



CHILD SEXUAL ABUSE IN INDIA: LAW WITH LACUNAE AND LOOPHOLES

*By Aroma Raman Picess
From National Law University, Delhi*

Introduction: Child Molestation in India

Sexual violence against children is the most horrendous crime which incorrigibly stigmatizes a naïve and brutally deracinates his innocence. It tailgates not only physical but also psychological aftermaths that afflicts the deteriorated victims' existence life-long. Child sexual abuse may be defined as any sexual activity victimizing children, whether physical or non-physical, by a mature person or an adult conducive to satisfy sexual fervors and for sexual gratification. It includes penetration or intercourse (anal, vaginal or oral), contacting or caressing of private organs or genitals, denuding private parts or genitals or exhibition of naked child, naked photography, pornography or prostitution or other sexual attacks. In India, sexual offences against children are soaring at a distressing elevation with a total number of 8904 cases reported in 2014, following 14,913 cases reported in 2015 while more than double, there were 36022 cases reported in 2016 under the POCSO (Protection of Children from Sexual Offences) Act, 2012.¹ Supplementary to the POCSO Act, 2012, certain punitive controls against CSA (child sexual abuse) are covered by the IPC (Indian Penal Code),

¹ National Crimes Record Bureau, *ncrb.gov.in*, Crime in India: Statistics -2016, Crime Statistics- 2015 and Crime Statistics- 2014, Indian Ministry of Home Affairs.

1860, subsuming engrossed penalty for kidnapping, child trafficking, voyeurism, sale of obscene objects, stalking and unnatural offences. Other sorts of child related sexual felonies, mostly being non-penetrative in nature are not expressly acknowledged as crimes under the IPC and hence, prior to the POCSO Act, 2012, these crimes were failed to be recorded, thus, which indubitably impelled the evolution and enactment of the afore-stated Act.² However, the unceasing rampant escalation in the number of CSAs cases dictates the contributions provided by the lacunae and loopholes present in the Act as well as the intensifying grievous malaise prevalent in the country. This paper attempts to identify and construe the lacunas and vacuity in the POCSO Act and also to concomitantly highlight the current countenance of the victims, offenders and the aggravated crime itself with the contemporary concerns.

Law with Loopholes

The Protection of Children against Sexual Offences Act, 2012, was devised with a view to specifically criminalize sexual abuses against children as punishable offences and to fix the hiatuses against these crimes under the Indian Penal Code, 1860. The Act encompasses sexual offences including “sexual assault”³, “aggravated sexual assault”⁴, “penetrative sexual

² Child Sexual Abuse and the law in India: a commentary, Jyoti Belur and Brijesh Bahadur Singh, *Crime Science An Interdisciplinary Journal* 20154:26, <https://doi.org/10.1186/s40163-015-0037-2>, © Belur and Singh. 2015, Published: 9 October 2015

³ Section 7 of the POCSO Act

⁴ Section 9 of the POCSO Act



assault”⁵ (PSA), “aggravated PSA”⁶, “sexual harassment”⁷, “online sexual abuse”⁸ and “pornography”⁹ along with the “procedures”¹⁰ involved in reporting of the cases. The Act has also given due attention to the child care and friendly recording of the statements.¹¹ The special courts have been established under the Act in order to attend the offences committed under the Act with due care and special attention.¹² Also, due diligence have been paid to the protection, treatment and prevention of the re-victimization of child. Agreeably, the Act educates as a comprehensive legislation against child sexual abuses. Nonetheless, it accommodates certain clear crevices which impede the efficient impact and implementation of the Act.

Men possess power over women therefore, they objectify them, similarly adults have power over children and likewise they also objectify them.¹³ Thus, children, having the least power, apparently become the most vulnerable falling victims against crimes, especially against sexual abuses. Also, though men have power over women, female offenders against children could not be guaranteed a conduit escape on the basis of the common vista of having female genders only as victims. This contested

notion, at the first blush, endangers male children who are victimized and subjected to sexual abuses. Seemingly, the confidence in the afore-stated infected ideology is inflated by the POCSO Act through gender biasness in many of its provisions thus, guaranteeing a shield to the female criminals. The penetration of a penis of a child impelled by a female perpetrator into her vagina to gratify her lust has not been clearly expressed as a sexual abuse under the Act. Section 3(a) of the Act expressly states the penetration of the penis as a sexual assault¹⁴, following section 3(b) which expressly includes insertion of penis¹⁵ and then, section 3(d) mentioning the penetration through mouth¹⁶. However, section 3(c)¹⁷ provides manipulation of any body part of the child to penetrate the body part of the child or “making the child to do so with him” i.e. to make the child manipulate his own body part for penetration, thus, this penetration could be interpreted as referring into the body part of the child or into the perpetrator’s body. Hence, this ambiguity blurs the inclusion of penal-vaginal

⁵ Section 3 of the POCSO Act

⁶ Section 5 of the POCSO Act

⁷ Section 11 of the POCSO Act

⁸ Section 11 (iv) and (v) of the POCSO Act

⁹ Section 13 of the POCSO Act

¹⁰ Section 19 of the POCSO Act

¹¹ Section 24 of the POCSO Act

¹² Chapter VII of the POCSO Act

¹³ ‘Online Child Sexual Abuse, Grooming, Policing and Child Protection in Multimedia World’, Routledge Publications, Author: Elena Martellozzo, pg 160.

¹⁴ Section 3(a) of the POCSO Act, ...“*he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person;*”..

¹⁵ Section 3(b) of the POCSO Act, ...“*he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person;*”..

¹⁶ Section 3(d) of the POCSO Act, ...“*he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.*”

¹⁷ Section 3(c) of the POCSO Act ...“*he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person;*”..



penetration induced by a female adult against a child in the Act.

Further, the deliberations upon the mental age of the victims have been avoided on the surface while the attention has been circumscribed only by the biological age to determine the persons referred under the Act.¹⁸ This creates dilemma concerned to those adult victims who are mentally retarded as children and therefore, could have similar mental agony and harm. Arguably, this manifests that the Act prioritizes the physical harm more than the mental agony, as being a child is determined according to the person's physical characteristics and age rather than mental status. Affably, this could also throw light upon the revelation that the Act expects to dodge the mental trauma and agony of a victim because in case if it would have considered it, then the mentally-ill adult victims would have been subsumed and redressed and thus, the mental age would have been given due importance under the Act. Likewise, then the victims having enough maturity level to give consent would also have been treated separately giving regard to their mental status and thus, consented sexual activities would have been distinctly dealt under the Act. This indicates that the Act accentuates maximally on physical identity rather than hovering over mental level of a person. Also in a recent judgment, the Supreme Court has clearly refused to entertain mentally retarded people under the POCSO Act.¹⁹

¹⁸ Section 2(d) of the Act defines a child as any person who is below the age of 18 years.

¹⁹ Rape Cases Of Mentally Challenged Victims Cannot Be Shifted To POCSO Courts: SC, Author: APOORVA MANDHANI JULY 21, 2017 10:05 PM,

Albeit the Act appears to have a proper structural framework through special courts and procedures, it fails to consider the issues revolving around the application of its provisions in the light of the prevailing conditions that impedes its efficient implementation and thus, hampers the connection between the law and its subjects. Thus, the concern related to less number of female medical examiners²⁰, fewer courts with deficient ambiance pertinent to the children-victims²¹, handling of victims reluctant to go through medical examination (the Act being silent upon this)²² or victims unwilling to disclose abuse before the

Read more at: <http://www.livelaw.in/rape-cases-mentally-challenged-victims-cannot-shifted-pocso-courts-sc-read-judgment/>

²⁰ Child Sexual Abuse: Issues and concerns, Indian Journal of Medical Research, Authors: Sydney Moirangthem, Naveen C. Kumar, and Suresh Bada Math* Indian J Med Res. 2015 Jul; 142(1): 1–3., doi: [10.4103/0971-5916.162084](https://doi.org/10.4103/0971-5916.162084), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4557243/>, PMID: [26261159](https://pubmed.ncbi.nlm.nih.gov/26261159/).

²¹ Lack of special courts under Protection of Children from Sexual Offences Act: A structural deficit, Journal of Family Medicine and Primary Care, Authors: Deepak Juyal, Ajay Setia, Ashutosh Sayana, Adarsh Kumar, Vyas Kumar Rathaur, and Benu Dhawan, 2017 Oct-Dec; 6(4): 881–882. doi: [10.4103/jfmpc.jfmpc.241.17](https://doi.org/10.4103/jfmpc.jfmpc.241.17) PMID: [29564286](https://pubmed.ncbi.nlm.nih.gov/29564286/); <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5848421/>

²² Section-41 of the POSCO Act: “Provisions of sections 3 to 13 not to apply in certain cases.-*The provisions of sections 3 to 13 (both inclusive) shall not apply in case of medical examination or medical treatment of a child when such medical examination or medical treatment is undertaken with the consent of his parents or guardian.*”; Consent of the victim for medical examination has not been deliberated under the said provision as well as under the Act.



court²³, ostensibly thwarts the positive progress of the Act. The problem of implementation also arises in relation to the police officers as there are known instances where the police has registered a case under IPC instead of the POCSO²⁴ which thereby, reveals the improper training and non-influencing directions provided by the government to them.

Moreover, whether sexual abuse suffered by an adult during his childhood can be reported under the Act? It is evident that, prior to the POCSO Act, a proper law to deal with sexual offences against children was not available. After the enactment, the awareness proliferated gradually regarding the newly penalizing crimes under the law. Thus, whether an adult survivor could avail the umbrella of the POCSO Act against the sexual abuse which he suffered during his childhood is quite complex to be determined. The Act has not expressly dealt with this concern and therefore, seemingly, the person would have *locus standi* before the court under section 19(1)²⁵ which that

mentions ‘any person’ having apprehension or knowledge can report the case. However, the obverse interpretation would again point out the digression of the Act from the mental sufferings of a victim by excluding adult survivors from the umbrella. Indeed, this would contest a concern complicating the already complex condition of the Act along with its administration and implementation procedures. Also, indubitably, this could lead to an increased risk of false complaints, blackmailing and mental harassment under the Act. Nevertheless, the risk factor cannot become an escape from providing remedy to the sufferers.

Agreeably, these leaves in the law render certain perpetrators to wander scot free and certain victims to have no avail and protection. Further, police activities usually revolve around “crime detection and investigation”.²⁶ As per evidences, there is very little gain in the prevention sexual abuse crimes by elevating numbers of policemen and their focus on response and arrest policies.²⁷ Rather, enhancing attention of the police authorities “by generating intelligence about and directing ‘problem-oriented policing’ methods”²⁸ and pertinent “methods for the identification of sexually abused children”²⁹ would ensure prevention

²³ Reviewing India’s Protection of Children from Sexual Offences Act three years on, Authors: Srishti Agnihotri and Minakshi Das, <http://blogs.lse.ac.uk/southasia/2015/12/18/reviewing-indias-protection-of-children-from-sexual-offences-act-three-years-on/>

²⁴ Sexual Crimes Against Children Still Registered Under Section 377, Not POCSO, <https://thewire.in/uncategorised/sexual-crimes-against-children-still-registered-under-section-377-not-pocso>

²⁵ Section 19(1) of the POCSO Act: “Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such

an offence has been committed, he shall provide such information to,.....”

²⁶ Preventing Child Sexual Abuse: Evidence, Policy and Practice; Authors: Stephen Smallbone, William L. Marshall and Richard Wortley; Willian Publications, pg 111.

²⁷ *ibid*

²⁸ *ibid*

²⁹ A Response to the Commentary on Faust, Bridges, and Ahern’s (2009) “Methods for the Identification of sexually Abused Children”, in “Contested Issues in the Evaluation of Child Sexual Abuse” edited by:



of sexual abuse in a better manner. Lack of training skills among police officers, deficient preventive measures and accentuating more on punishments (such as recent consideration of death penalty as a punishment for a rape of a child below 12 years by states including Haryana, Rajasthan and Madhya Pradesh³⁰), along with the afore-mentioned gaps, indicate the contribution of the Act in the increased crime rate rather than the reduction. Indicatively, there is an apparent need of the establishment of local bodies focusing upon parenting education, facilitating home visiting programs, victim-focused prevention and other such community based approaches of prevention³¹ and thus, having a continuous and periodic check over these concerned issues, which could ameliorate the worsening situation. Therefore, along with providing cure, efforts should also be made for prevention and annihilation of these crimes. Indeed, the POCSO Act is an apt law. However, more attention towards prevention and deterrence of child sexual abuse could envisage a better future for “the future of the country” than the punitive measures that mostly fail to correct the irreparable wrongs committed against them.

Preys and Predators

According to the National Crime Record Bureau report, every quarter-hour a child is

Kathleen Coulborn Flier and Mark D. Everson, by Routledge Publications.

³⁰ Death and deterrence; Plugging gaps in justice system, not death penalty, can curb child sexual abuse; Author: [Shruthi Ramakrishnan](#) | Updated: March 9, 2018 3:31:08 pm, <http://indianexpress.com/article/opinion/columns/death-and-deterrence-5091285/>

³¹ *ibid* 26

sexually abused.³² A study in 2007 also reveals that out of a total number of 53.22% children suffering from sexual violence, a substantial of 52.94% are male children.³³ Accordingly, child sexual abuse should not be genderized³⁴ and thus, victims could not be related to a particular gender only.³⁵ A prey to sexual abuse could be any child falling under the rubric of male, female children or children belonging to the third gender category³⁶. Further, children who are

³² National Crimes Record Bureau, *ncrb.gov.in*, Crime in India: Statistics -2016, Indian Ministry of Home Affairs; See also, India sexual abuse: 'Four child victims every hour'; <http://www.bbc.com/news/world-asia-india-42193533>

³³ According to the study done by Ministry of Women and Child Development in 2007; https://www.unicef.org/worldfitforchildren/files/India_WFFC5_Report.pdf

³⁴ SEXUAL ABUSE AND EXPLOITATION OF BOYS IN SOUTH ASIA A REVIEW OF RESEARCH FINDINGS, LEGISLATION, POLICY AND PROGRAMME RESPONSES John Frederick IWP-2010-02; https://www.unicef-irc.org/publications/pdf/iwp_2010_02.pdf

³⁵ Silence of male child abuse in India: Qualitative analysis of barriers for seeking psychiatric help in a multidisciplinary unit in a general hospital; Authors: [Vyjayanthi Kanugodu Srinivasa Subramanian](#), [Praveen Reddy](#), [Girish Chandra](#), [Chandrika Rao](#), and [T. S. Sathyanarayana Rao](#); Indian Journal of Psychiatry: 2017 Apr-Jun; 59(2): 202–207, doi: [10.4103/psychiatry.IndianJPsychiatry.195.17](https://doi.org/10.4103/psychiatry.IndianJPsychiatry.195.17), PMID: [28827868](https://pubmed.ncbi.nlm.nih.gov/28827868/); <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5547862/>

³⁶ Conklin K. Washington DC: Advocates for Youth; 2000. [Last cited on 2014 Oct 01], Child sexual abuse: An overview of statistics, adverse effects and prevention strategies. Available from: <http://www.advocatesforyouth.org/storage/advfy/documents/child-sexual-abuse-i.pdf>



younger³⁷ as well as doubly oppressed, i.e. belonging to minorities, mentally or physically disabled, orphans, juvenile homes³⁸, refugees or conflict zone area, are more prone to be sexual abuse.³⁹ However, this does not maintain that privileged children are not vulnerable and could not be subjected to abuse.⁴⁰ Evidently, there have been substantial rise in the incest cases in India as per the NCRB report 'Crime in India, 2015'⁴¹. A study by a NGO, named as RAHI maintained that the predators mostly involve family members and a person who is

routinely involved in a child's life.⁴² This exhibits a serious threat to children who are subjected to violence by the trusted people, thereby inhibiting their possibility of disclosing abuses and thwarted for the protection of family's honor and to maintain secrecy. Thus, the predators have a proper shielded conduit which not only helps them to escape from their guilt but also to commit crimes repeatedly without any threat of disclosure. Likewise, sexual violence against mentally-retarded persons i.e. those having a mental status of children has also become a grave concern especially after the Supreme Court refusal of the inclusion of mentally ill children under the POCSO Act.⁴³ This again reflects the primary concern accentuated under the law to be only physical violence, thus, wholly neglecting the mental trauma of a victim. Further, the perpetrators could be categorized under two rubrics: firstly, the pedophiles which refer to those people who have psychiatric-disorder of being specifically sexually attracted to children and secondly, those persons who commit offence under any stress or inciting factor commit such offences.⁴⁴ Apparently, the former has higher crime commission rate than the latter.⁴⁵ The juvenile offenders in these offences circumscribe again as a serious issue where the probability of commission of similar kind of offences in the juvenile homes by such offenders

³⁷ Save the Children Sweden-Denmark (Slugget, C.), 2003., 'Mapping of psychosocial support for girls and boys affected by child sexual abuse in four countries in South and Central Asia', See from: <https://resourcecentre.savethechildren.net/sites/default/files/documents/2973.pdf>.

³⁸ Juvenile homes are hellholes, says report on child rape; NEW DELHI, APRIL 21, 2013 02:16 IST; <http://www.thehindu.com/news/national/juvenile-homes-are-hellholes-says-report-on-child-rape/article4637540.ece>

³⁹ Save the Children Alliance, 2005, '10 essential learning points: Listen and speak out against sexual abuse of girls and boys' (global submission to the UN Study on Violence against Children); United Nations General Assembly (Pinheiro P.S.), 2006, 'Report of the independent expert for the United Nations study on violence against children'; <http://www.ohchr.org/EN/HRBodies/CRC/Study/Pages/StudyViolenceChildren.aspx>

⁴⁰ Bitter chocolate: Child sexual abuse in India'; Society for the Protection of the Rights of the Child, 2000 and 'Children in danger: The sexual abuse of children', 1998; Author: ; Pinki Virani, Penguin Publications

⁴¹ National Crime Records Bureau Report, Crime in India statistics- 2015, Indian Ministry of Home Affairs; http://ncrb.gov.in/StatPublications/CII/CII2015/FILE_S/Compendium-15.11.16.pdf, See also, <http://punjabkhabar.com/news/9400-incest-cases-on-the-rise-in-india-crime-report-states.aspx>.

⁴² "Voices from the Silent Zone", by Recovering and Healing from Incest (RAHI), <http://www.rahifoundation.org/>

⁴³ *ibid* 19

⁴⁴ Trends & issues in crime and criminal justice no. 429, Misperceptions about child sex offenders; Author: Kelly Richards, ISSN: 1836-2206; <https://aic.gov.au/publications/tandi/tandi429>

⁴⁵ *ibid*

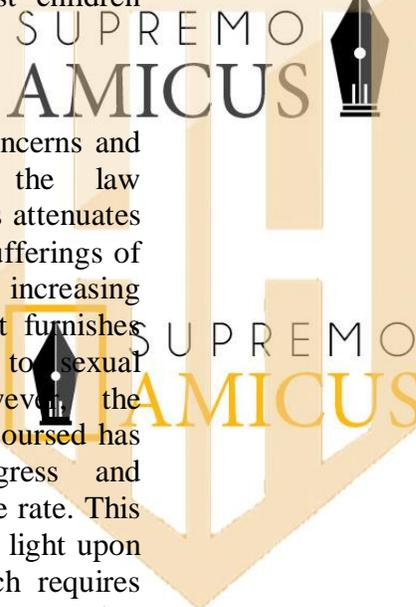


increases.⁴⁶ This evinces the incapacity and difficulty to control and prevent sexual crimes against children in certain cases and also in unmasking the predators. Arguably, punishments do not act as a complete remedy against these grievous aggravated crimes and rather, mostly the satisfaction from committing sexual crimes becomes the main focus of the perpetrators.⁴⁷ What could be sought at the first instance is indubitably the prevention of these crimes that would remedy most of these problems, albeit requiring diligent efforts.⁴⁸ Certainly, these concerns have to be addressed in order to extirpate sexual offences against children and provide them a secure future.

Conclusion

Conclusively, the afore-stated concerns and complications indicate that the law possessing lacunae and loopholes attenuates its efficiency in alleviating the sufferings of victims and in inhibiting the increasing crimes. Indeed, the POCSO Act furnishes the major concerns pertinent to sexual abuses against children however, the hiatuses in the law, as afore-discoursed has somehow mitigated its progress and contributed in the increased crime rate. This discourse has attempted to throw light upon such vacancies in the law which requires exigent redress for its better implementation and cause it to transform into a perfect weapon for preys against the predators thus, effectively curbing child sexual abuses in India. Thus, in order to uproot and eliminate sexual offences against children, spotlight should be placed on the prevention measures

and contested concerns that could contribute to the law its comprehensiveness.



⁴⁶*ibid* 37

⁴⁷*ibid* 26

⁴⁸*ibid* 30