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## POCSO: A Stringent Legislation

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*We must protect families, children, who have inalienable rights and should be loved, should be taken care of physically and mentally, and should not be brought into the world only to suffer"- Indira Gandhi. The legislative intent behind bringing child-centric legislation was to deal with shortcomings in cases of child abuse under the Indian Penal Code, 1860. POCSO deals with both sexual and non-sexual offences, such as pornography, and offers Special Courts with child-friendly legal procedures to prevent victim re-traumatization. In this perspective, the judiciary's broader role is commendable because it aims to maintain the integrity of legislative intent through its interpretations.*

**Keywords:** *child abuse, special courts, non-sexual offences, legislative intent.*

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## INTRODUCTION

International Criminal Police Organization, commonly known as INTERPOL, reported 2.4 million child abuse cases in India from 2017-to 2020.<sup>1</sup> A sexual offence against children is a menace to society, and still, the present laws do not effectively handle it. A substantial number

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<sup>1</sup> 'India Reported over 24L Online Child Abuse Cases in 2017-20: Interpol' (*Business Standard*, 17 November 2021) <[https://www.business-standard.com/article/current-affairs/india-reported-over-24l-online-child-abuse-cases-in-2017-20-interpol-121111701312\\_1.html](https://www.business-standard.com/article/current-affairs/india-reported-over-24l-online-child-abuse-cases-in-2017-20-interpol-121111701312_1.html)> accessed 09 June 9 2022

of similar crimes went unnoticed and unpunished for a long time. Section 375<sup>2</sup>, which defines rape, and section 377<sup>3</sup> related to the unnatural offence of the Indian Penal Code, 1860 (hereinafter referred to as IPC) did not have that broad ambit to cater to the needs of being child-centric and friendly at the same time. Therefore, it was necessitated to bring a stringent law that would create effective deterrence in society. Article 15(3)<sup>4</sup> and 39(f) The Constitution empowers the state to provide particular arrangements for children and to steer policies toward preventing their exploitation throughout their youth. The Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO) came into force on 14-11-2012.<sup>5</sup> 14th November is celebrated as Children's day in India. POCSO has twofold objectives. To begin, children must be protected against sexual assault, sexual harassment, and pornographic offences. Second, Special Courts should be established to trial such offences in a child-friendly manner.

## SCHEME OF POCSO

This Act's penalty structure is based on the deterrence idea, as every possible effort is made to hold the perpetrator liable for any potential action against the child victim. The sexual offences against children under Chapter 2 are categorized, as Penetrative Sexual Assault (Section 3)<sup>6</sup>, Aggravated Penetrative Sexual Assault (Section 5)<sup>7</sup>, Sexual Assault (Section 7)<sup>8</sup>, and Sexual Harassment (Section 11)<sup>9</sup>. On perusal of Section 3, it appears to be on the same lines as Section 375 of IPC. The only difference is concerning the broader ambit in the case of POCSO. It is a gender-neutral provision relating to both victim and accused and did not recognize consent because it is immaterial in the case of a minor. This offence is punishable under section 4<sup>10</sup>, which further categorizes the punishment into two parts concerning the age of the victim; that is, if the victim falls under the age of 12-16 years, then the accused will be liable for a minimum

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<sup>2</sup> Indian Penal Code, 1860, s 375

<sup>3</sup> Indian Penal Code, 1860, s 377

<sup>4</sup> Constitution of India, 1950, art.15(3) and art.39(f)

<sup>5</sup> Protection of Children from Sexual Offences Act, 2012, s 1

<sup>6</sup> Protection of Children from Sexual Offences Act, 2012, s 3

<sup>7</sup> Protection of Children from Sexual Offences Act, 2012, s 5

<sup>8</sup> Protection of Children from Sexual Offences Act, 2012, s 7

<sup>9</sup> Protection of Children from Sexual Offences Act, 2012, s 11

<sup>10</sup> Protection of Children from Sexual Offences Act, 2012, s 4

of twenty years which may extend to life imprisonment, but if the victim is aged between 16-18 years then minimum punishment is ten years extendable to life imprisonment and also liable to fine. While analyzing the latter part, it could be found that there was a conflict with Exception 2 of Section 375 IPC. Where if the man is the husband who commits the offence of rape or penetrative sexual assault upon his wife, who is between 15-18 years, he is not liable for any offence. But if someone else commits the same act on that wife, he would be liable under Section 376. There was an apparent dichotomy after the POCSO Act, which the Hon'ble Supreme court now resolves in *Independent Thought versus Union of India*,<sup>11</sup> which partially read down Exception 2 of Section 375 of the IPC to align it with constitutional morality as it was violative of Articles 14, 15 and 21<sup>12</sup>. POCSO, a pro-child, and special law would prevail over the general law as per Section 42A<sup>13</sup>, which states that in the event of a conflict, the provisions of this legislation will take precedence. Section 5 gives some peculiar circumstances related to the victim where the perpetrator is in an authoritative position or relative, or there is a relationship of trust, and one of these is where the victim is less than 12 years of age. This offence is punished with a minimum of twenty years of rigorous imprisonment or life imprisonment or death and also liable to a fine.

Section 7 deals with sexual assault where there is no actual penetration, but there is touch which need not be skin to skin, and; any other sexually motivated activity including physical touch. The Hon'ble Supreme Court in *AGI versus Satish and Another*<sup>14</sup>, the whole purpose of creating the POCSO Act is to protect children from sexual abuse, and if such a restricted reading is adopted, it would result in a negative situation that will frustrate the Act's basic purpose. Chapter 3 of POCSO deals with the offences where the child is used for pornographic purposes in any form of media for sexual gratification. Sections 14 and 15<sup>15</sup> provide for the punishments concerning usage for commercial purposes, storage, and even for failure to report to designated authority or destroy the same. The procedure for reporting cases is dealt

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<sup>11</sup> *Independent Thought v Union of India* (2017) Writ Petition (Civil) No. 382/2013

<sup>12</sup> Constitution of India, 1950, art.14, art.15, and art.21

<sup>13</sup> Protection of Children from Sexual Offences Act, 2012, s 42A

<sup>14</sup> *Attorney General For India v Satish* (2021) Special Leave Petition (Criminal) Diary No(s). 2286/2021

<sup>15</sup> Protection of Children from Sexual Offences Act, 2012, ss 14 and 15

with in Chapter 5, which is read with POCSO Rules<sup>16</sup>. It is apparent that POCSO is not only stringent for perpetrators but also for the persons and authorities who are involved at various procedural stages. Starting with reporting of offence on the knowledge that such crime is committed or on the apprehension that it is likely to be committed, failure in both the above situation would lead to a term of imprisonment of up to 6 months, a fine, or both. There is no bar on the limitation period to file a complaint, provided it shall be self-explanatory and, if not, then supported by justifiable reason. False complaints or false information is also punishable under Section 22<sup>17</sup> of POCSO. The media is strictly forbidden from disclosing the identity of the youngster, including his name, residence, pictures, family details, school, and so on. Failure by the media house to comply with the foregoing would result in a minimum penalty of six months, which might be increased to a year, or a fine, or both.

When a violation of Section 23<sup>18</sup> of the POCSO is committed, the publisher or owner of the media, studio, or photography facility is jointly and severally liable for the conduct or omission of his employee. The Hon'ble Supreme Court observed of India in *Nipun Saxena v Union of India*<sup>19</sup>, that no one may publish the victim's name in print, electronic, or social media, or even indirectly reveal any data that might lead to the victim's identification, and no one should reveal the victim's identity to the wider public. FIRs under IPC Sections 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB, or 376-E<sup>20</sup>, as well as POCSO offences, are not to be made public. The goal of Special courts, also known as fast track courts (Section 28)<sup>21</sup>, is to give a swift trial by recording evidence of a child with the help of an interpreter or expert within 30 days of taking cognizance, according to the preamble of POCSO.<sup>22</sup> In the case of *Alakh Alok Srivastava v Union of India*<sup>23</sup>, the Hon'ble Supreme Court laid down guidelines to be followed by Special Courts while trying a case under Section 35<sup>24</sup> for completion of trial

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<sup>16</sup> Protection of Children from Sexual Offences , Rules 2020

<sup>17</sup> Protection of Children from Sexual Offences Act, 2012, s 22

<sup>18</sup> Protection of Children from Sexual Offences Act, 2012, s 23

<sup>19</sup> *Nipun Saxena v Union of India* (2018) Writ Petition (Civil) No. 565/2012

<sup>20</sup> Indian Penal Code, 1860, ss 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB, or 376-E

<sup>21</sup> Protection of Children from Sexual Offences Act, 2012, s 28

<sup>22</sup> *Ibid*

<sup>23</sup> *Alakh Alok Srivastava v Union of India* (2020) Writ Petition (Civil) No. 468/2020

<sup>24</sup> Protection of Children from Sexual Offences Act, 2012, s 35

within one year from the date of taking cognizance is the ultimate prerogative of providing a child-friendly<sup>25</sup> environment which means any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child<sup>26</sup>. Simply put, not to re-traumatize the child while he is going through the proceedings. Trials must be held in front of a camera and in the presence of the child's parents or any other person in whom the child has trust and confidence.

### **APPROACH OF COURT WHILE GRANTING BAIL TO ACCUSED UNDER POCSO**

Section 31<sup>27</sup> of this Act expressly states that the provisions of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Cr. P.C) shall apply to proceedings before a Special Court (including the requirements for bail and bonds) and that the Special Court shall be deemed to be a Court of Session for the purposes of said provisions. This is read in conjunction with Section 42A, which states that POCSO is in addition to and not in derogation of any other legislation in force at the time and that in the event of any inconsistency; this Act has precedence over the provisions of any other law to the extent of the contradiction.

The Court's guiding principle in deciding the application under section 439<sup>28</sup> Cr.P.C is to consider the gravity of the crime, the nature of the evidence, the position and status of the accused in relation to the victim and witnesses, and the likelihood of the accused fleeing justice and repeating the offence. The possibility of tampering with the witnesses obstructs the course of justice and other grounds. While hearing the bail application, the court has to opine as to whether there is a prima facie case against the accused. This was observed by the Hon'ble Supreme Court in *Sanitaben Shaileshbhai Datanta v State of Gujarat and Another*<sup>29</sup>. Especially for women and survivors of abuse, judicial stereotyping should not be represented in judgments or orders based on preconceived or patriarchal assumptions and personal opinions; rather, Judges should be gender-sensitive and are required to be trained in a comprehensive manner

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<sup>25</sup> The Juvenile Justice (Care and Protection of Children ) Act, 2015, s 2(15)

<sup>26</sup> *Ibid*

<sup>27</sup> Protection of Children from Sexual Offences Act, 2012, s 31

<sup>28</sup> Code of Criminal Procedure, 1973, s 439

<sup>29</sup> *Sangitaben Shaileshbhai Datanta v State of Gujarat and Another* (2018) Criminal Appeal No. 1309/2018

where they can touch upon victim (child) psychology also. In *Aparna Bhatt v State of Madhya Pradesh*<sup>30</sup>, the Hon'ble Supreme held that when bail is granted to the accused, the court shall impose those conditions which aim to protect the interest of the victim.

## CONCLUSION

The ambit of POCSO is quite expansive as every possible act or omission on the part of the perpetrator is tried to be covered under this Act. The use of children for pornographic purposes and in cases of penetrative sexual offences are both prohibited. This Act is fastening liability strictly on the accused whereby requiring no men's rea (guilty mind) to be proved by the prosecution. At the same time, the other offences which do not involve penetration, like sexual assault and sexual harassment, require the 'sexual intent'<sup>31</sup> of the accused to be proved by circumstantial evidence, the conduct of the accused, etc to hold him liable. The failure to report POCSO offences is made punishable, which is in light of protecting the interest of actual and potential child victims. The absolute prohibition on media outlets from disclosing the victim's identification, including name, address, portrait, family details, school, locality, or any other information that might lead to identity exposure. Making breach of aforesaid is made punishable would help reduce social ramifications such as discrimination faced by victims and their families, thereby leaving deep and long-lasting emotional, mental, and even social scars. Special Courts are established to provide a speedy trial to the child victim with the assistance of ancillary support like an interpreter, expert, psychologist, etc. Legal aid and assistance are given to the child victim as a matter of right and compensation to meet the child victim's rehabilitation expenses. The overall view reveals the bend towards the children as it is a socially beneficial legislation that the Constitution also arches. But practically, Courts play an important role in ensuring that the Act is strictly applied on the one hand and that the accused is given a fair trial in a timely manner on the other. There shall be a balancing of interest between both parties as stringency should not defeat the basic principle of natural justice upon which the whole criminal justice system is based.

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<sup>30</sup> *Aparna Bhatt v State of Madhya Pradesh* (2021) Criminal Appeal No. 329/2021

<sup>31</sup> Protection of Children from Sexual Offences Act, 2012, ss 7 and 11