

POCSO: IMPORTANCE OF CONSENT

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In 2012, The Protection of Children from Sexual Offences was passed in order to protect and deal with issues of sexual offences against children. It is considered a gender-neutral law and under the act, “child” includes anyone under the age of 18 years of age. Sexual harassment, sexual assault and child pornography are the offences punishable under the said act.¹

It is very important to understand the meaning and the ambit of such offences to be able to apply this act to its full and intended potential. Sexual Assault under the POCSO act is Sexual assault occurs when someone touches a child's privates with the intention of doing such sexual harm. Subsequently, even if someone makes a child touch the private parts of others with sexual intent, it is considered to be sexual assault. It does not involve penetration, if it did, then it would become a much more serious offence and must be dealt with separately under the act.²

On the other hand, sexual harassment under this act involves a person with sexual intent saying any word, performing any gesture, displaying anything for pornographic purposes, etc., against a child.³

Under the POCSO act, using a child in any kind of media, with the aim of sexual satisfaction (including, indecent portrayal of a child, and usage of a child in for sexual acts) corresponds to the crime of making use of a child for obscene graphics.⁴

The object of this write-up is to display the drawbacks of this act, especially with regard to the minor boys who can easily be incarcerated under the POCSO act because of the few gaps that

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¹ *Protection of children from sexual offences act (POCSO)*. Available at: https://nhrc.nic.in/sites/default/files/10_PROTECTION_OF_CHILDREN_-_SEXUAL_OFFENCES.pdf (Accessed: 12 June 2024).

² *Protection of children from sexual offences act (POCSO)*. Available at: https://nhrc.nic.in/sites/default/files/10_PROTECTION_OF_CHILDREN_-_SEXUAL_OFFENCES.pdf (Accessed: 12 June 2024).

³ *Protection of children from sexual offences act (POCSO)*. Available at: https://nhrc.nic.in/sites/default/files/10_PROTECTION_OF_CHILDREN_-_SEXUAL_OFFENCES.pdf (Accessed: 12 June 2024).

⁴ *Protection of children from sexual offences act (POCSO)*. Available at: https://nhrc.nic.in/sites/default/files/10_PROTECTION_OF_CHILDREN_-_SEXUAL_OFFENCES.pdf (Accessed: 12 June 2024).

persist in it. While discussing such disadvantages, it also hopes to try to give possible solutions that would help bridge such gaps in the law with respect to this act.

Like the rest of the world sexual abuse of children is not an anomaly and has increased greatly in the recent past. Implications of the act could be seen in the empirical study conducted by the National Crimes Records Bureau, which has revealed that the growth rate of these offences has decreased from 4.681%-4.611%.⁵ It is very important to understand that this law was made keeping in mind the safety of children and stands as a gender-neutral law.

Before such an act was passed, there was no law to protect children from such offences and even though this law has played a very huge role in moving the legislation in the right direction, it does have many flaws. Even though it is a gender-neutral act, a larger proportion of boys are accused of these crimes. The reason behind this could be attributed to the concept of consent that the lawmakers have not kept in mind while making the act.⁶

As a result, no exemption has been provided to allow consenting sexual activity between teenagers, regardless of the victim's or accused's age, gender, or marital status, the POCSO views any sexual contact between teenagers as illegal.⁷ Consent is the mutual understanding and expression of consent or permission amongst all partners to engage in a certain sexual act at a particular time through positive, voluntary words or acts.⁸ The lawmakers have not considered the possibility of two consenting children from the ages of 16-18 to engage in sexual activity, which can pose a major issue while dealing with such cases. These cases are usually filed by the girl's parents when they are unhappy and disapprove of the relationship, and sadly even though it may have been a consensual activity, the boy gets booked under this act.⁹ This leads the girls to have an unfair advantage over the boys, thus, even though this must be a

⁵ Maity, S. and Chakraborty, P.R. (2023) *Implications of the POCSO act and determinants of child sexual abuse in India: Insights at the State level*, Nature News. Available at: <https://www.nature.com/articles/s41599-022-01469-x> (Accessed: 12 June 2024).

⁶ Associates, Q.L. (2022) *Critical analysis on the concept of consent given under the POCSO Act, 2012*, LinkedIn. Available at: <https://www.linkedin.com/pulse/critical-analysis-concept-consent-given-under-pocso/> (Accessed: 12 June 2024).

⁷ Associates, Q.L. (2022) *Critical analysis on the concept of consent given under the POCSO Act, 2012*, LinkedIn. Available at: <https://www.linkedin.com/pulse/critical-analysis-concept-consent-given-under-pocso/> (Accessed: 12 June 2024).

⁸ *What is consent?* (no date) *Stop Sexual Violence*. Available at: <https://stopsexualviolence.iu.edu/policies-terms/consent.html#:~:text=Consent%20is%20agreement%20or%20permission,as%20it%20is%20clearly%20communicated.> (Accessed: 13 June 2024).

⁹ Associates, Q.L. (2022) *Critical analysis on the concept of consent given under the POCSO Act, 2012*, LinkedIn. Available at: <https://www.linkedin.com/pulse/critical-analysis-concept-consent-given-under-pocso/> (Accessed: 12 June 2024).

gender-neutral law, it becomes very disadvantageous to the boys. Getting arrested under this law leads to long-lasting effects on the person's liberty and could destroy a life. Thus, it becomes very important to fill the gaps in the law, for it to be fairer.

There have been instances where girls and their parents have taken advantage of this law, where it has destroyed the boys' lives. In these cases, even the hands of the judiciary because this particular law deals with a very sensitive and important aspect of abuse and even the wordings of the law reflect the same. It becomes very important to handle these cases with utmost care are privacy because it is generally with adolescent kids, and not doing the same could affect the children involved in an adverse manner. This could possibly shape the whole perception of sexual intimacy in a child's mind.

The primary principle followed by the system is "innocent until proven guilty", but only under the cases filed under POCSO is that "guilty until proven innocent".¹⁰ The psyche behind following such a principle for these cases is that the issues that are being dealt with are very heinous and with the contemporary trend of such cases, it does seem to be very important to follow such a principle. Even though the intention behind following such a principle remains to be very important, it can sometimes lead to unfair and unwarranted arrests. Thus, there must be a balance while dealing with POCSO cases with regard to accused children and the principles followed by the legal system. It becomes very important while dealing with adolescent relationships, that not only the victim but also the accused is a child or is a teenager who has believed he has had a consensual sexual relationship with someone but is being booked under harassment or assault. Therefore, when these cases involve adolescent kids or teenage kids, it becomes very important to give both sides a chance to prove their point. Of course, if the case in question involves an obviously older man/person, then POSCO stands as a very effective and reasonable law. This article aims to point out and bridge the gaps in the law only with respect to adolescent boys and consensual relationships.

There have been multiple cases where girls have taken advantage of this exact flaw and have accused their partners of the act just out of resentment, a sort of revenge, etc. Thus, it is my suggestion to look at other methods of justice, while it involves two adolescent kids and maintaining the most privacy while dealing with their identification and the case. I think both

¹⁰ Katju, A. (2019) *Guilty till proved innocent*, *The Indian Express*. Available at: <https://indianexpress.com/article/opinion/columns/pocso-act-protection-of-children-from-sexual-offences-act-5520685/> (Accessed: 13 June 2024).

parties should be asked if they were in a consensual adolescent relationship, and once confirmed further steps to be taken. If they are confirmed to be in a relationship, then an alternate method of dispute resolution must be chosen and must not be taken to court. Finally, it all comes down to consent. Even after being in a relationship, if it is discovered that there was a lack of consent, then the actual criminal process laid down by the act must be followed. But, if it is established that there was prior consent, then it should not be considered a crime under POCSO.

Such a process has been taken in a recent Karnataka case of *Aarush Jain v State of Karnataka*. In cases where murder, rape, etc., you cannot usually quash a complaint of such a nature by coming to a compromise. In this case, it was argued that this was an individual offence, and the public at large was not harmed by quashing this case. It is important to remember that in such cases the future of such kids is at risk, and punishing an innocent person for the same based on a mere technicality issue is not the best idea of justice and would ruin their future.¹¹ Thus it is important to keep in mind a lot of other factors while coming to a conclusion in these cases.

This article does not dispute the process followed by courts in cases involving older men/women. It concentrates only on teenagers and adolescent relationships. Even in cases where a 19-year-old boy dating a 17-year-old girl consensually engages in sexual activities, following this law and act the boy is booked under POCSO which is not very fair under the law. Keeping in mind that this is a very sensitive subject, it is important to realize consent is of the utmost importance while dealing with cases of assault, harassment, etc. Moreover, merely placing a law is not sufficient to curb these events, it also is very important to spread awareness among people. "Consent" in this political climate holds a crucial position in society. In a country like India, where a significant percentage of the population remains to be not very educated, it is common knowledge that they may not understand the true meaning and importance of consent. If the awareness and importance of this word is spread, such a law would have a higher impact and efficiency in the legal and judicial world. It has been an issue in the talks to change the age of consent from 18 to 16 years, but it becomes an issue to do so while trying to fight child marriage and child trafficking. Thus, until another solution for fighting these social

¹¹ *Aarush Jain vs state of Karnataka on 9 September, 2022*. Available at: <https://indiankanoon.org/doc/91939448> (Accessed: 13 June 2024).

evils is found, we need to find alternate methods to fairly judge POCSO cases involving consensually engaged teenagers and kids.

It cannot be overlooked that the POCSO act in a certain way also plays a huge role in ensuring the safety of girls and additionally helps empower them. It gives them a sign of hope and lets them have confidence in the Indian judicial system, thus, even though there is a valid reason behind having such a strict law, it needs to be regulated. It can be thought of as an “unequal” law, that goes against the whole justice system.

Overall, these laws must be regulated, so that neither party can take advantage of the same, which may lead to unlawful arrests and destroy their lives. It is very important to fully understand the idea of consent while delivering judgements for these cases. It is important to also remember that the times have changed, and the age of consent must be set keeping in mind these changes. Children also must be taught the importance of consent. Additionally, these cases must be thoroughly investigated since they may have long-lasting effects on not only the child but also their future.

