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## Critical Analysis of Reverse onus clauses under the POCSO Act

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*In Criminal Law, the presumption of innocence is a well-accepted concept under which, in any trial, the prosecution is required to prove the guilt of the defendant beyond a reasonable doubt, which constitutes the burden of proof. In certain cases, statutes provide for the reversal of this onus which requires a defendant to prove his innocence. The Protection of Children from Sexual Offences Act 2012 has certain clauses which deal with the same. This article analyses these clauses with respect to how they may affect a fair trial and some constitutional rights while trying to understand the intention of these clauses and their validity.*

**Keywords:** *criminal law, defendant, sexual offence, constitutional rights, fair trial.*

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### INTRODUCTION

The Burden of Proof is one of the basic tenets of Criminal Law. It is the legal obligation that rests upon a party to bring forth arguments and evidence in relation to their case in a criminal trial or civil litigation.<sup>1</sup> The Evidence Act deals with the Onus of Burden of Proof, under Indian Law from sections 101 to 111<sup>2</sup>. Section 101<sup>3</sup> of the Indian Evidence Act defines burden of proof

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<sup>1</sup> James B Thayer, 'The Burden of proof' (1890) 4 (2) Harvard Law Review, 45-70  
<<https://www.jstor.org/stable/pdf/1321112.pdf>> accessed 02 May 2022

<sup>2</sup> Indian Evidence Act, 1872, ss 101-11

<sup>3</sup> Indian Evidence Act, 1872, s 101

as “whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.” In a criminal trial, the Burden of Proof keeps getting shifted, but under general circumstances, it originally lies with the prosecution, since it is the duty of the prosecution to prove the accused guilty beyond a reasonable doubt. There are certain legislations that may shift the evidential burden of proof on the accused.<sup>4</sup> In the Indian Context there exist a number of Special Criminal Laws, that pertain to specific offences, and allow for certain provisions of the CrPC and Indian Evidence Act to be surpassed. These offences create a distinct class of offences related to certain acts. These classes may be based on the nature of the victim, such as sexual offences against children, or the nature of the activities such as crimes involved with narcotic substances or organised crime.<sup>5</sup> The Indian Body of Statutes also includes some of these laws, such as the Unlawful Activities Prevention Act (UAPA), 1967, or the Protection of Children from Sexual Offences Act (POCSO), 2012. In this article, we are going to be concerned with the POCSO Act, in particular. Section 29<sup>6</sup> of the POCSO Act provides for a special presumption of guilt and allows the special courts to presume offences under sections 3,5,7 and 9<sup>7</sup> of the act unless proven otherwise. Section 30<sup>8</sup> of the (POCSO) Act provides for another presumption of culpable mental state, but the accused can defend himself by proving the absence of such mental state. This reverses the onus probandi or Burden of proof and presumes the accused to be guilty. This is a very contentious issue as many feel that, such clauses impose on an accused person’s right to a fair trial, and a right to equality. In this Article, the POCSO Act and its elements that shift the onus from the prosecution to the accused have been studied, in order to critically analyse the ramifications and impacts of such provisions.

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<sup>4</sup> Pooja Garg, 'Shifting Trends in Burden of Proof and Standard of Proof: An Analysis of the Malimath Committee Report' (2005) 17 Student Bar Review, 38 <<https://www.jstor.org/stable/44290308>> accessed 02 May 2022

<sup>5</sup> Kunal Ambasta, 'Designed for Abuse: Special Criminal Laws and Rights of the Accused' (2020) 14 (1) NALSAR Stud. L. Rev. <<https://nslr.in/wp-content/uploads/2020/07/NSLR-Vol-14-No-1.pdf>> accessed 02 May 2022

<sup>6</sup> Protection of Children from Sexual Offences Act, 2012, s 29

<sup>7</sup> Protection of Children from Sexual Offences Act, 2012, ss 3,5,7, and 9

<sup>8</sup> Protection of Children from Sexual Offences Act, 2012, s 30

## THE PRESUMPTION OF INNOCENCE

The Presumption of the innocence of the accused person is one of the very basic tenets of Criminal Law. This helps in the establishment of an equitable trial and ensures that the judges do not presume a person to be guilty. It is one of the most important reasons why the Burden of Proof rests on the prosecution in most cases.<sup>9</sup> This principle ensures that the fundamental freedoms and human dignity of the accused are protected and that the trial proceeds in a fair and equitable manner. The concept of presumption has evolved over a very long time, dating back to the times of the Magna Carta, following which due process and the presumption of innocence began to become a regular part of the common law system. When a suspect is arrested and charged, the presumption of innocence comes in. The constitutional right in certain countries to pretrial release through bail was one of the most important safeguards that came with the presumption of innocence. This Presumption has also been accepted in the Indian Thought of Jurisprudence and has also been recognised by the Supreme Court in a number of Cases. It recognised its importance in *Noor Aga v State of Punjab*.<sup>10</sup> This is also an internationally recognised tenet now, as Article 14(2)<sup>11</sup> of the International Covenant on Civil and Political rights discusses the importance of the presumption of innocence.

However, in certain special cases, this Presumption may be on the wrong side of the defendant. In the Indian Legal System, there exist Special Criminal Acts, that consist of provisions that allow for the presumption of an accused person's guilt, and *men's rea*, the Protection of Children from Sexual Offences Act, is a part of these acts. Section 30 of the act allows the court to presume a culpable mental state, and the defendant must prove the contrary in his defence. This provision is defended by many considering the nature of offences under the POCSO Act, but such a reverse presumption may hamper a person's right to justice as it may add to an already opinionated decision-making society. However, in a delicate situation, it could lead to cases of unjust rulings or a violation of the natural principles of law.

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<sup>9</sup> Shima Baradaran, 'Restoring the Presumption of Innocence' (2011) 72 (4) Ohio State Law Journal, 723 <<https://core.ac.uk/download/pdf/159601329.pdf>> accessed 02 May 2022

<sup>10</sup> *Noor Aga v the State of Punjab* (2008) 16 SCC 417

<sup>11</sup> International Covenant on Civil and Political rights, 1996, art.14(2)

In any trial there exist two sides the prosecution and the defence. The prosecution is the state which tries the defendant who is an individual. In such a case the prosecution is the stronger more resourceful side which ensures that justice is carried out. To strike an equilibrium in these seemingly imbalanced positions, the presumption of innocence exists so that the prosecution has to prove the guilt of the defendant beyond doubt. Reversing these presumptions would further tip the scales and may hamper the cause of justice in a criminal trial. Furthermore, it is a well-accepted principle of natural law that justice must not only be done but it must be seen to be done. By presuming that a defendant has a culpable mind, the court interrupts the cause of justice from the very beginning as the defendant is not given a fair right to defend himself, therefore voiding the presumption of innocence may be a controversial issue from a jurisprudential point of view.

## **BURDEN OF PROOF**

Once the very important shield of presumption of innocence is done away with, the Burden of proof or evidential burden, shifts upon the accused person, known as the reverse evidential burden. Essentially this means that now the defendant is required to prove his innocence to the point that there is reasonable doubt regarding at least one or more ingredients of the offence.<sup>12</sup> Section 105<sup>13</sup> of the Indian Evidence Act provides for exceptions regarding the Burden of Proof. It states that in case of special acts or if provided by the Indian Penal Code, the Burden of Proof may be on the defendant as in the present case. This may be because of the nature and seriousness of the offences discussed in the act. The statute was passed for an enhanced focus on crimes related to sexual offences against children and to bring about a more stringent way of trying such offences. Accordingly, when a person is accused under this act Sections 29 and 30 of the Act shift the responsibility of proving their innocence to the defendant. The apex court made a passing observation<sup>14</sup> on the reverse burden clause, "These provisions are a clear indication of the seriousness with which crimes against women and children have been viewed by the legislature. It is also evident from these provisions that due

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<sup>12</sup> Juhi Gupta, 'Interpretation of Reverse Onus Clauses' (2012) 5 (1) NUJS L Rev., 49

<sup>13</sup> Indian Evidence Act, 1872, s 105

<sup>14</sup> Federation of Obstetrics And Ors., v Union Of India (2019) 6 SCC 283

to the pervasive nature of these crimes, the legislature has deemed it fit to employ a reversed burden of proof in these cases.”

One of the reasons why the POCSO act has employed these clauses is that in such cases there are seldom witnesses. Further, the victim being children, it may be harder for the prosecution to obtain proof. To countermeasure these obstacles, the statute shifts the onus onto the defendant. Despite these reservations, reversing the burden of proof is a dangerous endeavour. Accused and arrested persons in India possess certain constitutional rights, and when an individual is criminally tried, such a power may be used draconic ally or may lead to the miscarriage of justice.

## **REVERSE ONUS AND FUNDAMENTAL RIGHTS**

### ***ARTICLE 14***

The criminal adjudication system in India does not consider a number of crimes as crimes against an individual but as crimes against society. Therefore whenever a person commits or is accused of committing an offence under the POCSO Act, he is deemed to have committed a crime against society. Applying this ideology, where the state considers such prosecution in the public interest, the reverse onus clauses have been provided using the same justification, considering the nature of the act. Considering this justification, many have also pointed out that the reverse onus may be in contravention of some constitutional rights of individuals. One of these is Article 14<sup>15</sup> of the Constitution of India. In the usual course of proceedings, the Burden of Proof and presumption of innocence are safeguards for the accused individual to bring a semblance of equality between the prosecution and defence. When the burden of proof rests on the prosecution, they are required to prove a rational nexus between the men's rea and actus rea, if the men's rea is presumed to be guilty in such a situation, it would lead to a grave endangerment of the accused person's rights. Therefore, an accused could be convicted despite the presence of a reasonable doubt if he is unable to satisfy the persuasive burden, which

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<sup>15</sup> Constitution of India, 1950, art.14

contravenes the presumption of innocence.<sup>16</sup> Thus reverse onus clauses prevent the prosecution from establishing an intelligible differentia and a rational nexus and therefore could be considered in violation of Article 14 as they very visibly obstruct the balance and equality of the two sides in the prosecution. The Hon'ble Apex Court has decided on the constitutionality of such clauses in a number of cases, so the question that arises here is whether the stringent measures of the Act are worth risking the miscarriage of justice in certain situations. It could be opined that such clauses are necessary to prevent gruesome and unthinkable acts against children, but the seriousness of such an accusation and the ramifications of a further false conviction should also be kept in mind. This matters as a high conviction rate is not directly proportional to less crime.

### **ARTICLE 21**

Article 21<sup>17</sup> protects the right to life and personal liberty, therefore by providing an accused with a presumption of innocence and a Burden of proof on the prosecution, his personal liberty and maybe even life is safeguarded, reversing the onus of proof may bring a hindrance to this process.

Article 20<sup>18</sup> of the Constitution, likewise, provides specific safeguards for the accused persons, which includes the right against self-incrimination. Sections 29 and 30 of the POCSO Act presume an accused person of having a culpable mind and require him to prove his innocence, this automatically does away with the right against self-incrimination, as the accused person is presumed to have a guilty mind.

More importantly, Article 21 also gives the accused person a right to a fair trial, which is according to 'procedure established by law' that is just reasonable, and fair. Reverse onus clauses raise questions regarding the fairness and reasonability of the procedure adopted in a trial. Such clauses, endanger individuals to the risk of wrongful convictions which in result could massively obstruct and hamper their personal liberty as well as their right to live a

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<sup>16</sup> Juhi Gupta (n 12)

<sup>17</sup> Constitution of India, 1950, art.21

<sup>18</sup> Constitution of India, 1950, art.20

dignified life. The POCSO Act is composed of some very serious offences and charges, upon conviction of which, an individual's dignity and reputation are exposed to serious harm, a wrongful conviction in such a circumstance could be seriously disparaging for such a person's life and dignity.

Further, it can be argued that the POCSO Act and the reverse onus clauses divert from the due process that is followed in regular criminal trials. As observed by the Hon'ble Apex Court in a Number of Cases, the right under Article 21 is wide and comprehensive. Article 21 Guards life and personal liberty and it cannot be deprived without following due process. As observed in *Maneka Gandhi v Union of India*<sup>19</sup>, liberty under Article 21 cannot be deprived without following due process and the rules of natural justice, and similarly, when a person is not given a fair chance to defend their Right to life and personal liberty is exposed to great danger.

### **JUDICIAL VALIDITY OF THE CLAUSES**

Along with the POCSO Act, a number of laws in the Indian Legislature, provide for a reverse onus clause. These include the Narcotics Drugs and Psychotropic Substances ("NDPS") Act, of 1985, and the Unlawful Activities Prevention Act, of 1967. As this issue has been a point of contention in Indian Jurisprudence for quite some time, it has been pondered upon by various courts and benches, and a number of observations regarding its validity and constitutionality have been made.

The concept of presumption of innocence was discussed by the House of Lords where in *Woolmington v D.P.P.*<sup>20</sup> the golden thread of the presumption of innocence was laid down. In India, it was given major legitimacy by the Indian Evidence Act, but it was first observed by the courts in the cases of *Ashraf Ali v the Emperor*<sup>21</sup> and *Queen-Empress v Raman*.<sup>22</sup>

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<sup>19</sup> *Maneka Gandhi v the Union of India* (1978) 1 SCC 248

<sup>20</sup> *Woolmington v D.P.P.*, [1935] UKHL 1

<sup>21</sup> *Ashraf Ali v the Emperor* (1917) 43 Ind Cas 241

<sup>22</sup> *Queen-Empress v Raman and Ors.*, (1898) ILR 21 Mad 83

One of the most relevant landmark judgements regarding the burden of proof and presumption of innocence was passed in *Noor Aga v State of Punjab*<sup>23</sup>, in this case, the clauses in contention were of the NDPS Act, but its observations also apply to POCSO and other similar statutes. The Court held that Sections 113A and 113B<sup>24</sup> of the Indian Evidence Act, along with certain sections of the Indian Penal Code allow for reversing the Burden of Proof and presumption of Innocence. It held that considering the grave nature of offences and the punishments, in certain acts such clauses were valid. While observing this, the court also took notice of the Human rights issue of such reverse onus clauses. It observed various judgments which had outlined the importance of the presumption of innocence as well as international agreements in support of it. The court therefore while laying down the law, highlighted the importance of this facet of natural justice. Additionally, the court specified while dealing with the burden of proof that, “Whereas in India the statute must not only pass the test of reasonableness as contained in Article 14 of the Constitution of India but also the “liberty” clause contained in Article 21 of the Constitution of India.” And that “Placing persuasive burden on the accused persons must justify the loss of protection which will be suffered by the accused. Fairness and reasonableness of trial as also maintenance of the individual dignity of the accused must be uppermost in the court's mind.”

A number of benches in a slew of judgements have opined on the operations of reverse onus clauses over the years, these include *Inder Sain v State of Punjab*<sup>25</sup>, *Dharampal Singh v the State of Punjab*<sup>26</sup>, and *Bhola Singh v State of Punjab*.<sup>27</sup>

These cases show that the Reverse Onus of assumption and Burden of Proof has been heavily discussed by the Apex Court in a number of instances. Despite the fact that they have been held constitutionally valid, these clauses do raise a question in the aspect of Fair trial and the balance of justice.

## CONSEQUENCES OF REVERSE ONUS CLAUSES

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<sup>23</sup> Noor Aga (n 10)

<sup>24</sup> Indian Evidence Act, 1872, ss 113A and 113B

<sup>25</sup> *Inder Sain v the State of Punjab* (1973) 2 SCD 372

<sup>26</sup> *Dharampal Singh v the State of Punjab* (2010) 9 SCC 608

<sup>27</sup> *Bhola Singh v the State of Punjab* (2011) 11 SCC 653

Apart from the threats to Fundamental Rights mentioned previously, incorrect convictions due to reverse onus clauses pose a possibility for a number of ill consequences. An incorrect conviction threatens the liberties of the individual as well as the safety of society. Since these clauses make it mandatory for a defendant to prove his innocence, it leaves him vulnerable to being falsely convicted.<sup>28</sup> A mistaken conviction in such a circumstance brings a multitude of disadvantages and hazards for the defendant. The first is the seriousness of the offence charged. The POCSO Act deals with the sexual misbehavior against children, an accusation much less a conviction of such an offence is a grave matter. If such a conviction is mistaken or wrongful due to the reverse onus, it brings serious ramifications for such a person, apart from the penalty he has to undergo it also affects the social reputation and personal dignity of the person, this is therefore the first threat of a wrongful conviction.

Another threat that wrongful convictions pose is the harshness of the Penalty, most punishments under the POCSO Act amount to imprisonment, but, sections 4,5, and 6<sup>29</sup> of the Act provide for the death penalty. In such a case, wrongful conviction points towards depriving an individual of their life and personal liberty, both of which are covered under Article 21 of the Constitution. A presumption of guilt that leads to harsh penalisation may not be the most effective way of carrying out a fair trial. Despite the validity of such clauses, the courts should keep such factors in mind, while arriving at a decision, as with the burden of proof on the defendant the stakes are even higher.

## CONCLUSION

The Protection of Children from Sexual Offences Act was passed with a very just and noble intention, and the need for passing the act is expressly justified. Keeping these intentions in mind, the Act consists of various provisions to ensure that a decision is arrived at, and the perpetrators of such crimes are convicted. For the commutation of such interests, the act imposes a presumption of guilt and a reverse burden of proof on the accused. As the article

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<sup>28</sup> David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 (1) The Cambridge Law Journal, 142-171

<sup>29</sup> Protection of Children from Sexual Offences Act, 2012, ss 4,5, and 6

mentions, there are certain criticisms these provisions may be vulnerable to. The presumption of innocence has been considered the “golden thread” in criminal law. When this facet is taken away from the defendant, it puts the fairness of the trial and proceedings to the test. Such circumstances require that justice is done immaculately with the utmost caution. The age-old saying that “1000 culprits can escape, but, one innocent should not be punished” applies here. The courts must make sure that the onus is weighed in while deciding the matters and analysing the arguments. The Indian Constitution ensures rights not only for the citizens but for the arrested and accused persons so that the rules of natural justice are followed in every situation possible. The very same rights include the Right against self-incrimination under Article 20(3)<sup>30</sup>. The validity of these clauses though confirmed by various statutes and judgements does pose a challenge to this right. Nevertheless, sexual crimes against children deserve to be treated with as much caution and severity that can be spared, and considering this the measures seem justified, the only danger that needs to be dealt with is that of wrongful convictions.

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<sup>30</sup> Constitution of India, 1950, art.20(3)