
PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT (POCSO) 2012: A CRITICAL ANALYSIS

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ABSTRACT

Every child has the right to live free from violence, exploitation and abuse.¹

Sexual Abuse is a matter of global concern, but it takes another dimension when it happens to children. Children who are victims of sexual abuse have to deal with its trauma for their entire lives. This global issue is even worse for the country of India, it is one of the most prevalent crimes in the country with the number of cases increasing day by day. Until the advent of this century, there was no dedicated legislation which was in place, for the protection of children from these crimes. In 2007, the National Commission for Protection of Child Rights was set up with the aim of protecting of children, but that could not do away with the need for child-centric legislation. In the year 2012, the Protection of Children from Sexual Offences Act (POCSO) was enacted for the protection of the rights of children. This is a comprehensive law which takes into account all forms of sexual offences against children. This paper aims to discuss the key provisions of the Act and critically analyse the same.

Keywords: Child Sexual Abuse, POCSO Act, Indian Penal Code, Crimes

¹<https://www.unicef.org/child-protection#:~:text=UNICEF%20works%20in%20more%20than,mental%20health%20and%20psychosocial%20services.> (Last accessed on 28th September 2023)

Child Abuse is a matter of grave concern especially when it turns into sexual abuse. This problem is pertinent to almost all parts of the world, but if we look at the last Census which took place in India, in the year 2011, clearly mentions that India has 472 million children, which is a considerable number² The latest NCRB Data also reported that the total crimes against children went up from 28.9% in 2020 to 33.6% in 2021. According to the NCRB, overall, a total of 1,49,404 cases relating to crime against children were registered in 2021 against 1,28,531 cases in 2020, a rise of 16.2 per cent³.

These crimes not only impact the children bodily, but they have an everlasting impression on their minds for all their lives The increasing rate of crimes with every passing year is a clear indicator that the laws were not the best equipped to deal with this problem. If we take a look at the legislation which specifically pertains to offences or crimes concerning children (individuals below the age of eighteen years), there was no such legislation in place until 2012, the offences were covered under the Indian Penal Code 1860 which had the same applicability to all individuals with enhanced punishments only in some cases.

It was long back in the year 1992 when India had ratified the UN Convention on the Rights of the Child in 1992. There was realization and sensitivity at the international level regarding the issue of child rights and crimes against children, but it still took us 20 more years to bring a law that specifically focuses on children. The Protection of Children from Sexual Offences Act 2012 was enacted on 16 July 2012 and enforced on 14th November 2022.

The Act mainly focus on the protection of children from offences of sexual assault, sexual harassment and pornography, along with the establishment of Special Courts for trial of such offences. This Act came as a fresh breath of air as the Indian Penal Code of 1860 did not recognize specific offences against the children and were not adequate to protect the interests of the children. The Act came into effect on 14 November 2012 and since then it has been the guardian of child rights. The Act strengthens the legal provisions for the protection of children from sexual abuse and exploitation.

The most striking feature of this legislation is that it is gender neutral, the definition of child in the Act clearly mentions child is any person below the age of eighteen years⁴ This aspect of

² Handbook on 'Statistics on Children in India 2018', National Institute of Public Cooperation & Child Development, New Delhi, can be accessed at: <https://www.nipccd.nic.in/file/reports/handbk18.pdf>

³ Available at <https://ncrb.gov.in/en>(Last accessed on 28th September 2023)

⁴ Protection of Children from Sexual Offences (POCSO) Act, 2012, Section 2(d)

the Act clearly takes into account that sexual offences are not always gender specific and brings into account that even male counterparts are equally susceptible to sexual offences. Another striking principle which can be seen in the legislation is that it is based on the concept of guilty until proven innocent, completely vice-versa to the commonly used principle of innocent until proven guilty. Section 29 and Section 30 of the Act discuss about the presumption with regard to certain offences and that of a culpable mental state.⁵ To counterbalance this principle, the Act also introduces punishments for false complaints and false information with bad intentions.

The Act has a very wide scope, where it covers all forms of sexual offences against a child, it encompasses penetrative sexual assault, aggravated-penetrative sexual assault, sexual assault, aggravated sexual assault and sexual harassment. These provisions clearly take into consideration all forms of sexual offences which can be committed against children. The inclusion of non-penetrative sexual assault takes account of the fact that any kind of unwelcoming gestures or touch can be put under the umbrella of sexual assault. The reflection of this provision was seen in the landmark case of *Attorney General for India v. Satish and another*⁶, the question arose in the present case after the Bombay High Court's Nagpur bench ruled that grabbing a child's breast without making 'skin to skin contact' will be considered as molestation under the POCSO Act in the case of *Satish Ragde v. The State of Maharashtra*⁷. The Hon'ble Supreme Court observed that the matter at hand would be appropriate for using the "mischief rule" of statutory interpretation. It emphasized that courts must constantly interpret the law to curb harm and promote the remedy and upheld the decision of the Satish Ragde case.⁸

Further, the Act also takes into account the use of children for purposes of pornography and also punishes, storing for commercial purposes any pornographic material. Furthermore, the act also imposes obligations on persons of media, hotels, lodges, hospitals, clubs, studios and photographic facilities to provide information in case they come 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 medium⁹. Not only this, the Act imposes punishment in cases of abetment of offences and if the offence is committed

⁵ Protection of Children from Sexual Offences (POCSO) Act, 2012, Section 29

⁶ AIR 2022 SC13

⁷ Criminal Appeal No. 161 of 2020

⁸ Criminal Appeal No. 161 of 2020

⁹ Protection of Children from Sexual Offences (POCSO) Act, 2012, Section 20

pursuant to abetment the punishment is the same as that of offence. That is to same, the abettor has the same kind of punishment if the offence is committed.

Special Courts have been established for the purposes of trial, and the trial has to be completed within one year. The Special courts have to create an atmosphere which is child-friendly and the presence of a family member, guardian, friend or relative is allowed. The court also needs to ensure that the child is not called multiple times to testify in court. The court has to ensure that the identity of the child is not disclosed during the investigation or trial. It is one of the prime responsibilities of the court to make sure that the dignity of the child is upheld at all times.

Talking about the procedural aspects, for recording the statement of the child, it will be recorded at the residence or at the place of his/her choice. The police officer recording the statement should not be in uniform and during the entire process of investigation and examination, the child should come in contact with the accused. Further, the Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence¹⁰ The Special court can pass an order for interim compensation for meeting the needs of the child or for purposes of rehabilitation at any stage after registration of the First Information Report (FIR)¹¹

The Act also mandates reporting of the crime to the Child Welfare Committee, within 24 hours of receiving information about it.¹² In the recently notified POSCO Rules, the Child Welfare Committee (CWC), has been given the power to provide a support person to render assistance, with the consent of the child and parents or guardian or any other person in whom the child imposes trust. In a recent judgment titled, *Bachpan Bachao Andolan v. Union of India*¹³, directions were issued for framing guidelines for the appointment of support persons in Uttar Pradesh, the Hon'ble Supreme Court also emphasised the critical role played by support persons in guiding and aiding the victims.¹⁴

¹⁰ Protection of Children from Sexual Offences (POCSO) Act, 2012, Section 25

¹¹ Protection of Children from Sexual Offences Rules, 2020, Rule 9

¹² Protection of Children from Sexual Offences (POCSO) Act, 2012, Section 19(6)

¹³ Writ Petition (Civil) No. 427 of 2022/ 2023 INSC 745

¹⁴ Id.

With the 2019 amendment in the Act, the provisions were made even more stringent and under the category of sexual assault, the administration of hormones and chemical substances for attaining early sexual maturity was also included. The provision for the death penalty was also introduced and in some cases, the punishment was increased to that of 20 years. For speedy delivery of justice, the government also sanctioned more than one thousand fast-track courts for cases related to the POCSO Act.

Even though the Act opens doors for the protection of children in a better manner, there are some underlying concerns in the legislation.

The first and foremost is that related to consent, the legislation does not mention about consent. In instances where a minor person has given consent for sexual relations with another major person, will the person still be booked under provisions of the Act. Another aspect of this is when two minors engage in any kind of sexual activity. The provisions of the act are insufficient to deal with scenarios like this, considering the present modern times, this is one area which requires serious consideration and deliberation. To accommodate the present societal trends is what the need of law is currently, if the laws cannot change with the society, they have the potential to become obsolete. The provisions of the Act should be made in lines with the morality of the society.

In a single-judge bench of Karnataka High Court, the court said, the Protection of Children against Sexual Offences (POCSO) Act, 2012 is not intended to penalise young people who fall in love. The laudable object for which the POCSO Act was brought into effect cannot be forgotten, but that would not mean that it is meant to punish young children who would fall in love and commit such acts which would become punishable under the Act.¹⁵

Secondly, the provisions of the POCSO Act showcase a bias towards the victims, as the act not only facilitates unfair advantage to the concerned victim but also undignifies the principles of natural justice by failing to act in accordance with justice, equity and good conscience¹⁶ There is a possibility of a negative outcome in certain cases because of the principle of guilty until proven innocent. The act should try to balance the interests of both the victim and the accused person. If an innocent person is put behind the bars, it is a grave injustice, the people tend to

¹⁵ Sri. N.M. Premkumar v. State of Karnataka

¹⁶ <https://lawwire.in/an-analysis-of-the-pocso-act/> (Last accessed on 28th September 2023)

loose faith in the judicial system. The provisions of any legislation should not be centric towards victims at the cost of accused persons.

Furthermore, the Act has a very wide scope in terms of what can constitute sexual abuse, due to the extremely wide scope, even gestures like patting the back of a child as a sign of praise can be put under the ambit of sexual activity. The basics of sex education start with good touch and bad touch but it seems that the Act has not taken that into consideration, leading to conflicting decisions in many cases. The earlier discussed case of *Attorney General for India v. Satish and another*¹⁷ received criticism on similar grounds. The aspect of intention which is a crucial part of criminal laws in India, should be considered while determining the cases under this Act.

Another concerning area is that there is a lack of awareness among the general people that an Act which deals with all sorts of sexual crimes exists. The lack of awareness creates a barrier in the implementation of the act and defeats the objectives of the Act. Institutions like government departments, universities, NGOs and other people working in allied areas should actively take steps to bring about awareness about this Act. For proper implementation, there can be a mandate in the schools to create awareness regarding this Act. Further, creating awareness should not be limited to the beneficiaries of the Acts, that is to say, authorities should also be trained about the sensitivity of these kinds of offences with children. Creating awareness should be accompanied by creating sensitivity regarding sexual crimes against children among the general public. People also should be made aware about the procedural aspects related to this legislation.

The concerned authorities involved in the procedural aspects of the Act should be sensitised towards the needs of the children. The process which is mandated in the provisions should be carried out in the best possible manner so that the victims are given the best possible treatment and counselling. Recognition to the mental health and trauma of the child should be given consideration at all points in time. The imprints of such an offence have the potential to stay on the minds of the children for all years to come. The legislation will only have a fruitful impact if it can create impact at all levels.

¹⁷ Supra Note 6.

The above point also sheds light on the issue of medical examination, there can be instances where a child refuses medical examination or does not cooperate with the medical examiner. This possibility has not been addressed by the Act, this possibility is an extremely predictable thing and still the lawmakers have not taken it into account while framing the provisions of this Act. There should be clear provisions in the Act regarding, where the child refuses medical examination and the family members insist on it. The question which arises here is whether the child's willingness should be taken into account or the consent should be based on the fact that the parents are the guardians of a minor child. This ambiguity should be done away with so that even authorities do not find it difficult to complete the procedural aspects.

If the fact is considered that consent should be taken from the guardians, in the recent report conducted by the police, it was found out that in 90 per cent of cases which are registered under this Act, the accused persons are known to the victims¹⁸. One of the possible solutions of this can be that the doctors should be more cautious and sensitive about approaching the children, the children should be given assistance of counsellors to discuss about what they are going through. Being particular about every little thing that the children are facing is the only proper way forward for the effective implementation of this Act.

Another major area of concern is that, even though the Act talks about the disposal of cases within one year, it was found out that, it takes 509.78 days for a case to be disposed of.¹⁹ As it is the courts in India are plagued with delayed timelines, it comes off as a no surprise when this is the scenario with these Special Courts also. In the case of *Alakh Alok Srivastava v. Union of India & Other*, the Hon'ble Supreme Court laid down guidelines to be followed by special²⁰ courts while trying a case, so that the same can be completed within one year from the date of taking cognizance of the offence.

The Act was the need of the hour, as the children who are considered the future of the country were at stake, the Act proved to be of great value to the children. Every provision of the legislation has been devised keeping in mind the interest of the children. The penalties which are imposed under the act are stringent and tend to create a deterrent effect on the convicted person. The act has come to the rescue of children at the most gravest of time and instances.

¹⁸<https://timesofindia.indiatimes.com/city/delhi/7-pocso-cases-every-month-90-of-accused-known-to-child/articleshow/63118909.cms>(Last accessed on 28th September 2023)

¹⁹ 10 years of POCSO: An analysis of India's landmark child abuse law by Esha Roy, Published on November 18, 2022 in The Indian Express

²⁰ (2018) 7 SCC 1.

Sexual offences against children not only harm them physically but affect a child's psyche also, these offences more than often lead to lifelong mental trauma and agony. There cannot be any doubt that the POCSO Act has opened the gates for protecting children from sexual offences.

Considering the present judicial structure, the societal conditions, the mindset of the common man and the lack of awareness, there is still a long way to go. The sole responsibility of effective implementation of the Act can not only be on the government or the courts, what is required is the change in the mindset of the people and the realization that this is a mutual responsibility of all the stakeholders. Even though considerable improvement has taken place, it is not sufficient if we take the current scenario into account. As responsible citizens and human beings, we should consider the safety and security of the children as our moral duty. The ideal scenario is not where there is extremely effective implementation of the provisions of the act, in reality it is where there is no need for legislation like this because there is a change in the mindset of the people. To ensure the protection of child rights in the country, every citizen of the country should come together as a support system to the government and its different institutions.