

FIGHT AGAINST CHILD SEXUAL ABUSE THROUGH POCSO ACT, 2012: AN ANALYSIS

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Abstract

“There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected that their welfare is protected, that their lives are free from fear and want and that they grow up in peace”¹

Child abuse is doing something or failing to do something that results in harm to a child or puts a child at risk of harm. Child abuse can be physical, sexual or emotional. **According to WHO:** “Child abuse or maltreatment constitutes all forms of physical and/ or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child’s health, survival, development or dignity in the context of a relationship of responsibility, trust or power.” In This Article we will primarily focus on child Sexual Abuse and its Social legal Implication.

The **WHO** defines Child Sexual Abuse (CSA) as the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws or social taboos of society.² CSA includes an array of sexual activities like fondling, inviting a child to touch or be touched sexually, intercourse, exhibitionism, involving a child in prostitution or pornography, or online child luring by cyber-predators. The trauma associated with sexual abuse can contribute to arrested development, as well as a host of psychological and emotional disorders, that some children and adolescents may never overcome.

The POSCO Act was initially enacted to address criminalizing a range of acts including child rape, sexual assault, sexual harassment, and pornography involving a child less than 18 years of age. The law mandates setting up of Special Courts to facilitate speedy trials in Child Sexual Abuse cases. Undoubtedly, the passing of POCSO has been a major step forward in securing children’s rights. The letter and spirit of the law, which defines a child as anyone under 18 years of age, is to protect children from sexual abuse.

Keywords: Child Sexual Abuse, Exploitation, Harassment, Pornography, PocsO Act

¹ Foreword by Kofi A. Annan Secretary-General of United Nations - “*In the State of World’s Children 2000*”.

² World Health Organisation. Report of the consultation on child abuse prevention (WHO/HSC/PVI/99.1). Geneva(Switzerland): World Health Organisation, 1999.

Introduction

As the world is developing rapidly, sexual offences against humans is increasing too. The scope of sexual offences in current world, is not only restricted to adults irrespective of their age or gender but it has extended to minors who are below the age of 18 years. Nowadays, sexual abuse of children (sexually, physically or mentally) is very common around the world, but it is increasing and reported at an alarming rate in India. In spite of the fact that sexual offences is considered as an offense under the Indian Penal Code yet the law was insufficient in perceiving and rebuffing other sexual offenses, i.e., child sexual abuse, grave sexual offences, and child pornography therefore POCSO (Protection of Children from Sexual Offences) Act was introduced in 2012. Child abuse report by MWCD (2007) unveiled that every second child has been sexually assaulted in India. This report also revealed that India has the doubtful difference of having the world's biggest figure of sexually abused children with a child below 16 years raped every 155th minute, a child below 10 every 13th hour and one in every 10 children sexually abused at any point of time.

Child sexual abuse is a form of sexual exploitation of a child and thus forms a violation to the basic human right of a child. Sexual Abuse is an inappropriate Sexual behavior with the child which comprises a number of acts such as fondling a child's genitals, oral contact with the genital part of a child, forced vaginal or anal intercourse, making child fondle on adult genitals, exhibitionism & Pornography etc. Sexual Abuse of Child may be defined as any Sexual relation established between the child and an Adult, in which the child is generally used as a Sexual object for gratification of the olden person's need or lust and to which the child is not given his/her consent.

Definition of child sexual abuse formulated by the 1999 WHO³ stated that:

“Child sexual abuse is the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, 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 who by 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.

This may include but is not limited to:

- The inducement or coercion of a child to engage in any unlawful sexual activity;
- The exploitative use of a child in prostitution or other unlawful sexual practices;
- The exploitative use of children in pornographic performance and materials”.

³ World Health Organisation. Report of the consultation on child abuse prevention (WHO/HSC/PVI/99.1). Geneva(Switzerland): World Health Organisation, 1999.

The definition of sexual abuse of children is best understood when the problem is related to pedophilia.. The term Pedophilia refers to any adult who habitually seeks the company of a child/children for the gratification of his/her sexual needs. The word pedophilia is derived from two Greek words “pedo” means “child”; and “philia” means “love for”. The United Nations has also defined child sexual abuse as contacts or interaction between a child and an older or more knowledgeable child or adult (a stranger, sibling, or person in a position of authority, such as a parent or a caretaker) when the child is being used as an object of gratification for the older child’s or adult sexual needs. These contacts or interactions are carried out against the child, using force, trickery, bribes, threats or pressure⁴.

There are four types of Sexual Abuse namely exposure which is viewing of sexual acts and exhibition, molestation, sexual intercourse on a chronic basis and rape in which there is acute assault intercourse. Rape can be of two kinds- first one is intra familial and extra familiar i.e. rape by known person or person in authority and rape by a stranger. Child rape is a great social stigma, which shows complete degeneration of moral values in society. In some cases the victims of rape are not even accepted at home. The victim is either too traumatized by the experience or the parents, out of concern for their child’s future, hush up the matter. The rapist knows that there is a high chance of his outrage against the minor not being discovered. This acts as a major motivating factor. Many victims do not go to the police out of fear of adverse publicity and unnecessary harassment. Apart from the delay or even absence of justice, the victims have to face similar incidence every now and then. When the victims do not find any safe place in society and do not see any future prospects, they enter into the den of prostitution.

Thus, child sexual abuse is a dark reality. It has become a common phenomenon and majority of cases go unnoticed and unreported due to innocence of the victims, stigma attached to the act, tardy and insensitivity of the investigating and law enforcement agencies. An adult who engages in sexual activity with a child is performing a criminal and immoral act which can never be considered normal or socially acceptable behavior. Article 34 and 35 of Convention on the Rights of the Child provides right to protect the child from all forms of sexual exploitation and sexual abuse.

Childhood sexual abuse infringes on the basic rights of human beings. Children should be able to have sexual experiences at the appropriate developmental time and within their control and choice. The nature and dynamics of sexual abuse and sexually abusive relationships are often traumatic. When sexual abuse occurs in childhood it can hinder normal social growth and be a cause of many different psychosocial problems.

Perpetrators of child sexual abuse

The majority of perpetrators are someone the child or family knows. As many as 93 percent of victims under the age of 18 know the abuser. A perpetrator does not have to be an adult to harm a child. They can have any relationship to the child including an older sibling or playmate, family member, a teacher, a coach or instructor, a caretaker, or the

⁴ UNICEF, 2001.

parent of another child. Child sexual abuse is the result of abusive behavior that takes advantage of a child's vulnerability and is in no way related to the sexual orientation of the abusive person.”

Abusers can manipulate victims to stay quiet about the sexual abuse using a number of different tactics. Often an abuser will use their position of power over the victim to coerce or intimidate the child. They might tell the child that the activity is normal or that they enjoyed it. An abuser may make threats if the child refuses to participate or plans to tell another adult. Child sexual abuse is not only a physical violation; it is a violation of trust and/or authority.

What are the warning signs?

Child sexual abuse isn't always easy to spot. The perpetrator could be someone you've known a long time or trust, which may make it even harder to notice. One can Consider the following warning signs:

Physical signs:

- Bleeding, bruises, or swelling in genital area
- Bloody, torn, or stained underclothes
- Difficulty walking or sitting
- Frequent urinary or yeast infections
- Pain, itching, or burning in genital area

Behavioral signs:

- Changes in hygiene, such as refusing to bathe or bathing excessively
- Develops phobias
- Exhibits signs of depression or post-traumatic stress disorder
- Expresses suicidal thoughts, especially in adolescents
- Has trouble in school, such as absences or drops in grades
- Inappropriate sexual knowledge or behaviors
- Nightmares or bed-wetting
- Overly protective and concerned for siblings, or assumes a caretaker role
- Returns to regressive behaviors, such as thumb sucking
- Runs away from home or school
- Self-harms
- Shrinks away or seems threatened by physical contact

Implications

The trauma of the abuse on the victim is devastating. Sometimes this becomes a severe blow to the individual's personality. Though CSA can ruin their childhood, the impact can last a lifetime. There are both short term and long term effects. But, every child and every situation is different. Thus, it is not possible to give a universal and all comprehensive data about the implications. Apart from the physical signs of the abuse, it is the psychological or the emotional effects that can cause more harm in the long term.

A few of the common consequences of CSA are-

- Short term effects include bed wetting, thumb sucking, sleep disturbances, eating problems, bad performance at schools and unwillingness to participate in other school or social activities.
- If they had suffered abuse as a child, it is more likely that they suffer abuse again and is known as re-victimization.
- Emotional challenges like low self-esteem, anxiety, guilt, self-blame, anger, etc.
- Become addicted to drugs, alcohol and other substances.
- Mental health problems like depression, self-harm, post-traumatic stress disorder, suicidal thoughts etc.
- Struggles with relationships.
- Learning difficulties, lack of concentration and they may feel powerless.
- They may feel betrayed and anger on the adults and social system which failed to protect them.
- Traumatic sexualisation- the child's sexuality is distorted with the age inappropriate sexualisation.
- The child may try to feel 'powerful' by abusing another child.
- The child may become isolated from the entire society and remain aloof

There is a very close relationship between child pornography and the sexual abuse of the children⁵. Using children for producing pornographic films is another form of abuse that is sky-rocketing nowadays. This is equally harmful not only to that child but also to the children all over the globe. This content, once uploaded to the internet can be accessed from anywhere around the globe and thus pave way to sexually stimulate the offender in preparation for offending⁶. This victimization never ends because these images, videos can never be fully erased and it can be passed to and fro many times. The victims can never rest in peace knowing that any other person might have their video, image etc. This could affect the child's future too i.e. its career, relationships and other phases of life. There shall be no privacy. This child pornography may desensitize children and normalize sexual activity among them.

These are some of the consequences and it is to be kept in mind that every child is different and thus their coping mechanisms are different. Some children recover quickly and bounce back to life with the entire trauma left behind.

⁵ Saritha Vashistha, Crime against Children, First Edi. , K.K. Publication, 2012, pp. 219-260, pp.79-96

⁶ Tripathi S C. and Vibha Aroora, Law relating to Women and Children, Forth Edi. Central Law Publications, 2015, pp.34-66

The environments at home, schools and the peer groups play a significant factor in buffering the impact. Even the norms of that State become a contributing factor in the protection of the children.

Different Forms of CSA

The CSA not only includes physical touching, rape, sodomy, incest or penetration but also online sexual solicitation, obscene remarks, obscene calls, virtual sex and exhibitionism. According to The Protection of Children from Sexual Offences Act (POCSO)-2012, the various forms of Child Sexual Abuse are:

- Inserting any object or using any part of the body to cause penetration or making the child to do so
- Touching penis, vagina, breast, anus of a child with sexual intent
- Making physical contact to the child with sexual intent or making the child to do so
- Making any sound or gesture or exhibiting any object or part of body, with sexual intent so that it will be heard or seen by the child
- Constantly following or watching the child in any form with sexual intent or enticing child for pornographic purposes.

When the offence is committed by a trustworthy person like a member of the family, doctor or teacher and when a child is mentally challenged, the assault is termed to be 'grievous' and 'aggravated'. In this era of advanced technology, apart from the above mentioned forms, CSA happens online too. Since children as young as 7-8 to the teens have free access to the internet they receive solicitations through social media sites. Assaulters coaxing the child to wear revealing clothes, sex talking, sharing and showing pornography films, asking to take off the clothes to see the child nude, exposing intimate parts to the child, engaging children for cyber-sex scenarios are all forms of online sexual exploitation of the child.

Extent of CSA in India

The problem of Sexual abuse is massive around the world. As we all know that child population in India is as high as 430 million children (Census 2011) and other factors such as poverty, lack of basic facilities for better standard of life, lack of education adds more into the problem of CSA. Reports of National Crime Records Bureau (2016), clearly highlighted that cases under the Protection of Children from Sexual Offences Act, 2012 reported 36,022 (34.4%) cases including child rape. Maximum numbers of cases under crime against children were reported in Uttar Pradesh, Maharashtra and Madhya Pradesh, (15.3%, 13.6% and 13.1% respectively). As many as 109 children were sexually abused every day in India in 2018, according to the data by the National Crime Record Bureau, which showed a 22 per cent jump in such cases from the previous year. According to the recently released NCRB data, 32,608 cases were reported in 2017 while 39,827 cases were reported in 2018 under the Protection of Children from Sexual Offences Act (POCSO).

The extent of the child sexual abuse in India is very high. Even then the researches/data available on the CSA is very limited. And preventive measures for children to safeguard are even lesser. Lack of awareness or rather the culture of silencing children is the major cause of flourishing nature of child sexual abuse in India as well as around the world. It's a high time to search for more precautionary measures for children to protect them from such dreadful crimes. Many studies reported that in the absence of evidence many culprits of CSA walk off without conviction. Presently in India we have a special law for children, the POCSO act 2012.

Evolution of the POCSO Act, 2012

In 2007, a survey was directed by MWCD, in which 53% of total child population had been the sufferers of child abuse. At the end of inquiry, 99.6% people agreed to have legislation against child abuse. The POCSO bill was presented and later approved by both houses of parliament on 22nd may, 2012 and came into effect from Children's day. POCSO Act, 2012 was passed to protect children from sexual offences while also keeping in mind to secure the interest of child at every stage of judicial process. Latterly The Protection of Children from Sexual Offences (Amendment) Bill, 2019 was introduced in Rajya Sabha by the Minister of Women and Child Development, Ms. Smriti Zubin Irani on July 18, 2019. The Bill amends the Protection of Children from Sexual Offences Act, 2012.

The Protection of Children from Sexual Offences (POCSO) Act 2012

The POCSO Act, 2012 is a comprehensive law to provide for the protection of children from the offences of sexual assault, sexual harassment and pornography, while safeguarding the interests of the child at each stage. The act came up with much hope and as a reform in the criminal justice system by providing special courts, making the police more sensitive in handling the cases such as recording of statement of a girl child victim by a female officer, providing legal safeguards to victim and above all deciding the case in a time period of One year. With light are the shadows resulting in delaying and pendency of such cases, police showing their indolent attitude making such legislation ineffective, police harassment resulting in diluting effective functioning of special efforts of the government. Going through bitter experiences of the cases in recent years POCSO Act 2012 has resulted to be a weak law as crime rate in sexual assaults has increased with time and no proper action has been followed and taken by authorities of criminal justice administration. The new amendment bill 2019 has added major amendments defining punishments for all the offences earlier defined in Act of 2012. The Act defines "child" as any person below 18 years of age. The Act seeks to protect children from offences such as sexual assault, sexual harassment, and pornography.

Penetrative sexual assault: Under the Act, a person commits "penetrative sexual assault" if he: (i) penetrates his penis into the vagina, mouth, urethra or anus of a child, or (ii) makes a child do the same, or (iii) inserts any other object into the child's body, or (iv) applies his mouth to a child's body parts. The punishment for such offence is imprisonment between seven years to life, and a fine. The Amended Act, 2019 increases the minimum punishment

from seven years to ten years. It further adds that if a person commits penetrative sexual assault on a child below the age of 16 years, he will be punishable with imprisonment between 20 years to life, with a fine.

Aggravated penetrative sexual assault: The Act defines certain actions as “aggravated penetrative sexual assault”. These include cases when a police officer, a member of the armed forces, or a public servant commits penetrative sexual assault on a child. It also covers cases where the offender is a relative of the child, or if the assault injures the sexual organs of the child or the child becomes pregnant, among others. The Amended Act, 2019 adds two more grounds to the definition of aggravated penetrative sexual assault. These include: (i) assault resulting in death of child, and (ii) assault committed during a natural calamity, or in any similar situations of violence. Currently, the punishment for aggravated penetrative sexual assault is imprisonment between 10 years to life, and a fine. The Amended Act, 2019 increases the minimum punishment from ten years to 20 years, and the maximum punishment to death penalty.

Aggravated sexual assault: Under the Act, “sexual assault” includes actions where a person touches the vagina, penis, anus or breast of a child with sexual intent without penetration. “Aggravated sexual assault” includes cases where the offender is a relative of the child, or if the assault injures the sexual organs of the child, among others. The Amended Act, 2019 adds two more offences to the definition of aggravated sexual assault. These include: (i) assault committed during a natural calamity, and (ii) administering or help in administering any hormone or any chemical substance, to a child for the purpose of attaining early sexual maturity.

Pornographic purposes: Under the Act, a person is guilty of using a child for pornographic purposes if he uses a child in any form of media for the purpose of sexual gratification. The Act also penalizes persons who use children for pornographic purposes resulting in sexual assault. The Amended Act, 2019 also defines child pornography as any visual depiction of sexually explicit conduct involving a child including photograph, video, digital or computer generated image indistinguishable from an actual child.

In keeping with the best international child protection standards, the said Act also provides for mandatory reporting of sexual offences. This casts a legal duty upon a person who has knowledge that a child has been sexually abused to report the offence; if he fails to do so, he may be punished with six months’ imprisonment and/ or a fine.

The said Act also casts the police in the role of child protectors during the investigative process. Thus, the police personnel receiving a report of sexual abuse of a child are given the responsibility of making urgent arrangements for the care and protection of the child, such as obtaining emergency medical treatment for the child and placing the child in a shelter home, should the need arise. The police are also required to bring the matter to the attention of the Child Welfare Committee (CWC) within 24 hours of receiving the report, so the CWC may then proceed where required to make further arrangements for the safety and security of the child.

The said Act makes provisions for the medical examination of the child in a manner designed to cause as little distress as possible. The examination is to be carried out in the presence of the parent or other person whom the child

trusts, and in the case of a female child, by a female doctor. The said Act provides for Special Courts that conduct the trial in-camera and without revealing the identity of the child, in a child-friendly manner. Hence, the child may have a parent or other trusted person present at the time of testifying and can call for assistance from an interpreter, special educator, or other professional while giving evidence; further, the child is not to be called repeatedly to testify in court and may testify through video-link rather than in a courtroom. Above all, the said Act stipulates that a case of child sexual abuse must be disposed of within one year from the date the offence is reported. It also provides for the Special Court to determine the amount of compensation to be paid to a child who has been sexually abused, so that this money can then be used for the child's medical treatment and rehabilitation.

The said Act recognizes almost every known form of sexual abuse against children as punishable offences, and makes the different agencies of the State, such as the police, judiciary and child protection machinery, collaborators in securing justice for a sexually abused child. Further, by providing for a child-friendly judicial process, the said Act encourages children who have been victims of sexual abuse to report the offence and seek redress for their suffering, as well as to obtain assistance in overcoming their trauma. In time, the said Act will provide a means not only to report and punish those who abuse and exploit the innocence of children, but also prove an effective deterrent in curbing the occurrence of these offences.

The said Act is to be implemented with the active participation of the State Governments. Under Section 39 of the said Act, the State Government is required to frame guidelines for the use of persons including non-governmental organizations, professionals and experts or persons trained in and having knowledge of psychology, social work, physical health, mental health and child development to assist the child at the trial and pre-trial stage. The following guidelines are Model Guidelines formulated by the Central Government, based on which the State Governments can then frame more extensive and specific guidelines as per their specific needs.

The fundamental principles to be followed in the determination of a case involving a sexual offence against a child have been laid down in various international instruments and in the Preamble to the POCSO Act, 2012 itself. The State Governments, the Child Welfare Committee, the Police, the Special Courts, all other Government functionaries as well as Non-Government Organisations, and all professionals and experts assisting the child at the trial and pre-trial stages are bound to abide by these principles. These principles are –

- Right to life and survival
- The best interests of the child
- The right to be treated with dignity and compassion
- The right to be protected from discrimination
- The right to special preventive measures
- The right to be informed
- The right to be heard and to express views and concerns

- The right to effective assistance
- The right to privacy
- The right to be protected from hardship during the justice process
- The right to safety
- The right to compensation

Conclusion and Suggestions

Child Sexual Abuse clearly indicate that there is a very high need for protection of children from CSA. Data from NCRB emphasized the need of further care and protection of children from CSA. CSA is a matter of shame for the society and till date considered as taboo to be talked about. In the name of culture and the structure of family in India and the low status of children in this structure, makes CSA even more rampant in India homes. As review of studies on CSA shows that child sexual abuse in India is often a hidden phenomenon. Since children are highly dependent on their parents and elders, they are often submissive and obedient to adults. Lack of awareness about laws and reluctant behavior of parents facilitate the continued perpetuation of such heinous crimes. Presently, in India POCSO is a special law to protect children from sexual offences. This law is powerful tool to guard children against CSA. Being a new act in the system the various stakeholders are at times not aware, or don't know how to implement it, considering the best interest of the child. It is more than six years of its existence still many stakeholders are not aware of about the basic points in POCSO.

Awareness about sexual abuse can go a long way in prevention from CSA. Information related to POCSO should come in public domain and awareness among stakeholders will help in eradication of CSA. Many studies on awareness on POCSO revealed that there is great need to disseminate more and more information on POCSO. Mandatory reporting is an essential part of POCSO act. Mandatory reporting was added into the laws as an attempt to increase the reporting of CSA offences. But in reality, it became problematic to many stakeholders. This is the area under POCSO which needs to be improved implementation and awareness of the law.

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