

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 4

2022

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Protection of Children from Sexual Offences with Special Reference to Pocso, 2012

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ABSTRACT

Our society has become prey to the offence of sexual offence to an extent where coming across multiple rape cases on a daily basis is mundane. Unfortunately, this deadly crime did not even exempt innocent children from the clutches of its monstrosity. The macabre site of the current status of our society is indescribable. In this article, I have discussed about the prime legislation that was framed and enacted to relieve minor victims of this heinous crime – POCSO. This article thoroughly entails the legal provisions of POCSO Act, 2012, the loopholes that still exist and how those loopholes are utilized to manipulate the law and deprive children of the justice they deserve.

The article addresses the struggles of minor victims and their parents as well. Even after 10 years of its enforcement, the provisions of POCSO are not put to use in their full capacity. We, as a society, have failed time and again to build an environment safe enough for our children. How far along are we then?

I. INTRODUCTION

A lost childhood is foundation of a deformed future”

A news report dated, 7th June 2022, submitted that five cases of rape against minor girls were reported in Hyderabad in a week.² This is the reported situation right after the sensational Jubilee Hills gang rape case.

Year 2020 witnessed 28,000 rape cases as per the report submitted by Statista Research Department. At least 5 rape cases were reported each day in Delhi in the year 2021.³

According to a report by NGO CRY, sexual offence is committed against a child in India every 15 minutes and over a period of 10 years, the number of crimes against minors have increased by 500%.⁴

As the years have passed us by, the grotesqueness of this heinous offence has not just remained

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² THE NEW INDIAN EXPRESS, Hyderabad gang rape: After state women's panel, now NCW issues notice to Telangana Police- The New Indian Express (last visited Jun 26, 2022)

³ STATISTA, • India: number of reported rape cases 2020 | Statista (last visited on Jun 26, 2022)

⁴ THE TIMES OF INDIA, Every 15 minutes, a child is subjected to sexual offence in India: CRY report | India News - Times of India (indiatimes.com) (last visited on Jun 26, 2022)

confined to full grown women but has also made minors it's prey, which is unimaginable, to say the least. Sheer negligence on the part of general public has augmented the rate of rape cases against minors the most.

It is very unfortunate to mention here that in most of the cases, minor girls are raped and molested by someone they already know or someone, who is known to their families.

The fight against women safety was already long overdue, let alone innocent children facing the trauma of fighting for the right to live their childhood, now.

II. WHY WAS POCSO ACT NEEDED?

Before POCSO Act, 2012 came into being, **Goa's Children's Act, 2003 and Rules, 2004** was the legislation that came to the rescue for protecting the rights of children. **Sections 375, 354 and 377** of IPC covered sexual abuse against children, as well.

Clearly, there was no explicit provision to safeguard the rights of minors against sexual assault as such. Prevalent legislations before POCSO were not sufficient to meet the needs of victims of sexual abuse. Therefore, POCSO was birthed.

But what were the actual limitations of IPC?

Well, IPC sections suffer from various inadequacies. They are discussed as follows:

- a) **Section-375** clearly does not protect male children. POCSO has overcome this limitation by making its provisions gender-neutral.
- b) It also, only protects traditional sexual offences like peno-vaginal intercourse, while POCSO covers all kinds of contact between the victim and accused.
- c) Terms such as "modesty" and "unnatural offences", which are used in Sections 377 and 354 of IPC, have not been defined.

The biggest flaw of Indian Penal Code was lack of protection for minor rape victims who were male. That injustice has now been assuaged by POCSO.

Although the journey from IPC to POCSO, so far as protection of children against sexual offences is concerned, has seen improvement in safeguarding provisions, the number of crimes against children has not seen any decline per se.

The bigger question is – Why is not POCSO enough? Even after making a specific legislation just to address the tribulations of a specific class of population, why do we still fail to deliver justice?

Like any other law, POCSO also suffers from certain loopholes and hence, it becomes easier

to shamelessly manipulate the provisions of this act.

In this paper, I will discuss the limitations of POCSO and how it is misused by authorities to exempt children of their rights.

III. OVERVIEW OF THE ACT AND IT'S SALIENT FEATURES

Protection of children against sexual offences Act was enacted in compliance with Article-15(3) of the Indian Constitution which empowers the State to make special provisions for women and children.

By way of this Act, at all stages of judicial proceedings, the best interest of the child has been put at the forefront, in terms of reporting and recording evidence, investigation and speedy trial. The Act specifically talks about the protection of children against – sexual assault, sexual harassment and pornography.

All sexual offences under IPC, except for the offence of trafficking, has perpetrator as male and victim as a female. This unfairness has been overcome by POCSO by putting men and women both in the light of victim to extend the benefits of justice to both the tribes.

The six kinds of sexual offences that have been dealt within this Act are as follows:

- 1) **Penetrative sexual assault** – It has been defined in **Section-3** of the Act. When a person penetrates, his penis or any object or any part of the body, OR applies his mouth, to the vagina, urethra, anus or mouth of a child, or makes the child to do so with him or any other person, has said to have committed the offence of penetrative sexual assault.
- 2) **Aggravated penetrative sexual assault** – When penetrative sexual assault is committed by a person who is under a situation of trust, such as police officer, member of armed forces, public servant, staff of a jail, staff of hospital etc., or done by a gang or when deadly weapons have been used or when such act has left the child in a grave condition then a person is said to have committed the offence of aggravated penetrative sexual assault. A complete list of different circumstances is given under **Section-5** of the Act.
- 3) **Sexual assault** – When any act is committed where there is physical contact with sexual intent without penetration, it is called sexual assault.
- 4) **Aggravated sexual assault** – Just like aggravated penetrative sexual assault, a certain specific group of persons, who commit sexual assault on any child, commit the offence of aggravated sexual assault.

- 5) **Sexual harassment** - A person commits sexual harassment on child when the person with sexual intent - utters any word, makes any sound or gestures or exhibits any body part; makes a child exhibit his body parts; shows any object which is pornographic; repeatedly contacts a child or watches or contacts the child; threatens a child; entices a child for pornography.
- 6) **using a child for pornographic purposes** – This includes using a child for sexual gratification including - representing sexual organs of a child; usage of child engaged in real or stimulated sexual acts; indecent or obscene representation of a child.

It has also been mentioned that abetment of or an attempt to commit these offences is also punishable under this act.

All the above acts are defined under different sections of this legislation.

But eventually, the real hurdle after framing any statute is to cover the distance between its enforcement and its efficient implementation.

IV. LOOPHOLES IN POCSO

POCSO has recognized every possible sexual offence that can take place with a child but we are still rendered helpless in various scenarios where lacunae in POCSO manipulate the whole case. Some of them are discussed ahead.

- 1) Section-4(2), that was added by the amendment of 2019, talks about classification between the children falling under the age group of 16-18 and below 16. But this goes against the doctrine of “*intelligible differentia*” as laid down in Article-14 of our Indian Constitution.⁵

Although it did increase the punishment for offenders committing penetrative sexual assault on children below the 16 years of age, from seven years of imprisonment to minimum ten years of imprisonment but what does this revulsion imply?

Do persons committing the same offence on children between 16-18 years of age do not deserve as stringent a punishment? Does the act become any less sinful when it comes to a certain different age group of children?

When a child, under Section-2(d) of the act, has been defined as any person below the age of 18 years, then why this distinction?

An act of sexual offence is as nefarious for a 17-year-old as it is for a 12-year-old.

⁵ K.G. Prithvi and K.P. Manish, A Critique on Protection of Children from Sexual Offences (POCSO) Act, Indian Law Journal (June 26, 2022, 6:01 PM), [India Law Journal](#)

While the idea of making punishment more severe for such criminals is correct but distinguishing between children is not.

- 2) Another lacuna in the POCSO is the interpretation of the term “physical contact” in Section – 7 of the Act. In a very recent case of *Satish Ragde versus State of Maharashtra, 2021*⁶, a landmark judgment was given which stated – ‘*If there is no skin-to-skin contact, then it would not be considered a sexual assault.*’ Justice Pushpa Ganediwala further said that ‘*mere groping will not fall under the definition of sexual assault*’. Not only the judgment is befuddling but also, the insensitive perspective through which such cases are dealt with is disheartening too.

The facts of the case reveal that Satish (offender in the case), offered guava to the minor and beguiled her back to his place. There, Satish groped her breasts and made an attempt to remove her salwar as well. Fortunately, for the minor, her mother reached the place in right time and prevented this mishappening.

The mother of the minor, later filed an FIR regarding this case but all those efforts were thrown in vain when the Bombay High Court gave an inconsiderate decision. As per Section-7, physical touch without penetration is the condition that has to be fulfilled to be prosecuted for sexual assault. But how is “skin-to-skin” contact relevant in this scenario? How does touching a minor’s breasts from above covering of a cloth any different from touching them directly? Did presence of cloth make this incident any less traumatic for that child? The unfortunate impact on that child’s mind will still remain the same. So why treat this crime any differently?

- 3) The usage of the term “sexual intent”, in section-7 has perplexed me the most. It is shocking that we have to consider the intent of offender in sexual offences against children. Rationality is lost in quagmire of useless questions like “sexual intent” and hence there are delays in appropriate decisions. Where offenders of such grave crimes should be put behind the bars as soon as possible, the burden of proving intention behind commitment of sexual offences leads to unnecessary procrastination of judgments.

Do we really need to examine the intention of a person who was willing to go to such lengths merely to satisfy his rapacity for this animalistic thirst?

Does a criminal of such kind deserve to be absolved of his liabilities if they had no sexual intent behind?

These questions have to be brought to the table because the tribe, which POCSO aims to

⁶ Satish S/O Bandu Ragde vs State of Maharashtra., Thr. P.S.O. ... on 19 January, 2021

protect, is a vulnerable one. We do not expect children to come forward and defend themselves on their own. For that matter, they are, most of the times, unaware of the acts they are being forced into. They can be easily hoodwinked into being abused and exploited.

V. HOW FAR ALONG ARE WE?

In a very recent case of *Donlang Nongsteng versus State of Meghalaya and Others*⁷, the petitioner was arrested on 21st September 2021, on the basis of an FIR filed by Smti. Mareenda Kharkongor, in which she had made an allegation that her minor son had been sexually harassed by the accused. The Investigating Officer's observations also revealed that the child, was indeed, abused and I/O filed a chargesheet against the offender too. But eventually, the accused was released on bail on the ground that the harassment took place in the month of January and the FIR was filed 8 months later, which, according to the authorities, was a delay. The FIR was declared defective as it did not specify the accurate date of occurrence of the unfortunate event. Finally, it was submitted that no case can be made out under POCSO and the accused was released from the judicial custody. Not only the above case divulged, the absolute malarky that justice delivery has become, in these cases but also highlighted the importance of sensitivity towards the victims of these occurrences.

More often than not, the victims are not even aware that something wrong was done with them. For a child to realize that and approach the appropriate authorities for help is the utmost courage he can show. Making them time bound on top of that only adds to their struggle. Cases like this are an accurate example of how much this society lacks sympathy.

According to a national survey conducted by the ministry of women and child development, in the year 2007, 53.22% children had faced one or more forms of sexual abuse, of which 52.94% were boys.⁸ The insensitivity, we, as a society, portray, towards the struggle of boys is unimaginable. Men face just as much trauma from these horrendous experiences, as women do, with the added pressure of being mocked by the society for having to come out and take action against them.

In another sensational case of *Aparna Bhat and Others versus State of Madhya Pradesh and Another*⁹, where Supreme Court ordered the minor victim of sexual harassment to tie Rakhi on the hands of the accused, is prime example of the mockery this offence has become. Such

⁷ Donlang Nongsteng versus State of Meghalaya and Others, 2022 SCC OnLine Megh 237

⁸ CHILD RIGHTS RESOURCE CENTRE, Study on Child abuse: India 2007 | Save the Children's Resource Centre (last visited on June 26, 2022)

⁹ Aparna Bhat vs The State Of Madhya Pradesh on 18 March, 2021

judgments trivialize the trauma that victims undergo and disdainfully impacts their dignity.

What are we concluding through these judicial pronouncements? That converting the relationship between victim and accused in cases of sexual harassment, to that of a brother and a sister, will reduce the pain of victim? Or will it make the offender any less responsible for inflicting a repugnant scar on victim's life?

In fact, recently, Mumbai police chief, Mr. Sanjay Pandey made it mandatory for permission from DCP (Deputy Commissioner of Police) before filing an FIR in cases filed under POCSO. Not only the circular over rides the objective of law, but also adds an extra layer before the registration of FIR. As per Maharukh Adenwalla, advocate and child rights campaigner, this additional condition provides ample amount of time to the accused to threaten victim and their family.

So, when asked how far along are we on this tedious journey between formation and implementation of POCSO, I'd say, we still have a long way to go.

VI. CONCLUSION

A country where one has to look both ways on even a two-way road, we definitely can not afford to take this issue casually. On a close perusal of an article published by G.K. Goswami and Aditi Goswami, titled "**Procedural Road Map for Handling Child Sexual Abuse under the POCSO Act, 2012**", I found out that, of the 90% cases of child sexual abuse incidents, against which a charge sheet is filed by the police, only 30% result in convictions.¹⁰ This is a very sad state of affairs because we potentially let these monsters roam our surroundings without letting them suffer the consequences of committing such heinous crimes.

Recent amendment in the Juvenile Justice Act in 2021 has made crimes committed by staff at Child Care Institutions (CCIs), non-cognizable, which simply means adding an extra layer in reporting crimes against children, which already is a tedious job. A recent newspaper article revealed that reporting instances of such abuse by staff and PICs at these child care institutions is not an easy task already, let alone adding on to the stress of the victims and their parents.

Lastly, I would like to mention here that to sit around and wait for authorities to take action in this direction is not what this society needs. The need of the hour is to realize the importance of taking responsibility on individual level. We, on personal level, can take baby steps to eradicate these evils that persist around us. Even though the way ahead seems nebulous, but

¹⁰ G.K. Goswami and Aditi Goswami, Procedural Road Map for Handling Child Sexual Abuse under the POCSO Act, 2012, (2021) 3 SCC J-1, J-2, J-2 (2021)

there is always a way forward.
