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EXAMINING THE IMPLICATIONS OF LOWERING THE AGE OF CONSENT: A LEGAL AND ETHICAL ANALYSIS

ABSTRACT

The age of consent is the age at which a person can legally form a sexual relationship [1¹]. In recent times, there has been a great clamor regarding lowering the age of consent. This report critically analyzes the major arguments asserted by different groups regarding the age of consent. This report also endeavors to answer certain questions, such as the exact age of consent. What are the legislative provisions related to this? What are the current issues regarding the age of consent law? Is there any need to lower the age of consent? Are these leads to injustice against minors? What is the Protection of Children from Sexual Offences Act, 2012 and how does it scenario? This study delves into the complex and controversial topic of lowering the age of consent. This study provides a comprehensive analysis of legal and ethical perspectives. The first part of this paper provides an overview of the current age of consent laws and their historical background. This study further explores the arguments for and against lowering the age of consent by examining cases in the court of law. Moreover, this study focuses on its implications for current laws and general society. The other part of this paper explores the ethical and philosophical issues regarding this matter while underlying the problems of the violation of child rights and the exploitation of minors and adolescents. In conclusion, this study presents a balance between legal and ethical dimensions regarding lowering the age of consent. It also scrutinizes the recommendations provided by the Law Commission.

KEYWORDS: Age of Consent, Minor, Exploitation.

INTRODUCTION

The 21st-century is a period of major changes in the legal system of India. Certain factors are responsible for these changes, including access to education, technological advancements, and

social reforms that make people more aware of their rights and duties. This creates an increase in the demand for justice and equality. Legal reforms are an ongoing process, and as society changes, the rules and regulations that govern them must also change. Likewise, there is a continuous debate about lowering the age of consent from 18 to 16 years. In India, the age of consent is defined by the POCSO Act, 2012^[2] which says that the legal age for establishment of sexual relationship is 18 years irrespective of their genders. However, there are certain instances coming up to the court of law where a minor (child below 18 years of age) girl eloped with a major boy and there was consensual intercourse between them. Although the act has been done after the consent of both, the boy, a major has to face criminal charges.^[3] In most cases, these minor girls did not want their partner to be charged for rape^[4] neither under section 365 of the Indian Penal Code, 1860 nor under the POCSO Act, 2012. Even in most cases, they admitted in front of their family and court that any physical relationship between them and their partner was consensual. However, as the girl was a minor, the parents of the minor girl wanted to make the boy liable and falsely framed the rape charges against the boy. Now, examine how the age of consent came into existence.

HISTORICAL BACKGROUND OF THE AGE OF CONSENT:

In India, child marriage is prevalent, and both the Hindu and Muslim communities consider it valid. Hence, there is no concept of age of consent. After the revolt of 1857, Britishers introduced this concept. As the influence and power of the British increased, they began to implement several reforms in India.

- In 1861^[5], the Age of Consent law was enacted by them, in which 10 years is laid down as the legal age to form any sexual relationship. However, it was opposed by the orthodox Hindus, who demanded to raise this age to 12 years on the grounds that it violated their personal norms called 'GARBHADHAN.'
- In 1891, after the sufferings of two young girls 'RUKHAMA BAI'^[6] and 'PHULMANI DASI'^[7]. The former was a case regarding the concept of conjugal rights. In this case, Rukhma bai was married at the age of 11 years, but she did not live with her husband. When she was 20 years old, her husband sent her a legal notice to live with him. However, she refused to live with him and contended that she married him when she was a child, and she did not know him at that time. The latter case concerned the death of a 10-year-old child bride who was brutally raped by her husband. These cases triggered the British Parliament to introduce a revised Law which is 'The age of

consent law, 1891, raises the age of consent from 10 years to 12 years for forming sexual relationships among all girls, irrespective of their marital status.

- In 1929, the Child Marriage Restraint Act was passed by British legislation, which sets the minimum age of marriage for women at 16 years and 18 years for men. This law is also called the SARDA ACT [8]. This act was further amended in 1978 and changed the age of marriage for girls to 18 years and for boys to 21 years. The main reason behind the increasing marriage age of women^[9] is the increase in the maternal mortality rate. It was observed that girls who married at 15 or less than 15 years of age were not physically and mentally ready to have a baby. They are not aware of reproductive health and other issues.
- Before the enactment of the Criminal Law Amendment Act of 2013 and the POCSO Act of 2012. All cases regarding sexual offenses were dealt with in Section 375 of the Indian Penal Code. However, this act is not gender neutral it defines that, ‘A man is said to commit an offense of rape if he has sexual relations with a girl less than 18 years of age no matter the act is done with or without her consent.’
- In 2012, after the tragic “NIRBHAYA RAPE” incident, several legal reforms in the context of sexual offences were introduced. The POSCO Act of 2012 is a gender-neutral act that defines any sexual relationship between persons under 18 years of age as illegal and provides several harsh punishments. However, there is an exception to Section 375 of the IPC, i.e., sexual intercourse by a man with his wife not being under 15 years of age is not rape. However, in the RIT Foundation vs. Union of India, 2022^[10], the high court held that the marital rape of a minor between the age of 15 and 18 years was unconstitutional, which means 15 years changes to 18 years of age.

Issues (legal and ethical) related to age of consent laws in India:

In the last few years, there have been certain cases where there is consensual sex between minor girls and major boys. The family of the girl files and makes the boy liable for rape. However, the minor girl is free from any liability just because she is a minor. Now, the question of injustice and inequality arises. If both are equally active in the act, why should only a boy be liable for criminal charges or treated as criminal. Even if the so-called victim, the minor girl does not want to make her partner liable or frame any charges against him.

Now, the other issue is if the girl is above 18 years of age and her husband forces her to have sexual intercourse. Although this act is not consensual, the husband is not liable for any

criminal charges. This is one of the major issues of the age of consent law. This clearly shows inequality and injustice in society and the law

Judges are also in a dilemma while dealing with such cases where there are various interests, such as human sexual dignity and adolescents' rights. There are certain instances when the judiciary wants reforms or clarification regarding this law so that they can deliver justice.

In December 2022, the Chief Justice of India, Mr. DY Chandrachud, had appealed to the parliament or government to look into this matter as this would cause difficulty for judges to examine the cases of consensual sex among adolescents. Similar appeals were filed by the Madhya Pradesh and Bombay High Courts, where they also demanded reforms in the POCSO Act, 2012 by reducing the age of consent from 18 to 16 years. ^[11]

Some activists asserted that today, India's adolescent population is much more active than it was in earlier times. This is because of access to the internet and social media. The NATIONAL FAMILY HEALTH SURVEY (NFHS-5) releases the most comprehensive data, which shows that more than 39 % of women have sex before marriage, i.e., 18 years of age, while 10% of females in the age group 25 – 49 years admitted that they had sex before the age of 15 years^[12].

Arguments against lowering the current age of consent:

Certain groups favour lowering the age of consent from 18 to 16 years, whereas others argue against it. These groups underline the fact that adolescents are more prone to engage in risky sexual behaviours because they do not have much knowledge and awareness about sexually transmitted infections, which increases the risk of HIV or AIDS. Child right activists are also concerned about child trafficking, asserting that lowering the age of consent further encourages child traffickers.

Some researchers have asserted that lowering the age of consent makes children more vulnerable to sexual exploitation and child abuse. Some contend that this change underpins the notion of child marriage, as it provides the opportunity for parents to arrange marriages for their minor children, especially daughters, whereas sometimes the honour killing of females can be increased. These groups also examine that in certain instances, the victim who is minor admitted consent under undue influence, coercion, threat, etc. They argue that if the age of consent is reduced, then their chances of being easily influenced.

Age of consent in other countries:

Age of consent laws vary from country to country. In countries such as Germany, Australia, Hungary, and Italy, children aged 14 years are considered capable of giving consent.^[13]

For most European countries, the age of consent lies between 16 and 17 years, while others, including Malta and Vatican City, require young people to be at least 18 years old to form sexual relationship.^[14]

Japan has one of the lowest ages of consent in the world at 13 years; hence, it raises its age of consent to 16 years^[15].

Countries such as Angola and the Philippines both set the age of consent at 12 years, which is the lowest in the world.

Recommendations introduced by the 22nd Law Commission of India:

To facilitate justice for adolescents and reduce the dilemmas of the courts, the 22nd Law Commission of India, chaired by former J. Rituraj Awasthi, in its report titled “Age of Consent under the Protection of Children from Sexual Offences Act, 2012,”^[16] has recommended ‘AGAINST’ the lowering of the age of consent from 18 years to 16 years under the POCSO Act, 2012. The Commission laid down several reasons for its recommendation

- They asserted that lowering the age of consent would increase the risk of child marriage, child prostitution, and their exploitation. This would create more complexity for investigative authorities in child sexual abuse cases.
- They also articulated the fact that it would send a wrong message in society that a minor can have sexual relations with adults, even if there is mutual consent.
- They stated that reducing the age of consent would provide a shield to those who coerce minor girls and may increase marital rapes and promote child marriage.
- The Committee recommended that the government provide some ‘guided judicial discretion^[17]’ or ‘discretionary power’ to the judiciary in cases that conflict with the rights of minors or adolescents. This would allow judges to create a balanced law and deliver justice vis a vis protect the child rights.
- They further state that this discretionary power of reducing sentencing cannot be automatically applied in all cases; however, it can be applied in cases where the age difference between victim and accused is less than 3 years and where mutual consent is proved.
- This power may be applied in cases where no prior criminal record is found against the accused, the accused has good conduct after the offense, and there is no undue influence

Although, there are certain criticisms for this recommendation, such as the reducing sentence has been created without any proper guidelines, this will give excess powers to the judges, this will not fully achieve its intended purpose that is justice to the accused, etc.

CONCLUSION:

Lowering the age of consent is a complex and controversial topic. There are a number of arguments for and against this. However, based on the current instances, it is evident that lowering the age of consent to 16 years would result in several negative consequences. Some of the main concerns are that it would make children more vulnerable to sexual exploitation, increase the risk of sexually transmitted diseases, and promote child marriage. Moreover, the practical implementation of lowering the age of consent would be a challenging task, as it would require several rounds of discussions and amendments to enact this law.

To cope with the issues faced by judges while dealing with such cases, the 22nd Law Commission of India recommended that the government provide certain 'discretionary powers' to the judges, so that the interest of individuals would not be hindered and justice would be delivered.

Lowering the age of consent is impractical and feasible; instead, the primary focus should be safeguarding children against sexual abuse, promoting sex education, and advocating for individuals' interests. To achieve these objectives, it is fundamental to follow a multifaceted approach by the government that encompasses education, introducing several awareness programs, and making policies for effective implementation of recommendations given by the Law Commission. However, the debate over this issue is likely to continue because there are strong and valid arguments from both sides. Moreover, such cases should be handled in a more diligent and delicate manner to ensure justice without hindering the rights of individuals.

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