

Teenage Pregnancy- Sexually Violated or Sexually Active: Medico Legal Dilemmas of POCSO Act 2012 and other Related Acts

Running Title: Teenage Pregnancy- Sexually Violated or Sexually Active

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Abstract

POSCO Act, 2012 and Criminal Law Amendment Act, 2013 mandates reporting of all child sexual offenses with provisions of stringent punishment for offense as well as non-reporting. However, many other Acts related to Child Marriage Restraint Act, MTP Act etc. have provisions under which there are exceptions to accept child marriages under some categories. Resultantly, there are numerous judgements from Hon'ble Courts, some accepting the child marriages and others strongly refuting it. There is no controversy anywhere, that child marriage should not be suppressed. However, in the current socio-cultural context, wherein child marriage is prevalent, what should be the implications on health care providers if they come across married pregnant teenager, or a teenager approaching for contraception or MTP? Will you give reproductive and sex education to children and adolescents? Is there need to distinguish offenses of child marriage from sexual offense? We have tried to raise a debate on the issue to inform policy makers for suitable amendments.

Key words: POCSO Act, Child Marriage Restraint Act, Sexual Offence, Child Marriage, Teenage Pregnancy, MTP Act, Criminal Law Amendment Act

Case Study

Mrs. X, a teenager reported to a small dispensary for ante-natal check-up. She was married to a teenage boy few months ago. Dispensary staff registered the pregnancy, provided necessary services and referred her for ultrasound examination at district health centre. They also informed the district nodal officer dealing with teenage pregnancies. At a later stage during the pregnancy, the matter came to the notice of police. An enquiry was held as to why dispensary staff didn't report the teenage pregnancy to the police as per the provisions of the Protection of Children from Sexual Offences (POCSO) Act.

The pregnant teenage mother was sent to a women welfare centre during her last trimester; her husband was put behind bars.

All health professionals must be encountering such situations frequently. Welfare of children is at the core of any legal provision / Act for children. In such teenage marriage cases, apparently, there is mutual acceptance of the social implications by the concerned families and their kinship. In fact, most of such couples live happily. The problem arises when, after the pregnancy (which, in India, is a socially accepted consequence of any marriage), the family seeks to obtain health care through formal health system. There is a clash of interests between the STATE ('law of the land') and THE FAMILY (personal freedom).

1. POCSO Act. = Health care providers have to report the teenage pregnancy to the police

2. FAMILY = Welfare of the couple / pregnant lady / fetus

But the moot question arises when as per the provisions of the POCSO Act, the police puts the husband behind bars and the pregnant woman in a welfare home! (AWAY FROM THE COSY COMFORT OF THEIR HOME!!), whose welfare will this serve?

This case of Mrs. 'X' pertains to pregnancy. However, what should be done if a teenager comes to demand contraceptive service? What is the purpose of providing reproductive and sex education to children in schools? What is the role of HIV/AIDs counselors when a teenage client reports exposure?

In all such situations, health care providers respect the sexually active client and provide service without being judgmental. Should such cases where adolescents approach for Contraceptive advise or medical care due to indulgence in sexual activity, be reported to the police for a possible violation of law? Will it not make the vulnerable age group loose trust in health system pushing them to illegal practices? How will this affect the edifice of adolescent health programs?

Even under MTP act, service is provided to teenagers, with the written consent of the guardians. Furthermore, what are the implications for the researchers who collect data on teenage pregnancy, age at marriage, reproductive services, sexual activity etc.?

All these situations reflect that these children/adolescents are sexually active. There is evidence to this effect that age of puberty has got pre-poned. The fundamental question is,

“Whether these sexually active children/ adolescents are on the wrong side of the Act, violating the existing Acts meant to protect them from sexual offence?”

We aim to raise debate on the existing Acts enacted for protection of children against sexual offenses. We also discuss the issue of legal age at marriage, and then come out with suggestions for policy amendments.

Brief review of relevant Acts is given below:

The POCSO Act (Protection of Children from Sexual Offences Act), 2012 and the Criminal Law Amendment Act, 2013 are major legal developments in India to reduce sexual violence against children and women and to punish the perpetrators.[1] These legislations mandate healthcare providers to report SUCH INCIDENTS to the police and provide free treatment to the victims. Failure to do so shall invoke punishment TO THEM with fine or imprisonment or both.

The Act stipulates a child-friendly judicial process, with an aim to encourage children who have been victims of sexual abuse, to report the offence and to seek speedy justice.[2, 3] It also provides support for overcoming their physical and mental trauma. The Act offers a means to report and punish those who abuse and exploit the innocence of children and aims to curb occurrence of these offences in the future.[4]

First question is what the definition of ‘Child’ is and what is ‘Sexual Violence’?

This Act recognizes almost every known form of sexual abuse against children as a punishable offence, where “Child” is defined as any person below 18 years of

age.[4, 5, 6, 7] It defines all forms of sexual abuse, including penetrative and non-penetrative assault, as well as sexual harassment and pornography. This law applies to both male and female children.

Under the Act, sexual assault is considered to be “aggravated” under certain circumstances, such as:

- Abuse of mentally disabled child.
- Abuse is committed by a person in a position of trust or authority *vis-à-vis* the child, like – a family member, police officer, teacher, or doctor.
- People who traffic children for sexual purpose are also punishable under the provisions relating to abetment in the act.

Stringent punishment graded as per the gravity of the offence is prescribed by the Act with a maximum term of rigorous imprisonment for life along with a fine.

This definition is based on the premise that girls below age of 18 years are not able to give consent for sexual engagement.

In a case in Kerala High Court, following observations and decisions were made by the Hon’ble High Court:

“A minor girl can be easily lured into giving consent for sexual intercourse since she does not have the capacity to understand the implications thereof. Such consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action.”

While denying pre-arrest bail of a person accused of committing offence under POCSO Act, the High Court of Kerala reiterated the legal position that consent given by a minor girl for the sexual act is of no legal validity. The accused person

contended that the girl was living with him on her own wish and that they engaged in sexual performance with mutual consent. The girl was found missing from the home, and on enquiries, she was found to be in house of the accused person, a 32-year-old man. When the girl stated that he had sexual intercourse with her on promise of marriage, the offences punishable under Sections 363 and 376 of the Indian Penal Code (IPC) and Sections 5(l) read with Section 6 of the POCSO were incorporated in the FIR.

Justice Narayana Pisharody, while dismissing the application for anticipatory bail filed under Section 438 of Cr.P.C, held: "Even when there is consent of a girl below 18 years, the other partner in the sexual act is treated as a criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual."

The Court stated that the age of consent for sexual act was 18 years, and there was no question of a girl below 18 years giving consent. Tracing the legislative wisdom behind the provision, the Court observed: The very purpose of bringing legislation in the form of the Act is to protect the children from sexual assault, harassment and exploitation, and to secure their best interest. Dignity of the child has been laid immense emphasis in the scheme of the legislation. The Act contains special provisions for protection of children, with a view to ensure that children of tender age are not abused during their childhood and youth. Explaining that the consent given by a minor cannot be treated as valid consent, the Court stated:

A mere act of submission does not involve consent. If there was no voluntary participation in the sexual act, it would not amount to consent.

*Voluntary participation involves the exercise of intelligence based on the knowledge of significance and moral quality of the act. Consent cannot be equated to an inability to resist or helplessness. Consent is an act of reason accompanied by deliberation. A minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. A minor girl can be easily lured into giving consent for sexual intercourse since she does not have the capacity to understand the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 18 years of age. The Court also noted that in *Independent Thought v. Union of India*, the Supreme Court has interpreted Exception 2 of Section 375 IPC to hold that sex with one's own wife will amount to rape if she is aged below 18. Therefore, offence under Section 376 IPC was also found to be prima facie made out against the accused. Reference was made to decision of Hon'ble Supreme Court (SC) in *State of Bihar v. Rajballav Prasad* where the bail granted to an accused under POCSO was set aside by SC holding that as per Section 29 of the Act there was no presumption of innocence available to the accused."*[8]

However, debate over the age for consensual sexual engagement is still on. In another case, Hon'ble High Court at Chennai suggested amendments in POCSO Act to be liberal while deciding the punishment based on age at which sexual engagement had occurred. [9]

“CHENNAI: Observing that relationship between a girl under 18 years of age and a teenage boy or little over the teenage years cannot be construed as "alien" or "unnatural", the Madras high court suggested exclusion of consensual sex after 16 years of age from the purview of POCSO Act. Justice V Pathiban gave the suggestion on Friday during the hearing of a petition by Sabari who challenged his conviction and 10-year sentence by a Mahila Court in Namakkal under the Protection of Children from Sexual Offences (POCSO) Act. The petitioner was accused of kidnapping and sexually assaulting a 17- year old girl. Suggesting amendments to the Act, the judge said, "Any consensual sex after the age of 16 or bodily contact or allied acts can be excluded from the rigorous provisions of the POCSO Act and such sexual assault, if it is so defined can be tried under more liberal provision, which can be introduced in the Act itself...". "The Act can be amended to the effect that the age of the offender ought not to be more than five years or so than the consensual victim girl of 16 years or more. So that the impressionable age of the victim girl cannot be taken advantage of by a person who is much older and crossed the age of presumable infatuation or innocence," he said. Justice Pathiban also directed the State Commission for Protection of Child Rights (SCPCRs), Commissioner of Social Defense, Department of Social Welfare and Noon Meal Programme to place the matter before competent authority and take steps to explore whether the suggestions are acceptable to all stakeholders. Perusing various reports of the DGP, SCPCRs among others, he said, though under Section 2(d) of the Act, 'child' is defined as a person below 18 years of age and in case of any love affair between a girl and a boy, where the girl happens to be 16 or 17 years old, the relationship invariably assumes penal character by subjecting the boy to the rigours of the law. Once

the age of the girl is established in such relationship as below 18 years, the boy involved in the relationship is sure to be sentenced 7 or 10 years as minimum imprisonment, as the case may be, he noted. "... Such a relationship cannot be construed as an unnatural one or alien to between relationships of opposite sexes," the judge added. Earlier, the judge acquitted the accused of all charges and set aside the conviction of the trial court. He found fault with the lower court for completely misdirecting itself by raising unwarranted presumption without any basis in favour of the prosecution. The court also expressed concern over growing incidence of offences under the POCSO Act on one side and the rigorous imprisonment envisaged in it.”[9]

Why adolescents between age of 16-18 are not considered mature enough to give consent for Sexual Engagement?

Looking at two judgments above, first debatable question is, whether ‘sexual engagement’ is an act of reasoning, that can be paralleled to the level of reasoning needed to be able to vote for the country, or is it a matter of passion and reasonable understanding? We argue that if, at the age of 17 years, students can appear for NEET exams [10], and if by 17½ years they can be enrolled in various army jobs [11], which shows that by this age they have sufficient reasoning abilities, then why cannot they be considered as sufficiently mature to have consensual sexual act? Sexual engagement is more of a matter of passion. The argument of raising the age at marriage, in the year 1978, was not derived from the supposition that at this age they are not mature to give consent for sex; however, it was more for population control. It was based on the evidence that rising age at marriage can lead to reduction in fertility parameters [12]. However, during all these years, it seems, age at marriage was considered as the age to define ‘child’

and later on was considered by other Acts to define the age for sexual violence.

Linked with this is the issue that in many Indian states and societies, early age at marriage is a norm. Although, efforts must be done to implement and enforce the legal age at marriage for the purpose of population control, and for the added window of opportunity to make up for the nutritional deficiencies; and to fulfill the human and reproductive rights of the adolescents; however, categorizing indulgence into sexual activity at such age, after social sanction through marriage, is debatable. It can not be equated with sexual activity without marriage that can be linked to the lure and lust. In numerous judgements from Hon'ble Courts, child marriage has been given legal sanctity under various conditions, with due caution to prevent this social evil.

Another issue is that 'child marriage' is legally punishable. The very fact that such marriage took place implies that the enforcement agencies failed to prevent (or even book it!). Then why do they come in to picture after the pregnancy? There are conflicts in various Acts related to child marriage. Marriage registration is still not compulsory. People who were party to solemnize the child marriage escape responsibilities as there is no structured mechanism to involve them in the process of marriage certification.

The next debatable question is: If a pregnant teenager comes to your health facility for seeking health care, what are your responsibilities as a health care provider?

As per POCSO Act [5] following features are worth noticing:

- Section 27 of the POCSO Act states that medical examinations

must be carried out even if a First Information Report (FIR) or complaint has not been registered. [4]

- Rule 5 (3) of the POCSO Rules categorically bars doctors or hospitals from demanding legal documents before conducting the medical examination. [4]
- The Act mandates reporting of all sexual offences that come to the notice of health service provider, after careful history and examination. It is not necessary to have visible signs of injury in each case of sexual violence.

It casts a legal duty upon a person who has knowledge or a suspicion that a child has been sexually abused, to report the offence to local police or special juvenile police or concerned authority. If he/she fails to do so, he/she may be punished with six months of imprisonment and/or a fine. It casts the police in the role of child protectors during the investigative process.

It seems that above responsibilities are with respect to sexual violence that causes trauma to the teenage girl. However, is it applicable to married pregnant teenagers who have reported for care during pregnancy and not for any direct sexual offense or any other indicator of offense like injuries to private parts or vaginal discharge etc.?

Act has defined the role of physicians/ health-care providers as under: [13]

Guidelines for medical and forensic medical examination have been clearly defined in the law:

- Doctors/ health care workers have a central role to play in cases of managing and reporting cases of sexual violence and assault, as per the POCSO Act, 2012.

- Mandatory reporting of all cases of offence wherein medical providers know or suspect that a child has been sexually abused.
- Documenting a complete and thorough medical report with diagnosis and recommendations for treatment.
- Testifying in court of law when required.
- **Under the POCSO ACT, a minor is unable to consent to sexual intercourse. Therefore, a pregnant minor girl (married/unmarried) is considered a victim of sexual assault. Thus, it is legally mandatory for the health-care provider to inform the authorities if a married minor is pregnant even if girl has not expressed a desire to take legal action.**
- **Marital status of the victims does not affect the conditions pertaining to punishment** related to any lapse in reporting such incidents.
- As per section 21, any individual who knowingly withholds such information and fails to report the case, can be punished with up to six months in prison and /or with fine.
- If he/she is uncertain of the age of pregnant girl. It is advised to report the pregnancy as per the legal requirement under POCSO Act and to allow the authorities to decide what action needs to be taken.

What can be another interpretation of the Act?

As per POCSO Act, even married pregnant minor females, fall under the ambit of reporting, even if they do not express the desire to report. However, what about the essential criteria of

violence? It is understandable, that if there are signs of violence in this age category, irrespective of marital status, then it should be reported. However, if there are no visible signs of violence and there is no history suggestive of violence, then whether it should fall under the ambit of POCSO? (as per above highlighted text IT DOES)

Is there a need to distinguish between Child Marriage Restraint Act and POCSO Act?

The Child Marriage Restraint Act was enacted to deal with the nuances of child marriage. Even in this Act, if any of the contracting party is found to be below legal age for marriage, it is optional for them to apply petition for nullification of the marriage. Anyone who comes to know of the offense should report. There are lots of legal provisions to report and punish. Still, in the absence of compulsory marriage registration, enforcement of this Act is very poor.

What are the implications for researchers?

Should the survey team, who collects data on reproductive history of a subject (male/female), need to disclose the information to police? This would pose an ethical dilemma while fulfilling their obligations as researchers.

Such dilemmas may arise when the victim and family provide a sexual history in confidence to the survey team/ researcher but do not wish the incident to be reported to the police, e.g., collecting age of marriage related data at time of District Level and National Family Health Surveys (DLHS & NFHS) or any other nationally representative surveys. [14,15] There may be instances where children or adolescents provide information regarding sexual exploration (out of curiosity) or involvement in

foreplay or even intercourse with mutual consent, e.g., adolescent RCH studies

The Act enshrines a legal duty upon a person who has knowledge or a suspicion that a child has been sexually abused, to report the offence to local police or special juvenile police or concerned authority.

Although child marriage is illegal and prohibited under secular law, it enjoys sanction under certain Personal Law thus complicating matters, and thus it is still prevalent in our society. Reporting such instances to the police, of couples who are visited by the survey team may create an ethical dilemma. Similarly, when sexual abuse has occurred in the past, the victim may not wish to refresh those memories and this too could lead to an ethical dilemma. [16] Reporting all such instances may lead to 'defamation' and social discrimination of the subjects, and entail serious consequences for them.

The Other Dilemma

1. POCSO Act warrants mandatory reporting. What is the role of consent of the victim or his/her family? Mandatory reporting against the will of a person violates Article 21 of the Constitution, refers to right to privacy of a person. Right to consent gives way to right to refusal for examination.
2. According to the POCSO Act, it is not mandatory for reporters to inform the child and/or his/her parents or guardian about the fact that they would be reporting the child abuse to authorities. However, it is advised to let them know as this will help establish an open relationship and minimize the child's feelings of betrayal if a report needs to be made. Here, again mandatory reporting against the will of a person violates

Article 21 of the Constitution, which refers to right to privacy of a person.

3. Latest amendment of the Indian Penal Code concerning rape laws in 2013 clearly mentioned that the age of consent for sex has been fixed to 18 years. Hence, anyone who has consensual sex with a child below 18 years can be charged with rape.
4. According to the 2014 guidelines on medicolegal care of victims of sexual violence issued by the Ministry of Health and Family Welfare, if the victim does not wish to report to the police and desires only treatment, then medical professionals should first inform the victim about benefits of reporting to police. If the victim still refuses to report, then they should document the informed refusal. [17]

Question then arises what should the survey team do about above all situations. On one hand, they have to collect correct reproductive data and on the other hand, they have to abide by the law and do mandatory reporting?

Conclusion

Though the POCSO Act, 2012 is an excellent piece of legislation and it recognizes almost every known form of sexual abuse against children as punishable offence, there are some challenges. There is need to distinguish between sexual violence and sexual activity. There is need to redefine and distinguish between age at consensual sex and age at marriage. Age at marriage was increased in the year 1978, for population control. Early age at marriage should be dealt under the provisions of Child Marriage Restraint Act and NOT under the POCSO Act. Health care providers should report only cases of sexual violence, that involves traumatic unwanted sexual act. Teenagers who come to seek care due to consequences of

consensual sexual activity should be able to do so without any fear of being reported to police. This is one of the barriers that forces such population to go to private sector especially unregistered quacks, and then face the complications. Teenage pregnancy is a risk, not because of age, but because health care services are more difficult to access in this group. Thus, policies should be directed to facilitate them in seeking health care and not restrict them.

In today's era of digital revolution, when almost every person has Aadhar card or PAN card or BPL card or PMJAY (Pradhan Mantri Jan Aarogya Yojna) card or other legally acceptable identifiers; mobile apps should be created to register the marriage on the spot with authorized identity cards. Details of two witnesses can also be uploaded. Marriage registration should eventually be made mandatory.

For researchers, there should be explicit mention in the Act, that it is not mandatory to report individual data related to age at marriage, age at pregnancy, or their sexual activity, as such data is collected under a confidentiality agreement. They may report incidents of sexual violence, that come to their notice, wherein the respondents give consent to report, considering the surveyor a God-sent opportunity to provide some help to them.

The lawmakers need to relook into this dilemma of health care providers, researchers and importantly the teenagers themselves, and come out with a comprehensive single Act/guideline so that interests of all the stake-holders are protected.

References

1. Protection of Children from Sexual Offences Act, (Central) Complete Act – Bare Act. Government of India. 2012. Available from: <http://www.wcd.nic.in/sites/default/files/childprotection31072012.pdf>.
2. Ministry of Women and Child Development. Model guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012. [Accessed on April 13, 2019]. Available from: <http://wcd.nic.in/act/POCSO%20-%20Model%20Guidelines.pdf>
3. National Commission for Protection of Child Rights, Government of India. 2017.
4. POCSO Act – Providing Child-Friendly Judicial Process. Press information Bureau, Government of India. [Accessed on April 19, 2019]. Available from: <http://pib.nic.in/newsite/efeatures.aspx?relid=86150>.
5. The Protection of Children from Sexual Offences Act, 2012 [Act No. 32 of 2012], Union of India [June 19, 2012].
6. The Protection of Children from Sexual Offences Act, 2012 [Act No. 32 of 2012], Union of India [June 19, 2012].
7. The Criminal Law [Amendment] Act, 2013 [Act No. 13 of 2013], Union of India [April 2, 2013].
8. Consent Not A Defence For Offences Under POCSO Act: Kerala HC [Read Order] BY: MANU SEBASTIAN 16 July 2018 9:30 PM <https://www.livelaw.in/consent-not-a-defence-for-offences-under-pocso-act-kerala-hc-read-order/> [Accessed on 3 June 2019]
9. HC suggests amendments to POCSO Act over consensual sex

- after 16 years of age PTI | Apr 27, 2019, 07.37 PM IST
http://timesofindia.indiatimes.com/articleshow/69071613.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst
 [Accessed on 3 June 2019]
10. NEET Eligibility Criteria 2019- minimum age requirement is 17 years.
<https://medicine.careers360.com/articles/neet-eligibility-criteria>
 [Accessed on 3 June 2019]
 11. Shrikant Palli. Indian Army 2019-20 GD, Clerk, Tradesman Eligibility Criteria, Age limit, Height, Chest.
<http://www.4eno.in/eligibility/indian-army-eligibility/> [Accessed on 3 June 2019]
 12. Premchand Dommaraju. Marriage Age and Fertility Dynamics in India. Asia Research Institute National University of Singapore 469 A Tower Block, # 8-10 Singapore 259770
prem@nus.edu.sg
<https://pdfs.semanticscholar.org/2742/bae8d6e9b98e388a4096e5d839eed1f7228c.pdf> [Accessed on 3 June 2019]
 13. Child Sexual Abuse. Guidelines for Medico-Legal Care for Victims of Sexual Violence.
 14. Registrar General & Census Commissioner of India. Census of India New Delhi 2011. Available from: <http://www.censusindia.gov.in>.
 15. International Institute of Population Sciences. National Family Health Survey- 4. India: International Institute of Population Sciences, 2015–16.
 16. Breaking the Silence. Child Sexual abuse-India. A Report by Human Rights Watch Organization. 2013.
 17. Ministry of Health & Family Welfare India. GUIDELINES & PROTOCOLS Medico-legal care for survivors/victims of sexual violence. 2014. [Accessed on April 10, 2019 Available from: <https://mohfw.gov.in/sites/default/files/953522324.pdf>

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