsibly.¹²⁵ Sexual Autonomy empower children and young people to "realize their health, well-being, and dignity; develop respectful social and sexual relationships; consider how their choices impact their own well-being and that of others; and understand and ensure the protection of their rights throughout their lives."

Contrary to the misconception that sexual education may trigger or promote sexual behavior among minors, in reality evidence suggests that it actually delays sexual interactions and

¹²²Swagata Raha & Shruthi Ramakrishnan, "Changing the age of consent", The Hindu, 5 October 2022, <https://www.thehindu.com/opinion/op-ed/changing-the-age-of-consent/article65849243.ece>, Last Visited – 24 April 2024

¹²³ Justice D.Y.Chandrachud in Justice *K.S.Puttaswamy v. Union of India*, AIR 2017 SC 4161

¹²⁴ GC 20, para 61. Committee on Economic Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, para 49(f).

¹²⁵ UNESCO, UNAIDS, UNFPA, UNICEF, UN-Women, & WHO, International technical guidance on sexuality education- An evidence-informed approach (2018), p.16 https://www.unaids.org/sites/default/files/media_asset/ITGSE_en.pdf, Last Visited on 24 April 2024

encourages responsible sexual conduct. Rather than avoiding this crucial topic, providing adolescents with accurate, comprehensive information and life skills enables them to make informed choices about their sexual health and well-being.¹²⁶

The importance of comprehensive sexuality education in mitigating concerns around adolescent impulsivity and risky decision-making regarding sexual matters. It emphasizes that such education, grounded in evidence and a rights-based approach, does not hasten sexual activity but rather delays it while promoting responsible behavior, informed decision-making, and an understanding of rights, consent, and healthy relationships.

In Indian Context, duty is cast upon the state to create awareness and instil gender equality under POCSO Act 2012 and Rules¹²⁷ that are founded on the suggestions given by Child Rights Commission to ensure that “ sexual and reproductive health education should be essential part of School Curriculum.¹²⁸ There is a need for making equal efforts towards imparting knowledge, skills to vulnerable groups such as children with different abilities and children out school and children in tribal or conflicted areas and with the support of grassroot workers, local authority and civil society organisations, so that all adolescents and young people can make their own decisions freely with positive life choices and successfully navigate the transition into adulthood.¹²⁹

b) Resolving the conflict between health programmes and the legal framework

Government Health Programs such as the Rashtriya Kishor Swasthya Karyakram (RKSK) stress on the provision of accessible information on sexual and Reproductive Health Information & Services.¹³⁰ The necessity to educate adolescents or young people on the use of contraceptives and safe sex methods, while the medical facilities such as clinics provide adolescents with emergency contraceptive.¹³¹

¹²⁶ BMC Public Health volume 21, Article number: 1439 (2021). Laura Duberstein Lindberg and Isaac Maddow-Zimet, “Consequences of Sex Education on Teen and Young Adult Sexual Behaviors and Outcomes”, *Journal of Adolescent Health*, Vol.51, Issue 4, October 2012, pp. 332–338.

¹²⁷ POCSO Act, 2012, Section 43 and POCSO Rules, 2020, Rule 3.

¹²⁸ Committee on the Rights of the Child, Concluding observations on the consolidated third and fourth, <https://www.refworld.org/docid/541bee3e4.html>, Last Visited 26 April 2024

¹²⁹ GC 20, para 16.

¹³⁰ Strategy Handbook, RKSK, p.40, <https://nhm.gov.in/images/pdf/programmes/rksk-strategy-handbook.pdf> Last Visited on 26 April 2024

¹³¹ Implementation Guidelines, RCH-II ARSH strategy at pg 12-13, https://nhm.gov.in/images/pdf/programmes/arsh/guidelines/implementation_guide_on_rch-2.pdf, Last Visited on 26 April 2024

Efforts need to be made to build Adolescent Friendly Health Services that are accessible and functional which provides services such as Maternal Care and abortion as well diagnostic services for HIV, STIs, and Pregnancy not hindered by the mandatory reporting under POCSO Act, 2012. Therefore, appropriate legal measures have to be initiated to make sure that service providers are not restricted and adolescents or young people have access to information and services is confidential and unrestricted. There is a requirement for the operationalisation of the clarification given by the Supreme Court on mandatory reporting in the context of termination of pregnancies in consensual cases,¹³² while safeguarding children against sexual exploitation.

c) Decriminalization of adolescent sexuality

The current legal framework fails to account for the evolving decision-making capacities of adolescents and their normative sexual behaviours. While the age of consent varies across jurisdictions, 16 years emerges as a common threshold adopted by several western countries¹³³ as well as South Asian nations like Sri Lanka,¹³⁴ Bangladesh¹³⁵, and Bhutan¹³⁶. Notably, the age of consent in India was 16 years from 1940 until the enactment of the POCSO Act in 2012.

Both the Justice Verma Committee and the Madras High Court have recommended lowering the age of consent under POCSO to 16 years. It is crucial to distinguish the age of consent from the age of marriage, as the latter entails additional responsibilities, expectations, and legal implications, while sexual acts occur outside the confines of marriage as well.

While some countries like USA, Canada and South Africa¹³⁷ have incorporated close-in-age exceptions that recognize consent within proximate age gaps, determining a suitable age gap is inherently arbitrary. Such an approach may not be viable in India, where significant age gaps in relationships are socially acceptable. Additionally, close-in-age exceptions could increase age-related litigation, prolonging trials and leading to extended incarceration periods for the

¹³² *X v. Principal Secretary, Health & Family Welfare Department*, Civil Appeal No 5802 of 2022, decided by the Supreme Court on 29.09.22.

¹³³ Legal Ages of Consent by Country. The age of consent is 16 years in the United Kingdom, Norway, Canada, South Africa and Spain, as well as several States in Australia and the USA, <https://www.ageofconsent.net/world>

¹³⁴ Sri Lankan Penal Code 1883, Section 363(e).

¹³⁵ Bangladesh

¹³⁶ Penal Code (Amendments) Act of Bhutan of 2021, Section 183

<https://www.nab.gov.bt/assets/uploads/docs/acts/2021/Penal_Code_Amendment_Act_of_Bhutan_2021.pdf> accessed 26 April 2024

¹³⁷ South African Criminal Law (Sexual Offences and Related Matters) Amendment Act 2015, Sections. 15 & 16. Canadian Criminal Code (R.S.C., 1985) Section 150.1(2.1).

accused. More significantly, such exceptions would not spare the parties in consensual, non-exploitative relationships from the humiliation and trauma of criminal investigations and trials.

There is a need to amend the POCSO Act and the Indian Penal Code to decriminalize consensual acts involving adolescents above 16 years, while ensuring that those between 16 and 18 years are protected against non-consensual acts under POCSO. A distinct provision recognizing consent for those above 16 years could be considered, while criminalizing acts against them if they are against their will, without consent, or if consent is obtained through fear, intoxication, or if the accused holds a position of authority. Until such amendments are made, law enforcement agencies, Child Welfare Committees¹³⁸, and Juvenile Justice Boards¹³⁹ should exercise discretion available under existing legal provisions to prioritize the best interests of children and adolescents. This includes avoiding or minimizing the harm caused by arrest, apprehension, and institutionalization of adolescents and young persons in consensual cases.

4.6 Conclusion

The current legal framework fails to strike the crucial balance between protecting adolescents¹⁴⁰ from abuse while respecting their evolving autonomy and acting in their best interests. Instead, it unjustly conflates normative consensual sexual acts among adolescents with sexual exploitation. Rather than safeguarding adolescents, the law exposes those in factually consensual, non-exploitative relationships to the risk of criminal prosecution, undermining the very mandate of child protection. The significant proportion of romantic cases in the criminal justice system raises concerns about overcriminalization and overburdening of legal and child protection systems with cases lacking elements of exploitation or abuse.

To address this, legal amendments are necessary to decriminalize consensual sexual acts involving adolescents above 16 years of age, while ensuring robust protection for all children below 18 from sexual offenses under POCSO. Complementing this, all children and

¹³⁸ The Hindu Bureau, "Police should exercise restraint, while arresting young people in cases of love marriage, under POCSO: Judge", *The Hindu*, 19 November 2022. Cr.P.C, 1973, Section 41-A., <https://www.thehindu.com/news/cities/chennai/police-should-exercise-restraint-while-arresting-young-people-in-cases-of-love-marriage-under-pocso-judge/article66156793.ece>, Last Visited on 26 April 2024

¹³⁹ Under JJ Act, 2015- Sections 3(xii), 37, and 39 and Section 3(xv), Section -12,

¹⁴⁰ Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013, para 84.

adolescents must receive comprehensive, rights-based sexuality education. Legal and policy reforms should also ensure confidential and unhindered access for adolescents to sexual and reproductive health services. Integrating comprehensive sexuality and life skills education into school curricula is an essential step towards safeguarding adolescents' rights, interests, health, dignity, and overall developmental potential.



CHAPTER – 5
CONCLUSIONS & SUGGESTIONS TO AMENDMENTS TO REDUCE THE GRAY AREAS WITH RESPECT TO CONSENSUAL ROMANTIC RELATIONSHIPS UNDER POCSO ACT, 2012

5.1 Conclusion to reduce grey areas under POCSO Act, with respect to consensual sexual relationships

While there are divergent opinions on how to resolve the issue at hand, there is a broad consensus that the POCSO Act, 2012, intended to protect children, is self-contradictory against their best interests. The blanket criminalization of all sexual activity involving minors, though well-intentioned, is leading to the incarceration of adolescents who engage in such acts driven by normative sexual curiosity and the need for exploration during that developmental stage.

The criminalization of young people or adolescents carries significant social costs, including negative consequences on the physical and mental health of these children, as well as overburdening investigative agencies and courts, shifting resources away from genuine cases requiring immediate attention. The mental trauma and harassment faced by children who fall within the purview of the POCSO Act due to consensual acts is a matter of grave concern.

Steps must be taken to address this unintended consequence of the law's implementation, which has created an unusual circumstance contrary to its intended purpose of safeguarding minors. A subtle approach that differentiates between exploitative acts and normative adolescent sexuality is needed to uphold the law's spirit while minimizing harm to the children it aims to protect.

Largely, there can be three possible resolutions which can be sought to deal with the grey areas in the case consensual romantic relationships under POCSO Act, 2012. :

- a) Blanket reduction of the age of consent to 16 years, reverting to the legal situation before the enactment of the POCSO Act.
- b) Introducing a limited exception that decriminalizes consensual sexual acts involving children above the age of 16 years.
- c) Granting judicial discretion in sentencing for cases involving consensual romantic relationships between adolescents or with an adolescent between the ages of 16 to 18 years.

Firstly, While providing a blanket exemption for consensual sexual acts by those above 16 years may seem like a solution, it could lead to severe unintended consequences. Consent can

potentially be manufactured, primarily since most perpetrators are known to the child, including family members.

Inadequate police investigations risk genuine POCSO cases being dismissed as consensual relationships. This dilution could provide an easy way to reduce POCSO cases without addressing complex issues, rendering the Act ineffective. Moreover, lowering the age of consent may negatively impact ongoing efforts against child marriage and trafficking, undoing hard-fought battles.

Secondly, Introducing a limited exception for sexual relations with children above 16 years is equally concerning and prone to misuse. A child's consent holds no legal validity, and recognizing it would be deeply problematic. All children deserve protection under the special POCSO law, and diluting the age of consent would deprive a significant portion, especially young girls aged 16-18, of this precaution, exposing them to unchecked exploitation.

Trends like grooming and cybercrimes targeting this vulnerable age group highlight how lack of experience should not deprive them of robust legal protection. In Assam, some parents coerce minor girls into subjugation, marital rape, and trafficking by arranging marriages through endorsed "love" agreements.¹⁴¹ Studies show friends and boyfriends/girlfriends are common perpetrators of child sexual abuse, including penetrative assaults, raising fears of young girls being seduced into trafficking traps if consent exceptions are introduced.¹⁴²

While in arguing for introducing the element of consent in cases where child is between 16-18 years, it can be observed that accurate pictures were not portrayed where victims turn hostile later due to pressure, lack of support, or the need for victim compensation during prolonged trials. Judicial laxity in cases where relationship is alleged to exist between the victim & accused¹⁴³. Recognizing any element of consent risks enabling adult abusers to exploit children through prostitution and trafficking.

¹⁴¹ Highlighted by Shri Vikram Srivastava of independent Thought.

¹⁴² Shri Bhuwan Ribhu provided the Commission with the unpublished report of Satyarthi Global Policy Institute for Children, Kailash Satyarthi Children's Foundation (2022) on Prevalence and Nature of Child Sexual Abuse in India.

¹⁴³ Veenashree Anchan, Navaneetham Janardhana and John Vijay Sagar Kommu, "POCSO Act' 2012: Consensual Sex as a Matter of Tug of War Between Developmental Need and Legal Obligation for the Adolescents in India" 43 Indian Journal of Psychological Medicine 158 (2020) available at <https://journals.sagepub.com/doi/full/10.1177/0253717620957507> , Last Visited – 27 April 2024

The courts tend to take a permissive stance when determining the age of the victim. In cases where a marriage has taken place, a relationship has been acknowledged, or the victim becomes hostile, the courts predominantly consider the victim to be an adult. However, this approach needs to be handled cautiously. Providing for consent to negate the criminal nature of the act is inappropriate, as it could lead to an assumption of consent where none truly exists. This would undermine the very purpose of the law, which is to safeguard children from abuse and exploitation.

Another argument states that while age of consent and age of marriage serve different legal purposes in theory, they are intrinsically linked in practice within the Indian social context. Courts have often granted bail or quashed proceedings in statutory rape cases if the accused marries the victim, even if the victim was below the age of consent during the incident. Marriage may be seen as a consequence if the girl gets pregnant from underage sexual activity. Introducing a consent exception for 16-18 year olds could enable abusers to claim "consent" existed after marriage, despite the victim initially being below the legal age of consent. There are also concerns about some accused deceitfully marrying victims to evade charges, only to abandon them later. Overall, allowing such consent exceptions could provide loopholes for child abusers to exploit through marriage and escape legal consequences.

Thirdly, allowing judicial discretion in sentencing seems to strike a balance between addressing the issue and protecting children from sexual exploitation. It suggests there should not be automatic decriminalization of sexual acts with 16-18 year olds. Instead, a limited judicial discretion at the sentencing stage is a more reasonable approach. This discretionary power would allow Special Courts to exercise discretion in cases where there appears to be factual consent from the child above 16 years for the alleged act. However, it must be ensured that such discretion is well-guided and insulated from potential misuse as far as possible. In this context, as to when such discretion will come to play and who will determine becomes crucial. Only a judicially trained mind aided by experts can appropriately determine if the child's consent was truly free from coercion, deception, fraud or undue influence. This would require proper investigation and evidence to ascertain if reduced sentencing is warranted. The concerns about wide judicial discretion leading to arbitrariness and being exercised based on gender stereotypes are genuine, where proper safeguards need to be instituted as noted by the Supreme Court in the *Aparna Bhat and Ors v. State of Madhya Pradesh and Anr.*¹⁴⁴ Thus, the

¹⁴⁴ SCC online SC 230

discretionary power of the Special Court in ascertaining consent and exercising discretion should be limited and properly guided to prevent misapplication. The issue of determining if factual consent exists cannot be left to investigating agencies alone, as there are higher risks of abuse and misapplication in such cases. Furthermore, to ensure there is no unnecessary harassment or prolonged proceedings, the current system of investigation and judicial determination needs to be strengthened and improved. This is crucial to ensure expeditious trials are conducted as envisaged under the POCSO Act, 2012.

5.2 Legal Loopholes

There are two categories of purported consensual romantic relationships that fall under the POCSO Act, 2012:

1. Relationships between two consenting adolescents, both aged 16-18 years. In such cases, technically both adolescents are victims as well as children in conflict with the law under POCSO Act, 2012. However, it is more common for the boy to be labelled the accused and the girl the victim, even though POCSO Act, 2012 is gender-neutral.

Ideally, such a boy should be prosecuted under the Juvenile Justice (Care and Protection of Children) Act, 2015, which allows for more liberal discretion in punishment and sentencing. However, a child can be tried as an adult for heinous offenses under the Juvenile Justice (Care and Protection of Children) Act, 2015. Sections 3 and 7 of POCSO are considered heinous offenses, so there is a risk of the child being tried as an adult even if the sexual act was consensual.

Therefore, changes are needed in the Juvenile Justice (Care and Protection of Children) Act, 2015 to ensure that in such romantic relationship cases, the child is not tried as an adult and gets the benefit of being tried under the juvenile justice system. The aim is to prevent adolescents in consensual relationships from being tried as adults for POCSO offenses.

2. In the second category of cases involving an alleged consensual relationship between a child aged 16 or above and an adult, the situation needs to be considered more delicately. Ascertaining true consent by a child is difficult, especially in an adult-child relationship. Courts may fail to recognize predatory and exploitative behavior wherein an adult takes undue advantage of a child's feelings towards them and wrongly labels it as consensual.

The nuances of power inequality ought to be carefully considered. The power imbalance is heavily skewed in an adult-child relationship due to factors like the age difference. Such an imbalance and resultant exploitation may even exist in relationships between adolescents. While courts in some instances considered the age gap, however the issue remains the same whether the child's "consent" was truly voluntary.¹⁴⁵

There are also some cases where courts have considered a child's consent as sufficient to quash proceedings, even in cases involving a large age gap where the adult was married¹⁴⁶. This fails to account for the inherent power dynamics and potential coercion in such unequal relationships.

The law cannot turn a blind eye to the coercive nature of large age differences and must factor them in to bring such exploitation within its purview. Although close-in-age exemptions have been largely considered inadequate to deal with the present situation, the Commission considers that the age difference between the victim child and the accused in romantic cases should be a relevant factor carefully considered by the courts.

However, in light of existing ground realities, if the age difference between the victim child and the accused is less than three years, the Commission is of the view that introducing judicial discretion in sentencing can help alleviate the plight of those truly aggrieved.

5.3 Overlapping of Statutes

Providing judicial discretion solely under the POCSO Act, 2012 will not entirely resolve the situation, as Section 375 (rape) of the IPC may still be invoked against the accused if the victim girl is below 18 years of age. It's pertinent to note that while Exception 2 of Section 375¹⁴⁷ exempts a husband from liability of rape for sexual intercourse with his wife above 15 years, the Supreme Court in *Independent Thought v. Union of India*¹⁴⁸ read down this exception, from the age 15 to 18 years. Currently, even if a husband has consensual sexual intercourse with his wife below 18 years, it amounts to rape under this provision. As per the current law, sexual

¹⁴⁵ *Javed v. State, NCT of Delhi*, Delhi High Court Bail Application 4129/2021 decided on 23.11.2022

¹⁴⁶ *Santanu Kaudi v. State of Odisha*, High Court of Orissa JCRLA No. 37 of 2019

¹⁴⁷ *Section 375 Exception 2 Under Indian Penal Code, 1860*.—*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.*

¹⁴⁸ (2017) 10 SCC 800.

intercourse with a girl child by the husband, lover or any other person amounts to an offence under both Section 375 of the IPC and the POCSO Act, 2012.

However, if reprieve is granted to the accused under POCSO in cases of adolescent romantic relationships, as recommended by Law Commission Report¹⁴⁹ however, it would be meaningless without a corresponding amendment in Section 375 (rape) of the IPC.

This is because while the reprieve under POCSO Act, 2012 can be claimed by the child's lover, the alleged offence will continue to be penalized under Section 375 for both the lover or the husband of the child.

A recurring theme is revolving around consensual romantic relationship which shows that there was lack of awareness about child sexual abuse and the POCSO Act among the public. There is a general lack of awareness among children about what constitutes child sexual abuse and its various forms. Even if a child knows that the act done is wrong and exploitative, a large number of them never report it to parents or friends out of fear of inviting further trouble for themselves and their families. Thus, the supportive mechanism available to children clearly requires strengthening.

Furthermore, there is a need to raise awareness about sex, consequences of early sexual activity, information about contraception and safe sexual behavior, along with awareness about the POCSO Act. Mandatory inclusion of comprehensive, age-appropriate sex education in the school curriculum is required. Efforts should also be made to upscale schemes like Rashtriya Kishor Swasthya Karyakram (RKSK), which focuses on the health and well-being of adolescents to enable their holistic development. This can go a long way in bridging the existing deficit in awareness.

There are several competing interests that call for a balanced approach in this situation. The law must strike a delicate balance between recognizing children's evolving capacities and the need to protect them from harm. While 16-18 year olds are differently placed than younger children, their brains are still developing.¹⁵⁰ Scientific data indicates the brain continues developing until at least 18 years. Not just physical but mental growth is equally important in

¹⁴⁹ 22nd Law Commission was extended vide Order No. FA No. 600111225/2022-Admn III (LA) dated 22nd February, 2023.

¹⁵⁰ *Salil Bali v. Union of India* (2013) 7 SCC 705 : (2013) 3 SCC (Cri) 686.

assessing maturity below 18.¹⁵¹ Studies show the social-emotional part related to emotions undergoes massive childhood changes. During this stage, juveniles may commit risky acts for thrill-seeking without considering consequences. Brain development is hardly complete at 18 and can continue into adulthood, sometimes until the age of 25. While teenagers today may seem physically mature and behave like adults, it doesn't mean they fully understand the implications of their actions.¹⁵²

The danger of introducing consent elements risks children being induced into sexual activity and later wanting to proceed with the case and the same may be dismissed saying that the sexual intercourse was voluntary. Even if initially volitional, if he/she later objects but the accused continues, they can claim it was voluntary under the law.¹⁵³

There have been instances where courts factored in a child's initial consent, contrary to POCSO Act, 2012 and quashed cases even when the child maintained it was non-consensual this becomes deeply problematic. Thus, Adolescents in the age of 16-18 years still remain children who deserve higher legal protection, so the age of consent cannot be disturbed either by reducing it or introducing limited exception.

While courts have observed adolescent love can't be controlled and such acts may lack criminal intent, they must tread cautiously on a case-by-case basis considering facts like determination of age, victim statement consistency, and lack of inducement.¹⁵⁴ Even when decriminalizing consensual young adult relationships, courts caution that consensual nature must be seen through each case's facts, and there might be cases where the survivors of sexual offence may settle the case under pressure/trauma.¹⁵⁵

In essence, despite evolving capacities, 16-18 year olds' developing brains and vulnerabilities require maintaining robust legal protections against child sexual abuse, while carefully

¹⁵¹ Ibid

¹⁵² Marty Beyer, "Recognizing the Child in the Delinquent" *Kenlucky Children's Rights Journal*, <https://static1.squarespace.com/static/571f750f4c2f858e510aa661/t/57d9542829687f80f7b1d54a/1473860650989/specialneedsofyouth.pdf> (1999); Last Visited - 24 April 2024

¹⁵³ *Rahul Chandel Jatav v. State of Madhya Pradesh & Anr.*, High Court of Madhya Pradesh, Miscellaneous Criminal Case No. 24691of2023.

¹⁵⁴ *Mahesh Kumar v. State of Delhi*, Delhi High Court, Bail Application 1240/2023 on 08.05.2023.

¹⁵⁵ *AK v State Govt of NCT of Delhi and Anr.*, Delhi High Court Bail Application 2729/2022 decided on 20.10.2022.

examining consent claims based on specific facts of each case. A balanced, nuanced approach is needed

5.4 Recommendations

After the detailed analysis of the POCSO Act, 2012 these are some recommendations that can be made to protect and safeguarding the rights of young people in the cases of consensual romantic relationships. These recommendations are made with regards to the suggestions given in 22nd Law Commission Report on Age of Consent under the Protection of children from Sexual Offences Act, 2012.

1. Amendment Under Section 4 of the POCSO Act, 2012

“Section 4 of the POCSO Act reads as under:

4. Punishment for penetrative sexual assault.-

(1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

1. It is recommended that after sub-section (3) of Section 4, the following sub-section may be inserted as sub-sections- (4), (5), (6), (7), (8) and (9):

“(4) Notwithstanding anything contained in sub-section (1), where the child on whom the offence is committed, was at the time of commission of the offence, of the age sixteen or above, and where the Special Court is satisfied, for reasons to be recorded in writing, that the relationship between the accused and the child has been intimate, the Court may, in its discretion, impose any lesser sentence on the accused than the minimum sentence prescribed under sub-section (1), taking into account all the facts and circumstances of the case.

(5) *While considering the facts and circumstances mentioned in sub-section (4), the Special Court shall take into account the following:*

(a) *that there was tacit approval of the child, though not consent in law, for the acts leading to the offence;*

(b) *that the difference in age between the accused and the child is not more than three years;*

(c) *that the accused has no criminal antecedents;*

(d) *that the accused bears good conduct after the occurrence of the offence;*

(e) *That there is no element of undue influence, fraud, misrepresentation, coercion, force, violence or deceit perpetrated on the child by the accused or any other person on behalf of the accused; or any element indicating child trafficking;*

(f) *That the accused is not in a dominating position to intimidate the child, parents or relatives of the child or the witnesses;*

(g) *That there is no change in the social or cultural background of the child, indicating an element of manipulation or indoctrination ; and*

(h) *That the child was not used by the accused or at his instance by any other person for pornographic purposes or for any illegal or immoral activity”.*

(6) *While considering the facts and circumstances mentioned in sub-section (4), the Special Court may also take into account the following:*

(a) *that the accused married the child on attaining majority of the child and they are leading a happy married life.*

(b) *that the family members of the accused or that of the child or that of both of them accept and approve the relationship between the accused and the child;*

(c) *whether any child was born in the relationship between the accused and the child;*

(d) *any other similar and convincing circumstances for exercising the discretion by the Special Court.*

Explanation: - Mere claim of marriage or birth of a child in the relationship between the accused and the child, shall not ipso facto entitle the accused for a lesser sentence unless the circumstances mentioned under sub-section (5) are satisfied.

(7) *Any accused to whom sub-sections (4), (5) and (6), as the case may be, apply would not be disentitled to the lesser sentence merely because he committed penetrative sexual assault on the child more than once or repeatedly, or that he has impregnated the child, notwithstanding anything contained in clause (l) of section 5 or sub-clause (ii) of clause (j) of section 5, respectively.*

(8) *The Special Court may get the assistance of experienced psychologists or psycho-social workers or other experts for the purpose of ascertaining any of the matters relating to sub-sections &), (5) and (6).*

(9) *The Special Court may pass such orders as are necessary for protecting the interests of the child till the child attains the age of eighteen years”.*

2. Amendment to Section 8 of the POCSO Act

“Section 8 of the POCSO Act reads as:

“8. Punishment for sexual assault.-Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.”

Section 8 of the POCSO Act deals with punishment for sexual assault. It is recommended that Section 8 should be re-numbered as sub-section (1), and the following sub-sections (2)-(7) be inserted:

(2) Notwithstanding (1), where the victim child was 16 or above at the time of offense, and the Special Court is satisfied that the relationship between accused and child was intimate, it may impose a lesser sentence than the minimum under (1), considering all facts and circumstances.

(3) while considering the facts and circumstances mentioned in sub-section (2), the Special Court shall take into account the following.

- (a) Tacit approval of child for acts, though not legal consent
- (b) Age gap between accused and child not more than 3 years
- (c) Accused has no criminal record
- (d) Good conduct of accused after offense
- (e) No undue influence, fraud, coercion, force, trafficking etc. by accused
- (f) Accused not in dominating position to intimidate child/family/witnesses
- (g) No change in child's background indicating manipulation
- (h) Child not used for pornography or illegal activities

(4) While considering the facts and circumstances mentioned in sub-section (2), the Special Court may also take into account the following:

- (a) Accused marrying child after attaining majority and leading a happy married life
- (b) Families of accused/child approving the relationship
- (c) Any child born in the relationship

(d) Any other convincing circumstances for court's discretion

Explanation: Mere claim of marriage or child's birth doesn't entitle lesser sentence unless (3) is satisfied.

(5) Any accused who is subject to sub-sections (2), (3), and (4), as applicable, is not barred from receiving a lighter sentence simply because he committed sexual assault on the child more than once or repeatedly, notwithstanding anything in clause (1) of section 9.

(6) The Special Court may seek the aid of experienced psychologists, psychosocial workers, or other experts to determine any of the matters relevant to sub-sections (2), (3), and (4).

(7) The Special Court may issue orders as are required to protect the child's interests until the child reaches the age of eighteen.

The proposed amendment allow the Special Court to use discretion in giving lesser sentences in certain consensual sexual relationship cases involving victims aged 16+, after considering various mitigating factors and circumstances.

3. Inclusion of Proviso and Explanation in Section 18 of Juvenile Justice (Care & Protection of Children) Act, 2015

Where the Board is satisfied after inquiry that a child, irrespective of age, has committed a petty offense or serious offense, or a child below 16 years has committed a heinous offense, then notwithstanding any other law, and based on the nature of offense, need for supervision/intervention, circumstances from the social investigation report, and child's past conduct, the Board may:

- a) Allow the child to go home after advice, admonition, inquiry and counselling to the child and parents/guardian
- b) Direct the child to participate in group counselling and similar activities
- c) Order the child to do community service under supervision
- d) Order the child or parents/guardian to pay a fine, ensuring no labor law violation if the child is working
- e) Release the child on probation of good conduct under parental/guardian/fit person's care for up to 3 years on executing a bond
- f) Release on probation under a fit facility's care and supervision for up to 3 years
- g) Send the child to a special home for up to 3 years for reformatory services like education, skill development, counselling, behavior therapy, psychiatric support. If not in the child's or other children's interest, send to a place of safety instead.

Additionally, the Board can order the child to attend school, vocational training, therapeutic centre, prohibit visiting specified places, or undergo de-addiction. If there's a need for trial as an adult after preliminary assessment under Section 15, the Board can transfer the trial to the Children's Court with jurisdiction.¹⁵⁶

It is recommended that the following proviso and explanation be added to Section 18 of the Juvenile Justice (Care and Protection of Children) Act, 2015:

“Provided that where a child in conflict with law is found to have committed any sexual offense under the Protection of Children from Sexual Offenses Act, 2012 [Act 32 of 2012] or any other law in force against a child aged sixteen or above, having regard to the facts and circumstances of the particular case, if the Juvenile Justice Board or the Special Court, as the case may be, is satisfied that there exist special and adequate reasons, to be recorded in writing, it may pass any appropriate dispositional order under this section”.

Explanation: Special and adequate reasons include the circumstances listed in sub-sections (5) and (6) of Section 4 and sub-sections (3) and (4) of Section 8 of the Protection of Children from Sexual Offenses Act, 2012 [Act 32 of 2012]. In essence, the proviso allows the Juvenile Justice Board or Special Court to pass appropriate dispositional orders under Section 18 for children in conflict with law aged 16 or above who commit sexual offenses, if special and adequate reasons exist as per the recorded circumstances. The explanation clarifies that these special reasons include those listed under certain sections of the POCSO Act, 2012 related to sexual assault and harassment.

4. Spreading Awareness regarding Child Sexual Abuse, Sexual & Reproductive Health as well as the provisions of the POCSO Act.

Raising awareness of child sexual abuse, sexual and reproductive health, and the terms of the POCSO Act, 2012. To ensure that children have the best environment in which they can develop and flourish, it is critical to raise awareness about child sexual abuse and the various forms it can take.

Furthermore, as part of their school curriculum, children can learn about their bodies and the different physiological and psychological changes that occur when they grow older. Information about sex and the negative consequences of engaging in it at a young age may help

¹⁵⁶ Section 15 of the Juvenile Justice (Care & Protection of Children Act) 2015 - Orders regarding child found to be in conflict with law.

children make healthier and safer decisions in life. Raising awareness of child sexual abuse, sexual and reproductive health, and the terms of the POCSO Act, 2012.

Comprehensive and age-appropriate sex education should be made mandatory in the school curriculum, and government programmes such as Rashtriya Kishor Swasthya Karyakram should be used to educate and empower India's adolescent population.



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