

THE LIMITS OF POCSO

Relevant for: Developmental Issues | Topic: Rights & Welfare of Children - Schemes & their Performance, Mechanisms, Laws Institutions and Bodies

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A single bench of the Madras High Court recently allowed a petition seeking to quash a case of kidnap, aggravated penetrative sexual assault and aggravated sexual assault of a minor. Aggravated penetrative sexual assault under the Protection of Children from Sexual Offences (POCSO) Act, 2012 is the equivalent provision for aggravated rape. A person can be charged with this offence in certain aggravating circumstances, such as if the rape occurs within a relationship of trust or authority, or if it leads to pregnancy, among others. Under POCSO, the consent of a person under the age of 18 is irrelevant, regardless of the nature and circumstance of the sexual interaction, or the particulars of the person with whom it takes place. This means that any sex with a minor is rape.

The judgment echoes the arguments that child rights activists have been making for years: by ignoring the natural sexual tendencies of adolescents, POCSO can and does become a tool for the persecution of young people in consenting sexual relations. The court reasoned that adolescence and young adulthood form a continuum because of the physical, biological, neurological, and social changes that occur during this time. The implication is that people within this age group may be clubbed together notwithstanding the legal line drawn at 18. This informed the court's view of the relationship of the minor 'victim' with the accused respondent as being a loving, rather than an abusive, one.

The judgment concluded that the case could be quashed because it was purely individual in nature and doing so would not affect any overriding public interest. However, in doing this, it ignored the established precedent against quashing cases of rape, a heinous and serious offence, held by the Supreme Court to be a public concern, and not a private matter. Perhaps the court was persuaded in taking this course because of its observation that POCSO could not have been intended to bring such cases within its scope. In making this observation, the court relied on the Statement of Objects and Reasons of POCSO, which states that the law was enacted pursuant to Article 15 of the Constitution, which allows the state to make special provisions for women and children, and the UN Convention on the Rights of the Child, to protect children from sexual assault, sexual harassment, and pornography.

However, neither the founding documents nor the listed categories of offences give a sense of what the limits of POCSO were meant to be. The Parliamentary Committee (Rajya Sabha) which considered the POCSO Bill, 2011 had, in fact, criticised the clause providing for the possibility of consent in cases of sexual intercourse with minors between the ages of 16 and 18. It believed that a uniform age of 18 would ensure that trials of child rape would focus on the conduct of the accused and the circumstances of the offence, instead of putting victims on trial as is often the case when the consent of the victim is in question. This would indicate that adolescent sexuality was not meant to be an exception to POCSO's bright-line approach.

The five State studies on the functioning of Special Courts under the POCSO Act, conducted by the Centre for Child and the Law, National Law School of India University, Bengaluru, have demonstrated that these de facto consensual cases are complicated. While adolescents can and do choose to have sex, it is a fact that they are still children, and their nascent sexual autonomy is susceptible to abuse. This contradiction created by the very nature of adolescence has led to inconsistent and unprincipled adjudication. The absolute age line of POCSO has not prevented

the insensitive assessment of minors' consent. At the same time, it has forced courts to choose between applying the law and doing justice, especially in cases where the minor victim has willingly eloped with or married the accused or is carrying his child, for imprisoning him would only do her harm.

Therefore, the judgment was intuitively just, even though it was not in line with precedent. It highlighted the urgent need for a reconsideration of the absolutist approach of POCSO when it comes to the sexual interactions of adolescents with other young people. Courts need to be able to strike a balance between the limited but developing capacity of adolescents to consent to sexual interaction and their vulnerability to being groomed, abused, and exploited. For this to be possible, the legislature must provide clarity on the core wrongs that POCSO is meant to address, so that valid conclusions may be drawn about what is the intent of the law, and what is clearly outside its purpose.

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