

# Critical Analysis of Judicial Responses to POCSO Act

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**Abstract:** *The sexual abuse of children (minor's) is a majorly neglected area. This is largely a problematic area where a lot of cases go undisclosed or unreported. The legislation dealing with this is specific was lacking until it was brought forward and implemented. Earlier to this legislation, there was no specific method to determine or hold a judicial process in specific to such cases. The functioning of the judiciary, police or the medical officers was not specified neither was there a prescribed steps to be taken in such act. The victim protection and the analysis of the victim statement being considered in the court were provided importance as per as the Act. There are a range of offences being criminalised such as pornography, Sexual Abuse, Sexual Harassment. Further the act of a person which can be consider under the offences are described further and observed under the law. The Pre and Post POCSO Act in India and its efficiency in execution under judiciary through case laws are further discussed in the paper.*

**Keywords:** Sexual Abuse, POCSO, Judicial Analysis, Criminalisation, Harassment, Offences

## 1. Introduction

### 1.1 Area of Research

The paper seeks towards the critical analysis and observation of the judicial system on the cases involving sexual offences against children. There have been multiple sections concerned under the Indian Penal Code [*Indian Penal Code, 1870*], India Evidence Act [*Indian Evidence Act, 1872*], but a new reform being made POCSO (Protection of Children from Sexual Offences) [*POCSO was enacted in 2012*].

The Analysis and overview of multiple judicial pronouncements concerning the usage of the POCSO Act and its application. The comparative analysis of laws of different countries dealing with sexual offences against children. The sexual offences involving children and analysis of laws of different countries dealing with them.

### 1.2 Significance of the Research

The recognition of the importance in sexual offences against children is observed and regulations are made. There are inadequate and sensitive concerns to pay attention to in the cases concerning children where there lies some serious issue. The sexual offences, sexual abuse of minor (Children) and other forms where the victim are children causing trauma. In the case of Sakshi vs Union of India [*Sakshi v UOI, AIR 2004 SC 3566*]. At present the focus lies on the inadequate laws that are present to deal with all the sexual offences made against children and involves aspects concerning children. The protection of children from sexual offences, purview of understanding the child evidence being implemented by the courts through its judicial pronouncements. The Understanding and the psychological development of the child for the judicial justification. Explanation of the child's interpretation during the judicial process.

### 1.3 Research Questions

The Consideration of the Age factor in the cases concerning the application of the POCSO Act. The application in evidence regarding the Child's interpretation and

understanding of the situation and victimization. Interpretation of laws under the Act and precise usage in the judicial interpretation. Child Evidence consideration in the Court proceeding.

### 1.4 Aims and objectives of Research

The Objective is to understand how the judicial response to cases under POCSO Act. Whether the judiciary is effectively able to protect children under POCSO Act. To study the impact of the POCSO Act in the judicial system after its enactment and enforcement. The analysis of evidence and the judicial system's interpretation of the child's explanation. Comparative study with other laws to set out the provisions under POCSO. The understanding of the age factor and consideration of the psychological development of the child serving as evidentiary value in the judicial process.

## 2. Study of Literature

The Research is based on the primary and secondary sources including judicial pronouncements under IPC and POCSO Act. The consideration of comparative study of the laws in the United Kingdom, USA and South Africa and Iceland inclusive of the reports on the sexual offences against children.

### Chapterisation

- 1) Introduction
- 2) Historical development of child protection laws in India
- 3) Comparative analysis of child protection laws in India and US
- 4) Judicial Interpretation (Judicial Pronouncements)
- 5) Finding and Suggestions

### Scope and Limitation

The research work extends to the wide - spread reference and understanding of cases in the Indian Judicial System. The reports and statistical data regarding the cases filed under the POCSO Act. The data amounting to reports of child abuse and Offences against Children.

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The Limitation lies as to the unreported cases and the incidents that have seen no light to be taken forward. The Cases being recorded in - camera where the access to data is forbidden.

### 3. Historical Development of Child Protection Laws in India

India has one of the largest child and adolescent population in India consisting of 444 million in numbers. It includes the ratio where 1 in every 5 children are below the age of 18 years. Children are of a very vulnerable group and are exploited at a tender age where they are subjected to trafficking, malnutrition, drug abuse, forced labour, sexual abuse, pornography. Sexual abuse gives the meaning under India in multiple forms: it could be physical, Non - Physical, Incest, Commercial Sexual Exploitation of Children, Child Sexual Tourism and Online Sexual Abuse.

Through a nation - wide survey that was conducted in India through the Ministry of Women and Child Development in which the crowd observed taking part was around 12, 500 across multiple states. The survey indicated that 53% of them were subjected to various forms of sexual abuse. The National Crime records Bureau (NCRB) observed the 20.1 per lakh population of children being subjected to sexual abuse and Increasing number of cases of child rape being observed. The number of cases that were reported increased under the POCSO Act and on the judicial pronouncement they have been punished for the act or omission of any such offences.

The basis to such acts and reported incidents are observed on a general scale where it is observed due to certain factors being affected such as, the taboo that exists to discuss and explain about sex and sexuality to children. The gender - based violence and the portrayal of tolerance in such gender - based violence. In certain cases, the trust and non - reliability on children for the interpretation being made about any particular act.

The consideration of child abuse before POCSO came into effect was made under the Indian Penal Code under the Section 377 (unnatural offences), Section 375 (Rape), Section 354 (Outraging the modesty of a woman) and the Constitution of India laid down under Article 21 that the State must abide by the Article and guarantee the protection of children. The child sexual abuse includes physical, psychological maltreatment of any child [Considered as child under the age of 18 years] by any person in the position of trust and confidence in the child's relation. The Child when used by the person in power or position of trust for the purpose of sexual stimulation or for sexual gratification. In one of the studies made by the Ministry of women and child development [Ministry of Women and Child development under Government of India "National Study on Child Abuse: India 2007] defined the act of 'Sexual Assault' as inclusive of when a child is made to fondle with her/his private parts or making the child show/exhibit the private body parts and that act being photographed in the form of nudity. Prior to 2012 multiple sections from Indian Penal Code dealing with sexual offences were also applied to the cases of a child sexual

abuse resulting serious miscarriage of the justice being delivered. The provisions under this section and norms of the law were not sufficient for the application to exist in the court of law. There were no reasonably justifiable provisions to prove for the application to the child abuse cases. The sections were general, as observed under Section 354 of the Indian Penal Code, it punishes a person for outraging the modesty of a woman by use of criminal force but the uncovered region under this section for an infant or a child, the observance lies on how an Infant/child's modesty can be observed in this case.

There has been no provision for the non - penetrative sexual act which is committed against boys. There are no courts or court halls which are stipulated mainly for the redressal of child friendly and sensitive matters concerning children to be dealt with. There are no specific laws, redressal methods, programmes concerning the rights of a child.

A special legislation was enacted in the year 2012 concerning the difficulties raising concerning to the Child abuse and sexual offences against children. The parliament observed these issues and enacted the special legislation POCSO Act in May 2012. Under this Act, some major implementation and developments were made such as any act of on - penetrative sexual act committed against boys. There are regulation and guidelines for police and court authorities to handle the victims. There are courts set up to separately handle cases concerned

under POCSO, it is made child - friendly environment and sensitivity of the matter of concern is observed. Children were being hampered after the issue due to which a lot of raised issues never came to light, this was dealt with the implementations made under the Act. In addition to this National Commission for the protection of Child Rights was established which consisted of laws, policies and programmes which was in line with the Constitution of India and the UN Convention for the protection of child rights. The commission furthermore oversees the implementation of the POCSO Act.

#### The deficiency in the legal system (Justice System)

The complaints made by children are often not considered important or paid attention to, due to which there is a tendency by the family members, police and medical experts to reject and not take consideration for the child's complaint. A child being sexually abused has different ways how they respond, and the protection of victim is utmost important, which the justice ends serve. In certain cases, children refrain from speaking up about instances, in this mode they need support to put out details about anything concerned due to the person entrusted with care and custody of the child is usually observed as he perpetrator. There is a social stigma attached to such instances due to which a lot of cases go unreported believing the shame, social disrespect it brings along with it, fear of getting ostracized from the society.

In the system functioning, most families significantly don't come forward to report the cases of the child's sexual abuse as they wouldn't be treated with all concern to be taken. The police, medical experts, at times the social workers show no sympathy towards them instead they add more trauma to the

situation. There are multiple cases where the doctor's have been incompetent to take up such cases as it heads with sensitive concern. The police in instances force the parents to take back the cases and refuse registering a complaint. The medical officers not taking due care or counselling inclusive of treating the child with due care is compromised. The criminal justice system and its functioning lacks the ability to deal with sexual offences concerning minors. Children are not at a vulnerable position at the only inside families, but in places like the NGO's for orphans, skill development centres for children, adoption care centres, etc. These are places where the primary motive is to protect, safeguard and look for the welfare of the development of children. The children at these institutions are at higher risk and vulnerable to such situations, whereas they are not able to receive due care, protection or justice after being in a victim in such instances. The cases of sexual abuse of children in such institutions are observed to be very common and most of them go unreported.

#### Protection of Children from Sexual Offences Act, 2012

The first step and general basis provided was making this Gender Neutral, which is a major progress. It makes a provision for the victims to report the abuse, it provides details on the sexual offences that are existing against children and provides for the protection during the judicial process. Some of the major regulations laid down under the Act are as follows:

- The police officers must take up the report and must bring the victim in the attention of the Child Welfare Committee within 24 hours of receiving the report.
- The police officers to be in civil attire while the child's statement is being reported so that the child does not feel intimidated and speaks up to the officer.
- The Child's statement must be recorded in the presence of the person whom the child trusts.
- The medical examination of the victim must be done in the presence of anyone the child trusts and must be done by a lady doctor for the forensic evidence.
- The are courts that are set up to function and conduct a speedy, in - camera trials. The court makes sure the child is protected and is not exposed. The identity remains undisclosed, the testimony is taken through a video, the cases are disposed in the span of one year from being reported and are not delayed in any manner. There is presence of an interpreter, special educator and even a translator along with any other experts that are required for the minor's assistance.
- The family is provided with the compensation of the medical treatment and rehabilitation expenses.

#### Punishments prescribed under the Act

##### 1) Abetment

The definition as under Section 107 and under Section 108 of the IPC, the punishment specifies as under Section 17 of the IPC.

##### 2) Reporting an offence

Under Section 21 of the Act, the punishment provided is six months along with fine.

##### 3) Sexual Assault (Penetrative)

Penile penetration may occur via the vaginal, oral, urethral, penile anal, or object routes. The law's Section 4 imposes a

minimum sentence of seven years, a maximum sentence of life in prison, and a fine.

##### 4) A person of authority or trust committing a severe, penetrating sex assault

The punishment is outlined in Section 6 of the law and must be at least 10 years in length. It may also include a fine and strict life imprisonment.

##### 5) Sexual assault that is not penetrative and is performed with a sexual motive

Touching a child's breast, penis, anus, or vagina is considered involved in non - penetrative sexual assault. In such circumstances with a sexual intent, Section 10 calls for a fine in addition to a sentence of at least 3 years, with the potential for 5 years.

##### 6) Aggravated non - penetrative sexual assault committed by a trusted or powerful person

Section 10 specifies the penalty that must not be less than five years, but it may be up to seven years, in addition to a fine (Section 10).

##### 7) Sexual Harassment

Indecent and sexually graphic comments, emails, or phone calls; mocking, jeering, or making a request for a sexual favour are all examples of sexual harassment. (Section 12) The penalty is three years in prison and a fine.

##### 8) Using a child for pornographic purposes

It involves creating and disseminating any print or digital pornographic material. Punishment is for five years and in the event of a second conviction, the penalty would increase to 7 years in prison and a fine (Section 14 (1)).

##### 9) Attempt of offence

Section 18 of the law stipulates a one - year sentence and fine.

## 4. Analysis of Judicial Pronouncements

#### Cases Pre POCSO, 2012

##### *Sakshi vs Union of India [26<sup>th</sup> May, 2004]*

NGO named 'Sakshi' filed a writ petition in the Interest of the Public with an intent to broaden the perspective of the rape in cases involving children I the cases where abuse is considered when the male organ insertion into body parts like the anus or mouth or the insertion of things into the vagina are both examples of child abuse. The Supreme Court dismissed the public interest lawsuit after rejecting the plea. However, it published helpful guidelines for rape and child sexual abuse cases.

The Provisions of IPC such as 377, 375/376 and the section 354. Over the years, the statistical data have displayed the penile or vaginal penetration is a manner how children are sexually abused. Section 377 does not do justice or cover the cases under its ambit. The petitioners focused on Article 15 (3) of the Constitution, which calls for "adequate provisions" and special protections for women and children.

##### *Bachpan Bachao Andolan vs Union of India [AIR 2011 SC 3361 ]*

The Supreme Court received a PIL in response to grave abuses of children's rights. The petition was especially filed to deter child trafficking from Indian circuses. These locations commonly engage in sexual abuse of children,



which is against juvenile law. Justice Act and various international agreements.

### ***State of Karnataka vs Manjanna [4<sup>th</sup> May, 2000]***

Refusal of Medical Examination of a girl aged about 15 years being a victim due to the police referral being absent. In the absence of the POCSO Act, there were no regulations being present to take due care and immediate steps to safeguard the victim of sexual assault, concerning children.

### **Cases Post POCSO, 2012**

In the year 2012, POCSO was enacted and the process of receiving justice for the sexually abused victims were made easier. There has been an increase in raising the awareness regarding the justice to be received for the victims of sexual abuse. The children are protected under this Legal provision.

### ***Nishu vs. Commissioner of Police***

A group of nine people kidnapped the petitioner, a young girl, and repeatedly raped her. One of the nine individuals was a Haryana Police constable. According to Section 376D of the IPC and the pertinent POSCO Act requirements, the prosecution failed to provide any medical reports or a copy of the FIR. In this case, the court ruled that it would not be appropriate to use its Article 32 authority because the Haryana Police had already conducted an investigation.

### ***Jarnail Singh vs State of Haryana [2013]***

The daughter of Savitri Devi was allegedly abducted and raped by the appellant while she was fast asleep. In this decision, The Supreme Court of India stated that matters covered under the POCSO Act, 2012. As well can be handled using the same process used to establish the age of a child who is in conflict with the law under the Juvenile Justice (Care and Protection of Children) Rules [2007]. The court found Jarnail Singh, the appellant, guilty after applying this rule.

### ***Attorney General for India vs Satish and Another<sup>12</sup>***

The Nagpur Bench of the Bombay High Court decided that, in accordance with the POCSO Act of 2012, touching a child's breasts without "skin-to-skin contact" amounted to molestation. Extreme hostility was directed towards Justice Pushpa Ganediwala's decision. In the current case of Attorney General for India versus Satish and another, which was heard by a bench consisting of Justices Uday Umesh Lalit, S Ravindra Bhat, and Bela M Trivedi, the Attorney General of India, the National Commission for Women, and the State of Maharashtra filed appeals against this High Court's ruling.

### ***Libnus vs The State of Maharashtra***

The question held in court for observation under Section 7 of the POCSO Act observed that when a person flashes or holds out the penis in front of the child, then would it be considered as an offence or a sexual assault. The Court bench at Nagpur observed this as, when a person unzips in front of the child holding out the penis then it would be considered as Sexual harassment and not as Sexual Assault. Under Section 12 and 13 of the POCSO Act the aggravated Sexual Assault was not considered for conviction for the offence committed. This issue raised similar to the skin-to-skin judgement.

### ***Avinash vs State of Karnataka***

The Victim was kidnapped and was used for sexual intercourses. The Victim's age was of concern and was viewed with sympathy by the Honourable High Court as it was an important factor to decide through so as to receive evidence and to actuate the case. Charge Sheet was under Section 366 of the Indian Penal Code, Section 4 of the POCSO Act.

The crimes of sexual abuse and Assault have impacted a lot on the society as well as the minors who turn victims to such acts. Reliable and solid evidence play a major role in upholding the convicts. The district court of Delhi has held the accused under Section 8, <sup>12</sup> 2021, Satish Ragde vs The State of Maharashtra

Section 11 and Section 12 of the POCSO Act, it has even considered Section 506 under the Indian Penal Code under circumstances where the victim has experienced misbehaviour. The trust and confidence are instilled on the statement and testimony given by the child victim.

## **5. Comparative Analysis of Laws of Different Countries**

While it is considered Internationally, Child abuse is a crime and is observed as a serious concern. It varies from each country and how the laws define and observe procedures for sexual assault or abuse of a child. Every child is naïve and are subjected being a victim to violation of their right due an adult taking advantage of the child. There are various social and cultural stigmas in the society while it comes to reporting cases of sexual assault or sexual abuse specific to India, due to which the law-making body also required a long time to make laws and legislation made provision under the law to protect children. In comparison of different countries, there are countries having higher sexual offences against children and there are countries which are lesser.

### ***United Kingdom***

United Kingdom has a high record of the children and observed higher amount of sexual abuse against children. There is record through the NSPCC of around 36,000 cases being recorded of children being abused and offences committed against them.

Through the reports [[http://www.cps.gov.uk/news/fact\\_sheets/sexual\\_offences/](http://www.cps.gov.uk/news/fact_sheets/sexual_offences/) (Last accessed October 12, 2015)] in the year 2003 of the sexual offences:

- 1) Children being trafficked for sexual exploitation.
- 2) Sexual abuse of children through prostitution and pornography, including encouraging or facilitating pornography or prostitution.
- 3) Children with mental disorders who are abused sexually.
- 4) Voyeurism, sexual activity in a public restroom, and exposing one's genitals to a child are all examples of voyeurism.

### ***Netherlands***

The Netherlands has the lowest rate of child abuse (4%) as a form of child abuse. This may be due to the country's policy against child sexual abuse. Children and adults who suspect sexual abuse are given a reporting code at various Advice

and Reporting Centres on Domestic Violence and Child Abuse (AMHK) in the Netherlands. These centres are very child - friendly and include counselling centres. When any case is accounted for at the middle, it takes on the obligation of examining the conditions and seeing whether there is a need of recording a case in regulation and in the event of need, the middle guarantees that the satisfactory move is made by the courts to safeguard youngster's advantage. Youngster maltreatment in the nation is principally viewed as a family related, clinical or psychosocial issue. Under these laws, legal action against child abuse can be taken.

- 1) The United Nations Convention on the Rights of the Child, which the Netherlands ratified in March 1995. Concerning the cases of child abuse, the Covenant's Articles 4, 5, 6, 18, and 27 are relevant.
- 2) Dutch common Regulation: A significant headway in the space of youngster freedoms was the consideration of an extra reference in Article 247 which peruses as "Guardians are under a commitment to deal with their kids and to raise them without utilizing either mental or actual viciousness or any other sort of embarrassing treatment". The number of cases of child sexual abuse has decreased as a result.
- 3) Criminal Law It is used in very serious cases of physical sexual offenses in criminal law.
- 4) Plan of action titled "Children's safety."

The current plan of action for the years 2012 through 2016 was launched in November 2011. Its primary goals are:

- To stop parents from hurting their kids.
- To encourage victims of child abuse to come forward.
- To end the abuse that currently exists.
- To reduce the negative effects of abuse

#### **US Federal Law**

All states in US have their various regulations managing youngster sexual maltreatment. Government Regulation is pertinent on the government lands which incorporate regions like army installation, Indian domains and other government claimed places. Section 2241 deals with aggravated sexual abuse, Section 2242 deals with sexual abuse, Section 2243 deals with sexual abuse of minor, Section 2244 deals with sexual abuse minor ward. Under these sections, infractions are punished with fines as well. When a crime is of an aggravated nature, such as abusing children with the threat of serious injury, such as death, or kidnapping a child for child sexual abuse, an offender faces severe penalties.

Segment 2256 of title 18 U. S. C. accommodates meaning of youngster porn as outwardly portraying any physically unequivocal lead including a minor (less than 18 years old). Images, videos, or computer - generated images that are indistinguishable from the actual minor are examples of these representations. Data on a computer that can be transformed into an image of child pornography is also included in this category. Any portrayal of minor under 18 years old is unlawful regardless of the youngster's assent. It is against the law, according to Section 2251, to persuade, entice, coerce, or induce a child to engage in any sexually implicit act. The federal law also imposes penalties on anyone who attempts to conspire for this purpose. Additionally, selling, buying, or transferring a minor's

custody for the purpose of producing child porn specifically done by the minor's parents or any legal guardian or other person in custody or control of that minor under the age of 18 is specifically prohibited by Section 2251A of Title 18, United States Code.

#### **South Africa**

The reforms were made with complete strictness that if any person was previously convicted of any offences under such offences sexually, then they're prohibited to loiter around places like the public ground and play area, schools, etc for the protection of children from sexual offences or any sexual abuse.

It has the recorded rate of highest child sexual abuse. The sexual offences against inclusions:

- Legally defined sexual assault which incorporates demonstrations of consensual sexual entrance [<sup>14</sup>[http://www.gov.za/sites/www.gov.za/files/38977\\_7\\_7\\_Act5of2015CriminalLaw\\_a.pdf](http://www.gov.za/sites/www.gov.za/files/38977_7_7_Act5of2015CriminalLaw_a.pdf) (Last accessed October 12, 2015) ]
- Acts of consensual sexual abuse are included in statutory sexual assault.
- Child sexual exploitation and sexual grooming versus forcing.
- Forcing children to witness sexual acts.
- Self - masturbation, and the display of genital organs, and using children for pornographic purposes.
- Sexual abuse of debilitated youngsters in the ways referenced previously.

#### **Canada**

The federal law covers the criminal justice system. The amendments were made in certain matters concerning Child Abuse and other Sexual Offences. It considered child evidence and other possible concerns of Sexual Abuse. The offences observed under the laws are as follows:

- Anal Intercourse
- Incest
- Vagrancy
- Indecent Acts
- Sexual Assault
- Sexual Interference
- Exploitation sexually of children
- Sexual Touching
- Genitals exposure
- Sexual Assault aggravated form
- Prostitution involving children.

Consent is considered as a very crucial evidence and observance is made under law. If consent is given by anyone aged between 14 and 18 years is considered as valid, but in cases if the elder one has the authority or the position to impose it, then the consent is not considered as valid. The victim is provided with utmost protection during the trial and evidence due to coercion and the undue influences by any of the offender.

There are provisions under the law to be governed under the institutions for the protection of the children. The children are protected, and the criminal justice system provides higher amount of protection compared to other countries. In observance to these laws the accused is protected as well in

the best interest of the victim, both the parties are observed as equals.

### **Zimbabwe**

Zimbabwe faces a highest concern of cases related to sexual offences. There has been an implementation of charter for child protection and rights, welfare of every child. There fundamental rights and duties are assured for every child and victim. The increased cases and record of child abuse has caused major law implementation and amendments. The state's primary objective is to punish the accused, not the victim, but the victim is required to provide true testimony or face legal consequences for breaching this duty. The state will ensure that the witness gives evidence in a position or location where the likelihood of the witness suffering from any kind of stress or fear is very low by appointing intermediaries and support staff for the witnesses. It could be in or out of presence of the blamed. The state - hired intermediaries provide constant moral support to the victim and witnesses.

### **Germany**

When compared to many other nations, Germany adheres to legal codes and procedures that provide children with greater protection. Children under the age of 14 are *aredoli in capax* under German criminal law for consenting to any kind of sexual activity. Under Section 174, it is also illegal to have sexual relations with a person under the age of 18 in certain situations, like when the child is adopted and is dependent. Additionally, the criminal procedure ensures maximum child safety. As soon as a complaint is made, responsible police officers themselves question the child.

## **6. Conclusion**

Through the analysis and study of major cases through comparison of laws of various countries. The laws we have, and the governing is insufficient. The laws being set or being implemented does not serve the purpose, there needs to be other support hand along with this to implement it and bring it to functioning. The police force, the hospital and social workers on the first instances need to be non - hampered for providing the justice to all victims who are juvenile. The children who turn victims due to unregulated laws and the effects further either through difficulties in the procedure of the court or the protection of the victim in all means. The development and advancement of procedures being made along with time provides for a safer and better society to live in. Certain advancements can be made such as:

- 1) Build much higher regulatory authorities against child pornography.
- 2) Develop better and equipped authoritative institutions for child welfare.
- 3) Victim protection program and its implementation.
- 4) Help and assist care and centres for children to protect the victim and justly get them through the judicial process without any undue influence.
- 5) The protection and stringent laws in protecting the victim of the crime along with the protection program of the vulnerable witnesses.

- 6) Procedure made easier and more available to general people to ensure the safety and protection of the victim and the family.
- 7) Judicial process to be made easier by interpreting the child's method of explanation of an incident.