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POCSO ^{Live}

Protection of Children from Sexual Offences

A quarterly insight to the POCSO Law!

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POCSO LIVE brings you updates and information relating to matters of protection of children from sexual abuse irrespective of gender. This is an effort to create awareness amongst all stakeholders having access to children about their duties and obligations towards protecting children from sexual abuse and keeping them safe.

The age of consent under the POCSO Act and its conflicting impact on consensual sexual relationships

Introduction

This article analyses the age of consent under the POCSO Act and its conflicting impact on consensual sexual relationships amongst adolescents under POCSO Act.

What is the age of consent?

The age of consent refers to the age at which a person is considered legally competent to consent to sexual acts. It is the minimum age that is required for an individual to consent and indulge in sexual relations/acts. In the year 2012, India raised the age of consent from 16 to 18 years.

Legislative and Historical Background

Age of consent laws have been amended several times throughout the years as it was determined by the socio-economic conditions prevalent at a particular period of time.

In the year 1860, the Indian Penal Code had the age of consent as 10 years, irrespective of whether the girl was married or not. It was in 1889 when a 10-year-old girl named Phulmoni Dossee died in Kolkata as her much older husband tried to consummate the marriage. As a result of this and the public outcry that followed, the age of consent for sexual intercourse was raised to 12 years. In the year 1925, the age of consent was increased to 14 years with 13 years for rape within marriage. This was followed by another increase in the year 1949 wherein the age of consent was raised to 16 years with 15 years for marital rape.

POCSO was enacted in the year 2012 to provide a robust legal framework for protection of children from offences of sexual assault, sexual harassment and child sexually abuse material (CSAM) or pornography while safeguarding the interest of the child at every stage of the judicial process. Under the POCSO Act a child is any person below the age of 18 which meant that the age of consent under the POCSO Act is 18 years.

The recommended age of consent in the POCSO Bill 2011 was 16 years when it was first introduced in the Lok Sabha. The POCSO Bill, 2011 also recognized consensual sexual activity and a provision

GOOD TO KNOW!

Provisions related to personal data processing of children under Digital Personal Data Protection (DPDP) Act, 2023

On 11th august 2023, the Indian government enacted the "Digital Personal Data Protection (DPDP) Act, which governs the processing of digital personal data related to individuals as well as other business entities.

The provisions governing the processing of children's personal data are listed in Section 9 of the bill. Before processing the child's personal data, data fiduciaries must obtain consent or permission from the child's parents or legal guardians, according to subsection (1) of the aforementioned section.

Subsection 2 also requires data fiduciaries to refrain from processing personal data that could harm the child's physical and mental development.

Subsection (3) also prohibits data fiduciaries from tracking or monitoring children's behaviour or engaging in negative child-centric advertising.

According to subsection (4), the central government has the authority to exempt specific data fiduciaries or classes of data fiduciaries from certain obligations, including start-ups.

In section (2)(f) of the bill, a child is defined as a human being under the age of 18. Adolescents (15-18 years old) are unable to make sound decisions; therefore, the parliament increased the age limit to 18 years to avoid the impact of unnecessary personal data processing on children's physical and mental health.

to that effect was included for clause 3 which stated as follows-

"Provided that where such penetrative sexual assault is committed against a child between sixteen to eighteen years of age, it shall be considered whether the consent for such an act has been obtained against the will of the child or the consent has been obtained by use of violence, force, threat to use force, intoxicants, drugs, impersonation, fraud, deceit, coercion, undue influence, threats, when the child is sleeping or unconscious or where the child does not have the capacity to understand the nature of the act or to resist it."

However, the provision was withdrawn due to concerns that such an exception would shift the focus on victim's conduct during trial.

Age of Consent around the World

| COUNTRY | AGE OF CONSENT |
|--------------------------|----------------|
| India | 18 Years |
| United States of America | 16 Years |
| United Kingdom | 16 Years |
| France | 15 years |
| Germany | 14 years |
| Japan | 13 years |

Criminalization of Teen Sex

The POCSO Act of 2012 firmly establishes 18 as the age of consent for all sexual activities involving minors. Regardless of apparent consent or the nature of the relationship, any sexual encounter with a child under 18 is considered sexual assault under the Act. This stringent stance aims to shield minors from potential harm and acknowledges their inability to give informed and voluntary consent. However the direct impact of this has been blanket criminalization of consensual and non-exploitative adolescent relationships. Most of such cases get filed if the girl has eloped or has become pregnant or when there is a strong opposition from the girl's family for the relationship and hence invariably such cases result in acquittal. However the criminal trial undermines their dignity, liberty, privacy, reputation and self-esteem which may result in scarring for life.

Romeo and Juliet laws, also known as close-in-age exemption laws or as age of consent exceptions, are designed to address situations where teenagers engage in consensual sexual activity with each other, even though one or both participants may be below the age of consent. The rationale behind introducing these laws is to recognize that consensual relationships between peers of similar age pose a lower risk of coercion or exploitation. As a result, the provisions ensure that states either do not criminalize such conduct at all or punish it less severely than relationships involving adults and minors. These laws aim to either decriminalize such conduct altogether or punish it less severely than relationships involving adults and minors and to reduce or eliminate the criminal penalty in cases where the age difference between the participants is minor and the sexual contact would not have been considered statutory rape if both partners were legally able to give consent. However, it is important to note that this exemption does not apply when the older person holds a position of authority over the younger individual. In such relationships, any sexual activity with someone under 18 in such cases is considered a criminal offense.

The Romeo and Juliet laws or the Age of Consent exceptions exist in the US, Canada, UK, Germany and Italy.

Romeo Juliet Laws in India Context

Romeo Juliet laws DO NOT exist in India. There is no close-in-age exemption in the POCSO ACT and that means that any sexual relationship between two underage people or between an older partner and an underage person is considered sexual assault, sexual harassment or statutory rape. The absence of these exceptions have made normal developmental processes such as exploring romantic relationships or one's sexuality become unlawful acts.

A study based on judgments from the Mumbai Sessions Court at Greater Mumbai and Dindoshi Court in 2019, under the Protection of Children from Sexual Offences (POCSO) Act, revealed that out of a total of 59 cases, 33 cases (56%) were related to "romantic relationships."

Further, a study conducted by the National Law School of India University's (NLSIU) Centre for Child and the Law showed the prevalence of cases revolving around romantic relationships in different states. The findings of the study have been shown in the table below:

Several experts and organizations have called for the introduction of a close-in-age exemption in India to address these issues effectively. A close-in-age exemption would allow for consensual relationships between adolescents to be treated differently from cases involving coercion or abuse. The National Commission for the Protection of Child Rights (NCPCR) has suggested that such an exemption should include:

| PLACE | PERCENTAGE OF CASES CONCERNING "ROMANTIC RELATIONSHIPS" |
|----------------|---|
| Delhi | 21.58% |
| Andhra Pradesh | 21.21% |
| Maharashtra | 20.25% |
| Assam | 15.69% |
| Karnataka | 5.45% |

(a) consensual non-penetrative sexual acts between two children above the age of 12 years, sharing the same age or having a two-year age gap, and

(b) Consensual penetrative sexual acts between children above 14 years, who are of the same age or have a three-year age gap.

In December 2022, **the Chief Justice of India, D Y Chandrachud**, during his keynote address at the National Annual Stakeholders Consultation on Child Protection, acknowledged that the POCSO Act treats all sexual activity involving individuals under the age of 18 as a crime, regardless of whether there is factual consent between the two minors in a specific case and called for an investigation into the "growing concern" regarding the criminalization of adolescents involved in consensual sexual activity under the POCSO Act. CJI, Justice DY Chandrachud, called on the Parliament to reconsider the age of consent for sexual activity under the POCSO Act.

While dismissing the proceedings in a criminal case against the accused for offences under Sections 3(a) and 4 of the POCSO Act, the **Meghalaya High Court** referred to the case of **Vijayalakshmi v. State, of the Madras High Court**, where it was observed that "upon examining the statement of Objects and Reasons of the POCSO Act, it becomes clear that the Act was enacted to protect children from sexual assault, harassment, and pornography, under Article 15 of the Constitution of India and the Convention on the Rights of the Child. However, many cases filed under the POCSO Act appear to be based on complaints lodged by families of adolescents and teenagers involved in romantic relationships. The Act's scheme indicates that it was not intended to encompass cases involving adolescents or teenagers in consensual romantic relationships." The Madras High Court further observed that the use of the POCSO Act could lead to irreversible damage to the reputation and livelihood of youth whose actions were only a consequence of "biological attraction" and questioned the wisdom of criminalizing such acts.

The Gwalior bench of **the Madhya Pradesh High Court** has also recommended that the Government of India consider reducing the age of consent under the Protection of Children from Sexual Offences Act (POCSO Act). Act based on a

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complaint by a 14-year-old girl. Justice Deepak Kumar Agarwal of the High Court termed it an injustice to boys and requested the government to lower the age of consent to 16 years. The Court emphasized that due to early puberty and increased awareness through social media and internet connectivity, teenagers near 14 develop physical relationships with consent. However, they are treated as criminals solely because of their age.

In the case of **SABARI V. INSPECTOR OF POLICE** and the case of **AGAVAI V. THE STATE**, the **Madras High Court** observed that the issue of consensual sex between minors is a legal grey area in India and concluded that, "punishing the minor boy who enters into a relationship with a minor girl who were in the grips of their hormones and biological changes which is otherwise normative development in the children, is against the principles of the best interest of the child.". The Madras High Court also suggested lowering the consent age to 16 or excluding consensual relationships between teenagers aged 16 to 18 from the purview of the POCSO Act and reiterated that cases of consensual adolescent sex must be identified and separated from genuine abuse cases, and the former kind must be quashed if proceedings are found to be against the adolescents' interests. According to the HC, an overlooked aspect of criminalizing consensual teen sex is its impact on family dynamics.

The Supreme Court in the case of **S. VARADARAJAN** stated "She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. She was no uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area.

The Supreme Court in the case of **ANOOP** observed that "Unfortunately, the statute does not distinguish between the conservative concept of the term "rape" and the "sexual interactions" arising out of pure affection and biological changes. The statutes do not contemplate the biological inquisitiveness of adolescence and treat all "intrusions" on bodily autonomy, whether by consent or otherwise, as rape for certain age group of victims....Prosecuting and sentencing a person found to have engaged in consensual sexual intercourse with a sixteen or seventeen-year-old to a minimum sentence of ten years or twenty years is contrary to the principle of proportionality."

NEWS CORNER –

MADRAS HIGH COURT:

Doctors need not disclose minor girl's name in report under POCSO Act while terminating pregnancies from consensual relations

In the case of **Kajendran v Superintendent of Police and others**, Madras High Court noted that Doctors may not reveal the minor girl's name or identity in report while terminating her pregnancy from consensual relations, as this may result in the victim or family members of the victim withdrawing or denial in the court proceeding.

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Advocate Vaishali Bhagwat, is amongst the first technology lawyers in the country with prior qualification and working experience in the field of Computer Science, Cyber Defense and Information Assurance.

Her work also focuses on women and children's rights and has worked extensively on cases relating to violence against women and children including sexual violence. Vaishali is an external member on various ICC committees and has conducted several complex inquiries relating to sexual harassment at workplace. POSH awareness and capacity building workshops conducted by her are rich in content as she discusses various cases and draws on her experience dealing with inquiries and POSH related court litigation including criminal cases.

Vaishali has advised several organizations across varied sectors on POSH compliance, safety in virtual workplaces, cyber safety and is also regularly invited as an expert speaker/ panelist on this subject by various organizations providing POSH services.

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Thank you for reading!

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