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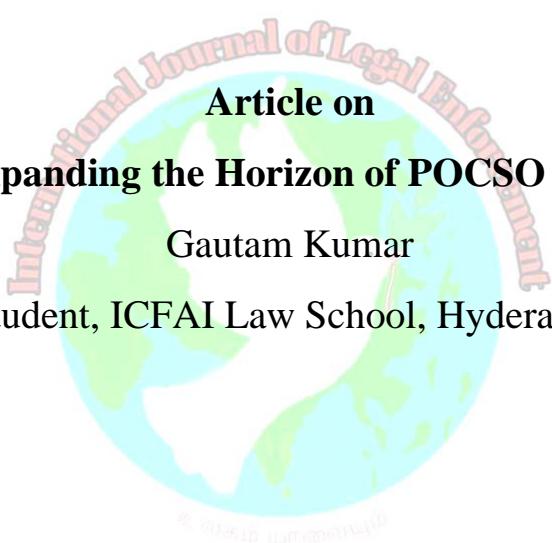
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“Dharma is to protect the Needy”



Article on

Expanding the Horizon of POCSO Act.

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Abstract

Before the existence of POCSO Act sexual offences with children were prosecuted under the provisions of the Indian Penal code. Sec 376 of IPC (punishment for sexual intercourse without consent), sec 377 of IPC (unnatural sexual offences such as carnal intercourse against the order of nature with man, woman, or animal), and sec 354 of IPC (Assault or criminal force to woman with intent to outrage her modesty). Since, numbers of sexual behaviours were out of the scope of above cited provisions of IPC, prosecutions of such victims were difficult. With increased presser from child right activist and media, government thought of special laws for children. POCSO Act. 2012 is a comprehensive law to provide for the protection of children from offences of sexual assault, sexual harassment and pornography. This research paper also cites the reasons behind less reporting of sexual offences cases than the actual incidence. Adding to it the present research paper also highlights the constitutional validity of POCSO Act and Amendments needed.

Objectives of the Research Paper:

1. To study the level of protection given by the present Protection of Children from Sexual Offence (POCSO) Act, 2012.
2. To highlight and analyse the Protection of Children from Sexual Offence Laws of Foreign land
3. To suggest the solution to the present problems in substantiative and procedural laws of protection of children from sexual abuse and create awareness among the masses.
4. To highlight the lacunas in the present POCSO Act, which needs to be amended.

Methodology

To a great extend the present work is a Qualitative study carried on with the help of Articles, journals and blogs. Data required for this research paper has been collected from secondary sources. Adding to it record of various government agencies such as National Crime Record Bureau and police Report and Advisory at Child Rights and you, are also included. The historical perspective of the respective fields has been taken to analyse and interpret the conclusion.

1. Introduction:

Punishment or Penalisation is a prerequisite to deter the offender. In order to build a welfare state penal provision of the state must be robust. It is a widely used Phrase in legal world that “Justice delayed is Justice denied”.

Children, the pure soul, an uncut diamond, who is unaware of the impurity of this planet. They teach us to spread love, happiness, purity but unfortunately those messengers of God are easy prey to goons of the society, as the minors fail to understand what happened to them. They remain in such a disadvantageous position that fighting against wrong is at the mercy of Major.

As per the report of National Crime Record Bureau, at least 109 children were sexually abused every day in India in 2018, which indicates 22 per cent jump from the past year record. NCRB data shows that India reported 32,608 cases in 2017, and 39,827 cases in 2018 under the Protection of Children from Sexual Abuse Act, 2012 (POCSO). ¹

In 2018, Purnima Govindarajulu, she was a survivor and petitioner, after a long time of 40 years she came to report her case but failed to do that. Then she decided to launch an online campaign raising awareness. Consequently, the Ministry of Woman and Child Development requested the Ministry of Law and Justice to lift the time limit of reporting the cases. Still, plight of children who suffered such heinous offences before 2012 remains out of the Jurisdiction of POCSO Act.²

2. POCSO and its constitutionality.

Article 14 of the Indian Constitution permits reasonable classification but prohibits class legislation. Reasonable classification is permitted because different classes of person and different places require separate treatment. Identical treatment in unequal circumstances would amount to inequality.

Classification is said to be reasonable when A) The classification must be founded on intelligible differentia which distinguishes persons or things that are grouped together from other left out of the group. B) the differentia must have a rational relation to the object sought to be achieved by the act. In the case of Subramanian Swamy vs. Raju and the members juvenile

¹ India Today, <https://www.indiatoday.in/india/story/109-children-sexually-abused-every-day-india-2018-1636160-2020-01-12> (last visited on May 25, 2021).

² Manuraj Shunmuga Sundram, Expanding the Scope of POCSO, THE HINDU, 7, 14, (2021).

justice Board, (Nirbhaya case)³ age was the basis of classification. In Nirbhaya case offenders were classified on the basic of age and objective of the Juvenile justice Act 2000 read as, An Act to consolidated and amend the law relating to juveniles in conflict with law and children in need of care and protection by catering to their development needs and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment.

Similarly, by amending the Present POCSO Act, a new clause can be inserted which could put children in special category and registration of historical child sexual offences could be entertained. Another addition in the present act could be the establishment of a special police force which has a power to investigate exclusively child sexual offences. Special police force set up by this Act must have special skill to investigate such tempered and old evidence.

Adding to Article 14 of the Constitution Article 15(3) of Indian Constitution exclusively mentions the Power of the state. It read as Nothing in Article 15 shall prevent the state from making any special provision for women and Children. Objective behind the same could be the physical and mental structure of the children and women. Women and children require special treatment on account of their very Nature.

3. Drawbacks in substantive and procedural laws pertaining to protection of Children from sexual abuse.

Sec 468(2) of Criminal Procedure Code (Cr.PC) Prohibits judicial Magistrates from taking cognisance of the case beyond 3 years.

The POCSO Act came into effect on the 19th of June 2012, this presents an insurmountable legal barrier against the registration of historical child sexual offences which took place before 2012.

Before POCSO Act came into effect, cases pertaining to Child sexual abuse were loosely Prosecuted under section 354 of IPC and sec 376(3) of IPC.

Sec 354 of IPC reads as Assault or Criminal force to Women with intent to Outrage her Modesty.

³ Subramanian Swami vs. Raju and members of Juvenile justice board,

The essential ingredients of the offence, in order to prosecute under sec. 354 are as follows:

- That the Person assaulted must be a Woman.
- Accused must have used Criminal force on her intending thereby to outrage her modesty.
- What Constitutes an outrage to female modesty is nowhere defined, the essence of a woman's modesty is her sex.
- Act of pulling a woman, removing her dress coupled with a request for sexual intercourse, as such would be an outrage to the modesty of a Woman.
- Knowledge, that modesty is likely to be outraged, is Sufficient to constitute the offence without any deliberate intention of having such outrage alone for its object.⁴

Intention is not the sole Criterion of the offence Punishable under section 354, IPC and it can be committed by a person assaulting or using criminal force to any Woman, if he knows that by such act the modesty of the women is likely to be affected.

Sec 376(3) of IPC reads as: Whoever, commits rape on a Women under Sixteen years of age shall be Punished with rigorous imprisonment for a term which shall not be less than twenty years. But which may extend to Imprisonment for life, which shall mean imprisonment for the remainder of that Person's Natural life, and shall also be liable to fine.⁵

4. Delayed in reporting cases: Why???

Sexual offences are such in nature which becomes a nightmare for victims. Even the victim's whole mental health gets disturbed which takes years together to restore it to normalcy. As per the reports of different institutions such as National Institute of Mental Health and Neuroscience says that 13.7 percent of Indians suffer from different types of mental disorder. WHO reports, more than 60 million Indians suffer from different types of mental disorder.⁶ The National Commission on Economics and Health Report reveals that out of the above mentioned patients of mental disorder a large group of people holds the victims of sexual offences. There is no fixed time which assures recovery, Dr. Sarah Das says that Depression is a serious mental illness and is unlikely to go away or cure itself. There is no average duration

⁴ Ratanlal & Dhirajlal, The Indian Penal Code, 601 (LexisNexis, 2019).

⁵ Ratanlal & Dhirajlal, The Indian Penal Code, 643 (LexisNexis, 2019).

⁶ GrowthNews, <https://www.crowdh.com/mental-health-stigma-india/#:~:text=The%20stigma%20affects%20people%20in%20India%20in%20many,related%2C%20often%20stop%20these%20people%20from%20seeking%20help.> .., (last visited on May 26, 2021)

for major mental disorder because a person's experience and response are the two different variables on which recovery depends. Also, depression can last for months, years or decades, it may worsen over time.⁷

Our Indian Society is still Pragmatic, especially in villages parents stop their children to make a complaint against the offender or raise their Voice fearing the social status. On the other hand, Indian Society is virginity obsessed, in India girls' character is evaluated on the parameter of virginity. Respect in society is prioritised over dignified life, self-respect, and personal well-being. Poor parents fear that when this incident comes out then it will be almost impossible to find a suitable bride-groom for marriage. We live in such a society where offenders move freely, live happily and proudly whereas the victims of sexual offences live life which is sometimes worse than animal living. Abandoned by society, sometimes by family etc.

In some cases, police officials too deny filing FIR of such nature when the complaint is against the high profile personal or where the name and fame of bigger Organisations are at stake. Similar incident took place where a four year old child was sexually abused by the watchman of the school. In order to rescue the name and fame of the school, the school trustee backed the watchmen and hired a high-profile criminal lawyer. On the other hand, a fresh graduate decided to help the victim in her fight of getting justice. At the end the accused was convicted to 7 years of Imprisonment.⁸ In another case where police official denied lodging FIR initially, in this case a father accused of raping her daughter and the FIR was lodged after 18 months from incidence, mother blamed the police official for late reporting, she argued that Police official did not lodged FIR against her Husband.

These are some of the reasons behind being late in reporting the cases against the offender. It takes a really long time to gain confidence in person or get support from society to fight against such violators.

⁷ The Recovery Village, <https://www.crowdh.com/mental-health-stigma-india/#:~:text=The%20stigma%20affects%20people%20in%20India%20in%20many,related%2C%20often%20stop%20these%20people%20from%20seeking%20help.> , (last visited on May 26, 2021).

⁸ The Indian Express, <https://indianexpress.com/article/opinion/columns/bombay-hc-judgement-child-sexual-abuse-pocso-act-7169159/> , (last visited on May 30, 2021).

5. Recent Judgement of Bombay HC seems dangerous for child rights.

In a case where uncle took a 12-year girl to his home to provide her with Guavas. Uncle, without removing her Salwar (clothes) pressed her breast and tried to remove the Salwar, in the meantime Mother reached on the spot to rescue her daughter. Then Accused (uncle) was tried under sec 8 of Protection of Children from Sexual Offences (POCSO) act, for punishment. Session court convicted the accused for sexual assault under section 8 of POCSO Act, and under sec. 354 of IPC. Aggrieved by the decision of the session court, the accused appealed to High court of Bombay. In appealed case, the key question stucked around, whether pressing the breast of a child without removing the shirt and without any skin-to-skin contact could fall under the category of sexual assault as defined under POCSO. High court of Bombay in its ruling said that “The act of pressing of breast of the child aged 12 years, in the absence of any specific detail as to whether the top was removed or whether he inserted his hand inside top and pressed her breast, would not fall in the definition of sexual assault. It would certainly fall within the definition of the offence under section 354 of the Indian Penal Code.⁹

In a country like India, where sexual offences are seen through the lens of social stigma. Cases of such nature are reported in exceptional circumstances. Reason behind, less reporting of cases than the actual one could be many but the major reasons are: social stigma, unawareness of different touches (good touch or bad touch), lack of social support, less awareness of child right, and many more. In addition to all the existing setbacks in sexual offences cases reporting hesitations, the precedent by Bombay HC would potentially break the backbone of the awareness spread. Consequently, a number of cases will come forward in future for justice and may witness a drastic decline.

When national bodies like the National Commission for Women and Child Right commission came into action many protests were held. The Supreme Court of India ordered a stay on the Bombay High court’s ruling.

6. Comparison with foreign land:

At present, Indian law is such that historical child sexual offences are not entertained. Sec 468(2) of Criminal Procedure Code (CrPC) Prohibits judicial Magistrates from taking

⁹ Live Wire, <https://livewire.thewire.in/gender-and-sexuality/bombay-high-court-judgement-groping/> , (last visited May 30, 2021).

cognisance of the case beyond 3 years and POCSO Act came into effect in 19th of June 2012, this presents an insurmountable legal barrier against the registration of historical child sexual offences which took place before 2012. Loss of evidence with passing time, increased complexity, difficulty in proving historical cases are some of the reasons behind such restriction. Indian legal experts are of the view that one of the major drawbacks of delayed reporting is the lack of evidence to advance prosecution. It is believed that there would be less than 5 per cent chance for gathering direct physical and medical evidence in such a case. On the other hand, the UK's legal system treats historical sexual offences very seriously, their courts and Police officials are well aware of the sensitivity and complexity of the historical cases. Legal system of UK gives free hand to sexual offence victims to report cases any time, time is not a restriction. Possibility is huge that by the passes of a considerable amount of time fair trial may be distorted and the likelihood of the case to be dropped by the court is very high. But when historical sexual offences are reported then investigative agencies aim to look for corroborative evidence to strengthen or corroborate the complainant's case. Under the umbrella of Corroborative evidence, it includes material received in the process of searching files from Schools and local authority. If investigating agencies get enough supporting evidence and if they find prosecution in the interest of the public then the accused could be punished. Fairness and the presumption of Innocence are fundamental principles that underpin the criminal justice system. The burden of proving an offence therefore falls on the prosecution. However, in historical sexual cases, their potential complexity and lack of corroborating evidence require that the defence take particular care to ensure the fundamental principles are given focus.¹⁰

Procedure to prove the case:

In Criminal cases credibility, reliability and consistency of the witness or evidence is very important to prove any fact but if the case is historical then establishing truth becomes challenging in this case. On the other hand, physical as well as Scientific evidence too becomes challenging in establishment of truth. In historical cases Witness statements and third-party disclosure could be helpful in proving the facts. Witness statements may include statements of complainant, accused, police officer who investigated the case, family members, friends etc. if anybody's memory helps in narrating the exact incident then those statements could act as

¹⁰ Sutton Defence lawyer <https://www.suttondefencelawyers.co.uk/sexual-offences/historic-sex-offences.html> , (last visited on may 28, 2021).

corroborative evidence in proving the facts. In case of third-party disclosure, it includes documents from social service, physiologist, educational and medical records.¹¹

7. Conclusion:

Undoubtedly, POCSO Act 2012 has made significant changes in tackling the sexual offences with children in India. The present protective law widened its coverage and have included all types of unacceptable sexual behaviour with children. Identification and criminalisation of sexual behaviour is very strict under the present law. In past few years reporting of cases of sexual abuse with children have increased which is a positive sign, it seems that the POCSO Act 2012, have succussed in making aware the masses regarding child right and adding to the same identification and criminalisation of the present Law was accurate.

Still the present substantive and Procedural laws regarding protection of children from sexual abuse faces some or the other challenges which needs to be reformed immediately for the betterment of the children. Both substantive and procedural laws put restrictions on reporting of cases. Restrictions of limited time should be lifted because these offences are such in nature that it takes years together to recover from mental trauma, sometimes because of social stigma families defer from reporting cases. It takes time to gain confidence, and support of influential crowd. Indian lawmakers cite reasons behind restriction such as, with the passing of time it becomes difficult to prove the fact as the evidence are not easily found and credibility, authenticity, and consistency of witness are not easily set up once a lone time has passed. In the present case, the UK's model of investigation and evidence collection could be a better deal. Adding to it corroborative evidence could also act as an important pillar in proving the alleged facts.

Priti Mehra, director of Police Report and Advisory at Child Rights and You, said that although the cases are increasing at an alarming rate which is a matter of concern but now the reporting percentage is increasing which is a positive sign, Citizens' faith in the police and Justice delivery system is reviving. Adding to the same she said Government's intervention in evidence creation could play a vital role in Justice delivery. Strengthening the community level Child Protection system is also a key to prevention. POCSO Act, 2012 is a comprehensive law to provide for the protection of children from offences of sexual assault, sexual harassment and

¹¹ Sutton defence lawyer, <https://www.suttondefencelawyers.co.uk/sexual-offences/historic-sex-offences.html> .(last visited on May 28, 2021).

pornography. It requires special treatment of cases relating to child sexual abuse such as setting-up of special courts, special prosecutors, and support persons for child victims.

