



PARTNERS FOR LAW IN DEVELOPMENT

SUBMISSIONS TO THE MWCD PERTAINING TO: PROPOSED CHANGES TO PCMA AND THE POCSO

INTRODUCTION

For some time, media reports have indicated that Ministry of Women and Child Development are considering proposals in relation to child marriage as well as child sexual abuse. It is understood some consultations regarding the same have also taken place. The proposal to amend the Prohibition of Child Marriage Act, 2006 (PCMA) aims at declaring all underage marriages void ab initio, and reducing the minimum age of marriage for boys from 21 to 18. The proposal for Protection of Children from Sexual Offences Act, 2012 (POCSO), relates to formulating additional rules.

Through these submissions to MWCD, Partners for Law in Development (PLD)¹, seeks to place evidence of the work done on the intersecting themes of early marriage and child abuse – to press upon the MWCD to widen consultations with those gathering evidence and working on these intersections, as guidance in formulating the proposals underway. The impact of these proposals on older adolescents especially needs to be considered, as it cautions against uniform responses to the all persons within 0 to 18 years. These submissions briefly outline the findings of the research studies and evidence gathering by PLD; moving on to recommendations that align with ground realities and international human rights standards. Having undertaken studies on the working of PCMA and POCSO, and having organized several consultations in relation to adolescent girls, we believe the submissions offer useful guidance on the two laws. As the two laws – PCMA as well as POCSO overlap, our submissions speak to both the concerns.

¹ Registered in 1998, Partners for Law in Development is a legal resource group that facilitates the realisation of women's rights and social justice by relating law to contexts of marginalization shaped by gender, sexuality, culture and poverty. We have undertaken research studies for the MWCD, Department of Justice, the NHRC and the NCW, conduct trainings extensively on the sexual harassment law for workplaces, and on developing consent culture among youth, and are a leading resource on CEDAW in the country.

FINDINGS FROM PLD'S WORK

1. PCMA mainly aids prevention work, and helps social workers negotiate informally, to prevent child marriage or help girls nullify marriage:

Documentation and consultation with 55 participants from 25 organisations from across the country reveals that when grassroots organisations intervene to prevent an underage marriage from taking place or help nullify one, they are more likely to use the law informally to negotiate rather than instate formal legal action. Not only is legal action difficult, and state mechanisms also subject to local power structures - but because it is risky to use the law (in terms of the backlash to the girl and the social workers). Legal action is inadequate and often, counter-productive – so is an option only if negotiations fail. Interventions are mounted based strictly on the girl's wishes if she is an older adolescent. Social workers gather evidence of age and marriage before involving multiple state agencies to verify, guard against disappearance of evidence, and maintain a check on the pliability of any single agency to local pressures. Accordingly social workers tend to go to the police only at a later stage, to ensure that the girl's plans are not leaked to her family, which often do, after which the girl is secretly shifted to another location and hastily married. The informal use of law is designed to sustain long term change – for beyond merely 'stopping' the marriage, the social workers negotiate with the girl's family, sometimes the groom's family and the community or the *biradari*. The law is useful in helping social workers involve the administration to support their efforts in engaging with the *biradari* to ensure that the girl and her family are safe, not ostracized, and to secure waiver of customary 'penalties' that the girl's family are bound to pay for compensating the reneging a bond – be that of a promise to marry, the *ghauna*, or nullifying a marriage. The customary penalties are high, and non-payment (in spite of a court order) can result in social and economic boycott of the girl's family. In some cases, social workers are attacked, or threatened and cannot visit the field location for a length of time, until the anger of the community leaders has been assuaged.

Besides being difficult, the direct use of formal law leads to arrests of the girl's parents (while the girl is sent to a shelter), which in turn results in abandonment and destitution of younger siblings in the family, who are left without care. Depending on the risk evaluation, the social workers use the law (formally or informally), find care givers for other children in family if parents are arrested, negotiate with the community, watch after the girl. Even as the law helps secure support of administration, agencies and police – it is risk laden, unable to secure long term protection against social ostracism to the girl and her family, and unable to promise a better future for the girl. As in the case of Bhanwari Devi who suffered retaliatory gang rape for stopping the marriage of an infant in 1992, the law may stop a marriage as scheduled, but cannot guarantee it from taking place the next day.

2. The formal legal proceedings under PCMA, are largely by parents against choice marriages of their daughters:

An analysis of 83 verdicts (Constitutional, civil and criminal cases from several states) in which PCMA is invoked (from 2008-17), shows that 65% of all the cases involve parents using the law against choice marriages by their daughters. Only 35% of the

cases involved arranged/ forced marriages by their parents, and in this category, the CMPO initiated cases are negligible. Some of the cases for declaration of nullity are by a parent themselves when the marriage is beset with troubles, including dowry or domestic violence or where the marriage was arranged by one parent without concurrence of the other parent. In effect, the PCMA appears to scarcely be used against forced marriages of underage girls by parents – but is primarily being used by parents against their daughters’ choices. The cases filed by parents and girls together to nullify marriage are likely to occur when the daughter’s arranged marriage develops problems – not against underage marriage itself. Although the cause of action in law arises from ‘age’ – in practice the law is driven primarily in response to ‘daughter’s choice’ and to a much lesser extent, ‘breakdown’ of marriage.

3. Mandatory reporting combined with a flat age of consent at 18 years, has turned POCSO into a tool of moral policing of daughters, and retribution against the daughters’ husbands/ boyfriend:

Of the 50 Delhi district court cases (filed between 2013-16) involving consensual relations, almost all were filed by the girl’s parents against the boy. The seven cases that were filed by the girl, sought to push the boy into formalizing the relationship through marriage. While the PCMA does not envisage a punishment higher than 2 years, the POCSO enables the girls parents to prosecute the daughter’s husband (in cases of self-arranged marriages) for aggravated penetrative assault punishable by more than 10 years – an outcome well beyond the legislative intent of both the laws. In not recognizing the consensual relations involving older adolescents in non-coercive and non-exploitative situations between peers, POCSO has become a legitimate tool of retribution against adolescents who the law was enacted to protect.

4. Contextualising elopements and problematizing socio-legal responses

A qualitative study based on interviews with 15 girls (between 12-19 years) and with nearly 28 personnel drawn from agencies (health care workers, counselors, shelter homes, CWC members etc) in Delhi, Jaipur and Mumbai helps understand the contexts within which adolescent consensual relations are most likely to lead to marriage and assesses the socio legal responses towards such couples. Circumscribed within resource poor settings, their lives are defined by incomplete and poor education, lack of opportunities, and the burden of housework. Like the girls, the boys who are proximate in age, too are pushed into early adulthood, taking on take up poorly paid jobs. Restricted in mobility, deprived of resources, the girls lead isolated lives, which magnify the value and enrichment of their romantic relationship. In this context, compounded by fear of discovery by parents, of forced marriage or occurrence of pregnancy – marriage becomes necessary, and the girls exercise substantial agency in securing it. Instead of supporting the already vulnerable girls, the legal interventions criminalise, institutionalise and reinforce the social stigma - with the husbands invariably getting charged under POCSO, and the girl being sent to a shelter. The external agencies mandated to work with adolescents and children, express unanimous concern about the application of criminal law in adolescent consensual relations, and the criminalization of youth from resource poor settings, for what is age appropriate and natural sexuality. In not recognizing adolescent right to consent, the POCSO is an impediment to sexual health information and services to the young, causing lasting harm in the young lives it impacts.

CONCERNS ARISING

Laws for children have been enacted with the express purpose of protecting the interests and rights across varied contexts. In relation to sexuality within a patriarchal context, the girls have been subject to stringent controls and moral policing, including through denial of mobility, restricted education and child/ early marriage. Increasingly, the laws as they are enacted and interpreted by the Constitutional courts, have sought to replace the notions of duty and parental authority, or honour based controls over girls - to notions of responsible guardianship, that adhere to the best interests of the child. The child is a rights holder, and the parents along with various other state and non-state stakeholders are the duty bearers.

Yet, what is troubling is that in practice, the PCMA and POCSO have increasingly become tools of parental retribution, moral policing against older adolescents. As children, older adolescents require the child protection framework that acknowledges their evolving capacities, their physical, sexual, emotional and psychological development, according to Article 5 of the CRC. Without this key principle governing CRC, a policy framework can harm rather than protect the child. In treating all persons from 0-18 years on par, the law infantilises older adolescents, and denies them recognition of their capacities, or access to resources that help develop and enable those capacities. Hence denial of adolescent sexuality translates not just into criminalization and punitive force, it also denies the adolescent sexual and reproductive health information and services as mandated by the CRC.

Data shows that the PCMA and POCSO are able to intersect to exert draconian controls over adolescents and youth from marginalized and poor populations. Further, the POCSO does not differentiate between abuse and non-coercive and non-exploitative sexual contact between peers or those proximate in age. In treating all sexual contact – including that which is non-coercive and non-exploitative between peers, POCSO erroneously blurs the distinction between abuse and positive sexuality – making sexuality per se taboo and shameful. In the long run, this creates a lasting stigma and silence around sexuality, disabling even adults from speaking out about abuse or expressing consent when they wish to.

RECOMMENDATIONS **(WITH SUPPORT FROM INTERNATIONAL STANDARDS):**

I. Regarding PCMA

1. PCMA provides calibrated responses to three kinds of under-age marriages – those that are impending can be stopped; those that take place can be nullified at the initiative of the party who was a minor; and void ab initio where the marriage was the result of kidnapping, trafficking or violated an injunction order. Given the diversity of trends within underage marriage which includes elopements; and the increasing age of marriage in India (NHFS-IV reports mean age of marriage at 19 years), which signals a corresponding decline in underage marriage - a differentiated and nuanced approach will be in the best interest of the child and their evolving capacities, as well as the contextual realities.
2. Underage marriages in India are largely within resource poor communities, where the lack of opportunities push the adolescents into early adulthood – in terms of the

responsibilities they assume including marriage. To accelerate any shift within this context, requires investments into root causes so as to create meaningful opportunities and develop agency of girls.

3. For an amendment of PCMA to help girls, it should take into account how the law is currently being used, and whether such use of law in practice, supports girls. At the heart of law reform is the well-being of the ‘girl’. Any approach that is focused on reducing numbers of underage marriage (by denying them legal recognition) will compromise girls’ rights who are one of the most vulnerable members within society.
4. The impact of making all underage marriages void has to be examined before introducing it. In Karnataka, not a single marriage has been reported yet – although the state law was amended to render all underage marriages void. News reports indicate the underage girls are still being married. What will their legal status of the girls, their children, their right to matrimonial property be, in the long run? How will law impact their social status within patriarchy where although they assume the social status of wife, without legal recognition. Will the shift render them destitute and without a standing to secure full rights of a wife.
5. According to the *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices [CEDAW/C/GC/31-CRC/C/GC/18] November 14, 2014, at para 20:*
“Child marriage, also referred to as early marriage, is any marriage where at least one of the parties is under 18 years of age... ..As a matter of respecting the child’s evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition.”
6. It is suggested that the amendment to PCMA specify the kinds of marriages that are void and voidable – and also increase the time frame within which a marriage can be nullified. Self arranged marriages/ elopements involving one or both underage parties should remain voidable at the option of parties. For marriages declared void, the responsibility must be placed on local government and administration to ensure that the girl is not rendered destitute and is provided meaningful training and livelihood opportunities.

II. Regarding POCSO

1. Article 5 of CRC mandates that the principle of evolving capacities shall guide the state in delineating and differentiating between rights of the 0-18 population based on their development. It reads: States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.
1. *General Comment No. 20 to the CRC: Rights of the child during adolescence [CRC/C/GC/20], December 6, 2016* “Generic policies designed for children or young people often fail to address adolescents in all their diversity and are inadequate to

guarantee the realization of their rights. The costs of inaction and failure are high: the foundations laid down during adolescence in terms of emotional security, health, sexuality, education, skills, resilience and understanding of rights will have profound implications, not only for their individual optimum development, but also for present and future social and economic development.”

2. The additional rules to POCSO to include conditions under which mandatory reporting is exempt, for professionals, educators, health care providers as well as ordinary citizens, based on the principle of evolving capacities, as well as recognition of non-abusive expressions of adolescent sexuality, which are between peers (within a 3-5 year age differential), that is non-coercive and non-exploitative.

In light of the above draft submissions, MWCD is called upon to organise a wider consultation with stakeholders. PLD offers to share names of organisations from different states and well as more data and readings to inform the deliberations.

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