POCSO Act, 2012: Consensual Sex as a Matter of Tug of War Between Developmental Need and Legal Obligation for the Adolescents in India

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1 romantic relationship and sexual instinct are a universal phenomenon with its developmental significance, especially during adolescence. One of the striking features of this developmental phase is the formation of a romantic relationship.¹⁻⁴ As a developmental pathway, healthy romantic relationship among adolescents plays a vital role in molding their personal ideologies regarding intimate relationship and sexuality, along with having the enduring influence on self-esteem and overall wellbeing with the progress to the later stage of life.¹⁻⁶

Adolescents strive for greater freedom in making their life choices, more so with selecting a romantic partner.⁷ But in India, because of the deep-rooted socio-cultural influence, the family plays a vital role in determining the life choices of the adolescents, including the selection of their life partners. Most often, there is a strong resistance from the families to the romantic relationships of adolescents. As a reaction to such resistance, in most of the cases, to secure the relationship, adolescents run away with their romantic partners¹⁻⁴ and end up in the clutches of the legal framework. As per the Protection of Children from Sexual Offences Act, 2012, popularly known as the POCSO Act, the legal age of consent is 18 years, and this prohibits any form of sexual engagement even in the context of a romantic relationship.²⁻¹² and the criminal law (amendment

Though nearly a decade has passed since the ratification of this act, studies in this area are very limited and focus primarily on aspects of its implementation and functioning.¹⁰⁻¹³ Though a few studies touched upon matters related to consensual sex among adolescents, apart from debates and opinionated discussions,¹⁴⁻¹⁷ to date, there is no literature available exclusively discussing the legal implications of the cases registered in the context of a romantic relationship. Therefore, considering the sensitive nature of the issue of consensual sexual act coming under the purview of the POCSO Act, a detailed discussion is worthwhile to make, keeping the sociocultural underpinnings in mind. This paper discusses how the POCSO Act influences the sexual rights of the adolescents and the need for evaluating the
concept of the consensual sexual act from a legal perspective in India.

**Sociocultural Influence of Adolescent Romantic Relationship in India**

The pioneering work of Dunphy established that individual and contextual factors play a vital role in ordering the developmental stage, including initiation of romantic involvement. Theories about the adolescent romantic relationship were developed based on this finding within the contextual and developmental framework. In Asia, and especially in India, in comparison with the western cultural norms, due to the collectivistic living, the sociocultural values practiced by the families influence the romantic ideologies in a large way. Although the concept is evolving, in most of the Indian states, adolescent romantic relationship is considered to be a taboo against the dignity and honor of the family, more so when differences in religion, caste, or economic class are involved. The ultimate decision of selecting a life partner within the goodness of fit pattern of the family network would be vested on the parents or other significant members in the family. Till then, strict parental supervision would be involved in any matters related to the romantic relationship.

Be it adolescents, young adults, or adults, if they engage in a romantic relationship, it is often treated as an act done as a result of poor self-discipline and having no mastery over self-control. There is a strong value attached to premarital sex, and it is considered as a sin against the value system. If at all such a relationship is discovered, most often, the families get those adolescents married even before attaining the legal age (especially if the girl is pregnant), which is against the law. Therefore, the adolescents have many dilemmas in forming a romantic relationship that is developmentally appropriate but is against the value system of the culture they live in. However, research studies assessing this phenomenon are scarce in India.

**POCSO Act, 2012, and Child Sexual Abuse (CSA)**

The POCSO Act, 2012, is a landmark law enacted in India on November 14, 2012 to protect the best interest and well-being of the children from all forms of sexual offenses such as sexual assault, sexual harassment, using the child for pornographic purpose, and abetment to commit such offense. Under this act, a comprehensive definition is given to all forms of sexual crimes and exploitation against children below the age of 18 years. As a supreme legislation, this act ensures safeguarding the best interest of the child at every stage of the judicial process through its child-friendly mechanisms in terms of reporting, recording of evidence, investigation, and speedy trial of offenses through designated Special Courts. The latest amendment to this act was done in 2019.

Before the implementation of this act, the legal age of consent to engage in sexual activity was restricted only to the girls, under the Indian Penal Code (IPC), 1860. Initially 10 years, it was raised to 12 in 1891, 14 in 1925, and 16 in 1940. It continued to be the same till the execution of the Criminal Law (Amendment) Act, 2013, followed by the nationwide outrage in the background of the fiendish gang rape case of Nirbhaya that took place on December 16, 2012, in New Delhi. Being a gender-neutral legislation, the POCSO Act, 2012, set the age of consent as 18 years for both boys and girls.

According to the IPC, 1860, section 375, any man having intercourse with a female below the age of 16, irrespective of her consent, was considered as rape, with the exemption for a married man having intercourse with his wife above 15 years of age. The Prohibition of Child Marriage Act (PCMA), 2006, prescribed 18 years for girls and 21 years for boys as the legal marriageable age. Any marriages performed before this age, under whatsoever circumstances, could be declared as voidable upon filing a petition to the District Court by either of the parties before or two years after attaining the legal age of marriage the attainment of majority, except for Karnataka State where such practice of child marriages are considered voidable forever. There are also religion-specific personal laws that prescribe the terms for age of marriage. For instance, as per Muslim Personal Law, a girl can be married after the age of 15 years or after attaining puberty. Under the Hindu Marriage Act, 1955, it is prescribed as 18 years for girls and 21 years for boys. Similarly, the Code of Canon Law for Christians stated that the consent of both the parties, legitimately manifested between persons qualified by law, makes marriage; no other human power can supply this consent. Yet, POCSO Act, 2012 overrides all these laws as provided under the provision of section 42-A. and Irrespective of the consent, engaging in sexual act before or after the marriage with or between the minors under the prescribed age is prohibited and such consummations amounts to sexual assault. Abetment for such acts is also punishable.

**Consensual and Non-consensual Sexual Act Among Adolescents: A Debate**

Nationwide, after the implementation of the POCSO Act, 2012, debates related to the relevance of the POCSO Act for the children who come in contact with child protection mechanisms (CPMs) in the background of romantic relationships are going on across the stakeholders. Under different pertinent headings, a debate in this line has been generated in the following section.

**Developmental Need and Legal Obligations**

Being a period of exploration and experimentation, adolescence demands more independence from family and education settings. Displaying interest to find a romantic partner falls under one such exploration as a normal developmental pathway. A significant number of adolescents aged 13–19 years reported having some form of sexual intimacy with their romantic partner. But from the legislative lens, such sexual engagement is considered to be against the norm.

As children below the age of 18 years are not in legal age to give consent, they invariably come under the framework of the POCSO Act. For instance,
the five states’ study done by National Law School of India University’s (NLSIU), Centre for Child and the Law (CCL)
CCL-NLSIU13 found that proportion of the cases registered in the context of a romantic relationship was 21.58% in Delhi,
21.21% in Andhra Pradesh, 20.52% in Maharashtra, 15.69% in Assam, and 5.45% in Karnataka. However, this prevalence varies across studies.29,41,42

Forming a romantic relationship does not have gender barriers and calls for mutual consent of both the partners. But, the gender-neutral principle ascertained in the act is often overlooked. questionable. Whether the boy is below 18 years or above 18 years, most often, legal actions would be taken against him, and girls would be considered as the victims.16 At the same time, if grooming is involved as a strategy, the component of psychological manipulation the offender caused to the victim is difficult to deter-

involved as a strategy, the component of

The CSA survivor and her child.13,43 On the other hand, this could be an attempt to help these adolescents and their families. also has a possibility of practical consideration stemming from their cultural background. For example, if a minor girl is married to the accused, is pregnant, or have a baby and if the accused is taken into custody, there are larger possibilities of social isolation and deprivation of the CSA survivor. That might even hinder the possibilities of the rehabilitation of the CSA survivor and her child.13,43 On the other hand, this could be an attempt simply to reduce the burden of pending trials of these romantic cases.46

Difference in Case Trajectory

By virtue of differences in the sociocultural context in getting a case filed between survivors of a consensual sexual act and non-consensual sexual act, their legal journey might be different with specific expectations from the CPMs. Glancing at the trend in case registration most often in case of consensual sexual act, missing complaints have been given by the family predominately the parents, when these children elope or make an attempt to elope with their romantic partner.13,44 This could be an indication of disapproval by the family of their romantic relationship, more so when there is a difference in religion, class, and/or class between the child and their romantic partner.44 In this case, separating their union by putting the boy behind the bar and to prevent the communication between them in whatsoever means could be the primary objective of the family.44 On the other hand, in real cases of sexual abuse, getting justice against the heinous act prevails as the expected outcome in registering a complaint.45

According to CCL-NLSIU report,13 the conviction rate in cases of consensual sexual activity is as low as 0% in Assam and Andhra Pradesh, 1% in Delhi, and 3% in Maharashtra. A large number of these cases end up in acquittals as these children refuse to testify against their partner and turn out hostile, especially when they would have been pregnant or would have married the accused against the wish of their families. It is also observed that in such cases, these girls refuse their consent for medical examination and age determination tests, which are legal mandates.46 Only in the instances where the romantic partner refused to marry or deny bearing the responsibility for the pregnancy, these girls come forward to file the complaint against their partner.31,46

Discussion

There is no doubt that the POCSO Act, 2012, being the landmark and supreme legislation of India, stands out as a comprehensive measure to safeguard the rights and best interests of the children, with a well-set holistic framework. As per the National Crime Records Bureau (NCRB) 2015,46 out of a total 8833 registered POCSO cases under sections 4 and 6, 4114 cases were of late adolescents aged
force, persuasion, inducement, grooming, checking whether there is an element of under dependable grounds, such as factual consent should be verified cautiously.

Signs of close in age consent, the circumstances leading to the provision of mutual consent and/or the context of gaining mutual consent should be verified cautiously under dependable grounds, such as checking whether there is an element of force, persuasion, inducement, grooming, manipulation of consent on defensible grounds, etc.

Till the enactment of the POCSO Act, there were not any specific legislation to protect the boys from sexual assault. A commendable move has been achieved through its gender-neutral principles. When it comes to the matter of consent, there is a straight-jacketed blind approach toward boys where gender neutrality seems to be failed absolutely.

Be it in the case of consensual sexual acts between two minors of the opposite sex or an adult man with an adolescent girl or vice versa, most often, the benefit of doubt would be given to the girls, considering them as the victim and taking legal action against the male counterparts.

Somewhere in the juggle between the consensual sexual act and the POCSO mandates, there are higher possibilities of it being not able to serve justice to the real cases of sexual assault due to various reasons, including misuse of the law under the ground of consent, waste of resources and their un-reachability to the real beneficiaries, an overload of the cases affecting the efficiency in the functioning of the stakeholders, delay in the process, and so on. As a result, unfortunately, whatever is said to be a child-friendly framework is remaining just in the document because of its poor implementation, practical challenges in the ground of consensual sexual activity, and other system-level barriers.

Although it is a milestone legislation implemented to protect the children from sexual exploitation, there is more scope to further infuse it within the sociocultural framework, upholding the sexual rights of the adolescents. When cases get registered in the context of consensual sex, punitive action against the adolescents is not justifiable, considering their normal developmental process. Especially when there is romantic interest involved, a careful investigation should be done, keeping the gender neutrality in mind, from the practice of accusing boys and considering girls to be the victims despite the mutual consent. In these cases, the restorative justice system should hold an upper hand within the principles of Juvenile Justice (Care and Protection) Act, 2015. More evidence needs to be generated in this area to have policy-level implications.

Conclusion

Exploring sexual aspects and engaging in sexual acts with a romantic partner are normal processes of development among adolescents. However, in India, the whole aspect of the adolescent romantic relationship is colored by the complex interplay of sociocultural phenomena. Even from the legal point of view as given under the POCSO Act, 2012, the matter of consent remains as a tug of war between the age-appropriate developmental needs and legal obligation for the children in India. Unfortunately, amidst this debate, the real cases of child sexual abuse are getting overshadowed and clouded. There is an urgent need to address this issue, for protecting the best interest of the children from all forms of sexual exploitation and promoting their healthy development as sworn by the act.

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