

# **Consent, Adolescence and the Pocso Act: A Critical Analysis of Romantic Relationships Involving Minors**

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**Abstract:** *The Protection of Children from Sexual Offences (POCSO) Act, 2012 was passed to protect persons under the age of 18 years from sexual abuse and sexual exploitation, and by law, to consider every person under that age as a 'child' and therefore not able to give valid consent to sexual activity. This bright-line rule was meant for a paradigm case of adult predation, grooming and trafficking. However, in reality, the vast majority of prosecutions under POCSO are not linked to predatory abuse but are instead the result of consensual romantic or sexual relationships between adolescents, or between an adolescent and young adult, often reported to police by disapproving parents, in relation to elopement, inter-caste and inter-faith relationships, or discovered pregnancies. This paper critically analyses the statutory design that has stripped and occluded adolescent consent from relevance, maps the criminalisation of teenage romantic relationships and considers the divided judicial approach to cases that are described in Indian law as "Romantic POCSO" cases. It compares the new approach of the High Court in quashing prosecutions where the relationship has grown into marriage or family life with the Supreme Court's emphasis on statutory fidelity as seen in its intervention in the West Bengal adolescent marriage case decided in 2024. The paper also discusses the Law Commission of India's 283rd Report on the age of consent and puts the Indian position in perspective relative to comparative exemptions like close-in-age. It suggests that ad hoc judicial quashing cannot sufficiently reconcile the competing values of child protection and adolescent autonomy, and proposes an amendment to the statute that is calibrated, includes a narrow close-in-age exception, and establishes authorizing sentencing discretion and codified standards for quashing prosecutions involving consensual adolescent relationships.*

**Keywords:** Adolescent girls, nutritional status, menstrual health, anemia, iron deficiency, menstruation, dietary intake, menstrual hygiene. POCSO Act, age of consent, adolescent sexuality, romantic relationships, statutory rape, Independent Thought v. Union of India, Law Commission 283rd Report, judicial discretion, child rights, criminalisation of adolescence.

## **I. INTRODUCTION**

The Act, known as the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act"), was passed following the realization of the pervasive and long neglected issue of child sexual abuse in India and, in its structure, it was a conscious choice on the part of the legislature that all persons under 18 years of age are children" for the purposes of the Act and that the consent of the child was irrelevant to any sexual act. This is a uniform, bright line approach with a paradigm case in mind: the adult predator, the groomer, the trafficker, the relative or authority figure who takes advantage of a position of trust. Within that paradigm, if a child seems to agree to something, that "agreement" is irrelevant, if such is the case, and this is a necessary position, for the law is designed to protect children who were once unable to make their own decisions, but are now forced to, as a result of their current vulnerability.

The challenge, however, is that the same bright-line rule also applies to a second fact pattern: consensual romantic/adolescent and sexual/young adult relationships, involving no exploitation, coercion, deception, or power imbalance—all of the things that the statute intended to regulate. Several district level studies of POCSO special court dockets have confirmed that a significant proportion of prosecutions are based on consensual relationships, in some of these studies nearly a quarter and in others, more than half, of prosecuted cases were discovered either when a family



member objected to an inter-caste or inter-faith relationship, or when a couple eloped, or even when an adolescent pregnancy came to the attention of a hospital to which the Act required reporting. In this seemingly repetitive scenario, a relationship that the young people consider to be a loving or marital relationship, becomes a criminal act – by the process of the law – punishable by mandatory minimum sentences designed for predatory sexual violence.

In this paper, that tension is critically examined. It is articulated in four main movements. First, it looks at the concept used to make adolescent consent legally irrelevant below age-18, and places that in the context of wider discussion of protection, vulnerability and child's capacities. Second, it charts the statutory structure of the POCSO Act which enforces this irrelevance — the definitions, the aggravated offence categories, the presumptions against the accused, the mandatory minimum sentencing regime — and reveals how this structure, together with complementary provisions from the criminal law on kidnapping and on mandatory reporting, leads to the criminalisation of the ordinary adolescent romance. Third, it explores how the judiciary, in a manner that Indian legal commentary has dubbed "Romantic POCSO" cases, has responded to these offences, highlighting a significant shift in the approach of the High Courts when it comes to quashing prosecutions linked to consensual adolescent relationships as compared to that of the Supreme Court since it added its own gloss to the POCSO definition in the recent West Bengal case involving the consenting couple. Fourth, it provides an analysis of the 283rd Report of the Law Commission of India on the age of consent, comparative analysis of how age of consent is treated in other jurisdictions and lastly a set of calibrated reform proposals.

The analysis assumes that the goals of child protection and adolescent autonomy are not in conflict in principle, and that the real problem in the Indian law is not that the POCSO Act is too protective of children, but that it is too protective of them with a law that fails to distinguish between a predatory adult and a sixteen-year-old's first relationship. The paper suggests that the solution to this problem should not be a permanent extension of inconsistent and ad hoc judicial equity at the threshold stage by High Courts or, in exceptional circumstances, by the Supreme Court under its extraordinary constitutional powers, but a calibrated legislative reform instead.

## **II. CONSENT, ADOLESCENCE AND THE LAW: A CONCEPTUAL FRAMEWORK**

### **2.1 Consent in Criminal Law and the Rationale for Age-Based Incapacity**

In criminal law, consent generally serves as a defense to a crime, and can take the form of a defense to a particular aspect of a crime, because it renders the action lawful when otherwise it would be illegal, if the consent is free, informed, and given by a person capable of exercising judgment. There are a few vitiating factors, which are recognised under the general criminal law, that make an apparent agreement unenforceable, and these include the factors of fraud, fear, unsoundness of mind and intoxication. The logic of age based incapacity is different, it does not require, on a case-by-case basis, that the child is in fact mature to grant a legally valid consent to sexual activity, but it takes a categorical presumption that a person under a certain age is not capable of giving a legally valid consent to sexual activity in any case whatsoever.

This "categorical" approach, also sometimes referred to as the doctrine of statutory rape, is based on several related concerns: the first is that in most cases, the relationship is inherently unequal, with the child being the younger party, and the older or more powerful party being able to exert control over the child; the second is that in most cases, coercion, deception, or grooming would be virtually impossible to prove; the third is the risk that, if maturity were to be determined on a case-by-case basis, children would be subjected to cross examination on the issue of maturity, thus the exact issue the law is designed to protect them from; and the fourth is the need to protect children from adult sexuality as a social policy, which is distinct from their personal wishes. A bright-line age threshold thus gives up the possibility of over-inclusion (capturing relationships in which there is no exploitation) for evidentiary certainty, deterrence, and robustness against the manipulation of apparent consent.

### **2.2 De Facto Consent versus De Jure Consent**

The central conceptual fault line in the debate on "Romantic POCSO" cases is the difference between "de facto" consent and "de jure" consent. The main conceptual difference between the cases of 'de facto' consent and 'de jure' consent is that the POCSO Act does not recognise the capacity to consent for anyone under the age of eighteen. Under the Act, the de facto consent of an adolescent, however sincere, is on the surface no less meaningless as a result of the



Act's lack of distinction between de facto and de jure consent. This is because strict doctrinally, POCSO offences involving adolescents are more accurately characterized as offences of presumed incapacity and not non-consent, the wrong that the law seeks to punish is not the absence of consent, but the absence of real consent.

### **2.3 The Evolving Capacities of the Adolescent**

The single threshold of POCSO Act is less robust than the international child rights law. Article 5 of the UN Convention on the Rights of the Child requires States to respect the responsibilities, rights and duties of parents in providing guidance to the child "in a manner consistent with the evolving capacities of the child". This means that the child is given increasing autonomy and capacity for self-determination over time, rather than the right to this autonomy being granted as of a certain birthday. The general comment of the treaty body on the implementation of children's rights during adolescence also highlights the adolescents' increasing ability to make independent decisions, such as regarding sexual and reproductive health, and warns against practices that discontinue protection too soon or leave adolescents without any recognised agency whatsoever. This is because the single and undifferentiated age of eighteen in the POCSO Act does not fit with this conception of a graduated age, where a thirteen-year-old is not the same as a seventeen-year-and-eleven-month-old in terms of physical, emotional and social capability to consent.

### **2.4 Protectionist and Autonomy Paradigms**

The issue of child sexuality and the law is often presented as a conflict between a protectionist paradigm which stresses the vulnerability of children and the State's responsibility to protect them from sexual exploitation whatever their wishes may be and an autonomy paradigm which stresses the increased capacity of adolescents to exercise autonomy and the dangers of over-criminalisation which will limit their agency over their own bodies and relationships. Even when protective laws are meant to safeguard girls from abuse by adult men, they can, in practice, be used to police girls' sexual and relational behaviors – laws cited by parents who are trying to manage an adolescent daughter's social circles rather than by the daughter herself. What the experiences of the Indians with the 'Romantic POCSO cases' (cases examined in detail below) show is just this double edge.

### **2.5 Constitutional Backdrop**

The Indian constitutional order provides alternative anchors for both paradigms. The Supreme Court in its privacy jurisprudence has interpreted Article 21's right to personal liberty as including the right to decisional autonomy in matters of intimacy and family relations as well as Article 15(3) of the Constitution, which explicitly provides for special provision for children, and Article 39(e) and (f) of the Directive Principles, which mandate the State to protect children from exploitation and provide opportunities for them to grow in freedom and dignity. The argument for the POCSO Act being a realisation of the protective mandate of Article 15(3) and 39 has gained strength and the argument against the blanket interpretation of the Act in relation to adolescent romance has been energised by the autonomy strand of Article 21. Both of these constitutional values stand alone, which is why the age threshold is properly subject to close scrutiny by legislature and courts, and the opportunities for adolescent agency are a subject of scrutiny.

## **III. THE STATUTORY FRAMEWORK OF THE POCSO ACT, 2012**

### **3.1 Object and Structure**

The POCSO Act aims to create a comprehensive, gender neutral, law on protection of children from sexual assault, sexual harassment and pornography and to establish special courts to try offences under this Act with procedures that are child friendly. The definition of a "child" in accordance with section 2(1)(d) is defined equally for all persons below 18 years of age regardless of sex, maturity and nature of the relationship to the accused.

### **3.2 The Offence Architecture and Aggravated Categories**

The Act introduces a tiering structure of offences with progressively higher mandatory minimum penalties — sexual assault (section 7), penetrative sexual assault (section 3) and aggravated sexual assault (section 9) and aggravated penetrative sexual assault (section 5). The 2019 changes to the Act substantially increased these minimum sentences, imposing a minimum sentence of twenty years' rigorous imprisonment, extendable to life imprisonment or death, for aggravated penetrative sexual assault, and the death penalty as an available sentence when the victim is under 12 years of age. Some of the categories listed in Section 5 are made "aggravated" by reference to the age of the victim (less than 16), by reference to the status of the accused (as someone in a position of trust or authority, a relative or a public



servant) or by reference to the use of violence, and it is important to note that there is no category in this statutory framework where the accused is in a close and continuing romantic relationship with the victim per se.

### **3.3 The Statutory Irrelevance of Consent**

The victim's consent has no bearing on the offence, if committed against a victim under 18 years in the POCSO Act. This does not constitute an 'interpretative gap', but rather a conscious design of the Act, in line with the doctrine of statutory incapacity, in that the Act does not ask and does not allow courts to ask whether the child's agreement was genuine, informed, or freely given, as the meaning of 'child' does not require a lower threshold at which factual maturity might be recognised. The offence is established on proof of the act and the victim's age, the child's declaration, however strong, of his willingness having no effect on whether the offence has been committed, but becoming relevant, as discussed in Section 5 below, at the entirely separate stage of the exercise of the inherent quashing power or of sentencing.

### **3.4 Presumptions and the Reversed Burden of Proof**

Sections 29 and 30 of the Act further sharpen its protective, prosecution-favouring design. Section 29 provides that where a person is prosecuted for specified offences under the Act, the special court shall presume, unless the contrary is proved, that the accused has committed the offence; Section 30 creates a corresponding presumption of culpable mental state, again subject to rebuttal by the accused. These reversed-burden provisions were calibrated for cases in which victims, often very young children, would otherwise struggle to discharge an ordinary prosecutorial burden against an adult abuser with superior resources and social standing. In the context of a consensual adolescent relationship, however, the same presumption operates against a young accused — frequently himself a teenager or a young adult only a few years older than the complainant — who must now affirmatively rebut a presumption of guilt in a case where no exploitation is alleged by either party.

### **3.5 Interaction with Kidnapping and Abduction Offences**

One of the hallmarks of 'Romantic POCSO' prosecutions is that, rather than by the adolescent herself, the First Information Report is usually filed by parents who complain of kidnapping or abduction under the general penal statute, usually when a daughter has gone missing to be with a boyfriend of the parent's disapproval. Routine challenges to POCSO Act for any sexual interaction that has taken place with girl in the relationship, irrespective of the girl's account of the interactions is made during the course of the kidnapping allegation. Charges of sexual interaction are routinely brought under the POCSO Act in the course of the kidnapping allegation, irrespective of the girl's version of events. The role of the complainant's "aggrieved daughter" can coexist with the role of the "protected victim" of the Act, the former being the "aggrieved party" and the latter a "victim", both being assigned to the girl as a result of the kidnapping and POCSO charges, even if she does not want to be either of these roles.

### **3.6 Mandatory Reporting and the Medicalisation of Adolescent Pregnancy**

Section 19 of the Act states that, "Any person who knows that an offence under the Act has been committed shall report the same to the police, and reportable failure to report is punishable by Section 21 of the Act. A pregnancy in an individual below the age of eighteen years is, by the provisions of the Act, conclusive proof that an offence has been committed and therefore, if a person under eighteen is admitted to a hospital for a pregnancy, that hospital is legally compelled to report the case to the police even if the couple does not wish to report it, regardless of the marital status of the person in terms of personal law or customary law, or whether an allegation of exploitation is made. This provision has been used repeatedly to bring consensual adolescent relationships to court just when they are most vulnerable, both physically and emotionally, to the pressures of prosecution, costing the woman and the internet a health checkup and turning it into a criminal trial.

## **IV. THE CRIMINALISATION OF CONSENSUAL ADOLESCENT RELATIONSHIPS**

### **4.1 The Empirical Pattern**

Independent empirical research into POCSO court records in various States has consistently found a significant proportion of cases where there is no allegation of exploitation, grooming, or coercion by an adult offender, and the complainant in those cases, and the accused in those cases, at some stage of the trial describe the relationship between them as consensual. In district studies conducted in the States of Delhi, Assam, Maharashtra and West Bengal, it has



been found that about a quarter of the disposed cases were of this type, with at least one district study conducted in the district of Lucknow, showing that over half of the cases analysed were consensual relationships. Although these numbers are from a specific and non-exhaustive sample, they are consistent across independent studies and suggest a phenomenon that is not marginal but is a significant proportion of the POCSO docket with a national average as shown in Figure 1 below.

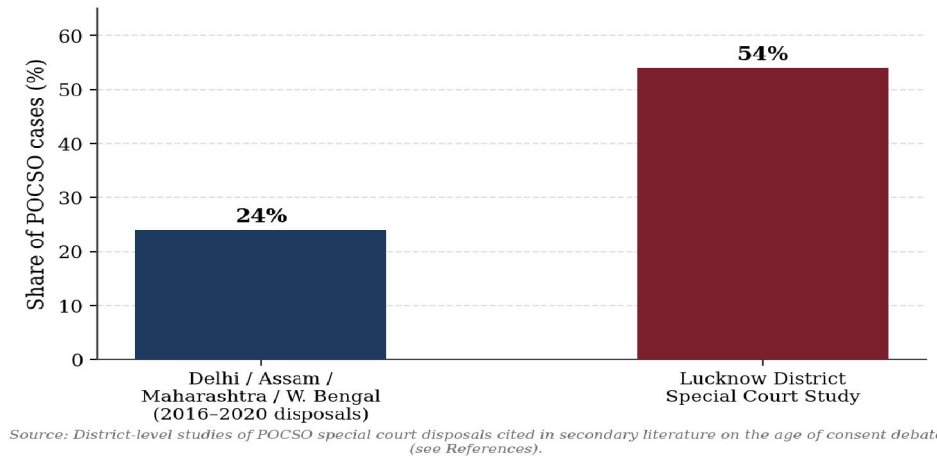


Figure 1: Share of POCSO cases found to involve consensual adolescent relationships in district-level special court studies.

The fact that this is found within court systems geographically and institutionally distinct, argues that this is not a coincidence and is most likely a structural consequence of a statutory design which fails to differentiate between exploitation by an adult and consensual adolescent relationships (as explored in Sections 4.2 to 4.5 below).

#### 4.2 Social Drivers: Family Control, Caste, and Religion

The typical case that follows in these cases is: An adolescent girl aged between sixteen and eighteen years enters into a relationship of which his/her parents are disapproving, often due to differences in caste or religion of their partners, or because the family considers the relationship is "too early" or "socially inappropriate. Once the couple has eloped or the relationship has been uncovered, the family files a police complaint alleging the adolescent abducted the person or that the relationship constitutes a sexual offense, placing the police under the coercive power of the family, which often acts in a discriminatory way against the choice of sexual partner. A similar issue had been raised by the Justice Verma Committee in its 2013 recommendations for the amendments to the criminal law, in respect of inter-caste and intra-community relationships where there is opposition from the family/community elders. The difficulty lies when the boy is also a minor in the relationship, in which case the criminal procedure turns one adolescent into a "prosecuted offender" and the other into an "unwilling victim," both of whom may reject such a distinction.

#### 4.3 Consequences for the Adolescent "Victim"

The effects of this on the young woman who becomes the victim are often severe and counter-protective. She may find herself institutionalized in a child care home for the duration of the proceedings or the family refuses to have her back and she may be separated from the partner she wanted to be with, and from her own child if one is born of the family. She is forced to testify in a formal, adversarial setting, usually against her will, in a criminal trial where the family she comes from is the "victim" and the man of the house the "offender," which is the opposite of what her family and community has decided, and she is deprived of their support because it is the formalized process of the criminal court that has placed them in that role. This sequence often perpetuates precisely the harms to the child for which the child protection law is intended – a lack of autonomy, institutionalisation, separation from a preferred partner and child.

#### 4.4 Consequences for the Adolescent or Young Adult "Accused"

On the opposite side of the dock, the accused in these cases is often himself an adolescent or a young adult, just a few years older than the complainant, who faces the same mandatory sentence as predatory adult offenders, while in the



case of the two, there's no statutory provision that takes into account the distance in age, the fact that neither could be considered coerced, and the couple's own choice to marry and remain together. With the evidentiary presumptions turned on their heads by Sections 29 and 30, the onus is on this young accused to establish his innocence in a system that's been designed for real power imbalance cases, while the mandatory minimum sentences make it impossible for courts to tailor sentences to the (often negligible or nonexistent) culpability that's actually present.

#### **4.5 Systemic Consequences**

Not only are the individuals concerned harmed by the prosecution of consensual adolescent relationships as aggravated sexual offences, but the prosecution of consensual adolescent relationships as aggravated sexual offences is a significant cost to the criminal justice system as a whole. The existing Special POCSO courts are already cramped for time and have to allocate limited judicial time to cases where no party claims to have been exploited; diverting resources from cases involving true predatory abuse. Low conviction rates in a significant number of POCSO cases – often due to the complainant becoming hostile after the couple marries or reunites with families – have also been cited by courts and commentators as supporting the view that a meaningful number of cases are never really appropriate for the POCSO framework of a serious sexual offence in the first place, and that continued prosecution does not serve the goals of deterrence or actual child protection.

### **V. JUDICIAL APPROACHES TO "ROMANTIC POCSO" CASES**

The doctrinal and empirical conflicts described above have resulted in a unique and dynamic Supreme Court jurisprudence, with High Courts and the Supreme Court taking dramatically different positions on prosecutions based on consensual adolescent relationships. This section charts that difference.

#### **5.1 The High Court Practice of Quashing Consensual-Relationship Prosecutions**

In recent years, a significant number of High Courts have exercised their inherent powers, provided for under Section 482 of the Code of Criminal Procedure, 1973 (now Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023) and/or Article 226 of the Constitution, to quash First Information Reports and terminate prosecutions based on relationships they have deemed as consensual adolescent romance and not exploitation. In the repeated fact pattern of these cases, a couple who married after their relationship became known, often after the birth of a child, and a victim who has submitted an affidavit claiming she is not a victim, has no desire to pursue the prosecution and views continued prosecution as a threat to her settled family life.

The Madras High Court, in *Vijayalakshmi v. State* (2021), quashed proceedings for kidnapping, penetrative sexual assault and child marriage against a young man in his early twenties who had entered into a relationship with a girl below eighteen, observing that the Act had never been intended to treat an adolescent who enters into such a relationship as an offender, and that adolescent romance is a normal developmental marker of self-identity and the capacity for intimacy rather than a form of predation. Several High Courts have applied similar reasoning to the recurrent fact pattern in which the criminal process is set in motion not by the girl but by hospital authorities discharging the mandatory reporting obligation, holding that where the couple have since married, are living together with their child, and the person whom the law deems the victim states on affidavit that she has no grievance and does not wish to prosecute, the prosecution cannot meaningfully be continued in the absence of any complaint by that person. In such orders the courts have acknowledged the gap between the parties' ages at the time of the incident and the "legal framework" of the Act, and have closed the proceedings even though the law was technically applicable to the parties' ages when the incident occurred.

In *Rosalin Rout v. State of Odisha* (2024), the Orissa High Court laid down guidelines for the adjudication of petitions seeking to quash POCSO proceedings which were based on adolescent relationships, and drew a distinction between those scenarios where the relationship was genuinely one of sexual exploitation and those where the adolescent relationship had grown into a marriage accepted by the couple and by society, which the Court held could be quashed where that was both permissible and just. The Court reasoned that the Act had been enacted in order to prohibit non-consensual and forced sexual relationships with children, including child sexual abuse and sexual harassment, and that adolescents of the same age group who fall in love, elope and marry ought not on that account to be criminalised.



High Courts in several other States have reasoned along similar lines, using the informal shorthand of "Romeo-Juliet" cases for prosecutions arising out of consensual adolescent relationships. They have declined to allow the prosecution to continue in cases where the couple had already reconciled or separated before the matter came up for hearing, where the complainant-parent gave an affidavit stating that the relationship was consensual and that the original complaint had been filed because of emotional distress related to the pregnancy, and where the person whom the law treats as the survivor did not object to the withdrawal of the prosecution, holding that further criminal prosecution and incarceration would not serve the cause of justice in such situations.

The Rajasthan High Court, the Allahabad High Court, the Himachal Pradesh High Court, and others have been of the same opinion – broadly, that sufficient for the termination of prosecutions under the POCSO Act should be marriage of the parties, the birth of a child, and express indication of a consensual relationship by the complainant.

It is important to note that this is not a uniform practice across all High Courts, and courts have specifically refused to quash where they have been satisfied that there is exploitation or an ongoing risk to the minor. The Supreme Court itself, in *Ramji Lal Bairwa v. State of Rajasthan* (2024), set aside a High Court order which had quashed POCSO proceedings on the basis of a compromise between the family of the minor and the accused, a teacher, holding that an offence under the Act is not a purely private dispute capable of being settled between the parties and that quashing on the strength of a compromise in such a case defeats the protective purpose of the statute. This split among the High Courts should be noted: it has been a fact sensitive exception, which has evolved because of the particular nature of the relationship involved, characterized by mutuality, non-exploitativeness and now even legitimacy, and not a rule that eliminates the applicability of the Act whenever a relationship is called romantic.

### **5.2 The Karnataka and Madhya Pradesh High Courts' Reference to the Law Commission**

In separate proceedings, the Karnataka High Court (Dharwar Bench) as well as the Madhya Pradesh High Court (Gwalior Bench) had noticed a surge in cases of minor girls above sixteen entering into relationships, eloping and engaging in consensual sexual activity with partners of a similar age and drawn the attention of the Law Commission of India to the issue, urging it to rethink the age of consent, or alternatively to suggest that Special Courts have the discretion to waive a minimum sentence where the child shows de facto consent, even if the relationship ends in marriage with or without children. In Section 6, this judicial invitation to legislative and quasi-legislative reconsideration is discussed in detail, and it is a sign that the higher judiciary long ago realised that it would not be possible to resolve the difficulty on a case-by-case basis alone.

### **5.3 The Supreme Court's Corrective Stance: Statutory Fidelity over Judicial Reformulation**

The most notable recent intervention in this area by the Supreme Court came from a case that began in West Bengal in 2018 where a fourteen-year-old girl was sent away from her family home and married an older man who went on to father a child; the man was convicted by a trial court under Section 6 of POCSO and Section 376 of IPC and sentenced to rigorous imprisonment for a minimum of twenty years. The Calcutta High Court, in 2023, annulled the conviction, basing its reasoning on principles that would be sharply criticized by the Supreme Court, such as the one that POCSO should be changed to decriminalize consensual sexual activity between those aged sixteen or older and others, and to establish an exception for what the High Court called "non-exploitative" sexual activity between older adolescents.

The Supreme Court in a judgment dated 20 August 2024, quashed the acquittal order issued by the High Court and reinstated the conviction on appeal filed by the State. The Court strongly rejected the High Court's proposal of an exception for non-exploitative adolescent sexual activity, asking how any sexual act which is criminalised in the protective framework of the Act could be considered non-exploitative, even though the facts might seem so. The Court strongly rejected the High Court's proposal of an exception for non-exploitative adolescent sexual activity, asking how the mere fact the sexual act has been criminalised in the protective framework of the Act would mean that the facts are non-exploitative, however sympathetic they might appear. The Court's language was pointed, in that it held that it was the duty of the judiciary to follow and implement the law, and cannot, in substance, act contrary to the law, and that the mere fact that the parties to the proceeding were now living together as husband and wife, or a settlement between them could not by itself have justified quashing the conviction under the High Court's inherent jurisdiction.

This judgment marks the strictest judicial stance, at the highest level, in condemning any notion that adolescent romantic relationships should be recognized as a broad, judicially fashioned exception to the uniform age threshold



required by the POCSO Act and is clearly at odds with the quashing decisions gleaned from other High Courts in operation concurrently, as described in Section 5.1 above.

#### **5.4 The Equitable Counterpoint: Article 142 and the Refusal to Sentence**

The same matter produced an equally significant, and in some tension with itself, second chapter. Having restored the conviction in August 2024, the Supreme Court did not proceed at once to sentencing. It instead directed the Government of West Bengal to constitute a committee of three experts, including a clinical psychologist and a social scientist, with a child welfare officer appointed to assist the committee as its coordinator, and with the assistance of institutions such as NIMHANS or TISS, in order to meet the victim, to place before her the full range of support and benefits the State was willing to extend to her and to her child, and to enable her to arrive at an informed choice about her own future. The committee was directed to submit its report to the Court in a sealed cover, and the question of sentence was expressly reserved until that report had been received and considered. Alongside this, the Court issued wide-ranging directions to the States and Union Territories and to the Union Ministry of Women and Child Development concerning the framing of rules under Section 46 of the Juvenile Justice (Care and Protection of Children) Act, 2015, and the delivery of victim compensation and support benefits under the schemes of the Government of India and of the National Legal Services Authority.

The significance of this course lies in what it concedes. By separating the question of guilt, which the Court held had to be determined strictly in accordance with the statute, from the question of what ought then to be done with the convicted man, and by routing the latter through an expert assessment of the victim's own circumstances and wishes rather than through the mandatory minimum prescribed by Section 6, the Court acknowledged that a sentence lawfully due on the statute's own terms might nevertheless fail to do justice in the individual case. That acknowledgement leaves open the prospect that the extraordinary jurisdiction conferred on the Supreme Court by Article 142 of the Constitution, a jurisdiction available to no other court in the country, may have to be brought to bear in order to avert a sentencing outcome that the Court itself would regard as unjust, and it does so without any suggestion that such relief could operate as a rule of law for the general run of cases.

#### **5.5 The Doctrinal Tension and Its Practical Implications**

In other words, the Supreme Court's 2024 judgment in the West Bengal matter, together with the sentencing process which that judgment set in motion, outlines a doctrinally coherent, albeit practically uncomfortable, division of judicial labour: the determination of guilt is to be made strictly "according to the statute", with no room for a judicially created exception for non-exploitative "adolescent" relationships, at the threshold or appellate stage; however, the exceptional equitable jurisdiction guaranteed to the Supreme Court only by Article 142 can, in a truly exceptional case and without establishing a precedent, be invoked to avoid an "unjust" sentencing outcome in a lawfully convicted case. This division, however, is not available to the High Courts as they have only the inherent jurisdiction to prevent abuse of process under Section 482 of the Code of Criminal Procedure (now Section 528 of the Bharatiya Nagrik Suraksha Sanhita) which the Supreme Court has cautioned should not be abused in terms of sympathy or settlement or subsequent marriage, to set aside a conviction, or by implication, a prosecution.

The effect is a body of law that is fundamentally contradictory: many High Courts still strike down consensual adolescent relationship prosecutions at the threshold stage, with the same types of justifications — that the child grew up, and so did the parents; that the child didn't complain about it; that the parents were not harmed — that the Supreme Court has warned against using to overturn a conviction by trial. High Court has consistently treated pre-trial quashing as a distinct exercise of its jurisdiction and in appropriate cases it is a permissible exercise of its inherent jurisdiction, as the Supreme Court's main decision did not involve the propriety of overturning a conviction after trial, but the propriety of quashing a prosecution before trial. The outcome of a consensual adolescent-relationship case can be highly dependent on where in the proceedings a person seeks relief and which High Court in which he seeks it, and not on a fixed, broadly applicable principle of law.

Indian courts recently developed a novel concept in which the refusal to grant a marriage exception was considered an act of "independent thought". Indian courts have recently invented a new idea, that the refusal of a marriage exception is an act of "independent thought".



This precarious balance should also be considered in the context of the Supreme Court's earlier and structurally similar judgment in *Independent Thought v. Union of India* (2017), which had raised the age of the wife's consent to sexual intercourse from the previously quoted age of fifteen under Exception 2 to Section 375 of the Indian Penal Code, to eighteen, in order to harmonise the age for marital rape in the general penal code and the POCSO Act's uniform age of consent. In that case, the Court had ruled that the social reality of child marriage in India did not justify a lower threshold for consent in marriage and found that a child continued to be a child, and entitled to the protection of the Act, regardless of her marital status. Read with this matter the Supreme Court has consistently taken the position that neither marriage nor a self-described "romantic relationship" is a protective exception to the POCSO Act's protective threshold, even if the Court has shown itself willing to temper the sentencing consequences that a strict application of that threshold can result in, in truly exceptional individual cases and through the exclusive remedy of the Supreme Court, namely the remedy of Article 142.

## **VI. THE AGE OF CONSENT DEBATE: THE LAW COMMISSION'S 283RD REPORT**

### **6.1 Background and Terms of Reference**

Twenty second Law Commission of India took the inquiry regarding the age of consent under the POCSO Act after the reference from Karnataka High Court and Madhya Pradesh High Court to them, which included views of National Commission for Protection of Child Rights, former judges, lawyers, child rights activists, NGO's and academicians who are experts in the field. The Commission's terms of reference focused on the possibility of lowering the statutory age of consent so that it would not include what the referring High Courts had deemed as "unnecessary and unjust prosecutions of what are in reality consensual relationships" among adolescents and on how to navigate through the inconsistencies and conflicts between the POCSO Act, the general penal law and the law on child marriage.

### **6.2 The Commission's Recommendations**

In September 2023, the Commission released its 283rd Report which was titled "Age of Consent under the Protection of Children from Sexual Offences Act, 2012. The central recommendation of the Commission was that the existing age of consent in the existing POCSO Act must not be changed: The Commission found that reducing the age of consent below eighteen would be likely to cause significant collateral damage to India's existing legal framework on child marriage and child trafficking, which are based on a uniform and unambiguous definition of childhood that a lowered or graduated age of consent would complicate or undermine. The Commission also noted the "factual reality" that a category of cases exists where a child aged between sixteen and eighteen years is "tacitly approved" in fact, but not consented in law, and called on the High Courts to avoid applying the severity with which the Act's makers had intended for cases of genuine sexual exploitation. In that context, the Commission recommended that Special Courts be given a graduated sentencing provision, where the trial court is ensuring that the relationship was with a genuine consent by a child aged 16-18 and not through coercion/exploitation, and that the Juvenile Justice (Care and Protection of Children) Act, 2015, and the general penal law be amended to ensure consistency of the statutory framework.

### **6.3 Critical Reception of the Report**

The Commission's Report has been subject to constant criticism from child rights scholars and reproductive-rights commentators, who have described it as an opportunity for greater meaningful reform. The central recommendation of the Report has been faulted by commentaries in the *Economic and Political Weekly* and in the *Indian Journal of Medical Ethics*, which argue that the absolute presumption of incapacity for all individuals under eighteen years of age remain in full force, and that the hardship caused by this is only addressed in the discretion of the sentence. These criticisms are that the Report was superficial in its engagement with the empirical literature that it cited on consensual cases in the POCSO docket, was not given a real chance of grasping the evolving capacities of adolescent girls in issues of sexual and reproductive life, and that by relying on the discretion of the Court in sentencing (without giving it detailed guidance on what factors it should take into account, which it is already doing differently in each of the High Courts that quashed POCSO proceedings) it risks succumbing to the same kind of forum-dependent, inconsistent outcomes that have already been observed in the High Courts' divergent applications of the POCSO Act. It has been pointed out that the Report ignored the gender-based and caste-based aspects of the issue that was purported to be addressed by the Act, particularly, the pattern outlined above in Section 4.2, where families object to a relationship



between two adolescents of which there was no exploitation whatsoever, a pattern that the Justice Verma Committee had already highlighted over a decade ago.

## VII. COMPARATIVE PERSPECTIVES

A number of other jurisdictions have addressed the tension between protecting children from sexual exploitation and recognising consensual sexual activity between adolescents close in age through the device of a close-in-age or "Romeo and Juliet" exemption, which preserves a general age of consent while providing a defence, or removing criminal liability altogether, where both parties are adolescents and the difference in their ages does not exceed a specified, narrow margin. Under the Canadian Criminal Code, for instance, the age of consent is generally sixteen, but there are a variety of close-in-age exceptions for younger teens, allowing consensual sexual activity between peers who are not significantly different in age and who have no relationship of trust, authority or dependency between them. Many states in the United States have enacted similar close-in-age laws with different age ranges and age differentials, demonstrating a general consensus that a single, unqualified age or age difference is not an appropriate tool to address the actual dynamics of adolescent peer relationships that remain firmly protective of adults from exploitation.

In the UK, there is no statutory close-in-age defence, but prosecutors are advised to be cautious, and that the public interest is a factor to be taken into account before taking action on consensual sexual activity between children of a similar age and degree of maturity. In a more recent and relevant case, South Africa's Constitutional Court, in *Teddy Bear Clinic for Abused Children v. Minister of Justice and Constitutional Development* (2014), held that provisions of that country's sexual offences law which criminalised consensual sexual conduct between adolescent children (between the ages of 12 and 16) violated the constitutional rights of dignity and privacy of the children concerned; and therefore struck down the offending provision to the extent that it criminalised relationships involving consensual, developmentally normative sexual exploration, but allowed the provisions to stand in respect of exploitative or coercive sexual activity, or where there was a significant age or power imbalance.

These comparative figures are presented in Figure 2 below, which indicates that India's general age of consent of 18 is significantly higher than that of other jurisdictions discussed, a number of which have a lower general age of consent but have more specifically drawn close-in-age exceptions as compared to India, which has no specific age of exception.

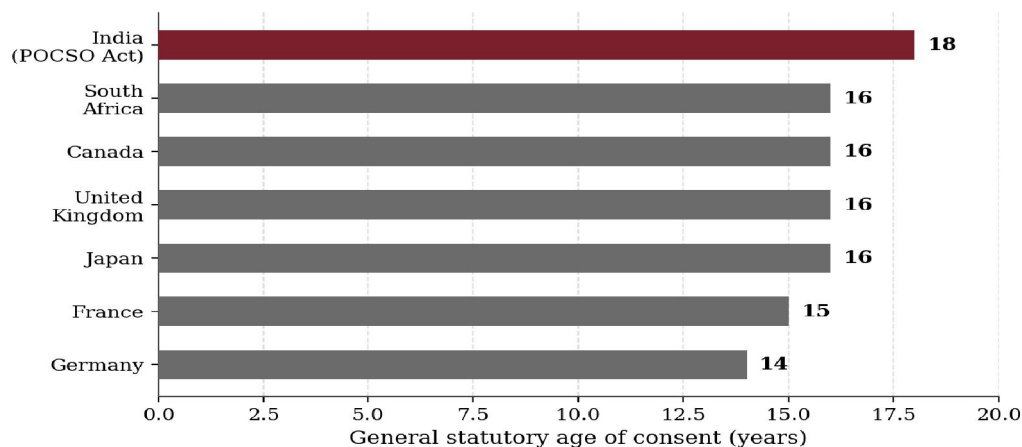


Figure 2: Comparative overview of the general statutory age of consent in selected jurisdictions.

Unlike the Indian POCSO Act, there is no judicial exception based on a close-in-age relationship, whether it be because of marriage or reconciliation; the exceptions that have now been crafted by the courts are downstream exceptions, in so far as they depend on the specific facts of marriage or reconciliation, and the Supreme Court has reserved to itself a unique power under Article 142 to temper the consequences of a conviction in exceptional circumstances. This comparative gap is meaningful given a number of concerns that led other jurisdictions to adopt the close-in-age exception: the risk of criminalising developmentally normal adolescent conduct and the disproportion between the



mandatory penalties for predatory abuse and the responsibility of a peer in a consensual relationship are clearly evident in the Indian context too, as illustrated above in Section 4. Comparative borrowing, however, should be done with caution, as India's ongoing battle against child marriage and child trafficking, and the fact that families have resorted to the POCSO Act to enforce caste and communal endogamy are not necessarily the same risks found in the jurisdictions discussed above, and any close-in-age exception in India would be required to be mindful of these unique social realities.

## **VIII. CRITICAL ANALYSIS: PROTECTION VERSUS AUTONOMY**

### **8.1 The Case for the Bright-Line Rule**

The uniform and consent-blind threshold in the POCSO Act has a strong ground which cannot be ignored by a critical analysis, rather than simply taken for granted by any analysis calling for the reform of the Act. A law that would allow courts to case by case address the issue of whether a child would have consented to the act would, by design, make it easier to target and undermine a child's willingness to participate, and subject the child to additional trauma, as his or her credibility and maturity would be questioned in open court. The bright line rule also plays an important deterrent and expressive role as it makes clear on its face that the consent of a child is not a justification for adult sexual access to a child, and there is no motivation for an accused adult to concoct evidence of the child's "consent." The continued prevalence of child marriage and child trafficking in certain parts of India could also argue for a graduated or lowered age of consent, as such marriages could be effectively seen as consensual, but deceptively so by virtue of family or economic pressure, a risk that has been highlighted by the Law Commission in its 283rd Report.

### **8.2 The Case Against Undifferentiated Application**

This is in contrast to the empirical and doctrinal evidence explored in this paper, which reveals that the broad scope of the Act in relation to consensual, non-coercive adolescent relationships leads to an array of harms that the Act was not intended to cause. In addition to the above disproportionate sentencing, the reversed evidentiary presumptions in Sections 29 and 30 add another layer by burdening the young accused with the task of proving innocence, whereas a partner accused of adult sex trafficking does not have to prove their innocence; the mandatory reporting requirement in Section 19 makes routine care for adolescent pregnancies a criminal trigger; and the kidnapping charge combined with prosecutions under POCSO provides a powerful tool for the disapproving family to dismantle relationships across caste and religious lines, as revealed by the sustained pattern of "Romantic POCSO" prosecutions discussed in Section 5. Rather than providing a vindication for the protective intent of the Act, this pattern often re-victimises the adolescent for which the Act was intended through institutionalisation, forced separation from the partner of choice and child, and unnecessary and prolonged exposure to the criminal justice system.

### **8.3 The Doctrinal Incoherence of the Current Judicial Response**

The judicial solution described in Section 5 does not so much solve the tension as play catch-up, unevenly and in significant ways incoherently. Quashing jurisprudence has grown at the level of the High Courts in various States, and in substance, appears to be an ad hoc close-in-age or reconciliation exception, but one lacking codified criteria, subject to the peculiarities of the High Court and the stage of the proceedings. The Supreme Court, on the other hand, has decisively rejected the more extreme proposal that courts should presume a general exception for adolescent, "non-exploitative" sexual activity, yet it has at the same time reserved to itself, at the sentencing stage, an extraordinary and exclusively apical remedy, one that is unavailable to the overwhelming majority of accused persons, who never reach the Supreme Court at all. The cumulative effect is a system where outcomes of factually similar cases vary based on jurisdiction of the court that hears the case, progress in the case, and, most importantly, whether a case ever reaches the Supreme Court in the first place — a system that is fundamentally in opposition to the principles of equal treatment under the criminal law, and one that neither the inherent jurisdiction of the High Courts nor the Supreme Court's power under Article 142 is intended to remedy systematically.

### **8.4 Distinguishing Adolescent Romance from Exploitation**

The only way to escape this incoherence is for the law to make the distinction which the courts, only partially by default, are now required to make by means of inherent and (unevenly and belatedly) equitable jurisdiction, this paper argues. The key distinguishing factors, as discussed in Sections 5 and 7 of this report, are reasonably well developed



throughout the case law reviewed and the comparative material examined: the proximity of age between the couple; the lack of any relationship of trust, authority, dependency or significant power imbalance; the lack of coercion, deception or evidence of grooming; and the couple's express choice to remain together, which occurred at a time and is ongoing. If these features do not apply, then the case does not differ from the predatory abuse that the Act was specifically designed to prevent, and the penal provisions it established, such as the mandatory minimum sentences, should continue to have the same effect.

## **IX. RECOMMENDATIONS FOR REFORM**

### **9.1 A Narrow, Legislatively Defined Close-in-Age Exception**

The concerns raised by the Law Commission regarding the impact of reducing the age of consent on the existing framework for child marriage and child trafficking should be heeded and Parliament should consider a close in age exception with a narrow definition applicable in cases where both are minors (e.g. where either party is aged sixteen or above but below eighteen or where the age difference between the two persons is not more than a narrow margin, such as two to three years), the relationship is found to be consensual, and no evidence of coercion, deception, exploitation or a relationship of trust or authority between the parties is found. The exception used in several foreign jurisdictions outlined in Section 7 would enable the Act to retain its full deterrent effect against adult predators, while excluding from the scope of its protection that category of case that has given rise to the persistent judicial and scholarly unease that has been the subject of this paper.

### **9.2 Codified Sentencing Discretion**

Where a close-in-age exception is found to be a sufficiently substantial deviation from the existing architecture of the Act, the Law Commission's alternative proposal of 'guided' sentencing discretion should be at least adopted, but with a structured and codified framework to determine the exception, as left largely open by the 283rd Report. Any such discretion must only be exercised after conviction, having regard for factors recorded by the court in relation to the age difference between the parties, the presence or absence of coercion or exploitation, the conduct of the parties before and after the alleged offence and the wishes of the child, the child's wishes having been recorded in a manner that is designed to protect the child from family or community pressure. Including these factors in the statute itself as opposed to relying completely on judicial elaboration would minimize the risk of a wide variation of outcomes across jurisdictions.

### **9.3 Codified Standards for Quashing at the Threshold Stage**

The quashing jurisprudence of the High Courts as discussed in section 5.1 should be brought together into a uniform set of statutory or Supreme Court prescribed guidelines to be followed across the country, building on the guidelines formulated by the Orissa High Court in Rosalin Rout and on the reasoning adopted by the Madras and other High Courts. Such guidelines should include that, prior to the lifting of any prosecution based on an adolescent relationship, there should be a recorded statement of the complainant taken by a judicial magistrate in the absence of family pressure, a judicial determination that a child is not being coerced or exploited in any relation with the offender and a considered assessment of the child's long-term welfare that does not rely entirely on marriage as a dispositive factor, as there is a risk, as set out in Section 9.5 below, that an automatic marriage based exception could be misused to validate coerced child marriages.

### **9.4 Recalibrating Mandatory Reporting**

The obligation to report under Section 19 needs to be reviewed in the context of routine adolescent healthcare, so as to ensure that the reporting requirement does not result in a criminal prosecution in all cases of adolescent pregnancy, without regard to the situation of the couple, but does not prevent full enforcement of the requirement in all cases where there is a suspicion of exploitation, a significant age difference, or coercion. In consultation with paediatric and adolescent health professionals, a graduated approach to reporting could channel cases with "legitimate" age gaps to child welfare/family mediation services before compulsion is considered, with the exception of cases with indicators of exploitation which would be mandatorily referred for police reporting.



### **9.5 Safeguards Against the Misuse of Marriage as a Shield**

Any reform on the lines of above must be carefully designed to prevent the creation of a new loophole for allowing underage marriage to cover truly coerced marriages under the umbrella of the law of parent and child marriage as prohibited by Prohibition of Child Marriage Act, 2006. Policies and statutory amendments should thus explicitly clarify the relevance of marriage as evidence of the nature of the relationship, but it should never, on its own, be sufficient to establish the absence of coercion and/or exploitation and courts and quasi-judicial institutions should have the task of establishing the absence of coercion independently by listening to the freely given, independently recorded, account of the child, in any case.

### **9.6 Sensitisation, Education, and Data Collection**

Last but not least, actions beyond the ambit of the Act are needed to police consensual adolescent relationships across caste and communal lines: comprehensive age appropriate sexuality education to ensure adolescents and families have accurate information and eliminates the stigma associated with punitive family responses to consensual adolescent relationships; targeted sensitisation of police and prosecutors, who are currently exercising enormous unguided discretion at the point of registering a First Information Report; and systematic tracking of the incidence, characteristics and outcomes of cases of consensual adolescent relationships under the POCSO docket by the National Commission for Protection of Child Rights and the State Child Protection Commissions giving a scientific basis for future better-calibrated legislative interventions.

## **X. CONCLUSION**

The uniform, consent-blind provisions of the POCSO Act were deliberate and in spirit, if not in form, a well-informed legislative response to the reality of sexual abuse of children, which has been endemic in India for long. The situation of adult predation, grooming and exploitation, where consent is often not a true choice but an apparent consent, is, and should be, the case most clearly in mind for the drafters of the Act, and where consent is the least controversial. The problem this paper has identified is that this unqualified threshold, which does not depend on how close in age the parties are, or whether they are coerced, has also embraced a significant subset of ordinary, non-exploitative adolescent romantic relationships and is applied to them in a mandatory minimum punishment provision which was meant for much more serious behavior.

The judicial solution to this difficulty, which is explored in great detail in Section 5, has been substantial but limited. High courts in multiple states have established an important, if not uniform, jurisprudence to quash prosecutions when the relationships have progressed to marriage and family life and the individuals involved deny even that they were exploited. In its judgment in the West Bengal case in 2024, the Supreme Court has clearly discredited any blanket exception fashioned by the courts for non-exploitative sexual activity between adolescents, while at the same time declining to move directly to the mandatory minimum sentence and routing the question of sentence instead through an expert assessment of the victim's own circumstances and wishes — a course which concedes, in substance, that a sentence lawfully due under the statute may still be an “unjust” outcome in the individual case. These two developments together show that the Indian judiciary at every level is aware of the problem that the paper has explored, but cannot, through the process of adjudication, provide the systemic and consistent remedy that the problem calls for.

This paper has proposed that such a remedy is squarely within the power of the legislature, not the courts relying on judicial equity that is too unpredictable to be relied upon. Together with appropriate safeguards to prevent misuse of the POCSO Act — to prevent the ordinary love life and sexual life of teenagers from being criminalised, even under the guise of marriage or reconciliation — a narrowly drafted close-in-age exception, a codified sentencing discretion based on clear statutory criteria, regular and uniform national guidelines for quashing threshold stage prosecutions, and a reworking of the mandatory reporting regime, would allow the POCSO Act to maintain its full protection against the sexual exploitation of children. Protecting children from sexual abuse and respecting the growing autonomy of adolescents are not, properly understood, competing aims — a more finely-tuned statutory framework is a more principled path towards attempting to balance them, rather than wholesale reduction of the age of consent or continuing to rely on ad hoc judicial intervention.



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