Premium

Place the child at the centre

Law Commission recommendations on age of consent sidestep key question of how to protect the young from sexual abuse, while ensuring they are not punished for consensual sexual activity with peers

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The onset of puberty at 10-11 years brings with it the biological, psychological and emotional stirrings of sexuality, the desire to learn and explore. (Illustration by CR Sasikumar)

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The 283rd report of the Law Commission of India (LCI), **which has advised against tinkering with the existing age of consent** under the **Protection of Children from Sexual Offences (POCSO) Act**, is a lost opportunity. The judicial references called for reviewing the criteria for the age of consent to sexual activity, to mitigate the "gross injustice in cases of statutory rape where de facto consent is present". The increase in the age of consent from 16 to 18 years with the enactment of the POCSO ACT, 2012, has magnified the volume of prosecutions against adolescents engaged in non-coercive consensual sexual activity with devastating outcomes, primarily for adolescents and youth from marginalised populations.

POCSO and equivalent provisions of the Indian Penal Code impose a mandatory minimum sentence of 10 years for statutory rape without regard to whether the minors, including those between 16-18, consent. The reference in Veekesh Kalawat vs State of Madhya Pradesh (2023), wherein a minor girl had eloped with a boy, married him and had a child, notes that a mandatory minimum sentence of 10 years for husbands results in, "… disrupting and devastating families in rural Madhya Pradesh by sending the sole breadwinner in the family to jail …. leaving his wife and children to the vagaries of social exploitation if the parents and the in-laws of the prosecutrix/ wife are not willing to keep her."

The LCI report traces the historical origins of the age of consent in law, through to the contentious positions relating to POCSO. Positions are divided between retaining the age of consent at 16 with close-in-age exceptions for consensual sexual activity between peers, as against a blunt increase in the age of consent to 18, which was adopted by POCSO.

The report outlines approaches adopted in the US, Canada, Japan, Australia and South Africa, all of which have lower ages of consent and additionally, protect adolescents from shame and stigma for consensual sexual activity through close-in-age exceptions. Its stakeholder consultations were limited, missing inputs from public health experts, gynaecologists, child psychologists, counsellors, and shelter homes, who, as first responders, offer valuable insights.

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The LCI recommendations favour retaining the age of consent at 18 years, to criminalise both abuse and non-coercive consensual sex, even when this occurs between peers. By way of mitigation, it recommends judicial discretion to award less than the mandatory minimum sentence of 10 years and provides guidelines for determining types of cases that are befitting of sentence reduction. The proposed mitigation is flawed on three counts.

First, the "close-in age" exception operates at the sentencing stage, so consensual sexual activity with a minor between 16 and 18, even where the accused is not more than three years apart, remains an offence. Had this exception been available as a defence, the accused might have had a chance of acquittal. Further, the exception allows sentence reduction, not sentence waiver, so the taint of criminalisation and incarceration remains.

Second, a new term, "tacit approval", is introduced to replace "consent". Consent is defined in law, backed by jurisprudence. Consent to medical examination is recognised for victims of sexual assault who are 12 years and above in the Ministry of Health and Family Welfare guidelines. The judicial reference to the LCI was also about consensual sex, so the use of "tacit approval", without so much as a definition, is confusing.

Third, a checklist of circumstances to guide whether or not exemption operates is provided. However, this is not limited to exploitative and coercive situations but also includes caveats that there be "no change in the social or cultural background of the child, indicating an element of manipulation or indoctrination," which are likely references to inter-faith and inter-caste relations. Additional circumstances listed include pregnancy, marital status and family acceptance; good behaviour and absence of criminal antecedents. Together, these could be read to suggest that judicial discretion is guided in favour of underage sexual relations which are not just close-in age, but rather, those that occur within socially conforming marriages backed by familial support.

Protecting the young from sexual abuse is of universal concern, which POCSO aims to serve. Equally important is the task of protecting the young from being shamed, punished and incarcerated for exploring what is developmentally appropriate for their age. This is at the heart of the reference that LCI was to address.

The onset of puberty at 10-11 years brings with it the biological, psychological and emotional stirrings of sexuality, the desire to learn and explore. Early marriage is a socially sanctioned response to containing the sexuality of girls within marriage to serve the socio-cultural order. The growing consensus against early marriage has resulted in it being replaced by abstinence through the fear of criminalisation. The Convention on the Rights of the Child (CRC) does speak to this conflict.

It places the child at the centre while recognising that persons under 18 years need differential protection corresponding to their evolving capacities, which refers to the process of "maturation and learning" through which the child progressively develops her competencies. Accordingly, CRC General Comment 20 calls for age-appropriate sexuality education, access to confidential medical counselling, and prohibits laws from criminalising consensual sexual activity with peers.

The data in India shows that criminalisation selectively strikes at the poor and the marginalised, with devastating consequences for girls. To quote Veekesh Kalawat (2023), "Where the prosecutrix is unemployed as is mostly the case, the options for survival are dismal, ranging from prostitution to crime. The State has no obligation under the POCSO to provide for the basic minimum required for the survival of the so-called 'survivor'". In other words, far from protection, criminalisation renders girls vulnerable to greater violations, and if protection is paramount, it is best secured through social security measures.

With the LCI sidestepping these issues, the matter rests with the courts to address, with sensitivity on a case-to-case basis, and the continuation of public dialogue.

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Five to go

Results of impending assembly polls will provide larger lessons and learnings. The stage is set

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In the poll-bound states now, the party is likely to draw attention to the Centre's and PM's successes and policies — G20, women's reservation Bill, increased subsidies on LPG cylinders, etc.

There is no established correlation between the outcomes of assembly elections and the vote for the Lok Sabha, even when the former closely precedes the latter. In 2018, for example, the Congress won three of the five states that are set to go to polls in November, but the BJP ended up doing much better in them in the subsequent general election.

Yet, the results of the assembly polls — the electoral calendar for Mizoram, Madhya Pradesh, Rajasthan, Chhattisgarh and Telangana was announced by the Election Commission Monday — will inevitably be parsed for what they say about the prospects of the major players in 2024. They will be read for the indications of which way the political winds might blow nationally.

Significantly, in three of the five states going to the polls, BJP and Congress are in a head-to-head contest. For Congress, which narrowly won MP last time (defections subsequently led to a BJP government), swept Chhattisgarh and had a comfortable win in Rajasthan in 2018, the current campaign will be judged on whether its organisational changes at the top and Rahul Gandhi's attempt at crafting a new political idiom through the Bharat Jodo Yatra translate into electoral success.

After the Karnataka win, it will also be another major test for Mallikarjun Kharge's leadership — his ability to manage differences within the Congress, especially in Rajasthan where CM Ashok Gehlot has been long at loggerheads with Sachin Pilot, will be watched. The party has also doubled down on the neo-Mandal agenda: It has announced a caste census in Rajasthan and promised the same in MP and Chhattisgarh. It is still an open question whether that politics will have a resonance on the ground with the 60.2 lakh first-time voters in all five states.

The BJP in its current avatar relies overwhelmingly on the PM's popularity to win elections, often at the expense of state-level leadership. This strategy has not always yielded dividends, as in Karnataka earlier this year. In the poll-bound states now, the party is likely to draw attention to the Centre's and PM's successes and policies — G20, women's reservation Bill, increased subsidies on LPG cylinders, etc.

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However, the uncertainty about CM candidates may prove to be a hurdle: Vasundhara Raje has looked discontented in Rajasthan and, in MP, Shivraj Singh Chouhan is running a personality-centric campaign but has not been announced as the party's CM face. Most significantly, as the BJP locks horns with the Congress in the context of the comeback of Mandal in a new form, the polls may indicate whether and how much the OBC vote, a sizeable portion of which has been moving to the BJP, can be wooed again by members of INDIA.

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