Child Marriage and the Protection of Children from Sexual Offences Act, 2012

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Introduction

The Prohibition of Child Marriage Act, 2006 (PCM Act) seeks to prohibit the solemnization of marriages of girls below the age of 18 years and boys below the age of 21 years. The Act prescribes penalties for the solemnization, promotion, and allowing of child marriages. A male above 18 years of age can be punished under the Act for contracting a marriage with a girl under 18 years. The Act is, however, silent on sexual relations in a child marriage. It extends legitimacy to children born of child marriages thus indirectly acknowledging sexual intercourse within a child marriage.

Under the Indian Penal Code, 1860 (IPC), sexual intercourse by a man with his wife above 15 years of age, is an exception to rape. The Criminal Law Amendment Act, 2013 raised the age of consent to 18 years but did not disturb this exception. As a result, sexual intercourse with a wife above 15 years of age and below 18 years of age will not amount to rape under the IPC.

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act), was enacted to protect children from offences of sexual assault, sexual harassment and pornography and to provide a child-friendly system for the trial of these offences. The Act provides for seven specific sexual offences against children and stipulates child-friendly legal procedures that must be adhered to during investigation and trial. Under the POCSO Act, the term “child” has been defined to mean “any person below the age of eighteen years”\(^2\). The Act does not recognize sexual autonomy of children in any form. Children can also be held liable for committing sexual offences under the Act. As a result, sexual interactions or intimacies among or with children below the age of 18 years constitute an offence.

This note examines the implications of the POCSO Act on child marriages in general and ‘love’ marriages in particular.

The POCSO Act and the Marital Rape Exception

As stated above, the IPC provides for a marital rape exception which states that “[s]exual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”\(^3\) No such exception has been grafted into the POCSO Act under which an act of sexual intercourse with a person under eighteen is an offence irrespective of the gender or age of the victim or the accused. Further, one of the grounds of aggravated penetrative sexual assault is penetrative sexual assault by “a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with

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1. © CCL-NLSIU, 2013. This note has been prepared by Swagata Raha with inputs from Anuroopa Giliyal from the Centre for Child and the Law, NLSIU.
3. Exception 2, Section 375, Indian Penal Code, 1860
the child commits penetrative sexual assault on such child”. This is punishable with a fine and a minimum term of 10 years imprisonment which may extend to life imprisonment.

It is clear that under the POCSO Act, a spouse of a person below the age of 18 years can be prosecuted. Irrespective of whether the marriage has been contracted voluntarily, a person having sexual contact with a person under 18 years can be punished. Further, it is now mandatory for those who have information about the commission of a sexual offence to report it to the local police.

The question that now arises is this: Will the POCSO Act override the IPC? The response to this can be found Section 42A of the POCSO Act which was introduced by the Criminal Law Amendment Act, 2013. This provision states:

42A. Act not in derogation of any other law, - The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of its inconsistency.

The above provision essentially implies that in case of conflict between the provisions of the POCSO Act and any other law, the former will override. Owing to Section 42A of the POCSO Act, the exception under the IPC will not apply. **Thus, in all cases of child marriage where the bride or groom is below 18 years of age, a charge of aggravated penetrative sexual assault can lie against them under the POCSO Act.**

**The POCSO Act, Child Marriage and Love**

Section 42A read with the definition of child and the offences under the Act has the potential to lead to unintended consequences - the most severe of which could be the resort to child marriage in order to evade criminal prosecution.

Since the passing of the Prohibition of Child Marriage Act, 2006 (PCM Act), a child marriage is voidable at the instance of the child who was party to the marriage. The option to annul the marriage can be exercised by a child who was a party to the marriage within two years of attaining majority. Section 12 of the PCM Act stipulates the circumstances under which a child marriage will be void. These include being taken or enticed out of the keeping of the lawful guardian or being forced or compelled by deceitful means to go from any place.

There have been a sizeable number of cases in which girls between the ages of 16-18 years have left their homes on their own and with a man of their choice. In such cases, it is routine for the parents of the girl to slap a case against the man alleging kidnapping from lawful guardianship, rape, and sexual assault. Even prior to the enactment of the POCSO Act, such cases have put the lower courts in a quandary – should criminal consequences follow in cases where girls elope with and/or marry a man they claim to love?

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4 Section 3, Prohibition of Child Marriage Act, 2006
In Court on its own motion (Lajja Devi) v. State\textsuperscript{5}, the Delhi High Court observed that it is “distressing” that the IPC “acquiesces child marriage” by stating that sexual intercourse by a man with his wife above the age of 15 and below the age of 16 years is not rape. The Indian Majority Act, Hindu Minority and Guardianship Act, 1956 and the Dowry Prohibition Act, 1961 also recognize child marriages and “destroy the very purpose and object of the PCM Act to restrain and prevent the solemnization of Child Marriage.” The court then distinguished the position of girls below and above 16 years of age. With respect to girls above the age of 16 years, it held:

“If the girl is more than 16 years, and the girl makes a statement that she went with her consent and the statement and consent is without any force, coercion or undue influence, the statement could be accepted and Court will be within its power to quash the proceedings under Section 363 or 376 IPC. Here again no straight jacket formula can be applied. The Court has to be cautious, for the girl has right to get the marriage nullified under Section 3 of the PCM Act. Attending circumstances including the maturity and understanding of the girl, social background of girl, age of the girl and boy etc. have to be taken into consideration.”

In cases of marriage of a girl below the age of 16 years, her consent would be immaterial. However, the court stated that “…there can be special or exceptional circumstances which may require consideration, in cases where the girl even after attaining majority affirms and reiterates her consent.” They also held that consummation with a wife below age of 15 years is an offence and in such cases whether she is married or applicable personal law provides otherwise, is irrelevant.

As is evident from the above ruling, the distinction based on age was linked to the marital rape exception under the IPC. It is pertinent to note that the POCSO Act had not been enacted when this judgment was passed.

However with the passing of the POCSO Act and the increase in the age of consent, this interpretation will no longer hold good. Yet, it appears that some Special Courts have continued to apply the above ruling to quash cases against persons accused of offences under POCSO Act and IPC. While increase in such cases has been a cause of concern, the later developments in these cases have serious implications. Based on the limited data available to CCL, cases have emerged where the Special Courts in Delhi have taken different positions on this issue:

1. A 15-year-old girl eloped with and subsequently married a 22-year-old man. Based on a complaint by the mother, the couple was traced and the man was booked for kidnapping and rape under the IPC and POCSO Act. Dharmesh Sharma, Additional Sessions Judge rejected the view that the POCSO Act criminalizes even consensual sexual relationships, acquitted the accused, and observed: “I am afraid if that interpretation is allowed, it would mean that the human body of every individual under 18 years is the property of the State and no individual below 18 years can be allowed to have pleasures associated with one’s body. In my opinion, it would neither serve...

\textsuperscript{5} 2012 VIAD (Delhi) 465
the object of present enactment, nor the purpose of criminal law to hold the accused guilty on the ground that he had sexual intercourse with a girl below 18 years."

2. The mother of a 14-year-old girl alleged that her daughter has been repeatedly raped by their landlord and had become pregnant as a result of it. The accused was arrested. However, at the bail hearing the parties decided to compromise the matter as the accused agreed to marry the girl and offer financial support to her mother. He was granted interim bail and the couple married in the course of the trial. Thereafter, the prosecutrix and her mother turned hostile. They claimed that the prosecutrix was 18 years of age and was in love with the accused. She had indulged in sexual intercourse with him under the belief that he would marry her. When she became pregnant, he refused to marry her and she then filed a case against him. The accused claimed that he did not commit fraud by performing marriage with her on account of this case. On its part, the Court attempted to discern the consensual nature of the decision made by the girl and then finally acquitted the accused when the girl refused to support the prosecution’s case.

3. A Muslim man was arrested for kidnapping and raping a 17-year-old girl. At his bail hearing, he claimed that the couple loved each other and intended to marry. Kamini Lau, Additional Sessions Judge rejected his bail and observed “Merely because both the girl and the accused happen to be from the same religion i.e. Muhammadan-whose Personal Law provides for a different age of marriage than the one provided under the statutory law of the land-does not mean any special indulgence is required to be given to the accused as far as criminal law of this land is concerned.” Further, she held “Muslim parents are as much entitled to protect their minor daughters from sexual abuse and exploitation as any other Indian irrespective of religious considerations. No separate parameters can be adopted for Muslim offenders only because the complainant happens to be from the same religion.”

A disparity in the approach and views of judges is apparent from the aforementioned cases. Two have taken the position that girls who engage in consensual sex cannot be seen as victims and consequently their lovers cannot be treated as criminals. In the last case, the Judge has gone by the letter of the law and not permitted any religion-based exceptions. These cases have posed considerable difficulties before the court. They have found it difficult to convict the accused when the prosecutrix did not support the case of the prosecution and claimed to have gone willingly with the man.

In the above circumstances, it needs to be noted that neither the POCSO Act nor the PCM Act can be truly applied for the following reasons-

i. In the absence of medical evidence, the oral evidence of the child becomes crucial for a case under POCSO Act. If she turns hostile, there is little that the Special Court can do in the matter.

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7 State v. Aas Mohammad, 78/3013, Sections 376 and 506 of IPC and Sections 4, 6, 10 of POCSO Act. Judgment dated 13.08.2013. Decided by Sh T.S. Kashyap, Additional Sessions Judge -01, Special Judge (NDPS), Shahdara District, Karkardooma Courts, Delhi

ii. A marriage is only voidable under PCM Act at the option of the child party. Since in these cases the child turns hostile, the situation does not arise where a petition for nullity is filed.

In the second case, it appears that marriage provided the parties with a way out of the criminal proceedings. Though the above decisions of the Special Courts do not hold any precedential value, they effectively undermine the provisions of the POCSO Act which do not permit any exceptions. More importantly, these decisions underline the problematic aspects of uniform age of consent. Given that the age of consent is pegged at 18 years, sexual intimacies and interactions among or with children in the age group of 16-18 years has been criminalized. In India, even though child marriage is prohibited under secular law, it enjoys sanction under the Hindu Marriage Act and Muslim Personal Law thus complicating matters. The opinion of the higher courts on this is crucial. If personal laws are allowed to override the POCSO Act, it will lead to the discriminatory application of the law.

The judiciary has recognized the autonomy of children to an extent by quashing complaints in cases of consensual marriages. If the above trend continues, in order to evade a minimum term of 10 years rigorous imprisonment, a young couple may have no choice but to marry to avail of such an interpretation of the law. This appears to be an inevitable consequence of having a uniform age of consent. In this regard, the National Commission for Protection of Child Rights (NCPCR) Bill, 2010 is instructive. It proposed that that any consensual sexual act that may constitute penetrative sexual assault should not be an offence when it is between two children who are both above 14 years of age and are either of the same age or the difference in age is not more than three years.\(^9\) It is imperative that the Act be amended to address this anomaly.

\(^9\) Section 3 of the Protection of Children from Sexual Offences Bill, 2010 prepared by the National Commission for Protection of Child Rights deals with ‘unlawful sexual act with the child’ and states that any sexual act with the child under the age of sixteen years with or without the consent of the child is an offence except in the two circumstances mentioned. The situation mentioned here is the exception in Section 3(ii) reads as “Any consensual sexual act penalized by this chapter (except for sections 23, 25, 27 and 31) is not an offence when engaged in between two persons who are both over 14 years of age and are either of the same age or whose ages are 5 within 3 years of each other.” Situations mentioned under Sections 23 (Unlawfully stripping the child in public view), Section 25 (Child pornography), Section 27 (Blackmailing for a sexual act) and Section 31 (Stalking a child) are excluded from these exceptions and will continue to be offences irrespective of the age of the children involved in such act.