

Self-Proclaimed God Convicted, POCSO Amended

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Abstract

In the wake of the strings of horrific child rape, on 21 April 2018, the Union Cabinet cleared the ordinance on POCSO or The Protection of Children from Sexual Offences, whereby any individual convicted of raping a child of 12 years or under will be awarded death penalty. This article is an attempt to critically analyse the ordinance, while trying to answer whether the death penalty would reduce rapes in children.

Keywords: sexual abuse/assaults, rape, murder, POCSO (The Protection of Children from Sexual Offences Act), India

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Introduction

On 25 April 2018, a 77-year-old self-proclaimed God, Asaram Bapu and his two accomplices faced conviction of raping a teenage girl in 2013. While Asaram was sentenced to life-long jail, his two associates were awarded 20-year each for helping Asaram to accomplish the crime. All three were convicted under the Section 376 of the Indian Penal Code¹ and the Protection of Children from Sexual Offences (POCSO) Act.² The case of Asaram Bapu is not an isolated incident, however. In August 2017, another flamboyant Indian guru, Gurmeet Ram Rahim Singh, was convicted of raping two of his disciples in 2002 in his dera premises and has been sentenced to 20 years (10 consecutive years for each) in prison.³⁴

Notwithstanding, following a string of brutal child sexual assaults/rape and murder across the country—Kathua, Nagaon, Guntur, Jharkhand (Apparasu, 2018; Eltagouri, 2018),⁵ on 21 April 2018, the Union Cabinet cleared the ordinance on POCSO or The Protection of Children from Sexual Offences that aims to award death sentence to the perpetrator found guilty of a rape crime of a child below 12 years of age.⁶⁷ This article aims to make a critical

analysis of whether the POCSO ordinance will be a crucial deterrent to reduce rape crime amongst children less than 12 years.

The article begins with a description of POCSO Act promulgated in 2012 as a result of the increase in crime against children. Following this, it critically discusses whether the amended POCSO ordinance, awarding death penalty for raping children up to 12 years, would serve as a deterrent of rape against children.

POCSO Act, 2012

On 22 May 2012, the maiden POCSO Act was passed by the *Lok Sabha* (the lower house of the Indian Parliament) after it was passed by the *Rajya Sabha* (upper house of the Parliament) on 10th May 2012. The Act extends to the whole of India except for the state of Jammu and Kashmir. According to this Act, any person below 18 years of age is considered as a child. Central objective of the Act is “to protect children from 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.”⁸ It mandates mandatory reporting of child sexual crimes, and for brutal acts like Penetrative Sexual Assault, Aggravated Penetrative Sexual Assault, Sexual Assault and Aggravated Sexual Assault, the onus of providing proof lies on the accused rather than the victim. A meticulous analysis of the Act is illustrated in Table 1.

¹For details, please refer to Section 376 in The Indian Penal Code, Indian Kanoon, retrieved 25 April 2018 from, <https://indiankanoon.org/doc/1279834/>

²Asaram convicted under POCSO Act: Govt guidelines on how media should cover rape cases(2018, 25 April). *Zee News*, retrieved 25 April 2018 from, <http://zeenews.india.com/india/asaram-convicted-under-pocso-act-govt-guidelines-on-how-media-should-cover-rape-cases-2102861.html>

³ India guru rape: Gurmeet Ram Rahim Singh jailed for 20 years (2017, 28 August). *BBC News*, retrieved 28 May 2018 from, <http://www.bbc.co.uk/news/world-asia-india-41070764>

⁴ Violence after Ram Rahim conviction: HC hints at common place of trial for all accused (2018, 26 May). *Hindustan Times*, retrieved 28 May from, <https://www.hindustantimes.com/india-news/violence-after-ram-rahim-conviction-hc-hints-at-common-place-of-trial-for-all-accused/story-IDKnIU1H50K87WbjdAmPnN.html>

⁵ India girl, 16, burnt alive after Jharkhand rape (2018, 5 May). *BBC News*, retrieved 5 May 2018 from, <http://www.bbc.co.uk/news/world-asia-india-44016176>

⁶ What is POCSO Act? (2018, 21 April), Financial Express, retrieved 19 May 2018 from,

<https://www.financialexpress.com/india-news/what-is-pocso-act/1140766/>

⁷ Ordinance likely to award death penalty for raping children up to 12 yrs (2018, 21 April), *The Economic Times*, retrieved 19 May 2018 from, <https://economictimes.indiatimes.com/news/politics-and-nation/ordinance-likely-to-award-death-penalty-for-raping-children-up-to-12-yrs/articleshow/63847897.cms>

⁸*The Protection of Children from Sexual Offences Act, 2012* (No.32 of 2012), Ministry of Law and Justice, Legislative Department, 20 June, 2012, New Delhi, retrieved on 17 May 2018 from, <http://www.wcd.nic.in/sites/default/files/childprotectio n31072012.pdf>

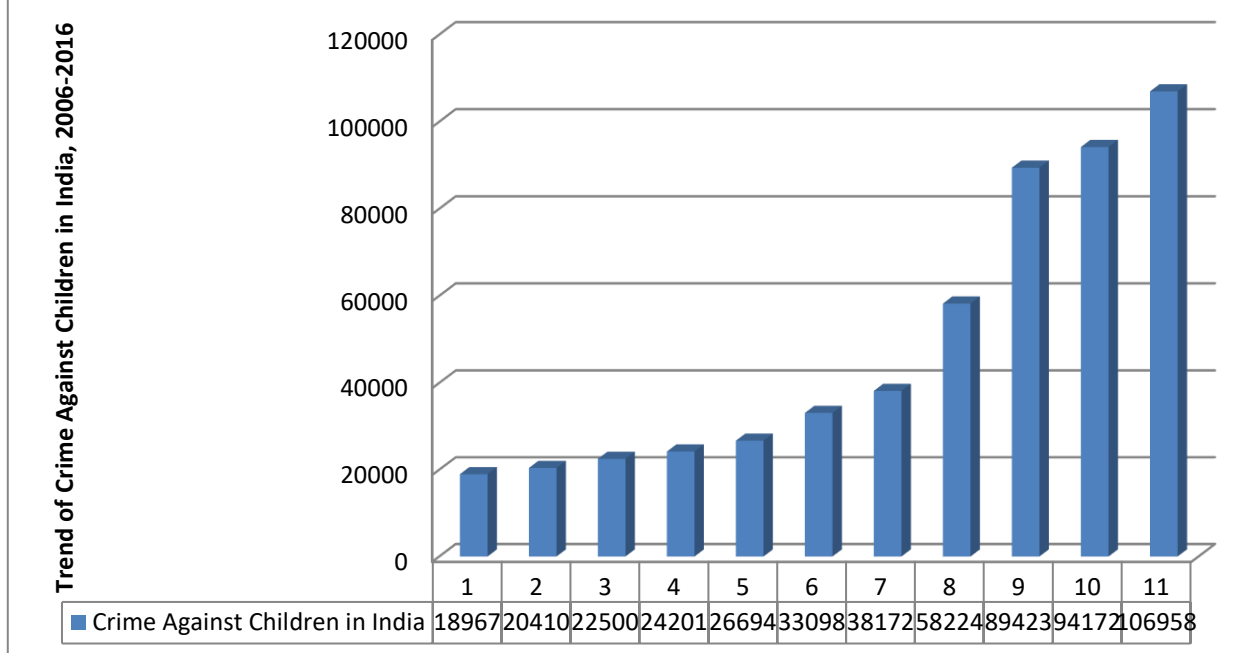
Table 1: Analysis of the Protection of Children from Sexual Offences Act, 2012

Offences and Punishment on a child (including disabled children defined under Section 2 of Mental Health Act, 1987 and female child trying to make the child pregnant)	<p>Chapter II: Penetrative Sexual Assault by an individual or group (including police officers, armed forces or security officers or a public servant, management or staff of an educational or religious institution)—Not less than seven years but may extend to imprisonment for life, and will be liable to monetary compensation/fine</p> <hr/> <p>Chapter II: Aggravated Penetrative Sexual Assault by an individual or group (including police officers, armed forces or security officers or a public servant, management or staff of an educational or religious institution)—Not less than ten years which may extend to imprisonment for life, and will be liable to monetary compensation/fine</p> <hr/> <p>Chapter II: Sexual Harassment includes any form of sexual gestures, uttering of sexual sounds or exhibiting of objects or body parts—Shall be punished with imprisonment of either description for a term or might extend to three years and shall be liable to monetary compensation/fine.</p> <hr/> <p>Chapter III: Use of child for Pornographic purposes—Punishment varies according to the scale of the crime and might start from three years of jail sentencing to eight years and upon payment of a fine.</p> <hr/> <p>Chapter IV: Abetment of and attempt to commit an offence through instigation, "or in pursuance of the conspiracy or with the aid, which constitutes the abetment."— Shall be punished 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 imprisonment provided for that offence or with fine or with both."</p>
Procedures	<p>The children should be interviewed in a child-friendly and neutral environment.</p> <hr/> <p>The interviewer, preferably by a non-uniformed woman police officer, must apply extreme caution and be extremely sensitive to approaching the child by recognising and understanding the vulnerability.</p> <hr/> <p>The child's statement should be recorded as the way the child speaks and the interview must be conducted in front of the child's parents or other trusted person. In some cases, assistance from an interpreter, special educator (in the case of disabled child), or other professional would arise.</p> <hr/> <p>The medical examination should be carried out in presence of the child's parent or other trusted person of the child, and in the case of a female child, the examination should be conducted by a female doctor</p> <hr/> <p>The trial should be conducted entailing frequent breaks and no child should called on repeatedly to be testified.</p> <hr/> <p>Trials should be in-camera. Questioning the child should be approached with meek bearing no character assassination. All forms of media are debarred from disclosing the identity of the child without permission from the Special Court.</p>

Sources: The Protection of Children from Sexual Offences Act, 2012 (No.32 of 2012), Ministry of Law and Justice, Legislative Department, 20 June, 2012, New Delhi, retrieved on 17 May 2018 from, <http://www.wcd.nic.in/sites/default/files/childprotection31072012.pdf>; Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012, Ministry of Women and Child Development, retrieved 28 May 2018 from, <http://childlineindia.org.in/pdf/POCSO-ModelGuidelines.pdf>

Figure 1: Crime Against Children in India, 2006-2016

Source: National Crime Records Bureau



Crime against Children

There is a broad discourse on different forms of violence against Indian women in India and its linked to psychological and physical health (Bhattacharyya, 2009; 2013a; 2015; 2016; Babu and Kar, 2009; Kalokhe et al., 2016; Rudd, 2001; Vacher and Sharma, 2010; Viswanath and Mehrotra, 2007). Nonetheless, India has emerged as one of the high-risk countries in the world for women. This survey conducted by Thomson Reuters Foundation found that while Afghanistan and Syria ranked respectively second and third, the USA occupied 10th position (Dewan, 2018). However, far too little is known about violence against Indian children (Bhattacharyya, 2017). The National Crime Records Bureau (NCRB) started recording separate offences against children only since 1994. NCRB started recording reported crimes under two key sections—crimes punishable under *Indian Penal Code* (Foeticides, Infanticides, Abetment of suicide, Exposure and abandonment of children, kidnapping and abduction, buying and selling of girls for

prostitution, rape, unnatural offences), and Crime against children, which are punishable under *Special and Local laws* (Immoral Traffic Prevention Act, Child Marriage Restraint Act, Child labour Prevention Act)(see, Bhattacharyya, 2017 on India’s missing children). Prior to 1994, NCRB recorded crimes under juvenile delinquency since 1969, but these are crimes committed by juveniles and youth offenders. Currently, this is considered as juveniles in conflict with law. Nonetheless, despite of various legislations in place, a pedantic analogy of the NCRB data by a civil society organisation: CRY–Child Rights and You⁹ unveils that during the decade 2006-2016, sexual offence against children has increased by 500 per cent signalling that a child in India faces sexual assaults every 15 minutes (Figure 1). In between 2015-2016, crime against children increased by 11 per cent (Figure 1).

⁹Crime Against Children in India, CRY – Child Rights and You, CRY Media release: Crime against Children 2016, retrieved 28 May 2018 from, <https://www.cry.org/wp-content/uploads/2018/01/CRY-Media-release-Crime-against-Children-2017.pdf>

Table 2: Top Five State-Wise Data for Crimes Committed Against Children , 2016

State	Number of Crimes	Rates
Child Rape		
Madhya Pradesh	2467	8.1
Maharashtra	2292	6.1
Uttar Pradesh	2115	2.4
Odisha	1258	9
Tamil Nadu	1169	5.8
India	19765	4.4
Kidnapping & Abduction of Children		
Uttar Pradesh	9657	10.9
Maharashtra	7956	21
Madhya Pradesh	6016	20
Delhi	5935	106
West Bengal	4178	14.2
India	52253	12.3
Sexual Assault/ Insult to the Modesty of Children		
Uttar Pradesh	2652	3
Maharashtra	2370	6.3
Madhya Pradesh	2106	6.8
Delhi Union Territory	766	13.7
Kerala	517	5.5
India	12226	2.7
Procuration of Minor Girls		
Assam	1519	12.8
West Bengal	706	2.4
Rajasthan	60	0.2
Haryana	56	0.6
Telengana	32	0.3
India	2488	7
Crimes under POCSO*		
Uttar Pradesh	4954	5.6
Maharashtra	4815	12.7
Madhya Pradesh	4717	15.7
West Bengal	2132	7.3
Odisha	1928	13.7
India	36022	8.1

*These are crimes under POCSO—Child Rape (Sections 4 & 6 of POCSO Act) / Section 376 IPC, Sexual Assault of Children(Sections 8 & 10 of POCSO Act) / Section 354 IPC, Sexual Harassment (Section 12 of POCSO Act) / Section 509 of IPC, Use of Child for Pornography/Storing Child Pornography Material (Section 14&15), Under Other Sections of POCSO Act

Sources: Crime in India, 2016, National Crime Records Bureau; Crime Against Children in India, CRY – Child Rights and You

Table 2 unfolds a detailed breakdown of crimes perpetrated against children. Of all the crimes committed against children, child rape and kidnapping occupies the top places of all crimes. Importantly, more than 50 per cent of the total crimes were reported from the states

of Uttar Pradesh, Maharashtra, Madhya Pradesh, Delhi and West Bengal. As mentioned above, in the aftermath of a series of child rapes barbarity[abduction, rape and murder of a 8-year-old child in Rasana village near Kathua (Jammu and Kashmir); gang-rape and murder

of a child studying in Class V in Nagaon district (Assam); rape of a 9-year-old child in Guntur, Andhra Pradesh by a 60-year-old man who later committed suicide from a tree near Amaralingeswara Swamy Temple in Amaravati; rape of a 17-year-minor old girl by Kuldeep Singh Sengar, a Member of the Legislative Assembly of Uttar Pradesh in Unnao; the gang-rape and murder of a 16-year-old minor girl in Jharkhand, who was burnt alive in her home}, on 21 April 2018, the Union Cabinet cleared the POCSO ordinance, whereby any individual convicted of raping a child below 12 years of age will be awarded capital punishment.

Notwithstanding, over 600 scholars and academicians from across the globe sent an open letter to honourable Prime Minister, Mr Narendra Damodar Modi condemning the Kathua and Unnao rape cases because in these two rape cases the members of the ruling party (Bharatiya Janata Party) of the respective states were involved. The letter accused Mr Modi that "his statements on the "monstrous crimes" had been "wholly inadequate, platitudinous" and gave "non-specific assurances of justice" for the victims."¹⁰ I argue that rape is an act of an individual. Why are these scholars trying to politicise rape? Why did these scholars fail to voice their concerns over the heinous gang-rape case of Assam that took place in March 2018?

Nonetheless, the critical question here is—will the capital punishment be a yardstick to enhance safety amongst children and reduce child rapes? Perhaps not! This is because, after the horrific *Nirbhaya* incident of December 2012, the stringent *The Criminal Law (Amendment) Act, 2013*¹¹ was passed by the Government of India (Bhattacharyya, 2013b; 2015; 2016) and the consequent historic verdict of the honourable Supreme Court of India awarded death penalty to all the four adult

perpetrators¹² of *Nirbhaya* on 5 May 2017. An excerpt of the 429-page historical *Nirbhaya* verdict read:

The casual manner with which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do. It is manifest that the wanton lust, the servility to entirely unchained carnal desire and slavery to the loathsome beastility of passion ruled the mindset of the appellants to commit a crime which can summon with immediacy "tsunami" of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety (page 313).¹³

However, despite of this historic verdict, little has changed for women on the ground (Khan, 2017) and the death penalty is no deterrent. This signals that *The Criminal Law (Amendment) Act, 2013* by it is inadequate to tackle crime against women (Viswanathan, 2013). Table 3 unravels the overall reported crime against women post-2013. In a similar context, I argue that death penalty incorporated in the POCSO ordinance will prove to be a fruitless exercise in the long-run. In the study titled *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists* by Michael I. Radelet and Traci I. Lacock of the University of Colorado and published in the *Journal of Criminal Law and Criminology* found

¹⁰ After Ex-Bureaucrats, 600 Academics Send Sharp Letter To PM Modi On Rapes (2018, 22 April). *NDTV*, retrieved on 26 May 2018 from, <https://www.ndtv.com/india-news/after-ex-bureaucrats-600-academics-send-sharp-letter-to-pm-modi-on-rapes-enoughisenough-1840952>

¹¹ The Criminal Law (Amendment) Act, 2013 (No.13 of 2013), Ministry of Law and Justice, The Gazette of India

¹²*Nirbhaya* was gang-raped by six men. Ram Singh, the principal accused, committed suicide in Tihar jail on 11 March 2013. One of the accused was a juvenile, who was released from remand home on 18 December 2015.

¹³Criminal Appeal Nos. 607-608 OF 2017, Retrieved on 19 July 2017 from, <http://www.thehindu.com/news/national/article18390998.ece/binary/SupremeCourtverdict>

Table 3: Crime Against Women

Overall Crime Rate		Percentage Variation		Overall Crime Against Women			
2014	2015	2016	2014-2015	2015-2016	2014	2015	2016
56.6	54.2	55.2	-3.0%	2.9%	3,39,457	3,29,243	3,38,954

Source: Crime in India, 2016, National Crime Records Bureau, Ministry of Home Affairs

that 88 per cent of the renowned criminologists of the USA failed to endorse that death penalty is an effectual deterrent to tackle crimes. Instead, it is arguable that life imprisonment might be less exorbitant than capital punishment because merely locking a perpetrator for a heinous crime and at the same time, making sky-high/inordinate payments to a group of legal practitioners for years (and even decades) debating whether or not death sentence be imposed—will prove to be both time-consuming and a costly affair. Besides, I support the arguments of Amnesty International, which states:

The death penalty is cruel, inhuman and degrading. Amnesty opposes the death penalty at all times - regardless of who is accused, the crime, guilt or innocence or method of execution.¹⁴

“As of December 2017, 106 countries of the world have abolished the death penalty for all crimes”.¹⁵Hence, I urge the rapists/other perpetrators should be awarded long-term imprisonment, possibly beyond their life, depending on the scale of the crime they commit. For instance, in a recent verdict (January 2018) in the USA that stemmed as a result of the #me too movement (Bhattacharyya, 2018), Larry Nassar, a pedophile gymnastics doctor was sentenced to 40-175 years in prison by Judge Rosemarie Aquilina for decades of sexual assaults, where he was accused of seven counts of felony first-degree sexual misconduct after a seven-day hearing in Ingham County Court (Bhattacharyya, 2018; Levenson, 2018).

“According to an affidavit filed by the centre in Supreme Court, 1,12,168 cases lodged under the POCSO Act are pending in trial courts. Uttar

Pradesh tops the list with nearly 31,000 cases”(Kapoor, 2018). “There is not just huge pendency; the conviction rate is abysmally low --- 29.6 per cent in 2016, down from 36.3 per cent the year before” (Kapoor, 2018).I urge for improvement of all-round infrastructure — filling in of vacant judiciary posts, fast-track trials, improvement of the police force (through recruitment of women police officers), societal reforms through increased gender sensitisation remains paramount (Bhattacharyya, 2013b; 2015; 2016). At the same time, we must also look for measures as to how we save our children from the bogus human Gods. The following quote from the historic *Nirbhaya* verdict (page 429) reinforce my observations on POCSO ordinance.

The battle for gender justice can be won only with strict implementation of legislative provisions, sensitization of public, taking other pro-active steps at all levels for combating violence against women and ensuring widespread attitudinal changes and comprehensive change in the existing mind set. We hope that this incident will pave the way for the same (page 429)¹⁶

Conclusion

The article set out to review the POCSO ordinance that aims to promulgate death penalty for raping a child below 12 years of age. However, death penalty has never been a solution to combat rapes or forms of crime. I therefore urge for a healthy debate in the Parliament before this ordinance is passed to become legislation.

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¹⁴ Death Penalty, *Amnesty International*, retrieved 20 April 2018 from, <https://www.amnesty.org/en/what-we-do/death-penalty/>

¹⁵Please refer to footnote 14

¹⁶Please refer to footnote 13

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