**POCSO ACT : AN OVERVIEW (A STEP TOWARDS PROTECTION OF CHILDREN FROM SEXUAL ABUSE)**

# Introduction

*“Childhood should be carefree, playing in the sun; not living a nightmare in the darkness of the soul”- Dave Pelzer*

No social problem is as universal as oppression of the child. The crime involving sexual offence has been increased drastically all over the countries in the world since last two decades; it is not only fatal but also life threatening. As a matter of fact the shameful crimes see no gender or age the truth still remains that the children are most vulnerable section of society & they are being targeted by the offender. Because children are of tender age, they can be easily be persuaded by the offender in lust of something form them like toys, chocolate, new clothes etc , they are having less understanding of what is good & what is bad. Till 2012 there was no any specific legislation to deal with the sexual offence against children. The Protection of Children from Sexual Offences Act (“POCSO”) was introduced in 2012 and it derive its breath from Article 15 constitution of India which confers a power upon state to make special provision for children. The POCSO 2012 was formulated in order to effectively address sexual abuse and sexual exploitation of children. It provides for protection of children from offences of sexual assault, sexual harassment and pornography. Before this Act, most of the sexual offences are covered under IPC, 1860. But IPC does not provide for all types of sexual offences against children and it is general legislation, it does not distinguish between adult and child victims. Further, forms of sexual abuse, like showing pornography to children could not be prosecuted; unless there was penetrative sexual assault. There were no provisions that could prosecute sexual offences against boys.

The prime focus of this article would be POCSO Act its silent features and scope, and broad interpretation on sec 2(d)[[1]](#footnote-2) through various judicial pronouncements and trial process under the act.

**Salient Feature of POCSO Act, 2012**

### Burden of proof on accused

POCSO requires the defendant to bear the legal burden of proof whereas the prosecution, according to the plain reading of the Act, would not even bear an evidentiary burden of proof.[[2]](#footnote-3) Section 29[[3]](#footnote-4) provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3[[4]](#footnote-5), 5[[5]](#footnote-6), 7[[6]](#footnote-7) and section 9[[7]](#footnote-8) of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, unless the contrary is proved. The law trust on children and ensures that the pressure is not on the child to prove that the crime took place.

The constitutionality of a provision reversing the burden of proof is determined by (a) nature of case; (b) the statutory objectives; and (c) the state’s responsibility to protect innocents.[[8]](#footnote-9) The SC held that as long as the defendant’s human rights are protected, Parliament can deal with social problems as best as it can be.[[9]](#footnote-10) If for the protection of child sex abuse the burden of proof is reversed then it is completely justified as it is done to protect the children from sexual abuse.

### Enactment of Child Friendly Procedure in Court

POCSO Act provides for child friendly measures as for instance, it clearly mentions that the child need not be taken to the police station to report a case of sexual offence. Rather it directs the police (to be not in uniform and as far as practicable a woman officer not below the rank of Sub-inspector) to reach out to the child, based on the child’s preference and convenience.[[10]](#footnote-11) The Act prescribed that the evidence of the child shall be recorded within a period of 30 days of the special court taking cognizance of the offence and reasons for delay if any, shall be recorded by the special court.

### Assistance of Support Person

POCSO Act assumes that it is not easy for child & family to handle sexual offence. So this act makes provisions for the assistance of expert to the child for pre-trial & trial stage.[[11]](#footnote-12) Under Rule 4 (7)[[12]](#footnote-13) of POCSO Rules, 2012, Child Welfare Committee is to appoint Support Person to render assistance to the child through the process of investigation and trial.

### Punishment for failure in Reporting or Recording a case

POCSO Act also provides for punishment to any person who fails to report or record the commission of an offence u/s 19(1)[[13]](#footnote-14) or 20(2)[[14]](#footnote-15).[[15]](#footnote-16)

### Accountability of Every Citizen towards Child Protection

POCSO Act makes it mandatory for every citizen to report cases of sexual offences against children to the police.[[16]](#footnote-17)

### Confidentiality of the Child and the Family

Media has to secure the identity and privacy of the child. Disclosing or publishing the identity of the child victim by mentioning name, address, photograph, family detail, school, neighborhood or any other particulars is punishable with imprisonment of not less than six months but extendable to one year or with fine or with both. It also prohibits making of negative reports that cause harm to the child’s reputation. Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.[[17]](#footnote-18)

### Calibration of Offences

POCSO Act addresses a wide range of sexual offences which include anything from complete and partial penetration; non-penetrative sexual assault; stalking of a child; showing children pornography; using the child for pornography; exhibitionism etc. The law protects children from both physical and or non-physical contact forms of abuse.[[18]](#footnote-19)

# Scope & objective of the Act

Article 15[[19]](#footnote-20) of the constitution confers duty upon state to make special provision for children. Further Article 39[[20]](#footnote-21) provides that the State shall in particular direct its policy towards securing the tender age of children and are not abused and their childhood and youth are protected against exploitation. The POCSO Act

1. Ensure the healthy physical, emotional, intellectual and social development of the child.
2. Undertake all appropriate national, bilateral and multilateral measures to prevent:

i. The inducement or coercion of a child to engage in any unlawful sexual activity;

ii. The exploitative use of children in prostitution or other unlawful sexual practice;

iii. The exploitative use of children in pornographic performances and material

1. Sexual exploitation and sexual abuse of children are heinous crime and need to be effectively addressed.

# Definition of “child”

According to sec 2 (d) of POCSO Act “child” means any person below the age of 18 years. ”child” means any person below the age of eighteen years and includes any adopted, step or foster child.[[21]](#footnote-22) Clause (aa) of Section 3[[22]](#footnote-23) of the Immoral Traffic (Prevention) Act defines “child” means a person who has not completed the age of sixteen years.

When a plea is raised on behalf of an accused that he was a “child” within the meaning of the definition of the expression under the Act, it become obligatory for the court, in case it entertains any doubt about the age claimed by the accused, to hold an inquiry, itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard.[[23]](#footnote-24)

Various ages of legal capacity is a phenomenon that can be seen in different legislation in India. Regarding certain aspects that are deeply rooted in the community, and compounded by historical poverty and vulnerable socio-economic condition, there is a gap between laws and their enforcement.

In the landmark case Supreme Court in *Eera v. State (Govt. of NCT Delhi)[[24]](#footnote-25),* the court ruled out that the POCSO Act has identified minors and protected them by prescribing the statutory age which has nexus with the legal eligibility to give consent. The Parliament has felt it appropriate that the definition of the term “age” by chronological age or biological age to be the safest yardstick then referring to a person having mental retardation. It may be due to the fact that the standards of mental retardation are different and they require to be determined by an expert body, degree is also different. Parliament as it seems, has not included mental age. It is within domain of legislative wisdom. Purpose of POCSO Act is to treat minors as class by itself and treat them separately so that no offence is committed against them as regards sexual assault, sexual harassment and sexual abuse. Sanguine purpose is to safeguard interest and well-being of children at every stage of judicial proceeding. It categorically makes distinction between child and an adult. On reading of POCSO Act, it is clear that it is gender neutral. In such situation, to include perception of mental competence of victim or mental retardation as factor will really tantamount to causing violence to legislation by incorporating certain words to definition. By saying “age” would cover “mental age” has potential to create immense anomalous situations without there being any guidelines or statutory provisions. If a victim is mentally retarded, definitely the court trying the cases shall take into consideration whether there is consent or not. In certain circumstances it would depend upon degree of retardation or degree of understanding. It is difficult to say in absolute terms. Only conclusion that can be arrived at this definition of sec 2 (d) defining term “age” cannot include mental age.[[25]](#footnote-26)

# Trial Procedure as Per POCSO Act

Prosecution by Special Public prosecutor u/s32

Victim compensation Rule 7

Take measures to prevent victim coming face to face with accused u/s 33 (7) & u/s 36

Child to be provided help of interpreter / translator/special educator u/s 19 (4) & Rule 3 (67)

Support person Rule 4(7)

Counseling u/s 40

Children homes Rule 4(4) or shelter home

Restoration to family/ guardian or fit person Rule 4

Special court (child friendly) shall complete trial within one year of cognizance u/s 28 & 33

CWC to determine child’s stay within 3 days, if the police/SPJU report indicates that a child is in need of care and protection Rule 4(4)

Recording of the statement by the magistrate u/s 25

Take the child to shelter home/ hospital u/s 19(5)

Take the child for medical examination by doctor and girl child to be examined by female doctor u/s 27(2) Rule5

Recording of statement by SJPU/ local police within 24 hrs

Reporting the incident to local police/SJPU u/s 19

Child Sexual Abuse

Note: - As per circumstance of the case

Chapter V of POCSO deals with procedure for reporting of cases. Section 19[[26]](#footnote-27) provides that Complaint for such offence can be made to the local police or Special Juvenile Police Unit (SJPU), if it has been made by the child itself the report will be recorded in a simple language so that the child understands the content of the report. Within 24 hours of the report, if the child is in need of care and protection then SJPU or local Police has to make immediate arrangements for that purpose such as obtaining emergency medical treatment for the child and placing the child in a shelter home, and bringing the matter in front of the Child Welfare Committee (“CWC”), should the need arise. POCSO also provides for the establishment of Special Courts for trial of offences falling under the act, apart from CWC such matters should also be reported to these special courts.[[27]](#footnote-28) If they fail to record such offence, they will be liable for punishment i.e. imprisonment of 6 month (max) and fine.

The media has been barred from disclosing the identity of the child without the permission of the Special Court.[[28]](#footnote-29) The Punishment for contravening this provision may be from 6 month to 1 year and fine.

Chapter VII of POCSO deals with Special Courts which are established for the purpose of providing speed trial. Under Section 28 of POCSO, State Government in consultation with Chief Justice of High Court can designate a Court of Session to be a Special Court for each district. Provisions of Code of Criminal Procedure, 1973 will apply to the proceedings before Special Courts.[[29]](#footnote-30)

Powers and Procedures of Special Courts are discussed under Chapter VIII of POCSO i.e. Section 33-38. Special Court can take cognizance of any offence under this act upon receiving a complaint or on the police report itself. Counsel of Accused cannot put questions directly to child during examination-in-chief, cross-examination or re-examination, question will be put before the special court first then it will communicate the same to child. A child friendly atmosphere shall be created by the court i.e. it can allow the family members or guardian to be present in court. If any child has committed an offence under the act or his/her age is in question before the court then Special Court has power to determine the age of such person and it shall record in writing its reason for such determination. Timeline is given for recording of evidences (30 days from the date of taking cognizance) and completion of trial (1 year from the date of taking cognizance)[[30]](#footnote-31). Trials of such cases will be in camera and in the presence of the parents of child or guardian if any.[[31]](#footnote-32) Assistance of an interpreter or expert can be taken by the Special Court while recording the evidence of child.

# Judicial Activism

Judiciary has with different pronouncement secured the right of children who are sufferer of sexual abuse and interpret the provisions enumerated in POCSO Act. The children are most vulnerable group in the section of society. A proper check and balance should be maintained by judiciary for the enforcement of right of children u/d POCSO Act. Here are some of the judgments by the different court in order to ensure child rights.

In the case of *Gajraj Singh v. State of U.P.[[32]](#footnote-33)* , the Hon’ble Court said that it is a well-settled law that a minor cannot be confined in Nari Niketan against her wishes. In this regard, the Judgment of this same Court was put forth. In the case of *Smt. Parvati Devi v. State of U.P. and another[[33]](#footnote-34),* it has been observed by the Apex Court that the confinement of a victim in Nari Niketan against her wishes cannot be authorized under any provisions of the Code. There is no such legal provision wherein the Magistrate has been authorized to issue directions that a minor female child shall, against her wishes, be kept in Nari Niketan. Therefore, Court held that it is clear cut case of illegal confinement of minor against her wishes violating fundamental right. Hence, the impugned order of the Special Judge/ Additional Sessions Judge is hereby quashed.

In *Siddu v. State of Karnataka and Ors.[[34]](#footnote-35),* the Hon’ble Court interprets Section 34 of POCSO Act. Court said that the main object of considering the age of the accused under Section 34 of the POCSO Act 2012 is to decide which is the proper Court to try the accused and also sentence him. If the accused is held to be less than 18 years and is a Juvenile, the learned Sessions Judge will lose his power to conduct trial and the Juvenile Justice Board alone is competent authority to try and dispose of the case, in accordance with the said special enactment.

The *State of Rajasthan v. Manoj Pratap Singh*[[35]](#footnote-36) , in this case Court heard the witnesses which stated that the deceased had been subjected to great cruelty at the time of committing rape and the subsequent murder thereafter. Doctor who has proved the postmortem report also gave a statement that before the death of the deceased; she was brutally raped and died on account of head injury. Court referred one supreme case i.e. *C. Chenga Reddy v. State of A.P*.[[36]](#footnote-37) , where it has been held that in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature, moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. That apart, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. Hon’ble Court in the instant case reached to a conclusion that there is enough circumstantial evidence to link and proves that accused had committed a brutal and heinous crime of rape upon young girl of who was only 8 years old. In the present case, court held that the death sentence is justified as the nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and\ uncommonality. It is diabolical and barbaric.[[37]](#footnote-38)

# Conclusion

POCSO Act only allows justice for children who are victims of sexual offences but also takes into account the best interests and well-being of the child. POCSO Act provides for child friendly measures as for instance, it clearly mentions that the child need not be taken to the police station to report a case of sexual offence. Special Courts which are established for the purpose of providing speed trial. Special Court can take cognizance of any offence under this act upon receiving a complaint or on the police report itself. A child friendly atmosphere shall be created by the court i.e. it can allow the family members or guardian to be present in court.

According to Crime in India, 2014 of National Crime Records Bureau (NCRB), crimes committed against children were observed as 20.1 per one lakh population of children (up to 18 years of age). A total of 10,854 cases of child rape were reported in the country during 2015 as compared to 13,766 in 2014 accounting for a decrease of 26.8 percent during the year 2015. However, the number of cases of child sexual abuse under the POCSO Act has increased. Proper check and balance should be maintained for enforcement of POCSO Act and also have a check on this mechanism to reduce the cases of child sex abuse, pornography, child harassment. Judiciary has also a role to play as their check and balance is mandatory for enforcement of right of child. Judiciary has with different pronouncement secured the right of children who are sufferer of sexual abuse and interpret the provisions enumerated in POCSO Act. The children are most vulnerable group in the section of society.

This act is gender bias from interpretation as it focuses more on girl child rather than boy child. As sexual abuse can be of both the child and nowadays the rate of sexual abuse has been increased drastically. The mechanism under the act should be simpler so that child and their family do not fear to report the case. There is no. of cases of sexual abuse where children do not tell to their parents. Children are afraid that the person who groomed and abused them will stop loving them or get in trouble because of them. This is because of manipulations during the ‘grooming’ process and is also true in cases where the offender is a family member. Social awareness will play a major role which will encourage the child & family to report the cases of sexual abuse.

1. Section 2(d), Protection of Children from Sexual offences, 2012. [↑](#footnote-ref-2)
2. Section 29,Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-3)
3. Section 29,Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-4)
4. Section 3 Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-5)
5. Section 5, Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-6)
6. Section 7, Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-7)
7. Section 9, Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-8)
8. Noor Aga v. State of Punjab, (2008) 16 SCC 417. [↑](#footnote-ref-9)
9. Ibid. [↑](#footnote-ref-10)
10. Section 24, Protection of Children from Sexual offences, Act 2012. [↑](#footnote-ref-11)
11. Section 39, Protection of Children from Sexual offences, 2012. [↑](#footnote-ref-12)
12. Rule 4(7), Protection of Children from Sexual offences Rules, 2012. [↑](#footnote-ref-13)
13. Section 19(1), Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-14)
14. Section 20(2), Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-15)
15. Section 21, Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-16)
16. Section 19, Protection of Children from Sexual offences, 2012. [↑](#footnote-ref-17)
17. Section 23, Protection of Children from Sexual offences, 2012. [↑](#footnote-ref-18)
18. User handbook on protection of children from sexual offence, National Commission for Protection of Children, at page no. 11, <http://pmc.gov.in/sites/default/files/69301171.pdf> [↑](#footnote-ref-19)
19. Article 15, Constitution of India, 1950. [↑](#footnote-ref-20)
20. Article 39, Constitution of India, 1950. [↑](#footnote-ref-21)
21. Section 2(b),Protection of Women from Domestic Violence Act, 2005. [↑](#footnote-ref-22)
22. Section 3, Immoral Traffic (Prevention) Act,1986. [↑](#footnote-ref-23)
23. Bhole Bhagat v. State of Bihar, AIR 1998 SC 236: 1998 Cri LJ 390. [↑](#footnote-ref-24)
24. AIR 2017 SC 3457. [↑](#footnote-ref-25)
25. Eera v. State ( Govt. of NCT Delhi ) , AIR 2017 SC 3457 ( para 82, 83,85,87) [↑](#footnote-ref-26)
26. Section 19, Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-27)
27. Section 19(6), Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-28)
28. Section 23, Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-29)
29. Section 31,Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-30)
30. Section 35 of Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-31)
31. Section 37 Protection of Children from Sexual offences Act, 2012. [↑](#footnote-ref-32)
32. 2015 (3) ADJ 350. [↑](#footnote-ref-33)
33. 1992 All Crl C 32. [↑](#footnote-ref-34)
34. 2015 MANU (KA) 0865. [↑](#footnote-ref-35)
35. 2015 Manu (RH) 0853. [↑](#footnote-ref-36)
36. (1996) 10 SCC 193. [↑](#footnote-ref-37)
37. State of Rajasthan v. Manoj pratap singh, 2015 Manu (RH) 0853. [↑](#footnote-ref-38)