
THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012: A CRITICAL ANALYSIS

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ABSTRACT

Children are the most vulnerable group in our society. In recent times, sexual offences against children has increased a lot. In India before 2012, there was no specific law related to protection of child from sexual offences, it was covered within the ambit of Indian Penal Code, 1860. With the increasing sexual cases against child parliament has enacted a legislation i.e. Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012). POCSO Act, 2012 find its sanctity from UN Convention on right to child 1992, and Article 15 Constitution of India, 1950. Protection of Children from Sexual Offences Act, 2012 was enacted with the objective to protect the children from the offences of sexual harassment, sexual assault, and pornography, for safeguarding the interests of the child at every stage. In this article author wants to highlight the Protection of Children against Sexual Offences Act, 2012, and its exemplary features. In recent years POCSO Act, 2012 has resulted to be a weak law as crime rate in sexual assaults has increased with time and no proper action has been followed and taken by authorities of criminal justice administration. Still we have POCSO Act but the crimes of child sexual abuse is increasing day by day. The author will also highlight the gaps in the law with the help of decided case laws.

Keywords: Child sexual abuse, children, assault, protection.

I. INTRODUCTION

“There can be no keener revelation of a society’s soul than the way in which it treats its children.” – Nelson Mandela

Crimes against children are increasing day by day, yet people are hesitant to address this issue. It is a social stigma in the Indian society. The history of mankind, being the silent spectator, has witnessed countless atrocities committed by the human race; and the harsh reality is that the mindless violence incited by the mankind had again and again scorched the children also. The subject of child sexual abuse is still a taboo in India. As more often than not, Indian families shy away from discussing topics such as safe sex practice, consent or the difference between good touch and bad touch, child sexual abuse is an under-reported offence in India, which has been rapidly and quite alarmingly, increasing since last decade. The sexual assault on a child is inflicted by, more often than not, a person who is known to the child or who is a family member or close relative. A child experiencing such trauma has to face severe repercussion for his or her life as sexual assault on a child badly effects the social and mental growth which frequently reflects as a psychological disorder in the later age of the child. Also, various studies have found that survivors of child sexual abuse tend to enter into the cycle of violence as they are at a greater risk of becoming predators or committing relational violence. To control or limit the fearsome velocity of child sexual abuse scenario in India, the Protection of Children from Sexual Offences Act, 2012 (hereinafter POCSO Act) was enacted.

According to the National Crime Record Bureau, everyday 109 children get sexually abused in several forms in India. The reports also state that the figures are increasing every year. The latest report released by the National Crime Records Bureau (NCRB) shows that 1,49,404 cases of crime against children were registered in 2021 were under the Protection of Children from Sexual Offences Act (POCSO). There were 47,221 POCSO cases of crime against children in 2020.¹

II. HISTORY OF POSCO ACT, 2012

Prior to the enactment of the Protection of Children from Sexual Offences Act, 2012, there was no specific law which deals with particular offences relating to sexual offences against children. The Protection of Children from Sexual Offences Act, 2012 derive its sanctity from The UN Convention on Rights of Child and The Constitution of India, 1950

¹India Crime against Kids A Third Still Under POSCO , THE INDIAN EXPRESS , (Dec 01, 2022, 10:00 PM) <https://indianexpress.com/article/india/crime-against-kids-a-third-still-under-pocso-8119689/>

The UN Convention on Rights of Child on 11th December, 1992 where all the State parties to the Convention are to ensure protection of child's right against any unlawful sexual activity, exploitative use of children in prostitution or other illegal and exploitative sexual practices using children in pornographic performance or materials, number of sexual offences committed against children were increasing with every passing moment.

The Constitution of India, 1950 has several provisions that guarantee the safeguarding of every child's childhood and subsequent youth. The Constitution of India, 1950 promises every child the right to lead a life of dignity and the right to privacy under Article 21², the right to equality under Article 14, the right against discrimination under Article 15, and the right against exploitation under Articles 23 and 24.³ It makes elementary education for children from age 6 to 14 a fundamental right under Article 21A of the Constitution of India, 1950. Article 15(3) of The Constitution of India, 1950 said "*Nothing in this article shall prevent the State from making any special provision for women and children*".⁴ Article 39(f) of The Constitution of India, 1950 under the Directive Principles of State Policy⁵ obligates the State governments to make certain that equal opportunities and facilities are provided to children so as to enjoy their childhood and youth, free from any and all exploitation.

Generally, Indian Penal Code, 1860 dealt with the offences and doled out punishment for the offenders. Even though, IPC, 1860 did not have any specific provisions which solely deals with sexual offences committed against children but existence of sections such as Section 322 which deals with causing physical grievous hurt, Section 354 which provides for punishment for assault towards a women which outrages her modesty, Section 375 which deals with rape and lastly Section 377 which provides for unnatural offences, were often being applied in the cases of sexual assault or abuse against children.

As these sections of IPC failed to provide for a concrete definition of modesty, included only traditional penovaginal intercourse in the definition of rape, and only female victims were given priority and hence, was not gender neutral, many offenders slid through these cracks of technicality and went unpunished for their transgression. The non-existence of a proper statutory solution for the ever-increasing number of sexual offences committed against children posed a real threat to the welfare of children and to the maintenance of justice in the society.

² The Constitution of India, Art 21

³ The Constitution of India, Art 23 & 24

⁴ The Constitution of India, Art. 15(3)

⁵The Constitution of India , Art 39(f)

Hence, on May 22nd, 2012 the Houses of Parliament passed the Protection of Children from Sexual Offences Act, 2012 and it came into force on 14th November, 2012. The POCSO Act is a self-contained statute which ensures providing protection of children from sexual offences, sexual assaults and pornography. The Act also provides safeguarding measures to maintain the welfare of the child during every stages of judicial process and provides for establishment of special courts with the objective of speedy trial. The main objective of The Protection of Children from Sexual Offences (POCSO) Act, 2012 is to ensure protection of every kind of sexual offences of child's right against any unlawful sexual activity, exploitative use of children in prostitution or other illegal and exploitative sexual practices, using children in pornographic performance or materials.⁶

III. EXEMPLARY FEATURES OF POCSO ACT, 2012

Protection of Children from Sexual Offences Act, 2012 is made by the parliament with an objective to deal with the cases of sexual assault and exploitation of the children over ages. This Act is a progressive Act to deal with the all possible exploitation of children in the recent time and it is open to amendments if required over time. The very recent amendment in this act is done in 2019 which I will highlight in this paper at later stage. The exemplary features of POSCO Act, 2012 are as follows:-

- i. **Gender Neutral:** - The Act is gender neutral. Unlike the provisions of the Indian Penal Code, 1860, the POCSO Act does not consider only females to be victims of sexual assault. Under this Act, a child⁷ as 'any person' below the age of 18 years, the POCSO Act sets a gender-neutral tone for the legal framework available to child sexual abuse victims. Consequently, a child of any gender who has been sexually wronged has access to the remedies provided under the act.
- ii. **Discrimination Free:** - The Act is an example of discrimination free legislative effort which only aims to provide protection to all children regardless of their gender.
- iii. **Comprehensive Definition of Sexual Assault:** - A comprehensive definition of sexual assault under Section 3 of The Protection of Children from Sexual Offences (POCSO) Act, 2012. A person is said to commit "*penetrative sexual assault*" if--
 - a. he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

⁶ Preamble , The Protection of Child from Sexual Offences Act , 2012 (Dec. 7, 2022 , 8:00 PM)
<https://bhubaneswarcuttackpolice.gov.in/wp-content/uploads/2020/08/POCSO-ACT.pdf>

⁷ The Protection of Child from Sexual Offences Act , 2012 , Sec 2(1) (d)

- b. he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- c. he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- d. he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.⁸
- e. This Act punishes not only the traditional penovaginal penetration but also punishes any person penetrating his penis or any object into the vagina, anus or mouth of a child or making the child do any such act.⁹

The Act also extended the scope of penetrative sexual assault to make any and every possible variations of such penetrative action punishable under the Act, whether such act is done by a person of trust or a person of authority who has influence on the child.

- iv. **Stringent Punishment:** - The Act also take the factor of abuse of power into account as it provides stringent punishment, under Section 5 of The Protection of Children from Sexual Offences Act, 2012, to any person such as a police officer, any public servant or officer of any security force who abuses his power to commit penetrative sexual assault on a child.¹⁰
- v. **Sexual Assault Objectivity & Stop Child Pornography:** - Sexual assault, under this Act, has also been given more concern which includes objectification of children for any pornographic purpose or other. To control the distribution of child pornography, the Act has extended the definition of the term media to include print, or any other technology which is used for production or offering or distribution of pornography. The Act also penalized any storage of child pornography.¹¹
- vi. **Establishment of Special Courts:** - To ensure speedy trial and precise delivery of justice, the Act provides for establishment of Special Courts¹² in every district. Also, the Special courts are empowered hold the trial in camera and with the presence of a trusted person of the child. Section 36 of The Protection of Children from Sexual

⁸The Protection of Child from Sexual Offences Act , 2012 , Sec 3

⁹The Protection of Child from Sexual Offences Act , 2012 , Sec 4

¹⁰The Protection of Child from Sexual Offences Act , 2012 , Sec 5

¹¹The Protection of Child from Sexual Offences Act , 2012 , Sec 13 & 14

¹²The Protection of Child from Sexual Offences Act , 2012 , Sec 28

Offences (POCSO) Act, 2012, talk about the prevention of child from mental trauma & mental strain by preventing the child not to see the accused at the time of testifying.¹³

- vii. **Child Welfare Committee:** - This Act provide for the set up of child welfare committees¹⁴ and it is being given an important role under the Protection of Children from Sexual Offences Act, 2012. All the cases that are registered under this Act need to be reported to child welfare committee within 24 hours of the recording of the complaint. It is also the duty of the child welfare committee to consider the opinion of the child and to decide on the case within a time frame of three days.¹⁵

IV. FEATURES OF THE PREVENTION OF CHILD FROM SEXUAL OFFENCE (AMENDMENT) ACT, 2019 ¹⁶

The Protection of Children from Sexual Offences (Amendment) Bill, 2019 was introduced in Rajya Sabha by the Minister of Women and Child Development, Ms. Smriti Zubin Irani on July 18, 2019. The Bill amends the Protection of Children from Sexual Offences Act, 2012. The Protection of Children from Sexual Offences (Amendment) Act, 2019 received the assent of the President on the 5th August, 2019. Following are the amendments:-

- i. The amended Act increased the punishment for penetrative sexual assault under Section 4 of POCSO Act, 2012 from a minimum of seven years to a maximum of twenty years.¹⁷
- ii. The amended Act ensures that the victim will be paid compensated for his / her medical expenses and expenses relating to rehabilitation.
- iii. The words “communal or sectarian violence” in case of penetrative sexual assault and aggravated penetrative sexual assault has been changed to “violence or during any natural calamity or in similar situations”.
- iv. The amended Act also widen the scope of Section 9 which deals with aggravated sexual assault by including, administering any drug, and chemical, hormonal substance to make the child attain sexual maturity.

¹³The Protection of Child from Sexual Offences Act , 2012 , Sec 36

¹⁴The Protection of Child from Sexual Offences Act , 2012 , Sec 44

¹⁵Hashmat Ali Khan & Mishal Naqshbandi , *Relevance of Protection of Children From Sexual Offences Act, 2012 To Curb The Child Sexual Abuse in India : An Analysis*, 26 ALJ 2018-2019, 137

¹⁶The Protection of Child from Sexual Offences (Amendment) Act, 2019 (9th December 2022 , 02:00PM) https://www.mha.gov.in/sites/default/files/WSDiv_20112019circulationofPOCSOAmndtAct_05082020.PDF

¹⁷ Ibid.

- v. The amended Act introduced more severe punishment for storing any pornographic materials containing child with the intention of distributing it commercially or neglecting to report.
- vi. The amended Act also empowers the Courts to impose the capital punishment on rarest of rare cases but such application of the capital punishment on the discretion of the court.¹⁸

V. DRAWBACKS

Still we have POCSO ACT, 2012 but the crime of child abuse is increasing day by day .Due to the loopholes of the Act or insufficient understanding of the issue leads to contradictions of the main objective of the Act. Some of the drawbacks of the Act are as follow:-

- i. Appointment of support persons under Rule 4(7) is important for the child against whom the crime has been committed. But in 96 % of the POCSO cases it have been observed by Supreme Court that a support person is not provided to victim. A support person assists the child survivor and their family through the process of investigation and trial under the POCSO Act by helping them navigate the legal system, facilitating therapeutic intervention.¹⁹
- ii. Special Courts for POCSO have not been designated in each district in Indian. Till 2022, only 408 Special Courts for POCSO have been set up in 28 States as a part of Government's Fast Track Special Court's Scheme. The less number of courts is directly proportional to the increasing numbers of pendency.²⁰
- iii. Research, information, monitoring and sensitizing the public are the biggest challenges under the Protection of Children from Sexual Offences Act, 2012.

Besides this the judiciary has played an active and significant role in providing speedy justice to the children who are the victims of sexual assaults and offences. But unfortunately, countless institutional weak points and severe infrastructural faults of the institutions leads to the failure of legal protection of the children which consequently leads to frustration towards the justice system. The recent judgment passed in which the judgment by the Nagpur Bench of the

¹⁸The Protection of Child from Sexual Offences (Amendment) Act, 2019 (9th December 2022 , 02:00PM) https://www.mha.gov.in/sites/default/files/WSDiv_20112019circulationofPOCSOAmndtAct_05082020.PDF

¹⁹ Esha Roy ,10 Years of POSCO : An Analysis of India's Landmark Child Abuse Law , THE INDIAN EXPRESS (Dec.12 , 2022 , 09:00PM)

<https://indianexpress.com/article/explained/explained-law/10-years-of-pocso-an-analysis-of-indias-landmark-child-abuse-law-8276030/>

²⁰ Ibid.

Bombay High Court have been faced with nationwide criticism. In *Satish Ragde v. Maharashtra*²¹, on an appeal against the conviction in a case where the accused had taken the minor girl into his house and had pressed her breast and partially stripped her, Justice Pushpa Ganediwala, the Nagpur Bench of Bombay High Court, contemplated whether the act of pressing the breasts of a child without removing her top considers as sexual assault. Section 7 of the POCSO Act defines Sexual Assault as the act of touching the private parts of the child or making the child touch the private parts of the accused or someone else. The Judge, in this case held that, there must be 'skin to skin' contact with sexual intent to establish sexual assault and since there is no clear detail as to whether the top of the minor girl was removed or not, the act of the accused would not fall within the ambit of sexual assault.

In *Jarnail Singh v. State of Haryana*²², The Supreme Court of India while deciding the case has observed that the procedure which is used to determine the age of a child who is in conflict with law as have been provided by the Juvenile Justice (Care and Protection of Children) Rules, 2007, can be followed in cases falling under POCSO Act, 2012 as well. In the present case, the appellant was accused of kidnapping and raping the daughter of one Savitri Devi, when her daughter was sleeping. The Apex Court observed that Rule 12 of the erstwhile Juvenile Justice (Care and Protection of Children) Rules, 2007, which detailed the age determination process for children in conflict with the law should be applied to determine the age of a child victim. Applying the same, the Court convicted the appellant, Jarnail Singh.

VI. INITIATIVES RELATED TO POCSO ACT

The initiatives are a sought of multiplier to the Protection of Children from Sexual Offences that has been undertaken by the government are as follows:-²³

Child Abuse Prevention and Investigation Unit: An Online Child Sexual Abuse and Exploitation (OCSAE) has been set up by the Central Bureau of Investigation (CBI). The unit is to work under the Special Crime Zone of CBI. The unit extends its territorial jurisdiction all over the country.

Juvenile Justice (Care and Protection of Children) Amendment Bill, 2021: The Juvenile Justice (Care and Protection of Children) Amendment Bill, 2021 was recently passed by the Lok Sabha and sought to reinforce to streamline the government's efforts to provide better aid

²¹ Criminal Appeal No. 161 of 2020 (Bom. H.C. Jan 19, 2021)

²² 2013 (3) SCC (Cri) 302

²³ Press Information Bureau, 'Ministry of Women and Child Development' PIB Delhi (Dec. 08, 2022, 10:30 PM), <http://pib.gov.in/pressreleaseshare.aspx?PRID=1519943>.

for the adoption and subsequent care of children. The Bill is an amendment to the Juvenile Justice (Care and Protection of Children) Act of 2015.²⁴

Beti Bachao, Beti Padhao: Beti Bachao, Beti Padhao is a campaign launched by the Government of India. It primarily targets the states of Haryana, Uttar Pradesh, Uttarakhand, Bihar, Punjab, and Delhi to address the declining Child Sex Ratio (CSR). It also aimed to work on the issues related to women's empowerment and emancipation.

Child Labour Prohibition and Regulation Act, 2016: This is an amendment to the act of 1986. The government shall provide harsher sentences and punishment for those in violation of this act. It bars the employment of teens in hazardous work conditions.

Child Marriage Prohibition Act, 2006: The Child Marriage Restraint Act of 1929 was implemented under British rule, and this act replaced it. It defines what a child is in the eyes of the law. An individual under 21 years of age and a female under 18 years of age shall be 'minors'. A marriage between minors shall be null and void if either of the parties demands it to be so. The marriage shall be void if the consent has been acquired through deceit, enticement, or fraud from their guardians or if the primary purpose of the marriage was to abuse the child for human trafficking.²⁵

These are some of the initiatives taken by the government to prevent the child from sexual offence and also to make aware the child about their right by educating them.

VII. CONCLUSION

Earlier we did not have any specific legislation dealing with the issues of sexual offence related to the Child but with the need of hour the parliament has enacted an Act called as Protection of Children from Sexual Offences Act, 2012. The main objective of the Protection of Children from Sexual Offences Act, 2012 is to provide protection to the children against sexual assaults and abuse and every kind of sexual offences. But the objective of this Act cannot be fulfilled as long as the topics of safe sex, good touch and bad touch remains a taboo within Indian families. The POSCO Act, 2012 was a need of the hour because children who are considered as the most valuable assets of the country, were traumatized at such a young age. The number of cases that were being registered also increased from the subsequent years. Though the Act is beneficial, yet it had many loopholes which paved the way of the Amendment Act of 2019.

²⁴ The Juvenile Justice (Care and Protection of Children) Act of 2015 (Dec. 09, 2022, 11:00 PM) <https://cara.nic.in/PDF/JJ%20act%202015.pdf>

²⁵ The Prohibition Of Child Marriage Act, 2006 (Dec 9, 2022, 11:00 PM) <https://legislative.gov.in/sites/default/files/A2007-06.pdf>

Thus, the Amendment Act is a highly welcomed legislation. Still awareness is lacking and there are some loopholes in the law which cause high pendency of POCSO cases till date.