

# POSCO AMENDMENT ACT, 2019: A CRITICAL AND COMPARATIVE ANALYSIS.

<sup>1</sup>**Arun Kumar Singh**

Assistant Professor

School of Law and Legal Affairs, Noida International University

<sup>2</sup>**Saurabh Pandey**

LLM Student School of Law and Legal Affairs, Noida International University

***“It cannot be denied that in cases of child rape the question of consent cannot arise at all, simply because a child or worst still an infant lacks mental power or knowledge to provide “consent” or even lacks physical ability to restrain. Moreover, such an act subjects the child/infant to physical trauma, leading to even physical, mental and psychological ailment. To eliminate the horror from the face of the earth, I firmly believe we need to accept capital punishment as an apt punishment for subjecting a child to such an ordeal”***

***-Henrietta Newton Martin<sup>3</sup>***

***Abstract:*** The Laws relating to protection of child from sexual abuse has been formulated in 2012. In last couple of years, we have observed that crime against children has increased which has compelled parliament to bring amendments into the laws. Our constitution specifically provides for the provision relating to the children where they should be treated equally and special provision for them can be made under the law. These amendments have tried to cover the broader issues but has not been able to give the desired results. Recent, amendment of 2018 has enhanced the punishment of various crimes related to child abuse. International covenants have been signed by our country and ratified in the parliament, in pursuance of those covenants more stringent steps should be taken by the state. An integrated approach is required to answer all the issues relating to children and being our national resource, children must be protected from all kind of evil at any cost.

***Key Words:*** POSCO,2012, Criminal Amendment Act,2018, International Covenants, The Constitution of India, Supreme Court of India,

## **1. INTRODUCTION**

Society has evolved with time and as every action has an equal and opposite reaction, similarly with advancement of society, crime in the society has also increased a lot. When we see the vulnerable population in the society, Women and children are at the top of the list especially when we see statistics<sup>4</sup> of the sexual crime against the children. Child abuse tends to increase in conditions of certain factors which include rapid socio- cultural change, urban migration, family disorganization. Indeed, it seems that factors that predict child abuse in one society will not be predictive in another because each society has its own peculiar

---

<sup>1</sup> Assistant Professor, School of Law and Legal Affairs, Noida International University.

<sup>2</sup> LLM Student, School of law and Legal Affairs, Noida International University.

<sup>3</sup> Author, international human rights law-A Primer.

<sup>4</sup><https://www.cry.org/wp-content/uploads/2018/01/CRY-Media-release-Crime-against-Children-2017.pdf> Accessed on 30th May,2020.

circumstances. Public and professional concerns led to the emergence of the truer picture of all forms of the child abuse and neglect: physical, sexual, emotional, and failure to thrive owing to maternal deprivation<sup>5</sup>.

In the Census of 2011, it was counted by the authorities that more than 440 million children in India are below 18 years of age which constitute 37% of the total population of the country. Within the age group of 0-17 years, children between 0-6 years constituted about 14% of the total population of children, followed by 17% between 7-14 years and the remaining 6% in the age group of 15-17 years<sup>6</sup>.

The Indian Constitution accords rights to children as citizen of the country and in keeping with their special status the state has even enacted special laws.

1. Right to free and compulsory education for all children in the 6-14-year age group<sup>7</sup>.
2. Right to be protected from any hazardous employment till the age of 14 years.<sup>8</sup>
3. Right to be protected from being abused and forced by economic necessity to enter occupations unsuited to their age or strength<sup>9</sup>.
4. Right to early childhood care and education to all children until they complete the age of six years<sup>10</sup>.

Indian legal system has evolved and through special legislation has covered crimes specifically dealing with sexual offences against children. The Act i.e. *The Protection of Children from Sexual Offences (POCSO) Act*, which came into force in 2012, is the first comprehensive law in the country dealing specifically with sexual abuse of children. Punishment mentioned in the act has been enhanced by the recent amendment<sup>11</sup> and for child sexual abuse convict can be sentenced to death penalty. Going by data in the National Crime Records Bureau report, released in January 2020<sup>12</sup>, a total of 3.78 lakh cases of crimes against women were recorded across India in 2018 compared to 3.59 lakh in 2017 and 3.38 lakh in 2016. The total number of rape cases in 2018 was pegged at 33,356, of which Madhya Pradesh registered 5,450 rapes, the maximum in 2018. Also, The National Crime Records Bureau which released its 2017 data in October, 2019<sup>13</sup> said a total of 3.59 lakh cases of crimes against women were reported, a 6% rise compared to 2016. Of this, assault on women with intent to outrage her modesty comprised 21.7%, and rape 7%. For every rape reported, there are many which go unrecorded as patriarchal.

<sup>5</sup>Jill E. Korbin, *Child Abuse and Neglect: Cross-cultural Perspective* University of California Press, 1983, page ix. Accessed on 29<sup>th</sup> May, 2020.

<sup>6</sup><http://www.butterflieschildrights.org/Situation-of-Children-and-Child-Rights-in-India.pdf> accessed on 2/06/2020.

<sup>7</sup>Article 21A of the Constitution.

<sup>8</sup>Article 24 of the Constitution.

<sup>9</sup>Article 39(e) of the Constitution.

<sup>10</sup>Article 45 of the Constitution.

<sup>11</sup>Criminal Amendment Act, 2018.

<sup>12</sup><https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf>, accessed on 31<sup>st</sup> may, 2020

<sup>13</sup><https://www.india.com/news/india/crime-against-women-on-rise-maximum-cases-in-up-ncrb-report-3815109/>, accessed on 1<sup>st</sup> June, 2020

## **1.1 ABOUT THE ACT-POSCO**

The Act<sup>14</sup> came into force on *November 14, 2012* and was specifically formulated to deal with offences including child sexual abuse and child pornography. The Act through its 46 provisions increased the scope of reporting offences against children, which were not earlier covered under the Indian Penal Code. It defines a child as a person under age of 18 years age. It encompasses the biological age of the child and silent on the mental age considerations. This included aggravated penetrative sexual assault to include punishment for sexual assault by a person in position of trust or authority including public servants, police, armed forces, management or staff of an educational or religious institution. It has also defined the procedure for reporting of cases, including a provision for punishment for failure to report a case or false complaint. It provided procedures for recording of the statement of a child by the police and court, laying down that it should be done in a child-friendly manner, and by the setting up of special courts. The gender-neutral character of the Act has been recognised by the Supreme Court<sup>15</sup> and the same was reaffirmed recently by the Delhi High Court<sup>16</sup>. With respect to pornography, the Act criminalizes even watching or collection of pornographic content involving children<sup>17</sup>. The Act makes abetment of child sexual abuse an offense<sup>18</sup>. It also provides for various procedural reforms,<sup>19</sup> making the tiring process of trial in India considerably easier for children. The Act has been criticized in respect to the provisions which has criminalized consensual sexual intercourse between two people below the age of 18.

As data on sexual crimes against children collected by the court show, 24,212 FIRs were filed across India from January to June in 2019. According to National Crime Records Bureau data of 2016, the conviction rate in POCSO cases is 29.6% while pendency is as high as 89%. The prescribed time period of two months for trial in such cases is hardly complied with.<sup>20</sup>

The 2007, Ministry of Women and Child Development Study<sup>21</sup> on Child Abuse aimed to fix this problem, by providing insight into the world of child abuse in India. The study dealt inter alia with the “sexual assault” of children, which it defined as, “penetration of the anus, vagina or oral sex”<sup>22</sup>. The study found that, out of the over twelve thousand child respondents, “5.96% reported being sexually assaulted”, and a majority, that is 54.4%, of such victims of sexual assault were male children<sup>23</sup>. From these figures we can clearly conclude that victim of child abuse is not only from female gender, it equally affects male children and make them victim of the heinous crimes.

Though the POCSO Act does provide some enhanced procedural standards in the special courts set up under the Act<sup>24</sup>, the provisions of the CrPC<sup>25</sup> are also applicable<sup>26</sup>, in general, to such special courts, and since the CrPC does not provide for enhanced procedural

<sup>14</sup>The Protection of Children from Sexual Offences Act, 2012.

<sup>15</sup>Alakh Alok Srivastava v. Union of India, 2018 SCC Online 478.

<sup>16</sup>Jabbar v. State, CRL.A. 1444/2013

<sup>17</sup>Chapter 3 of POSCO ACT,2012.

<sup>18</sup>Chapter 4 of POSCO ACT,2012.

<sup>19</sup> Chapter 5,6,7 of POSCO ACT,2012.

<sup>20</sup>In Re Alarming Rise in The Number Of ... vs for on 25 July, 2019.

<sup>21</sup>Ministry of Women and Child Development, *Study on Child Abuse: India 2007*.

<sup>22</sup>*Ibid*

<sup>23</sup>*ibid*

<sup>24</sup> Protection of Children from Sexual offences act,2012

<sup>25</sup> Criminal Procedure Code,1973

<sup>26</sup>MANU/SC/0254/2011

standards for offences under the POCSO Act, it clearly provides better enhanced procedural standards for offences under the IPC, as discussed above. Examples of the enhanced procedural standards prescribed under the POCSO Act, include provisions prohibiting the publication or disclosure of identity of the victim child<sup>27</sup>, while other such standards are similar to those applicable to the sexual offences under the IPC like, the provision relating to conduction of trials under the Act in camera, and those providing for time-limits for the completion of evidence recording and trial processes. It is pertinent to note here that, under the POCSO Act, the evidence recording process needs to be concluded within thirty days from the date of the special court taking cognizance of the offence, while the trial must be completed, as far as it is possible, within one year. Even when the POCSO Act provides for procedural standards similar to those applicable to the concerned IPC offences, there lies a distinction, as can be seen in the provisions relating to prescription of time-limits, with the time-limits applicable to the concerned IPC offences being much shorter and mandatory in nature.

## **1.2 AMENDMENT IN THE LAW**

The changes have been brought into the law in the wake of events of Kathua and Unnao rape cases, which created outrage in the society. The Act has enhanced punishment under various sections of the Act including punishment for aggravated penetrative sexual assault to be increased to include death penalty. Other sections under which the punishment has increased includes the minimum punishment for penetrative sexual assault, which has been increased from seven years to 10 years<sup>28</sup> and, if the child is below 16 years of age, the minimum punishment has been increased to 20 years<sup>29</sup>. The Act has also tightened the provisions to counter child pornography<sup>30</sup>. While the earlier Act had punishment for storing child pornography for commercial purposes, the amendment includes punishment for possessing pornographic material in any form involving a child<sup>31</sup>, even if the accused persons have failed to delete or destroy or report the same with an intention to share it. The Act has also removed the words “communal or sectarian violence”, which had punishment for a person who sexually abused a child during such violence<sup>32</sup>. The words have been replaced with “violence during any natural calamity or in similar situations”.

The report<sup>33</sup> indicating an increase in the number of cases registered under the said Act “from 44.7 per cent in 2013 over 2012, and 178.6 per cent in 2014 over 2013, and no decline in the number of cases thereafter”.

The POCSO Act, under Section 42, provides that where the same act constitutes an offence under the said Act and any other law, then the offender will be punished under the Act or such law, whichever provides for greater punishment. This brings a contrary situation as the effect of such an amendment was death penalty for rape of minor girls but not for assault against minor boys.

It is gender neutral and provides for the death penalty for “aggravated penetrative sexual assault of a child”, thus bringing both these pieces of legislation on a par with each

---

<sup>27</sup> Section 228A, IPC

<sup>28</sup> Section 4 of the Act.

<sup>29</sup> *ibid*

<sup>30</sup> Section 2 of the Act.

<sup>31</sup> Section 14 of the Act.

<sup>32</sup> Section 9 of the Act.

<sup>33</sup> National Crime Record Bureau, 2016.

other in this respect. With these amendments and with the Supreme Court considering child abuse “intolerable”, there seems to be reasonable hope now that vulnerable children could be safer.

### **1.3 LAW OF UNITED KINGDOM ON CHILD ABUSE**

For countries like Canada<sup>34</sup> and the United States<sup>35</sup>, evolution in the field of child abuse law occurred in the 1980s and the 1990s, wherein they adopted gender-neutral definitions of rape and other forms of sexual violence against children, either at the state or federal levels. In the Countries like the Republic of South Africa and the United Kingdom, the evolution of the said provisions has been brought relatively in recent times.

British law relating to rape provided protection to both men and women<sup>36</sup> ever since the Sexual Offences Act, 1956 was amended by the Criminal Justice and Public Order Act, 1994, though the perpetrator of the act could only be male. The Sexual Offences Act, 1956, provided protection to children by virtue of separate offences based on gender and age. The most severe of these offences, taking into account the maximum term of imprisonment awardable as punishment, was the offence of intercourse with a girl under the age of thirteen, where the maximum penalty was life imprisonment, and the offence of buggery, which involved anal penetration of children under the age of sixteen, regardless of gender, and provided for a maximum penalty of life imprisonment.

UN convention on the rights of the children<sup>37</sup> defines the child as a person under 18 years of age. It mentions the primary role of parents and the family in the care and protection of children, addition to it there are obligations of the state to help them carry out these duties. It is the legally binding international agreement setting out the civil, political, economic, social and cultural rights of every child, irrespective of their race, religion or abilities. From the time of its adoption by the United Nations in November 1989, a total of 194 countries have signed up UNCRC, only two countries in the world are still left to ratify it.

International Covenant on Civil and Political Rights<sup>38</sup> contains general provision for children and they are entitled to benefits under the covenant. It also contains specific provision for safeguards of children. Some of the provision dealing with Children are:

1. To respect and ensure all individual within its territory and to its jurisdiction<sup>39</sup>.
2. If a marriage is dissolved, provision must be made for the protection of any children<sup>40</sup>.
3. Every child shall have without any discrimination as to race ,color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state<sup>41</sup>.

---

<sup>34</sup>Julian V. Roberts and Robert J. Gebotys, Reforming Rape Laws: Effects of Legislative Change in Canada, LAW AND HUMAN BEHAVIOR, Vol. 16, No. 5, 555 (Oct. 1992)

<sup>35</sup>, Susan Estrich, Rape, THE YALE LAW JOURNAL, Vol. 95, No. 6, 1087 (May 1986),

<sup>36</sup>Sexual Offences Act, 1956,

<sup>37</sup><https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

<sup>38</sup><https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>39</sup> Article 2 of the Convention.

<sup>40</sup> Article 23(4) of the Convention,

<sup>41</sup> Article 24 of the Convention.

#### 1.4. SUGGESTIONS

Stringent measure is required to contain the rising trend of crime against children and deterrent effect must be achieved through the strict laws. Rules dealing with child pornographic material are needed to be framed and liability of each person responsible for the crime must be fixed.

One question which has been raised by the academicians is the quantum of punishment i.e. death penalty has been added to the act and most of the perpetrators are the known family member of the victim, this may give reason to the family for not reporting the case.

One of the priorities of the criminal justice system has to be speedy disposal of the case to ensure that victim does not go through the same ordeal of trial and event continuously, which will enhance the pain of the victim and trauma which she has suffered will continue. Conviction rate has been less and to address this issue Supreme Court has also directed the state for setting up of special court dealing with POSCO cases. This can only be achieved if proper infrastructure and dedicated manpower is built to tackle the issue at hand. Appointment of judicial officers and special public prosecutor should be made priority. We can even have a dedicated police force for investigation<sup>42</sup> of cases related to children which will ensure speedy investigation. These are the part of real issue, addressing these can only give us desired result. As justice Deepak Gupta has rightly pointed out “Putting up cartoons on the walls of the courtroom will not make it child-friendly... It is ultimately the attitude of the judge that should change.”<sup>43</sup>

It should be ensured by the state that laws are not formulated as a result of knee-jerk reaction of any criminal act, the proper course should be followed and stakeholders such as civil societies, NGO should be consulted and bills should be sent to standing committee for better suggestions and we can include those points which are suggested after analysing the ground situation and this combined process can result in effective implementation of the provisions of the act.

Provision of minimum sentence can at times cause difficult situation for the judges as cases where mitigating circumstances do exist in such cases also judges have to be sent the convict for larger punishment. At times to evade such punishment judges may opt for acquitting the accused which will also defeat the purpose of the law. Ensuring better investigation, amendments should be brought into the law to give power to the judges for monitoring the investigation which will ensure proper procedure is followed, such steps have given desired results in other countries.

It has been argued by many criminologist that making punishment same for murder as well as rape is not a good step and especially in this law punishment for rape of child below 12 years of age is death penalty which makes him more vulnerable to murder as now rapist can consider murdering of the victim for barring him/her to give the testimony and saving himself from the punishment. Laying more emphasis on death penalty should not be the goal rather our focus should be on the overhaul of the system. Apart from the law like POSCO, we also need to bring amendments into the other major legislation which govern criminal justice system like Indian Penal Code, Criminal Procedure code.

---

<sup>42</sup> Prakash Singh v. Union of India, AIR 2006.

<sup>43</sup> <https://www.thehindu.com/news/national/sc-startled-by-delay-in-child-rape-cases/article28448240.ece>

Concrete steps should be taken by the government which can include sex-education at all levels, by campaigning to increase awareness regarding all such kinds of crimes, by ensuring that citizens of this country realize the need of the hour i.e. to protect every child from sexual crimes by whatever means he/she can.

### **1.5 CONCLUSION**

Children are the most important asset for any nation and ensuring their development and protection is an implicit duty upon every State. It is one of the most fundamental duty to protect children from acts like rape and sexual assault, which are not only physically debasing and degrading, but also mentally traumatic, are even more fundamental. Though, the Indian criminal justice system provides for significant protection to children, but we still see the crime figures soaring up. In such a scenario it should be the priority of the Government to ensure that equal protection of the law to children of both genders, failing which the children in this country will continue to suffer. An integrated approach is needed to ensure that children receive the attention which they require and do not suffer in the hands of the perpetrators. The purpose with which criminal justice system was established will only be fulfilled if the perpetrators of crime against children will be punished.