MANDATORY REPORTING UNDER POCSO

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INTRODUCTION

Child Sexual Abuse though constitutes a relatively less number of victimization experiences of Children but it certainly a grave social problem that affects psychologically and physically which contravenes the fundamental rights granted to citizens. The incidence and prevalence of child abuse is difficult to be quantified. The term may be defined as, ‘any act of using the child for the sexual gratification of a more powerful person’\(^1\). It includes physical abuse, sexual abuse, emotional abuse and even neglect in few cases\(^2\). Child abuse often co-exist with poly-victimization and causes substantially damaging effects to children and the community as whole as it impairs the social, mental, emotional and behavioral development of child which include post traumatic disorder, low self-image, reduced perceptual reasoning, aggression, delinquency etc.\(^3\)

Child abuse has never been a criminal offence in the country, the only remedy could be channelized was through rape laws and other sections like 354 IPC or 377 IPC. The Indian Govt. sponsored survey was for the first time conducted in 2007 in 13 different states which stated the case of abuse of 12500 children out of which only 25% has told anyone and only 3% have been informed to police, thus putting the govt. under pretense of tensions and turmoil\(^4\). It was only through activists, NGO’s and Ministry Of Women and Child\(^5\). Development has brought into force

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3 Sedlak, Andrea, et al., ‘NIS-4 Report to Congresses, Executive summary, Washington D.C-2010
5 Annual stakeholders conference on child sexual abuse, meetings with forum against child sexual exploitation, discussion with women and child development cell.
Protection Of Children From Sexual Offences Act (POCSO), 2012 which is designed to protect children from sexual harassment, sexual assault and pornography.

The sexual assault on the child being under 18 years of age may be categorized as Penetrative or Aggravated or Aggravated penetrative forms of sexual assault and thus marks the departure from the IPC w.r.t the forms of assault and the punishments for each category of offences also vary. The difference is just in the degrees and not in the kind. The police is mandated to take immediate action of child care and medical treatment, be it by reporting in Child Welfare Committee or Special Judge, as soon as the reporting is made. Also, various provision of speedy disposal, child friendly procedures (chapter 6) and in-camera trial procedures along with establishment of special courts (clause 28) have been added to increase the efficacy of the legislation.

Since the cases of under reporting of child sexual abuse is prevalent in India. POCSO mandates every person who comes to know about the child Sexual assault that has taken place or is about to take place is mandated to report it to the police. It hampers the sexual autonomy of the victim who is forcibly swept into the criminal justice system and thus even hampers the further communication due to fear of reporting without informed consent. Also, the very mandate leads to false reporting of cases which is completely non-sensitive to the consequences of such false reports. Even the reporting of cases does not lead to proper investigation and ultimately the sexual offences remains unaffected and unreported in numbers.

RESEARCH OBJECTIVE

The paper seeks to deal with the following objectives:

- To find the very reason for entrenching the Mandatory reporting provision and thus check if the structure has been really effective to curb the Sexual assault on children.
- To check if the system is in compliance with the Indian Socio-Cultural background and to ascertain if the provision of mandatory reporting really apt in its horizon of applicability.
- To find the major effects of the provision and to compare with the normative ideal standards.

Mansi Binkiraja, ‘Mandatory Reporting Under POCSO : are we ready?’
To ascertain the checks and balances that could be instituted in the present system through a comparative approach and thus the blanket of the structure to be accordingly modified.

HYPOTHESIS

The mandatory reporting provision under POCSO is ineffective in curbing the Sexual offences as the provision is too inclusionary in nature leading to false reporting of cases. The gap between the actual cases of abuse and the reported ones is still high as the provision is flawed in its technical and practical applicability in Indian society.

UNDER-REPORTING OF CASES: A REASON FOR MANDATORY REPORTING

In India, Every second the child is becoming the victim of child sexual abuse and more than 7200 cases of children rape go unreported in India as per survey and thus the empirical records showed much unreported cases than thought of by authorities and families (Carson, et. al, 2016)\(^7\) To take precautionary and remedial measure against underreporting of abuses, ‘Mandatory Reporting’ is resorted to which casts a burden of reporting suspected cases of child abuse.

POCSO, 2012\(^8\) these are the practical situations which and ‘ought to’ law needed to fight thereby. Justice Verma committee recommended the amendments in criminal procedure code and POCSO was brought into force to tackle the child sexual abuse cases in a more refined manner. The issue of mandatory reporting in the act is mentioned in section19,20 and 21 of the Act\(^9\):

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\(^9\) 19. Reporting of offences : (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to.—
(a) the Special Juvenile Police Unit; or (b) the local police.
(2) Every report given under sub-section (1) shall be—
Child sexual abuse cases occur the most in domestic settings, than in institutional settings and the least in public places (Wortley and Smallbone, 2006)\(^{10}\). Since abuse happens in cases where they spend most of their time together, the frequent encounters process place them on the pedestal of non-reporting mechanism. For younger children, lack of vocal bury and greater dependence on adults is the factor for non-reporting as it is a case of extreme power imbalance. Multiple dimensions exist in coping with child abuse cases like characteristics of victim, modus operandi and persistence of offenders; and in regard to victims, different impact is posed on different victims and also the social and physical setting differs\(^ {11}\). Act of reporting is a very personal issue and the legal intervention hampers the personal feelings of victim and thus attacks the fundamental rights.

**REASONS SUPPORTING MANDATORY REPORTING**

(a) ascribed an entry number and recorded in writing;(b) be read over to the informant;(c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection including admitting the child into shelter home or to the nearest hospital within twenty four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1)

**20. Obligation of media, studio and photographic facilities to report cases** : Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.

**21. Punishment for failure to report or record a case** : (1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions of sub-section (1) shall not apply to a child under this Act.


\(^{11}\) Stephen Smallbone, William L. Marshall and Richard Wortley, ‘ Preventing Child Sexual Abuse’
The panorama of legislative framework has definitely contributed to the reporting of cases, which would not be otherwise revealed and has acted to prevent the child sexual abuse. There is certainly an increase as per the reports of NCRB in the reporting of cases after the insertion of mandatory reporting requirement\(^\text{12}\). In 2015, there has been an increment in 5.3% crimes against children in comparison to 2014. One of the main limitations of this report is that there is a lack of clarity that whether there is an increment in the incidence of crimes or in the reporting of Crimes. The effect of the law is remarkably positive without any doubt.

It is also reflected that reports by same professional group in one jurisdiction having mandatory reporting obligation would certainly be more in number than the one which does not have this provision\(^\text{13}\). This could be recognized in India as per the reporting trends under NCRB.

Another reason of responsiveness of people in reporting is the strict penal provision which requires the payment of fine and imprisonment and thus suffice the objective of legislation. Even in the absence of these penalties, it is argued that even the expected non reporters would definitely report if a legal duty is imposed upon them for reporting\(^\text{14}\).

In India, A mandate upon the individuals to report compulsorily exists. This, being the hidden phenomena happening within the families and thus needed an exposure to prevent compromise to the core developmental instincts of children\(^\text{15}\). Mandatory reporters only need to have reasonable suspicion of abuse which means sufficient objective evidence for suspecting abuse or neglect (Mc Clare 1990). Burden of proof does not lie with the mandatory reporter as that responsibility lie with the child protection agencies. It is because of this libertarian approach, the discretion of the mandatory reporters is seldom acclaimed (Finlayson,1990). Since failure to report is attracts civil and criminal obligations, so making of report is always preferred by the individuals\(^\text{16}\).

Mandatory reporting is a tertiary response to child maltreatment cases as it owes duty on the community to make reporting done\(^\text{17}\).Researches also suggest that reporters are more likely to

\(^{12}\) National Crime Records Bureau,2013,(89-98)(2013)
\(^{13}\) Mathews et al. , ‘ Factors influencing child abuse and neglect recognition and reporting by nurses: A multivariate analysis’, 1989
\(^{14}\) Webberley, ‘Impact of mandatory reporting legislation on reporting behaviour’, 1985
\(^{15}\) Nussbaum Martha, ‘Creating Capabilities’ Cambridge: Harvard University Press,2011
\(^{16}\) Jill Bryant and Amy Milson, ‘ Child Abuse Reporting By School Counsellors’
\(^{17}\) Ben Mathews, ‘ Mandatory Reporting Laws and identification of child abuse and neglect: consideration Of differential maltreatment types and cross jurisdictional analysis of child sexual abuse reports
report only when solid evidential marks of abuse are evident and are grave enough in nature so as to attract sanctions. Mandatory reporting thus without making any kind of distinction in the degree and the kind ambi to cover all the types of abuse under its purview in India.\textsuperscript{18}

**MANDATORY REPORTING AND INDIAN SOCIO-CULTURAL CONTEXT**

The ever pending cases just take the victim towards the secondary victimization process. Particularly, in India, the typical cultural and ethical values are not in favour of open discussion about sex. The lack of supporting parents further disclaims the victim’s idea which hampers the reporting. There is a problem of under reporting of cases as the issues connected with the reporting include familial relations, reluctance in disclosure due to shame and ignorance, behavior of offenders etc\textsuperscript{19}

There is reluctance due to the way the system handles the problem: the doctors who are not at all trained about the treatment to sexual abuse victims and the police officers who are rather concerned in the depressal of the complaint and often urges the victim to make false statements. Is this idea not promoting the secondary victimization? In India, The idea of underreporting could even be supported with the cases as per *Human Rights Watch Report (2013)*\textsuperscript{20}:

Ahmed, having a 12yr old girl, stated that her daughter remarked to have been abducted from a street while coming back from school to her home. He reported to police for the safety of many school girls who came from the same lane but the consequences turned out to be different as his family was socially attacked and her daughter been looked down as a rape victim and all his social circle demeaned him.

In a village of U.P, the mother tried to report the 17 year old daughter’s molestation by second cousin but then the police authorities and the village members insisted on private settlement and instead, forced them to leave the village. This police apathy is based on political motives,

\textsuperscript{18} Jill Bryant and Amy Milson, ‘Child Abuse Reporting By School Counsellors’


\textsuperscript{20} Human Rights Watch. Breaking the Silence: Child Sexual Abuse in India. United States of America, 2013
corruption, discrimination on the basis of caste etc. Why have the so called societal stigma been so dominated to overrule the individual dignity?

Such is the condition of India even after the mandatory reporting provision. The change in law cannot change the societal mind set where the reporting of sexual offences are considered to be stereotypically attached to the family reputation.

**ISSUES IN THE PRESENT FRAMEWORK**

There are certain arguments which do not favour this structure as there is a reporting of unsubstantiated cases or even the duplicate reporting of cases have added more harm than the benefit to the criminal justice system as it puts additional burden on the investigative agencies and even adds up to the harassment of parental authorities.\(^{21}\)

The relation of trust between the institutions, charities and organizations is usually undermined by this compulsorily reporting structure as the *fiduciary relations* will be distorted and the effective functioning of the institution or the organization which involve communication with young people may be severely hampered. The state has taken the liberty to access through the criminal justice system\(^{22}\). Even discussion with the persons in authorities or other NGO workers may land the victim onto jail and thus creates the communication-gap on which the epitome of this mandate is built upon. Does State have such arbitrary power wherein it leaves the citizens with no choice of informed consent? Is this legislative policy been not against the constitutional liberties?

Also it leads to the doctors or the academicians to break the Confidentiality of their patients and thus virtually takes out the sexual autonomy of the individuals and the state has taken that moral and ethical burden to fight for the *autonomy* while at the same time disrespecting the autonomy. The victims have seldom any trust factor over the institutional handling of cases and thus only the blame the state for playing in their private domains. How can the state take over the sexual

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\(^{21}\) Melton, ‘Mandated reporting: a policy without reason’, 2005

autonomy from the realm of private lives into the domain of public institution? How far these institutions taking care of autonomy with the utmost sensitization?

This provision forces the health care providers to inform every case of child abuse and thus the girls coming for abortion out of the consequences of such abuse have been denied reproductive autonomy as the provision in termination of pregnancy act demand parental consent for such abortion. Sexual autonomy and the Right to privacy, as Rubenfeld’s argue, ‘protects every individual from governmental intrusion into matters so fundamentally affecting a person or the decision whether to bear or beget the child’.

Even the professionals like doctors, teachers, nurses, counsellors etc do not know how to deal with the matter once the child makes report to them. Lack of training on the part of these professionals bring out the inefficiencies in the system.

The psychologists often come up with the idea that the very disclosure of abuse to them is often accompanied with the threat that if the doctor tried to have a legal recourse, the victim will further harm himself as the social stigma in the legal system would then be unbearable to them. So, how can this provision be effective when it has created threats in the minds of the reporters and the victim himself? Can we say that the very child protective legislation needs no exemptions? (Kushi, working with Bangalore based NGO Enfold, in an interview to TOI)

Even the schools fail to report the abuses as they are more interested in the preservation of their own credibility and thus often fail to take the charge of abuse and in fact, get an undertaking signed from parents that which exonerates their liability. There are serious lacunas in the compliance of legal mandates with the current education system and thus mandatory reporting structure fails and how does POCSO help to make the schools liable in such cases? (case study based on Vibgyor School of Bangalore)

MP Subramania Swamy has moved a Private member’s Bill on March 24 in Rajya Sabha, for the removal of section 19 of POCSO as it obliges even the Judges in the family court who come to know about the assault during the proceedings which leads to the refusal of hearing of the Divorce

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24 Supra note 22
25 Supra note 20
Cases and thus the section acts as double edged sword. It places the obligation upon the authorities and the general public to report even on a mere suspicion and thus acts as harassment to the people generally.

Thus, the realization of the abusive effects of the provision can be seen and thus the need of the hour mandates to bring amendments in this mandatory model of reporting.

**COMPARATIVE PERSPECTIVE: ALTERNATIVES TO THE EXISTING MODEL**

The phenomena of under reporting due to its attachments with societal stigmas is not just confined to Indian Situations and in fact, rooted in many Asian countries. This mandatory reporting structure first originated in USA and till now USA, Australia and Canada have most effective culture of mandatory reporting and Countries like England, Wales and Scotland have voluntary reporting mechanism where only professional reporting is emphasized through policy framework.

The alternatives may be studied in an international perspective and thus the same corollary may be applied to Indian Conditions after making necessary modifications. In U.S.A, The Child Abuse Prevention and Treatment Act of 1974 (U.S) was broadened to include mandatory reporting laws for the first time in world placing obligation upon professionals. Other countries having mandatory reporting in their framework are France, Hungary Canada, Australia, Israel, Denmark, Norway, Sweden, and Brazil. Research says that out of 33 developed nations and 29 developing ones, the percentage of countries having this framework is 81.8% and 78.6% respectively.

The mandatory reporting law is generally included in child protective legislations but some countries like Sweden has incorporated it in its Social Services legislation and Israel, France have entrenched it as a duty in their the penal laws. So, it depends on the socio-cultural fabric of the society and the weightage accordingly given to the mischief.

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SUBSTANTIATED AND UNSUBSTANTIATED CASES

There is not just a single model of mandatory reporting structure. The cases of difference may be based on substantiated and unsubstantiated cases where the minor neglect or cases involving less harm may be kept on a different pedestal and thus are given a differential treatment. The unsubstantiated cases are the one which are just precautionary in nature and thus for the prevention of escalation of minor harms to major ones.\(^{29}\)

Such difference in jurisdictional approach may be due to their own socio-political situations as such they can opt for a broad or a narrow range of reporters depending on the conditions of their system. A similar spectrum is also available with respect to the cases of maltreatments they apply from broad to a narrow range of abuses. Some jurisdictions are interested in criminalizing only severe forms of abuse\(^ {30}\) which are really visible and tend to ignore the casual abuses. Also the difference also lies with respect to their occurrence. Few jurisdictions simply avoid any kind of future abuse reporting cases and thus restrict themselves to only existing cases of reporting mandate. So every jurisdiction desires a law as per their own preferences of the society.

**Differential Response Treatment** Country like Australia\(^ {31}\) has passed a law which is limited to sexual abuse only. But later developments in the provision highlights the differential response system which talks about the balancing of burden of child protective agencies on one hand and the proper reporting of cases of every kind showing the dynamism of law being adaptable to social change. Here, the response of the investigative agencies vary from the degree of harm in cases, like the casual cases may only be supported by care and more of parental engagement which even acts as a means to avoid social stigma\(^ {32}\) and thus cheap disposal of cases is done.\(^ {33}\) The formal investigation measure need not to creep in thereby lightning up of the burden of the agencies and

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the corresponding response brings balance. The efficiency of this technique is debated in the sense that only parental engagement might not be sufficient in few cases of family abuse, also the compliance for mandatory parental engagement is tough to supervise \(^{34}\) and even the mechanism of traditional investigation might not then be funded by politicians\(^ {35}\).

**Exemptions to Non-reporters** As per the report of Royal Commission in Institutional Responses to child sexual abuse, the very purpose of mandatory reporting is to increase the reporting of cases rather than making it a strict penal provision. So, even the offenders of non-reporting may not be strictly penalized\(^ {36}\) as has happened in other jurisdictions. An effective mechanism for the effective functioning of the structure is highly desirable so that the objectives of the legislation are not rendered null and void. Moreover, certain exemptions may also be made in respect of people who fall outside the purview of this mandate and thus judges etc may be included in that list.

Countries like USA, Australia and many other EU countries have adopted for another mandatory reporting model which does not oblige upon every individual to report\(^ {37}\).

The reason as to why has the particular mandatory reporting been preferred by our legislative regime over other reporting models is still an open ended question and since the present framework is facing many challenges the alternative model may be followed from the aforesaid mentioned ones.

**Professional Reporting:**\(^ {38}\) The method focuses on the professional reporting technique including nurses, doctors, etc. recently, Saudi Arabia introduced one such law\(^ {39}\). The reporting by professionals account for substantiated cases only and thus false cases are having less probability of reporting. Australia, Queenslant has recently introduced in 2014, a new law for physical and

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sexual abuse cases only on the differential approach itself. Various models in an international framework are suitable in the respective socio legal systems.

Research may be conducted to check the aptness of a particular system and thus modifications in the law of mandatory reporting may be done as per different yardsticks so that the area and scope of law can be confined and maximum efficiency can be achieved. Why cannot India have a model of restrictive approach of reporting so that the double edged sword of the provision may be lightened to act as per the assigned task? Are the developments in International perspective not encouraging us to adopt the similar framework best suited to our conditions? These questions are to be tested for the validity of further amendments.

CONCLUSION AND SUGGESTIONS

The issue of Child Sexual abuse is multi-faceted cannot be simply resolved with one dimensional approach of Mandatory reporting. As per Finkelhore(1984) 40: four preconditions are necessary for the child sexual abuse- motivated perpetrator, ability to overcome internal and external barriers to sexual abuse and ultimately the inability to resist the abuse by the victim. So the preventive action need to be channelized to achieve a multi-disciplinary approach and thus the only provision of mandatory reporting would not serve the cause.

The approach needs to work not only towards the awareness of children but also on the immediate support systems where the coordination between the two sub sets can only further set the system in motion.

1) The spectrum of reporting may be limited by the type of maltreatment that the mandatory reporter is required to report (casual, severe, neglect etc).

2) The type of reporting groups may be confined to doctors, teachers, family members etc so that over reporting of cases does not arise.

40 Finkelhor's precondition model of child sexual abuse: 1984
3) Also, research may be conducted to differentiate the societal requirements of protection from abuse in the cases at hand or the cases that might arise in future. This way the blanket cover of mandatory reporting can be limited.

4) Since each case has its own mechanical way of operation, the scope of operations may be refined and confined as per the requirements of society as the decision to report is very much contextual depending upon the various factors qua victims, offenders and even the mode through which it operates.

5) Handling of cases need extensive training and thus the government need to set up training mechanisms for police and other legal authorities. Awareness campaigns, sensitization Programmes, Safety Education Programmes etc. may be emphasized to increase the cases of reporting. The open sex discussion should not be avoided so that the fine line of conduct of affection and gratification may be demarcated by the survivor before it is too late to realize.

6) The theory of ‘Prior and Informed Consent’ may also be applied to the cases before lodging of the complaint so that the sensitive cases may be given some exemption or some other legal basis of justification for not reporting must be allowed.

7) The trust, autonomy and confidentiality of the victim should be awarded the highest priority and cannot be made to suffer at the hands of legislative policy framework. The personal issues must be confined to a realm of selected authorities and even the disclosure of identities must be protected to the extent possible.

Ultimately, if the reporting structure itself hampers the communication between the victim and the trusted partner then the law is obsolete in its present ideological framework and demands an immediate and prospective amendment so that prevention of abuse is actually met. A comprehensive restructuring of the framework is mandated to meet the need of the hour and thus efficient guidelines are provided in International context.
If the main target is to prevent the sexual abuse of children then such cannot be wholly achieved in a vacuum as the legal system alone cannot help to create the deterring effect and even socio-cultural background needs to be retaliated to create a multi-agency, multi-tier, and multi-dimensional approach so that the comprehensive strategies are well enshrined in the policy framework.\textsuperscript{41}

\textsuperscript{41} Harbishettar V, Math SB. Violence against women in India: comprehensive care for survivors. Indian j Med Res. 2014;140:111–3. [PMC free article] [PubMed]
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