

CRIME AGAINST CHILDREN - CRITICAL ANALYSIS OF THE POCSO ACT, 2012

Written by *Riddhika Somani** & *Anandu P. Anand[#]*

**[#] 4th Year BBA LLB Student, Presidency University, Bangalore, India*

INTRODUCTION

According to the National Crime Record Bureau, everyday 109 children get sexually abused in some form in India. The reports also state that the figures are increasing every year. Crimes against children are increasing day by day, yet people are reluctant to address this issue. It is a social stigma in the Indian society.

The World Health Organization (WHO) states that "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."ⁱⁱ

The Ministry of Women and Child Development enacted the Protection of Children from Sexual Offences (POCSO) Act, 2012 in response to the rising incidence of child sexual abuse in Indiaⁱⁱ. The Act recognises and defines various crimes that can be committed against children, irrespective of their gender, the procedure that has to be followed and the punishment for the same.

This commentary explains why the Act was passed in the first place. The features of the POCSO Act, the offences and the punishments mentioned therein and also the 2019 Amendment of the same.

WHY POCSO WAS ENACTED?

The POCSO Act was enacted after the Ministry of Women and Child Development conducted a National Study on Child Abuse in India, in 2005. This initiative of the Ministry was supported by UNICEF and Save the Children. The report of the study was published under the name of “Study on Child Abuse: India 2007”. The research covered 13 states and a sample of 12,447 children from varied age groups, and other respondents covered under the research were 4,773.

The study's results explicitly stated that, among all types of violence, young children in the 5–12 year age range are the most vulnerable to abuse and exploitation. According to the study, two out of every three children have been physically abused, 53.22 percent of children have been sexually abused, and every second child has been emotionally abused. Out of the 69 percent of children physically abused in 13 states studied, 54.68 percent were boys, and 21.90 percent of children said they had experienced serious sexual abuse and 50.76 percent said they had experienced other types of sexual abuse.ⁱⁱⁱ The statistics of the research were alarming and the situation demanded immediate measures being taken for the purpose of safeguarding the children of the country.

The Indian Penal Code^{iv} does not specifically recognise any sexual offence against children. The only offences recognised were rape^v, outraging the modesty of a woman^{vi} and unnatural acts^{vii} defined as “carnal intercourse against the order of nature with any man, woman or animal.”

The need for a special law emerged because the offences listed in the Indian Penal Code were insufficient to protect the interests of children. As a result, the Government of India passed a special law called "The Protection of Children from Sexual Offences (POCSO) 2012."

FEATURES OF THE POCSO ACT

The POCSO Act came into effect on 14 November, 2012 throughout India, except the state of Jammu and Kashmir. The Act aims to protect the children from offences of sexual assault, sexual harassment, and pornography. It provides provisions for the establishment of Special

Courts for trial of such offences. In order to protect children's best interests, the Act also lays down child-friendly investigation and trial procedures.

The salient features of the Act are as follows:

GENDER NEUTRAL

The Act defines a child as any person who is below the age of 18 years. It does state that the gender of the child should be either male or female. Thus, the provisions apply to any person below the age of 18 years regardless of the gender of the victim.

GUILTY UNTIL PROVEN INNOCENT

The Act is based on the principle of 'guilty until proven innocent' rather on the general rule of 'innocent until proven guilty.' It means that the burden of proof to prove himself/herself innocent is on the accused.

LODGING OF FIR

The investigation in any criminal case begins with the filing of a First information Report (FIR) under section 154 and 156 of the Criminal Procedure Code. Similarly, the POCSO Act specifically states under section 19 that if any person including the child is under an apprehension that an offence may be committed under the Act, or if an offence has already been committed under this Act, then the same must be notified to the Special Juvenile Police Unit or the local police of the concerned area. It is mandatory for the Police Unit to record the information in writing.

After recording the necessary information, if the Special Juvenile Police Unit or the local police are assured that the child against whom an offence is committed, requires urgent care and protection, immediate arrangements have to be made for the same. If the situation warrants the child must be admitted to the nearest shelter home or hospital. Within twenty-four hours, the Police Unit is also expected to inform the Child Welfare Committee and the nearest Special Court.

PROCEDURES

The procedure for recording the statement of the victim, is very child- friendly, so that it does not affect the child in any manner. The statement of the child has to be recorded at his residence, and it should be done by a woman police officer not below the rank of a sub-inspector. The officer who is taking the child's statement is not permitted to wear a police uniform when doing so. The presence of the child's parents, or any other person in whom the child has trust or confidence, is required during the recording process. In addition, the Police Unit must ensure that the child does not come into contact with the accused. The child's identity and the information received from him/ her must be kept confidential.

SPECIAL COURTS

The Act mandates the creation of Special Courts in order to ensure a speedy trial. The Special Court (hereinafter referred to as the Court) has the responsibility of creating a child-friendly environment during the trial. A family member, a guardian, a friend, or a relative in whom the child has trust or confidence must be allowed to stay during the trial. The Court may also permit frequent breaks for the child. The child should not be repeatedly asked to testify in the Court and he/she may testify through video- link instead of coming to the court room. The child should not be subjected to aggressive interrogation or character assassination. Throughout the trial, the Court must ensure that the child's dignity is maintained at all times. A case under this Act must be resolved by the Special Court within one year of the date of taking cognizance of the offence.

OFFENCES DEFINED UNDER THE ACT

The report prepared by the Ministry of Women and Child Development, New Delhi stated that abuse among children can be in three different forms, namely physical abuse, emotional abuse and sexual abuse. According to WHO^{viii}:

- Physical Abuse: The infliction of physical harm on an child is known as physical assault. Burning, striking, punching, shaking, kicking, beating, or otherwise hurting a child are examples of physical abuse.

- Emotional Abuse: Verbal violence, mental abuse, and psychological maltreatment are all terms used to describe emotional abuse. It encompasses actions or inactions by parents or caregivers that have resulted in or may result in severe behavioural, cognitive, emotional, or mental trauma.
- Sexual Abuse: Sexual abuse is when a child is subjected to unwanted sexual conduct. Fondling a child's genitals, forcing a child to fondle an adult's genitals, intercourse, incest, rape, sodomy, exhibitionism, and sexual abuse are all examples of sexual exploitation. These actions must be committed by an individual responsible for the child's care and protection (for example, a babysitter, a parent, or a day-care provider) or by someone who is connected to the child. If these crimes are committed by a stranger, then the offence of sexual assault is committed and hence, it must be investigated by the police and criminal courts.

The POCSO Act has been enacted to curb not only sexual abuse but also other kinds of sexual offences committed against children. The following sexual offences are defined under the Act:

A. Penetrative Sexual Assault

Section 3 of the Act states that if a person penetrates any object, or his body part (finger, penis or any other body part) into the body (vagina, anus, urethra, mouth) of a child, he/she commits the offence of penetrative sexual assault. If a person makes the child do any of the aforementioned acts, it is considered as an offence under this section.

B. Aggravated Penetrative Sexual Assault

Section 5 of the Act defines aggravated penetrative sexual assault. The difference between penetrative sexual assault and aggravated penetrative sexual assault is based on certain factors such as 'who' 'how' 'where' and 'what act'.

Aggravated Penetrative Sexual Assault is penetrative sexual assault committed by people in position and authority. They are as follows:

- Police Officer- A police officer commits this offence when the offence is committed within the local limits of the police station, or within the premises of

any station house, or in the course of his duties, or when he is recognised as a police officer.

- A member of the armed forces- A member of the armed forces commits this offence when the offence is committed within the local limits of the area he/she is deployed in, or within any area under the command of the armed forces, or in the course of his duties, or when he is recognised as a member of the security or armed forces.
- A public servant.
- Member of the management or staff of a jail, remand home, protection home, observation home or any other place of custody commits the offence of penetrative sexual assault on any child who is an inmate of such place.
- A member of the management or staff of a government or private hospital.
- A member of the management or staff of an educational or religious institution.

There are other situations in which penetrative sexual assault amounts to aggravated penetrative sexual assault. Those instances are as follows:

- Any person committing gang penetrative sexual assault on a child.
- Any person causing penetrative sexual assault, using deadly weapon, fire, heated substance or corrosive substance.
- Apart from causing penetrative sexual assault, if the accused also causes grievous hurt to the body or sexual organs of the child.
- In case of a female child, makes the child pregnant.
- Any person committing penetrative sexual assault on a child below 12 years of age.
- Attempts to murder the child, after committing penetrative sexual assault.
- Any person who makes the child strip or walk naked in public, after committing penetrative sexual assault.

C. Sexual Assault

Section 7 of the Act defines this offence. It is a non- penetrative touch- based offence. It states that any person who makes a child touch the vagina, penis, anus or breast of a person or touches the child's vagina, penis, anus or breast, is said to commit the offence of sexual assault. The main ingredient of this offence is intention. The offence must be committed with sexual intent.

D. Aggravated Sexual Assault

Aggravated sexual assault is defined under Section 9 of the Act. The factors that distinguish aggravated sexual assault from sexual assault are the same as those that distinguish aggravated penetrative sexual assault from penetrative sexual assault.

E. Sexual Harassment

A person commits an offence of sexual harassment against a child under Section 11 if she/her does any of the following with a sexual intent.

- i) Says any word or makes a sound or gesture or shows any part of the body or object to the child.
- ii) Makes the child show her/his body, or part of her/his body to the person, or any other person.
- iii) Shows any object in any form for pornographic purposes.
- iv) Follows the child repeatedly or watches or contacts a child directly or through other means (stalking).
- v) Threatens to use a true or fabricated image of some part of the child's body or the child's participation in a sexual act in the media (e.g., a threat to circulate a morphed photo on the internet with the child's face and the body of another child).
- vi) Entices the child for pornographic purposes or gives gratification for such purpose.

Sexual harassment is a non-penetrative and non-touch based sexual offence. This crime differs from others in that it does not include the invasion of body parts, the insertion

of objects, or physical contact, but rather a sexual intent when performing either of the above actions.

PUNISHMENT OF OFFENCES

List of offences and punishments

Offence	Minimum Punishment	Maximum Punishment	Fine
Penetrative Sexual Assault	7years	Imprisonment for Life	Liabile
Aggravated PenetrativeSexual Assault	10 years	Imprisonment for Life	Liabile
Sexual Assault	3 years	5 years	Liabile
Aggravated Sexual Assault	5 years	7 years	Liabile
Sexual Harassment		3 years	Liabile
Use of Child for Pornographic Purposes		5 years	Liabile
<ul style="list-style-type: none"> • Second Conviction 		7 years	Liabile
<ul style="list-style-type: none"> • Penetrative Sexual assault for pornographic purposes 	10 years	Imprisonment for Life	Liabile
<ul style="list-style-type: none"> • Aggravated penetrative sexual assault for pornographic purposes 		Imprisonment for Life (Rigorous)	Liabile
<ul style="list-style-type: none"> • Sexual assault for pornographic purposes 	6 years	8 years	Liabile
<ul style="list-style-type: none"> • Aggravated Sexual Assault for pornographic purposes 	8 years	10 years	Liabile
Stores Pornographic Material involving a Child (for Commercial Purposes)		3 years	Liabile

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (AMENDMENT) ACT, 2019

The POCSO Act, 2012 was a very crucial legislation. But it asked for certain amendments. The NCRB's 'Crime in India' 2019 Report, stated that crimes against children increased by 4.5% in 2019 as compared to 2018.^{ix}In its report, NCRB stated that as many as 1,48,185 crimes against children were reported in 2019 in the country. After 2016, there was a sudden spike in the number of offences committed against children. This demanded more stringent punishments to act as deterrence. The Amendment Act, 2019 mainly makes amendments in the punishments provided. The main provisions of the Amendment Act are as follows:

- Earlier the minimum punishment for penetrative sexual assault was 7 years. Now, the minimum punishment has been increased to 20 years and it may extend to imprisonment for the remainder of the natural life of the person.
- The Amendment Act states that the fine levied on the prisoner must be fair and appropriate. It should cover the medical expenses and rehabilitation of the victim.
- Aggravated sexual harassment now has a broader definition. The Act also makes it illegal to administer any medication or chemical substance to a child with the intent of causing the child to reach sexual maturity too soon.

CONCLUSION

The POSCO Act, 2012 was a need of the hour because children who are considered as the most valuable assets of the country, were traumatised at such a young age. The Act proved to be very beneficial, as the number of cases that were being registered also increased from the subsequent years. The main object of the Act is the welfare of the child and each and every provision of the Act has been devised keeping in mind the effect it will have on the child suffering. Though the Act is beneficial, yet it had many loopholes which paved the way of the Amendment Act of 2019. Thus, the Amendment Act is a highly welcomed legislation.

ENDNOTES

-
- i World Health Organization, Report of the Consultation on Child Abuse Prevention; Geneva, (1999)
http://www.who.int/violence_injury_prevention/violence/neglect/en/
- ii The Protection of Children from Sexual Offences, 2012, No. 32, Acts of Parliament, 2012 (India)
- iii Ministry of Women and Child Development, Study on Child Abuse India 2007,
<https://resourcecentre.savethechildren.net/node/4978/pdf/4978.pdf>
- iv The Indian Penal Code, 1860, No. 45, 1860 (India)
- v Section 375 of the Indian Penal Code, 1860
- vi Section 354 of the Indian Penal Code, 1860
- vii Section 377 of the Indian Penal Code, 1860
- viii World Health Organization, Report of the Consultation on Child Abuse Prevention, 1999
http://www.who.int/violence_injury_prevention/violence/neglect/en/
- ix Reethu Ravi, *Crimes Against Children Increased 4.5% In 2019: NCRB Data*, THE LOGICAL INDIAN (Oct. 1, 2020), <https://thelogicalindian.com/crime/crimes-against-children-increased-24102#:~:text=In%20its%20report%2C%20NCRB%20stated,reported%20in%202019%20in%20India.&text=The%20National%20Crime%20Record%20Bureau's,2019%20as%20compared%20to%202018.>