



Study of Act and various amendments relating to Child Sexual Abuse

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Abstract : Child Sexual Abuse (CSA) postulates abuse of a child by an adult/older person for sexual stimulation. Time has stood witness to exorbitant statistical increase in CSA all around the world despite adoption of innumerable international legal documents, growing national legal and social concern for the horrendous CSA problem. CSA, be it sexual molestation, incest, rape, commercial sexual exploitation or pornography, is undeniably an underreported harsh truth of the Indian society. Irrespective of gender, social strata or class, children in India face the risk of exposure to various forms of sexual abuse. Trauma and after-effects of CSA can be grave enough to fill the life of the victimized child with prolonging horrors diminishing the quality of life forever. Non-indulgent social attitude, double standards towards CSA, poor community and authority response, non-denial and hesitant family response, insensitive police and medical fraternity are greatly responsible in the growth of CSA in India, ultimately leading to the enactment of Protection of Children from Sexual Abuse Act, 2012 for protecting children from sexual assault, sexual harassment and pornography. Amidst this scenario, this research paper sheds light on the global and Indian facts and figures pertaining to CSA and its nature; examines the international documents relating to CSA and evaluates the national legal scenario relating to CSA. It also focuses on the failure of the Indian society as a whole in effectively addressing the issue of CSA and ponders the ways to curb this horrible menace.

Key words : CSA, Act, Law, POSCO

1860: Indian Penal Code

The first time 'rape' was mentioned in our legal structure was when the IPC was written in 1860. Section 375 to Section 376E of the Indian Penal Code refers to 'sexual offenses'. It defined rape as sex without consent, with consent but under the fear of death or with consent but under false pretenses. It also defined 'statutory rape' as sex with a woman under the age of 16. It makes no mention of rape as a crime against a male, since Section 377 – the one that makes gay sex illegal – covers that already.



However, Section 377 criminalizes both participants while including male victims in Section 375 would have criminalized only the rapist and not the victim. This loophole discourages male rape victims from complaining against their rapists because it would mean opening themselves up to prosecution too. The 1860 version of the IPC also ignored sex without consent between a husband and wife (aka marital rape), a clause that is missing from our anti-rape laws even today. The punishment for gang rape and repeat offenders was harsher. All in all, the minimum punishment for rape was as lenient as two years in prison (the same as perjury) and the worst-case scenario was a life sentence. The first change to this very ‘general’ outline of rape comes after the Mathura Rape Case in 1972.

1983: The Criminal Law (Second Amendment)

On March 26, 1972, a young Adivasi girl named Mathura was raped by two policemen while in custody. Her family lodged a complaint against the two policemen and the trial went all the way to the Supreme Court. The policemen were acquitted because Mathura was apparently ‘habituated to sexual intercourse’, they could prove that she was sexually active but not that she had been raped. The Supreme Court Justices even said that Mathura had raised no alarm, there were no visible marks of injury or struggle and because she was used to sex, she might have incited the cops to have intercourse with her. This verdict resulted in outrage across the country. Lawyers observed that instead of relying on hard evidence, the Court has let the cultural taboo of pre-marital sex influence its decision. They said that ‘submission’ during the rape had been misunderstood for ‘consent’ just because of this taboo.

Women’s groups held protests and marches, demanding a change in the law. This change came in 1983 to Section 114 (A) of the Indian Evidence Act. Until this point, rapes by public servants had completely been ignored by our legal system. But with this case, a new category of rape called ‘Custodial Rape’ was introduced to include rapes of women while in custody of public servants. While so far the woman had to prove that the sex was not consensual, this amendment said that a court should presume a woman who says she did not consent is telling the truth. This made the idea of ‘consent’ an integral part of rape. Also, it was this amendment that banned the publication of victims’ identity and prohibited the ‘character assassination’ of rape victims in court. It’s thanks to this amendment that rape victims now have pseudonyms like ‘Nirbhaya’.

2002: Amendment to Indian Evidence Act



Even though the 1983 Amendment prohibited ‘character assassination’, it wasn’t defined to include the cross-examination of a rape victim. This was pointed out in a PIL filed by an NGO named Sakshi. They pointed out that women didn’t feel comfortable about reporting rape because “the intention of the defence in rape trials had become to humiliate and degrade the sexual integrity and personal space of the victim” rather than to treat them as someone who had undergone mental and physical trauma and someone who needed to be protected.

Taking note of this, the Supreme Court asked the Law Commission to review our rape laws and recommend changes. They found that Section 155 (4) of the Indian Evidence Act 2002, the defence lawyer could discredit a rape victim’s testimony by proving that she was of ‘immoral character’. This scenario included questioning her about past sexual acts. They identified that it was this specific clause that deterred rape victims from filing a case.

So, this clause was amended in 2002. After this amendment, the cross-examination of a rape victim was prohibited. Another reason why women refrained from reporting rape was the dreaded 2-finger test, in which a medical examiner inserts ‘2 fingers’ into the vagina to check its laxity. This test made women feel like objects in evidence, violating her privacy and integrity, instead of treating her like a trauma victim. Since cross-examination was out, medical examination became central to the case and therefore, this test couldn’t be prohibited. However, practitioners examining the victim had to provide all the necessary information to the victim and explain why the tests are essential, to not discourage anyone from filing a rape case.

2012: Protection of Children From Sexual Offences (POSCO) Act

Statistics indicated that India saw a 336% increase in child rape cases from 2001 to 2011. The National Crime Record Bureau statistics state that 48,338 child rape cases were recorded during this period. This alarming trend led to the need for a ‘special legal procedure’ for child victims of sexual offences. So far, the only mention of sexual offences against children was the ‘statutory rape’ clause mentioned in the IPC that criminalized sexual intercourse with a girl below the age of 16, regardless of consent.

However, the process of trying such a case was no different from a case that involved someone over 16. The resultant POSCO Act understood the special situations in which a child could be assaulted. For example, recognizing that the perpetrator might be someone close to the child or his/her guardian, the Act made the police in charge of protecting the child during the investigative process.



Now the police would have to make sure the child received protection (by placing the child in a shelter home) and providing emergency medical treatment. It also provided for special courts that could conduct the trial in-camera and without revealing the identity of the child, keeping it as child-friendly as possible. The Act said that cases of child sexual abuse should be fast-tracked within a year and that reporting such cases should be mandatory. That way, it's the legal duty of anyone who knows of the offence to report it. Another big loophole was that it did not specifically mention crimes against male-children. This loophole was rectified in 2012 with POSCO or the Protection of Children From Sexual Offences Act. The new Act was gender-neutral and recognized other forms of penetration apart from peno-vaginal penetration. The Act also included the abetment of child sexual abuse as an offence and included non-penetrative assault, sexual harassment and child pornography.

2013: Criminal Law (Amendment) Act

On December 16, 2012, a 23-year-old physiotherapy intern, Jyoti Singh was brutally gang-raped in a moving bus. After struggling to survive in the hospital, she succumbed to her injuries on December 28. The brutality and violence of the case led to widespread protests around the country.

The public wasn't only demanding a change in the law, but also a change in how the crime of rape was looked at. This was a turning point for anti-rape laws in India – now it wasn't just a violent crimes issue but it was also a women's rights issue. This forced the legal system of India to reconsider the existing laws and led to the realization that many other crimes that were specifically against women like stalking, acid attacks, and voyeurism were missing from our legal framework.

To make sure something like the Nirbhaya case never happened again, the government wanted to amend the existing laws to cover ALL crimes against women and make punishments as harsh as possible. This led to the 2013 Criminal Law Amendment. Under this change, new offences such as stalking, acid attacks, and voyeurism were added into the definition of rape. Even the threat of rape is now a crime. The minimum sentence was changed from seven years to 10 years. In cases that led to the death of the victim or the victim being in a vegetative state, the minimum sentence was increased to 20 years. This was the first time the vegetative state was included since the landmark Aruna Shanbaug case.



While the Nirbhaya case was on trial, the character of the victim came into play even with the 1983 and 2002 amendments in force. Considering how public this case was, a lot of the character assassination came from outside of court, from TV debates and Parliament discussions. Since the victim was a young professional, her independence and ‘western’ lifestyle were treated as ‘invitations’ for rape. To avoid this in the future, this amendment reiterated that the ‘character of the victim’ was totally irrelevant to rape cases.

Since one of the accused in this case was a juvenile and ended up being tried as such, another flaw in the system was identified. So, the age for being tried as an adult for violent crimes like rape and murder was changed from 18 to 16, that to the Juvenile Justice Act.

2018: Criminal Law (Amendment) Ordinance

In January 2018, an 8-year-old girl named Asifa Bano was raped and murdered in the district of Kathua in Jammu and Kashmir. Seven people were named in the case chargesheet, four of whom were police officers charged for attempting to cover up the case. The main accused, Sanji Ram, is a priest at the temple where the rape evidently took place. His nephew and son, both juveniles, were also accused.

This case led to national outrage, especially because it was against a child, but also because it took place in a temple and was perpetrated by a priest. It quickly became politicised along the Hindu-Muslim lines. All this against the backdrop of a political upheaval as the PDP and BJP alliance broke in Jammu & Kashmir, the state in which this crime took place.

The pressure on the government to legally address this crime led to an almost immediate policy change with this Ordinance only 3 months after the incident. This change was mainly made to POSCO since it was against a child. It made rape of a child below age 16 punishable by a minimum of 20 years imprisonment but provided for the death penalty for the rape of anyone below age 12.

While the death penalty for rape has long been demanded, this is the first time, where it has actually been introduced. It also altered the fast-track clause from a year to 6 months, so that such cases would find justice without being coloured by politics. Since this Amendment was an Ordinance, it still needs to be discussed in the Parliament in order to become an Act. This discussion will most likely take place this year, and considering the political pressure involved, it will probably be passed with little discussion. This can be problematic since even this one (like all its predecessors) is not without its flaws.



Conclusion

To deal with child sexual abuse cases, the Government has brought in a special law, namely, The Protection of Children from Sexual Offences (POCSO) Act, 2012. The Act has come into force with effect from 14th November, 2012 along with the Rules framed thereunder. The POCSO Act, 2012 is a comprehensive law to provide for the protection of children from the offences of sexual assault, sexual harassment and pornography, while safeguarding the interests of the child at every stage of the judicial process by incorporating child-friendly mechanisms for reporting, recording of evidence, investigation and speedy trial of offences through designated Special Courts.

References :

1. Ekstrand, L.E. (1996). Preventing Child Sexual Abuse: Research Inconclusive About Effectiveness of Child Education Programs. Washington, DC: General Accounting Office.
2. Finkel, M.A. & Giardino, A.P. (2009). Medical Evaluation of Child Sexual Abuse: A Practical Guide. Elk Grove Village, IL American Academy of Pediatrics.
3. Finkel, M.A. & Giardino, A.P. (2009). Medical Evaluation of Child Sexual Abuse: A Practical Guide. Elk Grove Village, IL American Academy of Pediatrics.
4. Freeman-Long, R. (2000). Myths and Facts about Sex Offenders. Silver Spring, MD: Center for Sex Offender Management.
5. guidelines_chap7.pdf. (n.d.). Retrieved from https://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap7.pdf
6. Jane Lewis (1995) The Voluntary Sector, the State and Social Work in Britain (Edward Elgar).