

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES: PERSPECTIVES AND CHALLENGES

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ABSTRACT

Children are considered to be the gift of god but still it is very disheartening to know that a large number of children are vulnerable to child sexual abuse. Children are not only being sexually abused by strangers but a major chunk of it begins from home i.e., relatives, neighbors, servants and even at school, due to which most of the cases are not reported. In May 2012, India's Parliament took a major step with the enactment of **THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (POCSO) Act**. Under this law, all such child sexual abuse is considered to be specific Criminal Offences. POSCO act focuses on protection of children from abuse and exploitation and upholding their children. It is the most effective tool for the empowerment for the development of children. The Act has revised the definitions and the older concepts and also introduced new concepts. The concept related to 'non- penile penetration' is discussed in the act. In our paper we will be discussing about the ways the children are abused, the enactment and effectively of the Act, and the challenges that are faced by the act during the achievement of its outcomes. We also bring forward some of the solutions that we think should be incorporated.

INTRODUCTION

Child sexual abuse in the past had been a hidden problem in India. A 'Study on Child Abuse: India 2007' survey by the Ministry of Women and Child Development¹ showed that 53% of the children in India had been sexually abused. When asked to the public whether there should be any specific law against such crime, 99.6% people responded, "yes". This showed that there was need for the law, which eventually led to the enactment of "The Protection of Children against Sexual Offences (POCSO) Act, 2012". The POCSO Bill was passed by both the houses of Parliament 22nd May, 2012 and subsequently the Act came into effect on 14th November, 2012

¹Ministry of Women and Child Development, Government of India study on Child Abuse: India 2007, <http://cocd.inc.in/childabuse.pdf>

i.e., Children's Day. The data² with the Government showed that there was an increase in the cases against children related to sexual offences. The interest of the child both, as victim and as well as witnesses have to be safeguarded. Child sexual abusers could be anyone even parents, relatives, neighbours or strangers. Many cases go unnoticed due to lack of awareness and social negligence. The 2007 report provided that 53.22% children face one or more forms of sexual abuse. The study also revealed that the sexual abuse of boys is higher when compared with girls. The passing of time the pain and physical injury do heal but the psychological and medical consequences can prevail to the entire life of the child. In the case of **Sheela Barse and another v. Union of India**³, the Hon'ble Supreme Court declared that a child is a national asset. In the Indian scenario a child requires proper care, love, affection and nourishment but experience shows that the children are subjected to maltreatment in some situations.⁴ In fact, the future of the nation depends upon the children, but even then the children are vulnerable to abuse, negligence and exploitation. The abusers take advantage of the vulnerability of the children such as poverty, disability.

After the uncontrolled increases in the number of cases related to child sexual abuse, there was an intense call for an act against the child sexual abuse. As a result the POCSO act, 2012 was brought into effect. The act provides clear definition of any penetrative and aggravated penetrative sexual assault, sexual assault, sexual harassment, and using a child for pornographic purposes. POSCO act establishes special codes for speedy trial of sexual offenses against the children.

- **WHO IS A CHILD?**

The age of the child is a sole factor for determining who is a child. There are several legislations in India that provides the age of the child. POSCO Act defines 'child' as any person below the age of eighteen years of age⁵.

- **CHILD SEXUAL ABUSE:**

The World Health Organization defines child sexual abuse as: "the involvement of a child in sexual activity that he or she does not fully comprehend and is unable to give informed

²Ministry of Women and Child Development, Government of India study on Child Abuse: India 2007, <http://cocd.inc.in/childabuse.pdf>

³AIR 1986 SC 1873: (1986) 3 SCC 596: 1986 All LJ 1369

⁴Dr. S.C.Tripathi & Vibha Arora, Law Relating to Women &Children.

⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4557243/>

consent to, or that violates the laws or social taboos of society. Child sexual abuse is evidenced by this activity between a child and an adult or another child whose age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person.”⁶Child Sexual Abuse is a kind of child abuse in which adult uses the child for sex stimulation.⁷Child Abuse is the violation of basic human rights of the child. Child sexual abuse involves both touching and non-touching activities.

Touching activities includes:

- Touching a child’s genitals or private parts.
- Making a child touch someone else genitals.
- Have sex.
- Insert objects or body parts like finger tongue or penis inside the vagina, in the mouth or in the anus of the child.

Non-touching activities includes:

- Showing pornography.
- Encouraging a child to watch or hear sexual acts.
- Exposing an adult genital to a child.
- Watching a child undress or use bathroom.

It is really sad to know that a large number of child sexual abuses go unreported and only a few cases are filed. Not only the family but also the police, doctors and other authorised persons dismiss the complaints. Victims may be re-traumatized by the public when asked about what happened, how they were abused and other irrelevant questions. These questions and responses of the adults make the child more disturb rather than providing assistance and comfort to them. Generally the persons who abuse the children are known the child or are the ones who have been trusted and given responsibility. According to a survey conducted by the

⁶World Health Organization, *Report of the Consultation on Child Abuse Prevention*, World Health Organisation (1999).

⁷“Guidelines for psychological evaluations in child protection matters, Committee on Professional Practice and Standards, APA Board of Professional Affairs.” *The American Psychologist* 54(8): 586-93. August 1999. doi:10.1037/0003-066X.54.8.586. PMID 10453704. “Abuse, sexual (child): generally defined as contacts between a child and an adult or other person significantly older or in a position of power or control over the child, where the child is being used for sexual stimulation of the adult or other person.”

Government in 2007⁸, the result showed that the abusers were the parents themselves in 83% of the cases.

Child sex abuse complaints are lodged with the Special Juvenile Police Unit (SJPU) or the local police who is vested with the responsibility of providing protection to the victim. POCSO immediately responded with measures to aid and restitution for the victim of the abuse. It also provide for special courts for the Brick Habeas corpus against the offenders. In a case, a victim was sexually abused by her step father at the age of sixteen. Initially, he started holding her hands inappropriately and started getting close to her. Later, the mother of the girl found out that he had placed hidden cameras in the washroom and collected the recordings. He later blackmailed his wife to get him married to the girl else he would viral the videos on the internet.

- **PERSPECTIVE OF A CHILD:**

Safety is one of the main concerns of the child. A child needs to be assured that he/she is safe, should be dealt with love and care nor should be degraded in the eyes of his parents. The child needs to be believed. Usually, such matters are not discussed within the family as the children hesitate to discuss the matters as they fear that the blame would put on them. Often abuser use psychological methods to coerce the children. Sometimes, the children and the families fear that the criminal justice system would treat them unsympathetically during interviews by the authorities. Victims are also ill treated by the doctors who examine them for evidence of the offences.

In a case, a victim, belonging from a lower caste was raped when she was sixteen years old. When she went to the police for filing the case, she was told to shut her mouth and go home by the police officer as the police doubted that she herself chose to be the victim of the crime.

In a case where the victim was raped had to undergo a medical examination. The victim informed that during the examination the doctor removed her clothes and inserted a single finger inside her vagina and the doctor told that “it was just a small rape, it’s no big deal”.

- **PROTECTION OF THE CHILD BY PARENTS AND NGO’S:**

The children at times feel the need of parents to protect them from the sexual abusers in the society. But what really happens is that the parents either avoid the matter or become very

⁸Ministry of Women and Child Development, Government of India study on Child Abuse: India 2007.

over protective rather than teaching the child how to protect themselves. Parents usually try to quieten the matter so that it does not risk in spoiling their child`s future or as a matter of their pride and prestige of the family. If the child has not spoken about the incident and due to any reasons tries to hide the matter, then the parents can sense by the behaviour of the child that there is something wrong with the child. Some behavioural indications can be that there is an abrupt changes in the behaviour of the children like the child harms himself, talks about suicide, or he is unwilling to go home, acting out sexually, wearing too many layers of clothes irrespective of the weather, disturbed sleep patterns or repeated nightmares, and infantile behaviour such as bedwetting, thumb sucking or crying excessively⁹.

About the ACT

Before the bill was passed cases of child sexual abuse were dealt under the section of IPC such as Sections 375¹⁰, 376¹¹, 354¹², 509¹³. The earlier law required a sexual intercourse for completing the offence of rape. The law on the point of age also offered a grey area in its determination. Quotes were helpless in holding accused guilty for a graver offence if the penetration was found to have been made by non-penile organs or objects. This point was made clear in **Maya Tyagi's Case** where the act of shoving a lathi in the sexual organs of the woman did not account in the offence of the rape.

POCSO Act highlights the issue related to the age of victim and accused and the challenges faced when they are child. Section 34 of POCSO Act explained that an offence under the act is committed by a child and the child shall be dealt under the provisions of Juvenile Justice (Care and Protection of Children) Act 2015. Section 94 of JJ Act¹⁴ provides the standards to determine the age of 'child' in conflict with law. Such an act is absolutely necessary in today's scenario; the inclusive nature of the Act makes it more significant. Contrary, to the other acts, this Act has an exceptional 'clause' which says that, an individual accused of sexual offence to children is guilty unless proven guilty.¹⁵

⁹<https://www.slideshare.net/Drswapnilpsychi/pocso-act>

¹⁰IPC defines Rape

¹¹ IPC provides for Punishment for Rape

¹² IPC defines Assault or criminal force to women with an intent to outrage her modesty

¹³IPC defines word, gesture or act intended to insult the modesty of a women

¹⁴ Juvenile Justice (Care and Protection of Children) Act 2015

¹⁵ <http://www.mapsofindia.com/my-india/government/the-protection-of-children-from-sexual-offences-act-2012-pocso>

Under the POCSO Act, Child Welfare Committee (CWC) plays an important role. Any case filed under the act has to be reported within 24 hours to CWC. The CWC takes into account the opinion of the child and provides their decision within three days as to where the child should remain with the family or be sent to an institution. The CWC permits a person to assist the child during investigation, pre-trial, trial and post-trial. If a child commits any offence, he shall be dealt under the Juvenile Justice (Care and Protection of Children) Act, 2000.

This act is more effective than the previous provisions of the Penal Code as it appoints Special Public Prosecutors, Special Juvenile Courts, provides a support system from Police Administrator and also provides an arrangement for victim child for their special protection and care. The act also provides some child friendly procedures such as that no child shall be detained in the police station, The statement of the child has to be recorded as spoken by the child, the child should be provided Frequent breaks during trial, the Child should not be called repeatedly to testify, the female victims shall only be looked after by lady doctors, and special courts conduct in-camera trials without disclosing the identity of the victim¹⁶.

The Act empowers the national commission and the state commission for safeguarding Child Rights constituted under the Commissions for Protection of Child Rights Act, 2005, for examining and implementing the provisions of POCSO. On February 7, 2013 the Supreme Court directed all the states of the country to ensure that the regulatory and examining bodies are constituted and made functional. In some state like Punjab and Haryana, the commissions are non-existent or non-functional. It is now that the state governments should implement this advantageous mandate and create an effective machinery to check heinous offences of gross sexual abuse against children.¹⁷

The POCSO Act introduces various categories of offences such as aggravated penetrative sexual assault, sexual assault and sexual harassment and to safeguarding the well being and interest of the children. The bill is proposed with a vision to remove and substitute the word 'rape' with technical and legal terms. The term 'aggravated' shall be applied in such cases where the offender is in the position of authority. This can be explained in the case of

¹⁶ http://timesofindia.indiatimes.com/city/goa/Analyzing-the-POSCO-Act-2012/articleshow/19718160.cms?utm_source=toiaandroidapp&utm_medium=Whatsapp&utm_campaign=show

¹⁷ <http://www.pressreader.com/india/hindustan-times-jalandhar/20150521/282402692971348/TextView>

Ruchika Girhotra¹⁸ where Ruchika, a 16 years old girl was sexually molested by Mr. Rathore, the DGP of Chandigarh.

OFFENCES

The offences that have been defined in the POCSO Act are being discussed below:

- **Penetrative Sexual Assault**

To meet the requirements of increased sexual abuses against children a new law has been legislated in POCSO Act. This law is subjected to 'body penetration' to a minor child. POCSO Act is the first act which has made a non-penile penetration same as penile penetration in a women's sexual organs. This Penetrative Sexual Assault envisages four types of acts on the part of the accuser i.e., penetration, insertion, manipulation and application. "Penetrative Sexual Assault" means when a male penetrates any object or his penis or any part of his body into the child's private parts or when he applies his mouth to the private organs of the child or makes the child do the same either to him or any other person. Section 4 of the POCSO Act provides the punishment for the offence of Penetrative Sexual Assault which is imprisonment for not less than seven years which may extend to imprisonment for lifetime, and liable for fine.

- **Aggravated Penetrative Sexual Assault**

The aggravated form of sexual offence of Penetrative Sexual Assault committed on children is known as Aggravated Penetration Sexual Assault. It is an offence of Penetrative Sexual Assault committed in those special aggravating circumstances mentioned in Section 5 of the POCSO Act. When the penetration is committed by a trust worthy person of child then such offence is treated as "Aggravated Penetrative Sexual Assault". Section 6 of the POCSO Act provides punishment for the offense of Aggravated Penetrative Sexual Assault i.e., imprisonment for not less than ten year which may extend to imprisonment for life, and liable for fine.

- **Sexual Assault:**

¹⁸ <https://indiankanoon.org/docfragment/30822518/?formInput=ruchika%20girhotra>

Sexual assault of children as a challenge is explained under **Section 7** of the POCSO Act, 2012. It says that whoever, touches the vagina, penis, anus or breast of child or makes the child touch someone else private parts of such or any other person or does any act with a sexual intention, which involves physical contact without penetration is called sexual assault. POCSO Act solves the problem satisfactorily than the previous law. The old law forms the basis of the new one. The new law uses simple words. It is important to note that the concept of 'Sexual Assault' is a new issue in law which was introduced by the POCSO Act. This act is more suited for gender equality. The punishment for such offense is imprisonment for not less than three years which may also extend to five years with or without fine.

- **Aggravated Sexual Assault**

Section 9 of the POCSO Act defines "Aggravated Sexual Assault". It means sexual assault committed by any policeman, armed forces, public servant, and manager of a hospital or an institution on children.

- **Abetment**

Section 16 of the POCSO Act defines "Abetment of an offence". It says that a person abets an offence when he instigates any other person to do that offence or engages with one or many other persons in any conspiracy for committing that offence or intentionally aids, by any act or illegal omission, the committing of that offence. Punishment for abetment is provided under section 17 of the POCSO Act i.e. imprisonment of any description provided for the offence, for a period which may extend to one-half of the imprisonment for lifetime.

- **Sexual Harassment and Pornographic Offences**

The concept of Sexual Harassment is revised in the POCSO Act. The traditional law covered only those aspects of Sexual conducts which have been covered presently under Sexual Assault in this Act. It is punishable to show pornography to children under Sections 13, 14 and 15 of POCSO Act.

Sexual Harassment may include:

- a. Staring or leering
- b. Unnecessary touch or closeness
- c. Unwelcomed jokes or comments
- d. Sexual nature's insults or taunt
- e. Questions or statements about private life

- f. Displaying magazines or screen savers of Sexual nature's
- g. Sending email and text messages which are of sexually explicit nature
- h. Inappropriate advances on social networks
- i. Using sexually explicit internet sites
- j. Repeated requests for sex or unwanted dates
- k. Behaviour which is considers being a criminal offence, such as physical assault, sexual assault in decent exposure stalking.

CHALLENGES FACED BY THE ACT

The challenges that can be highlighted in the Act are Consent, Medical Examination, Treatment cost, Child Marriage, Consented Sexual intimacy, training. If a child does not wish to undergo a medical examination but if the family or the authorities are insisting then the Act remains silent and does not give clear direction, the consent of the child is an important step. Under section 27(2)¹⁹, it mandates that in case of female victim, she must be treated and examined only by a female doctor. The law casts a legal obligation to the medical fraternity to provide free medical care to the survivors. Sexual contact between 2 adolescent or between an adolescent and an adult, it is considered illegal under the act²⁰, same way consummation of child marriage is also considered illegal. There is a need to provide training to the teachers, advocates, doctors and other authorities. Most of the cases go unreported mainly due to family pressure and embarrassment, whatever the case may be there must be mandatory reporting of the offences.

POCSO comes into effect only when complaint regarding the child sexual abuse is lodged. It also furnishes instructions to safeguard the child's identity. The Act also describes how the statement has to be taken from the victim so that it does not further disturb the child psychological state. In such situation not only the victim of the abuse but also the family of the victim needs societal and psychological support, but, the society rather than supporting them points a finger and blame them for the happenings. For the successful implementation of the POCSO the State Government needs to furnish clear codes and principles that need to be strictly implemented by the medical professionals and other officials involved in the case before, after and also during the trial. But no such steps have been taken so far. There is need

¹⁹POCSO Act, 2012

²⁰POCSO Act, 2012

of such program to exist that mandates extensive training programmes for the authority handling child sex abuse cases. The act lays down provisions related to compensation which includes lots of educational and employment opportunities along with disability, disease or pregnancy as an outcome of the abuse by the Special Court, which shall be paid during and also after the trial ends. It so happens that the protectors themselves turn into predators.

The recent decision of the cabinet in a bill to reduce the age of consent for sex to 16 years will mean that the protection given under this law to protect children from sexual crimes will be restricted to the children who are 16 years of age. There is a fear that this would end up taking away safeguards available to victims under the POCSO Act, especially girls in the 16-18 age bracket.²¹

CASE STUDIES

- **Ganshayam Misra v. State**²² - In this case, a minor girl aged 10 years was raped by her school teacher, the high court convicted the accused under section 376 IPC.
- **Tukaram and Anar. v. State of Maharashtra (Mathura rape case)**²³ - In this case, Mathura a minor girl had gone with others to the police station for recording of statement, where she was raped by two policemen. The session court acquitted the accused on the grounds that the victim herself surrendered her body to the police constable on her will. The medical report showed only the old injury that they found on the hymen and no semen stains were traced, hence the prosecution failed to prove the case. Whereas the high court convicted the accused and held that merely the submission of the body cannot be equated with the will. On the other hand the Supreme Court later set aside the conviction on the grounds that there was no fear of death or hurt. Therefore sexual intercourse is not proved to amount to rape.
- In the case of **Sideshwar Ganguly v. State of West Bengal**²⁴, the appellant who was the secretary of Nari Kalyan Ashram in Calcutta was alleged to have committed on some of the inmates. The appellant defended by saying that he was being framed in the case by the police

²¹ http://timesofindia.indiatimes.com/city/goa/Analyzing-the-POSCO-Act-2012/articleshow/19718160.cms?utm_source=toiaandroidapp&utm_medium=Whatsapp&utm_campaign=show

²² AIR 1957 ORRISA 78

²³ AIR 1979 SP185

²⁴ AIR 1958 SC 143; 1958 Cr LJ 273; 1958 SCR 749

with the help of the inmates. 23 witnesses were examined against him including 2 victims of the rape. In the documentation of their testimony, a deaf and dumb girl was questioned who gave evidence by signs. After the procurement of the evidences, the court held that the Secretary was guilty of rape and he was punished accordingly.

- In the case of **Sakshi v. Union of India**²⁵, the Supreme Court provided the directions regarding the manner in which the trial must be conducted in child sexual abuse cases. The court held that a screen or any such arrangement must be made so that the victim and the witness do not see the accused, the questions put in cross examination on behalf of the accused as they directly relate to the incident shall be given in writing to the presiding officer, who in turn would explain the victim in non- embarrassing manner. The victim during the testimony shall be provided sufficient breaks as and when required.²⁶
- In the case of **Sudesh Jhaku v. K.C.J.**²⁷, K.C.J. was a married man with 3 daughters the youngest being 'B' of 6 years of age. B was being taken by his father to his friends, who would consume alcohol, watch "blue films" and revel in sex orgies. During those naked games KCJ would make his own daughter 'B' consume alcohol, remove clothes and thrust his fingers and bottles in her vagina and anus. SJ²⁸ filed a complaint against KCJ under the Section 376²⁹, 377³⁰, 354³¹, 366A³² read along with Section 109³³ of IPC. The trial Court charged him under the Sections 354, 377 and 506³⁴ of IPC, the complainant was not satisfied and felt that the accused should have been charged under IPC Section 376 and 366A also. Finally, the Court held that the primary test remains to be the language employed in the Act³⁵.the duty to mould or creatively interpret the legislation does not thus arise. Subsequently, the view of Delhi High Court was challenged before the Supreme Court and it was decided in **Sakshi v. Union of India**.³⁶

²⁵AIR 2004 SC 3566: 2004 AIR SCW 3449: (2004) 5 SCC 518

²⁶ <https://indiankanoon.org/docfragment/380556/?formInput=sakshi%20v%20union%20of%20india%20>

²⁷1998 Cr LJ 2424:1996 (62) DLT 563:1996 (38) DRJ 22(Del)

²⁸The mother of the child 'B' and wife of KCJ

²⁹ IPC, Punishment for Rape

³⁰IPC, Unnatural offences

³¹ IPC, Outraging the modesty of the women

³² IPC, Procurator of Minor girl

³³ IPC, Punishment for abetment

³⁴IPC, Punishment for Criminal Intimidation

³⁵ <https://indiankanoon.org/doc/1525708/>

³⁶ <https://indiankanoon.org/docfragment/380556/?formInput=sakshi%20v%20union%20of%20india%20>

SUGGESTIONS

Children usually hide the matters where they feel that they have been touched inappropriately and even serious matters due to lack of communication, understanding and fear of being misjudged. In such situations the following situations need to be considered:

Parents should teach their children the names of their body parts so that with the knowledge the children are able to communicate to others what actually happened and everyone will be able understand it and this would minimize the misinterpretation. The schools should provide the children with legal education along with sex education and teach them self defence so that they can fight and protect themselves. Also the students should share with the parents and siblings what they have learned at school so as to make them also aware about it. Parents should convey messages about values and beliefs related to sexuality to their children. We start learning about sexuality from the moment we are born and continues till the life ends. So, it is not a matter of shame, in fact it is good to talk about sexuality at an early stage as it makes the child aware. These messages will have a long-lasting impact on the children. Parents should also tell their children that they have the right to say 'No' if they feel uncomfortable or wrong. For instance- if a 5-year-old son does not want to kiss his uncle. The child's decision needs to be respected and accepted by the others. Parents must teach their children how to differentiate between the appropriate and inappropriate things. Like a friend parents must be approachable to their children. They must make their children believe that they can talk to you at any time and about anything. In fact, Parents should try to be consistent and reliable source where children can go through any number of times with any number of questions. Develop a habit in children to tell someone, especially parents, if they are scared, hurt or have experienced an uncomfortable touch. Moreover, assure the child that whatever happens you are there to support and stand by their side so even if they do anything wrong or any wrong happens with them, they should first of all inform you. Parents should know where and with whom the child spends their time. It is necessary to report the wrong and also create a database of vulnerable children and child abuser. Age of the children should be determined on the basis of Birth Certificate or Class 10th Certificate from examination board and in absence of the certificates on basis of ossification test or any other medical age determination test.

CONCLUSION

Our paper analyses the issues and challenges related to sexual offences against the children.

The prevalence of child sexual abuse cases is found to be high in India. Child sexual abuse is a global problem with life-long outcomes and even in the low prevalence areas; there are large number of victims. Although, a plethora of documents in the form of provisions have been laid down but somewhere it's not fulfilling the criteria in making full justice to the child sexual abuse victims and abusers are successful in escaping from their crime. A culture of silence around this major issue, rampantly increasing of child sexual abuse cases, no proper implementation of law and lack of adequate mechanisms and proper criminal justice system especially in underprivileged sections to control sexual abuse of children are some of the significant challenges of this modern era. Therefore, stringent measures should be taken in order to prevent and control child sexual abuse. Apart from statutory provisions and legislations by perceiving warning signs of the children, parents can prevent the child from being abused. Our Indian legislative has various legislations for the problems related to children but no law is implemented effectively to protect the children from the abuse and other related issues. This implies that multiplicity of laws is not a boon but a ban. As children are not aware about their rights and the laws made effective for their rights, it is the responsibility of the parents and the elders to see to that the laws are been made effective enough. Not only the laws can **protect** the rights of the child but it also depends upon the mindset of the society which needs to be changed. Legislations are just a means and way towards the betterment but walking on the way to achieve the goal is the implementation of the laws³⁷. Hence, the government should focus on the implementation by improving the implementation process.

“Injustice is Relatively easy to bear; it is Justice that Hurts.”

-H.L. Mencken

³⁷Dr. Nuzhat Parveen Khan, Child Rights and the Law