



A CRITICAL ANALYSIS OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (POCSO) ACT, 2012

Anjali Bhandari*

ABSTRACT

The Protection of Children from sexual offenses act, of 2012 was made to give specific laws for the handling of sexual offenses against children in India. It categorizes various types of sexual offenses, gives harsh punishment, and child-friendly court procedures. Now with the new Bhartiya Nyaya Sanhita (BNS) 2023 replacing the Indian Penal Code (IPC) how it will impact POCSO is the debate now. This research paper examines closely sections 3 to 10 of POCSO which includes sexual offenses like penetrative and non-penetrative sexual assault, sexual harassment, and child exploitation in pornography. It also discusses protection in sections 19 to 23 which ensure child-friendly procedures, quick trials, and victim's identity protection. The research also discusses how special courts created by the act function to dispose of cases quickly.

BNS 2023 has amended the sexual offences act which impacts POCSO cases. The article explains how BNS has changed sexual offenses rules like definitions of rape, aggravated sexual assault, and child abuse and how it impacts POCSO. Introducing new rules in BNS like reduced investigation timelines and stricter bail clauses can help in enforcing POCSO more strictly. Fears of inconsistency between two acts persist especially in age-of-consent cases, consensual relations among teenagers, and similar definitions of offenses. This research examines landmark court judgments under POCSO. It examines cases that have shaped the debate on the age of consent i.e., cases of consensual teen relationships. It examines the criminalization of texting and sexual exploitation on the Internet and the abuse of POCSO in domestic disputes. A comparison of conviction rates, duration of case trends, and reported offenses will help us to see if the act is working in practice.

*BA LLB, THIRD YEAR, GRAPHIC ERA HILL UNIVERSITY, DEHRADUN.

It also mentions delays in investigation, lapses in supporting the victim, weak conviction rates, and charges of abuse which are preventing the enforcement of the act. It compares India's child protection system with international law and whether the recent reforms are compliant with international best practices. In conclusion, POCSO is an important part of India's child protection law. BNS 2023 brings opportunities and challenges. Strengthening institutions, awareness and same laws will increase child safety. The paper suggests drastic changes including POCSO aligning with BNS, victim support, and enforcement to strengthen India's child protection law.

INTRODUCTION

This study looks into the reforms related to child sexual violence in India specifically the POCSO Act of 2012 and the POCSO rules of 2012. These have changed the legal landscape for child victims and those accused of child sexual violence in the Indian criminal justice system. The law has established special courts with special processes and rules for reporting and recording child victim's testimonies in the pre-trial and trial stages. It has provisions for special courts, judges, public prosecutors, experts like translators, interpreters, and special educators who are trained to communicate with children. It has also introduced support persons to assist child victims throughout the process. One major change is the presumption of the guilt of the accused, unlike the traditional presumption of innocence. The burden of proof has shifted from the prosecution to the accused. The act has also increased the punishment including the death penalty for certain child sexual offences.

POCSO Act 2012 is a whole law to protect children from sexual assault, harassment, and pornography. It ensures the welfare of children throughout the judicial process by making child-friendly procedures for reporting, collection of evidence, investigation, and speedy trial through designated Special Courts. Under this Act, a child means any person below 18 years. It defines various forms of sexual abuse including penetrative and non-penetrative assault, sexual harassment, and pornography. It also includes situations such as "aggravated" sexual assault when the victim is mentally ill.

Or when the perpetrator is in a position of trust or authority over the child like a family member, police officer, teacher, or doctor. Those involved in the trafficking of children for sexual exploitation will be punished under the section of abetment of the Act. The law prescribes severe punishment according to the nature of the offense with life imprisonment and a fine for

the most heinous crimes. The Act also makes the police child protectors during the investigation process. When police receive a report of child sexual abuse, they are supposed to arrange for the child's care and protection immediately. This includes providing emergency medical treatment and if required, putting the child in a shelter home. Also, the police have to inform the Child Welfare Committee (CWC) within 24 hours of receiving the report so that CWC can take necessary steps to ensure the child's safety and well-being.

The Act establishes Special Courts where trials are held in a private setting where the child's identity is kept confidential and child-friendly. The child can have a parent or another trusted person with them during their testimony. They can also request help from an interpreter, special educator, or other professionals while giving evidence. Importantly the child doesn't have to give evidence multiple times in court and can do so via video link instead of appearing in person. The Act also says that cases of child sexual abuse must be completed within one year of the offense being reported. The Special Court can also determine the amount of compensation for the child which can be used for their medical treatment and rehabilitation.

Implementation of the Act relies on State Government involvement. According to Section 39, the State Government is responsible for developing guidelines for the involvement of various individuals and organizations including non-government organizations, professionals, and experts in areas such as psychology, social work, physical health, mental health, and child development. These individuals will support the child during both the trial and pre-trial stages.

IMPORTANT PROVISIONS OF THE ACT

The POCSO Act defines a child as any person below 18 years of age.¹

There are five types of sexual offences against children under the POCSO Act These are:

- penetrative sexual assault;
- aggravated penetrative sexual assault;
- sexual assault;
- aggravated sexual assault;
- and sexual harassment.²

¹ § Section 2 of POCSO Act, 2012

² § Section 3,5,7,9 & 11 of POCSO Act, 2012

Abetment of an offense or an attempt to commit an offense is also punishable under the Act.³ Using a child for pornographic purposes such as the representation of the sexual organ of a child, usage of a child engaged in real or stimulated sexual acts, or the indecent or obscene representation of a child is an offense under the POCSO Act and is punishable.⁴ A Special Court is a court to be set up under section 28 of the POCSO Act to provide a speedy trial and to try the case in a child-friendly atmosphere.⁵ The Special Court shall complete the trial within one year from the date of taking cognizance of the offense.⁶

THE SEXUAL OFFENCES RECOGNIZED UNDER THE POCSO ACT AND THE ASSOCIATED PUNISHMENTS

Penetrative Sexual Assault: According to the Act, a person is guilty of “penetrative sexual assault” if they: (i) insert their penis into a child’s vagina, mouth, urethra, or anus; (ii) make the child perform the same act; (iii) insert any object into the child’s body, or (iv) apply their mouth to any part of the child’s body. The penalty is 7 years to life imprisonment and a fine. The Bill proposes to increase the minimum penalty to 10 years.

Aggravated Penetrative Sexual Assault: The Act categorizes some acts as “aggravated penetrative sexual assault”. This includes a police officer, army personnel public servant, and relative of the child, and also if the assault causes injury to the child’s genital organ or results in pregnancy. The Bill adds two more circumstances to aggravated penetrative sexual assault: (i) if the assault leads to the death of the child and (ii) if it occurs during a natural disaster or similar violent situation. Currently, the penalty is 10 years to life imprisonment and a fine. The Bill proposes to raise the minimum penalty to 20 years and the death penalty as the maximum penalty.

Aggravated Sexual Assault: The Act defines “sexual assault” as touching the child’s vagina, penis, anus, or breasts with sexual intent without penetration. “Aggravated sexual assault” includes if the offender is a relative of the child or if the assault causes injury to the child’s genital organ. The Bill adds two more offenses to this: (i) during a natural disaster and (ii) administering or assisting in administering hormones or chemicals to a child to induce early sexual maturity.

³ § Section 16 of POCSO Act, 2012

⁴ § Section 13 of POCSO Act, 2012

⁵ Section 28 of POCSO Act, 2012

⁶ Section 35 of POCSO Act, 2012

Pornographic Purposes: Under the Act, a person is guilty of using a child for pornographic purposes if they involve a child in any medium for sexual gratification. The Act also punishes those who exploit children for pornographic purposes that result in sexual assault. The Bill defines child pornography as any visual representation of sexually explicit conduct involving a child, including photographs, videos, or digital images that look like an actual child.

Storage of Pornographic Material: The Act penalizes the storage of pornographic material for commercial use with a penalty of up to 3 years imprisonment, fine, or both. The Bill revises this to impose a penalty of 3 to 5 years imprisonment, fine, or both. The Bill also adds two new offenses for the storage of pornographic material involving children: (i) failure to destroy, delete, or report such material and (ii) transmitting, display, or distributing such material except to report it.

KEY CHANGES IN BNS AFFECTING POCSO

Omission of Section 377: The BNS does not include Section 377 of the Indian Penal Code (IPC), which previously criminalized "intercourse against the order of nature." This section historically addressed non-consensual acts, including those involving male victims and bestiality. Its removal suggests that non-consensual same-sex acts involving adult men and acts with animals may no longer be explicitly criminalized under the BNS. However, POCSO continues to criminalize all forms of sexual offenses against children, regardless of gender.

Enhanced Penalties for Child Sexual Abuse: The BNS proposes stricter penalties for offenses such as gang rape of minor girls, including the possibility of the death penalty or life imprisonment. This aligns with POCSO's goal of deterring severe crimes against children but raises questions about the proportionality and effectiveness of such harsh penalties.

Alignment with Contemporary Legislation: The BNS aims to create harmony with existing laws like POCSO, ensuring a cohesive legal framework for child protection. This includes adopting modern definitions and broadening the scope of punishable offenses to tackle emerging challenges in safeguarding children.

IMPLICATIONS FOR POCSO

Legal Gaps and Overlaps: The removal of Section 377 may lead to legal uncertainties regarding non-consensual acts involving adult male victims and bestiality, as these acts are no

longer explicitly addressed. While POCSO covers offenses against children, it is crucial to ensure that adult male victims and other specific situations are adequately protected under the law.

Judicial Interpretation: Courts may need to navigate the relationship between POCSO and the BNS, particularly in cases where definitions and penalties differ. Clear judicial interpretation will be vital to maintain consistency in rulings and uphold the rights of victims.

Policy Considerations: Legislators and policymakers must address the potential gaps resulting from the omissions and changes in the BNS. This includes considering amendments or additional provisions to ensure comprehensive protection for all victims of sexual offences, regardless of age or gender.

In conclusion, while the BNS, 2023, aims to modernize India's criminal justice system, its effects on the POCSO Act require scrutiny. Ensuring that all victims of sexual offenses receive adequate legal protection necessitates addressing emerging gaps and promoting coherence between the BNS and existing child protection laws.

ANALYSIS OF JUDICIAL PRONOUNCEMENTS

Cases Before POCSO 2012 -

Sakshi v Union of India [26th May 2004]: NGO 'Sakshi' moved a writ petition in the public interest to enlarge the definition of rape in child cases. The petition contended that child abuse includes cases where a male organ is inserted into body orifices like the anus or mouth, and also objects are inserted into the vagina. The Supreme Court finally rejected the public interest litigation and declined the petitioner's plea. Still, the Court did give significant instructions for handling cases of rape and child sexual abuse. The legal provisions of the Indian Penal Code (IPC), such as Sections 377, 375/376, and 354, were analyzed. Statistical reports over the years have reflected that penile or vaginal penetration is common sexual abuse against children. Section 377 was found inadequate to deal with such cases. The petitioners cited Article 15(3) of the Constitution, which demands "adequate provisions" and special safeguards for women and children.

State of Karnataka vs. Manjanna [4th May 2000]: Here, a 15-year-old girl victim did not agree to a medical examination as the police referral was not made available. Before the

POCSO Act came into force, there were no set rules to provide adequate care and timely action to safeguard child victims of sexual abuse.

Cases after POCSO Act 2012 -

Nishu v. Commissioner of Police: Here, a nine-year-old girl was abducted by nine persons, who raped her repeatedly, one of whom was a Haryana Police constable. The prosecution failed to file any medical evidence or FIR copy, as mandated by Section 376D of the IPC and corresponding provisions of the POCSO Act. The court decided that it would not be proper to use its powers under Article 32, as the Haryana Police had already investigated the issue.

Attorney General for India vs. Satish and Another: The Bombay High Court's Nagpur Bench held that, according to the POCSO Act of 2021, touching a child's breasts without "skin-to-skin contact" amounts to molestation. This ruling by Justice Pushpa Ganediwala was widely criticized. In the Attorney General for India vs. Satish and another case, which was before a bench with 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 had appealed against the order of the High Court.

COMPARATIVE ANALYSIS OF CHILD PROTECTION LAWS: POCSO AND INTERNATIONAL LEGAL FRAMEWORKS

United Kingdom: Sexual Offences Act 2003: The Sexual Offences Act, of 2003, of the United Kingdom is a complete classification of sexual offenses, such as sexual grooming, exploitation, and child pornography. The age of consent is 16 years, distinguishing between consensual relationships and sexual abuse. The law is strict in its approach to abuse by a person in trust, like a teacher and carer, and criminalizes Child Sexual Exploitation (CSE) so that coercion and abuse of children are penalized. The UK also has a robust online protection system, with strict controls on the dissemination of child pornography and internet-based crimes. Punishment varies from life imprisonment for child rape below the age of 13 years, with sentencing to take into account factors such as psychological harm, coercion, and repeat offending. However, with the comprehensiveness of the law, enforcement is a problem, especially in preventing trafficking and online grooming.

Canada: Criminal Code and Youth Protection Act: In Canada, the Youth Protection Act and the Criminal Code govern child protection, with the age of consent being set at 16 years

and exceptions made for "close-in-age" parameters. In particular, this allows for a 14-year-old to consent to a sexual relationship with a partner as much as five years older, thereby allowing teenagers, who would be harmed if such relationships were criminalized, to make their associations, and thus protect children against exploitation. Canada's laws against child pornography, online sexual harassment, and grooming are anathema, with strict minimum sentences for all child sex crimes. Child abuse

Cases are adjudicated in specialized family courts with a victim-sensitive legal framework. A strength in the area of child protection within the Canadian justice system lies in its cross-border effects, such as tracking down online sex offenders and human traffickers. A shortcoming includes difficulty in prosecuting offenders online in many jurisdictions, as well as the protracted legal process.

Australia: Criminal Code and Child Protection Laws: Child protection laws in Australia, being both federal and state legislation, vary by age of consent, with some states setting it at 16 years, and some at 17 years. Child exploitation, online abuse, and human trafficking laws in Australia are all-age types of laws that have been set up to battle these vices comprehensively. It includes criminalizing child exploitation material (child pornography), child grooming, and sexual acts with minors: penalties can include life imprisonment for aggravated offenses. The role of the e-safety Commissioner is vital in this regulation because it allows the rapid removal of illegal kinds of content. Protection orders are available for victims, ensuring continuing safety measures from offenders. Even though Australia has pretty firm laws on the prevention of exploitation by cyberspace, it faces the challenge of enforcing them consistently across states, as well as the much higher rate of child sexual abuse in Indigenous communities.

Germany: Criminal Code (Strafgesetzbuch) and Child Protection Laws: The age of consent according to German criminal law (Strafgesetzbuch) is set at 14 years, provided the prospective partner neither holds nor appears to hold an authoritative position nor is more than three years older. Germany adopts a strict approach towards child pornography, trafficking, and sexual abuse, making serious sexual offenses punishable by imprisonment for life. Prevention assumes paramount importance in Germany. Hence, compulsory education on the rights of children, consent, and the prevention of sexual abuse, as well as other related topics, has been integrated into the curriculum of the schools. Germany also has juvenile justice procedures that are as far as possible devoid of traumatizing cross-examination in terms of how

they are administered. The rising trend of online exploitation of children has emerged as an area for concern, requiring better enforcement and surveillance measures.

CONCLUSION

The Protection of Children from Sexual Offences (POCSO) Act, 2012, is a significant piece of legislation designed to provide comprehensive legal protection for children against sexual crimes in India. By defining various types of abuse, imposing strict penalties, ensuring child-friendly procedures, and mandating mandatory reporting, POCSO creates a robust framework for addressing crimes against children. Its gender-neutral stance and emphasis on victim protection position it as a progressive law compared to many international legal frameworks.

However, despite its solid legal foundation, the implementation of POCSO encounters several challenges. The blanket criminalization of all sexual activity involving individuals under 18, without exceptions for consensual adolescent relationships, has resulted in unintended legal repercussions, including wrongful prosecutions. The slow pace of investigations and trials, inadequate infrastructure in special courts, and insufficient training for law enforcement personnel further impede the law's effectiveness. Additionally, there has been a notable increase in online child sexual exploitation, highlighting the need for stronger cyber regulations and specialized investigative approaches.

To enhance the effectiveness of POCSO, several reforms are essential, including:

- Revising the age of consent provisions to avoid the criminalization of consensual adolescent relationships, similar to Canada's close-in-age exemptions.
- Improving enforcement mechanisms by ensuring swift trials, better victim support systems, and stricter adherence to mandatory reporting requirements.
- Strengthening cybercrime laws to tackle the rising threat of online child exploitation, inspired by models like Australia's e-Safety Commissioner.
- Investing in specialized training for law enforcement and the judiciary to facilitate child-sensitive investigations and prosecutions.
- Increasing public awareness and educational programs to prevent abuse, promote reporting, and support the rehabilitation of victims.

While POCSO is a vital legal instrument in the fight against child sexual abuse, its full potential can only be achieved through effective implementation, necessary amendments, and improved

enforcement mechanisms. A collaborative approach involving law enforcement, the judiciary, child rights organizations, and civil society is crucial for establishing a stronger and more child-centric legal system in India.