

A Transdisciplinary Perspective on the Adolescent Consent-Abuse Binary

Journal of Indian Association for Child and Adolescent Mental Health
1–4
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DOI: 10.1177/09731342221143854
journals.sagepub.com/home/iam



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Abstract

Recently, there have been a plethora of judgments from courts across India, on the issue of adolescent consent for sexual decision-making and the POCSO Act's criminalization of the same. This article begins with a brief overview of the socio-legal underpinnings of POCSO's age of consent, the imperatives informing legislative intent to abstain from a lower statutory age, and crucially, 'close-in-exceptions' to legal consent. Subsequently, the authors discuss the implications of these age requirements, for POCSO's implementation, from a child protection and criminalization perspective, and furthermore, highlight the imperative for the law to accommodate normative adolescent sexual development in its approach to consensual sexual engagement, as well as for consideration of the complexities of informed vis-à-vis manufactured consent in adolescent sexual engagements. The article concludes by highlighting the need for the application of transdisciplinary approaches, to developing methodologies, that assess adolescent consent in ways that resolve the consent-abuse dilemma.

Keywords

Adolescent development, age of consent, transdisciplinarity, POCSO

Background

As countries have moved to enact child sexual abuse legislation, to create a protective framework for child victims and witnesses across differing contexts of sexual offenses, questions have emerged about the nature and scope of such legislation. Significantly, one of these questions has often been concerned with over-inclusion in protectionist legal frameworks, that is, whether statutory provisions are over-broad in their attempts to create a robust protective framework and what might be their implications for target beneficiaries: children and adolescents.^{1–3} In the Indian context, the recurring issue of prosecution of adolescent relationships, under the Protection of Children from Sexual Offences (POCSO) Act, 2012, has brought to fore precisely these issues.

Recently, while upholding an acquittal order in a case registered under the POCSO Act, 2012, the Karnataka High Court observed that mutually consenting relationships, involving adolescents, are an issue that requires the Law Commission of India's consideration.⁴ The point of consideration was the POCSO Act's stipulated age of consent, that is, 18 years, for all children, irrespective of gender. Interestingly, the Court cited the

'ground realities' of adolescent relationships involving minors aged 16–18 and hinted at the disparity between POCSO's view on the capacity for sexual decision-making, and typical adolescent behavior. This is not the only case that has made such observations, on normative adolescent sexual development, with High Courts, across the country, issuing a catena of similar judgments.

The predominant reason for judicial consternation on the subject, seemingly stems from the justiciability of such cases, that are oftentimes marred by the victims' unwillingness to testify, that is, turning 'hostile', due to (perceived) consent to romantic relationships. As High Court decisions,¹ and a series of studies on the functioning of special courts have highlighted, complaints against adolescent relationships are, in many instances, registered at the behest of disgruntled

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parents who seek judicial assistance in repudiating adolescent relationships.⁵

Socio-legal Underpinnings of POCSO's Age of Consent

With legal consent being a heavily contested issue today, especially in the context of sexual abuse, it is easy to forget that the statutory age of majority (18 years) was not always settled as the age of sexual consent. In fact, as notable decisions like *Marimuthu* highlighted, an early draft of the POCSO bill proposed a lower uniform age of sexual consent (14 years) with a 'close-in-age exception'⁶ that permitted a maximum age difference of three years, between two adolescents, beyond which the relationship would constitute abuse. Yet, in 2011, the Parliamentary Standing Committee's recommendation, in favor of a higher age of consent, was founded on the idea that a lower statutory age would lend itself to trenchant cross-examination of factual consent and victims' sexual history, thereby defeating the victim-centric orientation of the POCSO law.⁷ However, in hindsight, we know today that a higher age of consent and POCSO's omission in considering normative adolescent (sexual) development, has done little, in practice, to address the concerns around vexatious cross-examination in the adversarial courtroom. In fact, this has been one of the key factors prompting adolescents to turn 'hostile' in the face of legal proceedings they view as contrary to their interests.

Implications of POCSO's Age of Consent for Adolescent Relationships: Protection Versus Policing

In the decade that has followed since the enactment of the POCSO Act, one of the challenges in its implementation has been the legal dichotomy between factual consent and legal consent,² therein raising the specter of the abuse-consent binary. The disjunct between these two concepts has facilitated a widening of the gap in the Act's effectiveness in cases of sexual assault vis-à-vis mutually consenting relationships. Interestingly, the source of this challenge is most evident in the Act omitting to stipulate an age of consent. This is, furthermore, concerning, given that close-in-age exceptions are dependent on legislation first identifying an age of consent. In the POCSO Act, however, we are left to contend with the definition of a 'child', that is, any person under the age of 18 years, and the related definitions of a range of sexual offenses. In theory, this means that children and adolescents of all genders are liable to prosecution, under the Act, albeit through the juvenile justice system.

In practice, however, this has come to signify vexatious litigation by the girls' parents, who typically disapprove of the relationship, owing to socio-cultural barriers rooted in

differentiators such as caste and class, among others. In addition to this sociological reality of power and access to judicial process, the issue is also marked by endemic gender bias, as evidenced by the quantum of cases brought against adolescent boys or young adult males, even when factual consent has been established in such cases. While the exact proportion of POCSO cases registered against adolescent boys in romantic relationships is unavailable, one study analyzing 1957 POCSO cases from Delhi and Mumbai, over a three-year period, found that the proportion of male accused was 96% and 93% respectively, across all POCSO cases.⁸ This reflects a significant gender skew in the registration of POCSO cases against adolescent boys, in consensual relationships. Consequently, the Act has, perhaps inadvertently, led to the discriminatory utilization of the POCSO Act against adolescent boys, with serious implications for juvenile transfer and sentencing.³

Considering this reality, it is worth noting the significant criticism of the Act's deontological premise, devoid, as it is, of an understanding of normative adolescent sexual development. As the decision in the *Vijayalakshmi* case⁴ elaborated, a punitive approach to adolescent sexual expression is at odds with existing literature on psychosocial and neurodevelopmental considerations in the context of adolescent sexuality. Significantly, adolescent relationships have been identified as an important development marker for adolescents' self-identity, functioning, and indeed, their capacity for intimacy.⁹ Further, biological, neurological, and cognitive changes during this life stage, combined with adolescent psychosocial experiences and contexts, have been established to affect sexual decision-making and behavior well into early adulthood.^{10, p. 578}

Such criticism has also raised serious statutory and constitutional arguments, especially on grounds of arbitrariness and abuse of legal process, that arise in POCSO's criminalization of consensual relationships. Given the Act's objective of 'protection' of children against sexual abuse, the discourse on its current impact, on the policing of children's sexuality, has been highly polemical. Interestingly, in *Vijayalakshmi*, the Court observed that criminalization would only be counter-productive to understanding psychosocial dynamics and the need to regulate the same through the process of law.

Awareness Programs on POCSO: Paternalism Versus Autonomy

A related dimension to judicial discourse on the incongruity of POCSO with prevailing adolescent sexual behavior has been the emphasis on paternalistic school awareness programs to educate adolescents about the penal consequences and morality of 'illegal' sexual behavior. This proposition, however, ignores a fundamental truth about adolescent development: low psychosocial maturity, limited emotional control, and impulsivity.¹¹ Judicial concerns about unsafe behaviors and adolescents' limited understanding of the

consequences of sexual engagement are perhaps better anchored, by a framework, that seeks to enhance adolescent empowerment and autonomy, through the creation of key social assets in the form of transferable life skills.¹²

Nuancing Legislative Approaches to Consent: Grooming Versus Abuse

In addition to the above, at present, evidence in CSA cases is not elicited in a manner that allows for distinction between ‘informed’ and ‘manufactured’ consent or grooming. This is primarily due to two reasons: (a) lack of awareness on the part of judicial personnel of CSA grooming dynamics and (b) paucity of systematic methodologies for evaluating the nature of adolescent relationships, with a view to ascertaining the incidence of abuse.¹³

Thus, discussion on the age of consent and adolescent sexuality must necessarily contend with an equally important issue, that is, grooming. In the Indian context, judicial perspectives on ‘factual consent’ have, in many cases, made little distinction between consensual cases and instances of grooming, with justifications ranging from prevailing socio-cultural mores on sexual relationships and early marriage, to more complex discussions on the contrast between religious law (personal law) and progressive legislation (like POCSO) on the issues of marriage and sexuality.⁵ While there have been multiple attempts to define grooming, and criticism regarding heterogeneity in the literature,¹⁴ the validated Sexual Grooming Model (SGM) outlines five broad stages of the process: (a) victim selection, (b) gaining access and isolating the victim, (c) trust development with the child and others, (d) desensitizing the child to sexual content and physical touch; and (e) Post-abuse maintenance behaviors.¹⁵

Conclusion

It is evident, from the many nuances and challenges in adjudicatory approaches, to adolescent sexual behavior, that there is an urgent need for re-evaluation of India’s law on sexual consent. Any reform effort would benefit greatly by converging legal frameworks with the existing evidence on normative adolescent sexual development, whilst simultaneously staying alive to the possibility of grooming-led abuse and manufactured consent.

The convergence of mental health professionals and judicial personnel is imperative for ensuring adolescent protection and well-being, and appropriate dispensation of justice. In this, the role of mental health professionals would be to evaluate relationship dynamics in adolescent abuse cases, and any grooming processes thereof, with due information and reporting to the court. Such an approach impels the development of methodologies that recognize the intersectionality between law and mental health, for, issues such as consent are embedded in the field of adolescent mental health, whilst having implications in the legal domain. Of course, such

evaluation methodologies call for developing definitions of ‘informed consent’ in adolescents, within the Indian socio-cultural context; and underlying this is the need to examine (a given) adolescent’s capacity for providing consent—for, this forms the core of the decision-making mechanism, based on which adolescents engage in sexual relationships. Therefore, ultimately, efforts to resolve the consent-abuse binary must lie in transdisciplinarity: to provide the POCSO law with the methodological tools to answer questions of consent.

Acknowledgment

We acknowledge the Ministry of Women and Child Development, Government of India, for supporting a national initiative for child protection, mental health, and psychosocial care, under the aegis of which work we implement research, practice, and capacity-building activities on child mental health and protection issues.

Declaration of Conflicting Interests

The authors declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The authors received no financial support for the research, authorship, and/or publication of this article.

Statement of Informed Consent and Ethical Approval

Necessary ethical clearances and informed consent were received and obtained respectively before initiating the study from all participants.

Notes

1. Marimuthu v The Inspector of Police, Ayakudi Police Station and Others (2016), MANU/TN/2236/2016; Renu v. State of U.P and Others, MANU/UP/1438/2015; Keerti Gupta and Others v State of U.P. and Others (2016), MANU/UP/0464/2016.
2. Factual consent, in judicial decisions, is differentiated from legal consent. The question of fact, in relation to consent, i.e., whether someone consented to sexual engagement or not, is distinct from the question of law, i.e., who does the law define as having the capacity to consent?
3. Section 15 of India’s Juvenile Justice Act, 2015, allows for the transfer of adolescents (aged 16–18) from the juvenile system to the adult criminal justice system, if they are accused of committing ‘heinous offences’ such as sexual offences under the POCSO Act.
4. Vijayalakshmi & Anr. v. State & Anr. (2021), MANU/TN/0254/2021
5. Virender Singh v. State of H.P (2021), MANU/HP/0092/2021; Yunusbhai Usmanbhai Shaikh v State of Gujarat and Others (2015), MANU/GJ/0876/2015

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