

## Protecting Innocence- The POCSO Act

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### Abstract

The research paper deals with the theme of “Protection of Children from Sexual Offences Act (POCSO)”. It aims at extensively examining the legislation with specific reference to the landmark judicial pronouncements in this regard, and highlighting its loopholes and challenges with respect to the present scenario in India.

The POCSO Act has been in India since a while now and even in 2017 we face various instances where the efficiency and execution of the legislature comes into question. The legislation has a number of loopholes which are being extensively dealt in the paper, primarily focusing more on the execution part.

The qualitative extensive research lays down the background of the subject, its meaning and its relevance in the present time. The much-debated infamous instances of child abuse in Delhi and various parts of the country are being dealt with in the presented research paper keeping in mind their relevance to the POCSO Act.

The paper further lays down specific emphasis on various aspects of the act, viz. what exactly amounts to sexual abuse and challenges the relevance of this piece of legislation.

The paper in the end briefly deals with upcoming problems and its implications in the present time. It also suggests some solutions for fruitful understanding of this concept, along with suggestions to ensure that its implementation is just & fair and is not ambiguous.

**Key Words:** POCSO; Loopholes; India; Legislation; Abuse

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## Introduction

The POCSO or The Protection of Children from Sexual Offences Act, 2012 has been a landmark piece of legislation in dealing with sexual abuse against children. Though it has several loopholes but it is the first substantive legislation followed in pursuance of the nation's child protection policies. This qualitative extensive research aims at critically analyzing the act as well as mentioning the loopholes in it with the help of certain judicial pronouncements.

Objective of the Act as mentioned in the Act is, <sup>2</sup>“An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.”

Constitutional backing to the validity of POCSO Act is found in Article 15(3) which provides that the State has the power to make special provisions for women and children. This provision in our Constitution thus makes the Act Constitutionally valid.

## Child Sexual Abuse Laws in India

A large proportion of children in India (Fifty three percent) face some form of child sexual abuse. The need for stringent laws had been felt many times but it was only in 2012 that a law on the same was actually passed. The Parliament of India passed the 'Protection of Children against Sexual Offences Bill, 2011' regarding child sexual abuse on May 22, 2012 formulating it into an Act. Its implementation began with a notification issued in November 2012. This was the first legislation protecting children against sexual offences and to be applied uniformly across India.

## Laws before the POCSO Act

Goa Children's Act, 2003 was the only specific piece of child abuse legislation before the 2012 Act. Child sexual abuse was prosecuted under the following sections of Indian Penal Code:

- I.P.C. (1860) 375- Rape
- I.P.C. (1860) 354- Outraging the modesty of a woman
- I.P.C. (1860) 377- Unnatural offences

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<sup>2</sup> The Protection of Children from Sexual Offences Act, 2012 (No. 32 OF 2012)

However, the IPC could not effectively protect the child due to various loopholes like:

- IPC 375 doesn't protect male victims or anyone from sexual acts of penetration other than "traditional" peno-vaginal intercourse.
- IPC 354 lacks a statutory definition of "modesty". It carries a weak penalty and is a compoundable offence. Further, it does not protect the "modesty" of a male child.
- In IPC 377, the term "unnatural offences" is not defined. It only applies to victims penetrated by their attacker's sex act, and is not designed to criminalize sexual abuse of children.

### **Unique Features of the POCSO Act**

Firstly, setting up of Special Juvenile Courts and appointment of Special Public Prosecutor- In the past, it has been observed that the trials took unnecessarily long time to dispose of the matter, but the new bill suggests disposing the case within one year. The essence of the bill lies in the fact that it is more child-friendly while recording of evidence, reporting and during investigation and trial.

Secondly, a support system from Police administration- Under this act, the statement of the girl child is to be recorded by a woman police officer who is not below the rank of sub- inspector. The presence of parents and other relatives during medical examination of the victim is allowed under the act. In the case of a victim girl, a medical examination is to be conducted by women doctor.

Thirdly, this act provides an arrangement for victim child for their special protection and care.

Fourthly, the act has an implication of the point that the person, who has attempted to commit the crime under the act, is liable for punishment. Just like in rape cases where the burden of proof is on the accused, here also the burden of proof of his innocence is on the accused. It should be noted that the act provides punishment for false accusation as well.

## **POCSO Act and Jurisprudence**

According to the author, applicable school of thought for “Prevention of Children from Sexual Offences Act 2012” is Positivist School of Law. The main thinkers of positivistic school law are Jeremy Bentham (The father of English Positivism), John Austin, H L A Hart and Kelsen.

Jeremy Bentham defines law as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state. He gave the concept of utilitarian individualism based on pleasure and pain in which he stated that any act which increases the overall quantum of pleasure or happiness is justified. If we take into consideration “Prevention of Children from Sexual Offences Act 2012”, then the concept of utilitarianism of Bentham can’t be justified because the act itself can’t be justified because of its nature, no matter what is the quantum of happiness that the act is responsible for.

Under the scheme of Austin, the law is the rule of guidance laid down for one intelligent being by another intelligent being who has power over the former being. POCSO Act 2012 can be explained under Austin’s scheme as Austin has described the positive law as “aggregate of rules set by man politically superior for men who are politically inferior.” ‘Sanctions’ under the scheme of Austin can easily be compared to some of the punishments mentioned in the POCSO Act 2012. However, Austin’s view that Positive law includes rules set by those who are not political superiors is an undue extension.

In Hart’s view, there is no necessary logical connection between the content of law and morality. He asserts that the existence of legal rights and duties may be devoid of any moral justification. According to the author, Hart was correct in stating that there is no logical connection between law and morality, and if there is any connection, it is very difficult to identify that connection because the concept of “morality” in itself is very vague and don’t appeal to reason.

## **Loopholes in the POCSO Act**

The POCSO Act, which branded itself as a piece of legislation for protecting children from undue harassment has come with certain loopholes which need to be taken care of at the war

footing. The primary loophole in the legislation is the executive machinery and the execution part.

The Police, NGOs and media should be cautious while dealing with the cases involving child rights and sexual abuse. Despite the Act making it mandatory that the abused or assaulted child has to be produced before the CWC, the police skips this process at times. Even when the Committee approaches the police, they show lethargic attitude. They show disrespect to the quasi-judicial body, making CWC a toothless bird. Even the NGOs violate child rights by revealing the identity of the child.

Presently, the POCSO recommends a punishment of six months' imprisonment to a policeman who does not record a complaint of sexual offence by a child victim. Though, the increase in the punishment could backfire, but stringent measures need to be adopted. Sensitization in the executory bodies is the key of getting maximum benefit out of the legislation.

### **Judicial Pronouncements involving POSCO Act, 2012**

Various aspects of law and issues related to POSCO Act were dealt with in these judicial pronouncements which gave it a more detailed judicial interpretation.

#### **1. Shankar KisanraoKhade v. State of Maharashtra<sup>3</sup>**

Hon'ble Supreme Court have held that relying on several judgments by the Apex Court, present Court applied "crime test", "criminal test" and the R-R Test and not "balancing test" to award death sentence. To award death sentence, "crime test" has to be fully satisfied, i.e. 100% and "criminal test" 0% i.e. no Mitigating circumstances favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused not a menace to the society no previous track record etc. Rarest of rare case test depends upon the perception of the society i.e. "society centric" and not "Judge Centric" i.e. whether the society will approve the awarding of death sentence to certain 22 types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual

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<sup>3</sup> (2013)5 S.C.C. 546

assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc. Supreme Court have also pleased to elucidate some judicial principles for awarding death penalty.

## **2. State of Maharashtra v. Dattatraya @ DattaAmboRokade<sup>4</sup>**

Hon'ble Bombay High Court have dealt with various legal aspects in respect of circumstantial evidence, in respect of test identification parade, in respect of recovery under Section 27 of the Indian Evidence Act, 1872, from any open place, in respect of extra judicial confession. In para No.17 all these citations the Lordship pleased to elucidate, aggravating and mitigating circumstance to be considered while confirming death penalty.

## **3. State of Uttar Pradesh v. Munesh<sup>5</sup>**

“It is held that the primary concern both at National and International level is about the devastating increase in rape cases and cases relating crimes against women in the world. India is no exception to 23 it. Although the statutory provisions provide strict penal action against such offenders, it is for the Courts to ultimately decide whether such incident occurred or not. The Courts should be more cautious in appreciating the evidence and the accused should not be left scot-free merely on flimsy grounds. In the instant case, the accused had committed rape, which repels against moral conscience as he chose a girl of 11 year to satisfy his lust and subsequently murdered her. The incident took place in the year 2002. Punishment of life imprisonment was awarded.”

## **4. Deepak Gulati v. State Haryana<sup>6</sup>**

“It is held that rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces women to an animal, as it shakes the very core of her life. By no means can a rape victim be called an

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<sup>4</sup> 2014 ALL M.R. (Cri.) 2078

<sup>5</sup> 2013 Criminal Law Journal 194 (S.C.)

<sup>6</sup> 2013 Criminal Law Journal 2290 (S.C.)

accomplice. Rape leaves a permanent scar on the life of the victim, and therefore, a rape victim is placed on higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated 24 crime, rape tantamount to serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks.”

#### **5. Narendra Kumar v. State of (NCT) Delhi<sup>7</sup>**

“It is held that conviction can be based on sole testimony of prosecutor provide it lends assurance of her testimony.”

#### **6. Salil Bali v. Union of India<sup>8</sup>**

“It is held that juvenile justice (Care and protection of children) Act, 2000 is in tune with provisions of Constitution and various declarations and convention adopted by World Community represented by United Nations. Said Act cannot be held to be ultra vires Constitution nor it can be struck down.”

#### **7. Joginder Singh v. State of Maharashtra<sup>9</sup>**

It is held that applicant preferred an application for seeking anticipatory bail - The offence was punishable under Section 354(A) of the Indian Penal Code, 1860 - The question was, whether applicant 25 was entitled for anticipatory bail - It is held that applicant had co-operated with the investigation agency - Custodial interrogation of applicant would not be necessary - Registration of offence against applicant had exposed him to social obloquy and that he had been humiliated in society as well as at work place - Registration of offence was sufficiently deterrent factor - Therefore, bail was granted to the applicant.”

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<sup>7</sup> AIR 2012 S.C. 2281

<sup>8</sup> (2013)7 S.C.C. 705

<sup>9</sup> 2014(3) Bombay C.R. (Cri.) 91

### **8. Nishu v. Commissioner of Police, Delhi and Ors.<sup>10</sup>**

Facts- Petitioner is a minor who was kidnapped on 25.10.2013 by a group of nine persons who had kept her confined up to 8.11.2013. The accused persons, in different combinations, had repeatedly raped her and that one of the accused, named, Pradeep is a constable in Haryana Police. After being recovered, medical examination of the girl was done, but neither the copy of the report was not furnished nor any FIR under Section 376 D of the Indian Penal Code or the provisions of the POCSO Act registered against the accused persons. Petition under Article 32 has been filed seeking directions from the Court for registration of FIR under above mentioned sections; for the arrest of the accused. Also the appropriate actions against the officers of the Delhi and Haryana police by way of departmental proceedings for their refusal/failure to register the FIR under the aforesaid sections of the Indian Penal Code as well as the provisions of POCSO.

Decision- In view of the arguments asserted by the counsels of both the respondents, court held that no order or direction to the first Respondent would be justified in view of the fact that the case has been registered by the Haryana Police and has been investigated by the authorities of the State of Haryana. The Hon<sup>ble</sup> Court also find out that as the charge sheet has been filed against all the nine accused and the trial has commenced in the meantime it will be wholly inappropriate to exercise our jurisdiction under Article 32 of the Constitution.

### **9. Ashish Kumar and Ors. v. State of U.P. and Ors.<sup>11</sup>**

Facts- FIR was lodged by the victim's father Deesaa Police Station at P.S. Rauja, district Shajahanpur under sections 147, 354 A, 352, 323 and 506 of IPC and Sections 7/8 of POCSO. After investigation, the police laid charge-sheet under Sections 352, 323 and 506 IPC only. As a result, Victim<sup>s</sup> father filed an affidavit alleging therein that on the date of the incident that is 30th October, 2014, the victim's age was about 16 years and as she had alleged molestation, etc. in her statement, offences punishable under sections 147 and 354A of IPC and sections 7/8 of POCSO Act were also made out. Upon receiving such affidavit, the learned Magistrate perused the police report and passed the impugned order dated 19.03.2015 thereby directing return of the

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<sup>10</sup> 2014 (3) ACR 2516 (SC)

<sup>11</sup> MANU/UP/0439 /2015



charge-sheet for being laid before the Special Court constituted under POCSO Act. In the order impugned it was observed that from the material available in the case diary offences punishable under Sections 323, 353, 354 and 506 IPC and Sections 7/8 of POCSO Act were prima facie made out, but as it was not empowered to take cognizance of the offences punishable under the POCSO Act, therefore, the charge sheet is to be returned for presentation before the Special Court.

Decision - Court observed that as the instant matter arises out of case which is based on a police report and not on the complaint, after submission of the charge-sheet, the matter goes to the Magistrate for forming an opinion as to whether it is a fit case for taking cognizance and committing the matter for trial or not. The Magistrate cannot exclude or include any section into the charge-sheet after investigation has been completed and charge-sheet has been submitted by the police. The same would be permissible by the trial court only at the time of framing of charge under Sections 216, 218 or under Section 228 CrPC as the case may be which means that after submission of the charge sheet it is open for the prosecution to contend before the appropriate trial court at the stage of framing of charge that on the given state of facts the charge of certain other offences should also be framed. The Hon'ble High Court held that in a case which is triable by a Court of Session though the Magistrate cannot add or alter a charge but he is empowered by sections 209 and 323 of the Code to commit the case to a Court of Session. Since under Section 31 of the POCSO Act a Special Court constituted under the said Act is deemed to be a Court of Session, the Magistrate, if he finds that offences triable by a Special Court under the POCSO Act are also made out, he is empowered to commit the case to the Special Court by taking aid of the provisions of section 209 of the Code. But such commitment arises after the Magistrate takes cognizance of the offences laid in the charge sheet.

### **10. Vijaykumar v. The State of Karnataka<sup>12</sup>**

Facts- The petitioner has been working in the Girls Hostel attached to the Kittur Rani Chennamma Residential School and he has been ill-treating, harassing and sexually exploiting the girl students in the said Institution. Another accused Smt. Jyothi (A- 2) has been giving

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<sup>12</sup> MANU/KA/044 3/2015

assistance to the said person in order to facilitate the petitioner. The Principal of Kittur Rani Chennamma School, Almel has lodged an FIR for such act. The Police have investigated the matter and submitted the charge sheet. They have recorded the statements of the girl students, Head Master and others during the course of investigation. Petition is filed before this Court by A-1 for grant of bail on the ground of parity as A-2 has been granted bail by the Court.

Decision- In the instant case, Court observed that none of the girls have stated as to whether any one of them has been exploited by anybody. Every student has stated that some students were called by the petitioner and he used to exploit her every day except that nothing has been stated in the statements. Even the other witnesses have also stated in the similar fashion that they received information that the accused has been exploiting the girls in the said hostel. But nobody has stated that who was the girl actually exploited out of the girls examined by the Police. Therefore on the basis of lack of strong reasons, the court has not rejected the bail application and held that petitioner is entitled to be enlarged on bail.

### **Conclusion**

After the extensive study, it can be clearly said that the piece of legislation aims at bringing positive changes in the society, but the approach towards the same must be changed. The legislation is a bit ahead of its time and in order to get the best out of it, mass sensitization is the only way out.