

# Consensual Teen Sex Is Real Complicated in India

Parents are abusing a law meant to protect minors from child pornography and sexual offences, to discourage those under 18 from having sex on their own terms.

By Arman Khan

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The first time Ashika and Raj met, both of them 15-year-olds based in Mumbai in India, they were eating gelato of the same flavour – butterscotch mixed with a dab of dark chocolate – from a shop at the end of a street near their school. This would be an inconsequential detail were it not for the fact that gelato is what Ashika has whenever she needs to self-soothe, particularly after a panic attack.

Fearing retribution from her conservative family, Ashika preferred to share only her first name, just as other young people we spoke to for this story. “I’ve had lots of [panic attacks] in my relationship with Raj, all thanks to my parents who cannot digest that their ‘upper-caste’ daughter is supposedly defiling herself by hanging out with someone they proudly claim wouldn’t even have the right to enter their village back home,” she said.

To this day, Raj and Ashika continue to stay in fear, counting each day till they turn 18, which is next year when they can legally marry. While the Protection of Children from Sexual Offences (POCSO) Act, 2012 states that it is an Act “to protect children from offences of sexual assault, sexual harassment and pornography,” the Act has been criticised for appearing to criminalise sexual intercourse between two people under the age of 18 – anyone not legally an adult. This basically means that any sexual act between minors, under 18, can be criminalised because they are legally not qualified to grant consent at all, even if it’s between two consenting people. The data breakdown of the cases under the POCSO Act also shows that such minors continue to be penalised.

Under section 6 of the act, punishment for “penetrative sexual assault that is aggravated in nature” with a minor, both girls and boys, can range from a minimum of 20 years of rigorous imprisonment that may be extended to a life sentence and is also liable to a fine.

Aaliya Waziri, an advocate with the Delhi High Court, explained that it is important to bear in mind that the Act draws from the UN Convention on the Rights of the Child. “We have to come to the consensus that it was never enacted to criminalise consensual romantic relationships,” she said. The POCSO Act was enacted two decades after India acceded to the UN Convention on the Rights of the Child in 1992.

“India is just one of the countries that has 18 as the age of consent, as opposed to many liberal countries where the age of consent ranges from 16 to 18,” said Waziri. “The law does not directly say that teen sex is a crime, but the statute defines this as the age of consent which is 18. The law believes that this is the age at which [an individual has] the wherewithal to make informed decisions.”

Ashika’s parents had used loopholes in this law to threaten the couple. That coupled with casteist slurs, spying on her phone, even locking her up in a room for hours on end without food meant that Ashika did not feel like she had any support – of her family or the law – until she turned of legal age.

In Argentina and South America, sexual relations with teenagers aged 13 to 18 though legal, are fettered by laws meant to avoid exploitation. Spain has a safeguard to check deceit in gaining the consent of minors below 16, although its age of consent is 13. In 2019, the UN Committee on the Rights of the Child (CRC), from whose recommendations India derives its POCSO laws, requested countries to revisit provisions that criminalise consensual sex between teens.

In December 2022, the Chief Justice of India, Dr DY Chandrachud, in a keynote speech urged parliament to consider “growing concern” relating to the age of consent as cases involving consensual romantic relationships between teens pose “difficult questions for judges across the spectrum.”

This remains a ground reality, too. According to a 2022 study conducted by the non-profit Enfold Proactive Health Trust along with UNICEF and UNFPA in three Indian states, 23.4 percent of POCSO claims were “romantic cases,” in which the victim was in a consensual relationship with the accused. The study further added that in these “romantic cases,” 70.8 percent of the informants were the girls’ parents.

## **Conservative beliefs around sex to blame**

According to the 2011 census, India is home to “the largest adolescent population in the world” with 253 million adolescents. This number has doubled more than a decade later. Any number of the government’s own official surveys have indicated that a huge proportion of these teenagers are sexually active well before they reach the official age of consent.

According to a policy brief on the impact of the POCSO Act on adolescent sexuality, “10 percent of women in the age group of 25-49 years had their first sexual intercourse before the age of 15, and 39 percent had their first sexual intercourse before they hit 18.

Ignoring these realities, the Act, which can be exploited to criminalise consensual teen sex, flows from the traditionally conservative approach to all things sex and sex education. The policy initiatives have always existed, but remain a dead letter in the law, with states and agencies on the ground refusing to implement them or narrowing their scope.

In 2005, for example, India tried to implement the robust Adolescence Education Programme developed by the Department of Education and the National AIDS Control Organisation. It recognised comprehensive sexual education as an integral part of education, with modules on contraception, safe sex, and masturbation. Not surprisingly, 12 states in India either stopped or censored the programme altogether, removing “morally objectionable content” and deleting words including “intercourse,” “masturbation,” and “condoms.”

In the case of Mahi, who is now a 21-year-old intern working with a media publication based in Delhi, her unintended pregnancy at the age of 17 could have been avoided had she and her partner, who continue to be together, known about the need to use condoms each time they had sex, even during supposedly “safe days” to minimise the risk of pregnancy.

“It’s shameful because I was in the best private school in Delhi. When my parents found out about my pregnancy, they couldn’t process it for a week and didn’t know how to respond. I was 17 and my partner was a year younger than me. The pregnancy could have been easily terminated with a prescribed pill because not even three weeks had passed,” she said.

India accounts for 11 percent of the world’s teenage pregnancies, thanks in part due to early marriage being the norm in certain cultures and societies. Putting it in perspective, 16 million women between the ages of 15 and 19 become mothers yearly. Mahi’s pregnancy was just one of the millions, a lost number whose story might never reach the powers that be.

Mahi’s parents delayed and delayed the process – questioning her, telling her how she’d brought shame to the family, how she was not even equipped to live her own life, let alone birth a new one. The days rolled on. Their family doctor, the only one they had ever consulted and trusted all their lives, refused to take the case and prescribe any treatment for fear of getting booked under aiding and abetting child abuse. Eventually, the abortion was done in a high-risk environment by a retired midwife in their village who was not trained in performing abortions.

“The desi anaesthesia barely worked and I had to bite on the gauze to bear the pain. It was the worst day of my life,” said Mahi.

## **‘Stop infantilising teens’**

Jehanzeb Baldiwala, a child and adolescent therapist, has been counselling children and teenagers for over two decades now. The way she sees it, the world would be a much better place if only we stopped infantilising and undermining those below 18, and instead started treating them as equal stakeholders in policy decisions that directly concern them.

“When they approach me, they are very hesitant to talk and take a long time to open up. They don’t know if you’re going to report them to the cops, even if they are 17 and their partner is one day above 18, as they can still be booked under POCSO. Their feelings are all bottled up,” she said.

Her approach is to create a safe space for her clients, assuring them that she is an adult they can trust while keeping open the possibility of slowly integrating the parents into the conversation if needed.

But is there a medical rationale behind the age of consent being a certain number? Does 18 really work in the medical sense? Or is 16 better? Baldiwala suggests that we need to “first start by acknowledging that 18 is clearly not working” because “everywhere around us people are having sex before 18.” By criminalising consensual teen sex, we completely shut off any possibility of help. For teens, it is an especially tricky time, as they are continuing to develop their sense of autonomy, so an iron hand in the form of parents trying to control their sexual and personal lives becomes suffocating.

“I’m not saying that children don’t need our guidance, but when we close their opinions off, assuming that they don’t know anything, we can’t collaborate with them in a meaningful way,” said Baldiwala. “When you undermine children this way, it makes them want to rebel and prove that you’re wrong, thus making it look like reckless behaviour – almost telling parents that if [they] think [they] can control [them], wait and watch. Nobody wins in that situation.”

At the core of the issue, lies the need for more inclusive gender and sexuality education that might equip parents and young people 18 and under to navigate these conversations better, as opposed to viewing love and desire in the binaries of imprisonment and acquittal.

Manak Matiyani, who works in the field of health and sexuality education for children and adolescents, told VICE that it is crucial to understand that young people are brimming with questions about sex precisely because it is forbidden. When these questions are unanswered in our textbooks or by parents, impulsive decisions follow.

“I’ve realised working with young people, and as even global evidence of sexuality education will show, that when you destigmatise this information, teens are able to make more responsible and thoughtful decisions about contraception, infections, and safety, [as well as] when they want to have sex,” he said.

However, it’s not fair to place the burden of sex education and awareness squarely on the shoulders of teenagers. Matiyani explains that there is so much “moral panic around sexuality education that the assumption is if you talk about sex, teens will actually have it.” This is also the approach he faced during his time at the YP Foundation, a youth-led organisation that works on issues of sexuality, health, gender justice, and equity, where he collaborated with schools and governments to incorporate a holistic understanding of sex.

This approach, he said, narrows down the scope of well-intentioned policies like the Rashtriya Kishor Swasthya Karyakram (RKSK), also known as the National Adolescent Health Programme that was launched by the government’s Ministry of Health and Family Welfare (MoHFW) in 2014. A widely hailed and progressive initiative, the RKSK had modules on reaching out to the queer community, even envisaging the creation of Adolescent Friendly Health Clinics (AFHCs) across urban and rural public health institutions across India.

“Unfortunately, over the years, the RKSK programme became diluted and limited to just AIDS prevention. In the parliament, there were members who stood up and said that the government wants adolescents to have sex, which was totally not what the programme was about,” he said.

Matyani explains that such attitudes come from a very feudal approach where we don’t want to ask young people what they want and what they need to have a comfortable and affirming experience of growing up. “If you go by the law and stereotypes, you cannot even have sex until you’re 18. Where will the information to navigate [those] experiences come from?”

## **‘Romantic cases do not amount to child abuse’**

According to lawyer Madhu Mehra, who works with the non-profit legal resource group Partners for Law in Development (PLD) which is pursuing social justice and equality of women, studies of the use of POCSO show that about 30 percent of prosecutions involve consenting or romantic relations.

“What this means is that cases are largely filed by the girls’ parents, who exploit the age of consent angle in the law. What they sometimes do is wait for the girl’s partner, who might be a few months older than her, to turn 18, and then lodge a case against him for child rape,” she told VICE. “The courts have time and again stated that romantic cases do not amount to child sexual abuse and are not offences for which POCSO was enacted. Many child rights groups have argued that these clog the criminal justice system delaying justice for cases of real abuse.”

The way Mehra looks at it, the law is being used selectively against consenting adolescent relations, defeating its very objectives and the goal of protecting the rights of the young. “The age of consent needs to be lowered,” she believes, “and this must be part of the discourse on the prevention of child marriage.”

According to advocate Gayatri Gokhale of the Bombay High Court, Indian courts have over the years been wary of these cases and lean towards acquitting the man in question after establishing consent. Unfortunately, before it reaches that stage of acquittal, the trauma and harm are often already done.

“I had a case of a couple where the girl’s family filed a case against [the boy] as soon as he turned 18, harassing him, and threatening him with the law to the point he’d become suicidal,” she said. “For two years, they were struggling in the courts. The couple maintained that they hadn’t even had sexual intercourse. In so many cases like this, the girl is [not the one] registering the case – she is shouting at the top of her lungs that it’s consensual.”

Gokhale suggested that the time and energy of the courts, and law enforcement authorities could be saved if such cases are considered with sensitivity at the time of registering the case with the police station itself. It’s not enough to just lower the age of consent, she added, but also to have proper checks and balances in place because there could be genuine cases of assault on minors.

“The first instinct of the cops cannot be to file an FIR when such a case comes up immediately. They must at least investigate and understand if the couple is happy and it’s consensual. Because we know for a fact that these cases are going to be quashed in court during the testimony when the couple will agree that it was consensual. So, why go through it all, despite knowing that the case will never stand?” said Gokhale.

Gokhale suggested there should be a committee of experts comprising mental health experts, sexuality educators, and members of civil society who can advise the cops on such cases, and who take the consent between the minors involved into consideration. While it might be logistically impossible to have a committee for every police station, a single committee can serve multiple police stations, too.

Gokhale said, “If this level of checks and balances can exist in cases involving commercial and financial fraud, what’s stopping it from being implemented here? People refrain from having sex before marriage not because they believe it’s immoral, but because they are scared of the scrutiny [resulting] from caste-based and religious norms. Love has stopped being the unfettered, free emotion it was supposed to be.”

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