

## Child sexual abuse and the law in India: a Commentary

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### 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—criminalising 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, criminalising all sexual behaviour under 18 years of age can be problematic. This paper identifies three main issues arising from POCSO: age of consent, age determination, and mandatory reporting; issues that highlight the fact that well-meaning laws can nevertheless have unintended negative consequences.

### Keywords

India Child sex abuse POCSO Consensual underage sex Child marriage

### 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 recognised by law in India. In the absence of specific legislation, a range of offensive behaviours 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 Organisations (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.

## CSA in India

Growing concerns about female infanticide, child rapes and institutional abuse of children led to the commissioning of the first large scale government sponsored research study to assess the extent and nature of child abuse in India (Kacker et al. 2007). The study, based on a well-designed methodology, covered 13 states (two states from each of the six geographic zones in the country) including states with the highest through to the lowest crime rates in incidence of offences against children. The sample was purposive and included 12,447 children, 2324 young adults and 2449 stakeholders representing five different evidence groups: children in the family, at the workplace, in schools, on the streets and in institutions. The study reported widespread emotional, physical, and sexual abuse prevalent in all the states surveyed. While every second child reported emotional abuse, 69 % (n = 12,447) reported physical abuse, and 53 % (n = 12,447) reportedly experienced some form of sexual abuse. Half of sexual abuses reported were committed by “persons known to the child or in a position of trust and responsibility” (Kacker et al. 2007: vii). Carson et al. (2013) survey of the current state of knowledge on CSA in India concluded that empirical studies report a much higher incidence of CSA than previously acknowledged by authorities or by families. The paper summarises the findings of several studies and reports that 18–20 % of CSA occurs in the family and around 50 % in institutional settings. Further, there is regional and rural–urban variation in the rates and extent of CSA in the country. Girls are more vulnerable to sexual abuse, although boys too reported a high percentage of victimisation and are subject to greater social stigma. Finally, Carson et al. (2013) suggest that although sexual exploitation and abuse is strongly correlated to poverty, it occurs in families across the socioeconomic and religious spectrum. However, factors that facilitate CSA, such as poverty, overcrowding, extended family living arrangements, abundance of street children, and lack of recreational facilities in families (Carson et al. 2013) are by no means exclusive to India. Admittedly, their impact might be exaggerated or intensified given the population density and size in India. Thus, a complex mix of individual, ecological and situational factors that are said to facilitate CSA (Smallbone et al. 2014) might account for its prevalence in the Indian context. However, the absence of empirical research precludes definitive conclusions.

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 were 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).

## Legal response to CSA

Until 2012, the only sexual offences against children recognised 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 recognised 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 criminalises 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.

Table 1 indicates recorded child rape cases nationally and for the state of Maharashtra as a case study.<sup>1</sup> Maharashtra is one of the most developed states in India and is among the top three states with the highest recorded child rapes from 2001 to 2013 (NCRB 2015).

**Table 1**

**Recorded rape against children-comparative figures (source: NCRB website)**

<b>Year</b>	<b>All India</b>	<b>Maharashtra</b>
2001	2113	367
2005	4026	634
2010	5484	947
2012	8541	917
2013	12,363	1546

Since 2001, there has been a gradual but steady rise in recorded incidents of sexual abuse i.e. child rape. Although there is no evidence to indicate that globally the prevalence of CSA has been going up over the years (Barth et al. 2013), we might hypothesize that increased reporting in India over this period might be the result of greater public awareness, education and a more sensitive criminal justice response to CSA. Following the enactment of POCSO, the number of offences registered under rape itself went up 44 % nationally and 68 % in the state of Maharashtra within a year, lending support to the hypothesis. Further, detailed figures from Maharashtra provided by the second author indicate that total registered crime under POCSO was 2540 offences in 2013 and 3858 offences in 2014, amounting to a 51 % increase in 1 year.

### **Distinctive features of POCSO**

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 recognised 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 criminalises a range of behaviours 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. However, the interpretation of what might constitute ‘repeatedly’ or ‘constantly’ following or contacting a child with sexual intent (with the law specifying sexual intent being a ‘question of fact’) is unspecified in POCSO 2012 and consequently is potentially contestable.

The Act is quite distinctive in that it penalises abetment of or attempt to commit any of the offences listed in the preceding sections (section 16). Another ‘extraordinary clause’ (section 29) in the Act is the presumption of guilt of the accused, until proven innocent. This matter of jurisprudence lends itself to problems in the light of some of the points raised below (Andrade and Rao 2013).

The provision of Special Courts (section 35) where trial proceedings may be conducted in a more sensitive manner with the victim’s testimony given either ‘in camera’ (i.e. privately), via video-link, or behind curtains or screens, is intended not only to reduce trauma but also protect the identity of the child. The Special Court plays a pivotal role in how the law and the evidence may be interpreted.

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 of 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 criminalises sexual behaviour for under-18 year olds. The Act does not confer any sexual autonomy to children who may then be liable for committing sexual acts under the law. POCSO invariably criminalises 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 behaviour. While ruling in a case where a 15 year old willingly eloped with and married a 22 year old man, the judge held that criminalising such behaviour 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). Child Welfare Committees are to provide this support in India but are not really functioning satisfactorily (Maharashtra State Consultation 2014). It therefore creates difficulties for ‘victims’ as well as ‘perpetrators’ under 18 years, the latter are criminalised but not provided with professional help they might need.

## Obligatory reporting

Mandatory reporting of CSA by any citizen, but especially those working with children and young people in the education, social, religious and health sectors is enshrined in POCSO (section 19). Failure to do so carries legal sanctions of imprisonment up to 6 months and/or fines intended to encourage compliance with the law. Evidence in other countries (USA, Australia) shows that mandatory reporting of child sexual abuse has had mixed success (Kim et al. 2012; Ainsworth 2002). The Report for the Royal Commission into Institutional Responses to Child Sexual Abuse (Mathews 2014) reported that since the aim of mandatory provisions is to encourage reporting not police it, failures to report are rarely prosecuted in some jurisdictions. As a result, in New South Wales (Australia) the law has been amended to remove sanctions for failure to report CSA (Mathews 2014). However, mandatory reporting obligation under POCSO raises three problems specific to the Indian context:

Criminalising 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 organisations 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 jeopardise 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.

A possible solution to the problem would be for a competent authority to distinguish between acts of crime and consensual sex at an early stage. Thus, the incident ought to be reported, but decisions regarding registering an offence and investigating may be discretionary.

### **Age determination**

Determining the age of the victim and the perpetrator is fraught with problems. The Special Court is authorised to determine age [section 34(2)] but there are no clear guidelines as to how they are to do so. It is generally acknowledged that forensic means of establishing age of a living person can be inexact and quite complicated (Schmeling et al. 2003). The Supreme Court of India ruled in the case of Babloo Pasi vs State Of Jharkhand and Anr that age determination is very difficult in the absence of birth certificates or other official documentation and while the opinion of a specially constituted Medical Board may be useful in determining age, it cannot be the only or conclusive factor to do so (Supreme Court of India 2008). The Supreme Court further states that a hyper-technical approach should not be adopted and the Court should lean towards giving the benefit of the doubt to the juvenile while ensuring that the law is not being misused. Under POCSO the ages of both, victim and perpetrator, are pivotal in determining whether and how the Act would apply and influencing the outcome at the charging and trial stages. In developing countries like India where a large proportion of births are just not registered and therefore substantial sections of the population do not have documents like birth certificates or school leaving certificates to provide proof of age, this could be problematic.

### **Interaction between the three issues and its impact on child marriages**

Laws do not operate in isolation and often real life situations can confound even the noblest of intentions enshrined in law. In this case, the legal age of consent and mandatory reporting obligations of POCSO combined with the difficulty in determining age could cause more problems than anticipated for the criminal justice system. POCSO in conjunction with Prohibition of Child Marriage Act 2006 is intended to protect girls from being forced into early marriages. While this is a worthwhile goal to pursue, cultural and social norms supporting early marriages in India combined with the individual's right to sexual autonomy might present impediments to the fulfilment of that aim. A recent report on the census data indicates that in India one in six women were married before they were 18 years of age, of

which 17.5 % (6.5 million) women had been married within 4 years prior to when the census was conducted (Shaikh 2015). Thus, there are possibly 6.5 million (and growing) potential law suits under POCSO. It could lead to enormous waste of time and resources of the criminal justice system in cases of consent to marriage by a girl between the ages of 15–18 years. Ignoring the role of consent in underage sex combined with the inexact science of age determination in a climate of mandatory reporting can potentially lead to abuse of the legal system or miscarriages of justice.

A possible solution to this problem may be the mandatory linking of UID<sup>2</sup> (Unique Identification) with victim and offender data in cases involving underage parties at the time of reporting to help determine the age of the victim and perpetrator. However, this could potentially raise a number of ethical issues and might be at cross purposes with the original intention of the UID project in India.

## Summary

POCSO 2012 has undoubtedly made a significant contribution to tackling the problem of CSA in India. It has identified and criminalised a range of unacceptable sexual behaviours 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.

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