Ethical Viewpoint

The Prevention of Child Sexual Offences (POCSO) Act and Ethical Considerations for children in Therapeutic Practice

Pragya Lodha[1], Avinash De Sousa[2]

[1]Research Assistant, Desousa Foundation, Mumbai.
[2]Founder Trustee and Consultant Psychiatrist, Desousa Foundation, Mumbai.

Corresponding Author : Dr. Avinash De Sousa
E-mail – avinashdes888@gmail.com

ABSTRACT

The Protection of Children from Sexual Offences Act (POCSO, 2012) was a landmark bill passed in 2012 and it was for the first time ever in India that adult and child sexual offences were demarcated, highlighting the significant markers for identifying abuse among children. The POCSO Act though powerful and a requisite in the times where sexual crimes against children are on a rise, faces ethical concerns with regard to the involvement of medico-legal and psychotherapeutic practices. This article addresses the relevant concerns that require revisiting from the stakeholders in order to ensure for holistic care and justice to children who have been victims of sexual offences. The several concerns that rise with regard to POCSO Act (2012) make it debatable in the setting of medico-legal and psychotherapeutic practice. An essential question that must receive adequate delineation is- 'Whether the legality or well being of the child is of more importance?' Though POCSO takes care of the reporting and undertaken legal proceedings with respect to child sexual abuse, it falls short to ensure the provision of good quality services for health care and mental well being.

Key Words: POCSO, children in therapy, child sexual abuse, India.

The largest child population in the world is inhabited in India with approximately 40% of the population being below the age of 14 years (as is considered to be the age of children by the Indian government). Where on one hand, there has been persisted effort to provide safety, developmental and therapeutic aid, and rehabilitative means; the crimes against children have continually risen to a shameful number, on the other hand. The 21st century has seen emerging problems related to the social, physical and mental well being of the children. The vulnerabilities of children are affected by the socio-economic, political and religious atmospheres that they are surrounded with. The lack of a protection system either due to mis-implementation of national laws and programmes or the absence of protection policies and legislation also renders children vulnerable [1]. Among the multiple psychosocial difficulties that concern children, child sexual abuse is a crime that has been rapidly magnifying in our country. The issue pervades among children, from the age of 6 months to all later developing years of the child.

Child sexual abuse is a growing public health concern for India. It was only after the Protection of Child Sexual Offences (POCSO) Act, 2012, that India had a separate law to distinguish adult and child sexual offences. The POCSO Act (2012) is a landmark law passed against child sexual

abuse in India that criminalizes heinous acts of crime against children below the age of 18 years and provides for stringent punishments to the offenders. The POCSO Act defines a child as anyone who is below 18 years of age and provides protection to all children below the age of 18 years from sexual assault, sexual harassment and pornography [2]. However, there remain clinically debatable issues with regard to the act that may be proposed to impact the well being of the child.

Children entering the therapeutic alliance as victims of sexual violence face blurred confidentiality, autonomy and anonymity as a consequence of legal and ethical commitments. As a requirement, the parents or primary caregivers (in the absence of parents) are involved to know about the abuse and the consequent implications of the same on the child. The provision of care for minors as survivors of sexual violence also falls under medico-legal emergency. The POCSO law makes it mandatory for all kinds of sexual crimes or abuse to be reported to the police. In India, the prevailing socio-cultural, religious and (traditionally) stereotyped practices place a stigma on the acceptance, reporting and seeking care for sexual abuse. The entering of the third party (police/legal agencies) fragments the therapeutic relationship along with the confidence and trust that are established in the relationship.

Thus, due to these social issues, primary and mental healthcare providers face several ethical and legal dilemmas when administering care to such survivors at hospitals or therapy clinics. Added to these are the compulsions under mandatory reporting laws, which oblige healthcare providers to abide by the ethical commitments of care and treatment, and make it mandatory for them to report cases of sexual violence to the police, failing which they face legal sanctions. The complications further with children being victims of sexual violence [3].

There are several questions that surface, questioning the ethical boundaries of the POCSO act and the existing therapeutic relationship between the victim and the therapist. Should it be mandatory for a mental health professional to report rape/sexual assault even if it is without the consent of the survivor and his/her family? Does this not violate the confidentiality of the therapist–patient relationship? Does abiding by the provision of mandatory reporting amount to denial of treatment? Will it prevent patients from disclosing the cause of injuries and/or ill health? Will it deter survivors from seeking mental healthcare, thus putting them at further risk? [3]

There are several ethical concerns that must be considered from a therapeutic, psychological and legal perspective that involve the POCSO Act-

- One of the major limitations of the Act is that it does not mention any statute of Limitation. Should an act committed 10, 15, 20 or 30 years ago be reported when it comes to light. This is very relevant as child sexual abuse has consequences that may need psychological or psychiatric intervention in adult life. The Act does not mention of the rules of reporting or exemption from reporting when a patient reports to a therapist or mental health professional / psychiatrist about abuse or sexual assaults that happened in their childhood, when they come for therapy man years later in life. Some differentiation should have been made between current or recent abuse and abuse which happened a long time ago [2].
- An important issue in regard to reporting of abuse that is missing from the Act is the protection of those reporting the abuse. When a teacher, for example, reports that a student is being abused by a family member (most abuse happens in the family), he or she may face negative consequences, including threat to life; the child too may suffer negative consequences including beatings and further assault etc. The same may be the case for a doctor, mental health professional or a psychiatrist. No protective measures are offered for the person who reports abuse. Obligation to report, without providing protection for the one who reports, including children other than the victim, can be dangerous. Very often the person who reports may be in grave danger and must be

protected. The Act however does provide for protection of child who has been abused [2].

- Another challenge that doubts the ethical implementation of the PPOCSO act is the lack of trained professionals in the legal, medical and police sectors that poses a threat in the process of dealing with the abuser and the victim. In addition, female officers are not always available as staff. This is an added challenge to the safety of female victims in the process of investigation which also falls short of meeting the legal requirements for investigation.
- Not every sexual act between children below 18 is inappropriate. There is much sexual experimentation among children that is part of healthy psychosexual development. The American Psychological Association, the premier association of psychologists in the world, has stipulated in its definition of sexual abuse that there has to be a difference of five years between a child and a perpetrator for a sexual act to be considered abuse [2].
- The Act does not specify regarding adolescents who have be below 18 and caught in sexual experimentation consensually. This is a very important lacuna as many adolescents in schools and colleges engage in consensual sexual acts and the parents of a particular adolescent may be implicate another adolescent by filing a complaint under the provisions of the Act. The Act does mention that if adolescents are found guilty under act, then the Juvenile Justice Act (2000) would apply to them [3].
- The borderline traits which may be seen among adolescents are not a consideredaspect in the phase of inquiry and prosecution of a case of child sex abuse. This has an important standing for the accused in the process of incrimination. The incrimination of the accused takes place without proof and on the sole base of suspicion which may not be sufficient evidence to prove him/her guilty.
- Treatment of offender as part of the rehabilitation ad reintegration into society leaves the criminal without a corrective understanding. Psychiatric treatment in cases of sexual or behavioural disorders may help the abusers learn about their maladaptive behaviours and thus, take to corrective means in the coming future.

Questions are also raised pertaining to the very concept of mandatory reporting in the absence of good-quality services for protection or additional options for survivors to heal from abuse.
Section 19 of the POCSO (3) states that any person (including a child and mental health professional) who fears that an offence under this Act is likely to be committed, or has knowledge that such an offence has been committed, shall inform the special juvenile police unit or the local police. Section 21 of the POCSO states that a person who fails to report the commission of an offence under subsection (1) of section 19 shall be punished with imprisonment of either description that may extend to six months, or with a fine or with both.

The new role that mental health professionals are required to play (mandatory reporting) is most likely to jeopardize their therapeutic role. Where on one hand, there needs to be a social awareness about sexual crimes and thus reporting is important; there seems to be a lack of sensitivity in approach and lack of training in the police personnel that hampers the process. Psychotherapists agree that such a procedure may deter the clients from taking to therapy or any other health care for help. There is research evidence that women are likely to not access healthcare if the requirement for mandatory reporting is enforced. Studies from the United States have shown that non-white women are less likely than others to support mandatory reporting.

Possible racial discriminatory attitudes along with the fallings of the criminal system are also partly held responsible to disrupt the well being and justness. Similar biases can be observed in the context of women belonging to the minority communities in India, with those subjected to violence being afraid of mandatory reporting. In India, there is a dearth of services for the survivors of violence and in the absence of these the application of mandatory reporting should not violate the victims' right to autonomy and agency.

Making it mandatory for hospitals to report all cases of rape and sexual assault to the police under section 357C,CrPC and section 21, POCSO (3), respectively, is in contradiction of various existing legal provisions such informed consent (Section 164A of the CrPC, amended in 2005), voluntary reporting (POCSO and CLA) and right to privacy (Article 21, Constitution of India). The mandatory reporting has also seen to conflict with medical ethics- violation of informed consent, threat to confidentiality and clashing obligations [3]. These have implications on the therapeutic involvement of the client since working effectively with child sexual abuse involves for holistic medico-legal and psychological interventions.

In conclusion, the documentation of an "informed refusal" must be mandated in the situations where mandatory reporting is disagreed upon. In the long run, the well being of the client must be considered to ensure his or her integration and optimal functioning on a day to day basis in competence to the fulfillment of legal proceedings and thus, adequacy of quality treatment provision must not be compromised upon under any circumstances. What is more important for the client- must be kept in mind while taking a call for mandatory reporting- Is the client willing to report his or her case and to what extent will his or her approach to seek therapy or health care will consequently be affected? Will the process of copping with trauma be compromised? Thus, in cases in which doctors feel that informing the police would result in the denial of treatment to the patient, documenting "informed refusal" is a way forward.

Efforts must be made to refer cases to services that are designed to provide protection to survivors and heal and reintegrate them into their daily routine of life. In the process, the violence would get reported to the protection services and not mandatorily to the police. In order for such a change to occur, there is a need to address the absence of comprehensive and quality services for the protection of victims.

Ethical problems in children is an area of sensitive concern, whether legality of psychotherapy/psychiatric treatment. They relate to the nature of the child as a developing being, with changing morals, cognitions and emotions, and as a dependent being, reliant on adults - whether parents or professionals.

REFERENCES

1. Seth R. Child abuse and neglect in India. Indian J Pediatrics 2015;82(8):707-14.
2. Sagar R. Child sexual Abuse: Need for a preventive framework in Indian context. J Ment Health Hum Behav 2014;19(2):53-5.
3. Sowmya BT, Seshadri SP, Srinath S, Girimaji S, Sagar JV. Clinical characteristics of children presenting with history of sexual abuse to a tertiary care centre in India. Asian j Psychiatry 2016;29;19:44-9.

RECOMMENDED FURTHER READING

1. Agarwal SS, Kumar L, Chavali KH. Legal and ethical complexities in the examination of victims of sexual assault in India: A medical practitioner's perspective. J Med Soc 2017;31:72-6
2. Belur J, Singh BB. Child sexual abuse and the law in India: a commentary. Crime Science: An Interdisciplinary Journal 2015;4(26):1-6.
3. Bhaskaran S, Seshadri SP. Ethical Issues in Counselling and Psychotherapy Practice: Walking the Line. Singapore: Springer ; 2016.
4. Green J, Stewart A. Ethical issues in child and adolescent psychiatry. J Med Ethics 1987;13:1-11.

****

Acknowledgements - Nil
Source of Funding – Nil
Conflict of Interest – Nil