

PLIGHT OF MEN AND THE CONCEPT OF CONSENT
(Under Protection of Children from Sexual Offences Act 2012)

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Abstract

The paper shifts the focus onto the men and their stance under the POCSO Act of 2012. The paper primarily revolves around the concept of consent of individuals between the age groups of 16 and 18. The legislature has kept the age for consent and the age for adulthood, at 2 different stand points. They often speak about maturity of the individual at the time of giving valid consent, but what about the age maturity at the time of committing an offence, why are the 2 treated separately. The paper, focuses on highlighting the problems out there for the male members of society, how they are said, that they cannot be raped or their modesty cannot be outraged. The focus of the paper is to bring out the misogyny behind the concept of consent. It also shows how laws meant to protect a class of society based on gender, is also being misused by them. It is a classic coverage of too much power given in the hands of the female. It shows how, mutual consent is converted into withdrawal as soon as being caught by an authority like a parent.

Introduction

India is a country, where majority of the things work in accordance with the way the society responds to the same. If the society responds to rape like its normal, then the judiciary reacts in a similar manner. If the society hypes up a rape, the outcome of the matter is similar in nature. Hence, we can see that the judicial response in several cases is similar to the response of the media. This was experienced in the 2012 Nirbhaya Rape case, which attracted high amounts of media attention and the rapists were given capital punishment, but what about other cases, where a crime heinous enough was done, but received no media attention ?

Historically, the concept of rape means a sexual act without consent upon the victim². Nowhere has it ever been stated that the rape needs to be done by a man alone. Neither is the concept in its origination focusing on the same, neither did it seem the legislatures intention at the time.

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² Jonathan Herring, Rape and The Definition of Consent, National Law School of India Review, 2014

Rape is considered a heinous crime in itself since its considered the highest form of outraging a woman's modesty. The laws until very recently have only worked in a gender biased manner, whereby, the man is deemed the culprit and woman the victim. It ranged from domestic violence, to outraging modesty to rape. However, what about circumstances when the opposite happens ?

What laws are there to protect men from being assaulted or abused in their domestic lives. Until today the concept of how a man can be raped is alien to the world. People discuss the biological situation at the time of the sexual act taking place, however time and again there are theorists who have said that, it was beyond the ambit. There are several cases where a man has been made to penetrate forcefully, against his wish. His consent may have been obtained by coercing him, or threatening him. Hence, borrowing the meaning of consent from Common law, coerced consent is not valid consent.

The situation might not be as rampant, but in March of 2020, a BSF Personnel, was denied bail, since he tried to sodomised a cab driver under influence, for being denied on the ground that the cab was already booked by someone else³.

This rise in crimes was alarming. However, the one thing that caught the eye of the legislature, is that there was no age limit or age bracket from which the victims belonged. The victims went from being a 2 year old girl in her diapers to a 60 year old mature woman, to young adolescent boys. The part most astounding was that 94.6% of the predators were people the victim knew or were family members⁴. The ambit was so large, that the legislature had to finally in the year 2012, come up with an act specifically for people below the age of 18, i.e. the legal age of consent. This was called the Protection Of Children from Sexual Offences (POCSO) Act of 2012.

Reasons for Introducing the Act:

- Increase of crimes on child victims at an alarming rate
- Delay in trials

³ Bhavna Uchil, "Mumbai Crime: RPF Cop accused of Sodomy, denied bail", 2020 < <https://www.freepressjournal.in/mumbai/mumbai-crime-rpf-cop-accused-of-sodomy-denied-bail> >

⁴NCRB Database,

<https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%203A.4_2.pdf>

- Crime against a helpless child began to be considered more heinous and hence a special enactment was made, which gave the punishment to be death penalty in certain circumstances
- For the act on the deterrence model of criminal law, to instill a fear in the minds of people preventing them from committing such crimes
- Need for a gender neutral legislation, which mentions that a man and woman both can be punished for sexual based crimes.

The law in its initial stages did garner certain support and words of encouragement, since it was the first ever gender-neutral law in India, on matters of sexual assault. However, within a few days of the enactment, the same was heavily criticized. The criticism largely came from. The sex-positive theorists, who detested the idea that “All sex is rape”. They were of the opinion that the concept of consent should also be seen in such situations. However, the government didn’t seem to budge on the same. The law was such that it connected “Sexuality” of an individual with their “contractual competence”⁵. The law has remained the same since its promulgation until today.

Another major problem with this act, is that they have misread the definition of “rape”. Rape in its essence required force and involuntariness of the victim. Here, the voluntariness, is only termed to be nonconsequential.

The one major thing, the act seemed to miss out is the concept of “*Consent*”

Consent ideally means the approval obtained from ones partner to indulge in a particular kind of activity. As defined by Dougherty “*Consent like promising requires both an appropriate mental attitude and communication of that attitude*”⁶. However, this concept in itself has a variety of complications. Consent can be withdrawn at any time during the performance of the facts. However, once the act is over, the consent is of no relevance. So, consent cannot be withdrawn after the act is done. However, the one loophole to the same is that, doubts upon the consent can be put in “*Coerced consent is no consent*”⁷. Consent in its ideal sense means free will. That is the approval given must be made without a prejudicial mindset towards a particular thing. Moreover, consent is not something that can be withdrawn retrospectively, since

⁵ The Indian Contract Act, 1976, S. 11 prescribes. Age of majority as the age of competence to enter into a contract.

⁶ Tom Dougherty, Sex, Lies and Consent, Ethics, July 2013, The University of Chicago Press

⁷ 84th Law Commission Report

allowing that would mean *calling a sex-worker a virgin, but only retrospectively* in the words of Mr. Ram Jethmalani⁸. Consent is supposed to be unequivocal, affirmative and enthusiastic⁹.

However, prior to 2013, there was some consideration and relief available in this aspect. The Supreme court held, that if a girl is above the age of 16, her consent would be material¹⁰. They did so in a judgment, where a girl (below the age of 16 at the time of the incident) and the accused eloped and got married. They had a love affair at the time, however it was the girls family that had the issue with the acts of their daughter, but they filed a case of kidnapping and rape against the accused under the Indian Penal Code. This got the accused a sentence of 4 ½ years of rigorous imprisonment. Rejecting his mercy petition, the court said that the “*minor is incapable of thinking rationally and can be lured easily*”, they further added, “*the so called consent of the prosecutrix below 16 years of age cannot be treated as a mitigating circumstance*”.

From this case, we understand the spirit and the letter of the POCSO Act¹¹.

In the case the same is seen, there is minute where we should feel bad for the women of our society as well. The life of young women has gone from the control of the family and community to later the law and state. By saying that a young adult girl is ‘*incapable of thinking rationally*’ the court has disregarded her sexual agency and consolidated it with the regime of sexual governance¹². Now consent forms part of the sexual agency of an individual. By making laws like the POCSO, isn’t the legislature trying to establish supremacy over an individual ?

Coming onto the point of gender neutrality of our rape laws in general, the feminist theory behind the same is very vast. However, several theorists who follow the lines of the *Halley's Project*. Feminism, can’t see injury to men, moreover they can’t see injury to men by women. It can’t see other interests, other forms of power and other justice projects¹³. However, this is not completely true in the Indian Context. However, the reason why we look at this, is so that

⁸ Susan Adelman, “The Rebel, A Biography of Ram Jethmalani”, Penguin Books India 2014

⁹ Latika Vashisht, “Age of Consent and the impossibility of child sexuality”

¹⁰ Satish Kumar Jayanti Lal Dabgar V. State of Gujarat, 2015(3) SCALE 344

¹¹ *Supra* (n-8)

¹² Pratiksha Baxi, ‘Habeas Corpus: Juridical Narratives of Sexual Governance’, Working Paper Series, Centre for the Study of Law and Governance Jawaharlal Nehru University, New Delhi, April 2009

¹³ Janet Halley, *Split Decision: How and Why to take a Break from Feminism*, Princeton University Press, 2006

we can eliminate the use of theories of these feminists, since in an effort to protect adolescent girls there are male-disadvantaged statutory laws. Unknown to them, there is a huge social cost that is being paid because of the same.

In India, when we talk about the age of consent concept, for debates, theories and probably even implication of laws, the stratum of cases seen are that of young adults who have fallen in love and eloped to get married¹⁴. However, a conceptual approach is required of the sexual desires of the young people.

The law is something which hard bound and cannot be open to interpretation by one and all, since it would cause a disbalance in the effect it has over society. This issue needs to be kept in mind, when we are looking at deciding a definitive age for establishing the age of consent. The real question before the law is, how can one reconcile the multiplicities of age. Until now, we have been looking at the legal age of contract to be the sexual age of consent, where as we have not considered the social and mental age at all.

There was some ray of hope when the *Justice Verma Committee* recommended age of consent to be 16 years. That still would've been fine, had they not put in a further clause of making the punishment for sex below the Age of 16, more stringent¹⁵.

In order to make further arguments about the reduction in age of consent, the one major thing that needs to be seen is that, "isn't the child as well a desiring object ? can the child not have their own desires ?"

Therefore the question of the child's desire, sexuality and agency need to be considered.

Today, the reason for the laws being placed as they are, is not because the legislature wants to protect the child from the fear of childhood sexuality, or in the best interest of the child. In fact it's made very clear that the age of consent is actually about preserving some social elements like decency, sexual governance, the institution of marriage etc.

¹⁴ Flavia Agnes, Controversy Over Age of Consent, *Economic and Political Weekly* 48(29), 2013

¹⁵ See, Justice J.S. Verma, Justice Leila Seth and Gopal Subramaniam, Report of the Committee on Amendments to Criminal Law, 2013, p. 443, "*Proposed Section 376B(1), in cases of sexual intercourse below 16 years with or without that person's consent, recommended minimum punishment of 10 years which may be increased to life imprisonment.*"

Prior to the POCSO, there were several cases, where the courts did understand the concept of a girls sexual agency. There are a plethora of cases, where the cases are filed by the parents against the girls lovers. The courts have stated that even though the girl has not attained the age of majority, she has attained the age of discretion to understand her own welfare¹⁶.

Often judges say that justice required long term vision¹⁷. This kind of vision is something which was lived upto previously, where in the year 1964¹⁸, the Supreme Court considered the case of a minor girls consent and held the accused not guilty of kidnapping or wrongful confinement. The court said that if a minor girl, willingly goes out of the custody of her lawful guardian, then the accused in that case cannot be held guilty. Therefore, if we see the transition, the laws seem to have gone backwards rather than forward in time. They have gone from being progressive to regressive.

The courts have given a mixed bag of reviews and judgments on these points, which can be seen in order to show how they themselves are not very clear as to what should become the norm. However, the courts seem to be approving of the consent of a girl above the age of 16. The courts state that *“there is no law which prohibits a girl from falling in love. The desire to marry the man she loves is no offence either. If a girl is around 17 years of age and runs away from her parent’s house, it is no offence on the part of the girl or the boy”*¹⁹

On the other hand, the court took account of consent, still held the boy to be responsible. The Supreme Court upheld the order of the Trial Court, affirming that the trial court gave a lesser sentence, since there was consent between the parties. Moreover, the girl (below the age of 16 at the time of the incident) voluntarily left with the accused²⁰.

The one thing which has not been considered by the parties, is that it’s the parents who get the FIR registered against the boy and they take this as a dual punishment for the girl as well as the boy for indulging in consensual sexual activities. Hence, if the courts want to further this, then they might as well promote the mindset which says bisexuality or homosexuality is a disease and hence curable.

¹⁶ Jiten Bouri V. State of West Bengal, (2003) 2 CALLT 457 HC, II (2003) DMC 774

¹⁷ Latika Vashisht, Women and the Law, Annual Survey of Indian Law, LI, 2015, p. 1057

¹⁸ S. Varadarajan V. State of Madras, 1965 AIR 942

¹⁹ Vivek Kumar @ Sanju and Anjali @ Afsanav. V. The State, Crl. M.C. zno. 3073-74 of 2006, Delhi High Court

²⁰ Mahendra Subhaashbhai Vankede v. State of Gujarat, 2017(9) SCALE 79

Hence when we see the pre-2013 era compared with the post-2013 era, i.e. the era of POCSO, the one thing that we can see is that “in the name of protecting young girls, the amendment has tightened the noose of sexual governance by the family, community, the police, the law, the state, stripping minor goals of all sexual agency and turning young boys in consensual sexual relations with minor girls into rapists who deserve no mercy. “

In addition to the same, the judiciary, vide a 2017 judgment²¹, has made the provisions of POCSO to super cede the Indian Penal Code of 1860, on the grounds of it being a specialized law.

Hence, in order to understand all of the same in a nutshell, we can see that consent is being pitted against agency, especially in the context of elopement marriages²².

The choice and desire of a girl, upon going against parental authority and familial/ community norms, is contained by reframing the terms of consent²³. Therefore, consent is more about parental authority rather than the choices of a young adult. It is no more to be determined by the women’s agency, autonomy or self-determination, but instead by larger social and community based goals²⁴. It will be a challenging task, to fathom the sexuality of a child, since in the legal system today, the child is erased and rendered mute²⁵.

In the words of psychoanalytic and feminist Jacqueline Rose, the benefits of rendered a child free of sexual desires has many psycho-social purposes²⁶:

“The language itself must be made innocent, since children can only be made to talk of abuse with great difficulty it is essential to believe them when they do. It is essential to the child’s voice be clear and unequivocal in order to lift the adult burden of disbelief more important if damage to children can be shown to stem from loan of users then the wider culture which is responsibilities, trials and dangers in relation to children can be absolved.”

The fact that children must be heard and that parents should take steps, since the impact of child abuse can last with the person a life time.

²¹ Independent Thought v. UOI, 2017, Writ Petition (Civil) No. 382 of 2013, MANU/SC/1298/2017

²² Flavia Agnes, ‘Consent and Controversy’, The Indian Express, 12 May 2012.

²³ Rukmini S., ‘The Many Shades of Rape Cases in Delhi’, <<http://www.thehindu.com/data/the-many-shades-of-rape-cases-in-delhi/article6261042.ece>>

²⁴ *Supra* (n-20)

²⁵ Pratiksha Baxi, Public Secrets of Law: Rape Trials in India. Oxford University Press, 2014, ch. 3: ‘Child Witness on Trial’.

²⁶ Jacqueline Rose, The Case of Peter Pan or the Impossibility of Children’s Fiction (1984).

Hence, one of the stakeholders for child abuse can also be the parents, who tend to let the child's suffering prolong to save face and disgrace in society. Sometimes they do it to prevent losing the support of the predator, since he is a family member or someone influential assisting the family in a certain manner.

Legally as well as culturally, the emphasis on child sexual abuse is at the cost of disavowing child sexuality as if addressing abuse requires repressing desire. The question of child sexuality is only understood in terms of child abuse where the child appears as a victim without agency or voice²⁷.

Hence, there are debates and discussions to be required on the same which would help ease down the legislation laid down in the POCSO Act. In the case, the same does not happen, at least it would trigger a thought in reducing the age of consent, and also start taking into consideration the concept of "consent" of the child. This study and reading in theory should be gender neutral, since its very normal for a girl or boy of the age of 17 to have the desire to be involved in a sexual act with a person older than them. That in no way means the older person should be punished, whereas the child, who too was there willingly, be made to suffer the guilt for having some sort of sexual agency. Rape and Sexual assault, must still be considered a heinous crime and have the highest prescribed punishment, but not at the cost of "furtherance of common sexual desires".

The POCSO Act is something, which is making it clear to everyone that *"make love to the person you please, but make sure they are above the age of 18"*.

Not only that, the courts have said that love the person who closer to your age, since in the case the age gap between the victim and accused is more, the higher the punishment can be for the accused. *The courts have clearly forgotten that love doesn't come with the pre-condition of age. The plight of men has been very lopsided since time immortal.*

Post the Nirbhaya case, there was an amendment made in the Juvenile Justice Act, which stated that, if a person is of the age of 16 and above, and involved in a heinous crime, then he could be put under trial like any normal accused.

²⁷ *Supra* (n-23)

Hence, the maturity of a 16 year old and 18 year old can be overlapped in the case of commission of an offence, but consent of a 16 year old is immaterial compared to that of an 18 year old. This hypocrisy of the judiciary and legislature is appalling to a large extent.

Recently, with the “*bois locker room*” and “*girls locker room*” chats being exposed in the media, there are several cases seen, where boys at the tender age of 17 are made to commit suicide since a girl has wrongly accused them of rape²⁸. He jumps out of the window, with the pure intention of not wanting to face the accusation and then disproving them²⁹. This is because our Indian society looks down upon the person and his family, as soon as a mere accusation is placed on the individual. The society and media have become the unofficial justice system of our country.

There are several instances which show that the men are not only subject to lopsided laws, but are also living under a fear, since the law which is made to protect women, is being used by them as blackmailing tool. It just shows how problems are being added on, onto men over and above the laws in the nation. A prime example of the same is Section 114 of the Indian Evidence Act 1872, which presumes rape, unless the otherwise is proven by the accused.

There are numerous people out there who are petrified of expressing their sexuality because of the fear of the woman, switching sides later and calling their consensual intercourse into rape. Girls below the age of 18 want to explore their sexuality, and at the same time use ‘rape’ as a weapon in the case they get caught by their parents. Under Criminal Jurisprudence, it is well known that the courts can let go of 99 accused, but not allow 1 innocent to serve a sentence wrongly. However, there is no such theory or practice when it comes to the protect a real victim versus the ones who make themselves to be victims.

Hence, to conclude, there are numerous things wrong with our society today, but the thing that affects the most is the fact that people are ready to jeopardize the life of another individual to prevent them from opening up about their sexual choices and needs to their parents. In the words of investigating officers, “*we don’t know what to consider right and wrong, because girls today are misusing rape laws against boys. They will do everything willingly, but later*

²⁸ < <https://zeenews.india.com/india/gurugram-school-boy-commits-suicide-after-girl-levels-allegations-on-him-on-instagram-2282162.html> >

²⁹ < <https://thefederal.com/states/north/delhi/delhi-teen-commits-suicide-after-being-tagged-in-metoo-post/> >

say it was rape. The problem increases further, is because the father who normally files the complaint, knows the truth, but to save face from society and protect the name of his family, will spoil the life of a boy, whose only mistake was to trust the daughter of that man.”³⁰

Hence, as has been recommended by the 277th Law Commission Report, a compensation mechanism³¹ must be set up in case of cases proven to be false.

Hence, before we end, there are multiple questions that come to the mind:

Who is the real victim of such a law ? To whose feelings of agony and anguish did the court really respond? Whose cry for justice was it? What was the injury that could only be compensated through retributive and vengeful legal response? In imagining the consenting girl as victim, isn't her (sexual) agency completely erased? Or, was it the girl's family on whose behalf the court was seeking revenge? Why did the court foreclose all possibilities of acknowledging the minor girl with desire and agency? Why did it choose to paper over the desire of the girl under the rhetoric of protection encoded in POCSO? Why did the court accept the collapsing of contractual age with sexual age even at the cost of life and liberty of a man whose actions were directed by mutual love and desire? And finally, what is the fear in opening up the question of age and sexuality and confronting it in its complexity?

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³⁰ This statement has been made during the time I was preparing for a trial during my internship. However, the name of the officer and details of the case cannot be revealed due to confidentiality.

³¹ <<https://scroll.in/article/895007/india-could-soon-have-a-law-to-compensate-those-who-have-been-wrongfully-prosecuted>>

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