

Protection of Children from Sexual Offences Act 2012: A Critical Analysis

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Abstract

On November 14, 2012, the Protection of Children from Sexual Offences Act went into effect, and it was designed to address crimes such as child sexual abuse and child pornography. The Act expanded the scope of reporting offences against children that were not previously covered by the Indian Penal Code, with 46 clauses (IPC). This amended the criminal penalty for serious penetrative sexual assault to include punishment for abuse by a person in a position of trust or authority, such as public officials, police, the military forces, and educational or religious institution management or staff.

It also outlined the method for reporting cases, as well as the penalties for failing to report a case or filing a fraudulent complaint. It established protocols for recording a child's statement by the police and the court, with a specific need that it be done in a child-friendly manner, as well as special courts.

The POCSO Act defines sexual assault, sexual harassment, pornography, and the protection of children's interests and well-being. It also lays out a child-friendly method for recording evidence, investigating and prosecuting crimes, establishing special courts, and expediting cases. The act's goal is to ensure that children are protected at all stages of the legal process.

Keywords: Children, Shortcoming, Judiciary.

Introduction

As a mute observer throughout history, mankind has observed many atrocities committed by the human race; and the grim reality is that the senseless violence incited by mankind has repeatedly burnt children. In India, the subject of child sexual abuse is still taboo. Child sexual abuse is an under-reported crime in India, which has been swiftly and disturbingly increasing within the previous decade, due to Indian families' aversion to discussing things like safe sex practises, consent, or the difference between good and poor touch. According to research done by the Government of India's Ministry of Women and Child Development in 2007, 53.22 percent of children have experienced one or more forms of sexual abuse, including severe and other forms. There were 52.94 percent boys and 47.06 percent girls among them. India is in first place, accounting for 11.7 percent of all global reports of child sexual abuse material discovered online.

Sexual assault on a kid is most typically perpetrated by a person who is familiar to the child, such as a family member or close relative. Sexual assault on a kid has serious repercussions for the child's life, as it affects the child's social and mental development, which frequently manifests as a psychological disorder in adulthood. Furthermore, research show that survivors

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of child sexual abuse are more likely to become predators or perpetrate marital violence, putting them in the cycle of violence. The Protection of Children from Sexual Offences Act, 2012 (hereafter POCSO Act) was enacted to slow down the alarming rate of child sexual abuse in India.

Historical Perspective

The Indian Parliament passed the Protection of Children from Sexual Offences Act (hereafter POCSO) in 2012, and an amending bill was introduced in 2011. The need for a new legislation arose as a result of the current laws' inadequacy. POCSO law is particularly concerned with violations of children's rights involving their sexual dignity. India has also accepted the United Nations Convention on the Rights of the Child, which establishes the basic rights of children to survival, mental and physical development, and participation in familial, cultural, and social life. Adult sexual abuse is very different from child sexual abuse. In most cases, because the child is a minor, he is unable to realise that his sexual identity is being violated. Children frequently believe that the wrongdoings that occur to them are usual for all children. In some circumstances, a youngster is not sophisticated enough to recognise that his family members are the ones who are causing him emotional distress and impeding his social development. Prior to the POCSO Act, most recorded offences were regulated by the Indian Penal Code, 1860. There was no explicit statute that could be used to penalise perpetrators. In a number of incidents, it was discovered that the crimes committed were not listed in the Indian Penal Code, and that the IPC was quiet on certain specific wrongs. As a result, the culprits were either left unpunished or did not receive enough punishment. Under the umbrella section of the IPC, sexual offences against children were broadly covered.

Section 322 deals with causing physical grievous harm, and Section 350 defines the use of criminal force; in situations where a clear definition of the crimes committed by offenders was not present, these sections were blindly applied; however, for the most severe punishment, perpetrators were charged under Section 354 (assault on a woman that offends her modesty), Section 375 (rape), and Section 377 (unnatural offence). Although these sections punished criminals, they were ineffective in a number of cases. These laws had flaws, such as a lack of a clear concept of modesty, a lack of gender neutrality in that they solely regarded female victims, and a definition of rape in Section 375 that only encompassed traditional peno-vaginal intercourse. The laws were still out-of-date with the passage of time. There have been cases where horrible and brutal methods of committing rape have been used, such as utilising glass bottles and iron rods. This necessitated new law to address the current needs, as well as clause (3) of Article 15 of the Indian Constitution, which allows the state to establish specific provisions for children, and thus the POCSO Act, 2012 was enacted.

The Protection of Children from Sexual Offences Act, 2012

Despite India's ratification of the United Nations Convention on the Rights of the Child on December 11, 1992, which requires all States parties to the Convention to protect children's rights against any unlawful sexual activity, exploitative use of children in prostitution, or other illegal and exploitative sexual practises involving children in pornographic performance or materials, the number of sexual offences committed against children has been steadily increasing. There was no explicit law dealing with specific offences connected to sexual acts against children prior to the enactment of the POCSO statute in 2012. In general, the Indian

Penal Code, 1860, dealt with crimes and punishments for those who committed them. Despite the fact that the IPC, 1860, did not contain any specific provisions dealing with sexual offences committed against children, sections such as Section 322 which deals with causing physical grievous hurt, Section 354 which deals with assault against a woman that outrages her modesty, Section 375 which deals with rape, and finally Section 377 which deals with unnatural offences, were frequently used in cases of sexual assault or rape.

Because these provisions of the IPC lacked a clear definition of modesty, only traditional peno-vaginal intercourse was included in the definition of rape, and only female victims were given precedence, many criminals slipped between the gaps of technicalities and went unpunished for their crimes. The lack of a comprehensive statutory remedy for the ever-increasing number of sexual offences against children constituted a genuine threat to children's welfare and the upholding of justice in society.

As a result, both Houses of Parliament passed the Protection of Children from Sexual Offences Act, 2012 on May 22, 2012, and it went into effect on November 14, 2012. The POCSO Act is a stand-alone law that assures that minors are protected from sexual offences, sexual assaults, and pornography. The Act also establishes special courts with the goal of fast trials, as well as safeguarding procedures to ensure the welfare of children at all stages of the judicial process.

Characteristics of the Protection of Children from Sexual Offences Act

POCSO is gender-neutral, which means that regardless of the gender of the kid, it will be used to prosecute crimes against children. Rather to the common concept of "innocent until proven guilty," this Act establishes a burden of proof of "guilty until proven innocent." Simultaneously, the law incorporates penalties for false complaints and misleading information with malicious purpose, in order to prevent misuse of the provision. This Act makes it mandatory to register abuse. In all situations of child abuse, the police are required to file a First Information Report (FIR). A child's statement can be taken at their home or at a location of their choice, and it should preferably be taken by a female police officer with at least the rank of sub-inspector. This statute defines all forms of sexual offences against children, including sexual assault, harassment, and the use of juveniles for pornographic purposes. The Act also specifies penalties for attempted offences, as well as assisting and abetting these crimes and failing to report them. The Act urges reporting if there is any suspicion that an offence should be reported because failure to report can result in up to 6 months in prison and/or penalties.

The Act also calls for the creation of special courts to handle these proceedings, which must all be concluded within a year. The youngster must not be exposed to the accused in any way during the recording of evidence, and their name must not be revealed at any point throughout the investigation or trial, according to the Act. The minor is not required to repeat their evidence in court and may instead use a video feed to do so. All questions are asked through the judge, and the defence is not authorised to ask them directly. For the minor's benefit, an interpreter, translator, special educator, or other expert may be present in court. The Special Court also has a set of criteria for granting compensation, which includes the loss of educational and employment possibilities, as well as disability, disease, or pregnancy as a result of the abuse.

Consensual sex is now illegal under the Indian Penal Code, according to the POCSO Act. The legal age of consent has been raised from 16 to 18 years old. This means that anyone (including

a kid) can be charged with sexual activity with a child, regardless of whether the latter consented. A husband or wife can also be prosecuted if they engage in a sexual act with their spouse when they are under the age of 18. Consensual sexual actions between children or between a child and an adult are not recognised by the POCSO Act of 2012.

The Protection of Children from Sexual Offences Act, 2019

Following 2016, there was an increase in the number of crimes involving children, with 1,04,976 cases registered under the POCSO Act between 2014 and 2016. According to the National Crime Records Bureau, a total of 34,449, 34,505, and 36,022 cases related to other sections of the IPC were reported under the Protection of Children from Sexual Offences (POCSO) Act, 2012 in 2014, 2015, and 2016, respectively.

In light of the alarming growth in sexual offences against minors, it was evident that more severe punishment was required to put an end to this dangerous trend. The modified POCSO statute of 2019 aims to raise the punishment by providing a more comprehensive definition of severe sexual assault, including specific provisions for child pornography, and empowering courts to apply capital punishments in the rarest of circumstances.

Characteristics of the Amendment Act

The modified Act increased the minimum sentence for penetrative sexual assault from seven to twenty years in prison.

The modified Act guarantees that the victim will be compensated for his or her medical expenditures as well as rehabilitation fees.

In cases of penetrative sexual assault and aggravated penetrative sexual assault, the terms "communal or sectarian conflict" have been replaced with "violence or during any natural calamity or in similar situations."

The modified Act also expands the scope of Section 9, which deals with severe sexual assault, to include the administration of any pharmacological, chemical, or hormonal substance to induce sexual maturity in a child.

The modified Act increased the penalties for holding any pornographic materials containing children with the goal of commercially disseminating them or failing to report them.

The revised Act also gives courts the authority to impose the death penalty in the most egregious of circumstances, but it is up to the court to decide whether or not to do so.

Shortcoming of the POCSO Act

The Protection of Children from Sexual Offences Act of 2012 may appear to be an ideal legislative effort to curb sexual violence against children and protect children from it, and with the amendment of 2019, increased punishments and more detailed and inclusive definitions of offences may give the Act the appearance of being all-encompassing legislation, but the Act has certain flaws or loopholes, as do all statutes.

The Act solely considers the child's biological age, not his or her mental age. The POCSO Act defines a child as a person under the age of 18, but it is silent on which document should be

used to determine the child's age. Since the POCSO Act does not give a response, the courts have been applying the terms of Rule 12 of the Juvenile Justice Rules.

Because teenagers aged 16 to 18 are not considered consenting adults, the Act does not recognise consensual sexual intercourse or sexual relationships between two minors. As a result, if a 17-year-old girl or boy engages in consensual sexual activities with a 19-year-old partner, the Act authorises the 19-year-old partner to be charged under the POCSO Act, as the 17-year-old's has no significance under the Act. Consensual sexual actions between two minors are not covered by the Act.

False complaining is punishable under Section 22 of the Act, however the kid is free from any such punishment if he or she lodges a false complaint. It opens the door to abuse of the Act, since there have been numerous examples of families filing fake complaints as a scare tactic or to exact revenge on someone.

Despite the fact that the POCSO Act makes an effort not to discriminate when it comes to protecting children from sexual abuse because it intends to protect all children, regardless of gender, the Act is not completely devoid of gender biases. The pronoun "he" is used in the Act to refer to the accused or perpetrator. As a result, the Act exempts women from the scope of the POCSO Act's penalties by turning a blind eye to the potential of female sexual offenders.

Despite the fact that the Act provides for the establishment of Special Courts with the goal of resolving cases quickly and establishing a time frame within which Courts must complete trials (Section 35 of the Act), the reality is a different storey, as the number of pending cases continues to rise, and the required establishment of Special Courts in each district is nowhere near being completed.

Role of Judiciary

The judiciary plays an important role in ensuring that children who have been the victims of sexual assaults and offences receive prompt justice. Unfortunately, numerous institutional flaws and serious infrastructural flaws result in the failure of legal protection for children, leading to disgust with the justice system.

The massive backlog of outstanding cases of sexual offences against children, regardless of the deadline set forth in Section 35 of the Act, is a clear illustration of this. According to Section 35 of the Act, the child's evidence must be taken within one month of the court's taking cognizance of the case, and the trial must be completed within the same time frame. However, the reality is far different, as Indian courts are clogged and overburdened.

Frequently, the Act's loopholes or a lack of understanding of the topic result in conflicts with the Act's fundamental goal. The Nagpur Bench of the Bombay High Court recently issued two judgments that have been widely criticised across the country.

In *Satish v. Maharashtra*, Justice Pushpa Ganediwala of the Bombay High Court's Nagpur Bench considered whether the act of pressing a child's breasts without removing her top qualifies as sexual assault in a case where the accused had taken the minor girl into his house and had pressed her breast and partially stripped her. Sexual Assault is defined in Section 7 of the POCSO Act as touching a child's private parts or forcing a kid to touch the accused's or someone else's private parts. In this case, the judge decided that to prove sexual assault, there

must be 'skin to skin' contact with sexual intent, and because there is no clear description as to whether the top of the little girl was removed or not, the accused's act would not fall within the scope of sexual assault.

Only a week later, in *Libnus v. State of Maharashtra*, Justice Pushpa Ganediwala of the Bombay High Court's Nagpur Bench issued an equally contentious ruling, holding that 'holding hand with the minor' and the accused's pants being opened zip by the minor's mother at the relevant time does not constitute sexual assault.

These two decisions sparked widespread public outrage, prompting the Supreme Court to intervene and grant a halt of proceedings. However, if all emotional links are set aside for a moment, it can be claimed that the Bombay High Court's misreading is largely owing to the Act's unclear phrasing. The inherent weaknesses in the POCSO Act must be addressed as quickly as possible, or else decisions like the ones in these two cases, which essentially contradict the aim of the POCSO Act, will return, increasing public frustration with the judiciary.

Pitfalls in the Judicial System and the administration of Justice

The POCSO Act's method for providing swift justice to children who have been sexually assaulted is one of its cornerstones. Many major institutional impediments, on the other hand, impede the legal protection of children under the age of 18.

The timeline established in Section 35 of the POCSO Act for child testimony and trial conclusion is an obvious example. This necessitates the child's evidence taking place within a month after the Court's notification, and the trial taking place within a year of that notification. Due to the overcrowded nature of Indian courts, these regulations are more commonly flouted than followed.

The tendency of lawyers to take adjournments, or adjournments caused by external events such as strikes in court, is a similar topic. In such cases, the victim may be summoned to court several times, or the hearing may be delayed for up to six or seven months after the incident is reported. This diminishes the likelihood of the victim accurately recalling the events of the occurrence.

Another thing to consider is interim compensation. In order to address their urgent requirements, the young victim is entitled to interim compensation. All stakeholders, however, must recognise that interim compensation should not be interpreted narrowly to cover simply his or her medical needs. It covers all of the child's rehabilitative requirements.

According to Section 33(2) of the POCSO Act, the Special Public Prosecutor should initially convey the questions to the Special Court before putting them to the child during the examination-in-chief, cross-examination, or re-examination of the child. Between questions, the youngster should be given regular breaks.

The role of the child's lawyer is equally critical. The lawyer's job is to support the prosecution. This will necessitate close collaboration between the Public Prosecutor and the child's attorney. Furthermore, while the Public Prosecutor and defence lawyer have well-defined duties in our adversarial legal system, there needs to be an evaluation of how the counsel for the child victim fits into this scheme.

Administrative Pitfalls

When it comes to POCSO, there are three major administrative mistakes to avoid.

To begin with, despite their best efforts, police officers encounter numerous obstacles in completing a thorough investigation into POCSO incidents. The registration of the FIR is the first step. The police must ensure that the filing of the FIR and the investigation of the Medico-Legal Case are completed as quickly as possible (MLC).

Second, the victim's MLC is frequently avoided because the victim's family is provided erroneous information about the MLC's long-term negative effects on the child's health. When a child is forced to undergo an MLC or an abortion, the hospital environment is often harsh. To avoid further stress, doctors must be taught on how to speak with the child in a sensitive manner about what he or she is going through. Furthermore, due to inappropriate storage, forensic samples acquired by the police frequently get tainted or putrefied. The police must be familiar with the best ways for gathering forensic evidence so that the evidence can be evaluated smoothly throughout the trial.

Finally, institutions such as the National and State Commissions for the Protection of Child Rights are obligated to monitor and review the Act's implementation on a regular basis, as well as raise public knowledge about the Act's provisions, under Section 43-44 and Rule 6 of the POCSO Act. The operation of such departments, as well as their monitoring and assessment mechanisms, have not, however, been made public. To this end, it is critical to examine the methods established by such groups and assess their effectiveness in producing meaningful results.

Recommendations

Statutes must be amended as time passes in order to keep up with the current pace. Every statute contains loopholes; no law is perfect. There's always the opportunity to make amends. The Protection of Children from Sexual Offences (Amendment) Act, 2019, is welcome legislation, however it ignores several important details. If a law is not implemented correctly, it does not bring value to the legislation. Certain places were expected to be acknowledged by the Act, however they were not. The following are a few of them:

- i. A child, according to Section 2(d), is defined as anyone under the age of eighteen; this is the Act's largest flaw, as it assesses anyone based on their biological age rather than their mental age. There have been occasions where a victim with cerebral palsy was 36 years old at the time of the accident but only six to eight years old at the time of the accident. If a youngster with such abilities is raped, only IPC 375 will be used, and the POCSO Act would not be used.
- ii. The POCSO Act does not regard minors between the ages of 16 and 18 to be consenting adults. To resolve this issue, the High Court of Madras 19 decided (Obiter Dicta) that a child's age should be reduced from 18 to 16.
- iii. While Section 22 of the POCSO Act establishes a penalty for making a false report, Section 22(2) exempts a minor from receiving any punishment for making a false complaint. If we look at the reality, families utilise this portion to seek revenge on others, and incidents have been documented where families used this section to

- blackmail and extort money from others. Recommendations for this part include keeping the subsection but adding some punishment to it.
- iv. The procedure for recording the child's statement is set out in Sections 24 and 25 of the Act; if the statement is recorded under Section 164 20 of the Code of Criminal Procedure in the Court of Sessions, the statement is received two to three days after the complaint is filed; in the majority of cases, the victim becomes hostile because there is no victim protection scheme. Special Courts for Child Sexual Abuse must be established to speed up the procedure.
 - v. Section 27 of the Act deals with a child's medical examination, and paragraph (2) specifies that the medical examination must be undertaken by a female doctor only if the victim is a girl child. This part conflicts with Indian Penal Code Section 166A 21, which requires the on-duty government medical officer to evaluate the rape victim without fail. When a female doctor is not available, a legal quandary develops. Every government hospital must have at least one female medical officer to deal with such instances, according to the state.
 - vi. Section 28 of the POCSO Act establishes Special Courts in each and every district in all Indian states. According to the government, 1023 Special Courts must be established throughout India; however, it has been nearly eight years since the Act was passed, and only 664 courts²² have been established as of April 30, 2019. It is an unspoken goal to get at a definitive figure as quickly as possible in order to resolve a number of POCSO Act cases that are currently pending in the courts.

Conclusion

In rural communities, children who have been abused by their parents are unaware of their rights, and there is specific legislation known as POCSO that addresses the unique demands of these cases. All parties involved, from the victim and his or her parents to the police officers who investigate complaints, must be made aware of the situation. POCSO Act instances were reported under IPC Section 375, which is for rape, by police personnel.

Various awareness campaigns in the economically weaker strata of society are required. The state should recognise the importance of a child's mental health; now, there is no counselling accessible to help the child recover from post-traumatic stress disorder. The POCSO Act included a wide range of child sexual abuse offences. The UN Convention on the Rights of the Child has been partially confirmed by the POCSO Act and its latest modifications. India is a diverse country with many different sects, customs, and religions, as well as the world's greatest population of children. Ensure that every child in India has access to their rights is a complex endeavour with numerous intricacies ranging from legislation to implementation.

When considering the nuances involved, India as a country is in a great position to protect children's rights; however, there are some flaws in the POCSO Act; it is past time for the legislature to address these flaws; and, in conclusion, the POCSO Act and the amendment Act are highly welcomed legislation.

The current legislation criminalising sexual offences against children was long overdue. People should feel a sense of contention and credibility in the entire process from initiation to adjudication if the adjudication process is made more transparent and the involvement of police in such offences is made much more rapid. This act's deterrent effect is sufficient, but in order

to conquer and remove this issue at the grassroots level, the masses' collective consciousness must be clean and include feelings of love and compassion.

Reference:

1. The Protection of Children from Sexual Offences Act, 2012
2. The Protection of Children from Sexual Offences (Amendment) Act, 2019
3. <https://www.jurist.org/commentary/2020/05/mayank-tiwari-posco-act/#>
4. <https://www.lawaudience.com/critical-analysis-of-the-pocso-act-2012-and-the-recent-amendment-act-2019/>
5. <https://lexlife.in/2021/03/28/a-critical-analysis-of-the-protection-of-children-from-sexual-offence-act-2012/>
6. <https://www.iosrjournals.org/iosr-jhss/papers/Vol19-issue8/Version-2/H019825460.pdf>