

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



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Peer Reviewed

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THE GREY AREA: IMPLEMENTATION OF POCSO ACT

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Abstract

Child Sexual Abuse is the worldwide problem and India is not exception of it. The degree of this heinous crime is underrated because of non-reporting of the complaint. The Protection of Children from the Sexual offence (POCSO) Act of 2012 was enacted with the aim to provide a strong, child friendly formation for the prosecution of sexual crime against minors within India. Despite such stringent legislation and progressive provisions there is a gap between the legislative intent and ground level implementation. There are numerous challenges like delayed justice, weak law enforcement and inadequate rehabilitation services. This research paper will focus on the evolution of the effectiveness of the POCSO Act and how it contribute to remove social stigma and emphasizes on the shortcomings, procedural deficiencies and challenges faced by the survivors. The research findings point towards delays in forensic procedure, violations of the mandatory protocols and victimizations of the survivors. It examines the implementation procedure which conflict with the international children's right standards and convention on the Rights of Child.

Keywords: Child Sexual Abuse, Implementation, Evidence, Procedural Lapses, Conventions

Evolution of Judicial Approach to Child Sexual Offences

The Indian legislation pertaining to child sexual offenses has undergone a figurative transformation, which is being implemented within the framework of constitutional law both inside and outside of state borders. The Protection of Children Regarding Sexual Offenses, 2012 (POCSO) guidelines was introduced prior to the section 375 of the Indian Penal Code, 1860 (IPC) now Section 63 of Bharatiya Nyaya Sanhita 2023 that deals with rape. But the

problem is related to reality, that IPC has not taken in the entire scope of the definition of what is child sexual abuse, the fact that the issue is a taboo in the context of the community reveals the underestimation of meaning of the specific role of children as the show of victims. The court's decisions gradually increased the rights guaranteed by the constitution in relation to body-based offenses, children's protection from sexual abuse, and their dignity. This is ascribed to a turning point brought about by the implementation of POCSO, wherein certain children's rights are now subject to legal consequences.¹

It chronologically documents the jurisprudential trend of child sexual crime, the vast majority of the better rulings that had been made prior to the POCSO, and how the post-POCSO era transformed the child-reforming energy to the kind that was amicably carried out that the prior knowledge of child rights had acquired.

Pre-POCSO Jurisprudence

In front of the courts, the need to apply the provisions—which state that the absence of a comprehensive regulation like POCSO predetermines the issue of child sexual abuse—was a winning tactic. It was only the Criminal Law (Amendment) Act, 2013 that came to generalize rape in that regard; the IPC had not explicitly indicated that juvenile sexual assault should be directly opposed to. Because of this, the legislation was interpreted in a way that gave children certain rights that were not entirely eliminated.

State of Punjab v Gurmit Singh (1996) 2 SCC 384

"The ruling of State of Punjab v. Gurmit Singh (1996) 2 SCC 384" was a seminal case that altered the Indian legal system's approach to sexual offense cases, particularly with regard to the standards of proof. In this instance, the "Supreme Court has solidified the rule that the evidence of a rape victim alone, when deemed credible and reliable, is sufficient to produce a conviction without the support of additional evidence." This ruling sought to address a long-standing patriarchal prejudice "within the criminal justice system" that had a history of requiring further proof, such as medical records or the testimony of an impartial third-party witness.

The case's fundamental circumstances concerned the kidnapping and sexual assault of a young woman. Concerns about the lack of supporting evidence and several inconsistencies in

¹ Barth, Richard P., et al. "Research to consider while effectively re-designing child welfare services." *Research on Social Work Practice* 32.5 (2022): 483-498.

supporting facts that had no bearing on her story were raised during the trial. However, the Supreme Court firmly refuted the notion that, in such cases, corroboration was necessary for conviction.

Bodhisattwa Gautam v Subhra Chakraborty (1996) 1 SCC 490

One such landmark decision that led to a new understanding of sexual offenses in the Indian judiciary was "Bodhisattwa Gautam v. Subhra Chakraborty in 1996." This included how this offense was to be viewed in relation to rape as a criminal offense as defined by the "Indian Penal Code (IPC)". The Supreme Court regarded rape as a direct violation of the victim's fundamental rights under "Article 21 of the Constitution, which guarantees the right to life and personal liberty," in addition to being a crime that could be punished by law. By doing this, the Court elevated the conversation above the criminal law threshold to the levels of human rights and the constitution.

The Court has made a strong argument that rape violates a woman's fundamental right to live with dignity under Article 21 since it is a heinous assault on her autonomy, dignity, and right to bodily integrity. This finding was crucial because it demonstrated that sexual violence is a violation of constitutional morality in general as well as an act committed against an individual. The Court further stated that the aftermath of rape encompasses much more than the act itself, including the survivor's long-term emotional suffering, social marginalization, and financial dependence. In this regard, the ruling takes into account more than just the conventional language of punishment but also a more globalized concept of the rights of the victim".

It's interesting to note that the Court's remarks are reflected in international human rights treaties that India has ratified, including in the "Convention on Elimination of All Discrimination against Women (CEDAW) convention." The ruling grouped India with modern law at the "international level, which perceived sexual abuse as a violation of basic human liberties" by placing rape in the context of human rights abuse. Since "child sexual abuse" cases include one of the most vulnerable populations whose dignity, security, and right to growth are jeopardized by such offenses, the logic has implicit application even though it is not stated expressly in the ruling.²

"The case itself dealt with an adult victim, but the principles it established had broader ramifications. The subsequent implementation of progressive laws like the "Protection of Children against Sexual Offences Act (POCSO)" 2012 was given constitutional emphasis by

² Washington, S. Lisa. "Survived & Coerced." *Columbia Law Review* 122.4 (2022): 1097- 1164.

the conclusion that rape amounted to a violation of Article 21. Later court rulings that emphasized "the state's responsibility to prevent, investigate, and penalize use of sexual offenses as a mandate of its constitutional core responsibility of the duty to defend fundamental rights" were also based on this reasoning."

As a result, the Bodhisattva Gautam represented a turning point in Indian legal philosophy. It reclassified sexual violence as a crime that not only violated human and constitutional rights but also influenced a victim-centered, rights-based approach. The evolution of child sexual offense jurisprudence, where the constitutional guarantee of liberty and dignity is crucial to judicial interpretation, would benefit from this broader perspective.

Broader Pre-POCSO Landscape

Prior to the creation of the "Protection of Children against Sexual Offences Act (POCSO)," India's legal framework for "child sexual abuse" was inadequate and essentially chaotic. The laws that judges had to use were scattered; the "Indian Penal Code (IPC)" did not address the unique needs of minors in a state or the legal situation of a victim of sexual misconduct. "Section 375 (rape) now Section 63 of BNS and Section 354 (assault or criminal force to a woman with intent to outrage her modesty) now Section 74 of BNS were the most frequently utilized clauses. Due to the significant limitations placed on all of these parts, there was a legal void that prevented much of the abuse from being acknowledged and the perpetrators from being punished.

Section 375 of the IPC now Section 63 of BNS defined rape, however it did not acknowledge rape that went beyond penile-vaginal penetration. This omitted a wide range of non-penetrative abuse, such as fondling, oral sex, penetration with an object, or simply exposure, all of which can have equally terrible effects on children. As a result, the majority of abusive acts that did not fall within this criterion were not properly classified as rape and, as a result, received disproportionately reduced penalties under other provisions. The backup would always be Section 354 IPC, where the offense was outraging a woman's modesty. However, the clause was vague, did not define modesty, and was written with adult women in mind rather than youngsters.

It was insufficiently sensitive and detailed to address a specific psychological injury inflicted upon the minors. Similarly, Section 377, which was initially designed to regulate homosexuality, was used to penalize "carnal intercourse against the order of nature." Although

it was occasionally expanded to include "child sexual abuse" including oral or anal penetration, its morality stigmatized both the victims and sexual minorities.³

Post-POCSO Jurisprudence

Compared to the IPC, which was mostly provided in sections, the creation of the Protection of Children against Sexual Offenses Act, 2012 was one of the most important initiatives in the field of child protection laws. Additionally, the Act criminalized the use of minors in pornography, defined sexual assault as both penetrative and non-penetrative, and expedited child-friendly investigation and trial procedures.⁴

Special Courts and Victim-Friendly Measures

Through the enactment of the Protection of Children using Sexual Offenses Act (POCSO) 2012, it has also developed a radical paradigm, including the addition of Special Courts that would decide whether to end the case of sexual offenses against children. This was done not only to ensure that the trial procedure was predetermined, but also because it was essential to provide the child, who should be considered a victim, with a setting that would not disregard his or her unique needs and dignity.

The Act's child-centered wording was also intended to eliminate the criminal court system's combative and intimidating nature, which contributed to the victims' tragic outcomes. Since the Supreme Court and various High Courts have been given the authority to interpret the provisions of the Indian Constitution in Article 21, these goals of the laws have been highly pertinent in the context of the issue in harmonizing the POCSO clause while taking into consideration their opinions⁵

Another requirement that POCSO did not meet was the requirement for in-camera proceedings. As a luxury of process and a fundamental right to the child, the court has also rendered numerous decisions about denials of the protection. This is one of the reasons the procedures will take place in camera: the victim won't be subjected to needless publicity, which might

³ Singh, Bhupinder, and Christian Kaunert. "Integration of cutting-edge technologies such as internet of things (IoT) and 5G in health monitoring systems: a comprehensive legal analysis and futuristic outcomes." *GLS Law Journal* 6.1 (2024): 13-20.

⁴ Rocha Beardall, Theresa, and Frank Edwards. "Abolition, settler colonialism, and the persistent threat of Indian child welfare." (2021).

⁵ Verma, Anita. "Judicial Approach towards Protection of Children in India." *Issue 2 Indian JL & Legal Rsch.* 5 (2023): 1

result in another traumatic event and victimization. The most significant adjudication question that the High Courts have already raised is whether to grant or deny a petition to revoke the orders that the trial courts had previously issued. However, the High Courts' procedures-in-camera determining the primacy right to dignity are still pending.

“These courts' interpretations demonstrate that the best interests of the child, which is one of the most binding statements made in the UNCRC convention on India, are prioritized over the palace of words found in the specifications provided to the child under the POCSO. The Indian law court's ruling has made it easier to harmonize statutory and constitutional standards, which has made it possible to grant POCSO life in a way that respects children's rights without undermining the culture of dignity.”

Alakh Alok Srivastava v Union of India (2018) 17 SCC 291

Alakh Alok Srivastava v. Union of India, (2018) 17 SCC 291, is a significant case in India concerning the protection and rights of children. Social audits conducted under the "Juvenile Justice (Care and Protection of Children) Act, 2015" have shown widespread instances of physical and sexual abuse of children at shelter homes, with Bihar being the most prominent case at Muzaffarpur.

Courts have ruled that these omissions are fundamental infringement of the child's constitutional and statutory rights rather than technical errors. This judicial sensitization indicates a change in how procedural fairness in a case involving children is understood: consideration given to a kid witness is just as important as speed and formality. In the end, these judicial interpretations confirm that the POCSO measures are fundamental ways to embody the best interests of the child, which is one of the most significant aspects of Article 21, and in compliance with India's obligations under the UNCRC convention.

Through the alignment of the constitutional principles and the statutory provisions, the Indian judicial system has granted POCSO with life so that the child rights may be prioritised with the custom of dignity being compromised.⁶

The Alakh Alok Srivastava ruling further emphasized the judiciary's need to take action when injustices are committed by legislation. Despite the existence of laws like the "Juvenile Justice Act and the POCSO Act," the provisions were rendered useless due to administrative laxity and the law's ineffectiveness at the implementation stage. The ruling made the written rule of

⁶ Ahmad, Nehaluddin. "Discriminatory Policies and Laws Target Indian Muslim minorities in the Recent Time: A Socio-Legal Study." *Law and Humanities Quarterly Reviews* 1.2 (2022).

child protection a complete, enforceable, and living right. Therefore, this scenario is more than a response to a singular instance.

It shows how the Supreme Court views safeguarding children as a matter of constitutional obligation in accordance with Article 21, the right to life and dignity, and Article 39(f), the right to provide childhood without exploitation. The Court established a strong precedent in the treatment of child protection as an integral part of national governance and a moral component of the Constitution by firmly establishing the ideas of accountability, transparency, and holistic rehabilitation within its orders.⁷

Comparative Analysis of Pre- and Post-POCSO Approaches

Comparative analysis of pre-POCSO and post-POCSO jurisprudence suggests that there is a paradigm shift in the mechanism of the judicial response which has already taken a more proactive stance:

Scope of Offenses: In the past, numerous kinds of "child sexual abuse" went unnoticed when specific parts of the IPC were used to address the problem. Numerous offenses have been comprehensively criminalized under the post-POCSO statutory measures.

Victim evidence: Although Gurmit Singh has acknowledged the sufficient importance of victim evidence, later post-POCSO jurisprudence has established procedures to guarantee that child victims can speak in a setting that is supportive of them.

Constitutionalization of Child Protection: Bodhisattwa Gautam treated rape as a breach of fundamental rights in his interpretation of the constitutionalization of child protection. In post-POCSO cases such as Independent Thought (avoiding discriminatory laws and their alignment), the POCSO provisions have been further construed through this constitutional lens.

Systemic Reforms: Prior to POCSO, judicial interventions were made on an individual basis. Judges like Alakh Alok Srivastava have started institution-level reforms, such as raising system accountability, after POCSO.

Foreign Influence: Post-POCSO jurisprudence has made the UNCRC and other treaties more

⁷ Jain, Dipika. "Regulation of digital healthcare in India: ethical and legal challenges." *Healthcare*. Vol. 11. No. 6. MDPI, 2023.

visible, with the highest courts directly citing foreign conventions to interpret statutory and constitutional issues.⁸

Key Supreme Court Judgments

“The Indian Supreme Court has had a significant influence on the development of jurisprudence regarding sexual offenses, including the importance of victim rights and child protection. Under the "Indian Penal Code (IPC)" and the "Protection of Children from Sexual Offences Act (POCSO)," the Court has rendered a number of significant rulings that have clarified the concepts of compensation, the trial procedure, evidentiary requirements, and legal interpretation. We will be examining important cases that have influenced the evolution of Indian child protection law in this session.

1. “Delhi Domestic Working Women’s Forum v Union of India (1995) 1 SCC 14”

“A horrific gang rape of a domestic worker in Delhi led to the case Domestic Working Women's Forum v. Union of India, (1995) 1 SCC 14. This incident not only highlighted the vulnerability of those women who work in the unofficial sector, but it also illustrated how organizations are unable to assist women who have experienced sexual assault, particularly those from lower socioeconomic backgrounds. According to the Delhi Domestic Working Women Forum's ruling, victims of rape can seek judicial remedy and justice by filing a "Public Interest Litigation (PIL)" with the Supreme Court. Survivors were often left on their own to deal with traumas and stigma due to a lack of organized official aid.

The Court discussed two primary issues: The first was whether the State had a constitutional obligation to compensate victims of rape whether or not criminal charges were brought. In order to prevent the survivors from being subjected to more victimization and humiliation during the procedures, the second question was whether the Court had to establish guidelines requiring the pertinent parties to assist the survivors during the investigation and trial.

“In its decision, the Supreme Court rendered a historic decision. The State had a positive obligation to protect and rehabilitate victims of sexual abuse after the "Court confirmed that rape was a crime but also a violation of the right to life and dignity under Article 21 of the Constitution." The ruling also created the foundation for the development of victim compensation programs, which are now mandated under section "357A of the CrPC, which requires every state government to establish victim compensation funds." As a reflection of the

⁸ Nampewo, Zahara, Jennifer Heaven Mike, and Jonathan Wolff. "Respecting, protecting and fulfilling the human right to health." *International Journal for Equity in Health* 21.1 (2022): 36.

progressive ideas of human dignity, rehabilitation, and governmental responsibility, the case continues to serve as the foundation for victim-centric jurisprudence in India.

2. Sakshi v Union of India (2004) 5 SCC 518

"The NGO Sakshi, which was actively involved in promoting the "protection of women and children towards sexual exploitation," turned the Sakshi v. Union of India case into a historic "Public Interest Litigation (PIL)." The inadequacies of the current criminal trial procedures for child sexual abuse were the main focus of the petition. The organization emphasized that the child survivors were frequently subjected to secondary trauma by the conventional criminal justice processes, especially during cross-examination.

Children's psychological sensitivity was not and could not be ignored at the time, and they were expected to testify in a frightening courtroom environment while answering repeated, probing, or depressing questions. Sakshi reasoned that these procedures not only prevented child victims' dignity from being protected, but they also deterred them from speaking the truth, undermining the legal system as a whole.

"The question of whether the rights, dignity of child victims in cases of sexual assault were sufficiently secured through the existing procedures in courts of trial" was the Supreme Court's primary concern. The question was whether it was consistent with constitutional mandates under "Article 21, the right to life and personal liberty," which presupposes "the right to dignity" and psychological well-being, to force children to undergo needless conventional forms of cross-examination, frequently in public court and in front of the accused.

Then the question that was raised in the petition was whether the State and courts were duty-bound to develop child-friendly procedures to create a "balance between the right of the accused to a fair trial and the primary responsibility", which is to act in the best interest of child victims.

In order to establish a "balance between the right of the accused to a fair trial and the primary responsibility," which is to act in the best interest of child victims, the petition then asked whether the State and courts had an obligation to construct child-friendly procedures. The Court was especially eager to emphasize that the criminal justice system should empower victims rather than be a tool for further harm. The "POCSO Act of 2012," which codified many of the judgment's directives into the law, helped bring about a victim-centric change in the law and the following introduction of procedural safeguards. Since the right to life and dignity was established in Indian law, of child victims cannot be sacrificed in the interests of achieving criminal justice.

3. State of Punjab v Ramdev Singh (2004) 1 SCC 421

The case involving sentencing during a rape case can be discussed as a landmark ruling because “the Supreme Court of India” tried to answer the burning question of whether procedural extenuating circumstances can be a reason to reduce a penalty in such a horrible action. These appeals were regarded as the petitions of the convicted to enable a compromise to their own situations like age or the necessity to take care of a family or the reason of not committing any crime. Whether, the question was, they could provide, the mitigating considerations which, on a scale against the mitigating considerations of punishment which the law provided, weighed the more. The Court has not been backward in criticising this course of action and reiteration of the fact that the crime of rape is not a crime against a human being, but a serious offence against the entire society as it is a sort of infringement of the honour of the body and of the independence of women. The Court pointed to the fact that the lenient treatment of ending up with a longer sentence eliminates the deterrence effect of criminal laws and undermines the confidence that the populace holds in the justice system. It stressed on the aspect that the trauma on the victim, the social stigma of rape and the need to uphold law and order overrides the individual aspects of mitigation that the accused is provided with.

some critical precedents that mean that the criminal justice system cannot afford to engage in the light swipe policy in the way the sexual assault cases are treated since by doing so the criminal justice system has failed to consider the fact that it is in the way of ignoring the horrific effects the crime may have on the victim and the society at large. This Court ruling was a mighty blow toward the beginning of victimfocused jurisprudence which assumed the need to sentence on raping in the manifestations of the rule of deterrence as the tool to deter additional rapes, on the other hand, adherence to the constitutional law of dignity, equality and justice. The Court was justified in refusing a lessening of punishment on the basis of a mitigation of the circumstances of sexual violence as again, it was a restatement that sexual violence should be administered with a solemn response without the intercession of justice through undeserved” kindness.

4. State of Maharashtra v Madhukar Narayan Mardikar (1991) 1 SCC 57

An example of such a case would be the case where a police inspector is accused to have sexually assaulted a woman were personality, as characterized by the defence attorneys would be of immoral character or customs of good reputation. The witness age of the victim 217 is not only trying to kill the victim but also trying to kill her as a credible witness since it will make her suspect her sexual action and the kind of life she has been leading. It is also stated

that the sexual history or the purported nature of the woman, had been on previous occasions, listened to in the disapproving of her accusations of sexual felicities against her will on the other courts (in India and most of other jurisdictions). What the case did do however offer to the courts avenue in demonstrating that that rather than being an imperative to a certain degree i.e. to the effect that there is no woman who in any way is inferior in the sense of possessing the ability to gain bodily independence guaranteed by the Constitution despite their genesis, status or any pre-existing sexual interaction.

This was the key question that needed to be answered by the Court and there may be a means of mutilating witness of rape that would be part of rape trial to not only moderate the content of rape based on earlier known sex history and the erotic character of rape victim and rape alleged pre-non-sexual behaviour. The defence asserted that initially she was a loose personality and her allegations on the sexual assault were not merely an assumption that she can also have consented with the complainants. It was a scuttle away and it is called in that sense and not merely discriminative but, on the contrary, it is gender discriminative and it is not calculated to reach the goal of creating justice as well as equality the sort of justice and equality that is created in the law.

The Court concluded with emphatic wording when the judges said that she is a woman; she is to be treated as an immoral-trade practises; but there are the indisputable protection of the law and the undeniable right of a body-owner. The Rape crime that is viewed as a crime in the eyes of the Court is a crime against human dignity and female body and could not be merely the question of morality and chastity. Therefore, the victim sexual history cannot be used in the given case to demonstrate the consent. It is a decision that strengthened the constitutional project on Article 21 that had been desecrating the right to life and to personal freedom, the right to live with humanity, with body intact.

The case therefore comes out as a landmark in the rape law in India. This meant that all women irrespective of their places of origin, occupations or actions must be accorded equal opportunity to ensure they receive justice in instances where they have fallen victim to sexual violence. The Court was in a position to create a better support base in the fair trial and protection of the victim by disallowing the use of allegation of character assassination as a defence in rape cases. Such a decision solidified the idea that the justice system has to centre itself around consent or lack thereof in any case, instead of appealing to a patriarchal vision of morality.⁹

⁹ Singh, Bhupinder. "Unleashing alternative dispute resolution (ADR) in resolving complex legal-technical issues arising in cyberspace lensing e-commerce and intellectual property: proliferation of e-commerce digital economy."

5. “Independent Thought v Union of India (2017) 10 SCC 800”

“The case of Independent Thought v Union of India” was a landmark case that addressed one of “the most contentious issues in criminal law, i.e. marital rape of young wives and its acknowledgement in the criminal law of India. At that time, Section 375” of the “Indian Penal Code (IPC)” was used to define rape and Exception 2, which provided that the “sexual intercourse” of a “man with his own wife, not under the age of 15 years, was not rape”. Such an exception literally implied that no husband could be indicted for rape in case the wife was over the “age of 15 years, regardless of whether the” marriage had been made against the will or without the consent of the wife. The petitioner was an NGO called Independent Thought, and they had filed a “Public Interest Litigation (PIL)” before the Supreme Court in order to have the Constitutional validity of this provision questioned. This was a high-profile case given the fact that India is bound under the “Protection of Children from Sexual Offences Act, 2012 (POCSO)”, which criminalises all types of sexual assaults on “children below the age of 18 years old”.

“The question going before the Supreme Court was to address the constitutional validity of the marital rape exception that applied to wives aged between 15-18 years or whether it amounted to a contravention of the rights of the girl child under “Articles 14, 15, 19 and 21 of the Constitution”. The Court was also required to scrutinise whether “Exception 2 of Section 375 IPC” was in line with the scheme of the POCSO and what commitments India has under international crimes under the “UN Convention on the Rights of the Child (UNCRC)” to which India is a signatory”.

The Court in its decision also struck down “Exception 2 to Section 375 IPC to the extent” that it allowed a child-wife of between 15 and 18 years to not have any right against rape even by her husband. The Court was categorical in observing that sex involving a minor wife in this age group would fall under rape and would be punishable “under Section 376 of the IPC”. Through this, the Court brought the provisions of the IPC in line with the provisions of the POCSO, which do not differentiate between the marital status of a “person under 18 years of age” to address any form of sexual activity as an offence. “The Court made it clear that it was not determining the wider issue of whether marital rape” exists against women over the age of 18, but it was, however, impermissible to use child marriage as a justification for the sexual exploitation of girl children.

It was viewed as a good move of ending the culture of child marriage and addressing the marriage concerns of child rape over the under-age. Although, according to this ruling, the legislative condition created was the criminality of marital rape on adult females, it was

categorical in stirring the fact that that there was no child in the law whether the party who acted on it were married or not and could be sexually assaulted.

