

**A COMPREHENSIVE OUTLOOK FOR DISCREPANCIES****Jjiraj M.J**LL.M, II year/ IV Semester 2022-2024 Faculty of Law, Kalinga University, Naya Raipur, Chhattisgarh  
jjirajarakkal.55@gmail.com**ABSTRACT**

*Law is considered the armor of society to defend and secure its purpose by ensuring the desired outcomes that serve the welfare of entire human rights and its existence with other co-beings. When the various needs challenges, precautions, preservation, protection, prohibition individual liberty and its limits, and so on of the society act as the sources of law which are enforced back upon the society to demand the desired positive outcomes of such pieces of legislation. Sometimes these laws are intended to be formed to protect certain very specific vulnerable groups in a civilian society who easily become the victims of unethical, indecent, immoral, and brutal crimes. In such scenarios, there is a denial of equal protection of the law and equality before the law because the law exerts greater emphasis on its aim than its balance that warrants the privilege of such groups by cautioning the society. In Indian conditions, the two most vulnerable groups of such kind are Women and Children. Both of these groups are more prone and likely to be the victims of crimes in various forms like abuse, violence, and sexual assault (natural and unnatural). So the time from which the various codifications are prevalent these groups are getting more consideration from such codes of both substantive and procedural types. The Indian Judiciary enters into the procedural side with the belief of legal principle 'Ignorantia Juris Non Excusat' and conducts further substantive side of the law with a prayer 'let hundred guilty be acquitted but one innocent should not be convicted'.*

*Act 32 of 2012 (POCSO) is constitutionally valid under Article 15(3) making such two terms 'PROTECTION' and 'PREVENTION' as a privilege.*

*Keywords: Protection to the child, POCSO law, Sexual Abuse against a child, rights of the child, Impact of POCSO, Positive and negative impact of POCSO, Misuses & Loopholes in POCSO Act, 'IGNORANTIA JURIS NON-EXCUSAT', Act against the sexual offence, Assault against a child with sexual intend, Offences, Punishment.*

**Factors Misguiding the Public Accountability Cast in Act****1. INTRODUCTION**

Every law induces the duty to the public for its implementation. The POCSO Act is a gender-neutral law<sup>1</sup>. Hence certain sections in it have serious interaction between the public and other machineries. Such conditions may give rise to changes that may bend and brittle the exact meaning and function of such sections. Public accountability demanded by this act is like a variable constant. The interpretation changes with the circumstances when the law remains static.

**2. Various Factors of Public Accountability in the POCSO Act****A. Section 19<sup>2</sup> POSCO ACT- Mandatory filing of FIR**

<sup>1</sup>Dr. Sonali Kusum, GLARING MISUSES OF PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (POCSO) ACT - CONTEMPORARY JUDICIAL PERSPECTIVES FROM INDIA, 11, IJFANS, 3370, 3376, 2022

f2e4c88fa2d3cef3c01ab7bb3f0c64a4.pdf (ijfans.org)

<sup>2</sup> THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012, §19, No. 32 Acts of Parliament 2012

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Anyone with knowledge of an offense committed or likely to be committed is required by law to report it to either the local police department or the Special Juvenile Police Unit. The primary goals of this are to shield kids from abuse by other offenders and to shield them from more exploitation. Police are required under this clause to write down the entry number and make a written record. Read it aloud to the informant or child. The criminal clause (Section 21) that imposes penalties for failing to provide such information lends further weight to the term "mandatory."

The intention of the law behind such mandatory reporting is to make the victim or their parents not hesitate for approaching the law for the paramount safety of the child and in another situation if the child has any form of developmental mental issues or retarded mental growth their caretakers may not co-operate to inform such offense to the police. Due to lack of social support, social isolation, economic issues, threats from the perpetrator, and other delays and issues may also make the family reluctant to inform.

In this condition, the main flaw in this area is the failure to provide a specific timeline for lodging the FIR. It only talks about mandatory reporting and further processes. This may result in the framing of fake complaints and on the other side a strong defense for the accused.

### **B. Case law**

In *Ajay Yadav v. State of UP & Others*<sup>3</sup>, the Allahabad High Court stated that it is the worst situation for the judiciary to see a corrupted section of the public using POCSO as an instrument to file fake FIRs with the crooked intention to loot money and damage the reputation of innocent peoples in society. In this case, when the alleged offender approached the court for anticipatory bail his counselor argued the delay in filing the FIR and the victim had nothing to justify such delay. Further, he said the occurrence reported in it had never happened and it aimed at harassing or defaming him.

### **3. Age of Consent<sup>4</sup>**

Section 2(d) of the POCSO ACT provides that "child" means any person below the age of eighteen years. When an act is enforced it's the responsibility of society to be aware and make use of it in compliance with the provisions. Earlier before the 2013 Criminal Amendment Act 2013 as per the IPC 1860, the consenting age was 16 years until The POCSO act was enacted and then onwards consenting age was raised to 18. Because it takes into consideration the mental and physical immaturity of a child below 18 years. This is mainly because the definition of 'aggravated sexual act' [Sec. 2(1)b]<sup>5</sup> has the legal presumption that the perpetrator may take advantage of such mental and physical immaturity/disability of the child to commit the offense. So the consent granted even for a consensual sexual relationship when his/her age is below 18 is immaterial. Hence the defense of 'Consent' is not applicable here as in the offense of rape in IPC. So there is a serious obligation of the public before lodging the petition to ensure whether the victim is under eighteen years old and hence the crime attracts the relevant sections of the POCSO act

### **A. Age of consent causes ambiguous approaches in different circumstances<sup>6</sup>**

In the *Ashik Ramjan Ansari* case, the Bombay High Court held that "whether a consensual relationship or otherwise, as the law presumes that a girl below 18 years is not capable of consenting to sexual intercourse and in such a scenario, even if a girl below 18, consent to sexual intercourse, her consent must be ignored and the other

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<sup>3</sup> Lead India, <https://www.leadindia.law/blog/en/misuse-of-pocso-act/>, 25-04-2024.

<sup>4</sup> Rachit Garg, Age of Consent in India, i-pleaders, (29-04-2024, 17:50), [https://blog.iplayers.in/age-of-consent-in-india/#Criminal\\_Procedure\\_Code\\_1973](https://blog.iplayers.in/age-of-consent-in-india/#Criminal_Procedure_Code_1973) .

<sup>5</sup> THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012, §2(1)b, No. 32 Acts of Parliament 2012

<sup>6</sup> *Supra* note 1 at 3374

party shall be guilty of committing an offense under the POCSO Act. This provision, though intended to target sexual exploitation of children i.e. a male or a female, however, has created a gray area, as it has resulted in criminalizing consensual adolescence/teenage relationships". This will also give a way to create some fictitious complaints against innocent people in society.

## **Conflicts of The POCSO Act Sections with other legal coding**

### **1. Introduction**

The theory of punishment that is emitted throughout every nuke and corner of the act is the substantial amount of deterrence. It is smelted for implementing the strictness. While accomplishing its target the act overrides the other laws. This ambiguity and the need for further interpretations and clarifications may cause the child to face secondary victimization, may extend the duration of procedures, a lack of protection machinery for victims and witnesses, possible threats by the alleged accused, and other social stigmas.

### **2. Section 42A-The Protection of Children from Sexual Offences Act, 2012<sup>7</sup>**

A. The provisions of this act will supplement and not diminish the provisions of any other law now in effect. In the event of a discrepancy, the act's provisions will take precedence over those of any other law to the degree of the discrepancy. Conflict with Personal laws

#### **1. Marriage of a Muslim Minor Girl and POCSO<sup>8</sup>**

Muslim marriages are governed by personal law and a Muslim girl who has attained the age of 15 is considered competent to enter into a marriage as per Islamic law. But even if the minor had exercised free will in choosing marriage and to consummate it thereafter, such consent has no value in the eyes of the POSCO law. As per Mohammedan Law<sup>9</sup>, Puberty is presumed on completion at the age of fifteen years. From this, an individual who attained such presumption is possible to enter the contract of marriage without the permission of her parents or family, and as per law, she can reside with her husband even if she is a minor. And such marriage is an exception to the Prohibition of Child Marriage (PCMA). But the POSCO act being a secular act gets into a strong collision with such personal laws.

The Delhi High Court further ruled that a juvenile girl who has reached puberty—which is generally considered to be 15 years old—is entitled to live with her husband and marry without parental approval under Muslim law. In these situations, where sexual relations occurs only after marriage, the POCSO Act will not apply to the charges. The Punjab High Court rendered a decision akin to this one, which the National Commission for the Protection of Child Rights (NCPCR) has appealed to the Supreme Court. The NCPCR said in its appeal that the decision effectively permitted child marriage and sexual relations with minors, in violation of both the POCSO Act and the Prohibition of Child Marriage Act.

#### **B. Conflict with Section 20 SC/ST Atrocities Act 1989<sup>10</sup>**

The SC/ST Act stipulates in Section 20 that it supersedes other legislation. "A Special Court established under the appropriate Act will handle the trial if a case involves violations under both the SC/ST Act and the POCSO Act. A Special Court established under Section 14 of the SC/ST Act will preside over the trial if Section 20 of the Act

<sup>7</sup> THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012, §42A, No. 32 Acts of Parliament 2012

<sup>8</sup>Bar and Bench <https://www.barandbench.com/news/pocso-act-issues-and-challenges-how-courts-responded-2022,30-04-2024>.

<sup>9</sup> **Sakshi**, Inconsistency Of Recent Judicial Decisions With The PCMA and POCSO Act, legal Service India E-Journal, (30-04-2024,03.00), <https://www.legalserviceindia.com/legal/article-10000-inconsistency-of-recent-judicial-decisions-with-the-pcma-and-pocso-act.html>

<sup>10</sup> <https://supremetoday.ai/issue/section-42-of-posco-Act,30-04-2024>.

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is used. However, in the event that Section 42-A of the POCSO Act is used, a Special Court established in accordance with Section 28 of the POCSO Act shall preside over the trial [State of A. P. VS. Mangali Yadagiri]. Last but not least, the POCSO Act supersedes other legislation in the event of a discrepancy thanks to Section 42A.

### **1. Mode of Punishment in POCSO Act and IPC<sup>11</sup>**

Section 42 of the POSCO Act 2012 provides that ‘Where an act or omission constitutes an offense punishable under this Act and also under any other law for the time being in force, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offense shall be liable to punishment only under such law or this Act as provides for punishment which is greater in degree.’ If an offense is criminal under both the POCSO Act and the Indian Penal Code (IPC), the offender will be prosecuted under the Act, which carries a harsher penalty, as per Section 42 of the POCSO Act. This goes against the conventional understanding of criminal justice, which holds that the offender benefits from a lesser sentence. The POCSO Act's Section 42 was purposefully added to provide children's protection first priority [Independent Thought VS Union of India

### **Misuse of The POCSO Act may deprive fundamental rights of the alleged offender**

#### **1. Introduction**

Some possibilities of misuse are discussed in previous chapters. When such misuses happen due to the defects and deficient constructions of substantive & procedural sections that fail to accommodate all arising circumstances from the society concerning a kind of offense prescribed in the act, it may cause an indirect infringement of the fundamental rights and thereby causing miscarriage of justice to the alleged accused when such fictitious complaint with malicious intent was lodged.

#### **2. POCSO- An Enclosure of Deterrence and Strictness**

##### **A. Classification of Offences Under the POCSO Act**

The POCSO Act broadly covers three types of offense to children. Sexual Assault, Sexual Harassment, and Using a Child for Pornography. There is no explicit section that gives information regarding the classification of offenses as Cognizable or Non-Cognizable. Hence the lowest degree of punishment for the accused provided is in Section 12(3 years imprisonment and fine) of the POCSO Act for the elucidated offence in Section 11. From this assessment, it is clear that all offenses against children under this act are Cognizable and Non-Bailable.

##### **B. Mandatory Procedural instructions of the Pocso act, 2012 and CRPC 1973**

As per section 19(1) of the POCSO Act Mandatory Reporting is a key as well as initial procedure to get the cognizance of such offense. The section provides as follows.<sup>12</sup> “Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, shall provide such information to,(a) the Special Juvenile Police Unit; or (b) the local police”. The rigidity of this section is further engrafted through Section 21(1) of the POCSO Act. “Any person, who fails to report the commission of an offence under subsection (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both”. The Interlink between these sections shows the importance of mandatory reporting which points to the purpose of the act.

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<sup>11</sup> Ibid

<sup>12</sup> THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012, §19(1), No. 32 Acts of Parliament 2012

Crimes under the POCSO Act are Cognizable. Hence there will be a mandatory lodging of FIR under Sec 154 CRPC and through the guidelines put by the Supreme Court in Latha Kumari v. State of UP&Ors<sup>13</sup>. Once a Petition has been filed with disclosing a cognizable offence FIR should be registered. Normally Police will start the investigation by recording the arrest of the alleged offender under Section 41(b)(ii) to question him/her (To conduct a proper investigation), to avoid the chances of tampering with the evidence by the offender, to ensure his/her presence in court.

### 3. Failure of the POCSO Act to interpret the term ‘Consent’ in certain Circumstances

#### A. Analysis of Various Cases<sup>14</sup>

##### 1. Varadarajan v. State of Madras, 1964

This case, while is historic in the field of abduction, has nothing to do specifically with the POCSO Act. The Supreme Court firmly believed that there had been no kidnapping in this case. The SC said that the girl could not be considered an uneducated girl because she was close to reaching the age of majority, a senior in college, and had spent her entire childhood in a large city. This has an impact on POCSO and the age of consent in the current situation since the Varadarajan ruling is increasingly being applied to exonerate POCSO defendants because the "victim" would be close to obtaining

##### 2. Atul Mishra v. State of U.P

The apex court of UP, in an elopement case a child was born out of wedlock, noted that *“the applicability of statutory provisions is not a mathematical exposition or its theorem. If the mathematical application of these statutes leads to disastrous effects, the onus falls upon the courts to mellow down the rigours of the provision to achieve a more meaningful and swallowable application of the statute.”*

*“If these teens decided to enter into a nuptial knot and now they have a baby out of this relationship, certainly the rigours of the POCSO Act would not come in their way. The girl is not sexually abused; no sexual assault was made upon her, nor has she been sexually harassed by the applicant, as contemplated by the object of the POCSO Act.”*

##### 3. Anoop v. State of Kerala

The Apex Court of Kerala, in the case of Anoop v. State, laid down that, “Unfortunately, the statute does not distinguish between the conservative concept of the term “rape” and the “sexual interactions” arising out of pure affection and biological changes. The statutes do not contemplate the biological inquisitiveness of adolescence and treat all “intrusions” on bodily autonomy, whether by consent or otherwise, as rape for certain age groups of victims.”

##### 4. Absence of Presumption of Innocence and Presence of Reverse Burden<sup>15</sup>

Our Criminal Justice System normally stands with the principle of Presumption of Innocence except for certain special purpose laws. A defendant/convict/accused has the right to be presumed innocent until proven guilty. As per The Bharatiya Sakshya Adhinyam Sec. 104 & 105, the burden of proof exists with the one who asserts the facts and not with the one who denies them. But in the case of the POCSO Act, the scenario is different. Section 29 provides that “Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed

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<sup>13</sup> <https://indiankanoon.org/doc/10239019/>

<sup>14</sup> Aron Thomas, Age of Consent in India, I-pleaders, (30-04-2024,11:19), <https://blog.ipleaders.in/age-of-consent-in-india/#References>

<sup>15</sup> Tanisha Prashant, Presumption of innocence and reverse burden of proof: maintaining rights of accused in current crime epidemic, I-pleaders, (30-04-2024,11:55) <https://blog.ipleaders.in/presumption-of-innocence-and-reverse-burden-of-proof-maintaing-the-rights-of-the-accused-in-the-current-crime-epidemic/>

or abetted or attempted to commit the offense, as the case may be unless the contrary is proved”, which is otherwise called Shift of Burden/Reverse Burden<sup>16</sup>. It is further established through section 30(1). “In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defense for the accused to prove the fact that he had no such mental state concerning the act charged as an offense in that prosecution”.

### **5. Misuse drains the natural essence and intent of Procedural law**

A law itself proving not of a comprehensive type will catalyze the ways of its misuse and such condition will attract the improper procedural application that may lead to erosion of natural justice.

#### **A. Illustrative Example**

If a petition carries the information of a POCSO offense arising out of a Consensual Sexual interaction from romantic relationships of adolescents<sup>17</sup> that lies outside the scope of law or the current status of law or due to an absence of explicit provision may open a strategy to any of the party or their family to deceive another for any other reason by misusing the act and its incompleteness. Even though many judicial pronouncements now acquit the alleged offender in similar circumstances. But it happens only in the later parts of the trial. Before that, the offender alleged in the fake complaint will undergo Arrest, Pretrial, & Incarceration that may defame and harass such person's reputation.

As the aforesaid presumption of innocence is unavailable and on the other hand burden shifts to the accused when the prosecution proves the foundation of the claim beyond a reasonable doubt through a fake petition will make more suffocation, hardships, adversity, stress, a state of zero endurance to the alleged accused in that petition.

Here it is very much evident that the act lost its balance because of its strenuous aspect of strictness and deterrence as its only purpose and non-fulfilment of classification of Procedure for different circumstances with an advanced outlook to prevent the misuses is also a notable drawback of POCSO that enhances its misuse.

### **6. Indirect Infringement/Ruin of Fundamental Rights of Accused<sup>18</sup>**

As a concluding part of this chapter, inferences drawn from all the prime heads discussed point toward the inability of a law to keep its pace in the substantive as well as procedural mechanism to mitigate or reduce its application which is against its original objective. Protection of Children From Sexual Offences Act only aims at strict implementation on the precautionary and preventive side. The diplomatic approach of this law without losing its primary purpose is too low, hence making it a failure to compile & interpret all emerging situations that may arise from the ever-updating momentum of the societal sphere beyond a reasonable doubt. When a law gives enough space for misuse, such will result in erosion of justice from any one of the sides. (Victim/Accused). When such misuse/incompatibility of law is applied to criminalize an innocent person it indirectly infringes on such person's fundamental right.

A good example is Section 12 POCSO Act which is mostly found in reported fake complaints. After mandatory reporting under the POCSO that discloses a cognizable offence the investigating agency normally lodges the FIR and Arrests the offender to keep their positions intact[CRPC 41(B)]. IF an Arrest takes place due to any misuse or incompliance of sections (Eg:-Consent immaterial in Consensual sex in teenagers) with disclosed facts or due to procedural imbalance will take away the liberty, dignity, and reputation. Such violates Article 21(“Protection of

<sup>16</sup> Pooja Amaravathi and Ananya Mishra, The Presumption of Innocence and its Role in the Criminal Process, 4, International Journal of Law management and Humanities(IJLMH),1135, 1136, 2021

<sup>17</sup> Sunidhi Kashyap, POCSO: A law that requires rethinking, Times of India, (30-04-24,14:00), <https://timesofindia.indiatimes.com/readersblog/the-legal-sapphire/pocso-a-law-that-requires-rethinking-43287/>

<sup>18</sup> Soumya Prakash, Sexual Abuse of Children and The Constitution of India, Rostrum legal, 1, Rostrum`s Law review(RLR), <https://www.rostrumlegal.com/sexual-abuse-of-children-and-the-constitution-of-india/>

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Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.”). The Non-availability of a provision to keep the details of the arrested person secret at least till the stage of the final report will make things worse.

So from above mentioned facts, it is very clear that the misuse of the POCSO act also clauses non-compatibility with Constitutional law.

### **Certain isolated observations regarding misuse and flaws of POCSO law**

1. Under POCSO Act the consenting age is 18. Under Section 118 Indian Evidence Act 1872 the court considers the child a credible witness irrespective of age if he shows enough maturity in Voir dire test. A child can be easily tutored/twisted by his parents/others. When it is alleged that the offense was conducted the burden of proof shifts to the accused and the consent by a minor is immaterial. So here the child means a person below the age of eighteen whose consent is immaterial. But on the other side, the court is ready to accept his /her statement if the child rationally gives the testimony. So here are the assumptions and procedures of law that may allow a person to misuse the POCSO Act sections as a weapon against another through fake framed circumstances.
2. If the victim declines a medical examination but the child's family and the investigating agency are ready to have the youngster examined, the Act says nothing.
3. A female doctor is required to examine a female victim child medically under section 27(2) of the POCSO Act. However, if a doctor of that gender is unavailable, no procedure can be performed.
4. POCSO is a gender-neutral law but Section 3 is not applicable in that term because of the usage of the term ‘girl’.
5. The Act considers sexual relations between two teenagers or between an adolescent and an adult to be unlawful. The POCSO Act is silent on the possibility of two juveniles having sex of any type and makes no mention of permission from anyone younger than eighteen. As a result, it criminalizes consensual sex between minors, restricting their freedom and making them vulnerable to harassment from the public.
6. The contract of child marriage and consummation are treated as out of law under this Act but are legal under various personal laws of different communities of India. There is no clarification in this regard in the POCSO Act, 2012.
7. Due to shame, embarrassment, anger, and frustration, non-reporting happens frequently making Section 19(1) a doll, but on the other hand, the family members will be punished if they don't report the case as mandated in Section 21 (1) of the Act, which has made mandatory reporting of FIR in such cases by the family members or head of the office under whose jurisdiction the offense occurred. The family members of the victim normally don't want to report the cases because of the fear of re-victimization during medical examination, court appearance, and the reaction of a poorly informed society.
8. The principles of natural justice are defeated because the presumption of innocence is absent burden of proof is reversed making it a very harsh
9. Section 22(1) provides that a child is not punishable if the matter disclosed doesn't exist making the people use of this for filing fake complaints to finish their vengeance on the targeted.
10. A strong document is needed to prove the age of the child. However, a direct provision is not available in the POCSO Act. And it is naturally considered the job of investigating machinery to ascertain it and at the complaint filing time, there is an admission of oral evidence. For that Courts normally take the help of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 to prove the age of the child. This rule accepts the child's birth certificate, school certificate, or matriculation certificate as proof of age.

11. Act causes jails to become overcrowded and gives the jail administration ongoing problems. It's quite tough to get bail in these kinds of cases, even if you're involved in a fraudulent case. Because of the strict provisions of the Act, which result in jail congestion and frequent problems for the jail authorities, under trial prisoners housed in jails in POCSO Act cases must stay in jails for extended periods because they are not granted bail and are subject to regular trials.
12. Section 33 (8) provides for compensation to the victim. But the amount calculation and the power to receive such money is not provided
13. A high deterrence rate attracts misuse by fabrication
14. The act doesn't provide any information regarding the prosecution of a govt. servant if he commits an offence under this act
15. There is no special authority assigned to supervise and ensure investigation and procedures are conducted as per the provision provides
16. Assigning capital punishment for aggravated sexual assault is debatable if the death sentence would inspire criminals to destroy evidence and kill victims in order to silence witnesses, or if it would have any deterrent impact at all.

**CONCLUSION**

The POCSO Act, 2012, was passed with the admirable goal of protecting children, who are the most vulnerable segment of society, from sexual offenses. As a result, the Act includes harsher penalties and fines for offenders, including the death penalty in certain situations, to dissuade them from committing such crimes. However as the Act has been used and implemented at the local level, several gaps and inconsistencies have been found. These must be filled to make the Act more effective and equitable in dealing with criminals while also preventing unscrupulous members of society from abusing it.

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