

Reviewing India's Protection of Children from Sexual Offences Act three years on

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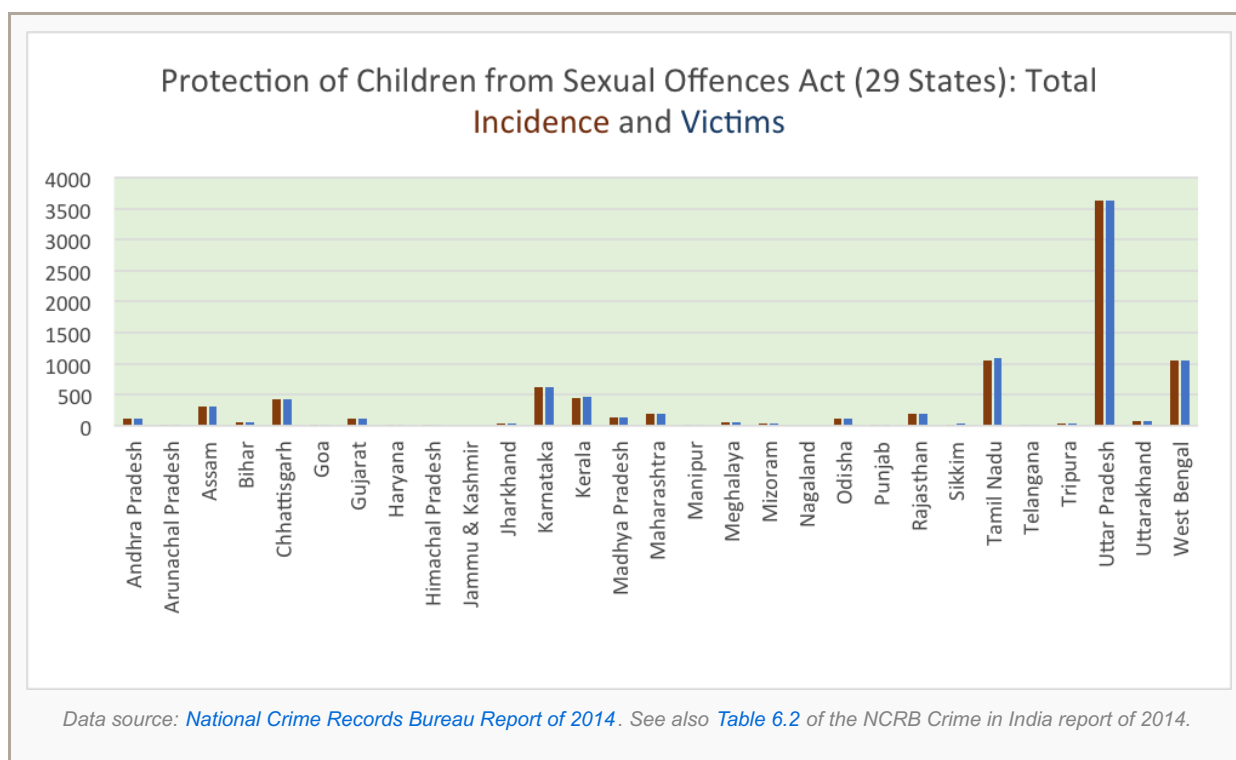
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*The Protection of Children from Sexual Offences Act (POCSO Act) was enacted in 2012. **Srishti Agnihotri** and **Minakshi Das** offer a three pronged analysis of the progress of the POCSO Act so far from the legislative, judicial and administrative perspective. In doing so, they assess the effectiveness of the Act, identify the implementation gaps, and suggest policy recommendations to plug these gaps.*

On 30 November 2015, MP Shri Rajiv Chandrashekhar spoke at an Open House on 'Why we need to start talking about Child Sexual Abuse and protect our children'. With the enactment of the [Protection of Children from Sexual Offences Act](#) (POCSO Act), and increasing awareness among civil society groups, there is an unprecedented momentum regarding protecting children from sexual abuse. Issues that were previously brushed under the carpet are now being openly addressed. The moment therefore seemed right to talk about the progress of the POCSO Act. Has it lived up to its promise? What more do we need to do to make this legislation effective?

The POCSO Act was enacted in 2012 with the aim of protecting children from sexual offences. It also provides for the establishment of special courts for trial of child sexual abuse matters. However, the Act's implementation has been mired in malpractices and outdated legal proceedings. It is therefore imperative to conduct a critical empirical assessment of its implementation mechanism. This article is a step in that direction. An example of the implementation gap is the fact that there are a total of 200-600 cases of sexual offences pending in each of the designated courts in Delhi. Further only two of the District Court complexes have a vulnerable witness room, for child witnesses giving evidence.

The graphs below illustrate the states that had highest number of cases registered under POCSO. A total of 8904 incidences and 8990 victims were reported from 29 states and 7 Union Territories in 2014.



We have to understand that NCRB has a number of limitations. Firstly, the crime rate is calculated purely

using government statistics. In addition, there could be a number of reasons that can lead to under- or overreporting in different areas, such as varying awareness and the stigma attached to child sexual abuse. However, it is important to respond to states actively reporting crimes of this nature (UP, Tamil Nadu and West Bengal).

Child sexual abuse may be committed by anyone, irrespective of age, gender ethnicity or educational/income profile. The victim of the sexual abuse may also come from any strata of society and may belong to any gender. However, when the abuser takes advantage of other vulnerabilities suffered by the child, such as poverty, migrant status, or disability, the result is a double victimisation. Children who face economic and social vulnerabilities have a harder time accessing the criminal justice system, and tend to have a more painful interaction with it when they do. For example, children with disability are entitled to the presence of a special educator or someone familiar with their method of communication during the recording of their statement under Section 164 of the Criminal Procedure Code. The authors have found that in practice this provision is not always complied with.

The Legislative Process

The POCSO Act defines offences of sexual assault, sexual harassment, pornography and safeguarding interest and well-being of children. It also lays down a child-friendly procedure regarding the recording of evidence, investigation and trial of offences, establishment of special courts and speedy trial of cases. The aim of the Act is to provide protection to the child at every stage of judicial process.

Upon a preliminary reading the POCSO Act may qualify as the ideal legislation to protect children from sexual offences. However, there are certain conceptual problems in it. For example, the Act does not give any room to the idea of consent given by persons under 18. This would mean that if a seventeen year old boy or girl had a nineteen year old sexual partner, the partner would be liable to be booked under the provisions of the POCSO Act. The Act also does not provide any clarity on what happens when two minors engage in any kind of sexual activity. Technically, they are both Children in Need of Care and Protection (CNCP) and Children in conflict with law (CCLs). In practice though, the police declare girls to be CNCPs and the boys to be CCLs.

Another problem is faced by the victims in proving the age of the child. Since the POCSO Act is silent on what documents are to be considered for determining the age of the child victim, the provisions of the Rule 12 of the Juvenile Justice Rules has been read by Courts as applying to child victims as well. This rule recognises only the birth certificate, the school certificate of the child, or the matriculation certificate. However, children who are only able to produce other documents – even a legal document such as a passport – have to undergo a bone ossification test. This test can give a rough estimate of the age of the child at best. There needs to be a clear provision in the POCSO Act that lays down what documents should be considered for proving the age of the child, and whether the benefit of the doubt should be given to the child if the ossification test cannot do an exact assessment.

Judiciary and Delivery of Justice

One of the cornerstones of the POCSO Act is its mechanism to provide speedy justice to children who are victims of sexual assault. However, many serious institutional bottlenecks affect the legal protection of children below the age of 18 years.

An obvious example is the timeline for child testimony and conclusion of the trial laid down in Section 35 of the POCSO Act. This requires the child testimony to take place within a month of the taking of cognisance by the Court, and the trial within a year of the same. However, these provisions are more often flouted than complied with due to the overburdened nature of courts in India.

A related issue is the tendency of the lawyer's to take adjournments, or adjournments caused due to external factors such as strikes in Court. In such situations, the victim ends up getting called repeatedly to court, or the hearing six or seven months after the incident is reported. This reduces the chance of their being able to recollect the facts of the incident accurately.

Interim compensation is another important issue. The child victim is entitled to interim compensation to meet their immediate needs. However, it is necessary for all stakeholders to understand that interim compensation should not be restrictively interpreted to mean only his or her medical needs. It includes every need of the child necessary for rehabilitation.

Under Section 33 (2) of the POCSO Act, the Special Public Prosecutor while recording the examination-in-chief, cross-examination or re-examination of the child, should first communicate the questions to the child to the Special Court and then those questions should be put to the child. The child should also be given frequent breaks between questions.

The role of the lawyer for the child is also pivotal. The mandate of the lawyer is to assist the prosecution. This will require proper coordination between the Public Prosecutor and the child's lawyer. Further, in our adversarial justice system, while the Public Prosecutor and defence lawyer have well-defined roles, there needs to be an examination of how the lawyer for the child victim fits into this scheme.

Administrative Pitfalls

There are two main administrative pitfalls when it comes to POCSO. Firstly, despite their best efforts, the police face a lot of barriers in conducting a proper investigation in POCSO cases. It begins with the registration of the First Information Report (FIR). The police must ensure that there is no delay in the registration of the FIR, and the conducting of the Medico-Legal Case (MLC).

However, the MLC of the victim is often not conducted as the victim's family is given inaccurate information on the long term ill-effect of the MLC on the child's health. When the child has to go for an MLC or an abortion, he or she often faces a hostile atmosphere in the hospital. Doctors therefore need to be sensitised on how to communicate with the child about what he or she is going through to prevent further trauma. Furthermore, the forensic samples taken by the police often end up getting contaminated, or putrefied due to improper storage. The police need to be acquainted with the best methods of collecting forensic evidence, so that the appreciation of the evidence can take smoothly during the trial.

The second pitfall is that under Section 43-44 and Rule 6 of POCSO Act institutions such as the National and State Commissions for the Protection of Child Rights are required to monitor and evaluate the implementation of the Act on a regular basis in addition to generating public awareness to the provisions of the Act. However, the functioning of such departments and their monitoring and evaluation procedures have not been open to public scrutiny. To this extent, it is imperative to study the procedures established by such bodies and evaluate their effectiveness in generating impactful outcomes.

Conclusion

In conclusion, the progress report of the POCSO Act gives mixed results. While the mandate of the legislation is truly radical in that it aims to protect children against sexual abuse, and provides for a victim sensitive criminal justice process, there are several snags in its implementation. Our three pronged analysis shows what creases need to be ironed out. We are at a time in our country's history, where serious open discussion on child abuse can and is taking place. We need to use this momentum to make lasting systemic change; for our children, it is the least we can do.

A longer version of the post originally appeared on [Kafila](#).

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Note: This article gives the views of the author, and not the position of the South Asia @ LSE blog, nor of the London School of Economics. Please read our [comments policy](#) before posting.

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