

CRIMINALISING CONSENSUAL RELATIONSHIPS

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December 20, 2022 12:15 am | Updated 12:15 am IST

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India is home to the largest adolescent population in the world. The National Family Health Surveys indicate that a significant proportion of Indian teenagers are sexually active.

According to an analysis by Enfold Proactive Health Trust, ‘romantic cases’ (where the relationship was consensual, according to the girls, their family members, or the court) constituted 24.3% of the total cases registered and disposed under the Protection of Children from Sexual Offences (POCSO) Act between 2016 and 2020 by special courts in Assam, Maharashtra and West Bengal. While POCSO’s objective is to protect children below 18 years from sexual abuse, its unintended effect has been the criminal prosecution and the deprivation of liberty of young people in consensual relationships. The law is also used by parents of adolescent girls to curtail sexual expression and “safeguard family honour”. The ensuing criminal investigation and trial and the simultaneous inquiry under the child protection system have an adverse impact on the adolescents’ development, education, employment, self-esteem, social reputation, and family life. For the adolescent boys, the long-term consequences of a conviction for statutory rape are incarceration and inclusion in the sex offenders registry.

The law casts adolescent girls as “victims”, thus rendering them voiceless. These girls are institutionalised in children’s homes when they refuse to return to their parents. Adolescent boys are by default treated as children in conflict with the law and can even be tried as adults. Such blanket criminalisation of consensual sexual acts among or with adolescents is in gross oversight of their sexual development, bodily integrity and autonomy, and violates their right to life, privacy, and dignity. The penal approach also impedes adolescents’ right to barrier-free access to sexual and reproductive health services and information recognised under the Rashtriya Kishor Swasthya Karyakram. The mandatory reporting obligation under the POCSO Act and the fear of the partner being reported to the police deters girls from availing themselves of medical services and inadvertently pushes them towards unsafe abortions.

The inclusion of consensual and non-exploitative acts involving adolescents detracts from the purpose of the POCSO Act and diverts time and resources from the investigation and trial of actual cases of sexual violence and exploitation. The median time between the lodging of the FIR and the disposal of such romantic cases was 1.4 years in Assam and 2.3 years each in Maharashtra and West Bengal.

According to Crime in India, 2021, 92.6% of cases under the POCSO Act were pending disposal. Consensual cases among these are overburdening the criminal justice system. The futility of using the criminal law to regulate adolescent sexuality is also evinced by the abnormally high acquittal rates (93.8% in romantic cases) and the fact that the girl did not say anything incriminating against the accused in 81.5% of the cases. Further, in 46.5% of the cases, the victims were married to the accused. The acquittal rate in these cases was 98.1% as many courts did not wish to disturb the marital life of the couple.

Many High Courts have recognised that adolescent relationships are normal and criminalisation of such acts affects both parties. In *Vijayalakshmi v. State Rep.* (2021), the Madras High Court cited evidence that “adolescent romance is an important developmental marker for adolescents’ self-identity, functioning and capacity for intimacy”.

The United Nations Committee on the Rights of the Child (CRC) in General Comment No. 20 on the implementation of the rights of the child during adolescence urged states to balance protection of children from sexual exploitation and abuse with respect for their evolving autonomy and recommended that “[s]tates should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.” In 2019, it urged states to remove status offences, which criminalise adolescents who engage in consensual sexual acts with one another.

Comprehensive sexuality education is needed to bridge knowledge gaps, build positive skills and attitudes so as to enable adolescents to make informed decisions and navigate through interpersonal relationships, while also realising the importance of their health and dignity. Equal efforts need to be directed towards imparting knowledge, skills and attitudes to vulnerable groups such as children with disabilities or those out of schools.

An amendment needs to be considered to the POCSO Act and the Indian Penal Code to decriminalise consensual acts involving adolescents above 16 years, while also ensuring that those above 16 years and below 18 years are protected against non-consensual acts. A provision recognising consent by those above 16 years may be considered, while criminalising acts against them if it is against their will, without their consent, or where their consent has been obtained through fear of death or hurt, intoxication, or if the accused is in a position of authority. Till such time as the law is amended, law enforcement agencies, child welfare committees and juvenile justice boards may consider exercising the discretion available to them under existing provisions in the best interest of children, so as to avoid/minimise the harm caused by arrest, apprehension, and institutionalisation of adolescents in consensual cases.

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