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With this thought, we hereby present to you

# **PROTECTING MINORS' RIGHTS: REVISITING AGE OF CONSENT LAWS IN INDIA THROUGH THE LENS OF PRIVACY RIGHTS**

AUTHORED BY - NIRIH KAMPLIMATH

## **Abstract**

It has been widely acknowledged that the right to sexual autonomy forms an inviolable subset of the right to privacy. This has been recognized by the Apex Court in *Navtej Singh Johar v. Union of India* and subsequently in *Justice K.S. Puttaswamy v. Union of India (2017)*. However, the question which then arises is, to what extent does the state have to unequivocally recognize this right to engage in voluntary sexual activity? This question assumes great importance, especially when approaching state restrictions on adolescent sexual activity. Section 375 of the Indian Penal Code, in its sixth explanation prescribes a statutory age of consent of 18 years which is in line with the definition of a child under Section 2(d) of the Prevention of Children's Sexual Offences Act, 2012 (POCSO). The consequence of this statutory age of consent is that it creates a legal fiction where all sexual activity between adolescents, even consensual and non-exploitative sexual activity is considered to be criminal in nature. The act no longer serves to merely protect children from sexual exploitation, it dictates the behavior of these adolescents to adhere to the conventional norms of sexual abstinence. This effectively denies an adolescent their sexual agency and restricts their right to sexual autonomy. Such provisions of law which seem to discard the ability of adolescents to consent altogether have been under immense scrutiny as a result of the overwhelming increase in the number of adolescents engaging in safe, consensual sex. In this context, it becomes pertinent to understand whether adolescents are afforded this subset of right to privacy, i.e. sexual autonomy. While several committees have merely theorized the rationale for reducing the age of consent, the question surrounding an adolescent's sexual autonomy remains largely unanswered. We will attempt to explore this significant and under-theorized issue via an analysis of the recent constitutional jurisprudence around state interference in sexual autonomy. Underlying the recognition of privacy as a fundamental right, have been the core principles of dignity and autonomy. We argue that the right to sexual autonomy is afforded to even adolescents, keeping in mind the spirit of the United Nations Convention on the Rights of

the Child (UNCRC), which forms the bedrock of pro-child legislations in India. Additionally, it is argued that the right to privacy as recognized by the Indian courts is premised on the safeguarding of the autonomy of individuals. Therefore, dictating the decisions of adolescents is antithetical to this autonomy-rich conception of the right to privacy. While respecting this autonomy is of paramount importance, it is not the only relevant factor in determining the validity of restrictions on right to privacy. We would employ the doctrinal tools utilized by the courts to adjudicate claims revolving arbitrary restrictions on privacy, namely the proportionality test to analyze the validity of this restriction on adolescent sexual autonomy. This has profound implications on rapidly evolving adolescents of our country.

**Keywords:**

Sexual Autonomy, POCSO, Restrictions, Adolescents, UNCRC

## 1. Introduction

The decision of the Hon'ble Apex Court in *Justice K.S. Puttaswamy v. Union of India (Puttaswamy I)*<sup>1</sup> in declaring the right to privacy as a fundamental right has been celebrated as a landmark moment in Indian jurisprudence surrounding privacy. It is also a well settled position of law that the right to sexual autonomy forms a subset of this right to privacy. This includes the rights of an individual to engage in procreation, abstain from procreation and seek access to reproductive health care. The court in numerous instances such as in *Navtej Singh Johar, NALSA v. Union of India* and *Joseph Shine* has upheld this notion that the right to privacy encompasses the right to sexual autonomy. However what remains relatively unanswered is whether or not this right to sexual autonomy extends to even minors. This question assumes utmost importance in the present Indian scenario, where the provisions of the POCSO act are rampantly misused to target adolescents engaged in romantic relationships. While, the intention of the legislature in establishing a statutory age of consent may have been to protect children from exploitative sexual activity, the ground realities are entirely different. The POCSO act is being utilized as an oppressive tool against adolescents involved in inter-caste or inter-faith relationships, with the girl's parents lodging complaints in cases of elopement<sup>2</sup>. This is evidenced by the fact that in nearly 80.2% of the complainants in 'romantic cases' were guardians of the adolescent girl who registered the case after elopement

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<sup>1</sup> Justice K.S.Puttaswamy(Retd) And Anr. vs Union Of India And Ors, (10) SCC 1, (2017).

<sup>2</sup> Partners for Law in Development, Who uses the Prohibition of Child Marriage Act 2006 (PCMA) Most and Why?, p.6.

or discovery of pregnancy<sup>3</sup>. A law enacted to address growing sexual abuse of children, is instead being used to ensure conformity to traditional values of sexual abstinence or safeguard family honor. In this light, it becomes pertinent to understand the nature and extent of the application of the right to privacy with respect to the sexual autonomy of minors in India.

The court in its unanimous recognition of the constitutional validity of the right to privacy, elaborated on various principles detailing the interwoven nature of this right with Articles 14, 15, 19, 21 and other provisions of Part III of the constitution<sup>4</sup>. However the application of these principles espoused by the court to various contemporary issues are tricky. This is primarily because of: i) the absence of a single and clear majority opinion in the *Puttaswamy I* judgment, ii) employment of conflicting theoretical foundations<sup>5</sup> in the recognition of right to privacy and iii) the limited application of the right by the Apex Court in *Justice K.S. Puttaswamy v. Union of India (Puttaswamy II)*<sup>6</sup>. This application becomes even more complicated when dealing with the right to sexual autonomy of minors. A cursory view of the legislations governing sexual activities of minors makes it abundantly clear that any sexual activities between adolescents or minors, even though completely consensual and non-exploitative, is prohibited by law. Section 375(d) of the Indian Penal Code<sup>7</sup>, in its sixth explanation states that any sexual activity with a minor girl “*With or without her consent, when she is under eighteen years of age*”<sup>8</sup> is to be considered rape. Similarly, the POCSO Act<sup>9</sup>, prohibits various acts of sexual nature between two minors irrespective of whether such acts were consensual in nature. The primary question which then arises is whether these statutory provisions can be held unconstitutional for being violative of the right to privacy of minors. This paper seeks to answer this question in five sections: i) The first section would detail the jurisprudential evolution of right to privacy in the Indian context. ii) The second section would analyze the existing Indian legal framework to determine the recognition of sexual autonomy

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<sup>3</sup> See, CCL-NLSIU, Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra, (2017) p.76.

<sup>4</sup> See M. Kamil, Puttaswamy: Jury still out on some privacy concerns?, 1(2) Indian Law Review 190 (2017); see also, Pritam Baruah and Zaid Deva, Justifying Privacy: The Indian Supreme Court's Comparative Analysis, Indian Yearbook of Comparative Law (Forthcoming in 2018) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3223381](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3223381),

<sup>5</sup> Pritam Baruah and Zaid Deva, Justifying Privacy: The Indian Supreme Court's Comparative Analysis, Indian Yearbook of Comparative Law (Forthcoming in 2018) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3223381](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3223381), last seen on 08/07/2019

<sup>6</sup> K.S. Puttaswamy (Retd) And Anr. v. Union of India, 2019 (1) SCC.

<sup>7</sup> The Indian Penal Code, 1860, §375(d).

<sup>8</sup> *Id.*

<sup>9</sup> The Protection of Children from Sexual Offences Act, 2012.

with respect to minors. iii) The third section would establish the recognition of the right to sexual autonomy with the aid of judicial pronouncements in the regard. iv) Finally, the fourth section would detail, with the aid of doctrinal tools, the validity of the restrictions placed on the right to sexual autonomy of minors.

## 2. Sexual Autonomy: From *Puttaswamy* to *Joseph Shine*

The right to sexual autonomy has not been explicitly provided for under Part III of the constitution, which necessitated the Apex Court in *Puttaswamy I* to effectively tie up the right to sexual autonomy with other constitutional values<sup>10</sup>. These other constitutional values constituted Articles 14<sup>11</sup> (the right to equality), 15<sup>12</sup> (the right against discrimination), 16<sup>13</sup> (freedom of religion) and 19<sup>14</sup> (the various freedoms of speech and expression. These rights, according to the court, serve as a prism through which privacy could be constructed<sup>15</sup>. While the plurality opinion in *Puttaswamy I* rendered by Justice Chandrachud, explicitly recognizes sexual autonomy to fall under the umbrella of right to privacy<sup>16</sup>, it becomes pertinent to understand the reasoning adopted by the court in arriving at such a decision. To a great extent, the Supreme Court's rationale for recognition of the right to privacy rests on the notion of individual liberty which is expressed through the values of autonomy and dignity<sup>17</sup>. This emergence of the right to privacy is therefore not based only on the values of life and liberty guaranteed under Article 21 of the Constitution but also from the core principles of dignity and freedom enshrined under Articles 14 and 19<sup>18</sup>. This emphasis on the values of autonomy and dignity, forms the bedrock for the recognition of the sexual autonomy of an individual. It becomes necessary to understand the jurisprudential evolution of these rights of autonomy and dignity, to evaluate the framework of application of these rights to minors.

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<sup>10</sup>John Sebastian & Aparajito Sen., Unravelling the Role of Autonomy and Consent in Privacy (July 9, 2020). Indian Journal of Constitutional Law 2020, <https://ssrn.com/abstract=4223897> or <http://dx.doi.org/10.2139/ssrn.4223897>

<sup>11</sup> INDIA CONST. Art. 14

<sup>12</sup> INDIA CONST. Art. 15.

<sup>13</sup> INDIA CONST. Art. 16.

<sup>14</sup> INDIA CONST. Art 19(1)(a).

<sup>15</sup> INDIA CONST. Art 19(1)(a).

<sup>16</sup> See Vrinda Bhandari & Renuka Sane, Protecting Citizens from the State Post *Puttaswamy*: Analysing the Privacy Implications of the Justice Srikrishna Committee Report and the Data Protection Bill 2018, 14 SOCIO-LEGAL REV. 143 (2018); Aparna Chandra, Privacy and Women's Rights, Econ. & Pol. Wkly. (Dec. 23, 2017), <https://www.epw.in/journal/2017/51/privacy-after-puttaswamy-judgment/privacy-and-womens-rights.html> [<https://perma.cc/H9SB-D8XL>].

<sup>17</sup> *Supra* at 4.

<sup>18</sup> *Puttaswamy*, 10 SCC at ¶ 320 (Chandrachud, J.).

Two years after *Puttaswamy I*, the Apex Court has expanded on these notions of autonomy and dignity in *Navtej Singh Johar* and *Joseph Shine*. In these decisions, the court in elaborating on the scope of sexual autonomy, established a relationship of the former with reproductive autonomy<sup>19</sup>. In *Navtej Singh Johar*, the court struck down Section 377 of the Indian Penal Code<sup>20</sup>, to the extent that it criminalized same-sex relationships between consenting adults<sup>21</sup>. The court reasoned that Section 377 by criminalizing consensual relationships between adults, kept individuals belonging to the LGBT community from fully realizing their identity. Additionally, the court's remarks on the chilling effect that arises out of the criminalization of a particular subgroup is pertinent to note. The court stressed on the inherent wrongness of legislations that “*would have human beings accept a way of life in which sexual contact without procreation is an aberration and worse still, penal*”<sup>22</sup>. Another tangent from which the Apex Court approached the issue of sexual autonomy, was the impact any restrictions on sexual agency would have on an individual's access to healthcare and allied reproductive services. The criminalization of a certain class from engaging in sexual activity, the apex court argued, creates barriers to reproductive healthcare for people who might become pregnant, by impeding the possibility of non-procreative sex<sup>23</sup>. Such barriers which may take the form of denial of access to contraceptives, birth control pills, etc are antithetical to the notions of privacy and autonomy. Thus indicating that the state cannot dictate conformity to the societal norms of “*rigid, marital procreational sex*”<sup>24</sup>. This recognition of the protection that the constitution provides with respect to human sexuality will form the basis of this paper's assertions that minor's are in fact afforded the right to sexual autonomy

This autonomy-rich conception of privacy was further strengthened in *Joseph Shine*, where the court declared Section 497 of the Indian Penal Code (IPC) unconstitutional, effectively decriminalizing adultery. Even though § 497 of the IPC was considered to be ‘beneficial’ for

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<sup>19</sup> Reimagining Reproductive Rights Jurisprudence in India: Reflections on the Recent Decisions on Privacy and Gender Equality from the Supreme Court of India, Columbia Journal of Gender and Law, Dipika Jain and Payal K Shah, Pg 4.

<sup>20</sup> Indian Penal Code, 1860, § 377.

<sup>21</sup> *Navtej Johar*, 10 SCC at ¶ 253 (Misra, J.); see also PEN. CODE (1860), § 377 (concerning acts deemed “unnatural offences”) (“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation. Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”).

<sup>22</sup> *Navtej Johar*, 10 SCC at ¶ 417 (Chandrachud, J. concurring).

<sup>23</sup> See Dipika Jain, Time to Rethink Criminalisation of Abortion? Towards a Gender Justice Approach, 12 N.U.J.S.L. REV. 2 (2019) [hereinafter Jain, Time to Rethink].

<sup>24</sup> *Navtej Johar*, 10 SCC at ¶ 478 (Chandrachud, J. concurring).

women, by prohibiting women from being prosecuted under the provision, the court held that such provisions were violative of the sexual agency of women. The court held that § 497 by entrenching the narrative that in all sexual relations (even those of consensual nature), women are victims who are seduced by men, § 497 is not ‘beneficial’ to women in any way.<sup>25</sup> Further, the court clarified on the ‘protective’ nature of § 497, by clearly establishing that the state cannot employ paternalistic notions of protectionism under the garb of protective discrimination to effectively limit women’s sexual agency<sup>26</sup>. From the decisions of the Apex Court in *Navtej Singh Johar* and *Joseph Shine*, it becomes evident that the court has adopted an autonomy-rich conception of privacy which is closely linked with the core values of equality and non-discrimination based on sex and gender<sup>27</sup>. Subsequently an obligation is created on the part of the state, to eliminate laws that enforce stereotype morality, even if it seeks to ‘protect’ a certain class of individuals. This has profound implications on the present regime of age of consent laws in India namely, the POCSO Act, the Indian Penal Code and various other legislations like the Juvenile Justice Act. All of these legislations in their pursuit of protection of children from sexual exploitation effectively limit the sexual autonomy of a minor from engaging in consensual sexual activity. By establishing a statutory age of consent, § 375 of the IPC as well as the POCSO act creates a legal fiction where all sexual activity between minors is unlawful. Consequentially, a minor’s sexual agency is completely restricted, by virtue of their inability to provide meaningful consent. A straightjacketed application of the court’s reasoning in *Navtej Singh Johar* and *Joseph Shine* might lead to the conclusion that the present regime of age of consent laws is violative of the right to privacy of minors. However, the issues of sexual agency and sexual autonomy of minors, are imbued with nuances by virtue of the protective stance towards minors that is adopted by the legal framework of India. The following section would analyze these nuances that arise with respect to sexual agency of minors, and establish that despite these nuances, the hon’ble Supreme Court as well as the legislature have recognized the right to sexual autonomy of minors.

### **3. Taking Stock of the Framework Surrounding Protection of Children in India**

In order to establish that minors are afforded the right to sexual autonomy, it becomes pertinent to acknowledge the jurisprudential evolution of rights of minors in India. India takes a

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<sup>25</sup> *Joseph Shine v Union of India*, (2019) 3 SCC 39 at ¶118

<sup>26</sup> *Id* at ¶185-189

<sup>27</sup> *Supra* at 19.

protectionist stance over its children. This is evident from the treatment of persons below the age of minority, in a manner distinct from its treatments of adults. These minors are deemed incapable of contracting<sup>28</sup>, driving vehicles, and providing meaningful consent to sexual activities<sup>29</sup>. The primary question that this section seeks to answer is whether this protectionist stance is enough justification for limiting the sexual agency of minors. In doing so this section would first review the constitutional, statutory and judicial framework surrounding the sexual agency of minors, and subsequently establish that this framework respects the values of dignity and autonomy of minors as well.

India has developed its own distinct jurisprudence surrounding children and the recognition of their rights<sup>30</sup>. Since the inception of the constitution itself, there existed constitutional safeguards for the protection of weaker sections of society. Children form an integral part of the classes protected by the constitution. Article 15(3) of the constitution empowers the state to make special provisions with respect to children<sup>31</sup>. Additionally, the constitution confers a host of other rights to children including free and compulsory primary education to children between the ages of six to fourteen, prohibition of trafficking and forced labor, prohibition of employment of children below the ages of fourteen in factories, mines etc. This protectionist stance is only strengthened in the various legislations introduced by the parliament. These include the Right to of Children to Free and Compulsory Education Act<sup>32</sup>, the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act<sup>33</sup>, the Protection of Children from Sexual Offences Act, 2012, the Juvenile Justice Act<sup>34</sup>. While all these provisions are indicative of a great degree of protectionism, it would be misguided to equate this protectionism with paternalism. This distinction becomes even more relevant, when we focus on the statutes that regulate and enforce penalties for engagement in acts of sexual nature, i.e. The POCSO and Juvenile Justice Act.

The POCSO Act and the Juvenile Justice Act are to a great extent inspired by the United Nations Convention on the Rights of the Child<sup>35</sup>(UNCRC). This is evident from the explicit reference that the UNCRC makes in the preambles of both the POCSO and Juvenile Justice

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<sup>28</sup> The Indian Contract Act, 1872, § 11

<sup>29</sup> The Indian Penal Code, 1860, § 375(d)

<sup>30</sup> (2013) 13 S.C.R. 1020, Salil Bali v. Union of India & Anr.

<sup>31</sup> INDIA CONST. Art. 15(3)

<sup>32</sup> The Right of Children to Free and Compulsory Education Act, 2009.

<sup>33</sup> Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act

<sup>35</sup> United Nations Convention on the Rights of the Child

Act. The Apex Court in *Salil Bali v. Union of India*<sup>36</sup> has clarified that the basis of fixing the age of consent under the POCSO Act was Article 1 of the UNCRC. While the POCSO and Juvenile Justice claim to act in the best interests of the child and conform to the values set out in the UNCRC, the substantive provisions indicate otherwise. The State is clear in its stance that any sexual activity between minors is unlawful, even if it is completely consensual and non-exploitative. Section 375(d) of the IPC in conformity with the definition of child under Section 2(d) of the POCSO Act, prescribes a statutory age of consent at eighteen years old. Subsequently, minors engaging in sexual activity are punished under Section 376 of the IPC or various other provisions provided for under the POCSO Act. This effectively renders the sexual agency of a minor null. The Supreme Court in *Satish Kumar Jayanti Lal Dabgar v. State of Gujarat*<sup>37</sup> has upheld this complete disregard for the sexual agency of minors by stating, “*if S.375 Sixthly gets attracted, it makes consent of prosecutrix to sexual intercourse immaterial and inconsequential... the Legislature has introduced aforesaid provision with sound rationale and an important objective behind it is that a minor is incapable of giving any consent*”<sup>38</sup>. This stance is, however, in direct contravention to the values espoused under the UNCRC.

While the POCSO and the Juvenile Justice Act invoke the UNCRC in their respective preamble, and claim to serve the ‘best interests’ of the child, they fail to conform to the standards of ‘best interests’ as prescribed under the UNCRC. A conjoint reading of Articles 3 and 5, of the UNCRC makes it evident that an integral element of serving the best interests of a child, is to acknowledge and respect the evolving capacities of a child. The UNCRC in its General Comment No. 20<sup>39</sup> has stressed on the importance of maintaining a balance between protection of children from exploitation and respect for their evolving autonomy by stating, “*States parties should take into account the need to balance protection and evolving capacities, and define an acceptable minimum age when determining the legal age for sexual consent. States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity*”<sup>40</sup>. It is this recognition of a child’s evolving capacities that the present regime of age of consent laws fails to make. This lack of recognition of evolving capacities of a child is however, limited to the regime of age of consent laws. The Indian legal

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<sup>36</sup> Supra at 30.

<sup>37</sup> *Satish Kumar Jayanti Lal Dabgar v. State of Gujarat*, (2015) SCC OnLine SC 198

<sup>38</sup> *Id.*

<sup>39</sup> 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,

<sup>40</sup> *Id* at Para 40

framework contrastingly is replete with acknowledgment of a child's evolving capacities and sexual autonomy. The parliament in enacting laws and the Hon'ble Supreme Court in various decisions have consistently recognized a minor's right to sexual autonomy by recognizing their evolving capacities. The following section would detail these instances and highlight the failure of the regime of the age of consent laws to conform with this recognition of sexual autonomy.

#### **4. Affirmation of a minor's sexual autonomy**

The recognition of a minor's evolving capacities and autonomy in the legal framework is primarily observed in a threefold manner: i) implicit recognition of a minor's capacity to consent in the legislative framework of the country, ii) decisions of the Apex Court acknowledging this capacity of minors to consent and iii) decisions of various High Courts in interpreting provisions of POCSO to permit consensual sexual activities between adolescents. The hypocrisy in the legislative framework surrounding the recognition of the capacity of a minor to consent, is highlighted in the contrary views adopted by the regime of age of consent laws and the multitude of policies and legislations enacted by the legislature. The POCSO Act and Section 375 of the IPC in fixing a statutory age of consent, effectively render null, the sexual agency of all individuals below the statutory age. Such provisions fixing a statutory age of consent are premised on the rejection of sexual autonomy of minors. However, if such a premise were to be factually correct, there would have been a uniform rejection of sexual autonomy in the Indian legal context. Yet there has been a clear legal recognition of an adolescent's capability to engage in sexual activity.

The Ministry of Health and Family Welfare's Rashtriya Kishor Swasthya Karyakram (RKSK)<sup>41</sup> recognizes the involvement of adolescents in unsafe sex which results in unwanted pregnancies, STI/HIV/AIDS, and seeks to redress these problems by respecting the evolving capacities of a child<sup>42</sup>. Similarly, the Guidelines for Administration of Emergency Contraceptive Pills necessitate provision of contraceptive pills to any woman of reproductive age irrespective of their age<sup>43</sup>. This recognition of sexual autonomy, however is highlighted in Rule 3 B(b) of the Medical Termination of Pregnancy Act, 1971<sup>44</sup>. The rule includes within its

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<sup>41</sup> Rashtriya Kishor Swasthya Karyakram, Ministry of Health and Family Welfare.

<sup>42</sup><https://p39ablog.com/2021/03/criminalizing-adolescent-sexuality-the-protection-of-children-from-sexual-offences-act-and-the-rights-of-adolescents/>

<sup>43</sup> Guidelines for Administration of Emergency Contraceptive Pills by Health Care Providers, Family Planning Division, Ministry of Health and Family Welfare, November 2008.

<sup>44</sup>Medical Termination of Pregnancy Act, 1971, Rule 3 B.

ambit, minors, as a category of persons who may terminate their pregnancy up to twenty four weeks. This inclusion of minors as a category of persons who may terminate their pregnancy, is a clear recognition of the sexual autonomy of minors. This view was even adopted by the Hon'ble Supreme Court in *Mr X v. Principal Health Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr*<sup>45</sup> where the court held, “*The proscription contained in the POCSO Act does not – in actuality – prevent adolescents from engaging in consensual sexual activity. We cannot disregard the truth that such activity continues to take place and sometimes leads to consequences such as pregnancy. The legislature was no doubt alive to this fact when it included adolescents within the ambit of Rule 3B of the MTP Rules*”<sup>46</sup>. Therefore, it would be misguided to assert that the legal framework fails to recognize a minor’s sexual autonomy. It becomes necessary to disprove this assertion, as it forms the foundation for invalidating the consent of a minor to engage in sexual activity altogether.

The supposed rationale for limiting the sexual agency of a minor, by imposing a statutory age of consent, lies in the incapacity of a minor to fully understand the consequences of their sexual conduct, resulting in an inability to meaningfully provide consent. This reasoning is illustrated perfectly in the Apex Court’s decision in *Satish Kumar Dabgar*- “*A girl child who is a minor... can be easily lured into giving consent for such an act without understanding implications thereof- Such consent, is treated as not informed consent... Therefore duty is cast on other person in not taking advantage of so-called consent... The law leaves no choice to plead that the act was consensual*”<sup>47</sup>. Such reasoning, which rests on the premise that minors are incapable of understanding the implications of their sexual conduct, is inconsistent with the legal framework surrounding protection of children. This inconsistency becomes apparent when the Juvenile Justice Act, 2015 (hereinafter referred to as the JJ Act) is taken into consideration. Under Section 15 of the JJ Act, the Juvenile Justice Board may conduct a preliminary assessment in cases of heinous offenses committed by a child between the ages of sixteen to eighteen, to determine whether the child has the ability to understand the consequences of their offense<sup>48</sup>. Subsequently, if the board is satisfied that the child was able to understand the consequences of his offense, it may pass an order under Section 18(3) of the JJ Act to transfer

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<sup>45</sup> *Mr X v. Principal Health Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr*, Civil Appeal No 5802 of 2022

<sup>46</sup> *Id* at para 77.

<sup>47</sup> *Supra* at 37.

<sup>48</sup> Juvenile Justice Act, 2015, § 15,

the trial to the Children's Court where they would be tried as an adult<sup>49</sup>. An application of this rationale to the restriction of sexual agency of minors highlights the inconsistency. Let us assume a minor 'A' aged 17, is charged under Section 3 of the POCSO Act (Sexual Penetration), even though he engaged in completely consensual sexual relations with a minor girl 'B' aged 16. While 'A' can be subject to preliminary assessment under §15 of the JJ Act for determining whether or not he understood the implications of his action, no assessment is carried out to determine whether or not the sexual activity was consensual in nature. An adoption of this rationale is riddled with hypocrisy in holding that minors can somehow understand the consequences of their crimes, but these very minors cannot understand the implications of their consensual sexual conduct.

Various High Courts have criticized this hypocritical approach in curbing a minor's right to sexual autonomy. The High Courts are replete with cases involving innocent children engaged in romantic relationships, being prosecuted under various provisions of the POCSO Act. This overinclusive criminalization of consensual sexual relations has received mostly, a uniform response. The High Court of Madras has criticized the present application of the POCSO Act towards minors engaging in consensual sexual relations by holding that- "*Punishing an adolescent boy who enters into a relationship with a minor girl by treating him as an offender, was never the objective of the POCSO Act*"<sup>50</sup>. To this effect, the High Courts of Karnataka and Madhya Pradesh in *State of Karnataka versus Basavraj S/O Yellappa Madara*<sup>51</sup> and *Veekesh Kalawat v. State of Madhya Pradesh*<sup>52</sup> respectively, referred this issue of overinclusion of consensual sexual relations under the POCSO act to the Law Commission of India, in order to rethink the regime of age of consent laws in India.

Therefore, after a perusal of the legal framework surrounding the protection of minors in India it becomes evident that: i) there is a clear recognition of a minor's right to sexual autonomy, ii) Utilization of the POCSO Act to control consensual romantic relationships have been uniformly criticized by various High Courts and iii) Any restriction of this sexual autonomy would be contrary to the best interests of a child, which is the object of legislations like POCSO.

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<sup>49</sup> § 18(3), Juvenile Justice Act, 2015

<sup>50</sup> Vijayalakshmi & Anr. v. State & Anr, CrI.O.P.No.232 of 2021 decided by the Madras High Court on 27.01.2021

<sup>51</sup> State of Karnataka. Basavaraj S/O Yellappa Madar (2023) t AIR Kant R 23 : (2023) I KANT LJ 486.

<sup>52</sup> Veekesh Kqlawat v. State oJ Mddhya Pradesh, High Court of Madhya Pradesh, Misc. Criminal Case No.4521 of2023.

While this overinclusive criminalization under POCSO is indeed detrimental to the interests of the child, sexual activity with children deserves to be regulated at least to a certain extent. Therefore it becomes pertinent to analyze what form such regulation ought to take, so as to secure the best interests of a child while respecting their evolving capacities. The next section seeks to accomplish this by delving into the permissible extent of intervention in autonomy of individuals, by referring to judicial decisions surrounding the same.

## **5. Court's decisions on state interference in the personal autonomy**

The right to sexual autonomy deriving its constitutional source from articles 19 and 21, is not absolute in nature<sup>53</sup>. Therefore reasonable restrictions can be placed on this right, provided that it sufficiently adheres to the 'golden triangle' of articles 14, 19 and 21. Therefore it becomes necessary to determine whether the complete curbing of an adolescent's sexual agency under the present age of consent regime amounts to such a reasonable restriction. This paper seeks to establish that this complete denial of an adolescent's sexual agency is not a reasonable restriction in primarily three limbs: i) firstly, it would be established that this curbing of an adolescent's sexual agency amounts to an excessive interference in the private sphere of an individual. ii) Secondly, the Apex Court's decision in consistently rejecting paternalistic notions of protectionism to justify curbing the sexual agency of individuals would be highlighted. Finally, iii) the doctrinal tools adopted by the Apex Court in *Puttaswamy I*<sup>54</sup> would be utilized to adjudge the validity of the restrictions imposed on an adolescent's right to sexual autonomy.

It is contended that the intention of establishment of the POCSO act, and the subsequent Amendment in the IPC to raise the age of consent established in the sixth explanation of Section 375(d) from 16 to 18 was to criminalize all forms of sexual activity between minors. This contention is based on the findings of the Parliamentary Standing Committee, and the variance of the final POCSO Act from the original bill proposed. The POCSO Bill, 2011 put forth by the Ministry of Women & Child Development<sup>55</sup> recognized and afforded legitimacy to consensual sexual relations between adolescents aged 16-18. While Clause 2(d) proposed the age of consent to be the same as present currently, a proviso was provided in Clauses 3 and 7,

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<sup>53</sup> See para 87 of Justice K.S. Puttaswamy vs. Union of India, Writ Petition (Civil) No. 494 of 2012

<sup>54</sup> Justice K.S. Puttaswamy (Retd) & Anr. vs Union Of India & Ors, (10) SCC 1, (2017).

<sup>55</sup> The Protection of Children from Sexual Offences Bill, 2011. Bill No. XIV of 2011

which held that consensual sexual activities between minors aged 16-18 is valid<sup>56</sup>. This bill was tabled before the Rajya Sabha. The Parliamentary Standing Committee of the Rajya Sabha criticized the proviso for affording legitimacy to the consent of adolescents aged 16-18 years engaging in sexual activities. As a result, the POCSO Act failed to include the aforementioned proviso's to Clauses 3 and 7. This clearly portrays the legislature's intent to criminalize even consensual sexual behavior between adolescents. The Apex Court in *Puttaswamy v Union of India*<sup>57</sup>, while detailing the expansive nature of the Right to Privacy, noted that the right to autonomy over one's life choices falls under this umbrella of privacy. While elaborating on the extent to which state intervention is permissible with respect to this right to autonomy, the court held, "The best decisions on how life should be lived are entrusted to the individual. ....The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions"<sup>58</sup> Section 375(d) in imposing a blanket criminalization of all sexual activities between minors, represents the very dictation of decisions that the *Puttaswamy* judgment has forbidden.

This very view is adopted by the Apex Court in adjudging constitutional validity of restriction of autonomy under the garb of protectionism. The court has held that even if a benefit is conferred upon a woman but the rationale behind implementation of such a measure is gendered then such a measure is unconstitutional in nature<sup>59</sup>. A seminal case in this regard is *pro*<sup>60</sup>. The court while adjudging the constitutional validity of Section 30 of the Punjab Excise Act, 1914, which prevented employment of women in shops serving alcohol and intoxicants held, "*It is to be borne in mind that legislations with pronounced protective discrimination aims, such as this one, potentially serve as double-edged sword. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role*"<sup>61</sup>. This reasoning coupled with the Apex Court's decision in *Joseph Shine*, where it declared Section 497 of the IPC to be unconstitutional, makes it abundantly clear that sexual agency of individuals cannot be curbed to accommodate paternalistic notions of protectionism.<sup>62</sup> In the present instance,

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<sup>56</sup> *Id.*

<sup>57</sup> *Justice Puttaswamy v. Union of India*, (2017) 10 SCC 1.

<sup>58</sup> *Id.*

<sup>59</sup> Affirmative Action Under Article 15(3): Reassessing The Meaning of "Special Provisions" For Women , National Law School of India Review, Volume 32, Issue 2, Unnati Ghia

<sup>60</sup> *Anuj Garg v Hotel Assn. of India* (2008) 3 SCC 1 ('Anuj Garg').

<sup>61</sup> *Id.*

<sup>62</sup> *Joseph Shine v Union of India*, (2019) 3 SCC 39

even if it is argued that prescribing a fixed statutory age of consent is for the ‘benefit’ of an adolescent, it cannot come at the cost of restricting their sexual agency.

In *Puttaswamy II*, the Apex Court laid down the four pronged proportionality test to determine the validity of a restriction on the privacy of individuals. This four-pronged test consisted of the following: “ 319.1. A measure restricting a right must have a legitimate goal (legitimate goal stage); 319.2. It must be a suitable means of furthering this goal (suitability or rational connection stage); 319.3. There must not be any less restrictive but equally effective alternative (necessity stage). 319.4. The measure must not have a disproportionate impact on the right holder (balancing stage).”<sup>63</sup> In the present instance it is clearly established in the preceding paragraphs that the intention of the legislature in enacting the POCSO Act was to dictate behavior of sexual abstinence amongst adolescents. Such paternalistic notions of protectionism are unconstitutional in nature<sup>64</sup> and therefore do not form a legitimate goal. While the second prong may be satisfied in the present regime of age of consent laws, the same cannot be said about the third prong of the proportionality test. There exist several equally effective alternatives which are less restrictive in nature. To this effect, inspiration can be drawn from various other jurisdictions which have striven to give effect to the UNCRC. For instance the Canadian Criminal Code, while fixing a statutory age of consent at 16, provides for a close age gap exception<sup>65</sup>. Under such an exception adolescents between 12 to 16 years can engage in consensual sexual activity provided that the accused is less than 2 years older than the complainant. A similar approach is followed in South Africa as well<sup>66</sup>, where the Constitutional Court of South Africa in *The Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Others*<sup>67</sup> declared criminally punishing adolescents for engaging in consensual sexual activity as unconstitutional. Such provision for a close age gap exception serves as an equally effective but less restrictive measure by accommodating the ability of an adolescent to consent, while simultaneously safeguarding them from exploitative sexual activity. Finally, this regime of age of consent laws, fails to satisfy the last prong of proportionate impact on right holders. There can be no second thought as to the seriousness of offenses under the POCSO Act and the object it seeks to achieve.

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<sup>63</sup> K.S. Puttaswamy (Aadhaar-5J.) v. Union of India, (2019) 1 SCC 1: 2018 SCC OnLine SC 1642

<sup>64</sup> Supra at 63.

<sup>65</sup> Criminal Code of Canada, sec. 150.

<sup>66</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007, sec. 56(2).

<sup>67</sup> *The Teddy Bear Clinic for Abused Children and Another v. Minister of Justice and Constitutional Development and Others* Case CCT 12113 [2013] ZACC 35 (3 October 2013), para 15.

However, the courts must draw a thin line that demarcates the nature of acts that should not be made to fall within the scope of the Act, for such is the severity of the sentences provided under the Act. Justifiably so, that if acted upon hastily or irresponsibly, it could lead to irreparable damage to the reputation and livelihood of youth whose actions would have been only innocuous. What came to be a law to protect and render justice to victims and survivors of child abuse, can, become a tool in the hands of certain sections of the society to abuse the process of law. Under the present regime of age of consent laws, a young boy can be castigated for being guilty of committing the rape on a minor girl, merely because she is below 18, but an equal participant in the act, he would suffer a severe dent, which he will have to carry lifelong. This will result in adverse effects and disproportionate impact on the right holder. It is on these grounds that restrictions on sexual autonomy of adolescents under the present regime of age of consent laws are unconstitutional in nature, by virtue of failing to meet the proportionality test laid out in *Puttaswamy II*.

## 6. Conclusion

The primary reasons for contending that the present age of consent regime is violative of a minor's right to sexual autonomy can be encapsulated in a threefold answer : i) the right to sexual autonomy forms an integral component of the right to privacy, which is evidenced in the jurisprudential evolution of the recognition of privacy as a fundamental right. ii) Any argument that the right to sexual autonomy has been completely rejected in Indian jurisprudence can be invalidated by the presence of legal provisions and judicial pronouncements that indicate the contrary. iii) the restrictions imposed on the sexual autonomy of a minor fail to satisfy the four pronged test of proportionality laid out in *Puttaswamy II*. Therefore this paper highlights the need to revisit these age of consent laws, and ensure an intricate balance is struck between protecting a minor and respecting their sexual autonomy.