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REFERENCE TO THE POSCO ACT,
2012**

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NEGLECTED CHILDHOOD & DEPRIVED DREAMS: A SOCIO LEGAL STUDY ON SEXUAL CRIMES AGAINST CHILDREN WITH SPECIAL REFERENCE TO THE POSCO ACT, 2012

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ABSTRACT: Sexual Crimes have detrimental effect on the controlling activities of the society. Across justice system it is imperative to grant right to everyone. Every State is under legal obligation to implement the laws and protect right for everyone, but implementation is abysmal. As a result, sexual victims undergo hardship. The consent age for sex is also a controversial and debatable problem in question in our Country since last many decades, wherein dominion heritage, intellectual values, civilization, cultural beliefs, legislative amendments & judicial reforms come into collision. Recently, many judicial amendments have badly influenced the existence, living and decency of teenagers & youngsters, who are often stuck between sexual agency and social control. The United Nation has also taken protective measures to combat this problem and have encouraged all member States to enforce International Conventions to solve this problem at world level. It is also contended that the new Laws and regulations, while attempting to defend children from sexual abuse, but also have created new issues for youngsters who are engaged in mutually agreed sexuality Thus, the statutes has enhanced the power of families and communities over adolescents' sex \relations, and it has limited their approach to spermatic and sexual fitness care. There is urgency to balance the interests of safeguarding youth's decency, morality, health and autonomy, and to identify the diversification, multiplicity and complications of youngster's sex relations. Denying and limiting children to their rights will not only affect them, but also hinders the progress of a Nation.

KEY WORDS: Controversial, abysmal, detrimental adolescent, diversification.

" Touching flowers may create shrinking;

Touching fire may result burning;

Touching feet may cause blessing,

Touching childhood may stop developing,

As happy & healthy childhood lead to development of a Nation,

Ultimately, it may adversely effect success of the Nation"

1. INTRODUCTION

Youngsters are extravagant mortal asset and priceless wealth for a Nation, they are subject to vulnerability due to their abuse and misuse in various forms in our societies. One of the most serious threats to children's health and strength is carnal abuse or sex crime which can have long lasting physical, mental, psychological and social effects and consequences. To reflect this problem, the Government of India has enacted the Protection of Children from Sexual Offences (POCSO) Act in 2012, which deals with a comprehensive legal framework to safeguard youths from forcible sexual relations, sexual exploitation date rape, molestation. Indecent assault unwanted sexual advances & pornography, which contemplates India's responsibility to maintain, support, sustain and defend the rights of children by protecting their sexual well-being.

The Act also ensures that the child's best interests are safeguarded at every stage of the judicial process, by providing child-friendly procedures, special courts, trained personnel and victim support services. But the concept of consent among minors and how it is viewed by the law, particularly in relation to the Protection of Children from Sexual Offences (POCSO) Act, is a complex and controversial matter. The POCSO Act criminalises all sexual activity involving minor children less than 18 years of age, regardless of their onset or relationship status. This has led to an increase in families filing cases against teenage couples who engage in consensual sex,

especially if they belong to different castes or religions. The interpretation of consent in such cases is subjective and there is lack of clarity.

2. DEFINITION OF CHILD

The term 'child' can have different meanings in different contexts: The Convention on the Rights of the Child, 1989, which India ratified in 1992, a child is any person under the age of 18¹. As per Indian Penal Code A child is defined under Section 2(12) of the Act as a person who has not completed eighteen years of age. The Section 2 of the Prohibition of Child Marriage Restraint Act, 2006 definitions the term Child in the following words, "A child is a person who has not completed 21 years in case of male and 18 years in case of female".

According to the Protection of Children from Sexual Offences (POCSO) Act, 2012, a child is defined as any person below the age of 18 years². The Juvenile Justice (Care and Protection of Children) Act, 2015 defines a child as any person below the age of 18 for matters related to crime and justice³.

According to the Child Labour (Prohibition and Regulation) Act, 1986 – a child is defined as a person who has not completed 14 years of age. The act also prohibits employing children in 65 processes and 18 occupations that it views as hazardous, including beedi-making, tanning and brick kilns etc.

The Motor Transport Workers Act 1961, and the Beedi and Cigar Workers (Conditions of Employment) Act 1966, both Act define a child as a person who has not completed 14 years of age.

An international treaty, the convention of the rights of child, also defines the rights of children and the obligations of governments to respect and protect the rights and interest of the children it also covers various aspect such as protection, participation, survival and development, due to lack of statute providing a clear cut definition, the unorganised nature of work and cases not being reported, it's easier for the employers to exploit childhood. Thus, it become essential to decide the age of consent and clearcut definition of child by passing stringent statute.

India also follows the international agreement on child Law Times Journal on children's rights, which covers their needs for growth, involvement and safety and the role of UNICEF India in supporting the government and other partners to ensure that children in India have access to these rights and opportunities. As they have the same rights as other citizens, such as education, equality, freedom and protection from harm.

1. International Conventions & Instruments For the protection of Abuses Against Childhood:

- a. Conventions on Economic, Social & Cultural Rights: It was adopted by United Nation General Assembly on 16th December, 1966. By this Convention State parties laid down special provisions for the safety and security of childhood from social and Economic exploitation as it harms childhood physically as well as mentally, which hinders their overall development. Hence, child labour is prohibited and punished by Law.
- b. Conventions on Civil and Political Rights, 1966: It was adopted by United Nation General Assembly on 16th December, 1966. It provides protection to childhood, which is essential to protect his status as a minor on the part of family, society and State without any discrimination on the basis of caste, sex, colour, language, religion, nationality, property or birth.
- c. Declaration on Rights of Child, 1959: This Declaration was adopted by the United Nation General Assembly on 20th November, 1959. It provided Special Protection to the childhood by introducing special provisions for the purpose of overall development of the child by safeguarding him from all kinds of neglect, cruelty & exploitation of Child labour.
- d. Convention on the Right of Child, 1989: It was adopted by United Nation General Assembly in December, 1989 and came into force on 2nd September, 1990. It was a comprehensive treaty B/W the Party States for protecting Rights of Childhood from all kinds of abuses. This Convention imposed duty on the Government to provide safety and assistance to the childhood deprived by the family.
- e. The Optional Protocol on the Sale of Children, Child prostitution and Child pornography: It was adopted by the United Nation General Assembly on 25th May, 2000 with the purpose to prohibit child pornography, child prostitution and child trafficking.
- f. The Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse:- It is also called as 'The Lanzarote Convention and came into force in 2000. The said

¹Law Times Journal

² Summary on the Protection of Children from Sexual Offences(POSCO Act, 2012), lawyersclubindia.com

³Child Law pdf, crpc.in

convention aimed to prevent Sexual Offences including sexual exploitation of children. This convention aimed to promote International and National cooperation among member States on sexual offences by implementing preventive measures for the safety and security of childhood against all kinds of sexual offences against childhood

2. Constitutional Provisions Concerning Protection Of Children:--

Article 15 of the Constitution, —inter alia, confers upon the State powers to make special provision for children. Further Article 39, —inter alia, provides that the State shall in particular direct its policy towards securing that the tender age of children is not abused and their childhood and youth are protected against exploitation, and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

The United Nations Convention on the Rights of Children, ratified by India on 11th December 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent:

- (a) the inducement or coercion of a child to engage in any unlawful sexual activity
- (b) the exploitative use of children in prostitution or other unlawful sexual practices, and
- (c) the exploitative use of children in pornographic performances and materials.

The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the —Study on Child Abuse: India 2007 conducted by the Ministry of Women and Child Development.

3. The Protection of Children From Sexual Offences Act, 2012: Moreover, sexual offences against children are not adequately addressed by the existing Laws. A large number of such offences are neither specifically provided for nor they are adequately penalized. The interests of the child both as a victim as well as witness need to be protected.

It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence and hence a comprehensive law was enacted called "**The Protection of Children from Sexual Offences Act, 2012**"⁴. This Act has been enacted to deal with child sexual abuse cases. It received assent of the President on 19th June, 2012⁵ and came into force on 14th November, 2012. POSCO Act, 2012 provides for the protection and safety of children from the offences: -

- (A) Sexual Assault;
- (B) Sexual Harassment, and
- (C) Pornography

Sexual Offences covered under POSCO Act, 2012: - POSCO Act recognizes seven kinds of sexual offences and 3 types of non- sexual offences. These are: -

- a. Penetrative Sexual Assault
- b. Aggravated Penetrative Sexual Assault
- c. Sexual Assault
- d. Aggravated sexual Assault
- e. Sexual harassment
- f. Using child for pornographic purposes
- g. Storage of pornographic materials involving a child

Non- Sexual Offences covered under POSCO Act are: -

- a. Failure to Report or record of a case
- b. False complaint or false information
- c. Publishing or revealing identity of a child

Penetrative Sexual Assault: - Penetrative Sexual Assault is defined as

1. Penetration of the penis into any orifice of the child's body.
2. Insertion of an object into the vagina, urethra, or anus of the child.
3. Manipulating the body of the child so as to cause penetration into the vagina, anus or urethra of the child.

⁴ Popularly called as 'the POCSO Act'

⁵ Came into force on 14.11.2012 vide S.O. 2705 (E) dated 9th November, 2012 published in the Gazette of India Extra, Pt.II, See 3(ii) No 2250, dated 9th November, 2012.

4. **Applying the mouth to the vagina, penis, anus or urethra of the child.**

Whoever causes to the commission of any of the offence as stated above then he must be punished with imprisonment for a term which shall not be less than 10 years but it may extend to imprisonment for life and fine also. Further, whoever commits Penetrative Sexual Assault on a child below 16 years then he shall be punished with imprisonment for a term which shall not be less than 20 years but it may extend to imprisonment for life and fine also.

Aggravated Penetrative Sexual Assault:- Penetrative Sexual Assault by following persons becomes aggravated Penetrative Sexual Assault:-

- a. Police officer,
- b. Member of Armed Forces,
- c. Public Servant
- d. Staff of Remand Home, Jail, hospital or school.

Aggravated Penetrative Sexual Assault also includes: -

1. Gang Penetrative Sexual Assault on a child.
2. Penetrative Sexual Assault using deadly weapons, fire, heating substance or corrosive substance.
3. Penetrative Sexual Assault which makes child physically incapable or causes child to become mentally ill, causing grievous hurt or bodily injury to the sexual organs of the child.
4. Making girl child pregnant.
5. Inflicting child with HIV or any other life-threatening disease.
6. Penetrative Sexual Assault more than once.
7. Penetrative Sexual Assault on a child by taking advantage of child's mental or physical disability.
8. Penetrative Sexual Assault on a child below 12 years of age.
9. Penetrative Sexual Assault on a child by a relative, owner, manager or staff of any institution providing services to the child, by a person who is in position of trust and authority over the child.
10. Committing Penetrative Sexual Assault knowing the child is pregnant.
11. Committing Penetrative Sexual Assault on a child and attempt to murder the child.
12. By a person previously convicted for a sexual offence.
13. Penetrative Sexual Assault in the course of communal or sectarian violence or during any natural calamity or similar condition.
14. Penetrative Sexual Assault and making the child strip or naked in public.

Whoever causes to the commission of any of the offence as stated above then he must be punished with imprisonment for a term which shall not be less than 20 years but it may extend to imprisonment for life and also fine.

Sexual Assault: - Sexual assault is:-

1. Touching the vagina, penis, anus or breast of the child with sexual intent; or
2. If any person makes the child touch the vagina, penis, anus or breast of the child himself/herself or any other person, or
3. Doing any other act with sexual intent involving physical conduct without penetration.

Whoever causes to the commission of any of the offence as stated above then he must be punished with imprisonment for a term which shall not be less than 3 years but it may extend to 5 years and also fine.

Aggravated Sexual Assault: - Sexual Assault by following persons becomes aggravated Sexual Assault:-

- a. Police officer,
- b. Member of Armed Forces,
- c. Public Servant
- d. Staff of Remand Home, Jail, hospital or school.

Aggravated Sexual Assault also includes: -

1. Gang Sexual Assault on a child.
2. Sexual Assault using deadly weapons, fire, heating substance or corrosive substance.
3. Sexual Assault which makes child physically incapable or causes child to become mentally ill, causing grievous hurt or bodily injury to the sexual organs of the child.
4. Inflicting child with HIV or any other life-threatening disease.

5. Sexual Assault more than once.
6. Sexual Assault on a child by taking advantage of child's mental or physical disability.
7. Sexual Assault on a child below 12 years of age.
8. Sexual Assault on a child by a relative, owner, manager or staff of any institution providing services to the child, by a person who is in position of trust and authority over the child.
9. Committing Sexual Assault knowing the child is pregnant.
10. Committing Sexual Assault on a child and attempt to murder the child.
11. By a person previously convicted for a sexual offence.
12. Sexual Assault in the course of communal or sectarian violence or during any natural calamity or similar condition.
13. Sexual Assault and making the child strip or naked in public.
14. Whoever persuades, induces, entices or coerces a child to get administered or direct any one to administer, help in getting administered any drug or hormone or chemical substance, to a child with intent that such child attains early sexual maturity.

Whoever causes to the commission of any of the offence as stated above then he must be punished with imprisonment for a term which shall not be less than 5 years but it may extend to 7 years and also fine.

Sexual Harassment:- Sexual Harassment under the POSCO Act is said to be done when such person with sexual intent:-

- a. Utters any word or makes any sound or makes any gestures or exhibits any object or part of the body with the intention that such sound or word shall be heard by the child or such gestures or object shall be seen by the child; or
- b. Makes any child exhibit his body or any part of the body so as it is seen by such person or any other person; or
- c. Shows any object to a child in any form or media for pornographic purposes; or
- d. Repeatedly or continuously follows or watches or contacts a child either directly or through electronic, digital or any other means; or
- e. Threatens to use, in any form of media, a real or fabricated depiction through any electronic, film, or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or
- f. Entices a child for pornographic purposes or gives gratification therefore.

Whoever causes to the commission of any of the offence as stated above then he must be punished with imprisonment for a term which may extend to 3 years and also fine.

Report of an Offence Under POSCO Act, 2012:- It is mandatory to report an offence under this Act where Any person, Who has:-

- Apprehension that an offence under this Act is likely to be committed must provide such information to the Special Juvenile Police Unit or the local Police.
- Knowledge that an offence under this Act has been committed must provide such information to the Special Juvenile Police Unit or the local Police.
- Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities if find any material or object, which is sexually exploitative of the child shall provide such information to the Special Juvenile Police Unit or the local Police

In case of failure to report in above cases, he/she under **Section 21 of this Act**, shall be punished with imprisonment which may extend to six months or with fine or both. It is mandatory for the police also to record the information received under this Act. Failure to record information is also punishable with imprisonment and fine both.

Disclosure of Identity of a Child Victim Under POSCO Act, 2012:- Also, disclosure of identity of the child including his name, family particulars, photograph, school or his neighbourhood or any other particulars that leads to disclosure of his identity, in contravention of **Section 23(1) and (2) of the Act**, is punishable with imprisonment for a period not less than six months, but which may extend to one year or with fine or with both.

Disclosure can be made with the permission of the Special Court. Special Court may allow such disclosure if it is in the interest of the child.

Measures taken by Special Courts While Conducting Trial:-

1. If required, permit frequent breaks during the trial
2. Create child friendly atmosphere by allowing family members, a friend or relative, a guardian in whom child is having belief or confidence, to be present in the court.
3. Ensuring that the child is not repeatedly to testify in court.
4. Not allowing aggressive questioning or character assassination of the child.
5. Ensuring that dignity, self-respect and autonomy of the child is maintained at all times during the trial.
6. Ensuring that the identity of the child is not disclosed at any time during investigation or trial., but such disclosure can be made with the permission of the Special Court.if it is in the interest of the child.
7. Ensuring the completion of the trial, as far as possible, within one year from the date of taking cognizance of the offence.

From the above discussion it is clear that **POSCO Act, 2012** contains child friendly provisions for the purpose of reporting, recording of evidence, Investigation and speedy trial of offences via Special Courts. Hence, **POSCO Act** protects interests of the child at every stage of judicial proceeding. For the purpose of this Act Child includes any person below the age of 18 years.

POCSO Act, sets forth several actions, should be applied with gravity, urgency, calmness and peace and no obstacle should impede its success. The ambition and intent of the State should not only be safety of the children from sexual abuse but also their empowerment and freedom by ensuring their constitutional rights.

Hon'ble Mr. Justice P. Sathasivam,⁶ **CJI**, while speaking on —safeguard of Children from **Sexual Abuse Act, 2012** made several propositions for its execution and application and further said, —It is in the best interest of the future of this great nation that the most cherished rights of our young ones, are protected from the evils of child abuse.

The year 2012 saw the State's robust and dynamic legislative approach to solve the issue of children being sexually abused by enacting the **POCSO Act**. But this Act covered only one section which is the root of the nation i.e., the children, but not the tree which has already grown from these roots, i.e., the women who have attained majority and know about the impulse of sexuality. A woman's life is like a flower and chastity is its fragrance, but when her life is twisted by the devils, fragrance being lost.⁷ It is worth nothing that the Murderer destroys only the physical body of the victim. But those who commit Rape on weak and helpless women degrade their very soul.⁸ They are to be protected because their protection is the protection of motherhood.

4. **The Criminal Law (Amendment) Act 2013**: - In the **Adi Granth**, the sacred book of the Sikhs, it is stated that it is the mother who gives birth to kings. Thus, the State realizing this glaring fact and prompted by the dreadful Nirbhaya incident of Sinful nature brought out **the Criminal Law (Amendment) Act 2013**. It was shameless incident where there was rape and fatal assault on 16.12.2012 on a 23-year-old female physiotherapist intern. While travelling with her male friend in a private bus, she was beaten and gang-raped. There were six other persons including the driver. After the shameless and sinful gang-rape she along with her male friend were thrown out from the moving bus. 13 days later, while under treatment she lost her breathe in hospital in Singapore. The incident generated widespread national and international protests throughout the country and abroad. The Government on 22.12.2012 formed a Judicial Committee headed by Mr. **Justice J.S. Verma, former CJI**, who submitted his report and recommendations within 29 days whereas the time fixed for submission of report was 30 days. 80,000 suggestions were received. On 3.2.2013 ordinance was passed and on receipt of Report submitted by the Judicial Committee, the Central Government acted swiftly and enact the law called '**The Criminal Law (Amendment) Act, 2013**', made effective w.e.f. 3.2.2013 and **The Criminal Law (Amendment) Ordinance, 2013 was repealed**.

The **amended Act 2013** made amendments to the existing Criminal Laws i.e. **Indian Penal Code, 1860; the Code of Criminal Procedure 1973, the Indian Evidence Act, 1872, and the Protection of Children from Sexual Offences Act 2012**. The amendments to the **IPC, 1860** regarding Rape have been as under:

Rape- A man is said to commit rape if he-

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

⁶ See All India Reporter, Journal Section P.I.

⁷ Babuli Bora v. State (Law Court Report) – The Assam Tribune June 24, 1985

⁸ J .B Kirpalani , The Rape on Women| North East Times, Friday, 5th Sept. 1980

- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under circumstances falling under any of the following seven descriptions:
 - First- Against her will.
 - Secondly- Without her consent.
 - Thirdly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
 - Fourthly- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
 - Fifthly- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
 - Sixthly- With or without her consent, when she is under eighteen years of age.
 - Seventhly- When she is unable to communicate consent. **Explanation 1-** For the purpose of this section, vaginal shall also include labia majora.

Explanation 2- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. **Exception 1.** A medical procedure or intervention shall not constitute rape.

Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.⁹

Punishment for rape- (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,

a) being a police officer, commits rape

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

c) being a member of the armed forces deployed in area by the Central or a State Government commits rape in such area; or

d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman or

g) commits rape during communal or sectarian violence; or

h) commits rape on a woman knowing her to be pregnant; or

i) commits rape on a woman when she is under sixteen years of age; or

j) commits rape, on a woman incapable of giving consent; or

k) being in a position of control or dominance over a woman, commits rape on such woman; or

l) commits rape on a woman suffering from mental or physical disability; or

m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or n) commits rape repeatedly on the same woman, shall be punished with rigorous

⁹ 84 Section 375 41

imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person 's natural life, and shall also be liable to fine.

Explanation—For the purposes of this sub-section,

a) armed forces means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

b) Hospital means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

c) police officer shall have the same meaning as assigned to the expression —police under the Police Act, 1861 (5 of 1861);

d) women 's or children 's institution means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.¹⁰

Punishment for causing death or resulting in persistent vegetative state of victim.— Whoever, commits an offence punishable under sub-section (1) or sub- section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person 's natural life, or with death.¹¹

Sexual intercourse by husband upon his wife during separation -Whoever, has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description, for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.¹²

The Amended Act, 2013 is the outcome of a commendable job done by the Judicial Committee, alarming protests and candle-light march-pasts by the public showing their anger on this outrageous crime committed not only against womanhood but against humanity and the dynamic enthusiasm shown by the legislature. Still, it is felt that this law is below expectations. Though law made is swift, stern and stringent but it has not plugged all the loopholes which the ingenuity of the accused is capable of finding the escape route.

N.A. Palkiwalla, a great Lawyer of repute had once said, even if the angels are asked to draft the legislation, still some deficiency or gap will be left. Though the legislature covered a very wide area, still the demand of public which is quite genuine, is not met. Raped woman is neither dead nor alive. She has to live a life with a indignity, stigma, insinuation and humiliation which is indestructible, permanent, deathless and indelible which cannot be abolished, wiped out or destroyed. She is a injured or disabled body and exhausted, tired and weak soul.

Subhod Verma¹³ gave some statistics about circling assault or barbarousness attack against women which are unexpected and the man is compelled to consider and think about as to which direction we are going. He says, all registered crimes against women went up by 70% between 2001 and 2012, rape increasing by 55%, assault with intent —to outrage modesty rising by 32%, dowry deaths by 20%, and cruelty by husband and relatives by 117%. This is evident and noticeable part of problem because a huge number of crimes against woman go unreported.

After this amendment, while deciding the case of State of Karnataka by **Nonavinakere Police vs. Shivanna @ Tarkari Shivanna**,¹⁴ the **Hon'ble Apex Court** of India issued certain interim directions in the form of Writ of Mandamus to the Director General of Police of all the States, upon which, DGP of Andhra Pradesh Hyderabad issued a Circular to the all the police stations to follow the said direction which are as follows:

- (i) Upon receipt of information relating to the commission of offence of rape, the Investigating Officer shall make immediate steps to take the victim to any Metropolitan/preferably Judicial Magistrate for

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¹¹ Section 37

¹² Section 376B

¹³ Times of India dated 11, September 2014

¹⁴ 2014(2) ALT (CrL.) 500 (S.C) on 25-4-2014.

the purpose of recording her statement under Section 164 Cr.P.C. A copy of the statement under Section 164 Cr.P.C should be handed over to the Investigating Officer immediately with a specific direction that the contents of such statement under Section 164 Cr.P.C should not be disclosed to any person till charge sheet/report under **Section 173 Cr.P.C** is filed.

- (ii) The Investigating officer shall as far as possibly take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.
- (iii) The investigating officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.
- (iv) If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.
- (v) Medical Examination of the victim: **Section 164 A Cr.P.C inserted by Act 25 of 2005 in Cr.P.C** imposes an obligation on the part of Investigating Officer to get the victim of the rape immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim under **Section 164 Cr.P.C**.

5. Inadequacy Of Criminal Law To Deal With Child Sexual Abuse Cases:-

Sakshi v. Union of India¹⁵ In the present case the narrow and out-dated definition of “rape” provided under Indian Penal Code, 1860 was challenged due to its failure to address the problem of child sexual abuse in India. It was a landmark case in the history of case laws that exposed the gaps in the IPC’s definition of “rape” and its inability to defend the victimization of sexuality of child victim of sexual abuse.

Fact of the Case: - Sakshi, a Delhi-based NGO, filed a PIL asking the court, seeking a broader interpretation of existing Sections 375 / 376 of the IPC and other related sections, in light of the prevailing sections it recognized the need to expand the scope of “rape” to include not only penile-vaginal penetration, but also other forms of sexual assault on any part of the body. The NGO argued that this definition did not reflect the current state of affairs in the society, where children are subjected to various forms of sexual violence, such as oral sex, anal sex, digital penetration, insertion of objects, etc. They also highlighted the psychological and physical harm caused by such acts on the child victims, and the need for legal reform to ensure justice for them. The court, after hearing the arguments of both sides, agreed with the NGO’s contention and held that the term “rape” should be construed to include all forms of sexual assault on any part of the body, irrespective of gender and age. The court also issued guidelines for the investigation and trial of such cases, to protect the dignity and privacy of the child victims.

The case of Freddy Peats¹⁶ was one of the shocking examples of child sexual abuse in India. The highlighted facts from this case are:

- Freddy Peats was a German paedophile who ran a gurukul in Goa and sexually abused boys in his childcare institution.
- He was convicted for life under Section 377 of IPC and other offences, but his case revealed the legal gaps in dealing with child sexual abuse.
- The existing law only recognized penile-vaginal penetration as rape, and did not have any provision for non-penetrative sexual assault or male victims.
- If the victim was a girl, she could file a complaint under Sections 354 and 509 of IPC for non-penetrative sexual assault, but there was no such provision for a boy.

This situation called for a new law that would address the specific needs and rights of child victims of sexual abuse, regardless of their gender. This led to the enactment of the Protection of Children from Sexual Offences (POCSO) Act in 2012, which covered all forms of sexual offences against children and protected their rights.

The law was like a sieve, full of holes that let the perpetrators of child sexual abuse escape punishment. The Act (POCSO) was needed to plug those gaps and bring justice to the victims, who were often silenced and traumatized by their ordeal. The existing law failed to capture the range and severity of sexual crimes against children, which

¹⁵ [Protection of Children Against Sexual Offences \(POCSO\) – Criminal Law Research & Review \(crlreview.in\)](https://www.crlreview.in/protection-of-children-against-sexual-offences-pocso/)

¹⁶ [HC order to CBI in paedophile case | undefined News - Times of India \(indiatimes.com\)](https://www.indiatimes.com/news/india/hc-order-to-cbi-in-paedophile-case)

could have lasting physical and psychological effects. Only the most extreme forms of abuse, involving penetration, were covered by **Sections 375 and 376 (2) of the IPC** for girls **and Section 377** for boys, which also carried a stigma of unnatural offences. For other forms of abuse, such as touching, groping, kissing, or exposing etc. Girls could seek recourse under **Sections 354 and 509 of the IPC**, which dealt with outraging modesty and insulting decency, but boys had no such option. The law was blind to their suffering and did not recognize their dignity and rights.

The report acknowledged the reality that “young boys are being increasingly subjected to forced sexual assaults”, and that the perpetrators used various methods to violate their victims. It also recommended harsher penalties for those who abused their position of trust and faith such as “the father, grandfather or brother” or “any other person being in a position or authority figure towards the other person”, who often preyed on “the members of the family or on unsuspecting and trusting young persons.” The report also suggested special procedures to be laid down to protect the rights and dignity of child victims, such as recording their statements by the police, conducting their medical examination, and taking their testimony in court.

6. **The Protection of Children from Sexual Offences (Amendment) Bill, 2019:-**

In short, the POCSO (amendment) Bill 2019 introduced a shift in the evidentiary burden in some specific scenarios, such as those involving victims who are unable to consent or resist due to mental or physical impairment. It has explained child pornography which is nowhere defined before. The child pornography means any visual representation of sexually explicit conduct involving a minor, including photograph, video, digital or computer-generated image indistinguishable from an actual child¹⁷.

The law has also imposed a legal obligation on any person who is aware of the commission of sexual offences to report or record them, and has stipulated penal consequences for the omission or negligence of such duty. To make it more stringent and effective law it has augmented the minimum penalty for penetrative sexual assault from seven to ten years, and for aggravated penetrative sexual assault from ten to twenty years, or life incarceration, or capital punishment and has instituted various new offences such as aggravated sexual assault by a person in authority, sexual assault resulting in fatality or debilitation, utilization of child for pornographic purposes, and storage or transmission of child pornography.

Expected Impacts of the Bill:- The bill aims to deter the trend of child sexual abuse by acting as a deterrent due to strong penal provisions incorporated in the act and protecting the interest of vulnerable children in times of distress and ensure their safety and dignity and also seeks to establish clarity regarding the aspects of child abuse and punishment thereof. It tries to address some of the emerging challenges in the prevention and prosecution of child sexual offences, such as child pornography, online grooming, cyber bullying, and sextortion and also tries to align the POCSO Act with the latest technological developments and international standards, such as the United Nations Convention on the Rights of the Child, and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

The Bill tries to ensure that the best interests of the child are paramount in every stage of the judicial process, such as reporting, investigation, trial, and rehabilitation. With this bill the intent of the legislature is to deter potential offenders from committing such heinous crimes against children by imposing harsher penalties, including death penalty in rarest of rare cases and also to create a sense of responsibility and accountability among all stakeholders, such as parents, teachers, doctors, media, police, judiciary, and civil society, by making them mandatory reporters of any sexual offence against a child.

7. **Various Challenges Faced by Hon’ble Courts to Deal With Grey Zone With Help of Judicial Verdicts:-**

In the case of **State v Akhilesh Harichandra**¹⁸, two minors who are below the age of majority abscond together or engage in sexual intercourse with each other by their own volition. These cases are distinct from sexual offences where one person coerces or deceives another person to have sex. These cases are about adolescent exploring their sexuality. The courts have to adjudicate these cases judiciously, keeping in mind the best interest of the child and the law and also to maintain a balance between social and legal norm. Sometimes, the courts quash the police complaints or mitigate the sentences of the accused if the juveniles enter into matrimonial alliance or consent to resolve the matter amicably.

¹⁷ <https://indianlegalsolution.com/pocso-amendment-act-2019-synopsis/>

¹⁸ <https://www.youthkiawaaz.com/2023/06/rethinking-the-pocso-act-adolescence-consent-and-grey-areas/>

The **Calcutta High Court's** decision to acquit the accused in the case you mentioned was based on its interpretation of **Section 19(6) of the POCSO Act**, which states that "nothing in this section shall apply to any information given by a child if such information is given in good faith for the purpose of protecting himself or herself or another person from any sexual offence under this Act". The court held that this provision implies that a child can give information about his or her own sexual activity if it was done voluntarily and for self-protection. The court also observed that the **POCSO Act** was not intended to punish natural biological attraction among minors or minors with young adults, but to safeguard innocent children from sexual offences. The court's verdict was based on the facts and circumstances of the case, where the girl had eloped with the boy and later retracted her allegation of rape. This case illustrates the complexity and controversy surrounding the issue of consensual sex between minors in India. This would require more judicial discretion and sensitivity, as well as more awareness and education among parents, teachers, and children themselves.

Some legal experts have argued that the validity of a minor's consent in POCSO cases should be analysed on a case-by-case basis, taking into account factors such as the age difference, maturity level, relationship status and intention of the parties involved. They have also suggested that there should be a distinction between consensual and non-consensual sexual acts among minors and that the law should not criminalise adolescent sexuality or infringe on their right to privacy and autonomy¹⁹.

Criminalising consensual sexual activity between 16–18-year-olds is harmful to both males and females, as it violates their rights, autonomy, and dignity, and reinforces gender stereotypes and inequalities no doubt the offence is gender-neutral, but the application is gender-biased, and that this perpetuates gender discrimination. Also, this existing law limit women's agency to give consent until she is of legally marriageable age.

Several authorities and expert bodies have studied the issue and applied their minds on the subject of the "age of consent" and how old a person should be to agree to sex. The **Justice Verma Committee Report**, on construing **Article 34** of the **United Nations Convention on the Rights of the Child**, recommended that the age of consent under the **POCSO Act** should be reduced to sixteen years, stating that the **POCSO Act** "was aimed inter alia to safeguard children from sexual assault and abuse and not to criminalise consensual sex between two individuals even if they are below eighteen years of age."

Children and adolescents have the right to be safe from sexual abuse and exploitation. However, they also have the right to express their sexuality and make their own choices as they grow and mature.

- The law should balance these two rights and protect the best interests of the young people.
- The law should recognize that there is a minimum age below which sexual contact is always harmful and criminal, because the child or adolescent cannot give meaningful consent.
- The law should also acknowledge that adolescents have different levels of capacity and maturity to decide about engaging in sexual conduct for themselves, depending on their age, development, and circumstances.
- The law should not punish adolescents for consensual sexual activity with peers who are close in age, but rather remove inappropriate penalties that can harm their future prospects. The rights groups said that the legal framework should support adolescents to deal with their sexuality in an informed and responsible way, by providing them with accurate and comprehensive education and health services.
- The law should not treat adolescents as criminals for their sexual choices, but rather as a population that needs protection and guidance.

The Hindu Marriage Act, 1955 was the first law in India that set the minimum age for marriage and consent. It said that a boy must be at least 21 years old and a girl must be at least 18 years old to get married legally. This was to prevent child marriages, which were very common in India.

The Special Marriage Act, 1954 also had the same rule for people who wanted to marry outside their religion or caste. Later, **The Child Marriage Restraint Act (1929)** and **the Prohibition of Child Marriage Act, 2006** made it illegal to marry anyone who was not an adult.

8. **Whether Age of Consent & Age of Marriage are Identical Concepts:** - The age of marriage and the age of consent are related but not the same. The age of consent means the minimum age at which a person can agree to have sex with someone else. In India, the age of consent is also 18 years. This means that anyone who has sex with someone below 18 years is committing a crime, even if they are married or in love. This is to protect young people from sexual abuse and exploitation.

¹⁹[Amikus Qriae \(theamikusqriae.com\)](http://theamikusqriae.com)

Over the time, the age of consent has been increased by the various statutes in India and it was maintained at 16 from 1940 to 2012, when POCSO Act raised the age of consent to 18 years, probably one of the highest ages globally (as many countries have set their age of consent in the range from 14 to 16 years) overriding various personal laws where people can marry earlier causes the large amount of legal complexities and cluttering the legal system entirely.

However, this law is too strict and does not respect the choices of young couples who want to have sex before marriage, the law should not punish them if they both agree to have sex and are not harming anyone else. Some High Courts in India have agreed with this view and have used the POCSO Act, which is a law to protect children from sexual offences, to help such couples.

Recently, in **Ashik Ramjan Ansari v. State of Maharashtra, the Hon'ble Bombay high court²⁰ has court said**, “The **POCSO Act** cannot stop the natural feelings towards the opposite sex, particularly in the age which is accounts for biological and psychological changes”. This cannot turn the tide of time and hormones as this law was made to protect the children from sexual violence but somewhere it has been used to punish the consensual sexual act where the adolescent are naturally explore their sexuality which is also limiting their options. In such a situation, it is said, punishing a minor boy who entered into a relationship with a minor girl who ere in the grip of their hormones and biological changes would be against the best interest of the child. The Bombay high court also made very clear difference between the age of marriage and the age of consent explained the meaning of sexual autonomy which encompasses both, the right to engage in wanted sexual activity and right to be protected from unwanted sexual aggression. Only when both aspects of adolescent's rights are recognized, human sexual dignity can be considered to be fully respected.

Various international and regional human rights treaties have given the recognition to both the aspects of sexual autonomy. Some of them are **European convention on human rights, the convention on the elimination on discrimination against the women²¹, and the Yogyakarta principles²².**

The Hon'ble Apex Court, which is the highest court in India, has also supported this view. It has said that it will not interfere with the decisions of the High Courts that have cancelled the cases against young couples who had sex with consent. Overriding the conservative view of premarital sex in the country, High Courts in various instances have interpreted the POCSO Act to safeguard the interest of consenting couples. The Hon'ble Apex Court has taken the lead and made its position clear. For example, recently, two judges of the Supreme Court refused to change the order of the Rajasthan High Court that had stopped the case against a man who had married a girl who was below 18 years.

Also, **CJI (Chief Justice of India), D Y Chandrachud**, urged the legislative branch to address the “escalating apprehension” over penalisation under the POCSO Act of juveniles who participate in voluntary sexual intercourse. The CJI Chandrachud said, “As you are no doubt aware, the **POCSO Act** symbolises all sexual activity for those under the age of 18, regardless of whether consent is factually present between the two minors in a particular case. In my time as a judge, I have observed that this category of cases poses difficult questions for judges across the spectrum²³.”

Every country has a law that says how old you have to be to say yes to sex. This law is called the “age of consent” and it protects young people from being hurt or taken advantage of by grown-ups. The law understands that young people grow and change at different rates, and that some may be ready for sex before others. This is called the “evolving capacities” of a child.

The **POCSO Act** in India that aims to protect children from sexual abuse and exploitation defines any sexual activity with a person below 18 years as rape, regardless of consent or relationship. This law has been criticised for being too rigid and unrealistic, as it does not recognize that some adolescents, who are physically mature but below 18 years, may voluntarily and mutually explore their sexuality with their partners of similar age.

²⁰ [ASHIK RAMJAN ANSARI Vs THE STATE OF MAHARASHTRA AND ANR | Bombay High Court | Judgment | Law | Case Mine](#)

²¹ [The Human Right to Sexual Autonomy \(cambridge.org\)](#)

²² [Autonomy and Consent | Criminalizing SexA Unified Liberal Theory | Oxford Academic \(oup.com\)](#)

²³ <https://indianexpress.com/article/india/concern-over-minors-booked-under-pocso-law-panel-not-for-lowering-consent-age-8825048/>

The law also knows that sometimes young people who are close in age may want to have sex with each other, and that this is not the same as an adult forcing a child to have sex. Hence, the law tries to find a balance between keeping young people safe and respecting their choices.

Under **POCSO Act**, the current age of consent, which is 18 years, is arbitrary and does not take into account the biological and psychological changes that occur during adolescence. It also infringes the principle of proportionality, which means that the punishment should fit the crime and the offender. Hence the legislature need to revise the age of consent and make it more evidence-based and rational, with inputs from relevant professionals and also appeals to the courts to show more compassion and have sympathy and understanding while dealing with cases involving teenagers who are caught in the criminal justice system for violating the **POCSO Act**.

Consent among youngsters and related statutes in India is a complicated issue that requires balance careful application and analysis. While the POCSO Act is a liberal and advance step in securing youngsters from sexual crimes and abuses, it also criminalises consensual sex between minors or minors with young adults who may not be aware of the legal consequences. There is a urgent need for improving statutes in order to accept and realize the fact, actuality and diverseness of weak matches sexuality and to ensure that justice is not denied to those who are genuinely victims or perpetrators of sexual offences.

9. **Suggestions:** - The prevailing Statutes are having negative consequences on the lives of young ones; one of the such issue faced by them is the contradiction between their rights and the laws on sexual crimes. Frequently, these laws are in the need of Government officials, like doctors, teachers, or counsellors, to report any cases of sexual activity involving minors to the police, even if the minors consented and did not experience any harm. All this discourages young ones from seeking health care or other services that they need, for fear of being exposed, stigmatized, or punished. It can also infringe their privacy, self-respect, decency and autonomy, and weaken their belief and trust in the professionals who are supposed to help them.

Legal instruments alone is not capable of solving this social issues affecting youngsters, teenagers and adolescent girls, such as child marriage, sexual violence, and unwanted pregnancies. They also require other protective measures which are capable of improving their health, well-being, rights, and choices. These measures are:

- Comprehensive sexuality education that teaches consent, contraception, and diversity,
- Independence and empowerment of girls to pursue their education, career, and personal goals,
- autonomy of young people to make informed decisions about their sexuality,
- affordable, confidential, and respectful sexual and reproductive health services,
- gender-sensitive and efficient law enforcement that protects young people and adolescent girls from abuse and discrimination,
- Social support for young people and adolescent girls when they have family conflicts or difficulties

These protective measures can certainly help the society to have a more positive and accepting view of adolescent sexuality, and provide more opportunities for young ones and adolescents to have healthy sexual relations, instead of forcing them into unwanted or early marriages.

10. **Conclusion:-** The **POCSO Act**, , has failed to protect the rights and interests of adolescents in India, and has instead criminalised their consensual sexual activity and denied them access to essential health care. There is the urgent need to decide the age of consent that should be lowered to 16 years, and mandatory reporting should be replaced by confidential counselling and social services. More distinct and contextualised understanding of adolescent sexuality, which recognises the agency, diversity, and vulnerability of young people, and that respects their testimony and consent must be carefully examined and observed.

The POCSO Act, is on the basis of benevolent, patrilineal mistaken and wrong thought and faith that raising the age of consent for sex will curb sexual assaults for adolescents under 18 years. As this belief is imperfect and defective, as it ignores the truth, reality and variety of sexuality among adults, and considers that all sexual acts under the age of consent is sexual assault.

"Kids are the precious gems, invaluable treasure & future for a Nation,

Those who abuse them tear at the fabric of State & weakens the Nation;

*Invisible marks don't faint, unseen harm doesn't cure;
Child abuse plant seeds of grapple, that grows with time;
Abuse may end in tender age, but it's shadow lasts for life;
Abusing childhood is a stain leaving long lasting impact;
Child abuse is a theft of innocence, potential and simplicity that effects future';
Curing from abuse is a voyage from sufferer to survivor to fighter &
echoes of abused childhood can vibrate for decades; leaving imprints on the soul
As stains of mind are fainted, abuse of childhood weaks a tangled web in mind;
Thus, healing from abuse is a journey, not a destination
It's impact extends far beyond youth, shaping future of Nation;
Adverse Childhood experiences are detrimental to the health and well-being of the Nation;
Let's swear to safeguard them and stop abusing childhood;
Childhood is not expendable, but invaluable;
As protecting child from abuse is not an option, it is moral obligation; Protecting childhood means protecting
future of the Nation,
So, happy and healthy childhood means healthy & progressive Nation"*