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POCSO ACT 2012: AGE OF CONSENT AND THE CRIMINALISATION OF ROMANTIC RELATIONSHIPS.

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INTRODUCTION

India is home to the largest adolescent population in the world. These children and adolescents are victims of various violence and sexual violence is the most prominent one among them. So, to protect children from sexual offences the parliament has enacted the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). This Act provides a comprehensive framework complete with substantive and procedural provisions to address sexual offences against children. As per POCSO Act, a child is a person who is below the age of 18 years.¹ The original bill that was proposed considered the age of consent to be 16.² However, this provision was changed and currently, the age of consent in India is 18 years without giving any regard for adolescent sexuality.

As per NFHS-5 (2019-21), 39% of women had sex for the first time before they attained 18 years. This report indicates that teenagers in India are sexually active. The legislation, however, does not consider the possibility of consent to non-exploitative sexual activities by adolescents. As per the provisions of the POCSO Act and the Indian Penal Code, these consensual sexual intercourses would amount to criminal offences. The issue under consideration in this paper is the criminalisation of such consensual relationships between teenagers. As per NCRB, the number of victims under 6 years of age and between 6 to 12 years was 675 and 3297 respectively, they almost increased by five times in the 16 to 18 age group. POCSO victims between 12 to 16 years and 16 to 18 years were found to be 13256 and 16275 respectively in 2021.³ As per the report by Child and the Law at the National Law School of India University (CCL-NLSIU), it was revealed

¹ Protection of Children from Sexual Offences Act 2012, s 2(1) (d).

² AGNES, FLAVIA. "Controversy over Age of Consent." *Economic and Political Weekly*, vol. 48, no. 29, 2013, pp. 10–13. JSTOR, <http://www.jstor.org/stable/23528498>. Accessed 18 May 2023.

³ National Crime Records Bureau, *Crime in India 2021 Chapter 4A.9*.

that romantic cases constituted almost about 22% of all the cases filed under the POCSO Act.⁴ So, the criminalisation of romantic relationships is a menace that has burdened the judiciary and has impacted teenagers severely.

In this paper, the jurisprudence around the age of consent would be looked into through various dimensions. This would be followed by the approach of different countries to the concept of age of consent and measures used to prevent the criminalisation of romantic relationships. The romantic relationships and the interpretation of the consent by various courts would be analysed through case laws. Finally, suggestions would be made to protect teenagers by upholding their rights.

AGE OF CONSENT

The age of sexual consent is the age at which an adolescent is deemed mentally capable to consent to sexual contact. As per section 375 sixthly of IPC rape is any kind of sexual activity with a girl either with or without her consent, when she is under eighteen years of age. The only deciding factor between legal sexual activity and statutory rape under section 375 sixthly is age. All the statutory rape laws in different countries are intended to discourage adults from pursuing sexual relationships with minors.

The age of consent and its origin in India can be traced back to the colonial period and its statutes. The Age of Consent Act of 1891 was enacted as a response to *Queen-Empress v Hurree Mohun Mythee* case.⁵ In this case, Phulmoni Dasi, at the age of 10 married a man of 35 years old. She died as her husband forcibly tried to consummate her. This event results in the enactment of the Age of Consent Act of 1891. Over time the age of consent has kept on increasing. The following table shows the change in age in the age of consent.⁶

Year	Relevant Acts and Sections	Age of Consent under section 375, 6 th Clause I.P.C
1860	-	10 Years
1891	Act 10 of 1891	12 Years

⁴ Implementation of the POCSO Act, 2012 by the Special Courts: Challenges and Issues Centre for Child and the Law-NLSIU's Studies on the Working of Special Courts in Five States (2018).

⁵ (1891) ILR 18 Cal 49.

⁶ Independent Thought v. Union of India (2017)10 SCC 800

	(After the Amendment of IPC)	
1925	(After the Amendment of IPC)	14 Years
1929	(After Passing of Child Marriage Restraint Act)	14 Years
1940	After the Amendment of the I.P.C. and Child Marriage Act	16 Years
1978	-	16 Years
2013	-	18 Years

Over time, this age of consent has been kept on increasing by various legislation as shown in the above table. Presently it has been increased to 18 in India.⁷ The effect of this is that if a female or male minor enter into a sexual relationship with his/her counterpart, in case a complaint is filed, the other one can be convicted of rape. It means, the consent given by a male or female who is less than 18 years, does amount to no consent in the eyes of the law.

JURISPRUDENCE OF AGE OF CONSENT

The subject of a minor's consent is delicate and contentious. Since these people, who are typically classified as "children," lack fully developed physical, mental, and emotional capacities, they are not regarded as having the agency to make certain decisions or exercise certain rights. These might include voting, possessing a firearm or a vehicle, engaging in sexual activity or matrimony, bringing a legal action or signing a contract. Although the legal majority/consent age may vary by jurisdiction, these restrictions are uniformly applicable in all legal systems.⁸

The preamble of the United Nations Child Rights Convention recognizes that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.⁹ For the purpose of this

⁷ Protection of Children from Sexual Offences Act 2012, s 2(1) (d).

⁸ Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues, CCL-NLSIU, with support from Tata Trusts (CCL-NLSIU Report).

⁹ child-rights-convention (UNICEF,)<<https://www.unicef.org/ /convention-text>.

Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, the majority is attained earlier. This refers to the fact that the idea of a legal majority may be attained early. So, the jurisprudence of age of consent can be analysed through various statutes such as Indian Penal Code, Indian Evidence Act, Child Labour Act, Juvenile Justice Act and judicial pronouncements.

As per the Indian Penal Code, a person below the age of 7, is considered to be incapable of having a criminal intention.¹⁰ If someone is aged between 7 and 12, the culpability depends on whether the child has sufficient maturity to understand and judge the nature and consequences of his action on that occasion.¹¹ All these establish the importance of chronological age in a criminal trial. Thus, in criminal jurisprudence age of 18 is considered to be a milestone for becoming an adult, and so is capable of taking decisions of importance.

Even though there exist court decisions, that discarded the chronological age, and gave importance to the fact that a person is capable enough to understand the consequences of his/her decision, and took decisions that are least expected or far-fetched from what is directly mentioned in the statute. For example, in *State v Akhilesh Harichandra Mishra*,¹² the victim was 15 years old when she eloped and married the accused. They had a child before the trial was completed. The accused was acquitted because the informant stated that the couple was married and she had no grievances. The Special Court noted that the matter had been compromised. It rejected the PP's argument about consent being irrelevant under the POCSO Act. The idea of mental age was rejected by the Supreme Court of India, in *Eera v State*¹³. Considering the gravity of the offence committed against a woman who was intellectually incapable of consenting, any reasonable person would argue that the perpetrator should be tried under POCSO Act. But the court refused to consider the mental age of the victim to be the deciding factor. Thus, some of those below the (chronological) statutory age may be sexually mature, as might some of those with a low mental age. If the legal fiction is sustainable in one case, why not in the other?¹⁴

Similarly, the Indian Evidence Act does not differentiate between a child witness and an adult

¹⁰ Indian Penal Code 1860, s 82.

¹¹ Indian Penal Code 1860, s 83.

¹² Spl. C. No. 165 of 2015 decided on 28.01.2016 (Thane) in Maharashtra Report, p.82.

¹³ (2016) SCC OnLine SC 1678.

¹⁴ Arushi G, "Navigating Through 'Age' and 'Agency' in *Eera v. State* " 14 Socio Legal Review <<https://www.sociolegalreview.com/archives>> accessed April 29, 2023.

witness. As per section 118 of the Indian Evidence Act a person of any age irrespective of whether they have turned major or not, can be a competent witness if they are in a position to understand the question and are capable of giving rational answers. It is the discretion of the court to decide competency, and the discretion should be exercised judicially. No precise age is fixed by law within which there is total prohibition. The competency is not judged merely by age but by the degree of understanding possessed by him. There is no rule regarding the degree of intelligence or knowledge which will render a child a competent witness. The effect of such a section is that statements by a witness with no statutory eligibility condition can affect another person's right to life and personal liberty, and this can have a lifelong impact on the affected person. So a person with no particular age-related eligibility is considered capable enough to affect another person's life and liberty.

As per Child Labour Act, a child i.e. person below the age of fourteen is allowed to work only in the family business. The point to be noted here is that a child below the age of 14 is considered capable of working, even though it is qualified by certain industries, and adolescents (14 to 18 years of age) are prohibited from working in hazardous industries, while they are also considered capable of working, but they are not legally allowed to cast their vote or secure a driving licence, because of other statutory prohibitions. These prohibitions have no reasonable basis. Why should someone who is capable of consenting to do a job in a non-hazardous industry be prevented from casting a vote or signing a contract? Why should the idea of being capable of consenting for work be extended to other capabilities? There is no logical reason for discarding the idea of mental capacity to other fields of law including signing a contract or consenting to a sexual act.

Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015 provides for preliminary assessment where the alleged offence is heinous and where the child has completed or is above the age of 16 years, the Board is required to conduct the preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence and after such assessment, pass an order. If the Board is of the opinion that the child needs to be tried as an adult then the case will be transferred to the Children's Court having jurisdiction to try such an offence. Otherwise, the Board itself will proceed to try the matter as a summons case under the Criminal Procedure Code, 1973.

All these principles and provisions point to the fact that the mental capacity of a person may not be on equal terms with the chronological age. Therefore, it is imperative to consider a person's mental age when determining their legal majority rather than relying solely on their chronological age. And this legislation recognises the importance of mental capacity to the extent that other individual's lives are affected, or the offence committed by the individual is an offence against the State. There is no reason for discarding the idea of mental capacity, in legislation that deals with consent, as far as the lives of other individuals are affected, sometimes to the extent of affecting their bodily autonomy.

In India for both girls and boys, puberty begins between the age of 8 to 14 years. It starts earlier in girls (around 11) as compared to boys (around 12). The median ages of thelarche, pubarche and menarche were 10.8 years, 11 years and 12.4 years.¹⁵ If the appropriate age for sexual activity were defined by physiological development, then we could infer that earlier sexual activity is appropriate.¹⁶ So, children reach sexual maturity during adolescence. They undergo various and significant changes in their transition to adulthood. Their experiences during this transformative period have long-lasting effects that shape their adult lives. However, the reform movements have not focussed significantly on physiological factors and have argued for a higher age of consent. At the end of the 20th century, the debates surrounding the age of consent gained prominence. UNCRC is the result of these movements.

There is no mention of the age of consent in UNCRC. But, it recognises the evolving capacity of adolescents, defined as “an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies.”¹⁷ The concept of evolving capacity of adolescents was also highlighted in the *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*¹⁸ judgement of South Africa. In *Vijayalakshmi v State*¹⁹, the court observed that- it is now well-evidenced that adolescent romance is an important developmental marker for adolescents' self-identity, functioning and capacity for intimacy. Developmental-contextual theories of adolescent romantic

¹⁵ Khadgawat, R., Marwaha, R., Mehan, N. *et al.* Age of onset of puberty in apparently healthy school girls from northern India. *Indian Pediatr* 53, 383–387 (2016).

¹⁶ Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (1st edn, PALGRAVE MACMILLAN 2005).

¹⁷ Committee on the Rights of the Child general comment No. 7 on Implementing Child Rights in Early Childhood (2005), para.17, , [http://www2.ohchr.org/english/bodies/crc/docs/ AdvanceVersions/GeneralComment7Rev1.pdf](http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf)

¹⁸ 2014 (2) SA168 (CC).

¹⁹ (2021) SCC OnLine Mad 317.

stages also provide a framework for how romantic relationships assist young adults with addressing their identity and intimacy needs. Therefore, the age of adolescence as can be seen evidently is one associated with an amassing change in the neurological, cognitive and psychological systems of a person and one of the most important aspects is that the individual tries to establish their identity, develops emotional and biological needs during this period as a result of which the individual tends to look for new relationships, bonding and partnership. It is also important to acknowledge in addition to this, the vast exposure that is available to adolescents and youth in the form of digital content that play a major role in influencing their growth and identity. Therefore, the jurisprudence of age of consent establishes the fact that a stringent age cap with the age of consent cannot be justified when we analyse it through legislation and judicial pronouncements.

AGE OF CONSENT ACROSS THE WORLD AND CLOSE IN AGE EXEMPTIONS.

The UNCRC defines a 'child' as a person below the age of 18 years unless the age of majority is set lower by the laws of a country. It is no wonder then, that ranging from 12 in Mexico to 18 in several states of the U.S.A, in Egypt, and India, the age of consent for heterosexual sex varies widely across countries even today.²⁰ These differences in age of consent are due to social, climatic, cultural, and psychological factors but, almost every age line is arbitrary and incapable of dealing with the complexity and diversity within age groups. Let us now look into the age of consent and close in-age exemptions provided in various countries.

Close in age exemptions in Canada

From 1890 to 2008 the age of consent in Canada was 14 years. In 2008, the criminal code of Canada was amended and the consent for non-exploitative sexual activity is now 16 years. Non-exploitative activity is defined as sexual activity that does not involve prostitution or pornography, and where there is no relationship of trust, authority or dependency between the persons involved. The spirit of the new legislation is not to regulate consensual teenage sexual activity. To this effect, there are a few notable exceptions to the law:²¹

²⁰ UNICEF, *20 Years of the Convention on the Rights of the Child- Are You Old Enough?* https://www.unicef.org/rightsite/433_457.htm (Last visited on May 1, 2017).

²¹ Steven Bellemare, MD, Age of consent for sexual activity in Canada, *Paediatrics & Child Health*, Volume 13, Issue 6, July/August 2008, Page 475.

1. Youths 12 or 13 years of age can consent to nonexploitative sexual activity with peers when the age difference is no more than two years. For example, a 12-year-old child is deemed capable of consenting to sexual activity with a 14-year-old, but not a 15-year-old.
2. Youths 14 or 15 years of age can consent to nonexploitative sexual activity when the age difference is no more than five years. For example, a 15-year-old can consent to having sexual intercourse with a 20-year-old, but not with a 21-year-old. Children younger than 12 years of age can never consent to sexual activity with anyone, of any age, regardless of whether they say they do.

From the above clauses, it is evident that the close-in-age exemptions are different for different age groups. Therefore, persons under 16 years can have consensual sex with someone close in age. These exemptions do not apply to persons who are in a position of authority and this is included to prevent the misuse of law.

Romeo and Juliet laws of the USA

In the United States, the age of sexual consent is regulated by state laws and it varies across the States. These laws are often referred to as statutory rape laws and these are unique because they result in a teen being the victim and a sex offender at the same time. These laws intend to protect children from adult sexual predators and to reduce teen pregnancies. According to these Romeo and Juliet statutes, teenage couples who have not achieved the age of consent may engage in sexual activity without running the risk of being accused of statutory rape as long as the proper guidelines are followed. Romeo and Juliet laws offer considerable flexibility regarding the age of consent restrictions.²² In a typical circumstance, an older person who has sex with a minor may be prosecuted with statutory rape. However, if the minor age is close to that person's age, a Romeo and Juliet law ensures that the older person won't be charged with this sex crime.

As of 2022, 26 states in the USA had Romeo and Juliet laws in place. Each state has its own age of consent, and the states with Romeo and Juliet laws allow for sexual relationships with minors if the older person is two to four years older. For example, people in Minnesota and Washington State can have sex with persons with a two-year age difference. In Tennessee and Pennsylvania, that gap increases to four years. In the state of Texas "Romeo and Juliet" laws generally refer to

²² Victoria Simpson Beck & Stephanie Boys, 'Romeo & Juliet: Star-Crossed Lovers or Sex Offenders' (2013) 24 Crim Just Pol'y Rev 648.

provisions in the law that provide an affirmative defense to criminal prosecution in consensual cases where both actors are similar in age. The law states that anyone between the ages of 14 and 17 can legally give consent to someone within three years of their age, so long as the other party is at least 14 and gives his or her consent. There is no single “Romeo and Juliet” law, but several sections of the Penal Code contain these kinds of provisions. These laws have been used as defences in consensual sexual acts between minors thereby preventing the criminalisation of romantic relationships.

Sexual Offences Act of 2003 of the UK

Half of all UK teenagers have their first sexual experience by the age of 14, according to the National Survey of Sexual Attitudes and Lifestyles. This experience includes intercourse, oral sex, mutual masturbation and sexual touching. Under the Sexual Offences Act 2003, all these sexually active young teens are criminals and sex offenders. They are lumped together with rapists and paedophiles.²³ As per section 9 of the Sexual Offences Act 2003, the age of consent is 16 years. The low age of consent is adopted in the context of the high rate of teenage pregnancies, and the increasing threat of HIV/AIDS to young people. However, the fact that a significant number of children below the age of consent suggest the possibility of re-examining the current law since the age of consent remains high in the UK by the standards of Western Europe, where the age of 14 or 15 is typical

The United Kingdom does not have a close-in-age exemption. So, it is possible for two individuals both under the age of 16 who willingly engage in intercourse can be prosecuted for statutory rape. Similarly, no protections are reserved for sexual relations in which one participant is a 15-year-old and the second is a 16 or 17-year-old.

ROMANTIC RELATIONSHIPS

As per the Report by Enfold, the romantic cases under POCSO Act have the following features:²⁴

- The “victim” expressly admits to being in or having been in love with the accused or having consented to sexual activity with the accused or willingly entered into a marriage

²³ Peter Tatchell, ‘The Current Age of Consent of 16 Doesn't Protect Young People, It Criminalises Them’ huffingtonpost, 25 January 2009) < https://www.huffingtonpost.co.uk/peter-g-tatchell/age-of-consent_b_4314619.html > accessed 03 May 2023.

²⁴ “Romantic” Cases under the POCSO Act An Analysis of Judgments of Special Courts in Assam, Maharashtra & West Bengal, Enfold Trust, in collaboration with UNICEF.

with the accused;

- “Victim’s” family members or other prosecution witness states that the victim was in a “romantic” relationship with the accused at the time of the offence;
- The Special Court concludes that the “victim” was having a love affair with the accused or was in a consensual relationship at the time of the offence.

Several criminal cases booked under the POCSO Act fall under this category. Of the total 7064 POCSO judgments registered between 2016 and 2020 and available on e-courts from the states of Assam, Maharashtra, and West Bengal, 1715 cases (24.3%) constituted “romantic” cases.²⁵ In the majority of romantic cases, the FIR was lodged by a family member usually the parent of the victim. Another common trend observable across the Studies was that romantic cases almost always resulted in an acquittal because the victim either refused to testify against the accused or turned hostile, denying that the alleged offence had ever taken place.²⁶

Though the POCSO Act is gender-neutral it’s the boys who get convicted in the majority of the cases. As per the Enfold report on POCSO cases All “victims” in “romantic” cases were girls (1715 cases) and in all but one case from Maharashtra, the primary accused was male.²⁷ In the majority of the romantic cases after the registration of FIR invariably it’s the boy who gets arrested. This has severe impacts on the life and career of the person who gets arrested. An adolescent boy caught in a situation like this will surely have no defence if the criminal case is taken to its logical end. Punishing an adolescent or minor boy who enters into a consensual relationship with a minor girl by treating him as an offender, was never the objective and intent of the POCSO Act. An adolescent boy and girl who are in the grips of their hormones and biological changes and whose decision-making ability is yet to fully develop should essentially receive the support and guidance of their parents and the society at large. These incidents should never be perceived from an adult’s point of view and such an understanding will lead to a lack of empathy. An adolescent boy who is sent to prison in a case of this nature will be persecuted throughout his life.

²⁵ Enfold report.

²⁶ CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh* (2017), p.64, <https://www.nls.ac.in/ccl/POSCOAP2017study.pdf>

²⁷ Enfold report.

INTERPRETATION OF CONSENT BY THE COURTS IN THE CONTEXT OF POCSO

Consent by a minor is not valid consent in the eyes of the law. this aspect has been dealt with in detail under the jurisprudence of age of consent. So, consensual sex between minors has been in a legal grey area.²⁸ The High Court of Meghalaya in *Smti. Ephina Khonglah v State of Meghalaya*²⁹ case noted that “On perusal of the records, particularly the statement of the victim and the accused, prima facie it is apparent that there is a romantic relationship between the two and that the sexual act involved between them was one of consensual, notwithstanding the fact that in the case of an alleged victim being a minor, consent has no legal validity, however, this aspect of the matter cannot be lost sight of while a plea for grant of bail is being considered by the court.” The Calcutta High Court in *Ranjit Rajbanshi v The State Of West Bengal And Others*³⁰ held that POCSO Act was enacted to protect innocent children from sexual offences. However, a Draconian interpretation of the provisions thereof would merely convert it into a tool of abuse of the process of law, instead of being a protective shield against defenceless minors. Keeping in view the definition of ‘child’ in Section 2(d) of the POCSO Act, even a person who is aged 17 years and 364 days would qualify as a child, but her maturity would not be much different from another person, who was just one day older than her, that is, 18 years old. Thereby the Court highlighted the issue of the age of consent being 18 years in India. The court further noted that the interpretation of a statute cannot be with eyes closed to practical realities and have to be construed in proper perspective, keeping in view the objects and reasons of the Act. Hence, while construing the expression ‘child’ in an appropriate perspective, the age, maturity and other circumstances also become relevant to clinch a case on the ground of penetrative sexual assault.

In *State of Assam v Anjan Kumar Manjhi*,³¹ the girl’s father lodged an FIR alleging that his 17-year-old daughter did not return home and he suspected that the accused might have kidnapped her. The girl went willingly with the accused and stayed with him as his wife in his uncle’s house and engaged in sexual intercourse. The Special Court expressly noted that she and the accused’s love affair “continued for 3 years and that on her sweet will she fled away with the accused to Bihar” and also that the accused made sexual intercourse with her due consent. The Special Court

²⁸ (2021) SCC OnLine Bom 136.

²⁹ (2021) SCC OnLine Megh 228.

³⁰ SCC OnLine Cal 2470.

³¹ POCSO Case No. 12/2018 decided on 23/09/18 by the Special Court in Karbi Anglong (Assam).

noted that the girl declared that she does not desire the accused person to be punished. However, it held that the girl's consent was immaterial. It placed reliance on the Supreme Court's decision on *Independent Thought v Union of India*³² and concluded that the POCSO Act is enacted for the protection and welfare of the child. For committing penetrative sexual assault consent of the girl is immaterial. The offence committed in this instant case is against the State and as such the accused cannot go unpunished. The accused was sentenced to rigorous imprisonment of six months under Section 363, IPC and rigorous imprisonment of seven years and a fine of Rs 1000 and two months simple imprisonment in default of payment of fine under Section 4, POCSO Act.

Therefore, the aforementioned case laws show that the courts have highlighted the issues associated with consent in romantic cases. Though courts admitted to the consent given by the victim but subjected the accused to the punishment under various provisions of the POCSO Act.

CHALLENGES POSED BY “ROMANTIC CASES”

The romantic cases constitute a significant number of cases filed under the POCSO Act. In these cases, the justice system was triggered not to fight the sexual offence or sexual abuse. The might of the criminal justice system was instead invoked more often to control and deter girls from being in relationships against the wishes of their families, and to coerce the girls to return home if they had eloped. In the majority of the cases, the girls admitted to the consensual relationships and did not testify against their partners before the special courts.³³ An overwhelming majority of cases ended in acquittal, principally because the girls did not say anything incriminating against the accused person. Family members also backed down at the evidence stage and expressed that they had accepted the relationship or marriage and did not want any action to be taken against the accused. Convictions were recorded only in exceptional cases and acquittals were the norm in “romantic” cases.

Due to fear of criminalisation of romantic relations, the vulnerable children avoid availing of necessary medical and health care facilities thereby leading to unwanted pregnancies and an increase in sexually transmitted diseases. In 2017, an estimated 11.8 million teenage pregnancies

³² (2017) 10 SCC 800 (Supreme Court).

³³ Enfold report.

occurred in India.³⁴ In the case of *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*, the court held that the statute was inherently contradictory to the extent that it treated children as incapable of making sexual choices, but capable of criminal responsibility for sexual acts. This aspect can be seen in the context of the POCSO Act as the statute impose criminal responsibility for sexual acts.

The other major problem that arises due to the criminalisation of romantic relationships is child marriages. In many countries, child marriages are the result of attempts to prevent the imprisonment of the older partner for statutory rape.³⁵ This was highlighted in the enfold report. The parents who file the FIR later deny giving testimony against the accused. Therefore, the laws aiming to prevent child marriages without a close-in-age exemption may cause the prosecution of adolescent couples who engage in consensual sexual activity when both partners are significantly close in age to each other, and one or both partners are below the age of consent.³⁶ Therefore, the criminalisation of romantic relationships is the result of a lack of close-in-age exemptions in India.

NEED FOR REDUCING THE AGE OF CONSENT AND INCLUDING CLOSE IN-AGE DEFENCE

The evolving capacities and sexual autonomy of adolescents need to be balanced with the responsibility of the State to protect children from sexual abuse.³⁷ While POCSO Act has tried to follow the latter but it has ignored the former. Hence, the law needs to be amended in order to recognise the evolving capacity of teenagers. While dealing with romantic cases the courts have suggested the legislatures look into the issue and also opined that the law needs to evolve with the changing times. During the enactment of the POCSO Act, the National Commission for Protection of Child Rights (NCPCR) suggested that the age of consent in the IPC (16 years) before the Criminal Law (Amendment) Act, 2013, be retained, so that teenage relationships and consensual sexual activity are not criminalised.³⁸ The commission also suggested for close-in-

³⁴ [Prachi Sharma](https://feminisminindia.com/2021/01/19/what-contributes-to-teenage-pregnancies-in-india/) and [Dr. Nisha Sharma](#) 'What Contributes To Teenage Pregnancies In India?' (Feminism in India, 19 January 2021) <<https://feminisminindia.com/2021/01/19/what-contributes-to-teenage-pregnancies-in-india/>> accessed 02 May 2023

³⁵ Kanbur, Nuray. "Close-in-age exemption laws: focusing on the best interests of children and adolescents" *International Journal of Adolescent Medicine and Health*, vol. 33, no. 2, 2021, pp. 20180143.

³⁶ Ibid.

³⁷ CCL-NLSIU Report.

³⁸ Pallavi Polanki, *Time to Lower Age of Consent for Sex? National Child Rights Body Thinks So* (FIRSTPOST (March 6, 2013)<http://www.firstpost.com/india/time-to-lower-age-of-consentfor-sex-national-child-rights-body->

age exemptions, which would protect consensual non-penetrative sexual acts between two children above 12 years of age who are either of the same age or within two years of each other and consensual penetrative sexual acts between children above 14 years who are either of the same age or within three years of each other.³⁹ The close-in-age exemptions do exist in various jurisdictions across the world as discussed earlier. The age of consent in the UK is 16 years but the Sexual Offences Act 2003 does not provide for any exemptions. Whereas in USA and Canada, the statutes have close age exemptions provisions to avoid criminalisation of consensual relationships.

CONCERNS ASSOCIATED WITH CLOSE-IN-AGE EXEMPTIONS

These close-in-age exemptions are not fool proof. They too can be misused. The consent given by a teenager may not be well-informed. Investigators studying adolescent sexuality have identified a multiplicity of factors beyond sexual desire and love that lead teenagers to consent to sex. Among these are fear, confusion, coercion, peer pressure, and a desire for male attention.⁴⁰ Because of these susceptibilities, adolescent girls often strike "painfully one-sided" bargains, appearing to consent to sexual activity under circumstances difficult for adults to understand. Thus, in many circumstances, a girl's consent falls into the grey area that lies between mutually desired, pleasurable sex and rape. As per Oberman intimidation, acquiescence, adolescent naivete and silence "contribute to the problem of nonvoluntary, yet 'consensual' sex among adolescents."⁴¹

But these laws if incorporated within POCSO Act can uphold the choices and dignity of teenagers and respect their Right to privacy which is inherent within the right to Life under Article 21 of the Indian constitution. While upholding the choice of the teenagers and recognising the evolving capacity of the children these provisions would prevent the criminalisation of consensual sexual relations.

[thinks-so-650471.html](#) accessed April 30, 2023).

³⁹ NCPCR, Protection of Children from Sexual Offences Bill, 2010, exceptions to Clause 3.

⁴⁰ Michelle Oberman, 'Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape' (2000) 48 Buff L Rev 703.

⁴¹ *ibid*

CONCLUSION

The legislature appears to have adopted a conservative stance by arbitrarily setting the legal age of consent at 18, completely ignoring the fact that adolescents are going through a process of maturation and self-discovery and that as part of this process, they will inevitably make sexual decisions. The POCSO Act has many negative effects on adolescents since it ignores their right to sexuality and arbitrarily sets the legal consent age at 18. By not recognizing the right to the sexuality of adolescents and mechanically fixing the age of consent at 18 years, the law leads to many harmful consequences for adolescents as discussed in the write-up. Therefore, the criminalisation of romantic relationships has led to the further exploitation of teenagers' exploitation by unprofessional and illegal elements of society. They become vulnerable to diseases, unwanted pregnancy, and trauma. Further, due to a pervasive silence about sexuality, adolescents do not get the right advice from parents, teachers, or medical professionals, instead, they have to take recourse to available information which is more often than not distorted, like pornographic material or peer group.

Therefore, the law must recognize that adolescents have sexual relations and must not criminalize consensual sexual relations between adolescents. However, at the same time, the law must also be cognizant of the state's duty to protect them from exploitation. The legislature has to keep pace with the changing societal needs and bring about necessary changes in law and more particularly in a stringent law such as the POCSO Act. In such a case, we can borrow close-in-age exemptions used in Canada and the USA. Thus, these exemptions would ensure realising the objectives of the POCSO Act which is also in the best interests of our children and adolescents.

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