

AGE OF CONSENT AND THE AUTONOMY OF PERSONAL LAWS: ANALYZING THE CLASH BETWEEN POCSO ACT AND MUSLIM PERSONAL LAW IN INDIA

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Abstract:

The POCSO Act, 2012 is a distinctive legislation aimed at providing robust legal safeguards to girls below 18 years of age against sexual offences, abuse, and harassment. Nonetheless, believers of a specific religion are subject to the religious personal law. For example, Muslims are subject to Muslim personal law for religious matters such as marriage, which is formally given statutory recognition under Muslim Personal Law (Shariat) Application Act, 1937. It is a well-settled principle that special law will not prevail over personal law. Now the problem is that under Muslim law, completing 18 years of age is not necessary for marriage, rather, to reach at the age of puberty is one of the necessary elements for marriage and a girl may attain the puberty at the age of 15 or 16 years or before as it usually happens nowadays.

Although a minor may give consent, the POCSO Act treats such consent as legally ineffective for those under 18. In such situation, if POCSO Act has been given an overriding effect over Muslim personal law, a Muslim girl who marries legally as per Muslim law at the age of 15 or 16 but below 18 years will not be a valid marriage. This is questionable because the said special law is given a situation to prevail over personal law relating to marriage. In this context, the conflicting judgements of various High Courts in recent past have made it more complex. And that's why authors think that there is a need to critically analyze this issue and find out what could be the best solution.

Key words: *POCSO Act, Personal Law, Overriding Effect, Consent and Marriage*

1. Introduction

The POCSO Act enacted in 2012 serves as a special law aimed at providing robust legal safeguards to minor girls below the age of eighteen against sexual offenses. The central goal is to ensure protection for children from sexual offences and exploitation in any form. It was never meant to trap eloping couples or those who were consensually and legally married before turning 18 and penalize them for expressing their right to enjoy their lives and make their own decisions.

But through various recent and past judgements of the different High courts, it apparently seems that many eloping couples who married under their personal law have been booked under various charges and trapped under POCSO Act which is indirectly an attack on the rights of liberty of choice and enjoyment. Particularly the view of different High Courts pertaining to the application of POCSO Act vis-à-vis personal laws apparently looks contrary to each other.

2. Contradictions in the Age of Consent: A Legal Perspective

When it comes to the application of personal law, particularly Muslim personal law, the legislative goal of POCSO Act which is of shielding young girls from sexual assault seems to be less of its specific concern. It appears that these goals are being served by trapping loving couples rather than shielding young girls from sexual harassment and abuse. "Consequently, cases of sexual assault were registered in a selective manner, and it is alarming to note that between 2012 and 2021, a

total of 53,874 complaints were lodged under the Protection of Children from Sexual Offences (POCSO) Act.”¹

Age of consent regulations seem to be a blatant example of the State directly interfering in teenagers' sexual lives. The goal of the State should be to safeguard girls from sexual abuse, which is undoubtedly its responsibility. However, the issue that comes up is how the POCSO Act can apply to a girl under the age of eighteen who has consented to a marriage that was consummated voluntarily and legally under personal law. It's also important to recognize that parents' and law enforcement agencies' roles strongly influence teenagers' larger perceptions of teenage sexual behavior and sexual morals. There should not be intervention into the consensually sexual life of underaged girls especially when they have legally married under personal law.

But in reality, the way FIR has been registered and the matter brought into the court seems to be contrary and it looks like to control the girls from consensual sexual activities and to repress them which consequently causes mental discomfort to the girls and also creates unhealthy environment between girls and parents and their partners as well. In case of *Sabari @ Sabarinathan @ Sabarivasan vs. State*², The court observed that the primary objective of the Act is to safeguard young girls from sexual offences³, not to criminalize consensual relationships between eloping couples. The question now is "Is sexual control present while protection is in place if it is consensually and legally done, or does protection itself introduce sexual control?"⁴ In this case of *xxx v. ministry of health and family welfare department NCT Delhi*,⁵ the honorable Supreme Court of India clearly said that "POCSO Act does not recognize consent in sexual activities for minors, but this does not prevent adolescents from engaging in consensual sexual activity."⁶

This judgement raises two questions as noted below,

1. Why the consent of underaged has not been recognized? If not recognized then what does freedom of choice means?
2. Court said "non-recognition of consent does not prevent adolescents from engaging in consensual sexual activity" then why the eloping couples are trapped under POCSO Act and punished?

Similarly, in the case of *Sabari v. State*⁷ the Madras High court has raised in its ruling in April 2019, two major issues;

- (a) Majority of cases under POCSO are elopement cases.

¹ Maity, S. & Chakraborty, P. R. Implications of the POCSO Act and determinants of child sexual abuse in India: insights at the state level. *Humanities and Social Sciences Communications*. 2023. <https://doi.org/10.1057/s41599-022-01469-x>. Accessed 10/9/23 at 7:30 PM

² *Sabari @ Sabarinathan @ Sabarivasan vs The Inspector of Police* on 9 January, 2019. (n.d.). <https://indiankanoon.org/doc/197077895/> accessed on 11/02/2024 at 6:15 PM.

³ Ondeng'e, L. (2021). A critique of the criminalization of consensual sexual interaction between adolescents in comparative jurisdictions. In Thesis.

⁴ <https://www.tandfonline.com/doi/full/10.1080/26410397.2021.1878656?cv=1> accessed on 07/01/2024 at 6:15 PM.

⁵ X vs. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Another. (n.d.). <http://privacylibrary.cgnlud.org/case/x-vs-principal-secretary-health-and-family-welfare-department-govt-of-nct-of-delhi-and-another>.

⁶ Dmello, A. (2022, October 4). SC abortion verdict: Reading down mandatory reporting under POCSO is a Double-Edged sword. <https://livewire.thewire.in/livewire/sc-abortion-verdict-reading-down-mandatory-reporting-under-pocso-is-a-double-edged-sword/?cv=1>

⁷ Parthiban, V., LiveLaw, Rama, L., & Sarathadevi, V. (n.d.). *Sabari @ Sabarinathan @ Sabarivasan vs. The Inspector of Police*, https://www.livelaw.in/pdf_upload/pdf_upload-360324.pdf accessed on 06/01/2024 at 04: 52 PM.

(b) Only the boy is punished if both eloping couples are under the age of eighteen.

According to the ruling, "the majority of the cases are elopement cases registered under POCSO, based on our records and analysis." The court also stated that "only the boy is punished in case the boy and girl below the age of eighteen love each other, which is detrimental against the principles of natural justice for the boy."

We talk about equality when the matter comes for a girl and we raise our voice. It is an appreciable approach but we don't act in the same way when the matter is for a boy or there are instances of injustice with boy. We should act in neutral way and try to give weightage to the liberty, equality and justice. For instance, if a girl is 16 years and a boy is 18 years, so why only the boy should be punished and not the girl? There should be no punishment if they both have consented. It is suggested that eloping couples should not be punished, if it would be done then it would be a violation of right to life and liberty to enjoy it. It would also be an instance of punishment without committing any wrong. Therefore, the couple's testimony, especially the girl's, must be given primary importance rather than age alone.⁸

3. Marriage in India and Caste Dominance

Every individual's right to life and personal liberty is safeguarded by the Constitution of India,⁹ which implies that a person has the freedom to choose their life partner, regardless of caste, class, or religion. In addition to this, we also wish to have an egalitarian society where all should be treated equally and all should be free to enjoy the life.

Based on findings from the 2011–12 India Human Development Survey (IHDS), interreligious marriages account for merely 2% of all unions in contemporary India, while inter-caste marriages comprise only between 5% and 10%.¹⁰ We are taught that although marriage is a social institution, it is influenced and dominated by community religious norms as well as family values. Marriages between members of different castes and religions are only done and encouraged to establish dominance.

Now the question is, if a society will not allow an individual to enjoy his/her liberty, then how his/her liberty will be ensured? And how an individual will enjoy the provision guaranteed under the Constitution? Similarly, how we will make our society an egalitarian society? And how we will change a rigid, stratified, and hierarchical caste system which does not allow a marriage with the lower caste girl or boy? How to create a society which should be free of caste-based notions and stereotypes?

Law treats all equally or all are equal before law as it is mentioned under the Constitution¹¹. Is it myth or reality? If it is reality, then the question is how to make it experienced as real? One suggestion may be that it is possible only through promotion of love marriages but the prevalent situation where loving couples are trapped under POCSO Act, makes it hard to promote love marriages or to give free and healthy space to young couples.

4. Reconciling the Age of Consent: The Conflict between POCSO and Personal Law

In India, every community is governed by their own religion and for the people of that community, their religion will be applicable in matters of personal laws until and unless Uniform Civil Code

⁸ Section 375, Indian Penal Code.

⁹ Article 21, the constitution of India

¹⁰Pitre, A., & Lingam, L. (2021). Age of consent: challenges and contradictions of sexual violence laws in India. Sexual and Reproductive Health Matters, 29(2). <https://doi.org/10.1080/26410397.2021.1878656>

¹¹ Article 14, Constitution of India, 1950.

(UCC)¹² is implemented. For instance, Muslim personal law will be applicable to Muslim community governing their personal matters such as marriage, inheritance etc., In Muslim law, to complete of 18 years of age is not a necessary condition for marriage, rather, to reach at the age of puberty is one of the necessary elements for marriage. A girl may attain the puberty at the age of 15 years or before as it usually happens. But POCSO Act does not recognize consent if given under the age of 18. The conferral of overriding effect to the POCSO Act over Muslim personal law raises critical questions that if a Muslim girl who is legally married and above the age of 15 or 16 but under 18 may be considered invalid? It is a well-established legal principle that a special law does not override personal law, and since the POCSO Act is categorized as a special legislation, it should not supersede the provisions of personal law.

Recently, it has been observed that various High Courts hold differing views on this issue, as reflected in multiple judgments to be discussed later. The key legal question that arises is whether a husband can be convicted of rape if a Muslim girl, who has attained puberty but is under eighteen, engages in marital intercourse as permitted under Muslim personal law? It is a legal matter, and a positive determination of it will lead to the conclusion that the POCSO Act will supersede Muslim personal law¹³. The following section examines recent judicial interpretation to highlight how various High Courts have adopted differing perspectives on this issue.

5. Inconsistent Judicial Approaches: Varying High Court Views on Age of Consent and Marriage

5.1 Karnataka High Court's Interpretation

In the case of *Aleem Pasha v. State of Karnataka*¹⁴ "The POCSO Act is a special legislation to protect children from sexual offences and therefore, it will have an overriding effect on Muslim personal law," the Karnataka High Court noted. The Court has also stated that "even if the sexual contact occurred during the marriage, a person will be found guilty of penetrative sexual assault under the POCSO Act if the wife is under the age of 18."¹⁵

"The petitioner, who was seeking bail, argued before the High Court that there had been no violation of Sections 9 and 10 of the Child Marriage Restriction Act since the girl in this case had reached puberty and Muslim law treats reaching puberty as a condition for marriage at the age of 15." Contrary to what Muslim law suggests, the High Court held that "marriages under Muslim Personal Law are not excluded from POCSO Act."¹⁶ The court also held that the provisions of the POCSO Act take precedence over personal laws, affirming that the legal age for consensual sexual activity is 18 years.¹⁷

5.2 Delhi High Court's Interpretation

¹² Article 44, Constitution of India, 1950.

¹³ Dmello, A. (2022b, October 4). SC abortion verdict: Reading down mandatory reporting under POCSO is a Double-Edged sword. <https://livewire.thewire.in/livewire/sc-abortion-verdict-reading-down-mandatory-reporting-under-pocso-is-a-double-edged-sword/?cv=1>

¹⁴ Badamikar, R., Sri. Basavanna M.D, the State of Karnataka, Kum. Vanadana Kalagudi, & Sri. K. Nageshwarappa. (2022). criminal petition no.7295/2022. in in the high court of Karnataka at Bengaluru.

https://www.livelaw.in/pdf_upload/aleem-pasha-v-state-and-another-karnataka-high-court-441658.pdf

¹⁵ See supra note 15.

¹⁶ Staff, O. (2022, November 20). Marriages under Muslim Personal Law not excluded from POCSO: Kerala HC. Marriages Under Muslim Personal Law Not Excluded From POCSO: Kerala HC.

<https://www.onmanorama.com/news/kerala/2022/11/20/marriages-under-muslim-personal-law-not-excluded-from-pocso-says-hc.html>

¹⁷ See supra note 17.

In the case of *Fija v. State (NCT of Delhi)*,¹⁸ the Delhi High Court held that the accused, being a Muslim, was not liable under the POCSO Act, as the provisions of Muslim personal law took precedence over the special legislation in this case. The accused was legally married to his wife, who was under the age of 18, and they had sexual relations during their marriage. "Muslim minor girls who have reached puberty can voluntarily marry without their parents' consent; POCSO charges do not stand," the court observed.

5.3 Kerala High Court's Interpretation

In the case of *Khaledur Rahman v. State of Kerala*¹⁹ the girl has reached the age of puberty and was 15 years and 8 months old. She married as per Muslim law. The court has opined that "Marriage between Muslims under personal law is not excluded from the sweep of POCSO Act. If one of the parties to the marriage is a minor, irrespective of the validity or otherwise of the marriage, offences under the POCSO Act will apply."

The Court also acknowledged that "the Muslim Personal Law (Shariat) Application Act, 1937, statutorily recognizes that in all questions relating to marriage, the rule of decision shall be the Muslim Personal Law (Shariat). However, after the coming into force of the Prohibition of Child Marriage Act, 2006, it is questionable whether the said personal law will prevail over the special statute relating to marriages."²⁰

5.4 Punjab and Haryana High Court

In 2022, the Punjab and Haryana High Court held that under Muslim Personal Law, a girl who has reached puberty-presumed at the age of 15 years-is legally competent to marry. The court further ruled that a 16-year-old Muslim girl could validly contract a marriage under this framework.²¹

It is unclear from the inconsistent rulings of Delhi, Karnataka, Kerala and Punjab and Haryana High Courts whether special law will prevail over personal law or vice versa? The National Commission for Protection of Child Rights (NCPCR) has challenged the ruling of Punjab and Haryana High Court in the Supreme Court. It argued that allowing girls under 18 to marry based on personal law raises a key legal issue, as it conflicts with the secular Prohibition of Child Marriage Act, 2006, which prescribes 18 as the minimum marriage age for women. It further contended that such marriages expose minors to offences under the POCSO Act, which bars sexual

¹⁸ Editor. (2022, August 24). Delhi High Court| Muslim minor girl who has attained puberty can willfully marry without consent of her parents; POCSO charges do not stand | SCC Times. SCC Times.

<https://www.seconline.com/blog/post/2022/08/24/delhi-high-court-muslim-law-police-protection-marriage-minor-girl-puberty-without-consent-of-parents/>

¹⁹ 2022 SCC OnLine Ker 5833

²⁰ Editor. (2022b, November 21). Kerala High Court | Marriage between Muslims under personal law is not excluded from the sweep of POCSO Act | SCC Times. SCC Times.

<https://www.scconline.com/blog/post/2022/11/21/kerala-high-court-marriage-between-muslims-under-personal-law-is-not-excluded-from-the-sweep-of-the-pocso-act-legal-research-legal-news-updates/>

²¹ Biswas, S. (2025, August 19). Muslim girl, 16, entitled to valid marriage under personal law, rules SC: 'If two minor children are protected. . . ' Mint. <https://www.livemint.com/news/muslim-girl-16-entitled-to-valid-marriage-under-personal-law-rules-sc-if-two-minor-children-are-protected-11755595874031.html>

consent below 18.²² However, the Supreme Court of India has dismissed the petition filed by NCPCR.²³

No one should be penalized because of their religion, and the victim's marital status or religious beliefs cannot be used to determine whether an act qualifies as a crime or not. Only the essential components of the crime should be used to define the offense. It should come under the purview of personal laws of a particular community that regulates the believers of that particular religion in the matters of their personal laws. The purpose of POCSO Act will be defeated if it is made subject to personal laws, particularly Muslim personal law.

6. Criminalizing Consent? Legal Thresholds for Marriage and Consensual Relationships

Age of consent for marriage and gender neutrality have always coincided with age of consensual sex. As per the Global Fund for Women, the definition of Gender justice is that "*it is the systematic redistribution of power, opportunities and access for people of all gender.*"²⁴ Now the question is what is the definition of gender? So, as per Word Health Organization "*Gender refers to the characteristics of women, men, girls and boys that are socially constructed.*"²⁵ But unfortunately, there is issue of gender neutrality as whenever we talk about the consent, we only talk about the consent of girls and this is the reality that in our society only the consent or denial of consent by girls matters. The consent or denial by boys never taken into consideration²⁶

We have to change such mentality. This is unjustifiable that only the boys are always wrong. Wrong can be with anyone and anyone can be wrong. This is not a gender-based activity. Therefore, to make an equitable society, we have to think beyond gender lines and while thinking so, we should be neutral and this is the only way to make an equitable society.

Another aspect of this issue is that though India has prohibited child marriage and for this purpose the legislature has enacted the law in 2006.²⁷ The government informed the Supreme Court in opposition to a petition that "India has 23 million child brides and criminalizing the "consummation of the marriages" as rape would not be appropriate."²⁸

Recently, on 19th of August 2023, the Supreme Court also felt that there is need to reevaluate the age of consent and to decriminalize consensual sex by the age group of 16-18. Therefore, the Supreme Court seeks the response of the Centre on a plea to decriminalize consensual sex by 16-

²² Bawa, A. K., & Law, L. (2025, August 22). Supreme Court dismisses NCPCR's challenge to HC ruling that 16-Year-Old Muslim girl can marry under. . . Live Law. <https://www.livelaw.in/top-stories/supreme-court-dismisses-ncpcrs-challenge-to-hc-ruling-that-16-year-old-muslim-girl-can-marry-under-personal-law-301292>

²³ Express News Service. (2025, August 19). 'No locus standi to challenge such an order': SC dismisses child rights body's plea against verdict on Muslim girl's marriage. *The Indian Express*.

<https://indianexpress.com/article/india/sc-child-rights-body-plea-verdict-muslim-girls-marriage-10198491/>

²⁴ What is Gender Justice? | The Importance of Gender Justice. (n.d.). Global Fund for Women.

<https://www.globalfundforwomen.org/what-we-do/gender-justice/>

²⁵ World Health Organization: WHO. (2019, June 19). Gender. <https://www.who.int/health-topics/gender>. accessed 08/10/2023 at 11:25 AM

²⁶ Petroni, S., Das, M., & Sawyer, S. (2018). Protection versus rights: age of marriage versus age of sexual consent. *The Lancet Child & Adolescent Health*. <https://www.girlsnotbrides.org/documents/890/Age-of-Marriage-brief.pdf>

²⁷ The prohibition of child marriage Act, 2006

²⁸ Bagriya, A. (2017, September 1). Age of consent law can't apply to child brides, Centre tells SC | Latest News India - Hindustan Times. Hindustan Times.

18 years old.²⁹ Similarly, in case of *Probhat Purkait @ Provat vs State of West Bengal*³⁰ The Calcutta High Court has recently called for the decriminalization of consenting sexual actions between teenagers who are older than sixteen. All these developments show that consensual sex should not be criminalized and its criminalization was never the intention of the legislature behind the enactment of POCSO Act.

7. Conclusion

Any legislation that restricts an individual's freedom begs important issues about its implications. This is the reason it's necessary to take another look at the POCSO Act's goals and original intent when it was passed in 2012 and how it has been enforced ever since by different High Courts. The state of affairs in India raises the question of whether laws always carry out the intended purposes.³¹

The POCSO Act currently lacks a distinction between cases of genuine consent and those involving coercion or other non-consensual circumstances.

1. A meticulous examination of the standards for making this kind of distinction is desperately needed.
2. To reconsider when permission is required and how special law supersedes personal laws.
3. To make it clear in the clause that eloping couples shouldn't be imprisoned.

These questions must be settled down by the legislature through amendment or by the Supreme Court through interpretation. The authors believe that the personal matters of the believers of a religion must be left to be governed by their personal laws of that religion. We also have to consider that legal instrument alone cannot solve the complex social issues or make positive differences in the society. Law is an instrument to control or to bring some changes in the society. This is not an end in itself. Hence, in addition to amending laws, it is essential to ensure access to inclusive and well-rounded sexuality education.

²⁹ Khanna, G., & Law, L. (2023, August 19). Supreme Court seeks Centre's response on plea to decriminalise consensual sex by 16–18-year-olds. Live Law. <https://www.livelaw.in/top-stories/supreme-court-seeks-centres-response-on-plea-to-decriminalise-consensual-sex-by-16-18-year-olds-235623>. accessed 08/10/2023 at 11:25 AM

³⁰ Narsi Benwal. (2023, October 18). POCSO Act: Calcutta High Court calls for decriminalising consensual sexual acts involving adolescents above 16 years. Bar And Bench - Indian Legal News. <https://www.barandbench.com/news/pocso-act-calcutta-high-court-calls-decriminalising-consensual-sexual-acts-adolescents-16-years>

³¹ Sutherland, Kate, From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities (2003). William and Mary Journal of Women and the Law, Vol. 9, pp. 313-349, 2003, Available at SSRN: <https://ssrn.com/abstract=1586883>