
Romantic relationships: the case of special courts under POCSO Act of 2012

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Abstract

The POCSO Act came as a respite for curbing the menace of child rape and childhood molestation by adults. However, the effectiveness is now questioned. The record of the State of West Bengal as an example establishes that the use of the Act is merely as a mode of expression of vengeance or threat for marriage, extortion of money among other ill intentions. At the same time, with change in the cultural pattern of the country early relationships are not uncommon. However, if the provisions of this Act are strictly implemented these innocent relationships will be penalizing. The paper seeks to understand whether there is a need to have an exception to the application of the Act in cases of childhood romantic relationships by trying to grasp whether increased rate of crimes is as a result of this strict application and whether this Act is really merely a tool for revenge by the parents.

The paper is neither to justify any illicit or childhood relationships especially involving sexual intercourses nor to propagate the same, but is intended towards portraying the ground reality and the changes in the society that have emerged over the years. The gradual acceptance and subsequent amendment of the laws with its adequate interpretations to suit the “best interests of the child” towards successful attainment of the objectives behind this legislation as enshrined in

the Preamble of the Act and upheld in catena of judgements is the pivotal aim of this paper. Finally, the question whether incorporation of an age group for “consent” by children for consensual sexual relationship under a new category as has been proposed lately can bring about an overall success of the Act will form the edifice as well as the conclusion of this paper.

Keywords: *consent, age categorisation, autonomy, privacy, POCSO Court*

Introduction

The enthusiasm and sigh of relief that the country was faced with after the enactment of the POCSO Act in 2012 was unmatched. The law was to ensure deterrence in the society for the acts indulged in with sexual intent against children below 18 years. However, the POCSO cases after 4 years of the Act are mostly false cases that the courts are faced with which challenges the novelty of the Act and the purpose for which it was brought now seems farce. There are several reasons attached to this failure, but the major being the cases of teenage romantic relationships often involving sexual behaviors which creates apprehensions in the families and the societies leading to slapping of false cases under this Act. Surveys conducted by various organizations in various capacities is witness to this fact.¹

¹Surveys conducted by NLSIU Bangalore in the States of Karnataka and Assam, WBNUJS in West Bengal, etc.

Recognizing this proposal shall certify 2 concerns: *firstly*; give respect to the right to a dignified life of the adolescents guarantying them their right to autonomy over body and therefore consent for the same and *secondly*; shall reduce the number of false cases the Special Courts are faced with every year (if not every month) which otherwise affects the veracity and effectiveness of the Act, since the ultimate faith of such cases lead to marriage.

Thus, if the law recognizes such relationships as valid in the very first place, the society shall be conditioned accordingly because we need to realize that the world has changed and teenagers, whether we like it or not, are sexually active. They cannot be dragged to court over it², in the words of activist Enakshi Ganguly of the HAQ Centre for Child Rights.

Duality of Indian laws and the road ahead

India lacks a uniform age recognizing juvenility, different Acts have different age mentioned therein for considering a person as a child. Hindu Marriage Act (18,21), Juvenile Justice Act (18), Child Marriage (Restraint) Act (18,21), POCSO (18), Child Labour (Prohibition and Regulation) Act (14), Indian Majority Act (18), Factories Act (15), IPC [*doli incapax (below 7 years), doli capax (7 years -12 years)*], Marital rape (above 12 years consensual). Thus, when there is no uniform age of juvenility, there is no adherence to UNCRC, the main argument being put forward by critics of the new proposal of having a new age of consent categorisation under POCSO.

The Juvenile Justice (Care and Protection) Act has been amended to make a new categorization of the age group of 16 to 18 years where the juvenile with knowledge consents to committing a grievous offence and conducts it. Here the legislature and the parliamentarians have accepted age of 16 as an age of consent for committing the offences. So, the concept of age of consent has keyed the Indian legal system with this amendment. In POCSO, which is yet another Act for the children below 18 years, this concept must be adopted. A different category recognizing the age of consent is needed i.e. 16-18 years and 12-15 years of age with an age gap of 4-5 years between the partners. In fact, as mentioned above, there are proposals of incorporating 2 different age groups for consenting age, like 12-15 and 16-18 years with certain conditions.

Formulations of the judges of the Special Courts

In order to restore faith in this Act and to let remain the strict attitude towards genuine POCSO cases, there is a new proposal which has been initiated by the honorable judges of the Special Courts dealing with such cases at the district level and accepted subsequently by many child rights activists.

New age categorisation

National Commission for Protection of Child Right (NCPCR) had stressed on the need for the law to recognise consensual sexual exploration among adolescents by decriminalising it when it is between:

- Children above 12 years when the age-gap was less than two years and

² Ananya Sengupta, "Teen romance in line of child abuse law fire" *The Telegraph*, Feb.10, 2016.

- Children above 14 years when the age-gap was less than three years.³

In the UK, the age of consent is 16 years. In the US, it varies from 16 to 18 across states. It is 14 years in Germany and Italy, and 15 in France⁴. In Korea it is 13 and Mexico has it as low as 12.⁵

This categorisation shall facilitate the youngsters to live their lives in a dignified manner with freedom of choice being ensured and the courts being faced with less false cases.

International obligations

The best interest of the child which is the utmost outcome the Act seeks as established by UNCRC⁶ lies in having a liberal interpretation of the provisions- in a way of application of the golden rule of interpretation where the object and purpose of the Act be upheld. Such an approach shall enable success of the Act by ensuring fruitful development of the child. For this development of the child his or her **right to privacy and confidentiality**⁷ must be protected and respected by every person by all means and through all stages of a judicial process involving the child⁸. This right⁹ needs to be

respected especially in case of adolescents which the courts have partially recognized and must continue to do so even though not expressly mentioned under the constitution¹⁰.

Children's autonomy over the body

In order to ensure this, autonomy over body is needed by ensuring an age of consent as proposed. The right of privacy has evolved to protect the freedom of individuals to choose whether or not to perform certain acts or subject themselves to certain experiences.¹¹ In USA, this concept has developed into 'liberty' which is protected under the Due Process Clause of the 14th Amendment¹² calling for a similar development in the Indian legal system under Article 21 of the Constitution. Furthermore, it is important to recognize that sexuality is an integral part of the personality of every human being. Its full development depends upon the satisfaction of basic human needs such as the desire for contact, intimacy, emotional expression, pleasure, tenderness and love. Sexuality is constructed through the interaction between the individual and social structures. Full development of sexuality is essential for individual, interpersonal, and societal well being¹³ which in turn ensures the same kind of parameters of best interest of the child being fulfilled. Sexual rights are

³Swagata Raha, "Love and sex in the time of the POCSO Act, 2012", In Plainspeak A digital magazine on sexuality in the Global South, (June 1, 2014), <http://www.tarshi.net/inplainspeak/voices-love-and-sex-in-the-time-of-the-pocso-act-2012/>.

⁴Ananya Sengupta, "Teen romance in line of child abuse law fire" *The Telegraph*, Feb.10, 2016.

⁵ Averting HIV Aids, Global information and education on HIV and AIDS, "Age of consent for sexual intercourse", <http://www.avert.org/sex-stis/age-of-consent>.

⁶Article 3 United Nations Convention on the Rights of the Child.

⁷World Health Organization, Human Production Programme on Sexual health, human rights and the law (2015).

⁸Preamble, United Nations Convention on the Rights of the Child.(And whereas it is necessary for the proper development o the child that his or her right to privacy and confidentiality be protected and respected be every person by all means and through all stages of a judicial process involving the child.)

⁹ International Conference on human rights ICPD Beyond 2014, Human Rights and Sexuality in the Context of Development(2013).

¹⁰ David A.J. Richards, "Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the unwritten Constitution" 30 *Hastings L.J.* 957 (1978-1979).

¹¹Cornell University Law School, "Personal Autonomy", https://www.law.cornell.edu/wex/personal_autonomy.

¹²Roe v. Wade[410 U.S. 113 (1973)].

¹³ World Association For Sexual Health, Declaration of Sexual Rights (Adopted in Hong Kong at the 14th World Congress of Sexology)(August 26, 1999).

universal human rights based on the inherent freedom, dignity, and equality of all human beings. Since health is a fundamental human right, so must sexual health be a basic human right.¹⁴ Recognizing this shall enable the success of the object and purpose of the Act as enshrined in the Preamble.

Consent as a key element

The key aspect to be harped upon here is consent. In order to ensure this, a simple test can be put forth. If the accused in section 164 CrPC¹⁵ statement confirms of a romantic relationship and sexual acts which is similarly confirmed by the so called victim in his or her section 164 CrPC statement as well as in the cross examination the same must be given the due respect of consent. This shall ensure right to freedom of expression and right to life. Acknowledging that consent is immaterial for offences under POCSO, the realization needed is that the same must be confined to instances of victimization and sexual abuse and not for consensual sexual relationships which is not victimization unless the contrary is proven through instances of coercion¹⁶ which cannot be justified at any given moment of time in life¹⁷. The Act otherwise infringes upon the right to dignity and bodily integrity, freedom, of expression, right to life and right of privacy of the adolescents. The honorable courts have accepted the age consent at various instances.

¹⁴ibid.

¹⁵Recording of confessions and statements.

¹⁶United Nations,A/CONF.177/20 on Report of the Fourth World Conference on Women(September, 1995).

¹⁷ Right to sexual freedom: Sexual freedom encompasses the possibility for individuals to express their full sexual potential. However, this excludes all forms of sexual coercion, exploitation and abuse at any time and situations in life, World Association For Sexual Health, Declaration of Sexual Rights (Adopted in Hong Kong at the 14th World Congress of Sexology, August 26, 1999).

Interpretation of Case laws

In a case in Pune, the special court relied on various judgments by the supreme court and the high courts that no offence of rape can be made out if the girl is above 16 years of age and there is consensual sexual relationship. The court cited medical and other evidence while observing that the girl was above age 16 and was a consenting party.¹⁸ In the case of *S. Varadarajan v. State of Madras*¹⁹, though the age of consent though as per law was 18 years, when the girl eloped with the accused, she was approximately 17 years and 9 months old. However, the matter was finally heard and the accused was convicted realizing that the girl who takes the decisions.

In *State v. Suman Dass*²⁰, a 15-year-old girl left home and married a 22-year-old man. Her mother filed a complaint alleging that the man had kidnapped and sexually assaulted her. In court, the girl admitted to having gone willingly and to having sexual intercourse. Judge Dharmesh Sharma was of the view that a strict interpretation of the POCSO Act ‘would mean that the human body of every individual under 18 years of age is the property of State and no individual below 18 years of age can be allowed to have the pleasures associated with once [sic] body.’ He reasoned that: ‘The words ‘penetrative sexual assault’ used in section 3 of the POCSO Act goes to suggest that where physical relationship or sexual intercourse had taken place with consent of a girl child which is not derived by coercion or not in the nature of an assault or use of

¹⁸TNN, “Child's consent immaterial in deciding guilt in sexual assault case: Court”, *The Time of India*, July 24, 2015.

¹⁹*S. Varadarajan v. State of Madras*[1965 SCR (1) 243].

²⁰*State v. Suman Dass*[Decided on 17.8.2013 by Dharmesh Sharma, ASJ01, New Delhi District, Patiala House Courts, New Delhi SC No. 66/13].

criminal force, or which is not resulting in exploitation, or where the consent is not obtained for unlawful purpose, no offence within the ambit of section 3 of POCSO Act can be said to have been committed.²¹

The Bombay High Court in *Sunil Mahadev Patil v The State of Maharashtra*²² the court granted bail on the similar understanding and acknowledging the consent of the adolescent girl. Moreover, a South African court²³ on the like matter of admitting the age of consent of children for sexual conduct to be 12 years passed a verdict for striking down the law which restricted the same.

It is ironical to note that the Hindu Marriage Act has recognized child marriage implicitly under section 12 and subsequently POCSO disallows sexual intercourse with persons below 18 years at the same time exception to section 375 IPC does not recognize rape beyond 15 years if the girl is the wife. Further, legitimacy of a child born out of a voidable marriage in this that being of a minor couple cannot be questioned, which a way permits sexual intercourse.²⁴ There are contradictions in these provisions and hence policy ambiguities exist which certainly does not seem justified.

²¹Swagata Raha, "Love and sex in the time of the POCSO Act, 2012", In Plainspeak A digital magazine on sexuality in the Global South, (June 1, 2014), <http://www.tarshi.net/inplainspeak/voices-love-and-sex-in-the-time-of-the-pocso-act-2012/>.

²²*Sunil Mahadev Patil v The State of Maharashtra*[ABC 2016 (I) 34 BOM].

²³*Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*[2013] ZACC 35].

²⁴Hindu Marriage Act, 1955 (Act 25 of 1955)(s.16 (2) - Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity).

Sexual pleasures in an integral part of humans' lives whose urges can occur at any moment in time²⁵, restricting that part of healthy living are certainly not the goal of laws. Whether married or not, if one of the partners is sent to jail, it shall have ill effects on the mental well being of the other partner which certainly is not the outcome the law seeks and is definitely against the preamble of the Act²⁶ enacted towards protecting the best interests of the child.

The other pertinent concern which might bring apprehensions to the minds of many is what if the girl gets pregnant as a result of such relations? In order to address such issues, it is pertinent to note that in such unfortunate cases we need to act as per the *Chandrakant Jayantilal Suther v State of Gujarat*²⁷ verdict of the Supreme Court by allowing abortion of the foetus in case the mother is a minor girl keeping in mind her future and career even though it contradicts the provisions of the MTP Act in order to facilitate a healthy life for the girl.

Probable Solutions

There needs to be check on such cases at the initiation of these at the initial stages of the cases i.e. at the time of investigation after lodging of FIR for framing of the charge-sheet.

There must be little more stringent guidelines for investigation for POCSO cases which shall ensure the filtering of genuine cases only. The reasons for

²⁵United Nations, Report of the International Conference on Population and Development (September, 1994).

²⁶Protection of Children Against Sexual Offences Act, 2012 (Act 32 of 2012). (And whereas it is imperative that the law operates in a manner that the best interest and well being of the child to ensure the healthy physical, emotional, intellectual and social development of the child.)

²⁷*Chandrakant Jayantilal Suther v State of Gujarat*[R/SCR.A/4255/2015].

complaint must be of the nature which shall be cogent and the investigation shall exactly be witness to that fact to augment further proceeding with that case.

We need to recognize that Marriage is not the solution, but recognizing this freedom and liberty is what is sought out of this proposal. POCSO Act has sadly conflated child sexual abuse and child sexuality as is now understood after its implementation. Thus, if this proposition based on the true events as unfolded now is accepted it shall reduce the unnecessary cases of POCSO which overburdens the courts and ultimately serve no purpose in ensuring justice to the victims of such offences. If this is not so conceded there would be a tendency to commit graver offences which shall in return affect the society.

Conclusion

The paper is neither to justify the illicit/ child hood relationships especially involving sexual intercourses nor to propagate the same, but is intended towards accepting the changes in the society which have cropped up in these years and modifying the laws and its interpretations accordingly for the best interests of the child²⁸.

The Supreme Court has given a ruling allowing the women living in live-in relationships for long period of time to claim maintenance in case of

separation²⁹. The apex court has confirmed in another case that there lies a right to inherit property of a child born out of a live-in relationship³⁰. These forward looking decisions of the court embodies the tendency in the legal system to allow societal developments to percolate down the existing laws to bring adequate changes. The judicial orthodoxy has been diluted with judgments like Triple Talaq and Right to Privacy this year which serves as the perfect juncture to accept a modification in regard to the rights of the young souls of our country. The proposal for incorporating the age of consent for children under a new category under POCSO Act shall enable the overall success of the Act and the objectives of the legislation will be accomplished.

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²⁸Protection of Children Against Sexual Offences Act, 2012 (Act 32 of 2012). (Preamble-And whereas it is imperative that the law operates in a manner that the best interest and well being of the child to ensure the healthy physical, emotional, intellectual and social development of the child.)

²⁹Pyla Mutyalamma vs. Pyla Suri Demudu, (2011) 12 SCC 189.

³⁰Tulsa & Ors. vs. Durghatiya & Ors., Appeal (civil) 648 of 2002.