

EDITORIAL

Law Commission of India report on the age of consent: Denying justice and autonomy to adolescents

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Introduction

The 22nd Law Commission of India (henceforth, the Commission) [1], in its recent 283rd report, offered its recommendation on the question of age of consent (AoC) to sexual activity. Two High Courts which have seen several cases of non-exploitative consensual sex involving adolescent girls, filed by the police under “sexual assault”, had referred this issue to the Commission. The substantive matter before the Commission was whether to lower the AoC to prevent unnecessary prosecutions and resolve the contradictions in sexual violence laws. In this regard, we find the report rather disappointing. It is a lost opportunity to decriminalise adolescent sexuality, to restore the autonomy of adolescent girls over their bodies, uphold their sexual and reproductive rights, and respect their evolving capacity to exercise their sexuality. The Commission has also let go of a chance to undo a highly protectionist clause in the Protection of Children from Sexual Offences Act (POCSO), 2012 [2] which renders all sexual activity of individuals under the age of 18 years as an offence. It failed to reiterate the progressive recommendations made by the Justice Verma Committee Report in 2013 [3] in this regard, which had come after extensive deliberations and were widely welcomed by stakeholders.

In this editorial, we point out the implications of the Commission’s recommendation [1] for adolescents and other relevant constituencies. These include: denying justice to adolescents; compromising their right to dignified sexual and reproductive care; and denying medical practitioners relief on challenges they face in providing sexual and reproductive health services. We draw upon both the insights from the existing empirical research in this area, submissions made to the Commission by civil society organisations and reviews of judgments from various states across India to discuss these adverse implications. It is an opportune time to discuss this matter given that Parliament is also set to discuss the Bharatiya Nyaya Samhita, Bharatiya Nagrik Suraksha Sanhita and Bharatiya Sakshya Sanhita^a which are expected to replace the Indian Penal Code (IPC) 1860 [4], the Criminal Procedure Code, 1973 [5], and the Indian Evidence Act, 1872, respectively [6]. This endeavour has already faced criticism for retaining colonial controls over citizens by expanding both judicial detentions and the ambit of crime through very broad and vaguely defined crimes [7].

The 283rd report in context

The age of consent in this context is the age at which a girl is considered capable of providing consent to engage in sexual activity. The AoC had been 16 years in India. It had remained unchanged since 1940, until the gender neutral POCSO Act [2] raised this age limit to 18 years in 2012. This has resulted in making all sexual activity, particularly penetrative sex, a crime for those of all genders below the age of 18 years. It flows from the definition of a child which is set at 18 years in the United Nations Convention on the Rights of the Child, 1990 (UN CRC, 1990) [8] for good reasons. However, the POCSO Act [2] appears to have mechanically adopted it as the threshold under which there can be no meaningful consent. The Criminal Law Amendment Act 2013 (CLA 2013) [9] made reciprocal changes to Section 375 of the IPC [4] which defined rape as applicable only to women and girls, and also raised the AoC in the rape law to 18 years. Penetrative sexual activity under 18 years is therefore termed as “statutory rape”, which amounts to rape irrespective of consent^b.

It is commendable that the Commission situates the age of consent in India in the broader global and national historical context of legal frameworks and international conventions. For example, it makes reference to the UN-CRC [8], the diverse legislations relating to child rights in India, alongside the changes over the years in age of consent as well as marriage, the earlier Law Commission report in this regard, laws of other countries on AoC, the Justice Verma Committee Report [3], and parliamentary

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debates at the time of passing of the POCSO Act 2012 [2]. The report also mindfully notes the divergence in the age limits mentioned in the various laws relating to children in India across sectors, such as labour, juvenile justice, and marriage laws related to sexual violence and others.

Furthermore, the report elicits overwhelming evidence from various sources including judgments, consultations, and empirical studies to describe the problems arising out of the raised age of consent; and also presents the divergent opinions of different stakeholders with whom consultations were held.

It is therefore rather perplexing and disappointing that the recommendations do not align with the concerns brought in by multiple stakeholders. While the Commission has reiterated the concerns of “protection” of all children from sexual violence, it has refused to recommend an unequivocal decriminalising of non-exploitative adolescent sexuality. We briefly highlight the specific adverse implications of the recommendation.

Rising cases of statutory rape wrecking justice delivery

The backdrop to the references made by the High Courts of Karnataka and Madhya Pradesh to the Commission is that of the repeated cases under the POCSO Act where the girl is generally between 16 and 18 years old and testifies to consensual sex. What would not have been a crime in 2011, prior to the enactment of the POCSO Act [2], is now a punishable offence irrespective of the girl's consent.

The CLA 2013 [9] further worsened matters by taking away judicial discretion in sentencing in cases of rape; and another amendment [10] made ten years the minimum mandatory punishment. This has left courts with little manoeuvrability for justice delivery.

Since 2012, substantial evidence emerging from review of sexual assault cases demonstrates the concerning magnitude of the problem. For example, Pitre and Lingam [11] noted that 18 to 30% of all rape cases decided between 2013 and 2016 have been of consensual nature, the numbers typically ballooning after 2012. Similarly, Ramakrishnan and Raha [12] observed 24% of such cases in district level POCSO courts in Delhi, Assam, Maharashtra and West Bengal among those disposed of between 2016 and 2020. Yet another study [13] in Lucknow corroborates such a trend, with 54% of such cases being consensual. It is noteworthy that the 283rd report cited some of these works and yet chose to ignore their salience.

Process is punishment

The POCSO Act, Section 30 [2] places the burden of proof of innocence on the accused. Police procedure under it mandates for immediate arrest of the boy or man after registration of a complaint of penetrative sexual assault [14]. Once the age of the girl is ascertained to be under 18 years and sexual intercourse is established, the judge is obligated to order the minimum punishment. This has created a serious dilemma for judges, especially when it is clear during trials that the relationship is not exploitative in nature, that the girl consented to it, and is interested in living with the boy. Often, she has already married the boy, and they have children. Young people in these situations can face several hardships such as: substantial time in detention for the boy, delayed bail or sentencing upto 10 years, loss of job or livelihood, the girl being forced to stay in a women's shelter or facing destitution or other problems including becoming a single mother.

In one case [15] referred by the Commission, the trial court had duly tried the case, concluded that it was a case of consensual sex and acquitted the boy. However, the state appealed to the High Court. In these cases, the process itself becomes the punishment. The recommendation by the Commission regarding judicial discretion for sentencing doesn't address the ordeals of long and tortuous pathways to justice in India.

Increased incarceration of the most underprivileged and minoritised: Reflection of a constrained judicial ecosystem

We also note additional hardships which stem from entrenched discrimination, based on class, caste and religion-based vulnerabilities. These are largely attributable to the oppressive social structures in general, and the constrained and inaccessible judicial ecosystem, in particular. For example, it is the poorest and most marginalised litigants who are unable to hire a lawyer to represent them or find the money for surety (bail) and face much higher chances of detention, incarceration, destitution and lack of social support. Studies on undertrials [16], those convicted and under sentence of death have demonstrated that most of them come from the poorest, the scheduled castes, scheduled tribes, nomadic tribes, and the Muslim community, since they face a heightened bias in society. Undertrials often spend more time in jail before trial than they would have even if convicted.

However, these general constraints are worsened in case of POCSO prosecutions, because very often POCSO cases are initiated against those marginalised on caste, religion or other marginality by aggrieved parents opposed to their daughters' interfaith or inter-caste or intra-clan (*sa-gotra*) marriages [17]. This deprives the young couple of support from parents, either of one side or

both. The Justice Verma Committee Report, 2013, had taken into account these complex social realities while recommending rolling back the age of consent to 16 years.

Gender-biased standards

The outlook can be quite grim when the boy is also under 18 years of age. The amendment in 2015 to the Juvenile Justice (Care and Protection of Children) Act, 2000 [18] motivated by the conviction of a minor in the Nirbhaya gang rape opened up the provision to try some juveniles between the ages of 16 and 18 years as adults. Since then, there have been such trials leading to two ironies. First, it has compromised the autonomy of young girls under 18 years, under the guise of “protection”, while boys in the same age bracket are treated as adults. Second, the POCSO Act [2] is gender neutral; as a result of which both girls and boys under the age of 18 years ought to be considered victims. However, in practice, girls are routinely considered victims and boys the aggressors. This has been duly noted by the Commission as a challenge. And yet its recommendations offer little to address these real-life challenges for adolescent boys. We would expect the Commission to go a step further and recommend repealing the amendment to the Juvenile Justice Act which treats some juveniles as adults in criminal trials. It goes against the very purpose of having a separate law for adolescents accused of a crime, in keeping with special circumstances related to their biological, emotional, mental and social development. As mentioned before, it is also likely to affect adolescents from the most marginalised sections.

Compromised sexual and reproductive health rights and justice

The POCSO Act [2] and the CLA 2013 [9] require mandatory reporting to law enforcement of any sexual assault (or activity) or the “*apprehension*” or “*knowledge*” of such an activity by any citizen, and especially by doctors and hospitals. Married women under the age of 18 years too were brought under POCSO through the *Independent Thought* judgment [19]. Failure to report can result in punishment.

On the ground, this implies that doctors are required to report any underage medical termination of pregnancy (MTP) or request for one, any request for contraception, ante natal care, or treatment for sexually transmitted diseases for an underage girl. There is evidence [20,21] that First Information Reports (FIRs) have been initiated for each of these reasons. Underage girls in these circumstances have avoided healthcare to protect their partners, in the process facing severe health consequences including death. Mandatory reporting has a similar dampening effect on research on sexual and reproductive health as well as safe sexuality education because of reduced safe spaces for confidential discussions.

The Commission report takes only partial cognisance of the adverse impact on sexual and reproductive health rights (SRHR) of adolescent girls. The discussion about provision of MTP is dedicated to maintaining the confidentiality of adolescent girls seeking the service in compliance with the MTP Act. However, the report fails to recognise and discuss violations of other rights of adolescent girls, such as breach of their right to privacy, inability to seek essential SRH services resulting in breach of their right to life, liberty and protection from harm.

Also, a fall out of such mandatory reporting requirements is the increasing reluctance of doctors to provide MTP services to underage girls, fearing involvement in criminal cases. Besides, mandatory reporting implies a breach of medical ethics, posing ethical dilemmas for doctors. These include the inability to maintain confidentiality of patients, their actions ending up in adolescents rejecting lifesaving healthcare, their examination report resulting in instituting rape charges and their testimony being used to convict the partners of consenting adolescent girls.

Challenges faced by the judiciary

We briefly mention below two key challenges for the judiciary on account of the raised age of consent at 18 years.

Tacit approval vs consent

The CLA, 2013 introduced the idea of consent as “...an unequivocal voluntary agreement...”. This affirmative standard of consent is a hard-earned gain for the women’s movement. However, the benefit of this definition is not given to adolescents under the age of 18 years because their consent is rendered moot or non-existent [9]. The first challenge stems from the Commission report introducing a term, namely, “tacit approval” for sexual activity to describe consenting relationships of underage couples, and we quote “...the Commission considers it necessary...to remedy the situation ...in cases wherein there is tacit approval in fact, though not consent in law on part of the child ...” [1].

“Tacit approval” is a much weaker term as compared to “consent” and is not defined in the law books. If accepted, this will add to the tasks of judges to decide what would constitute “tacit approval” and may even result in diverse practices followed by the courts. Such a term obstructs young people from being actively enabled to understand consent, both to ask for it and provide it, and from learning to exercise these rights. Besides, such concepts may also be misused to dilute the standards of consent in other coercive cases, involving adolescents as well as adult women.

Backlog of cases in courts and poor conviction rates

There is sufficient evidence of the pendency of POCSO cases [22,23]. The judiciary has flagged the clogging of courts by a high proportion of unnecessary prosecutions under the POCSO Act as a barrier to faster and better investigation and quicker judgments, to ensure convictions and deterrence. It has also led to differing state level practices to counter what are often considered “false” cases, which can sometimes undermine the aim of justice itself [24].

A lost opportunity

Given the significance of the matter at hand, the Commission's views were awaited by key stakeholders including medical practitioners, the police, judges, lawyers, social workers and counsellors, who routinely provide services to survivors across the country. There had been no serious demand for change in the age of consent from these stakeholders prior to 2012. In fact, the opposite is true: several judgments [25] and women and child rights groups as well as lawyers [21] have advocated for a restoration of the age of consent to 16 years. However, the Commission missed the opportunity to provide bold and robust recommendations to decriminalise adolescent sexuality.

The way forward

The UN-CRC, 1990 [8] provides important directives regarding any action, policy or law by any institution with regard to children. These include the “best interest” of the child to be the primary consideration, emphasis on the evolving capacities of adolescents and provision of an enabling, safe and supportive environment to progressively exercise their rights as elaborated in the CRC General Comment No 14 [26]. Highly protectionist laws work against the best interests of adolescents. It is important to recognise the rights of adolescents over their bodies and to consent to sexual explorations. In a context when a large number of girls get married before the age of 18 years, as well as where there is ample evidence of teenage sexual activity, it is important to have enabling legislation for young people to get information and easy access to services rather than a law to police their sexuality.

We need and expect the Commission's recommendations to be truly transformative and, in this case, uphold the UN-CRC provisions in spirit rather than in letter, facilitating justice for the young people of India. To us, these are simply non-negotiable. Therefore, the Commission's recommendations need to be urgently revisited to provide more substantive solutions, such as a roll back of the age of consent to 16 years as provided by the Justice Verma Committee Report. We also appeal for the Commission to institute the robust standard of “consent” as the most important parameter in deciding sexual assault or rape. It must also read down mandatory reporting by citizens, doctors, and hospitals to law enforcement, and instead consider instituting mandatory reporting to designated social services which would then be required to ensure access to sexual and reproductive health rights and services.

Note: *As this issue goes to print, Parliament has already passed these three laws, missing the opportunity for a thorough debate on such important matters.*

^bIPC section 375 uses the word “rape” and is meant only for women and girls and POCSO is gender neutral and uses the term “sexual assault”. Therefore, the concept of “statutory rape” is used mostly in the case of girls. However, as we discuss, the POCSO Act deems all genders under 18 years incapable of giving consent to sex making them all victims of sexual assault.

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EDITORIAL

Time to treat the climate and nature crisis as one indivisible global health emergency

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Over 200 health journals call on the United Nations, political leaders, and health professionals to recognise that climate change and biodiversity loss are one indivisible crisis and must be tackled together to preserve health and avoid catastrophe. This overall environmental crisis is now so severe as to be a global health emergency.

The world is currently responding to the climate crisis and the nature crisis as if they were separate challenges. This is a dangerous mistake. The 28th Conference of the Parties (COP) on climate change is about to be held in Dubai while the 16th COP on biodiversity is due to be held in Turkey in 2024. The research communities that provide the evidence for the two COPs are

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