



ORIGINAL RESEARCH PAPER

Law

STUDY ON CHILD SEXUAL ABUSE AND THE LAW IN INDIA: A CRITICAL BREAKDOWN

KEY WORDS: Child, Sexual Abuse, POSCO Act

Mr. Divyesh Sureshchandra Mehta*

Research Scholar, Madhav University. *Corresponding Author

Dr. Pradeep Kumar Singh

Research Supervisor, Madhav University.

ABSTRACT

Child Sexual Abuse (CSA) has only recently been publicly acknowledged as a problem in India. A welcome development has been the enactment of a special law—Protection of Children against Sexual Offences (POCSO) 2012—criminalizing a range of acts including child rape, harassment, and exploitation for pornography. The law mandates setting up of Special Courts to facilitate speedy trials in CSA cases. The paper highlights the intended benefits and the unintended consequences that might arise from the application of the law in the Indian context. Undoubtedly, the passing of POCSO has been a major step forward in securing children's rights and furthering the cause of protecting children against sexual abuse in conjunction with a related legislation to clamp down on child marriages called the Prohibition of Child Marriage Act 2006. 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. However, criminalizing all sexual behavior under 18 years of age can be problematic. This paper identifies three main issues arising from POCSO: age of consent, and mandatory reporting; issues that highlight the fact that well-meaning laws can nevertheless have unintended negative consequences.

INTRODUCTION

Historically, child sexual abuse (CSA) has been a hidden problem in India, largely ignored in public discourse and by the criminal justice system. Until recently, CSA was not acknowledged as a criminal offence; rape was the main, if not the only, specific sexual offence against children recognized by law in India. In the absence of specific legislation, a range of offensive behaviors such as child sexual assault (not amounting to rape), harassment, and exploitation for pornography were never legally sanctioned. In the past few years activists, Non-Governmental Organizations (NGOs) and the central government's Ministry of Women and Child Development have actively engaged in helping break 'the conspiracy of silence' (HRW 2013) and have generated substantial political and popular momentum to address the issue. The movement, spearheaded by the Ministry of Women and Child Development, led to the enactment of new legislation called the Protection of Children from Sexual Offences (POCSO) 2012. This commentary highlights the distinguishing features of POCSO and focuses on three issues that might have consequences for how the law operates in reality. In this reflexive piece, we begin by briefly discussing the prevalence of CSA in India and the legal response to it. We draw upon existing literature, legal documents, media reports, access to police sources and personal practitioner experience to inform the paper.

LITERATURE REVIEW

Sexually abused children are severely let down by systemic failure of the criminal justice system to redress their grievances and by social ostracism associated with such abuse (HRW 2013). Only 3 % of CSA offences uncovered by Kacker et al. (2007) study was reported to the police (HRW 2013). It is unsurprising that CSA is severely underreported given the shame and associated socio-cultural stigma, especially if the abuse is in the context of the family (Choudhury 2006). This phenomenon is not unique to India but common to collectivist cultures in other Asian countries where an individual's experience is ignored so as to protect the family from shame associated with sexual abuse (Back et al. 2003; Stoltenborgh et al. 2011).

Until 2012, the only sexual offences against children recognized by the law were covered by three sections of the Indian Penal Code (IPC) not specific to children. The only

crimes registered were rape (sexual intercourse without consent—section 376), outraging modesty of a woman (unspecified acts—section 354) and unnatural acts defined as “carnal intercourse against the order of nature with any man, woman or animal” (anal sex, homosexuality or bestiality—section 377). Consequently, other forms of non-penetrative sexual assaults, harassment and exploitation were not explicitly recognized as crimes and therefore not recorded (assuming they were reported). Increased activism around child protection issues in the media and public discourse might partly account for the Government of India passing a special law called, 'The Protection of Children from Sexual Offences (POCSO) 2012'. This Act criminalizes sexual assault, sexual harassment, and pornography involving a child (under 18 years of age) and mandates the setting up of Special Courts to expedite trials of these offences.

POCSO ACT

POCSO 2012 does not use the term 'rape' more commonly used and also does not confine penetrative sex to penile penetration. Instead, it broadens the offence termed 'penetrative sexual assault' (section 3) to include oral sex, as well as, insertion of any object into anus, mouth or vagina, in addition to penile penetrative sex. In State vs Pankaj Choudhary 2011, (pre-POCSO) the accused could only be prosecuted for 'outraging the modesty of a woman' for digital penetration of the anus and vagina of a 5-year-old child. The prosecution was unsuccessful in proving rape as the High Court ruled that digital penetration was not recognized as an offence under the India Penal Code (Delhi High Court 2011). The addition to the definition of penetrative assault has increased the cover of protection for children. POCSO also criminalizes a range of behaviors as being sexual assaults, short of penetration (section 7).

Additionally, the offences of 'aggravated' penetrative and non-penetrative sexual assault is made more serious and attract stronger penalties (sections 5, 9) when committed by a specified range of perpetrators, in a wide array of situations or conditions, and/or has a severe impact on the victim. This includes sexual assault committed by persons in authority or position of power with respect to a child, committed by persons in a shared household with the child, in conditions such as: gang rape, causing grievous bodily harm, threatening with firearm or corrosive substances, during

communal or sectarian violence, assaulting a child under 12 years of age, or one who is physically or mentally disabled, causing a child to become pregnant, or knowingly assaulting a pregnant child, or infecting the child with HIV, repeated assaults, or accompanied by public degradation. The definition is very comprehensive and covers a range of possible scenarios. POCSO is also forward thinking in many aspects, in that, the definition of sexual harassment includes repeatedly or constantly following, watching or contacting a child either directly, electronically or through other means [section 11 (iv)]—thus, covering incidents of child harassment via sexting or sexual cyberbullying.

Implementation of POCSO 2012 involves various criminal justice, state and third sector agencies and is very resource intensive. Various problems arising from resource scarcity and lack of appropriate training which affect how investigations, prosecution and medical examinations are conducted in cases of CSA in have been identified by stakeholders in a state wide consultation in Maharashtra (Maharashtra State Consultation 2014). Instead of revisiting those problems which impact the implementation of the Act, this paper focuses on three issues—namely, age of consent, obligatory reporting and age determination—embedded in the provisions of the Act that might cause unintended negative consequences individually and in combination.

AGE CONSENT

All sexual acts described under POCSO are, without exception, considered to be criminal offences if they involve a 'victim' under the age of 18 years. This holds true regardless of the issue of consent or the age of the 'perpetrator'. In cases of consensual sex between two minors the concepts of victim and perpetrator become interchangeable as the law inexorably criminalizes sexual behavior for under-18-year-old. The Act does not confer any sexual autonomy to children who may then be liable for committing sexual acts under the law. POCSO invariably criminalizes a juvenile 'perpetrator' of CSA to be "dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act 2000" [section 34(i)].

However, in 2013 a Special Court judge rejected the notion that the human body of a person under 18 years is the property of the State, whereby it can restrict individual autonomy on sexual behavior. While ruling in a case where a 15-year-old willingly eloped with and married a 22-year-old man, the judge held that criminalizing such behavior would not serve the purpose of the enactment (TOI 2013). There is thus a tension between the letter of the law and its spirit. Determining whether an allegation involving underage sex was forced or consensual would depend greatly on individual interpretation of the circumstances. The law allows for abuse in either direction: being too restrictive of children's autonomy or too permissive of CSA. Finally, lack of proper support and professional help to the victim and their family can sometimes cause greater psychological harm and trauma (Oz and Balshan 2007).

OBLIGATORY REPORTING

- Criminalizing sex under 18 years virtually pushes it beyond the purview of health professionals and school counsellors who might be reluctant to impart safe sex advice or treat effects of unsafe or reckless sexual practices without breaching patient confidentiality and/or getting involved with reporting it to the authorities.
- The law raises many issues for institutions, charities and organizations working with poor and backward communities and children and who are deeply committed to building relationships based on trust with young people. Breach of trust would seriously jeopardize their efforts to communicate with and work with young people

if they are legally bound to report any knowledge of consensual, albeit underage sex. Lack of training for professionals (doctors, teachers, psychologists, social workers, counsellors etc.) working with children on how to deal with knowledge of sexual activity and to respond appropriately can be an additional problem (Goldman 2010).

- Mandatory reporting raises the issue of who is or should be responsible for enforcing this legal obligation. The police are overworked and scarcely possess the capacity to do so. Prescribing a legal obligation with penal and financial sanctions, without thinking through the mechanism for its enforcement, and the resulting lack of accountability, might mean that cases of failure to report fall through the cracks. There is a danger that the law may be used only retrospectively to punish transgressions, rather than ensure prospective reporting of suspected CSA by competent authorities in appropriate cases.

CONCLUSION

POCSO 2012 has undoubtedly made a significant contribution to tackling the problem of CSA in India. It has identified and criminalized a range of unacceptable sexual behaviors that pose a threat to children. The number of reported cases is increasing rapidly, indicating that the law has made a substantial contribution in educating the public, sensitizing the criminal justice system, and making the reporting of CSA not just acceptable, but also mandatory. The law has some unique features and is very comprehensive. However, three main issues identified in the letter and spirit of the law could create potential problems for implementation in the Indian context. The issues are: inflexibility regarding age of consent for sex under 18 years of age; mandatory reporting obligations; and the inexact nature of age determination. Further, the Indian government's desire to prohibit child marriages and protect vulnerable children expressed in the Prohibition of Child Marriages Act 2006, combined with POCSO 2012 should prove to be a deterrent to underage marriages. However, given the problems identified above and, in a climate, where social and cultural norms still tolerate, if not actively encourage child marriages, the potential for waste and loss of resources cannot be denied.

REFERENCES

1. Karthiga RK, Ravikumar R. Child sexual abuse in Madurai, India: a literary review and a empirical study. *J Child Sex Abus.* 2014.
2. Ministry of Women and Child Development. Model guidelines under Section 39 of The a. Protection of Children from Sexual Offences Act, 2012.
3. POCSO Act - Providing Child-Friendly Judicial Process. Press information Bureau, GOI.