



THE DOUBLE-EDGED SWORD OF CONSENT LAW IN INDIA

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Abstract-- In this article the author critically examines consent laws in India for their impact on the rights of children. The age of consent for sexual relationships is determined under section 376 of the Indian Penal Code, 1860 and the Protection of Children from Sexual Offences Act 2012. The over-broad nature of these provisions adversely impacts the sexual autonomy and privacy of children. An attempt is made in this article to examine the unintended consequences of imposing criminal sanctions on children to deter sexual intimacy and sexual conduct. Additionally, in India, consent laws operate within the caste and patriarchal fabric unfavorably targeting women, tribals and other marginalized people in the country. These consequences are studied in the context of the international principles governing child rights' regimes as well as the constitutionally guaranteed rights. The author analyzes the adverse consequences of these consent laws and proposes a framework for a consent law which is progressive and reflective of modern penal policies and international principles.

Keywords: Age of consent, criminal law, child rights, sexual autonomy, sentencing guidelines

INTRODUCTION

The Indian Penal Code (hereinafter referred to as IPC) and the Protection of Children from Sexual Offences Act 2012 (hereinafter referred to as IPC) are the primary legislations that determine the age of consent. The objective of fixing an age of consent is to protect young people from being coerced into indulging in sexual activity.¹ The brutal gang rape and murder of a young woman in Delhi in a public transport vehicle on December 16, 2012 caused massive outrage and anguish in the country (*Nirbhaya case*). There was an outcry for reformulating the law to protect women from such heinous assault. The incident forced the government to revisit the laws of India for the protection of women from sexual assault.² One of the significant changes made to the law was increasing the age of consent to 18 years under the provisions of the Indian Penal Code.³

Since these laws are penal in nature, engaging in all forms of sexual activity with a person below 18 years is considered a criminal offence. The consent law brackets all forms of sexual activity be it consensual or non-consensual and abusive or non-abusive.⁴ Such an approach severely restricts the sexual autonomy of young people who are minors and criminalizes all

¹D Olszewski.(2006). "Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform", 89 *Marquette Law Review*(89):693.<https://scholarship.law.marquette.edu/mulr/vol89/iss3/>

² Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law, (2013) <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committee%20report.pdf>

³The Criminal Law (Amendment) Act, 2013 <https://www.iitk.ac.in/wc/data/TheCriminalLaw.pdf>

⁴Lina Acca Mathew Right to Sexual Autonomy of Children—Implications of the UNCRC upon the Indian Law on the Age of Consent, *International Journal for Crime Justice and Social Democracy*, 2019 8(2): 121-134.



forms of sexual activity. In this article, we attempt to examine the consequences of imposing criminal sanctions on under 18's to deter sexual intimacy and sexual conduct.

In the first section, the legislative history of the age of consent in India is traced. The age of consent which was first fixed at 10 years has been amended over the years and is now fixed at 18 years. As the age of consent in India is closely related to the permissible age of marriage, the author explores the rationale of the legislature in fixing a higher age of consent in this context. The law in its present form criminalizes marital choices and has in many cases become a tool to perpetuate patriarchal norms through excessive regulation of the sexual agency of young women. The second section is a detailed study on the unintended consequences of the consent laws in India. Any sexual relationship below the age of consent is criminalized and the fallout of this criminalization is that the law does not differentiate between consensual sex and child sexual abuse. In the last section, the author has done a comparative study on the consent laws and practices around the world with a view to suggesting reforms in the Indian consent laws, following a more progressive approach and reflecting modern penal principles.

CHILD SEXUAL ABUSE AND THE LEGAL RESPONSE

Macaulay's Draft Penal Code (1834) had defined rape under Section 359 and fixed the age of consent at nine years.⁵The Section was then included in the IPC as 375⁶ and 376⁷, setting the age of consent at ten years. These new provisions also fixed the age of consent at ten years if the woman is the man's wife.⁸In 1891 following the case *Queen Empress v Haree Mohan Mythee*⁹ an amendment was made to Section 375, raising the age of consent to twelve years for marital and non-marital sexual relationships.

Following this, The Amendment Act of 1925 further increased the age of consent to fourteen years for non-marital and thirteen for marital sexual relationships. This marked a shift in the policy of age of consent, recognizing the need to define the age of consent and the permissible age of marriage separately. Prior to this, men were marrying small children as there were no laws against this practice. On 25 June 1928, the Government of India appointed an Age of Consent Committee to examine and report matters specifically related to the age of consent for marital and non-marital relationships.¹⁰The Committee suggested that the age of consent under

⁵Vibhute, K.I. (2001). "Rape' And The Indian Penal Code At The Crossroads Of The New Millennium: Between Patriarchialist And Gender Neutralist Approach" *Journal of the Indian Law Institute*, 43(1): 25-44. www.jstor.org/stable/43951752.

⁶ Indian Penal Code, 1860 <https://www.indiacode.nic.in/handle/123456789/2263?locale=en>

⁷ Indian Penal Code, 1860 <https://www.indiacode.nic.in/handle/123456789/2263?locale=en>

⁸Vibhute, K.I.(2001). "Rape' And The Indian Penal Code At The Crossroads Of The New Millennium: Between Patriarchialist And Gender Neutralist Approach" *Journal of the Indian Law Institute*, Vol. 43(1): 25-44. www.jstor.org/stable/43951752.

⁹Dr. Vandana. (2017). "Marital Rape - Exemption Under Indian Penal Code: Quest For Recognition And Liability", *Indian Law Review* 2. 2-19 *Queen Empress v Haree Mohan Mythee*(1891) ILR 18 Cal 49. In 1890, Phulmonee a girl of ten or eleven was raped and killed by her 35 years old husband. Under the then existing penal code provisions, however, he was not guilty of rape since Phulmonee was more than ten years. The decision if the court was severely condemned and it was held that the husband did not have the right to enjoy the person of his wife without regard to the question of safety to her. <https://www.ijraset.com/files/serve.php?FID=24495>

¹⁰ Mahmood. (1980). *Marriage Age In India And Abroad A Comparative Conspectus*. *Journal of Indian Legal Institute* 22(1):38-80 www.jstor.org/stable/43950671.



the Penal Code be raised to fifteen.¹¹ The Committee's recommendation paved the way for enacting the Child Marriage Restraint Act 1929, which fixed the age of marriage at fourteen for girls and eighteen for boys. Simultaneously, by making amendments to the IPCL the age of consent was increased to 13 years for marital relationships and 14 years for non-marital relationships.¹² In 1940, the age of consent was increased to 15 years for marital and 16 years for non-marital relationships.¹³ The age of consent remained at sixteen years till the enactment of the POCSO Act of 2012.

Before the enactment of consent laws, there was no comprehensive legislation addressing child sexual abuse. Judgments of the Supreme Court reflect the need for such legislation. In *State of Punjab v. Major Singh*¹⁴ the accused inserted his finger into the vagina of a 7.5-month-old child. However, there was no penile penetration. An essential ingredient for the offense of rape under Section 376 is penile penetration. The conviction of the accused was under Section 354¹⁵ of the IPC a much lesser offense, sentencing him to one year. About 30 years later, in *Sudesh Jhaku v KCJ*¹⁶, the victim's father, a high-ranking official in the Indian government, was accused of sexually abusing his daughter. The father did not perform any penile penetrative sex on the child. The Court was to consider whether rape under Section 375 would include non-penile penetrative sex. The Court held that "*definition of rape is based on the common law and in England, as well as in India the words "sexual intercourse" and "penetration" have all along been taken to mean the Act of inserting the penis into the female organs of genitalia.*" The Court refused to widen the scope of Article 376 and held that any change to the law should come from the legislature.

Apart from this restrictive definition, the rape law under Section 375 was applicable only when the victim is a woman and the accused was a man. Boys who were victims of sexual abuse did not receive any protection under the Section. There was a need for gender-neutral, comprehensive legislation addressing child sexual abuse. The year 2012 can be said to be a watershed moment in law against child sexual abuse with the enactment of the POCSO Act.¹⁷ This Act concerns itself with sexual offenses committed against children and defined a

¹¹Government Of India.(1929)*Report Of The Age Of Consent Committee*. <http://hdl.handle.net/1959.9/519249>

¹² Mahmood. 1980. Marriage Age In India And Abroad A Comparative Conspectus. *Journal of Indian Legal Institute* 22(1):38-80 www.jstor.org/stable/43950671.

¹³ 84th Law Commission of India Report 1980, *Rape and allied offences some questions of Substantive Law, Procedure and Evidence*, <https://lawcommissionofindia.nic.in/51-100/report84.pdf>

¹⁴ AIR 1967 SC 63

¹⁵ Indian Penal Code, 1860 S.354

¹⁶ (1996) S.C.C. OnLine (Del) 397.

¹⁷ The Statement of Objects and Reasons necessitating the enactment of the POCSO Act makes detail account for the immediate factors that necessitated the need for having specific law for dealing with child sexual abuse. One of the important factors was the data collected by the National Crime Records Bureau (NCRB) which indicated an increase in sexual offences against children. This was corroborated in the Study on Child Abuse: India 2007 conducted by the Ministry of Women and Child Development of the Government of India. Two Hundred Fortieth Report On The Protection Of Children From Sexual Offences Bill, 2011. New Delhi: Rajya Sabha Secretariat

<http://www.prsindia.org/uploads/media/Protection%20of%20children/SCR%20Protection%20of%20Children%20from%20Sexual%20Offences%20Bill%202011.pdf>



child to be a person below eighteen.¹⁸The new legislation has included all forms of penetration, penile and non-penile, within the definition of the offenses.¹⁹With the age of consent fixed at eighteen years, the POCSO Act was in conflict with the IPC provisions (the age of consent under Section 375 of IPC was sixteen years). However, this anomaly did not last long since, with the Criminal Law Amendment Act 2013,²⁰the age of consent under Section 375 was increased to eighteen years.

Both these enactments fix the age of consent at 18 years.²¹ However, POCSO Act is more progressive as the law is gender-neutral, thus ensuring that both boys and girls below 18 years come within its ambit. Under Section 375, the offence of rape is still restricted only to women.

CHILD MARRIAGE AND THE AGE OF CONSENT

With the passing of the POSCO Act, it was thought that perpetrators of rampant sexual abuse and rape of minors would now face stringent punishment and this would act as a deterrent. In raising the age of consent, the vexed issue of child marriage is also addressed. In the *Independent Thought*²² judgment, the Court recounts the adverse effect of child marriage and approves of a higher age of consent. The Court observes that increasing the age of consent would help to ensure that young girls are not trapped in child marriage. The age of marriage is the age at which two individuals are permitted by law to get married. In India, the Prohibition of Child Marriages Act 2006 fixes the age of marriage at 18 years for girls and 21 years for boys.²³Child marriage is prohibited under the Act's provisions; however, it is not *void ab initio*, but voidable at the instance of the parties on attaining majority.²⁴ Marriage below the age of consent can still occur as, under the law, the marriage is recognized. Increasing the age of consent is seen as a way to prevent child marriages.

The flaw in this milestone litigation is that it does not distinguish between forced child marriage and young adults voluntarily entering into marriage. In *Jitender Kumar Sharma v. State & Another*,²⁵the Court explains the difference between the two, the former kind of marriage affects the development of children and is an *affront to their individualities, personalities, dignity, and, most of all, life and liberty*. The latter marriages, on the contrary, have to be treated sensitively through educating the youngsters of the drawback of early marriage and not by treating them as criminals.

¹⁸The Protection of Children from Sexual Offences Act, 2012S. 2(d)

https://legislative.gov.in/sites/default/files/The%20Protection%20of%20Children%20from%20Sexual%20Offences%20Act%2C%202012_0.pdf

¹⁹ The Protection of Children from Sexual Offences Act, 2012 S. 3 and S. 5

²⁰ The Criminal Law (Amendment) Act, 2013<https://www.iitk.ac.in/wc/data/TheCriminalLaw.pdf>

²¹The Protection of Children from Sexual Offences Act, 2012 S.2(d) and Indian Penal Code 1860S. 375 and S.376

²²*Independent Thought v. Union of India*, W.P. (Civil) No. 382 of 2013, decided on October 11, 2017, Though age of consent is 18 years in the exception clause of Section 375, age of consent was still 15 years when the girl is the wife of the man. In the case of *Independent Thought v Union of India*, the court was faced with the question "whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape." The court read down the section and deemed the age of consent to be 18 years irrespective of the marital status of the girl.

²³ Section 18 Prohibition of Child Marriages Act 2006.

²⁴Section 13 Prohibition of Child Marriages Act 2006

²⁵ 2010 (4) Civil Court Cases 432 (Delhi)



The social evil of child marriage in India has persisted and can be ascribed to the persistence of poverty, illiteracy, and the dowry system. Girl children are considered a burden on the family due to the payment of a dowry for their wedding. In such circumstances, getting girls married at a younger age is seen as a way of reducing the burden on the family. A higher age of consent fixed by law is not the only factor that would prevent child marriage in such a society. On the contrary, the state must focus on improving women's education, opportunities for employment and providing them a better standard of living.²⁶ Only socio-economic development, leading to the raising of the status of women and giving them economic independence can resolve such pernicious social issues.

CONSENT LAW AND THE UNINTENDED CONSEQUENCES

Two basic features of the consent laws are: (i) They criminalize all forms of sexual activity below the age of 18 years. By fixing the age of consent at 18 years for sexual relationships, any form of sexual activity with a person below the age of consent is treated as a criminal offense. (ii) The consent laws prescribe a mandatory minimum sentence for most of the offenses. Under the mandatory minimum sentencing policy, the court has no discretionary power to reduce the sentence. A person convicted of an offence under the Act will have to be sentenced to the minimum imprisonment as prescribed by the law.

These fundamental features of the consent law have legal implication on children's rights to sexual autonomy and privacy. Imposing criminal sanction for controlling sexual conduct of children has resulted in many unintended consequences. In this part we examine these unintended consequences.

- *Infringement of right to privacy and sexual autonomy*

Both constitutional obligations and the international treaty obligations permit the Indian state to make laws relating to the age of consent. In *Puttuswamy v UOI*²⁷ the Supreme Court declared the right to privacy a fundamental right within Part three of the Indian Constitution. The Court identified privacy as a right arising from both autonomy²⁸ and the dignity²⁹ of an individual. In the case *Independent Thought*, the Supreme Court held that a girl child also has the right to privacy and dignity.³⁰ The Child Rights Convention 1989 (hereinafter referred to as CRC) also extends the right to privacy to children.³¹ Privacy and dignity are fundamental human rights, and extend to include the right to sexual autonomy and privacy. Children, especially adolescents, are sexually curious and engage in sexual activity ranging from kissing to masturbation.³² Romantic relationships between adolescents which have the dimension of a

²⁶Flavia Agnes. (2013) Controversy over Age of Consent, Economic and Political Weekly 48(29):10-13. <https://www.jstor.org/stable/i23527225>

²⁷ (2017)10 SCC 1

²⁸*Id*

²⁹*Id*

³⁰*Independent Thought v. Union of India*, W.P. (Civil) No. 382 of 2013

³¹Article 16, UN Child Rights Convention 1989.

³²The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another, [2013] ZACC 35. (expert report) compiled by the late Professor Alan Flisher, a child psychiatrist at the University of Cape Town, and Ms Anik Gevers, a clinical psychologist specialising in child mental health. <http://www.saflii.org/za/cases/ZACC/2013/35.html>



healthy sexual relationship are now viewed with tolerance in most societies.³³ Some studies have also discussed the importance of romantic relationships in adolescent development, fostering *autonomy, individuation, identity, and sexuality*.³⁴

By criminalizing all forms of sexual relationship including consensual and non-abusive relationships, the state is infringing on the right of sexual autonomy and physical fulfilment of a young adult. In the case of *State v. Suman Dass*,³⁵ the court explains this conflict. In this case the victim was a 15 year old girl who eloped with a 22 year old boy. The couple was happily married and living in peace and harmony. However, the accused was arrested under the POCSO Act for an offence of sexual assault as the victim was a girl below 18 years. The state argued that engaging in a sexual relationship with a person below 18 is a criminal offense and hence the accused must be sentenced to the minimum term of imprisonment. The Court, however, objected to such a narrow interpretation of the law noting that such an interpretation “*would mean that the human body of every individual under 18 years of age is the property of the State and no individual below 18 years of age can be allowed to have the pleasures associated with one’s body.*” The state seeks to imprison young adults for the act of falling in love and engaging in consensual sexual relationship. The court on the other hand seeks to uphold the right of young adult to choose their partners and engage in consensual sexual relations.

This dilemma is again reflected in the case of *Vijayalakshmi & Anr. v. State & Anr.*,³⁶ the couple was in love and eloped to get married, following which a case is registered under the POCSO Act against the boy. The girl victim approached the Court to quash the POCSO case registered against her husband. In this case, the Court ruled in favor of the girl and reasoned that the offence in question is purely individual and personal and involves the future of two young persons. The court proceeded to explain the dangerous consequence of the consent laws, where a love affair, with a girl of about 16 or 17 years, assumes a penal character and if the boy involved is above 18 year she would be sentenced to 7 year imprisonment which is the minimum sentence under the law. The judges point out that these relationships are not abusive or non-consensual and they are merely consequences of mutual innocence and biological attraction. Falling in love and engaging in sexual relationships is a part of adolescent growth. In such cases even though the girl is capable of giving consent, the rigidity of the law fails to recognize her capability. Imprisonment of young adult boys is not the objective of the consent laws. The impact such prosecutions have on the life of such boys is permanent. In this case the court noted that both the parties are in their early twenties and are starting their lives and hence took a decision favouring the couple. In the case of *Md. Saddam Hussain v. State of Assam and Ors.*,³⁷ a 14-year-old girl had eloped with a boy aged 16 years, and they performed the Nikah

³³AnchanV, Janardhana N, Kommu JVS. 2021 “POCSO Act, 2012: Consensual Sex as a Matter of Tug of War Between Developmental Need and Legal Obligation for the Adolescents in India”, *Indian Journal of Psychological Medicine*. 43(2) :158-162.

³⁴ The romantic relationship is understood voluntary relationships which are mutually acknowledged by both the parties. W. Andrew Collins (2003) “More than Myth: The Developmental Significance of Romantic Relationships During Adolescence” 13(1) : 1-24<https://doi.org/10.1111/1532-7795.1301001>

³⁵ Decided on 17.8.2013 by DharmeshSharma, ASJ01, NewDelhi District, Patiala House Courts, New Delhi SC No. 66/13

³⁶Vijayalakshmi & Anr. v. State & Anr. in CrI.O.P.No.232 of 2021 and CrI.M.P.No.109 of 2021 delivered on January 27, 2021,

³⁷ MANU/GH/0744/2017



and started living together. The Session Court convicted the accused under POCSO Act and sentenced him to 7 years imprisonment. On appeal, the High Court approved of the conviction. However, the High Court found him to be a juvenile and sent him to the Juvenile Justice Board for further sentence. Unfortunately, this child was in adult jail till receiving bail in the High Court. The children had a consensual relationship, yet their relationship was considered a crime under the law. For all practical purposes, the consent laws treat these types of relationships as equivalent to child sexual abuse.

The legal policy of the state should be to ensure that children are protected from sexual abuse and not to infringe on their right to sexual autonomy. Young adults have a right to engage in sexual exploration and the state should formulate policies which ensure a safe space for children to pursue their biological needs. The consent laws in India are outdated and are not in consonance with the internationally recognized principles of child rights.

- *Legitimatising the caste and patriarchal norms of community*

When we examine the consent laws in the context of sexual autonomy of young adults in a patriarchal society embedded with caste and other social barriers, we see the fault lines in the laws. “*The legal provisions become a weapon to control the expression of sexuality, and curb voluntary marriages, and are used to augment patriarchal parental power.*”³⁸ Inter-caste or inter-religious marriages still don’t have legitimacy in Indian society. When young girls fall in love with men who are not of the same caste or religion or belong to lower castes, they face severe opposition from the family and society. Since these “elopement” marriages defy the culturally conservative norms, they find resistance from the community. Girls carry the burden of the *honour* of the community; hence, any expression of sexuality by the girl is dishonorable, resulting even in *honour* killings. This unholy nexus between caste, religion, and patriarchy has a dangerous effect on the free will of individuals to enter into matrimony.

The law is used as a form of punishment or harassment against those who seek to break this nexus. For example, in *Jitender Kumar Sharma v. State & Another*,³⁹ the accused was a boy of 18 years, and the victim was a 16-year-old girl. They fell in love and eloped to get married. The girl’s parents were vehemently opposed to the relationship and filed a case under the rape provision of the IPC. In this case, the victim girl refused to stay with the parents and was placed in an NGO. The Court upheld the right of the young girl to be with her husband as was her preference. In another case of *Pramod Kumar v. State of UP and Ors*⁴⁰, a writ petition was filed by the victim’s husband. The main issue was a lack of clarity on the victim’s exact age as to whether she was a minor below 18 years. Based on the school leaving certificate, the trial court decided she was below 18 years and sent her to the custody of the father. In the High Court, the girl victim stated she did not want to continue living with her father and had apprehensions about her safety. She confirmed that she had married the accused of her free will and would like to stay with him. On medical evidence, it was submitted that the girl was above 19 years. The Court held that she was an adult and permitted her to live with her husband.

³⁸Flavia Agnes. (2013) Controversy over Age of Consent, Economic and Political Weekly 48(29):10-13 <https://www.jstor.org/stable/i23527225>

³⁹ 2010 (4) Civil Court Cases 432 (Delhi)

⁴⁰MANU/UP/3107/2017,



In both these cases, the victims have entered into consensual marital relationships with their husbands and the girls were fearful for their own lives. Since the partner was of a different caste/religion, approval for the marriage was not given by the family. Here the families and the communities are attempting to impose the patriarchal and caste norms on the children, and the consent law has inadvertently helped in enabling these regressive notions.

- *Customary practices in tribal population*

The consent laws in India largely ignore the customs and practices of the tribal population in various parts of the country. The tribal people in India have their customary practices and culture that are unique and diverse. These include customary practices of marriage, courtships, as well as age of marriage. For example, in the Paniya tribal community in the Wayanad district in Kerala, biological maturity is the only marriage criterion.⁴¹ Wedding rituals of the Paniya tribes include “elopement”. Similarly, in the Muthuvan tribe the wedding ritual is in the form “hide and seek.” These wedding rituals are very different from the marriage rituals practiced in the rest of the country. Traditional symbols of marriage, including photos of wedding rituals or other indicators such as sindoor and thali, are also not present. In these communities, pre-marital sex is not considered a sin and many of them elope and get married as a customary practice. It is also seen that the tribal women within the community enjoy a lot of freedom and a liberal social life. Hence, they enjoy more marital freedom and sexual liberty than the non-tribal population in India.⁴²

The consent laws come in conflict with these marital practices of the tribal community. The tribal communities are ignorant of the consent law and still practice their distinctive wedding rituals. In a *suo moto* petition by the Kerala State Commission for Protection of Child Rights, the Commission looked into the issue of POCSO Act being slapped on the members of tribal communities.⁴³ The commission acted in pursuance of some newspaper articles reporting harassment of young tribal men under the POCSO Act.

The commission found that adivasis (tribals) face rigours of the consent law as marriage below 18 years is part of their custom. Some news articles had estimated around 20 to 30 young tribesmen had cases registered under the Act and were jailed pending trial. Since the provision of bail under the law is stringent, it becomes complicated for them to get bail, and they often have to depend on non-tribals for this purpose. A tribal male of 22 years was recently charged under the POCSO act when he brought his minor wife for pregnancy to the hospital.⁴⁴ The marriage was solemnized as per the tribal custom with the approval of both the parents and the girl. In this case application of the consent laws serves no purpose. It will only result in causing distress to the minor pregnant wife, who will now have to fight for her husband’s freedom. The child rights commission has suggested that more awareness of law must be given to tribals.

⁴¹Rajasree M R &Dr. P H Kalesh (2019)*Customary Marriage Practices versus Modern Laws: A Study based on Paniya marriages and POCSO Act, 2012, The Research Journal of Social Sciences*

10(7).https://www.researchgate.net/publication/338230508_Customary_Marriage_Practices_versus_Modern_Laws_A_Study_based_on_Paniya_marriages_and_POCSO_Act_2012

⁴²Id.

⁴³http://web.kespcr.kerala.gov.in/uploads/ef15a3878a0989488df007c8e14a0979_29-01-2019_111658.pdf

⁴⁴Pocso case against tribal youth as 14-year-old wife gives birth in Kerala (2021)

<https://www.newindianexpress.com/states/kerala/2021/feb/06/pocso-case-against-tribal-youth-as-14-year-old-wife-gives-birth-in-kerala-2260181.html>



The Constitution of India has special provision enacted with the intention of protecting scheduled tribes.⁴⁵ The consent laws in India at present are not in consonance with these constitutional principles.

Criminalizing consensual sexual relationships between young adults and treating them on par with child sexual abusers is an absurdity of the law. At present, the consent laws do not provide any scope for children below 18 years to make decisions related to sexual autonomy. The law, with its rigidity, constructs child sexuality as a taboo that has to be destroyed.⁴⁶ Sex is viewed as a crime, and children charged under the Act are subject to “*shame, embarrassment, anger, and regret.*” Such an approach would adversely affect their development and result in an unhealthy relationship with sex.⁴⁷ A study conducted by NLSIU, Bangalore on the implementation of POCSO Act, 2012 in five states in India has found that many cases registered under the Act fall within the category of “romantic relationship”.⁴⁸ Due to their disapproval of the relationship, the victims’ families report the cases, and in most cases, the trial ends with an acquittal.⁴⁹ In a study by *The Hindu*, analyzing 500 cases involving sexual assault in Delhi in 2013, it was found that of the cases in which trial was completed, over 40% dealt with consensual sex, usually involving the elopement of a young couple and the girl’s parents subsequently charging the boy with rape.⁵⁰ In 2015⁵¹ on examination of 120 cases registered during 2001-2015 in 28 police stations in Coimbatore rural district (state of Tamil

⁴⁵ Lina Acca Mathew Right to Sexual Autonomy of Children—Implications of the UNCRC upon the Indian Law on the Age of Consent, *International Journal for Crime Justice and Social Democracy*, 2019 8(2): 121-134, Article 46, 5th and 6th schedule, Constitution of India 1950.

⁴⁶ Lina Acca Mathew Right to Sexual Autonomy of Children—Implications of the UNCRC upon the Indian Law on the Age of Consent, *International Journal for Crime Justice and Social Democracy*, 2019 8(2): 121-134. <http://classic.austlii.edu.au/au/journals/NewLawRw/2001/16.pdf>

⁴⁷ *The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*, [2013] ZACC 35. (expert report) compiled by the late Professor Alan Flisher, a child psychiatrist at the University of Cape Town, and Ms Anik Gevers, a clinical psychologist specialising in child mental health.

⁴⁸ In Karnataka, six of the 110 (5.45%), in Delhi, 144 of 667 (21.58%) judgements analysed were ‘romantic’ cases, and in Assam, 27 out of 172 cases (15.69%) were ‘romantic’ in nature. The percentages in Maharashtra and Andhra Pradesh were found to be 20.52% and 21.21% respectively. Implementation of the POCSO Act 2012 by Special Court: Challenges and Issue Based on CCL-NLSIU’s Studies on the Working of Special Courts in Five States, Centre for Child and the Law (CCL) National Law School of India University (NLSIU), February 2018 file:///C:/Users/user/Downloads/Implementation-of-the-POCSO-Act-2012-by-special-courts-challenges-and-issues-1(3).pdf

⁴⁹ Some of the reasons for the acquittal being the victim either refused to testify against the accused, or turned hostile, denying that the alleged offence had ever taken place. The rate of conviction in cases where the victim and the accused were married was 0% in Assam and Andhra Pradesh, 1% in Delhi and 3% in Maharashtra. Implementation of the POCSO Act 2012 by Special Court: Challenges and Issue Based on CCL-NLSIU’s Studies on the Working of Special Courts in Five States, Centre for Child and the Law (CCL) National Law School of India University (NLSIU), February 2018 file:///C:/Users/user/Downloads/Implementation-of-the-POCSO-Act-2012-by-special-courts-challenges-and-issues-1(3).pdf

⁵⁰ Rukmini.S (2014) The many shades of rape cases in Delhi, <https://www.thehindu.com/data/the-many-shades-of-rape-cases-in-delhi/article6261042.ece>

⁵¹ Nithya Nagarathinam 2015 “*Enabling Reporting of Rape in India: An Exploratory Study*, *The Hindu Centre for Public Policy and Research, Policy Report No 15*”

https://www.thehinducentre.com/multimedia/archive/02675/Policy_Report_No_1_2675192a.pdf



Nadu), it was found that 54% of the cases were consensual sex.⁵²We see that the consent laws have inadvertently left children at the mercy of their parents and social norms. The law's primary objective is to protect children, and provisions under the law must reflect this. As discussed above, the law has resulted in several unintended consequences affecting many children, particularly of economically and socially disadvantaged sections of society.

Recently the Indian Supreme Court of has decided to review the scope of consensual sex and treatment of minors engaging in consensual sex under the POCSO Act.⁵³The scope of review by the court is very limited; the consent laws in India need to incorporate modern principles of child rights as well as adopt a progressive penal policy. In the next section, we undertake a comparative study of international practices in consent law jurisprudence and how these can be adopted in the Indian context

REFORMING THE CONSENT LAWS IN INDIA

- *“Right of Choice” in consent laws*

Child' rights policies are governed by two principles, one being of protection and the other of “rights of choice.” Under the protection principle. Children are seen as “vulnerable, innocent and pure”⁵⁴and incapable of understanding the consequences of their actions.⁵⁵In the choice-based approach, children are considered to be individual shaving the authority to make affirmative and legally binding decisions.⁵⁶⁵⁷ The consent laws in India incorporate the protection principle, by criminalizing sexual behavior for protecting children from sexual abuse. However as seen in the previous chapter such an approach has adverse implication on the rights of children. .

At the United Nations Convention on the Rights of the Child 1989, the desired principles were codified and reflect this choice-based approach.⁵⁸ Under Article 5 of the CRC, parents or family have the primary responsibility for the welfare of children. However this right of parents is subject to the principle of “evolving capacity.” According to the principle of “evolving capacity,” children should exercise their rights as they acquire the competence to do so.⁵⁹ Children are seen as right holders, constantly maturing and learning, and can develop the

⁵² Consensual relationship under the study includes two categories firstly; cases of consensual sexual relationships wherein the girl is a minor and the cases are criminalised as rape by the parents. The second category included consensual sex and breach of promise of marriage by the accused male.

⁵³<https://www.thehindu.com/news/national/sc-to-study-whether-minors-can-be-punished-under-pocso-for-consensual-sex/article34200856.ece>

⁵⁴Horii, H. (2020) ‘Walking a thin line: Taking children’s decision to marry seriously?’, *Childhood*, 27(2), pp. 254–270. doi: 10.1177/0907568220901758..

⁵⁵ <http://classic.austlii.edu.au/au/journals/NewcLawRw/2001/16.pdf>

⁵⁶Hafen,BandHafen,J (1996) Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child.*Harvard International Law Journal*.37(2): 449-491

⁵⁷Hafen,BandHafen,J (1996) Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child.*Harvard International Law Journal*.37(2): 449-491

⁵⁸Hafen,BandHafen,J (1996) Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child.*Harvard International Law Journal*.37(2): 449-491

⁵⁹ <https://archive.crin.org/en/home/rights/convention/articles/article-5-parental-guidance-and-childs-evolving-capacities.html>



competence to make decisions independently.⁶⁰ The role of parents and the community is to engage children and help them to exercise these rights based on their capacity. Article 12 of the CRC further expands this principle further by giving children the right to form their views concerning themselves and express these views freely. The evolving capacity principle is relevant in the context of consent laws as the age and maturity of children are important factors in determining the sexual autonomy of each child.⁶¹ The determination of this age of consent should thus be based on the principle of evolving capacity autonomy.

Another principle under the Child Rights Convention is the “best interest” principle, which states that the child’s best interest shall be the primary consideration concerning all actions taken for the child. This principle is an umbrella provision encompassing all the provisions of the convention. The principle can be considered a procedural safeguard. It requires that the primary consideration in all actions taken in relation to children both by state and private institutions must be in tune with the “best interest principle.”⁶² Any decision taken for children must include a *child impact assessment*. The decision makers must ensure that the consequences of their decision should be in the child’s interest. In case of any conflict of interest, the ‘best interest principle’ prevails. Examining the consent laws on this principle, we see that the law falls short. The law is ambiguous on the treatment of children before the trial, for example in the registration of the crime, investigation, arrest, etc. As seen in the case of *Md. Saddam Hussain v. State of Assam and Ors*,⁶³ the accused was treated as an adult by the trial court and convicted. It was only in the appeal stage that the age of the accused was determined and the accused was sent to the Juvenile Justice Board. Here till the age of the accused was determined medically he had to undergo the rigours of the law as an adult. The consent laws in India treat children as participants in a crime. Young adults who enter into romantic relationships and engage in sexual exploration guided by their biological needs are considered to be perpetrators of sexual abuse.

In the Indian context, we see that consent law has not successfully engaged with the principle of evolving capacity and the best interest principle. Both these principles embody the “choice-based approach” in child’s rights regime.

- *Flexibility in Age of consent*

The consent law criminalizes all forms of sexual relationships below 18 years, whether consensual or not. There is no scope in the law to consider the circumstances and context of the relationship. This has resulted in harassment and misuse of the law. Justice JS Verma Committee had objected to increasing the age of consent from 16 years to 18 years in the consent laws. The committee was of the opinion that an increase in the age of consent would criminalize all

⁶⁰ UN Committee on the Rights of the Child, General Comment No. 7 (2005), *Implementing child rights in early Childhood* cr/C/GC/7/Rev.1

⁶¹ Sheila Varadan (2019) .The Principle of Evolving Capacities under the UN Convention on the Rights of the Child. *International Journal of Children’s Rights* 27: 306-338 , UN Committee on the Rights of the Child, General Comment No. 4 (2003), *Adolescent health and development in the context of the Convention on the Rights of the Child*. cr/C/GC/2003/4,

⁶² Thomas Hammarberg (2008) The Principle Of The Best Interests Of The Child – What It Means And What It Demands From Adults. <https://rm.coe.int/16806da95d>

⁶³ MANU/GH/0744/2017



consensual sexual activity of children below the age of 18, which goes against the spirit of the Child Rights Conventions. It is this rigid and narrow interpretation in determining the age of consent that needs to be reformed.

An alternative approach would be to incorporate a flexible age of consent. Recent studies have discussed the age of consent from two perspectives: the single-stage system and the multi-stage system. In the single-stage system, one age is fixed as the age of consent and it applies to all cases irrespective of the facts and circumstances.⁶⁴ In the multistage approach, the age of consent would vary depending on the circumstances of the case and the nature of the relationship between the parties. Under this approach the protection under the age of consent law reduces with the *decreasing need for protection and the increasing capacity for self-determination*.⁶⁵ The age of consent would increase when the relationship is that of authority as children need more protection, while it could be lower when both the parties are of nearly same age. Some of the methods to categorize age of consent are:

- a) There will be a minimum age of consent which will be universally applied under all circumstances. In the United States, the age of consent varies from state to state between 16 years and 18 years.⁶⁶ In the European Union of the average age of consent in among 59 countries is 15.47 years, with 23% countries adopting an age limit of 14 years or below.⁶⁷ In India we have one age of consent at 18 years.
- b) Another method is that of fixing a separate, higher age of consent in relationships of trust, authority, or dependency.⁶⁸ Such an approach aims at ensuring that children are given the protection of consent laws when the relationship is one of authority. For example, the age of consent could be fixed at 16 years; however, when the relationship is one of authority, it could be increased to 18 years. Such a system would ensure that children are given protection against abuse and assault, but enable them to engage in healthy sexual relationships. In the EU more than 30 have adopted a separate higher age of consent based on authority.⁶⁹
- c) The third type is fixing a lower age of consent for close-in-age consensual sexual relationships. In the USA these are popularly referred to as the “Romeo and Juliet” laws

⁶⁴Guangxing Zhu and Suzan van der Aa (2017) Trends of age of consent legislation in Europe: A comparative study of 59 jurisdictions on the European Continent, *New Journal of European Criminal Law* 8(1):14-42 <https://doi.org/10.1177/2032284417699293>, Helmut Graupner, J.D.(2000) Sexual Consent: The

Criminal Law in Europe and Overseas, *Archives of Sexual Behavior* 29(5). <https://doi.org/10.1023/A:1001986103125>

⁶⁵Helmut Graupner, J.D.(2000) Sexual Consent: The Criminal Law in Europe and Overseas, *Archives of Sexual Behavior* 29(5). <https://doi.org/10.1023/A:1001986103125>

⁶⁶Lina Acca Mathew Right to Sexual Autonomy of Children—Implications of the UNCRC upon the Indian Law on the Age of Consent, *International Journal for Crime Justice and Social Democracy*, 2019 8(2): 121-134,

⁶⁷Guangxing Zhu and Suzan van der Aa (2017) Trends of age of consent legislation in Europe: A comparative study of 59 jurisdictions on the European Continent, *New Journal of European Criminal Law* 8(1):14-42 <https://doi.org/10.1177/2032284417699293>

⁶⁸Helmut Graupner, J.D.(2000) Sexual Consent: The Criminal Law in Europe and Overseas, *Archives of Sexual Behavior* 29(5). <https://doi.org/10.1023/A:1001986103125>

⁶⁹Guangxing Zhu and Suzan van der Aa (2017) Trends of age of consent legislation in Europe: A comparative study of 59 jurisdictions on the European Continent, *New Journal of European Criminal Law* 8(1):14-42 <https://doi.org/10.1177/2032284417699293>



which protect young children who are close to each other in age and engage in consensual sex, from penal liabilities.⁷⁰ For example in the state of Florida in USA the age of consent is fixed at 18 years and an age gap of up to 4 years is legally exempted. In Canada the age gap is determined in two categories, for children of 12 or 13 years the age gap could be of up to a maximum of 2 years. Whereas for children of 14 or 15 years the age gap could be up to 5 years.⁷¹ In South Africa the *Teddy Bear Judgment*⁷² decriminalized consensual sex in the age of group of 12 to 16 years. Following this judgment amendments were made to the Sexual Offences Act, 2015 which introduced varying degrees of punishment as per the age of the children. If both the children are in the age group of 12 to 15 years, then there is no offence under the law. When one party is above 12 years an age gap of 2 years is permitted.⁷³ In Australia the age of consent differs in each state. In South Australia, consent is a defence only to a party below 17 years and if the other party is at least 16 years. While in Australian Capital Territory the defence of consent can be availed by a person of 10 years and above with age gap exemption of 2 years.⁷⁴

Indian could adopt a multistage approach in determining the age of consent. The consent laws in India have categorized offenses as rape *simpliciter*/sexual assault, and aggravated rape/aggravated sexual assault; the latter includes rape by persons in authority or relationship of trust, dependency etc. The offenses are graded based on their severity and incorporating a flexible age of consent would only make it more effective. The legislature in India could consider adopting a multi-stage method of fixing a higher age of consent for the aggravated offenses of rape and sexual assault. A recent study of rape judgments from trial courts of Delhi have showed that 23% of the cases were consensual/elopement marriages, in 80% of which, the victim was between 16 to 18 years.⁷⁵ Along with a higher age of consent for aggravated offences an “age-gap” exemption should also be included in the consent laws. There is thus a need to reform the legal age of consent to protect young adults and adolescents from unjust prosecution.

⁷⁰Joseph J Fischel (2010) Per Se or Power? Age and Sexual Consent Yale Journal of Law and Feminism 22(2):279-341 <https://digitalcommons.law.yale.edu/yjlf/vol22/iss2/4> , Steve James (2009) Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform, *UMKC Law Review* 78: 241

⁷¹Lina Acca Mathew Right to Sexual Autonomy of Children—Implications of the UNCRC upon the Indian Law on the Age of Consent, *International Journal for Crime Justice and Social Democracy*, 2019 8(2): 121-134

⁷²*The Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*, (2013). <http://www.saflii.org/za/cases/ZACC/2013/35.html>

⁷³Zaynab Essack and Jacintha Toohey Jacintha Toohey, Unpacking the 2-year age-gap provision in relation to the decriminalisation of underage consensual sex in South Africa, November 2018, *South African Journal of Bioethics and Law* 11(2):85

⁷⁴Lina Acca Mathew Right to Sexual Autonomy of Children—Implications of the UNCRC upon the Indian Law on the Age of Consent, *International Journal for Crime Justice and Social Democracy*, 2019 8(2): 121-134

⁷⁵Preeti Pratishruti Dash (2020) Rape adjudication in India in the aftermath of Criminal Law Amendment Act, 2013: findings from trial courts of Delhi, *Indian Law Review*, 4(2): 244-266 DOI: 10.1080/24730580.2020.1768774



- *Mandatory minimum sentencing vs Sentencing guidelines*

The next aspect is the imposition of a mandatory minimum sentence in the consent laws. Under the POCSO and the IPC provisions a mandatory minimum sentence of 7 years is imposed for sexual assault/ *rape simpliciter* and a mandatory minimum sentence of 10 years is imposed for aggravated sexual assault/aggravated rape. The law denies judges the space to consider the facts and circumstances of each case to determine an appropriate sentence. It completely removes the discretionary power of the judges in the sentencing process.

In the NLSIU report on the implementation of POCSO,⁷⁶ certain trends were observed with respect to mandatory minimum sentences influencing judicial sentencing policy. In the vast majority of cases the court prescribed the minimum sentence and did not impose a higher sentence.⁷⁷ The judges have a tendency to restrict the sentencing to the minimum. Another implication is low conviction. According to the crimes data released by the Indian government, the conviction rate under the POCSO is 34.9 for the year 2019. Since the judges have very limited discretionary powers, if a judge feels a sentence is too extreme in a particular case, he may choose to acquit the person.⁷⁸ The NLSIU report attributes the low conviction rates to the limited discretion given to judges. As we have seen many of the cases registered under the consent laws are consensual relationships and in such cases the court would prefer to acquit the person rather than make them undergo harsh sentences.

It is clear that removing judicial discretion proves to be counterproductive in ensuring higher convictions, or fitting sentence to an offence. Legislation could introduce a more rationalized model of sentencing. One of the methods is through a guideline system of sentencing. The Supreme Court's observation in *Soman v State of Kerala*⁷⁹ throws light on the need to adopt sentencing guidelines. "*Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it, after he is held guilty of the charges.*" In March 2003, the Committee on Reforms of Criminal Justice System (the Malimath Committee), a body established by the Ministry of Home Affairs, issued a report that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences.⁸⁰

Two of the most popular sentencing guidelines are the grid model of USA and the step-by-step guideline model of UK. In the grid model the sentence is calculated through mathematical calculation. These calculations are based on factors such as the seriousness of the offense, the

⁷⁶ Implementation of the POCSO Act 2012 by Special Court: Challenges and Issue Based on CCL-NLSIU's Studies on the Working of Special Courts in Five States, Centre for Child and the Law (CCL) National Law School of India University (NLSIU), February 2018 file:///C:/Users/user/Downloads/Implementation-of-the-POCSO-Act-2012-by-speical-courts-challenges-and-issues-1(3).pdf

⁷⁷ Delhi (54.94%), Assam(75%), Maharashtra(72.5%), Andhra Pradesh(39.39%)

⁷⁸ Mrinal Satish (2017) *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India*. Cambridge University Press

⁷⁹ Criminal Appeal Nos.1533-1534 OF 2005 decided on 14 December, 2012

⁸⁰ Government of India, Ministry of Home Affairs 2003. *Committee on Reforms of Criminal Justice* https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf



nature and characteristics of the offense, and the criminal history of the offender etc.⁸¹ In the UK system, each offence has a separate and individual sentencing guideline. It is a step-by-step system, where the starting point of the sentence is determined based on the harm and culpability of each offense.⁸² Courts use this starting point to shape the sentence with the help of the remaining steps as provided under the guideline.⁸³

Guidelines system ensures uniformity in sentencing which is otherwise found lacking in a completely unstructured sentencing system. Also, the guidelines provide a range of sentencing within which the judiciary has the discretion to choose. This helps the Court to determine a sentence considering all aggravating and mitigating factors. The legislature should move away from mandatory minimum sentencing policy and adopt more progressive penal policies such as guidelines system. The judges retain their discretionary powers in sentencing and the guidelines would ensure that the discretion is exercised rationally and in a guided manner.

CONCLUSION

The consent law in India, while amended with the best of intentions of curbing the sexual assault of children, has resulted in unforeseen consequences for minors who are in consensual sexual relations. The issue here lies in not just in the criminalizing of consensual relations between minors but also in the way these provisions intersect with mandatory sentencing guidelines that prevent mitigating circumstances from being factored in by the judge during sentencing. It has been used as an extra-ordinarily blunt instrument to fight the scourge of child marriage and child sex abuse without due consideration to the social and psychological realities of the lives of minors. It has also been used as a convenient legal tool by conservative sections of society to constrain the sexual agency of youth in the name of preserving social and cultural identities. Further, the consent law has not been framed keeping in mind the socio-cultural contexts of scheduled tribe communities and has resulted in unjust penalizing of tribal members whose sexual relationships conform to their traditional cultural practices. In these cases, consent laws clash with the constitutional protections available to scheduled tribes in India.

Keeping the above in mind, the solution in terms of decreasing the age of consent would be simplistic and would not address the underlying issues of the lack of discretion offered to judges in sentencing. This can clearly be seen through the numerous notes of dissent voiced by judges when it comes to prosecuting those accused under these provisions. Introducing flexibility in the age of consent, factoring in authority exercised, closeness in age, as prevailing in the legal system of other countries may be difficult in a country as large and complex as India.

The solution that stares one in the face is the abolition of mandatory sentencing guidelines for offenses under the consent law which would enable judges to factor in mitigating circumstances and prevent those accused of such offences from languishing in jail for extended periods of time for alleged acts that don't fit neatly into the framework of the law. Alternately, we could have a

⁸¹ 18 US Code Crime and Criminal Procedure .s. 3553

⁸² Andrew Ashworth and Julian V. Roberts (2013) The Origins and Nature of the Sentencing Guidelines in England and Wales in Andrew Ashworth and Julian V. Roberts(eds) *Sentencing Guidelines*, Oxford University Press and Julian V. Roberts.(2013).*Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues. Law and Contemporary Problems.*76 :1

⁸³ Andrew Ashworth,(2011). Sentencing Guidelines and the Sentencing Council.*Criminal Law Review*5:389



more nuanced system, treating consent as a defense in certain circumstances and with judicially laid down guidelines for sentencing.

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