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Law: An Impediment in Sexual Autonomy of Teenagers

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Among many other objectives such as to protect children from offences of sexual assault, sexual harassment, and pornography the Protection of Children from Sexual Offences Act, 2012 (or POCSO, in short) was enacted to ensure that, supra Omnia, the best interest and wellbeing of the child are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. This article examines, by way of doctrinal research and statistics from various reliable agencies that instead of being “protective” in nature this law has proved to be “restrictive” by betraying its very objective. This paper begins by attempting to read the milieu of this enactment and then goes on to examine how this has constrained, limited, and even disciplined the sexual enthusiasm of the young and how this has, in contrast to its intention, violated the sexual autonomy of the juvenile the most. Finally, towards the end, the author attempts to suggest ways to counter barbaric crimes not by way of stringent legislation but by evolution and development of society in toto.

Keywords: *pocso, sexual autonomy, children, teenagers.*

INTRODUCTION TO THE HISTORY OF “SEX”, “SEXUALITY” AND “PROTECTION”

The public sphere is deepening and becoming more democratic in the current day. This is evident in the visibility of many topics that were once considered to be private matters and are

now out for discussion and debate.¹ A type of “democratization of desire” has since taken place. Such conversations are becoming too prevalent to be disregarded in the modern era. Because it is obvious that both economic and cultural forces are transforming sexual norms and the connections between gender and sexual order and other economic and cultural structures.² Sex, as we understand is the biological and anatomical identity³ of an individual whereas gender, on the other hand, is a social ‘coating’ on the sex. Gender manifests itself as being masculine or feminine. Therefore, it is more like Simone de Beauvoir’s “One is not born but rather becomes, a woman”.

Numerous ways exist in which sexuality is regulated by the criminal code. The law's prohibition of sexual touching that a participant perceives as unwelcome is the clearest and most significant illustration of this. However, the penal code also draws several further distinctions between what constitutes appropriate sexual behaviour and how it should be conducted. Legal restrictions that forbid the ability to consent to specific sexual activities or under specific conditions are one way that laws regulate what could otherwise be defined as consensual sex. In some situations, the law across jurisdictions prohibits the ability to agree to sex. Age, state of consciousness, cognitive ability, and social utility are all factors considered in, for example, Canada, when determining a person's competence to agree to sex.⁴ But in India, the position of law is unique. After 3 February 2013, a man is said to commit rape if he indulges in a sexual act with a woman with or without her consent, when she is under eighteen years of age.⁵ The position of law, therefore, is clear – a woman’s consent is immaterial if she is below the age of eighteen years.

¹ Sumit Saurabh Srivastava, ‘Disciplining the ‘Desire’: ‘Straight’ State and LGBT Activism in India’ (2014) 63(3) Sociological Bulletin

² *Ibid*

³ Shefali Moitra, *Feminist Thought: Androcentrism, Communication, and Objectivity* (Munshiram Manoharlal Publishers 2002)

⁴ Elaine Craig, ‘Capacity to Consent to Sexual Risk’ (2014) 17 (1) New Criminal Law Review <<https://doi.org/10.1525/nclr.2014.17.1.103>> accessed 19 November 2022

⁵ Siddharth Mehta, ‘Rape Law in India: Problems in Prosecution Due to Loopholes in the Law’ (SSRN, 5 May 2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250448> accessed 19 November 2022

In legal systems all around the world, the right to sexual privacy is being recognized more and more. The courts have eagerly identified a fundamental right to sexual privacy, particularly in the US. The United States Supreme Court was cautious in *Griswold v Connecticut*⁶, to highlight the importance of privacy in the particular sphere of marital bedrooms in the context of birth control. In *Lawrence v Texas*⁷, the court determined that no "majoritarian sexual morality" could supersede genuine privacy concerns when the issue of the legality of specific sexual conduct between people of the same sex was raised.

DISCIPLING DESIRE - CALL FOR REASONABLE REVALUATION OF CONSENT

Sexuality at the very basic level is desire, and desire towards someone else. Broadly sexuality means 'the quality or state of being sexual or the condition of having sex, sexual activity and expression of sexual receptivity or interest especially when excessive'. It can also mean 'capacity for sexual feelings'.⁸ According to statistics gathered in Quebec in 2002 as part of a campaign to promote "sexual health," about half of the thirteen-year-olds had already had an intimate relationship (which implies kissing and caressing), and 4.2% of them had engaged in sexual activity that included penetration. These percentages increase to 80% (intimate relationships) and 40% for students who are 16 years old (sexual intercourse with penetration). Among sixteen-year-olds who claimed to be sexually active, the average age of the first sexual encounter was 14.5 years old.⁹

The first thing that needs to be noted by this is that adolescents between the ages of twelve and sixteen do frequently have sex lives. This knowledge shouldn't be shocking because adolescence is a time of rapid physical development that leads to the development of sexual maturity in the body, which is a requirement for assuring the survival of the human species. Every person is biologically predisposed to engaging in sexual activity as puberty progresses.

⁶ *Griswold v Connecticut* [1965] 381 U.S. 479

⁷ *Lawrence v Texas* [2003] 539 U.S. 558

⁸ *Ibid*

⁹ Institut de la statistique du Québec, *Enquête sociale et de santé auprès des enfants et des adolescents québécois* (Québec: Publications du Québec 2002) 277-78

The second sexuality-related insight is that the idea of normalcy is fluid. Adolescents do not fit into a single behavioural norm. Approximately 4% of people have had sexual encounters by the time they are thirteen, while other people who are sixteen have never kissed someone (19 percent). All adolescents are currently going through a process of sexual maturation. At ages that fall within the range of what is considered "normal," young individuals progress through distinct stages of preparedness for sexual experimentation. Therefore, legislators run the risk of criminalising a sizable number of adolescents' normal sexual behaviour if they set a minimum age of consent without considering those realities.

Consent is necessary in the case of rape since sexual penetration is "considered" prima facie wrong¹⁰. It entails applying force to the other person's body as well as against a body. The defendant must have a valid justification for the intrusion. Only consent can permit this. This is due to the lack of any other justification for believing that the victim will benefit from sexual penetration besides the victim's consent. Consent, or rather the lack of it, is a component of many crimes of various kinds, and the meaning of this crucial notion changes depending on the type of crime. The legitimate goal to be pursued by criminal law academics¹¹ is that of consistency through reasonable reevaluation. The author makes the argument that including a legal definition of consent in sexual offences without including any provision for consent in non-sexual offences poses a significant risk in favour of the development of inconsistency and the likelihood of a miscarriage of justice. The author does not discuss the benefits and drawbacks of including the concept of consent in the modern definition of rape.

Female adolescents mature physiologically more quickly than young boys, according to Canadian experts, and they typically pick partners who are slightly older than they are. It is challenging to extrapolate the scope of this occurrence. The prevalence of adolescent female/male adult relationships, the most frequently reported sexual pairing, when the age

¹⁰ Jonathan Herring & Michelle, 'Why Sexual Penetration Requires Justification' (2007) 27(3) Oxford Journal of Legal Studies <<https://doi.org/10.1093/oj/ls/gqm013>> accessed 20 November 2022

¹¹ NEIL MACCORMICK, 'Reconstruction after Deconstruction: A Response to CLS' (1990) 10(4) Oxford Journal of Legal Studies <<https://doi.org/10.1093/ojls/10.4.539>> accessed 20 November 2022

difference is a concern, has been the subject of a few studies in the United States.¹² Therefore, the evidence significantly contradicts the idea that having intercourse with adult men causes trauma. Despite this, more research is required in this area given the existing level of knowledge, particularly concerning interactions between adults and female teenagers.

Anyone who pursues a connection with a young adult deliberately, enthusiastically, and even with love and passion at the age of fifteen most definitely does not view themselves as a victim. There is never a crime without a victim and the state should not compel its people to adhere to its moral standards. Additionally, the criminalization of intimate relationships between adults and teenagers between the ages of fourteen and sixteen presents serious issues with how the law should be applied consistently and fairly. Although it is unknown how many of these interactions exist, it is most likely that they are rather common. The majority of investigations in the United States are reported to be started by complaints made to authorities by worried or disapproving parents, despite the lack of data on the matter. However, although some parents view such a connection as illegal, others disapprove but choose not to inform the authorities, and still, other parents just choose to have faith in their teenagers and their sexual preferences. Consequently, the legislation is only sometimes and potentially unfairly applied to regulate adolescent sexuality. And in light of several of these criteria, including the criminalization of a consensual relationship, the haphazard application of the prohibition based on arbitrary age cut-offs, and an inappropriate legal response to an issue more social than criminal in nature, the criminalization of consensual relations between adults and sixteen- to eighteen-year-old adolescents is difficult.

Sexual intercourse with children is illegal under criminal law, regardless of whether it is consenting. This ban is justified by two grave worries. Firstly, a child's body is not at all ready for coitus, and any penetration could cause laceration or harm. Second, because self-autonomy is still developing in youngsters, they cannot give informed, free permission. They are open to

¹² Denise A Hines & David Finkelhor, 'Statutory Sex Crime Relationships between Juveniles and Adults: A Review of Social Scientific Research' (2007) 12 *Aggression and Violent Behaviour* <<https://www.unh.edu/ccrc/sites/default/files/media/2022-03/statutory-sex-crime-relationships-between-juveniles-and-adults-a-review-of-social-scientific-research.pdf>> accessed 20 November 2022

all kinds of exploitation and pressure. When threatened or constrained physically, they have no way to defend themselves. Simply put, they are not sexual partners on an equal footing.¹³ Both of the reasons in the context of adolescents stand challenged both – biologically and morally – as there is no cut clear age to justify the bar in such a dynamic process and even if the adolescents are not able to exercise free consent it gives the state no authority to restrict their right to exercise such consent. The age of sexual consent has historically ranged from twelve to eighteen in Western democracies. The age of consent, however, says very little about how teenagers should be regulated because it is only one element of a pretty complicated system of laws meant to safeguard children while preserving teenagers' sexual freedom.

CONCLUSION: NEED FOR IMPLEMENTATION OVER IMPOSITION

The age of consent in sexual relationships is debatable for a variety of reasons. In actuality, the "age of protection" is a takeover of the original goal (the protection of teenagers from sexual exploitation and abuse) to revive legalistic moralism. The POCSO has had the effect of forbidding sexual contact between the age range of adolescents aged 14 to 16 and adults, even when such contact occurs in an egalitarian setting. By the virtue of this law, the type of relationship doesn't matter.

We know very little about the depth of intimate interactions between young people and adults as well as the results of those relationships. Without being firmly rooted in the social milieu, the law was established in a vacuum out of fear of child abusers. Sexually active adolescents over the age of fourteen are frequently denied the right to sexual autonomy over their bodies by such laws. So, there is a real danger of alienating young people even more from the law. Law loses credibility and relevance when we attempt to control the sexuality of young people through regulations that have no bearing on their experiences. Additionally, using criminal legislation to govern adolescent sexuality poses the great risk of dividing parents and teenagers against each other, resulting in a haphazard and unpredictable use of the law.

¹³ *R v L (JJ)* [1998] RJQ 971 (CA)

The author suggests that special sensitisation programs must be run in school to provide teenagers with the skills and knowledge necessary for developing and thereafter exercising their capacity to exercise good judgment about their sexual relationships. Of course, there are ethical and moral issues with personal relationships between adults and adolescents. But forbidding such connections under threat of criminal prosecution is a move that should never have been taken, especially given that "offenders" face incarceration. John Stuart Mill believed that the total of individual liberties benefited all of humanity by fostering new fields of knowledge and new methods of "doing, knowing, and living". He argued for the fullest possible individual action freedom. Therefore, to avoid establishing an oppressive norm, the government must refrain from using repressive measures. The guiding premise is simple: only actions that injure another should be prohibited.