

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

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**Volume 5 | Issue 3**

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**2022**

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# Constitutionality of Reverse Burden of Proof: Sections 29, 30 of POCSO Act

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## ABSTRACT

*The judicial legislation is a temptation, often finds it difficult to avoid. The thin line which separates adjudication from legislation should not be crossed or erased, for the sake of that temporary temptation. The courts must avoid the danger of determining the meaning of a provision based on their preconceived notion of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. The courts are not entitled to usurp the legislative functions under the disguise of interpretation, whereas the separation of powers is sacrosanct in a modern democracy. There are various occasions, where the Public Interest Litigation domain was used to enter into the legislative domain as well. It is apart from the fact that the judicial decisions were invited to the facts where the legislative vacuum existed. Though the precedent is not the law of the land and it does not have the sanctity of statute, over the period in India, precedent became more authentic than the statute itself. Though the judicial legislation, in modern times cannot be ruled out completely, it does have its inherent limitations as well. The judicial legislation may be used as a special medicine where the disease is acute, as an emergency measure, but that shall not be the order of the day, rather the daily menu. Some of the said inherent limitations are discussed in the given article.*

## I. INTRODUCTION

The fundamental principle of criminal jurisprudence is that the accused shall be considered innocent until proven guilty. Sections 29 and 30 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) invokes the presumption of guilt contrary to the basic and well-guarded tenets of criminal jurisprudence. The legislation was enacted to protect the children from offences of sexual assault, sexual harassment and other offences with a view to protect the well-being and interest of children. Justice rests on the anvil of equal rights, liabilities and is never alien to rights. The excessive and arbitrary use of pre-trial detention around the world is also a massive form of human rights abuse that affects more than 14 million people a year. Most of them are poor and lacks the capacity to hire a lawyer or to procure bail or to access tools to secure pre-trial release in many jurisdictions in the world. Sections 29 and 30 of the

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POCSO Act takes away the valuable defence available to accused thus making it unconstitutional and against the fundamental well-guarded tenet of criminal jurisprudence.

## **II. POCSO: AN OVERVIEW**

The World Health Organisation in its Report of the Consultation on Child Abuse Prevention defines child sexual abuse as “the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or that violates the laws or social taboos of society.”<sup>2</sup> The Protection of Children from Sexual Offences Act, 2012 exclusively meets the necessary obligation of India in furtherance of the signatory assented on the 11<sup>th</sup> December, 1992 to the United Nations Convention on the Rights of the Child with regard to the crimes of sexual offences against children.

The object of POCSO is to protect children from offences of sexual harassment, sexual assault and pornography and also to provide for establishment of special Courts for the trial of such offences. It is specifically mentioned in the object that, it was passed on the mandate of Article 15(3) of the Constitution which empowers the State to make special laws for children. The General Assembly of United Nations adopted a convention on the Rights of Child on 20.11.1989, which laid down a set of standards to be followed by public in securing the best interest of the child. Since, India being a party to the convention was obligated to give effect to the aforementioned Declaration. In furtherance of the convention, the POCSO Act was brought into force.

Sections 29 and 30 of the POCSO Act,<sup>3</sup> reads as follows:

29. Presumption as to certain offences: -

Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

30. Presumption of culpable mental state:

(I) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with

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<sup>2</sup> 29-31 March 1999, WHO/HSC/PVI/99.1 - <https://researchersclub.wordpress.com/2014/06/15/suffocations-in-pedophilic-society-a-sin-against-society-child-sexual-abuse/>

<sup>3</sup> Protection of Children from Sexual Offences Act, 2012; [https://legislative.gov.in/sites/default/files/The%20Protection%20of%20Children%20from%20Sexual%20Offences%20Act%2C%202012\\_0.pdf](https://legislative.gov.in/sites/default/files/The%20Protection%20of%20Children%20from%20Sexual%20Offences%20Act%2C%202012_0.pdf)

respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

### III. CONSTITUTIONAL VALIDITY

In light of the presumptions available under sections 29 and 30 of the POCSO Act,<sup>4</sup> the accused is virtually defenceless who is called upon to adduce negative evidence, compelled to tender advice and expose oneself to cross examine which may incriminate himself. The right to life and liberty of a person can be restricted only by procedure established by law, which must be just, fair and reasonable. Every accused is entitled to the constitutional right to fair trial guaranteed under Article 21 of the Constitution.<sup>5</sup> In addition, specific provisions are incorporated in the Code of Criminal Procedure and Evidence Act, which are intended to ensure that the accused gets a reasonable opportunity for a fair trial. Prima facie, convictions in most of the POCSO cases is by virtue of sections 29 and 30 of the Act. The presumptions under these provisions impose restrictions on the discretion of the trial court and it casts the burden on the accused to prove certain facts. The liability is on the accused to rebut the presumptions. Section 29 of the POCSO Act is not in contravention of right of fair trial guaranteed under Article 21 of the Constitution of India. Section 30 of the POCSO Act creates a presumption against the accused as well as reverse burden in the matter of defence. Sections 29 and 30 of the POCSO Act cumulatively creates a reverse burden of proof on the accused, which is contrary to the basic and well-guarded tenets of criminal jurisprudence, the right to silence available to accused, the principle of presumption of innocence and the principle that prosecution has to establish the guilt beyond any reasonable doubt. Even though the Constitution guarantee right to fair trial, the mandatory presumptions under sections 29 and 30 of the POCSO Act impose a restriction on the above right. Section 29 of the Act is directly at the teeth of the rigor of Article 21 of the Constitution and run against the procedural safeguards provided under the CrPC and the Evidence Act (**Nikesh Tara Chand Shah v. Union of India ((2018)11 SCC 1)**).

Article 11(1) of Universal Declaration of Human Rights (UDHR) provides that there is a right to be presumed innocent until proved guilty. Article 14(2) of the International Covenant on

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<sup>4</sup> The Protection of Children from Sexual Offences Act, No. 32 of 2012,  29, <https://indiacode.nic.in/bitstream/123456789/20179/4/A2012-322.pdf>.

<sup>5</sup> Durga Das Basu, *Commentary On The Constitution Of India* 970 (8th ed. 2009).

Civil and Political Rights (ICCPR) states the same which provides that the presumption of innocence is an independent right, which stands distinct from the right to fair trial under article 14(1) and the minimum guarantees mentioned under article 14(3).

Wrongful convictions and accusations will follow typical consequences, as they have to face the apprehension of the society and even the blot of social stigma is left on them. The names and locations of people accused of these offences are identified by media, exposing them to harassment and threats from sections of public. The general principle of Criminal Law provides mens rea as an essential ingredient of every offence. Complete definition of every crime predicates a proposition, expressly or by implication, as to the state of mind and if the mental element of any conduct alleged to be a crime is absent in any given case, the crime so defined shall not be committed.<sup>6</sup>

Chapter II of the POCSO Act unambiguously shows the distinction between definition of sexual harassment under section 11 of POCSO Act and definitions of other offences under the Act such as sexual assault, aggravated sexual assault, penetrative sexual assault and aggravated penetrative sexual assault. In furtherance of sexual harassment under section 11, if any act mentioned therein is committed with a sexual intent it will constitute a sexual harassment. Thus, mens rea is a statutorily vital constituent of sexual harassment. While, mens rea is not included in the offences of sexual assault under section 7, aggravated sexual assault under section 9, penetrative sexual assault under section 3 or aggravated penetrative sexual assault under section 5. In the case of sexual harassment, acts mentioned under section 11 includes certain acts, which may be done by a person innocuously and without sexual intent. Unless sexual intent is made an important ingredient of the offence, it is possible that such acts may be misunderstood to be acts of sexual harassment. Wherefore, Statute requires the existence of a mental state of mind or sexual intent as an essential condition precedent for an offence under section 11 of the POCSO Act. While sexual intent is not statutorily an important ingredient in all other offences under the Act. Such offences involve varying degree of physical interference on the victim or the penetrative act, which if done, explicitly exhibits a sexual intent and thus, mens rea is implied in the conduct of the offender itself. Since that mental element is implied in the very nature of the crime, the Parliament has consciously omitted the ingredient of sexual intent from the above offences.

A distinction is made between the accused who are booked under other similar offences of various other penal statutes and the accused in POCSO cases. The distinction based only on

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<sup>6</sup> Nathulal vs State Of Madhya Pradesh on 22 March, 19652

the age of the victim makes a devised distinction between two classes and is irrational, which has no rational nexus with the object. Such a distinction of the accused is contrary to Article 14 of the Constitution of India where the classification is not based on any rational or intelligible differentia. If an act alleged against the accused in a POCSO case is attributed to an accused who has committed it on an adult, the latter is tried without any presumptions and the onus of proving the case is more on the prosecution than in the trial of an accused in POCSO case. In the former case, the trial starts begins presuming the accused to be guilty, while no such presumption is made in the case of an accused who is involved in identical offences under the other penal statutes. But, POCSO Act was implemented to achieve the edict under Article 15(3) of the Constitution for providing special protection to children, thus it cannot be challenged on the ground that it violates Article 14 of the Constitution. Treating child victims as a class by itself is based on an intelligible differentia and which is to achieve the object of the Act. Thus, the provisions do not offend Article 14.

Article 20(3) of the Constitution provides for protection in respect of conviction for offences, which is no person accused of any offence shall be compelled to be a witness against himself. The Constitution Bench of the Supreme Court in **State of Bombay v. Kathi Kalu Oghad, (1961 KHC 343)**, held that the bar under Art.20(3) of the Constitution arise only if the person is compelled to give evidence. The Court further held that compulsion is a physical, objective act and the state of mind of the person making the statement except where the mind has been so formed by some extrinsic process as to provide the making of the statement involuntary and extorted.

In **Yogesh Arjun Maral v. State of Maharashtra, (2016(1) Bom CR(crl) 474)**, the learned Single Judge was sceptical about the presumption under section 29 of the POCSO Act and held that it was contrary to the basic principles of criminal jurisprudence and the terms of the said section was very vague. Sections 29 and 30 of the POCSO Act has not nullified the duty of prosecution to establish the foundational facts. This duty never shifts to the accused and is always on the prosecution to establish. The statutory burden on accused is only partial and it will not shift the fundamental duty of prosecution to establish the foundational facts which constitutes the case to the accused. Hence, sections 29 and 30 of the POCSO Act in any way do not violate the Constitutional guarantee, and hence not ultra vires to the Constitution.

The prosecution has to prove and establish a prima facie case beyond any reasonable doubt. The accused will be under an obligation to rebut the presumption that arise only when the foundational facts are established by the prosecution, which shall be by adducing evidence with standard of proof of preponderance of probability. Foundational facts in a POCSO case include

the proof that alleged incident has taken place, the victim is a child, the accused has committed the offence and physical injury caused to prove it with supporting evidence. If the foundational facts of the prosecution case is established by the prosecution by submitting admissible evidence permissible by law, the duty of the accused is to rebut it with the aid of the evidence on record that he has not committed the offence. The process of producing evidence in a POCSO case does not substantially vary from any other criminal trial except that in a POCSO trial the prosecution is additionally armed with the presumptions.

Part IV of Constitution which provides for the Directive Principles of State Policy (DPSP) mandates that the directive principles are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.<sup>7</sup> Article 39(e) of the Constitution provides that State shall implement policy towards securing the health and strength of workers, men, women and the tender age of children shall not be abused. Article 39(f) provides that children shall be given opportunities and facilities to develop in a healthy manner and that their childhood are protected against exploitation and material abandonment. As discernible from its objective, POCSO Act is introduced to give effect to the Directive Principles of State Policy and also to discharge the mandate of the international convention and Constitution of India.

#### **IV. REVERSE BURDEN OF PROOF IN OTHER STATUTES**

The provision for reverse burden is provided not only under statutes like the present one, but also under general statutes like the Indian Penal Code. The Indian Evidence Act<sup>8</sup> also provides for such onus on the accused in certain matters, which are, under section 113A and 113B. According to the Common Law, it is the duty of the prosecution to prove a person guilty. To the contrary, this common law principle is subject to Parliamentary Legislation. Article 11(1) of the Universal Declaration of Human Rights (UDHR), 1948 states that everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law.<sup>9</sup> Similar provisions can be seen in Article 14(2) of the International Covenant on Civil and Political Rights, 1966 and Article 6(2) of the European Convention for the protection of Human Rights and Fundamental Freedoms, 1950.

In addition to POCSO, Section 138A of the Customs Act, 1962 provides for presumption

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<sup>7</sup> Article 37, Constitution of India, 1950.

<sup>8</sup> The Indian Evidence Act, No. 1 of 1872, §45.

<sup>9</sup> Nguyen Minh Tam - Vu Cong Giao, "The Right to be Presumed Innocent in the International Human Rights Law and Its Reflection in Vietnam"; [https://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0003/3446274/Paper\\_Nguyen-Minh-Tam\\_Vu-Cong-Giao.pdf](https://law.unimelb.edu.au/__data/assets/pdf_file/0003/3446274/Paper_Nguyen-Minh-Tam_Vu-Cong-Giao.pdf)

regarding culpable state of mind. Culpable mental state includes motive, intention or knowledge of a fact or belief in or reason to believe a fact. Identical presumptions with regard to culpable mental state is available in section 10(c) of the Essential Commodities Act and section 35 in a prosecution under the NDPS Act.

## **V. CONCLUSION**

Constitutionality of a penal provision placing burden of proof on an accused, must be tested on the anvil of the State's responsibility to protect innocent citizens. The sensitive nature of the crimes of sexual offences against children cannot be neglected while these cases is to be tackled with proper necessary procedural steps stipulated by law. It is very pertinent to consider the gravity of offence, young age of the victim involved, increasing incidents of child abuse, impact of abuse on the psychological and physical well-being of the victim child, the mental trauma which the child and family undergoes and the likely absence of direct eye witnesses to such incidents in these cases. Reverse burden of proof have been envisaged in several statutes such as the Negotiable Instruments Act, Prevention of Corruption Act, TADA etc. Presumption is applied only when certain foundational facts are established by the prosecution. The accused in such an event would be entitled to show that he has not violated the provisions of the Act. Evidently, any presumption has to emanate on establishment of certain foundational facts and presumption cannot arise from a vacuum.

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