

# POCSO: FACTORS HINDERING THE IMPLEMENTATION

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India has the world's largest child population. Securing a child from being sexually exploited has always been one of India's primary concern. On December 11, 1992 the government of India acceded to United Nation's Convention on the Rights of Child. It prescribed a set of standards followed by all state parties in securing the best interests of the child. The Indian Penal Code has various sections (for example section 292, 293, 372, 376(2)(f), 377) which can be included in the ambit of sexual abuse of child however the same was considered to be a broader and more generalized definition. *Alice Miller*, a Swiss psychologist, speaking about child abuse has said: *Child abuse damages a person for life and that damage is in no way diminished by the ignorance of the perpetrator. It is only with the uncovering of the complete truth as it affects all those involved that a genuinely viable solution can be found to the dangers of child abuse.*

However, even after the implementation of such stringent law, the implementation of the same has not been as expected. The conviction rate under POCSO is seemingly low. It is pertinent to note that this low conviction rate does not point towards less number of cases but towards the irregular and disrupt implementation in all the cases. Other reasons for the same are the high pendency and difficulty in adjudicating such offences due to vulnerability of the victims. Even though special courts have been created to ease the procedure and increase the effectiveness and efficiency in dealing with such sensitized cases yet a lack in the judicial mechanism is seen. It points to a question if the legislature has defaulted in creating the law, the burden of which is being faced by the judiciary; or it is the judiciary which is unable to adjudicate the offences falling under the act. An interpretation with regards to the same has been laid down in the latter part of this article, along with the various other reasons, directly and indirectly affecting the low conviction rate.

In *Eera through Dr. Manjula Krippendorf v. State (NCT of Delhi) and Anr. MANU/SC/0876/2017 : (2017) 15 SCC 133*, Dipak Misra, J, dwelling upon the purpose of the Statement of Objects and Reasons and the Preamble of the POCSO Act, observed that *the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. It recognizes the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. The statement of objects and reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.*

## STRINGENT PROVISIONS

Noting the high rise in cases and the atrocities being faced by children, especially girls and women, the criminal law amendment act of 2018 was passed. It provides grievance to the sexually assaulted wife ranging the punishments to as grave as death penalty. It brought out amendments in the IPC, 1860; the Cr.PC, 1973; the Evidence act, 1872; and the POCSO, 2012.

As far as the IPC is concerned, the newly inserted section 376AB punishes the perpetrators of rape (on a woman who is under 12 years of age) with rigorous imprisonment for a term which shall not be less than 20 years, and it may extend to life imprisonment and fine or even death penalty. It also provides for victim rehabilitation as the accused to bear the charges of the same. Furthermore, India is not new to the atrocities of 'gang rape'. There is no doubt that such grave offence leaves the victim in the most vulnerable state. The perpetrators in such cases are equally punishable if acting in pursuance of a common intention. The punishment in such cases amounts to imprisonment for life punishable under the added section 376 DA (if the victim is a woman under the age of sixteen years) and with imprisonment for life or death penalty punishable under section 376 DB (if the victim is a woman below the age of 12 years).

It is pertinent to note that the punishment of death penalty is only for rape committed on women of under 12 years of age. It shows the graver impact of such heinous offences on young women. These provisions of death penalty have resulted in many debates and a massive hue and cry concerning the rights of the accused. It is said that the punishment is not in proportion to the crime committed. However, it is seen that death penalty has a deterrence effect on the crime and therefore helps prevent it. As per Report No. 35 on Capital Punishment by the Law Commission of India (September 1967), death penalty allows retributive justice for the victims. According to the Rtd. Justice P.D. Kode of the Bombay High Court, this punishment is well in proportion with the crime as the crime is committed on minors who are practically incapable of protecting themselves from the harsh and lustful perpetrators. It is outrageously evil to commit the very offence of rape, let alone committing it on women of young age with underdeveloped minds and bodies. In today's time, many cases come forward where rape is committed on as girls as old as a few weeks to a few months. In such cases, death penalty might be a punishment of less magnitude than the crime committed. However, Justice Verma Committee and the Law Commission of India in its 262nd report have advocated against the implementation of the death penalty. It is also considered that since the perpetrators in such cases are usually the relatives (as has been brought out in this article), bringing death penalty will only decrease the reporting and filing of cases. However, the legislature considered it proper to have the provisions of death penalty due to the rising atrocities. The bigger question that raises is if the focus has been shifted from the real problem of low convictions. The implementation of this amendment act is another issue. The conviction rate will eventually remain as low if the speedy and expedite trials as per the amendment are not carried out. A research shows that Madhya Pradesh has been proactive in doing the same. The state has completed the investigation of rape cases within the time frame i.e. within 60 days in 72% of the cases. The Centre has applauded the government of Madhya Pradesh for the successful implementation of the amendment Act and has asked other states to follow the same. It is the effective implementation that will ultimately solve the problem of low convictions.

As far as the amendment to POCSO Act is considered, an amendment to section 42 was made which provides for alternative punishment wherein a punishment of greter degree should be considered. A discrepancy has been created in the punishment by POCSO and by IPC. In POCSO, the maximum punishment is life imprisonment, however in IPC it has now increased to death penalty. This differentiation is created with respect to gender as these provisions of IPC considers sexual offences only on girls whereas POCSO is gender neutral.

## FILING

The first thing to consider is the low filing rate in cases relating to POCSO. The power to decide if the complaint should be filed or not, in such cases usually lay in the hands of the victim's family and guardian. A general perspective of the hoi polloi in such cases is to hide the matter than to raise a voice against it. A rather pertinent aspect of degradation of good will has been ceaselessly associated to raising a voice against the wrong. In 2016, a twelve year old boy in Tamil Nadu was sodomised for nine months. On being approached by an NGO called Tulir, the victim's father resisted towards filing a complaint and reasoned that "*My son will never get pregnant.*" Furthermore, when a thirteen year old girl from Maharashtra was raped by her teacher, the village was of the opinion that the girl purported the story only to stop the teacher (an upper class man) from being a taluk.<sup>1</sup> Another belief that a traditional mindset possess is that child abuse is a western concept and is not something that will occur in India.<sup>2</sup>

## CONVICTION AND PENDENCY

Even with the low filing rate, the number of cases is still surging. According to a report of the National Crime Records Bureau - 39,827 cases were reported under the Protection of Children from Sexual Offences Act in 2018, an 18 per cent jump over the previous year. This prima facie points towards the actual henious condition that India faces. Furthermore, if a case is filed, it then suffers various distinct difficulties. The major problem that the statistics reveal is the low conviction rate and high acquittal rate. A news report highlighted that conviction rate of offences registered under POCSO is as low as 18.32% in Kerala upto 2018.<sup>3</sup> Out of 1255 cases tried, accused in only 230 cases were convicted. In Villupuram, Tamil Nadu, among the 493 cases reported from 2013 to October 31, 2019, only seven persons were convicted. Furthermore, the cases that are filed have lingered on. The supreme court, on perusal of the status report of different states noted that investigation in 20 percent of the cases were not even completed. It also noted that 2/3rd of the cases were pending trial for more than a year. In Uttar Pradesh, as many as 10 districts have over 1000 POCSO cases pending for over a year while in West Bengal one district has over 1600 pending cases, another has over 1200 pending cases and yet another has over 1,000 pending cases. The annual report of Delhi Commission for Protection of Child Rights (DCPCR) tabled before the Delhi assembly on 22 March, 2016 shows that dismissal of cases filed under POCSO is dismissal, with the average percentage of conviction at just 2 per cent. According to Delhi State Legal Services Authority (DSLISA),

<sup>1</sup> <https://www.newslandry.com/2016/11/18/pocso-this-is-how-a-pathbreaking-law-becomes-toothless>

<sup>2</sup> <https://www.legallyindia.com/views/entry/mandatory-reporting-under-pocso-are-we-ready>

<sup>3</sup> <https://www.thehindu.com/news/national/kerala/pocso-conviction-rate-low-in-state/article29835360.ece>

the conviction rate leaves an unsavoury image of the way the criminal justice system is being administered in Delhi, and creates alarm in the mind of the general public that child victims of rape and sexual offences are not getting justice. A graph showing the difference in conviction rate in case of stranger accused and acquainted accused can be seen from here.<sup>4</sup>

## AFFECTING FACTORS

The reasons that can be attributed to such low conviction rates and high pendency rates are many-

The prime importance has to be laid to the sensitization of the matters by both the police and the judicial authorities. It has to be kept in mind that the victims are minors and hence more prone towards being vulnerable. Hence, the authorities indulging in an interaction with such victims should show empathy. A prime reason for the low conviction rate is the victim turning hostile. A widely discussed factor in the court is the reliability of the testimony of the child victim. However, very recently the Delhi High Court in **RAJENDER @ v. STATE, CRL.A. 276/2020 &Crl. M. (Bail) 438/2020, Crl. M.A. 5506/2020 &Crl. M. (Bail) 6383/2020 delivered on 03-July-2020** while holding that pulling down the leggings of a child victim and touching of the thighs is evident of sexual intent and accordingly constitutes an offence of sexual assault in terms of Section 7 of the POCSO Act the Court concluded that the testimony of the children was of sterling quality and no discrepancy had been pointed out to disbelieve the testimony of the two children.

Often, the victims are unable to handle the overwhelming questions of the authorities; the interview turns into an interrogation forcing the victim to withdraw or remain silent. Several studies on neurobiology and trauma reveal that when a person recalls a traumatic event, the prefrontal cortex, which is the key to decision-making and memory, can become temporarily impaired. It has also been indicated that it's normal for child victims to offer a muted response when asked about the abuse. Such responses often confound judges, making it appear as if victims are lying even when they're not and because of this difficulty, the convictions are not proved in the court of law. It is thus essential that judges receive trauma-informed training on gender-based violence. In such cases, the police, prosecution, and the court become helpless. In *Nipun Saxena and Ors. vs. Union of India (UOI) and Ors. (11.12.2018 - SC) : MANU/SC/1459/2018* it was held- *"Unfortunately, in our society, the victim of a sexual offence, especially a victim of rape, is treated worse than the perpetrator of the crime. However, for no fault of the victim, society instead of empathizing with the victim, starts treating her as an 'untouchable'. A victim of rape is treated like a "pariah" and ostracised from society. The matter does not end here. Even after a case is lodged and FIR recorded, the police, more often than not, question the victim like an accused. In Court the victim is subjected to a harsh cross-examination wherein a lot of questions are raised about the victim's morals and character. Over a period of time, lot of effort has been made to sensitise the courts, but experience has shown that despite the earliest admonitions, the first as far back as in 1996, the Courts even today reveal the identity of the victim"*

<sup>4</sup> <https://www.haqcrc.org/news/pocso-cases-child-sexual-abuse-mostly-end-acquittal/>

A report by the National Law School, Bangalore, which analysed 667 POCSO judgments between 2013 and 2015, stated that victims turned hostile in 67.5 per cent cases and testified against the accused in only 26.7 per cent cases. To add to this is the complicated procedure wherein police are constrained to file an appeal only through the government, resulting in inordinate delays. Hence, both, the police authorities and the judicial authorities be given a special ‘sensitivity training’ to handle an emotionally challenged victim.

The perpetrators in such offences are usually from inside the house - the family members. The DCPCR Report, 2016 shows that the offenders in a majority of sexual assault cases involving children in the national capital are acquaintances. The report further points out that the high pendency is because the courts are not fully dedicated to the cause. In such cases, the accused gets ample time to pressurize the victims or their families to backtrack. Further, Even though alternative dispute resolution is not used in criminal cases, it is seen that out of court settlements still occur in such cases thereby further leading to withdrawal of the cases. In the case of *Bijoy v. State of West Bengal MANU/WB/0140/2017* the Calcutta High Court has given a detailed judgment setting out the reasons while dealing with the provisions of POCSO and held that neither during investigation nor during trial the name of the victim should be disclosed. The Calcutta High Court has also given other directions to ensure that the provisions of the law are followed in letter and spirit, and the fundamental rights of a child victim and other basic human rights are protected.

Another pertinent aspect is the psychological factor associated to such heinous crimes. Enough stress cannot be laid to the psychological factor. Human beings are regulated by it and the authorities involved in the first hand dealing of the cases relating to POCSO should be given specific training to this regard. The impact of sexual abuse on a child will have a direct effect on their psychological, social, emotional and behavioural development. These impacts are compounded when physical abuse and neglect are also present. A child embroiled in sexual exploitation is no longer being treated in a way that is consistent with their physical or psycho-social stage of development. Their needs are not the priority. Their world is unsafe, adults cannot be trusted and their responses become skewed as a result. These young people develop a borderline low average cognitive faculties, dysfunctional relationships, difficulties in inter-personal relationships and Post Traumatic Stress Disorder (PTSD). Often, a peculiar human perspective is attached to the victims which tends to make out of the place and thereby cause further psychological issues. India is not alone fighting this cause and the horrific effects. The **United Nations Secretary General’s Bulletin** “Special measures for protection from sexual exploitation and sexual abuse” (ST/SGB/2003/13) entered into force on 15 October 2003 in the United Nations (UN). The objective of these special measures is to end SEA (Sexual Exploitation and Abuse) by staff of the UN and its programmes. They were developed in response to incidents of SEA involving humanitarian workers.



Alongside other UN agencies, civil society organizations, and the Red Cross and Red Crescent Societies, WHO has been an active participant in the Inter-Agency Standing Committee (IASC) Task Team on Accountability to Affected Populations and Policy on SEA, established in 2014. The Task Team supports the development of complaint mechanisms, and the institutionalizing of minimum operating standards for policies on SEA. Furthermore in India, Dr Kavitha Shekhar filed a writ petition in the High Court of Kerala for appointment of Special Public Prosecutors, who have special knowledge in psychology, to the Special Courts conducting trial of POCSO cases. It is pertinent to note that The POCSO Act only insists 7 years of experience for the appointment of public prosecutors in contrast to CrPC's 10 years. It is stoutly advocated that the inability of the authorities in sensitively dealing with such cases is a huge concern and a factor affecting the high conviction rate as well as the low pendency rate. On October 10, 2019, the J&K Division bench of Chief Justice Gita Mittal and Justice Dhiraj Singh Thakur issued the direction to the Government to inform it about sensitization and awareness programmes to be carried out with regard to J&K Protection of Children from Sexual Violence Act in Jammu and Kashmir. after perusing the status report filed by Director Information J&K. Directions were also given to the District courts for setting up of Vulnerable Witnesses Deposition Complexes.

To fight such extrinsic circumstances on 25 July, 2019 the Supreme Court directed to set up special courts under the central scheme especially for dealing with cases related to POCSO. In order to monitor, the Hon'ble Supreme court asked for status reports. Madhya pradesh, on not submitting the report was fined on two occasions - once on 25 July, 2019 and then again on 7 November, 2019. States like Uttar Pradesh and West Bengal continue to ignore Supreme Court's directive to set up Special POCSO Fast Track Courts (FTC) despite extremely high pendency rates.

The presence of such courts has made a differences by leaps and bounds. For example, Delhi has 27 Special POCSO FTC and it has resulted into faster disposition of cases and is expected to gradually solve the problem of pendency of cases. A study of different states can depict the prevalent position. A detailed table of such courts can be seen from here.<sup>5</sup>

If a finger has to be pointed at either one of the two pillars of the Indian constitution - the judiciary or the legislature; the same cannot be done with a view to depict the fault. It has to be noted that the legislation is in contradiction with the Medical Termination of Pregnancy Act, 1971 ("MTP Act"). As per POCSO, it is mandatory for the concerned authority to report a case for sexual assault if any girl under age of 18 seeking an abortion. However, the same is not mandatory under the MTP Act. This difference creates an abyss and affects the filing of cases. The judiciary on the other hand has been attempting to deal with the cases in the best possible manner, i.e via in-camera trial. Realizing the sensitivity of such crimes, the victims are not made to face the accused. When the two pillars stand strong to the cause, it is the other mechanisms that fail. Our child protection mechanism is still at a very nascent stage and is overwhelmed by the large number of cases that it faces. Apart from the issues discussed in the former part of this article, there are problems of unfortunate that allocation of

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<https://www.firstpost.com/india/high-pendency-of-child-sexual-abuse-cases-render-pocso-a-toothless-law-uttar-pradesh-accounts-for-25-of-all-cases-under-the-act-7883801.html>

infrastructure and manpower. In *Alakh Alok Srivastava vs. Union of India (UOI) and Ors. MANU/SC/0489/2018* the court considered the treatment of an eight month old female child who had become a victim of a crime committed under POCSO Act and the second, speedy trial and monitoring of the trials under the POCSO Act in a child friendly court regard being had to the letter and spirit of the provisions contained in the said Act, held that *Keeping in view the protection of the children and the statutory scheme conceived under the POCSO Act, it is necessary to issue certain directions so that the legislative intent and the purpose are actually fructified at the ground level and it becomes possible to bridge the gap between the legislation remaining a mere parchment or blueprint of social change and its practice or implementation in true essence and spirit is achieved.*