

POCSO ACT, 2012: A TALE OF DELAY IN JUSTICE

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ABSTRACT

The Protection of Children from Sexual Offences Act (POCSO, 2012) was a landmark bill passed in 2012. It was the first time in India that a need was recognized for demarcation of adult and child sexual offences, correspondingly this act came into force. The POCSO Act, 2012 is a comprehensive law to provide for the protection of children from sexual abuse while expanding the scope and range of forms of sexual offences. The Act though powerful and requisite in the times of alarming increase in the number of sexual offences against children faces innumerable hardships in its effective implementation. This paper addresses the relevant concerns that require revisiting from the stakeholders in order to ensure holistic care and justice to the children who have been the victim of sexual offences. The paper presents few major issues inclusive of the restrictive interpretation of the POCSO Act, 2015, ambiguity in the position of consensual sexual intercourse, lack of sensitivity to the act, etc. The latter part of the paper also discusses the provisions adopted by various countries worldwide to provide comprehensive care to the child victim and to meet the ends of justice. At the outset, it is outside the scope of this paper to suggest an alternative for the existing Act but to only highlight the problems.

Keywords: Child Sexual Abuse, POCSO Act, Indian Penal Code, National Commission for Protection of Child Rights, Commission of Protection of Child Rights.

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INTRODUCTION

Child Sexual Abuse (CSA) is a global public health problem impacting children across all socio-economic and ethnocultural strata. It is a form of maltreatment that provokes reactions of indignation and incomprehensibility, leaving a traumatizing impression on the child for the rest of his life. Unfortunately, the current scenario in India is even worse as it is one of the most heinous and appalling crimes prevalent in India. Despite the alarming rate of increase in CSA cases, it remains widely unreported. Not only this, one might find a child being sexually abused under the veil of culture and tradition, and the parents ignoring to even report the offence.

Statistically, 'children' constitute approx. 20 percent of the world's population and 40 percent of India's population. Traditionally in India, children are cherished and pampered but for some children, the truth is the opposite as they have to face sexual harassment in the name of culture and folk practice. In a survey, it was found that around 40 percent of children in India are exposed to the threat of social evils like forced labour, child trafficking, drug abuse, sexual abuse, etc., and are in grave need of protection. Such an alarming rate calls for the formation of an extensive and stringent policy. Child sexual abuse has become a high priority concern for the community and it demands likewise attention of the policymakers.

LEGISLATIVE FRAMEWORK

Before 2012, there was no special provision for dealing with cases of CSA in India, and the offences were penalized under the provisions of The Indian Penal Code, 1860, including Section 376 dealing with rape, Section 354 punishing acts intended to outrage the modesty of a woman and section 377 covering unnatural offences. Out of which only Section 377 would apply in the case if the child is male. There were no provisions whatsoever for covering acts other than penetration as sexual assault against a child.

Although in the year 2007 the National Commission for Protection of Child Rights (NCPCR) was set up under the Commission of Protection of Child Rights (CPCR) Act 2005 for the sole purpose of protection of children. Its establishment has mandated the laws, policies, and procedures which are enshrined in the Constitution of India and the UN Convention on the Rights of Child. Subsequently, due to the surge in activism for child protection in media and

other public discourses, the Govt. of India felt the need to pass a law specifically safeguarding the interest of children, called “The Protection of Children from Sexual Offence, 2012”.

As hereinbefore stated, there was no provision of sexual assault against boys under the Indian Penal Code, 1860. This Act (POSCO) is gender-neutral as it widens the scope of ‘victim of sexual assault’ including male child within its purview. The act has enhanced the realm of reporting sexual assault cases against children. It has also expanded the definition of sexual assault, which now includes acts from penetrative sexual assault to the aggravated sexual assault (sec 3 to sec 10 of POCSO Act, 2012). It has also included punishment for the person in authority. Moreover, the Act has also introduced the significant provision of mandatory reporting.

The Act strengthens the legal provisions for the protection of children from sexual abuse and exploitation. It protects all children under the age of 18 and prescribes punishment according to the gravity of the offence. The Indian Penal Code (IPC) does not distinguish between adults and children whereas POCSO is made exclusively for sexual assault against children. The Act mandates the establishment of the Special Courts and also provides child-friendly procedures ranging from reporting, investigation, to trial of an offence.

Despite the commanding nature of the act, it falls short of achieving its objective even after a decade of its enforcement. Moreover, the cases of CSA are increasing more than ever. In the light of the current scenario, a few of the major challenges and gaps hindering the effective implementation of the act have been dealt with hereinafter;

CHALLENGES AND SHORTCOMINGS OF POCSO ACT, 2012

I. Restrictive Interpretation

The Act takes into consideration the special vulnerability of children. It acknowledges the fact that special protection, over and above that provided in the IPC, is required when the victim is a child. It is important to understand that the severe punishment provided under the Act is not due to the severity of the felonious sexual act in itself but because the offense is committed against a minor who is much more vulnerable. Here, a major point of concern is

that the continuing restrictive interpretation of the court seems to defeat the purpose of the POCSO Act.

In an appalling series of judgments, the Bombay High Court in the case of Satish Bandu Ragde v. The State of Maharashtra¹ held that groping a girl child and pressing her breast wouldn't amount to sexual assault punishable within the POCSO Act. Instead, it would fall within the ambit of Section 354 of the Indian Penal Code, 1860, which criminalizes outraging the modesty of a woman. It entails a much lower minimum sentence of imprisonment for one year, as compared to Sexual assault punishable under the POCSO Act which entails minimum imprisonment of three years. The reason – the girl reportedly had her top on, and hence there was no “skin-to-skin” contact as her clothes were not removed while pressing her breast. The condition of “skin-to-skin” contact is mandated for an act to fall in the purview of “sexual assault” within the meaning of Section 7 of the Protection of Children from Sexual Offences Act, 2012.

If one is to adhere to the strict rule of “skin-to-skin” contact as an essential ingredient of sexual assault then actions like intrusive touching of the vagina through underwear or forcing a child to touch a penis through a cloth or putting a penis in the mouth of a child with a condom on would fail to constitute the offense of sexual assault. Therefore, if such an interpretation is followed, there is a threat that the POCSO Act in itself might become redundant as a wide range of sexually violative activities would not be encompassed due to lack of “skin-to-skin” contact.

Moreover, the court seems to have followed a rather pedantic approach to reach this conclusion. In applying the Penal Code instead of the specifically provided Act with respect to the sexual harassment of a minor, the honorable court seems not to have given due consideration to the legislative intent and object of the Act.

The judgment failed to give due relevance to the fact that the trauma of the child whose breasts were groped through a cloth could be of the same nature and gravity as direct touching of the breast. And if such trauma is the same, then the mere existence of cloth should not affect the applicability of the Act.

¹ Criminal Appeal No. 161 OF 2020

The judgment has been criticized by many prominent lawyers and child right activist for taking an ultra-technical interpretation without explaining the legal basis for the same. Senior Advocate Rebecca John commented that interpreting the POCSO Act in a narrow, regressive manner would essentially negate decades of work that put together a law seeking to protect children from sexual violence.

This interpretation also lays down a dangerous precedent as judgments like this send a wrong signal to the subordinate courts who would no longer take the cases of sexual assault seriously.

One would be shocked to learn that this is not the first time a court has taken such an insensitive view. Some recent cases encompassing such restrictive view of the Act include Arun Kumar v. State² where the Madras High Court had granted bail to a man accused under Section 6 of the POCSO Act after he undertook to marry the 17-year-old pregnant victim when she turns 18 years of age. In a yet another case³, a Delhi court acquitted a man under the POCSO Act and later convicted him under the Penal Code, the case is with respect to a minor girl aged 7 years who testified that the accused forcibly took her into the bathroom, slapped her, and then tore her jeans. The Special Court ruled that the act of tearing the clothes of the victim did not imply physical contact even though there was a sexual intention. Taking these instances into account, the Attorney General of India⁴ had called for gender sensitization training for judges even proposing "*Gender Sensitization*" as a subject for recruitment exams and also as a subject for training at the National and State Judicial Academy.

II. Ambiguity in Position of Consensual Sex

In India laws regarding sexual abuse against children were specialized in recent years with the implementation of the 'Protection of Children against Sexual Offences Act (POCSO). Earlier there was only the Indian Penal Code (IPC) for the protection of children against the accused. Despite the well-detailed POCSO Act, it has one major lacuna i.e. it does not distinguish between sexual acts among consensual minors and sexual acts between minors and adults.

² CRL OP (MD). No.11883 of 2020

³ State v. Bijender (2014)

⁴ **KK Venugopal**

All sexual activities under POCSO ACT 2012 are considered to be criminal offences if the victim is under the age of 18 years. Adolescence is the age of development. Children develop sexually and under POCSO even if consent is given for the sexual intercourse it is a crime. POCSO ACT does not give any exception like IPC does, in IPC if a man does sexual intercourse with his wife above the age of 15 years is an exception to rape.

Nowadays consensual sex between minors has become very common at least amongst the children living in metropolitan cities. Despite, this fact the legislation still feels there is no requirement to amend the age of consensual sex. Hence, criminalizing all individuals below the age of 18 years is very problematic. For instance, a 17 years old boy is given rigorous punishment for having consensual sex with a 17 years old girl, this is not an appropriate measure. Therefore, it can be said that even a well-detailed law like POCSO has some negative consequences⁵.

Apart from the outdated moral viewpoint imposed on children, there is another reason as to why consensual sex between minors below the age of 18 is still not valid, it is because the Indian Judiciary believes that consent given by minors are not considered as valid consent as they think that children are not well informed. So, they are not aware of what is good or bad for them. The same point of view has been stated in numerous judgments.

Being in the development, exploration, and experimental stage children wants more freedom from family. Showing interest to find a romantic partner is a normal pathway in exploration. A significant number of children aging from 14 to 18 years were found in sexual intimacy with their romantic partner in some form or the other. But, through the legislative lens sexual engagement of adolescents is against the norms and is a punishable offence.

As children below the age of 18 years are not considered to be at a legal age to give consent so they invariably come under the purview of the POCSO Act. However, according to the survey of 'Centre of Child and the Law' it has been found that 21.58% of the cases registered in Delhi, 21.12% in Andhra Pradesh, 20.52% in Maharashtra, and 15.11% in Assam are pertaining to romantic relationships.

⁵<https://www.thehindu.com/news/national/sc-to-study-whether-minors-can-be-punished-under-pocso-for-consensual-sex/article34200856.ece>

Article 12⁶ of the Universal Declaration of Human Rights (UDHR) to which India is a signatory, states that everyone has the right to protection of the law against the arbitrary inference with his or her privacy. Consensual sexual acts come under the purview of the Right to Privacy. This has been recognized under Article 21 of the Constitution. In a landmark judgment in the case of JUSTICE PUTTASWAMY VS UNION OF INDIA⁷, it has been held that consensual sexual acts considered as crime violate the Right to Privacy of Minors.

In many countries, the age to involve in sexual activities is 16 years and above. So High Court suggested in Obiter Dicta to redefine the definition of ‘child’ under sec 2(d) of POCSO ACT and to reduce the age of child from 18 to 16 years. Any consensual sex after the age of 16 years should be excluded from the rigorous punishment of the Act. The said provisions should be amended to distinguish between teenage relationships after 16 years.

II. Lack of Sensitivity

Here term ‘lack of sensitivity’ refers to the state of ignorance of the said act. There exist a grave lack of understanding of what constitutes an offence, how the medical examination should go about, who is to be approached first, etc. under the act. To understand better, the persons who should be sensitized about the act can broadly be classified under two categories, namely-

1. Functionaries under the Act

The Oxford Dictionary defines the word ‘functionary’ as a person who has official duties especially in a government, or a political party. Generally, a functionary can be said to be a person or body of persons to discharge institutional, governmental, or political functions.

Indian Criminal justice system has various functionaries set up for ensuring smooth and effective delivery of justice to the victim. Some of the important functionaries under the Act are:

⁶ <https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%2012,against%20such%20interference%20or%20attacks.>

⁷ WRIT PETITION (CIVIL) NO 494 OF 2012

- **Medical or Health Department-** A survey on the POCSO act yielded results that the majority of doctors are unaware of the Act. They understand POCSO as a gender-specific crime, in which, only penetrative acts would constitute an offence and no other act would fall within the ambit of sexual assault. Not only this, the ground reality is that doctors are hesitant to conduct medical examinations and prefer to refer the case to a gynecologist. There is also an urgent need to train all the medical undergraduates and primary health care doctors in providing child-friendly interviews, structured assessment, collecting evidence, prophylaxis for sexually transmitted diseases and HIV, family counselling, and regular follow-up.
- **Court or Judges-** Though the Act came into force for providing an extra layer of mechanism to protect the vulnerable group of 'children from such heinous offences, the act still falls short due to lack of awareness among Judges. It is high time to provide requisite training to the Judges on how to handle cases involving sexual crimes against women and children. Perception with regard to sexual violence is set to mean penetrative rape. This was in conformity with the provisions earlier provided for the same. But the earlier provisions have undergone a huge change. With the advent of POCSO, courts do need exposure to understand the impact of sexual violence on victims especially minors, and why these laws were enacted so that the judges are able to apply these sections and provisions in the way that they were intended to, for the protection of victims.
- **Defence Lawyer-** Defence lawyers put too much emphasis on the infrastructure and are often unwilling to comply with the legal mandate. They go to lengths to prove that their client is an innocent and law-abiding citizen, even if it means traumatizing the minor. Defence lawyers are one of the major reasons why many parents of the victim opt not to file a case in the first place, they don't want their child to suffer more. Defence lawyers must take a subtle approach with the victims of POCSO and should question them with due care.
- **Law enforcing Agencies-** Agencies, not specified hereinbefore, that help in the implementation of the Act. For instance, the police are one of the law-enforcing agencies. Such agencies must also be provided special training on effective handling of cases under the POCSO act.

2. Parents, Teacher and Children

As time and again instated, the POCSO act is made solely for the protection of minors. But all the efforts of the legislation would go in vain if a child is unaware about good touch and bad touch and hence, fails to even understand that some wrong has been done to him/her. Therefore, it becomes important to sensitize the child from a very early age as to what kind of touch is appropriate.

Parents and teachers play a pivotal role in the life of their children. To educate the kids regarding the law it becomes important that parents and teachers themselves have a basic understanding of the act. For this purpose, Seminars and Workshops should be conducted by the school authorities or even at the district level by child right activist or the legal aid authorities.

IV. Lack of Special Courts

Child sexual abuse (CSA) is a very serious plaguing of our society and has reached epidemic proportions. A survey conducted by the Government of India has reported that CSA is increasing tremendously and it is seen that every 2nd child in India is sexually abused at the same time. In order to address the problem of CSA in the country, a law was required to be framed which will provide severe punishments and provides less ambiguity. As a result of this, POCSO ACT was implemented in 2012 to resolve the problem, and that too on the Children's Day occasion.

The main objective of the Act was to make special courts for the children and to provide them a child-friendly environment in the proceedings. These courts were made with the aim to provide speedy disposal of the case. After almost a decade of its inception, it has seen unforeseen challenges in its complete enforcement and the main failure was to set up special courts in each district of the country. Setting up was the essential feature of the Act but due to its failure, it provides a lot of delay in the proceedings and also in the disposition of the case. It is unnecessarily providing for the pendency of registered cases under the Act.

Under Section 28 of the POCSO Act, clause 1 clearly states that for speedy trial of cases State Govt. can consult Chief Justice of High Court and designate session courts as a special court for the trial of offence. Whereas Clause 2 of the same section states that if session court

under any other law is notified as children's court then they will come under the ambit of POCSO act only and will be considered as POCSO special court. Despite the statutory direction to make exclusive POCSO court at the very district level, the directives have been continuously ignored.

The unconcerned attitude of the state government's bureaucracy throws light on the system that until or unless Supreme Court intervenes neither they would formulate proper guidelines nor they would perform their responsibility for its implementation. POCSO Act faced the same problem from its very inception and hence, after 3 years of its implementation it was only after the Supreme Court intervention that Women and Juvenile Justice Board got special status in various districts.

To make the case worst, the Judges appointed for the special court do not possess any special knowledge neither they are given training by the state government nor they have any expertise in the said field. Therefore, they are of the view that CSA cases are an additional burden on them which is one of the major reasons for delay and pendency of the cases. Hence, the cases of CSA are not being handled effectively and efficiently under the purview of the Act. This was reflected in the 2016 judgment pronounced in the Maharashtra special court which was actually a session court where the court had issued perjury notice to a 16 years old girl who registered the case under the POCSO Act⁸. The case was that the girl was allegedly raped by her father. She narrated the whole scene in examination in chief but she turned hostile in the final cross-examination. The trial scene and the questions of the defence counsel were as same as an adult woman victim would be asked like asking her about her sexual history or what exactly happened? Where attempts are made, etc. these things tell that the aim of the POCSO act has been violated and the objective to provide a child-friendly atmosphere was simply ignored. Most importantly under Sec 22 Clause 2 of the Act says that children below the age of 18 years would not be punished for providing false statements. But in the above-cited case, the girl was given punishment for turning hostile and for providing a false statement which wasted the time of the court. So the court decided to send her to the Juvenile Justice Board under sec 4 of the Juvenile Justice Act, 2002. Unfortunately, in this case, on account of the ignorance of the judge, an erroneous decision took place. Due to this

⁸ <https://www.hindustantimes.com/cities/thane-court-pulls-up-minor-girl-for-falsely-accusing-father-of-rape/story-RfVbf3M3ekTAEWSSeIJJaHK.html>

incident, there is an urgent need to educate the medical, judicial, and law enforcing agencies in order to effectively implement the POCSO Act 2012.

However, no law can be effectively and efficiently used without the coordinated and dedicated efforts of the implementing organization/agency. A multidimensional approach is required so that the onus lies on the state government, police department, and judicial system to respond to these cases with utmost urgency and dedication.

V. Other Challenges

1. Underreporting: One of the significant challenges under the POCSO Act still remains the underreporting of the cases. This could be due to the fact that the family knowingly chooses not to report the issue as they feel ashamed and embarrassed bearing the guilt, anger, frustration, and emotional turmoil of the act. The fear of re-victimization because of medical examination and the criminal justice system also plays a major role in underreporting. On the dark side, the family may also opt not to report the act owing to the fear of degrading their societal image. This problem can be resolved by educating the family members of children and by making mandatory provisions for counselling of the parents of the victim under the POCSO Act.

On contrary, in certain cases, the family might not even have the knowledge of the commission of such an act. It is possible that the victim, a minor, might have a fear of not being believed or might have been confused as to what had happened with him/her. If the minor is mature enough he/she might not inform anyone to protect their family or to avoid social stigma. This challenge can be overcome by providing requisite education to the child from the initial childhood years. The parents have to be vigilant enough to notice any behavioural change in their child and they must provide a safe space for their child where they can share any and everything with them without any hesitation.

2. Medical Examination: The POCSO Act mandates the medical examination of the victim after obtaining the requisite consent from the victim and family member. However, if the adolescent refuses to undergo medical examination but the family member is insisting on the medical examination, the stance of the POCSO Act is unclear and the act is considered to be silent on this matter. There is an urgent need to formulate unambiguous provisions with respect to consent in such cases. Although, the ideal situation here would be to secure the

consent of family members only if the survivor is a child below the age of 12 years while for the age group of 12-18 years the consent of both the adolescent and the family member should be mandated.

With respect to medical examination, another challenge faced by the medical staff is with respect to the non-availability of a female doctor in case the survivor is a girl child. The act under Section 27(2) mandates that in the case of a female child victim, the medical examination should be done by a female doctor. However, the law also mandates the available medical officer to provide emergency medical care and the government medical officer on duty to examine the rape victim without fail. The conflicting legal position arises when a female doctor is not available for the medical examination. The legislation needs to make appropriate amendments in the act to remove this uncertainty and provide a clear provision for the same.

3. Age determination: The application of the POCSO Act hinges on the age of the victim. Unless the prosecution can establish that the victim is below 18 years, the provisions of the POCSO Act will not apply. The procedure for age-determination was first provided in Rule 12(3) of the Juvenile Justice (Care and Protection of Children), Rules, 2007. Later, in the case of *Jarnail Singh v. The State of Haryana*, ((2013) 7 SCC 263) the Supreme Court held that the process described in the aforementioned JJ Rules, 2007 should be applied to determine the age of a child victim as well.

The question that arises here is whether Special Courts under the POCSO Act need to follow the procedure prescribed under Section 94, JJ Act, 2015. It may be argued that since Section 94, JJ Act, 2015 does not refer to a “court”, a Special Court under the POCSO Act is not bound to adhere to the age-determination procedure prescribed under the JJ Act, 2015 and that Section 34(2), POCSO Act leaves it to the Special Court as to how age should be determined. There is a need for transparency as to the procedure for determining the age of child victim if no documents exist.

COMPARATIVE ANALYSIS OF LAW OF DIFFERENT COUNTRIES

To grasp a comprehensive knowledge with regard to provisions of Indian law, it becomes important to have a brief overview of the statutes and provisions prevailing in the 0foreign countries with respect to CSA. Internationally, child sexual abuse is considered a very

heinous crime against a child, and the law for children varies from country to country depending upon the local jurisdiction of that country. Every country defines sexual abuse against children in its own way so the following are the countries where the sexual abuse is high and where it is relatively low and what are the laws implemented by each and every country to control that.⁹ The contemporary position of few countries have been discussed hereinafter;

SOUTH AFRICA

South Africa has the highest child sexual abuse rate¹⁰ amongst the top five countries in the world. As per the reports it is seen that every three minutes a child face sexual abuse¹¹. Chapter 3 of the Criminal (Sexual offence and related matters) Act 2007 deals with sexual offences against a child in South Africa. The Supreme of the country made it very clear that after conviction the accused person cannot roam in public places so as to protect the children.

UNITED KINGDOM

The United Kingdom also has the highest child sexual abuse rate which means at 1 child amongst the 20 has been sexually abused.¹² According to the National Society for Prevention of Cruelty to Children (NSPCC) in 2011-2012 report states that there are around 37600 cases registered against child sexual abuse. Sexual Offences Act 2003 deals with child sexual abuse in the UK.

CANADA

The Criminal code and the Canada Evidence Act are two federal laws consisting of criminal justice matters in Canada. Compared to South Africa and the United Kingdom Canada has less child abuse rate. According to Canadian Law children above the age of 12 and below the age of 14 are considered to be incapable of giving consent. Further, prosecution under Criminal law is designed in a way not only to protect the child but also to safeguard the rights of the accused in order to balance the interest of both the concerned parties.

⁹ <https://www.undispatch.com/here-is-how-every-country-ranks-on-child-safety/>

¹⁰ <https://www.ibtimes.co.uk/child-sexual-abuse-top-5-countries-highest-rates-1436162>

¹¹ [https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(18\)30060-3/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(18)30060-3/fulltext)

¹² <https://learning.nspcc.org.uk/research-resources/statistics-briefings/child-sexual-abuse>

GERMANY

Germany follows many legal norms and procedures which provide more protection to children compared to many other countries. It has somewhere the best legal system for child protection. According to Sec. 176 of German criminal law child below the age of 14 years are considered as *DOLI INCAPAX* and are incapable of giving consent for sexual activities whereas Sec. 174 of the German criminal law states that engaging in sexual activity below the age of 18 years is also punishable under certain circumstances. But a child above the age of 16 years gives consent to it then it will not be declared invalid.

CONCLUSION

'Childhood should be carefree, playing in the sun; not living a nightmare in the darkness of the soul' - Dave Pelzer

Over the last few years, the offence of Child Sexual Abuse has reached epidemic proportions. Though POSCO Act, 2012 is excellent legislation and it recognizes almost every known form of sexual abuse against children as a punishable offence, a few challenges remain to be answered. After a critical analysis of the Indian legal framework, the challenges faced thereto, and the laws of other countries, it can be concluded that the present-day laws are inadequate in many respects. Furthermore, when the law is clear at certain instances, the provisions made are not strictly adhered to by the functionaries of the act. The government can also accommodate some of the principles from laws of other countries which are more child-friendly and work towards the advancement of justice. The researcher appeals for further reforms in the laws dealing with CSA, combined with improvised implementation mechanism by the Centre and the State Governments would definitely save the children from the menace of CSA.