



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

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THE CONFLICT BETWEEN A MINOR'S RIGHT TO PRIVACY AND BODILY AUTONOMY: A CRITICAL ANALYSIS OF THE POCSO ACT, 2012

AUTHORED BY - ANDREA MIRIAM STANLEY

Abstract:

The Protection of Children from Sexual Offences (POCSO) Act, a comprehensive legislative structure created to protect minors from sexual abuse, has drawn appreciation for its intended purpose of safeguarding children. However, the ambitious objectives of the act clash with a minor's right to privacy and bodily autonomy. This paper provides an in-depth study of the issues at play in this discussion, as well as the importance of developing a thoughtful plan to protect children without jeopardising individual freedoms. The POCSO Act includes procedures that may breach a child's right to autonomy and confidentiality, such as statement recording, medical examinations, and the legally enforceable requirement to reveal information about any sexual conduct with a minor. Adolescents' sexual behaviour is frequently restricted by law. A number of these issues make it difficult to criminalise relationships between adults and adolescents that are consensual, such as the inconsistent execution of laws based on arbitrary age limits, and the paucity of legal solutions to problems that are more societal than criminal in nature. Due to their disapproval of the relationship between the children, which is mostly driven by prejudices instigated by the community, the guardians of the children typically file fabricated complaints in these cases. It skilfully draws attention to the dichotomy between the POCSO Act's primary intent of protecting adolescents from sexual exploitation and its potential for overreach when its limitations are applied to romantic relationships between minors. It highlights the significance of preserving a careful balance between upholding individual rights and safeguarding children while we seek to build a just and empathetic community.

Keywords: Adolescents, minors, sexual abuse, right to privacy, right to bodily autonomy, consensual relationships

INTRODUCTION:

In an attempt to address an upward trend in child sexual abuse cases, the Parliament established the Protection of Children from Sexual Offences Act (POCSO) in 2012. Before the current legislation was implemented, engaging in sexual activity with a woman under the age of eighteen was considered statutory rape and was criminalised under Section 375 of the Indian Penal Code, 1860. Unlike the IPC, which views rape as a crime to one gender, the POCSO Act safeguards all children regardless of their gender. According to the law, a "child" is any individual who is under the age of eighteen. Interestingly enough, while determining culpability for any of its offences, the POCSO Act makes no reference of "consent" or the absence of it. This is because children are incapable of conveying informed consent to sexual activity since they lack the maturity and agency necessary to comprehend the possible repercussions of doing so. POCSO defines a child as someone under the age of 18.¹

It was a step towards safeguarding minors, with a contemporary approach. The statute has flaws, though, leaning it toward the non-progressive side. Regardless of whether the sexual act was that of voluntary consent, the law states that any sexual contact with, any individual under the age of 18 qualifies as rape. Article 12 of the United Nations Convention on the Rights of the Child (UNCRC), 1989 states that a child has the right to be heard, and this goes against the principle of a minor's organic and physical development. Globally, the "evolving capacities of the child" are given prominence under this Convention.² Critics have asserted the significance of imparting youngsters the liberty to make independent choices and the freedom to discover their sexuality. There are no gender restrictions when it comes to starting an intimate relationship; both partners have to offer their consent. However, the act's gender-neutral principle is frequently disregarded. Irrespective of the boy's age, girls would typically be perceived as the innocent party and legal action would be taken against him. However, when grooming is employed as a strategy in cases where the victim holds a position of trust it becomes challenging to determine the extent of psychological manipulation exerted by the perpetrator, on the victim.³ This raises a contentious debate, in our society; whether consent given by a minor before reaching the age of 18 is valid?

¹ Yashaswini Basu et al., *POCSO And The Age Of Consent: Question Of Teenage Sexual Exploration And Bodily Autonomy*, OUTLOOK, Thursday, 27 JUL 2023, 7:34 AM, <https://www.outlookindia.com/national/pocso-and-the-age-of-consent-question-of-teenage-sexual-exploration-and-bodily-autonomy-news-305925>.

² United Nations, General Assembly, United Nations Convention on the Rights of the Child, November 20, 1989, United Nations, Treaty Series, vol. 1577, p. 3

³ Veenashree Anchan et al., *POCSO Act, 2012: Consensual Sex as a Matter of Tug of War Between Developmental Need and Legal Obligation for the Adolescents in India*, SAGE JOURNALS, Oct 19, 2020, <https://journals.sagepub.com/doi/full/10.1177/0253717620957507>

RESEARCH PROBLEM:

The clash between the POCSO Act and the rights of minors to privacy and bodily autonomy sparks a contentious ethical and legal predicament. While designed to shield adolescents from sexual exploitation, the POCSO Act's implementation may potentially infringe upon their fundamental rights. The Act mandates the reporting of sexual offences against minors, backed by legal consequences for non-compliance. Moreover, medical practitioners are obligated to notify authorities if a minor seeks a termination of pregnancy. These provisions might induce shame and apprehension in victims, especially if the relationship was consensual and they fear repercussions for their partner. A child confides in the people they trust the most, hoping that confidentiality will not be breached. Since the Act imposes a legal obligation on the medical practitioners or any other person having such information to report it, it leads to the dilemma between getting penalized or violating the minor's right to privacy. Striking a balance between safeguarding victims and ensuring justice becomes intricate. The Act's treatment of consensual relationships as criminal, disregarding a minor's consent, restricts adolescents; sexual agency and autonomy. This necessitates divulging personal details and conducting medical procedures that infringe on privacy and restrict bodily autonomy, even in consensual relationships. The guardians of the minor falsely file the majority of such cases because they disapprove of the association, which is primarily based on social prejudice. It astutely highlights the conflict between the POCSO Act's primary objective is to shield children from sexual exploitation and the potential overreach of its provisions when applied to romantic relationships among minors.

RESEARCH OBJECTIVES:

1. To assess the provisions of the Protection of Children from Sexual Offences Act, 2012.
2. To examine the lacunae in the POCSO Act, 2012.
3. To analyse the effect of this Act on minors' right to privacy and bodily autonomy under Article 21 of the Indian Constitution.
4. To investigate the correlation between conviction rates under this Act and those cases falling under the category of romantic relationships.

RESEARCH QUESTIONS:

1. Whether the provisions of the POCSO Act, 2012 infringe upon the privacy and bodily autonomy rights of minors?

2. What are the reasons for the low conviction rates of offenders under the POCSO Act?
3. Is there any effect on consensual or romantic relationships due to this Act?

RESEARCH METHODOLOGY:

The researcher has adopted a doctrinal method of research. The aims and objectives are exploratory. The data has been collected from primary sources such as statutes and cases, as well as secondary sources like journals, treatises, digests, and law reports.

MODE OF CITATION:

The mode of citation used by the researcher in this paper is Bluebook 20th Edition.

The reporting of offences is regulated under Section 19 of the Act. Individuals must disclose incidents in which there is a plausible suspicion that a POCSO Act violation may have occurred or where knowledge exists that a violation has already occurred. Such information must be reported to the Special Juvenile Police Unit or the local police.⁴ However, the fear of the filing of a formal police complaint prevents many children, teenagers, and their families from receiving the help they need, posing an impediment to securing protection. However, since failing to comply with the statutory reporting requirement could result in being imprisoned, medical professionals are hesitant to terminate pregnancies without first filing a police complaint.⁵

Although the POCSO Act was designed to safeguard children, it may cause the identify and personal details of the minor to be revealed. This may result in social stigma and solitary existence, which can be particularly harmful when a family member or someone in the child's close social circle abuses them. Consensual sexual behaviour between minors is prohibited, and this will have disastrous effects for the adolescents involved. Even if the person is acquitted for the crime under this Act, they may face the stigma of being labelled as a sex-predator, or the possibility of having a criminal record, which will follow them for the rest of their lives.⁶ For example, when determining whether or not a person is competent to consent to sexual activity,

⁴ The Protection of Children from Sexual Offences Act, 2012, § 19, No. 32 of 2012, Acts of Parliament, 2012 (India).

⁵ Anubhav Kumar et al., *Why the protection of teenagers needs to be balanced with respecting their sexual autonomy*, SCROLL.IN, October 05, 2023, 7:30 am, <https://scroll.in/article/1057009/why-the-protection-of-teenagers-needs-to-be-balanced-with-respecting-their-sexual-autonomy>

⁶ Himanshu K Mishra, *Law: An Impediment in Sexual Autonomy of Teenagers*, 3 Jus Corpus Law Journal 327-333 (2022).

Canada considers their age, level of consciousness, and cognitive ability. India's judicial system is unique, nevertheless. The legal situation is simple: if a woman is a minor, her consent to any sexual activity is insignificant or irrelevant. The rising cases demonstrate how rampant sexual engagement is among individuals during their adolescent years.

The Supreme Court ruled in *Independent Thoughts v. Union of India* that Exception 2 of Section 375 IPC, which exempts sexual intercourse with a female below the age of 15 from being constituted rape, is contrary to the welfare and interests of the female adolescent.⁷ The court reasoned that this provision establishes an arbitrary difference between a married girl-child and an unmarried minor, which is draconian and violates the Indian Constitution's fundamental rights to equality, non-discrimination, life, and private liberty. As a result, the court invalidated this exception.⁸

The Allahabad High Court ruled in *Payal Sharma alias Kamla Sharma v. Superintendent* that although living together before marriage may be viewed as immoral by society, it is not against the law.⁹ Law and morality do not always have to be two sides of the same coin. These decisions serve as a benchmark for the liberal interpretation of the rights to equality, privacy, and individual freedom established by the constitution. Instead, they have made patriarchy more entrenched and given young females a suppressed voice when it comes to making decisions. Every person who reaches a certain age has the right, with the other party's absolute and free consent, to get married and start raising a family on their own, without having to encounter any discrimination on the basis of race, nationality, or religion, according to Article 16 of the 1948 Universal Declaration of Human Rights.¹⁰ The simple fact that this expression exists suggests that a person's freedom to marry the person of their choosing is inalienable. In 1962, the General Assembly recognized the importance of marriage by adopting the Convention, on Consent to Marriage, Minimum Age, for Marriage and Registration of Marriages.¹¹ The 1950-adopted European Convention on Human Rights states the same thing in Article 12. This is the international scenario concerning an individual's freedom to select a partner of their choice.

⁷ Pen. Code § 375(2).

⁸ *Independent Thought v. Union of India and Anr.*, [2017] 10 SCC 800

⁹ *Payal Sharma alias Kamla Sharma v. Superintendent*, AIR 2001 All 254

¹⁰ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (December 12, 1948).

¹¹ Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, G.A. Res. 1763 A, (November 07, 1962).

The idea that a person's body who is under the age of 18 belongs to the State and that it is therefore permissible for it to impose restrictions on personal sexual autonomy was, however, rejected by a Special Court judge in 2013. The choice held that criminalizing such behaviour would no longer similarly fulfil the objectives of the law when deciding a case concerning a fifteen-year-girl who willingly eloped with and married a 22-year-old man.¹² This leads to a conflict between the legislation's letter and spirit. Interpreting these facts differently may affect whether or not the assertions that children engaged in sexual activity were under duress or voluntary. A minor may lack the emotional maturity to comprehend what they consent to; however, criminalizing it altogether would pose a detriment to those involved. The legislation permits misuse in both directions: restricting children's autonomy too much or excessively allowing child sexual abuse. The problem with the current age of consent is that adolescents are dragged into the rigours of the law just for making an autonomous choice about their sexual activity, which is a primary indication of biological urges. Adding a legal definition of consent in sexual offences without making any provision for consent in consensual sexual crimes offers a severe risk for the emergence of inconsistency and the potential of a miscarriage of justice. Since there is no set age to justify the bar in such a fluid process, and even though adolescents cannot express free consent, the state lacks the authority to impose restrictions on their ability to exercise their sexual and bodily autonomy. The criminalization of these acts curtails a minor from exercising their right to bodily autonomy, and it further restricts their average pace of development. Sexuality is inherent to a person's physical and mental makeup. In addition to neurological and psychological factors, children at this age are more likely to seek out relationships and companions to develop emotionally and explore their identities. If the liberty to act on consensual sexual relations is prohibited, it could lead to sexually deviant behaviour as an adult. When the regulation treats consensual sexual activity as against the law, it violates a minor's right to live with dignity, and it will become hard for the ones wrongfully convicted under this Act to later combine into society. When adolescent victims insist on staying with their partner and refuse to return to their parents, they are institutionalised in children's facilities, which compromises their freedom. According to a study on their situation, they are alienated from their partners and society, criticised, humiliated, and stigmatised for their acts, and on occasion not released even after they turn 18 years.

¹² Savita Bhatnagar, *Child sexual abuse and the law in India: a Commentary*, Legal Express An International Journal Of Law, 6, 1-9 (2020), <https://legalexpress.co.in/downloads/child-sexual-abuse-and-law-in-india-prof.-savita-bhatnagar1.pdf>.

In the case of *State v. Suman Dass*, the accused, a 22-year-old boy, was arrested under the POCSO Act for eloping with a 15-year-old. The couple was married and resided in harmony. The State contended that the accused should be given a minimum sentence under this Act because any sexual conduct with a minor is a criminal act. The court determined that such a restrictive construction of the legislation would be detrimental to the minor's best interests and that the provisions should be interpreted more broadly by the golden rule of interpretation, wherein the aim and purpose of the Act are upheld.¹³ Such an approach shall enable the success of the Act by ensuring the fruitful development of the child. A pre-requisite to this development would be upholding their right to privacy and confidentiality must be protected through all stages of a judicial process involving the child. A comparable circumstance, wherein a minor absconded with an older man and he was charged under this Act, was observed in the case of *Vijayalakshmi and Others v. State and Others*. She urged before the court to have the matter dismissed, and the court passed in her favour. The court came to the conclusion that the couple's private lives would be invaded if the consent criteria were to be strictly enforced.¹⁴ Relationships of such nature cannot be treated as abusive and are merely a result of natural biological attraction.

Even though the law is "gender neutral," the unfortunate social structure mostly ends up criminalizing the boys, even in mutual relationships or consensual eloping. Imprisonment of young boys should not be the object of this Act. This often leads to behavioural changes and traumatizes children against the justice system. Criminalization also leads to violation of Articles 5 and 17 of UNCRC, which advocate access to information regarding mental and physical health. This also violates a child's right to dignity, privacy, and life guaranteed by Article 21 of the Indian Constitution.¹⁵

The courts have heard many cases where the boy has been arrested for living with a minor, although they are married under their customary or personal laws. Section 42A of the POCSO Act expressly provides that in the event of conflict with another law, the POCSO Act would take precedence.¹⁶ Thus, the Act itself provides no leeway to those married under their personal laws. Although this may be perceived as a measure to curb child marriages, it could be exploitative as

¹³ *Suman Das & Anr v. The State Of West Bengal & Ors.*, WPA 4364 of 2020

¹⁴ *Vijayalakshmi and Others v. State and Others*, 2022 Latest Caselaw 11692 Mad

¹⁵ United Nations Convention on the Rights of the Child, November 20, 1989, United Nations, Treaty Series, vol. 1577, p. 3

¹⁶ The Protection of Children from Sexual Offences Act, 2012, § 42A, No. 32 of 2012, Acts of Parliament, 2012 (India).

well. The interpretation of this provision is done differently by the High Courts. For instance, in the case of *Fija v. State Govt. of NCT of Delhi*, the Delhi High Court provided protection against the girl's family to the petitioners, a minor girl and her husband, on the grounds that they had lawfully wed under their own personal law and had consenting sexual relations.¹⁷ This is because the Court felt that the petitioners, who were evidently adored each other and knew full well what they were doing, should not have been separated because doing so would have harmed the girl rather than protected her.¹⁸ Every law is constructed and then interpreted with the historic social realities in mind, in addition to the necessity of the law.

CONCLUSION AND SUGGESTIONS:

The POCSO Act offers no protection whatsoever to adolescents who are engaging in consensual sexual conduct and discovering or expressing their autonomy. The purpose of safeguarding adolescents from sexual harm is not sufficiently served by criminalising teenagers who are in non-exploitative relationships. Their basic rights to life, liberty, privacy, and dignity are violated since the State is permitted to intervene, restrict, stigmatise, and punish acceptable sexual expressions. Teenagers are put in more vulnerable situations and have their best interests violated when the necessity to protect them is not balanced with their growing autonomy. Access to safe sexual and reproductive health services and information is also impeded.¹⁹

Given these concerns, striking an equilibrium between safeguarding children from sexual abuse and maintaining their right to autonomy and confidentiality is critical. This not only violates the right of adolescents to bodily and sexual autonomy, but it also ignores the chaotic nature of a legal system absent of socio-legal mobility. This may involve revisiting the provisions of the POCSO Act and implementing safeguards to prevent its misuse, such as ensuring that medical examinations are conducted with the minor's informed consent and that children are not criminalized for consensual sexual behaviour. The 205th Law Commission Report and the Justice

¹⁷ *Fija v. State Govt. of NCT of Delhi*, 2022 SCC OnLine Del 2527

¹⁸ Atishya Kumar, *POCSO vs. Personal Laws: The Need to Reevaluate the Age of Consent*, VIDHI CENTRE FOR RESEARCH AND POLICY, Dec 19, 2022, <https://vidhilegalpolicy.in/blog/pocso-vs-personal-laws-the-need-to-reevaluate-the-age-of-consent/>

¹⁹ Swagata Raha, *Criminalizing adolescent sexuality – The protection of children from sexual offences act and the rights of adolescents*, NLU PROJECT 39A, March 4, 2021, (November 03, 2023), <https://p39ablog.com/2021/03/criminalizing-adolescent-sexuality-the-protection-of-children-from-sexual-offences-act-and-the-rights-of-adolescents/>

Verma Committee Report have both proposed revising the age of consent.²⁰ These modifications are necessary in this context to enable adolescents in India to practise their sexual liberty and expression without fear of consequences from the law, which is crucial for the autonomous, holistic development of the adolescent population.

This should be combined with a close-in-age exception and the Romeo and Juliet laws concept. The person does not qualify as a "sexual offender" when the Act is carried out with the permission of both partners. The law has to acknowledge that minors older than 16 with an age difference of no more than three years or who are the same age as them can engage in consenting sexual behaviour. Various countries have approved this to stop the exploitation of children by adults. Since close-in-age consensual partnerships are thought to be less likely to be coercive, such an approach must be employed.²¹ In places like Austria, Australia, Bolivia, and Sweden, the criminal justice system takes a more liberal and tolerant approach because they have the defence of "close-in-age" or "age proximity." This implies that sexual interaction between people of similar ages will not be considered a crime. In the Netherlands, the perpetrator will only be brought to court if a minor victim, aged 12 to 16, files a claim against non-violent sexual conduct. Suppose the age gap between the minor and their partner is not more than four years. Under the Romeo and Juliet statutes of the United States, consenting to sexual encounters is not illegal.²²

The social stigma associated with discussing sexual intercourse in India results in sexual violence victims suppressing their voices and feeling ashamed. Similarly, when adolescents are curious about these matters but do not have their questions addressed, they may be inclined to experiment independently and make uninformed decisions. This could potentially expose vulnerable minors to exploitation, as they lack any form of education on matters related to consent and sexual activity. This reinforces the relevance of comprehensive sex education while bearing in mind that the practical challenges of providing this type of instruction in a culturally and racially diverse nation like India may be addressed by a more nuanced and sensitive approach.²³ Policies are

²⁰ Rishav Devrani, *Relinquishing Adolescent Sexuality in India: Rape and Consensual Sex Under the POCSO Act*, JURIST, Jun 21, 2022, 12:30 AM, <https://www.jurist.org/commentary/2022/06/rishav-devrani-adolescent-consent-india/>.

²¹ Suchitra Singh, *Age of Consent Under POCSO: A Need for Change?*, 6 SSRN 1-4 (2023).

²² Lina A Mathew, *Right to Sexual Autonomy of Children- Implications of the UNCRC Upon the Indian Law on the Age of Consent*, 8 International Journal for Crime, Justice and Social Democracy 121-134 (2019).

²³ Veenashree Anchan et al., *POCSO Act, 2012: Consensual Sex as a Matter of Tug of War Between Developmental Need and Legal Obligation for the Adolescents in India*, 43 Indian Journal of Psychological Medicine 158-162 (2021).

necessary to provide guidance and educate teenagers on how to make safe and healthy choices regarding their sexual activities. To create a framework that upholds protection and autonomy, more focus should be on fostering continuing discussions involving lawmakers, educators, legal professionals, and adolescents. Lastly, the solution entails passing laws that safeguard the legal rights of vulnerable children while encouraging healthy adolescent development.²⁴ The problem is made worse by structural factors including poverty, unequal development, discrimination against girls, and a lack of possibilities for education, which leads to elopements in the hopes of improving their futures.



²⁴ H. S Tatiya et al., *Consensual Sexual Intercourse Among Children vs Current Legal Provisions Under POCSO: A Scientific Review With Prospective Quantitative Analytical Study*, 20 *Medico-legal Update* 60-64 (2020).