

# Study on Protection of Children from Sexual Offences (POCSO) Act

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## ABSTRACT

To deal with sexual assaults and exploitation over children, the government has established a special law, POCSO Act, 2012. The said Act sanctions every recognised offences of sexual abuse against children by prescribing stringent punishment keeping in mind the gravity of offence. There is divergent progression of the Act to ensure justice is prevailed. The medical examination of the victim shall be done with minimum distress as possible. The POCSO Amendment Act, 2019 was enacted to enhance the punishment upto death penalty and to curb child pornography. However, the amendment seems to be arbitrary and vague. Below stated are certain provisions of Amendment Act, 2019 which the authors suggest to be arbitrary and vague in nature.

## INTRODUCTION

Section 4(2) of the POCSO Act, which was inserted by the POCSO Amendment Act of 2019 provides for a classification that is unreasonable and is in violation of Article 14 of the Constitution.

Article 14 provides for the "equal protection of laws". It prohibits class legislation but permits reasonable classification of persons or things. The classic nexus test was set forth in the Anwar Ali Sarkar case thus;

"In order to pass the test of permissible classification two conditions must be fulfilled viz.

- That the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others left out of the group, and
- That the differentia must have a rational relation to the objects sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct and what is necessary is that there must be nexus between them." <sup>1</sup>

This test laid down by the Hon'ble Supreme Court in Anwar Ali Sarkar case has been reiterated and applied in the subsequent cases dealing with the issue of violation of Article 14 by the court. For instance, in D. S. Nakara v. Union of India<sup>2</sup>, a classification which was made between the pensioners who retired before a specific date and those who retired after that date was held unreasonable by the Court and it was held arbitrary. Thus, it was an infringement of Article 14 and as a result, the Rule 34 of Central Services rules was set aside.

Before the POCSO Act was passed in 2019, the punishment for committing penetrative sexual assault as per POCSO Act 2012 was from seven years imprisonment till life and also fine. The Act of 2019 increased the minimum term of punishment from 'seven' to 'ten' years by inserting Section 4(1) <sup>3</sup> and also inserted two sub-clauses to Section 4:- Section 4(2) & 4(3).

Now, the new sub-clause (2) inserted by the Act provides punishment for the offenders who commit penetrative sexual assault on a child below sixteen years of age. It is pertinent to note that the minimum term of imprisonment (twenty years) has also been increased under this newly inserted clause.

By inserting this sub-clause (2), the legislature makes a classification between a child who is below sixteen years of age and a child who is above the age of sixteen, but below eighteen. However, the legislature has defined a "child" as 'any person below the age of eighteen years', for the purposes of this Act. Thus, the above classification should be a reasonable classification since it has been made within the same group, i.e., 'children'.

There can be no intelligible differentia in this classification. The differentia in this classification is vague, since there is an uncertainty in determining the age of maturity factor. For instance, A seventeen-year-old child may have the same maturity as a fifteen-year-old one and in some cases, it may be the other way around. At times, some may attain maturity at the age of nineteen only, whereas some may attain maturity at seventeen itself. A fifteen-year-old child can appear like a nineteen-year-old one.

It is to be noted that the differentia must have a rational relation to the objects sought to be achieved by the Act. The object of this Act is to protect children from the offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. Hence, the main objective of the Act being to protect the children, this differentia in no way has a nexus to the objects sought to be achieved by the Act. This classification gives way for the thought that raping a child below sixteen years is a graver offence, whereas on the other hand raping a child of sixteen or seventeen years of age, who may have the same maturity as some children belonging to the other class is not considered to be a graver offence. This classification thus, is unreasonable and hence violative of Article 14.

Also, the newly inserted sub-clause (3) states as “The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.” It is pertinent to note that the newly inserted clause (2) also provides for the payment of fine in case of committing the offence, but the sub-clause (3) does not speak about the fine imposed by Section 4(2). Is it not necessary that the fine imposed under Section 4(2) should be reasonable and should it not be used for the rehabilitation of the victim?

## ANALYSIS

### **Sexual Harassment:**

Section 11 and 12 of the POCSO Act provides for the provisions regarding sexual harassment and punishment therefor. Section 11 states as “A person is said to commit sexual harassment of a child when such person with sexual intent...” Also, it has been provided that any question which involves “sexual intent” shall be a question of fact. It is an ascertained fact that it is well known that the question involving intention is very difficult to prove before the Court of law. Also, there arises a question whether an offender performs the acts listed in Section 11 without sexual intention, will it not amount to sexual harassment? Even Section 354A of the Indian Penal Code, which describes Sexual Harassment does not use the term “sexual intent”, since it is not a mandatory requirement for committing sexual harassment. Thus, the term sexual intent creates a loophole in Section 11 of the Act, which will favour the offenders.

### **Chaos Regarding The Understanding Of The Life Imprisonment:**

The POCSO Act leaves behind some controversies and confusions with regard to the understanding of the concept of life imprisonment. Sections 4(2) and 6(1) inserted by the POCSO Act 2019 use the words “imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person”, instead of just using the term “imprisonment for life” as in Sections 4, 6, 14(2), 14(3) of the principal Act. This new insertion of words leads to a misunderstanding that the latter mentioned Sections do not provide for the punishment of life imprisonment for the remainder of natural life of that person. It is not necessary to mention in a provision that life imprisonment means imprisonment for the remainder of natural life of that person, because it deems that the other existing provisions that do not mention so, do not mean the same.

Section 53 of the Indian Penal Code provides for the imprisonment of life. Imprisonment of life means a sentence of imprisonment running throughout the remaining period of a convict’s natural life, unless it is commuted or remitted by competent authorities.<sup>4</sup> “Imprisonment of life is not equivalent to 14 years or 20 years of imprisonment. There is no provision either in the IPC or the Code of Criminal Procedure whereby life imprisonment could be treated as 14 or 20 years without there being a formal remission by the appropriate government. He can, however, be released if the appropriate government passes a separate order remitting the unexpired portion of his sentence.”<sup>5</sup>

While the Courts in India has been reiterating upon the question that the term imprisonment for life means the imprisonment for the remainder of natural life, inserting provisions such as Sections 4(2)<sup>6</sup> and 6(1)<sup>7</sup> bearing such words, is very much likely to disregard the punishment of life imprisonment. It also loses its deterrent

effect since the offenders punishable under Sections 14(2)<sup>8</sup> and 14(3)<sup>9</sup> will use this as a loophole and escape from their original sentence of life imprisonment.

Also, one more important point to be noted in this regard is that, is it possible to calculate the term “One half of life imprisonment”? Section 18<sup>10</sup> of the Act provides for the punishment for attempt to commit an offence. It provides that the maximum punishment shall be a term which may extend to one half of the imprisonment for life. It may be 20 or 30 years or any term which is not fixed. Not fixing the maximum term of punishment, it leaves to the judges to decide upon it. This term ‘one half of life imprisonment’ is uncertain. It leads to many possible interpretations for fixing the maximum term of punishment and hence the provision is vague and is therefore violative of article 14 of the constitution.

#### **Including Death Penalty As A Punishment:**

The new amendment made in the Act by the POCSO Act 2019 has in fact reduced the deterrent effect by including death penalty as a punishment. Section 6(1), which was inserted substituting the Section 6 of the principal Act provides death penalty as the maximum punishment for aggravated penetrative sexual assault.

The introduction of death penalty might be even more problematic in such cases where the offender is a family member of the victim or the survivor. As per the National Crime Records Bureau (NCRB) report crime in India, 2016, 94.6% of cases registered under rape with penetrative sexual assault against children were committed by the people known to the victim. Seeing in a realistic perspective, there are very remote chances in cases where a child is sexually abused by family member or a relative, they will come forward and register a complaint, knowing that the complaint will lead to death of the person concerned. Thus, there is a high possibility of lesser number of cases being reported. The introduction of death penalty might also increase the chances of high rape and murder cases, since the disclosure of sexual act by the survived victim can lead to death penalty.

Further, as stated by the Law Commission’s 2015 report on death penalty, there is no empirical evidence exists to suggest that death penalty has a deterrent effect over and above life imprisonment.

#### **Are Sections 29 And 30 Of The Act Constitutionally Valid?**

The provisions of §29 and §30 of the POCSO Act, 2012 are in violation of Right to free and fair Trial guaranteed under Article 21, and are completely in violation of Article 14.

#### **The presumption is against the general principles of criminal law:**

An accused is presumed to be an innocent until proven guilty. The onus of proving that the accused is guilty lies on the prosecutor. This principle is based on the maxim, ‘Ei Incumbit Probatio Qui Dicit, Non Qui Negat’, which means the burden of proof rests on the one who asserts and not on the one who denies. Sec.29<sup>11</sup> presumes even actus reus which is fundamentally against natural Justice.

The presumption of mens rea under Sec. 30<sup>12</sup> is unconstitutional. Although many other enactments have similar provisions such enactments mostly deal with white collar crimes or crimes where mens rea can be presumed because of very nature of the Act. Sec.106 of Evidence Act, 1872 itself would suffice in such cases. However, in the case of POCSO is an offence where mens rea is required to be proved. Nobody may be able to prove that the offender had touched a child with love and affection and not with any bad motive beyond all reasonable doubt.

Presumption of innocence is a fundamental human right under various international human rights instruments. Article 11(1) of UDHR reads ‘Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to the law in a public trial at which he has had all the guarantees necessary for his defence.’

#### **Sections 29 & 30 are in violation of Article 14:**

“In order to pass the test for permissible classification two conditions must be fulfilled, namely- The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group the differentia must have a rational relation to the object sought to be achieved by the statute in question.”<sup>13</sup>

The classification, however, must not be —arbitrary, artificial, or evasive but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the

legislation.<sup>14</sup> In the absence of a just cause to the classification, the classification is deemed discriminatory and ex facie are in violation of Article 14.<sup>15</sup>

The classification made in the Act is that the offenders under the POCSO Act are treated differently from other offenders by shifting the burden of proof beyond all reasonable doubts to the defence. This classification of shifting the burden of proof as per Sections 29 and 30 of the POCSO Act are completely unreasonable and have no nexus to the object sought to be attained. Thus, there is no intelligible differentia in the classification made, thereby clearly violating Article 14.

#### **Violation of Right to Free and Fair Trial and International Human Rights:**

The fair trial is the heart of criminal jurisprudence.<sup>16</sup> The right to fair trial is a part of various international human rights instruments. Article 6 of the ECHR<sup>17</sup>, Article 8 of the Inter American Human Rights Convention<sup>18</sup> and Article 14 of the ICCPR<sup>19</sup> guarantee a right to fair trial as a human right. The Supreme Court in the case of Jolly George Verghese v. Bank of Cochin<sup>20</sup> held that such international human rights even when not ratified can be read down as a part of the fundamental rights guaranteed under the constitution. A fair trial is a fundamental right which flows from article 21 of the Constitution.<sup>21</sup> Denial of the fair trial is the denial of human rights.<sup>22</sup> Fair trial actually means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.<sup>23</sup> These principles of Right to free and fair trial have been completely violated per se when a bias and prejudice is created against the accused.

The provisions of Sections 29 and 30 of the POCSO Act state that the duty prosecution is over at the point of framing of the charges itself and needn't establish their case. Prosecution has been defined in a plethora of cases "a criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime"<sup>24</sup>. 'Prosecution' is mentioned as "Institution or commencement of a criminal proceeding, the process of exhibiting formal charges against an offender before a legal tribunal and pursuing them to final judgment on behalf of the state or government or by indictment or information."<sup>25</sup>

From all these various definitions of prosecution itself it is very clear that the duty of the prosecution is done with mere framing of charges and it is to the accused to prove himself no guilty which is clearly in violation of his rights to free and fair under Article 21. The case of the prosecution cannot be allowed to rest on a preponderance of probabilities.<sup>26</sup> The provisions are clearly arbitrary against the accused, thus affecting the Right to Free Trial guaranteed under Article 21, and clearly violating of the provisions of Criminal Procedure code as well. Thus, the provisions Section 29 and Section 30 of the POCSO Act are unconstitutional and needs to be struck down.

#### **Treating A Minor Accused As A Juvenile:**

Section 34 of the Amended act states that when any offence is committed by a child as prescribed in the provision, they shall be treated under the Juvenile Justice Act, 2015 and accordingly any question regarding to the age of the person is in dispute, it would be determined by the Special Court.<sup>27</sup> On perusal of the above section, it states that if any child who is less than 18 years commits any offence mentioned under the Act shall be dealt under the Juvenile Justice Act and the age aspect of whether he is a minor or not is a question of law to be answered by the Special Court.

By virtue of it, when a minor accused has committed a sexual offence, the Court would look on to the question as to whether he shall be treated under the Juvenile Justice Act or POCSO Act. This is done on the basis of questioning the age of the accused, but the assault committed is never taken into consideration. As a result, minors who commit heinous crimes are not punished for the gravity of offence which they have committed. In the infamous Kathua Rape case, wherein an 8-year innocent girl was kidnapped and raped by 8 accused, of which six of them were found guilty and one has been acquitted on benefit of doubt and the other accused who was a minor, was tried under Juvenile Court. It is pertinent to note that, the investigators state that on 10<sup>th</sup> of January the girl was kidnapped by the juvenile and later on the very same day, she was brought to the temple and was raped by him, and it is also found that the juvenile had strangled and smashed the deceased face with stone which caused the death. The most notable part is that the juvenile accused who is the prime accused has not been punished for committing such heinous crime, "half justice" was only given for the deceased's family. But till date, the remaining accused are yet to be hanged and the judicial process is dragging, with various petitions put forth by the accused. Even in the Nirbhaya Case, the juvenile who was the main reason for the death of the

deceased, as he had hit her with iron rod, was treated as juvenile and was given an imprisonment of three years, now he is working as a cook in some southern part of the nation. Even though it is an undisputed fact that the juvenile's action had also led to the rape and death of the deceased, they are being protected with the shield that he is a juvenile. This shield should be broken and any accused who may be a minor who has committed any sexual offence, should be treated as an adult, for the justice to prevail.

Section 34 of the Act, shall be in such a way that, when any minor being an accused who has committed a heinous crime, he shall be treated as an adult by virtue of his act and shall be given extreme punishment. The aspect of treating the accused as a minor under the Juvenile Justice Act, because of the age factor is not acceptable. This fallacy under Section 34 shall be amended in such a way that it helps in achieving the object of the code and for ensuring that justice is given to the right person.

## **CONCLUSION**

It is true that loopholes can be created however good and efficient the law is. The POCSO Act is a comprehensive law which was initiated to protect the children from sexual abuse and exploitation. Considering the welfare of the people, legislature is making laws, and in no way would the intention of the legislation would be to make an inefficient and uncertain law. However, the amendment Act is arbitrary and is against the fair procedure of law, at certain points it is favouring the offenders. The authors view that certain provisions of the amendment shall be removed to procure law in its unvarnished sense.

## **REFERENCES**

- [1]. State of West Bengal v. Anwar Ali Sarkar, A.I.R. 1952 S.C. 75.
- [2]. A.I.R. 1983 S.C. 130.
- [3]. Section 4(1): "Whoever commits penetrative sexual assault shall be punished with imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable for fine"
- [4]. Gopal Vinayak Godse v. State of Maharashtra, A.I.R. 1961 S.C. 600.
- [5]. LaksmanNaskar v. State of West Bengal, A.I.R. 2000 S.C. 2762.
- [6]. Section 4(2): "Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine."
- [7]. Section 6(1): Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.
- [8]. Section 14(2): If the person using the child for pornographic purposes commits an offence referred to in section 3, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.
- [9]. Section 14(3): If the person using the child for pornographic purposes commits an offence referred to in section 5, by directly participating in pornographic acts, he shall be punished with rigorous imprisonment for life and shall also be liable to fine.
- [10]. Section 18: Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the imprisonment for life or, as the case may be, one half of the longest term of imprisonment provided for that offence or with fine or with both.
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- [12]. Presumption of culpable mental state.
- [13]. Ram Krishna Dalmia v. Mr. Justice S.R.Tendolkar, A.I.R. 1958 S.C. 538.
- [14]. Garg v. Union of India, A.I.R. 1981 S.C. 2138.
- [15]. Supra
- [16]. Article 12 of UDHR; Rajesh Talwar v. CBI, 2012 Cri L.J. 2217
- [17]. Everyone charged with a criminal offence shall be presumed innocent until proved guilty.

- [18]. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.
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