

**The National University of Advanced Legal Studies, Kochi.**



DISSERTATION SUBMITTED IN PARTIAL FULFILMENT  
OF THE REQUIREMENT FOR AWARD OF DEGREE IN  
MASTER OF LAWS (2020- 2021)

ON TOPIC:

**LEGISLATIONS TO COMBAT CHILD SEXUAL ABUSE IN INDIA: A CRITICAL  
ANALYSIS WITH SPECIAL REFERENCE TO LOOPHOLES AND CHALLENGES IN  
ITS IMPLEMENTATION**

UNDER THE GUIDANCE & SUPERVISION OF

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## **CERTIFICATE**

This is to Certify that SONAL RAO (Reg. No: LM0120012) has submitted her Dissertation titled “LEGISLATIONS TO COMBAT CHILD SEXUAL ABUSE IN INDIA: A CRITICAL ANALYSIS WITH SPECIAL REFERENCE TO LOOPHOLES AND CHALLENGES IN ITS IMPLEMENTATION” in Partial fulfillment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law to the National University of Advanced Legal Studies, Kochi under my Guidance and Supervision. It is also affirmed that the Dissertation submitted by her is original, bona fide and genuine.

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I Declare that this Dissertation Titled, “**Legislations to combat Child Sexual Abuse in India: A critical analysis with special reference to loopholes and challenges in its implementation**” researched and submitted by me to the National University of Advanced Legal Studies in partial fulfilment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law, under the guidance and supervision of **Dr. Sandeep M.N** is an original, bona-fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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## ACKNOWLEDGEMENT

The guidance, assistance and support received throughout the writing of this dissertation have contributed significantly to this work, to the extent that this dissertation would not have been possible without it. I would first like to thank my guide and supervisor **Dr. Sandeep M. N** for his guidance, patience, encouragement and useful criticism. I thank him for the effort he took to help me throughout my research, particularly to organise my thoughts in a logical manner. He helped me disintegrate ideas into the most basic form and then rebuild them in an organized fashion. I also thank him for all the encouragement and support which helped me through this pursuit.

I would also express my deep gratitude to **Prof. Dr Mini S.**, our Course Director, who supported and helped me at the starting stage of my Dissertation Work. I thank her for making us feel confident enough to put forward our academic opinions and to groom us into Post Graduate Research Scholars. I would also extend my heart filled gratitude to all the faculties of NUALS for their constant encouragement.

I would also like to thank **Prof. (Dr.) K. C. Sunny**, Vice Chancellor and all the members of the faculty for all the help which was provided to me in completing this dissertation.

SONAL RAO

## LIST OF ABBREVIATIONS

<b>1.</b>	<b>CDR</b>	Call Details Record
<b>2.</b>	<b>Cr. PC</b>	Criminal Procedure Code
<b>3.</b>	<b>CSA</b>	Child Sexual Abuse
<b>4.</b>	<b>CWC</b>	Child Welfare Committee
<b>5.</b>	<b>FIR</b>	First Information Report
<b>6.</b>	<b>POCSO</b>	Prevention of Child Sexual Offences
<b>7.</b>	<b>SCPCR</b>	State Commission for Protection of Child Rights
<b>8.</b>	<b>UNCRC</b>	United Nations Convention on the Rights of the Child, 1989
<b>9.</b>	<b>STD</b>	Sexually Transmitted Disease
<b>10.</b>	<b>UDHR</b>	Universal Declaration of Human Rights, 1948
<b>11.</b>	<b>NCPCR</b>	National commission on protection of child rights
<b>12.</b>	<b>IPC</b>	Indian Penal code
<b>13.</b>	<b>JJ ACT</b>	Juvenile justice (prevention

<b>14.</b>	IEA	Indian Evidence Act
<b>15.</b>	PCMA	The prohibition of child marriage Act, 2006
<b>16.</b>	OSC	One Stop Centre
<b>17.</b>	Ibid.	It Means In The Same Place.
<b>18.</b>	Art.	Article
<b>19.</b>	SUPRA	Above Or On The Upper Side. Whenever An Authority Has Been Fully Cited In Preceding Footnotes, The "Supra"Is Used.
<b>20.</b>	H.C.	High Court
<b>21.</b>	S.C.	Supreme Court
<b>22.</b>	FR	Fundamental Rights
<b>23.</b>	DPSP	Directive Principles Of State Policy

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## CHAPTER 1

### FACTORS CONTRIBUTING TO CHILD SEXUAL ABUSE IN INDIA

#### INTRODUCTION

According to Justice Misra Rangnath, who delivered the order in *Sheela Barse & Others v. Union of India*,<sup>1</sup> children are regarded national assets, and it is the state's duty to make sure that their personalities develop properly. The development of a country is reliant on its children. They require organised care and opportunities for socialisation in order to reach human status. Their development should take into account all dimensions, such as cognitive and emotional development, as well as the strengthening of love, affections, and security, among other things.<sup>2</sup> The way a civilised society treats its children is a good indicator of its civility. It is the obligation of the government and society to acknowledge that children require protection and care. The growth of nation is dependent upon intellects of children and their welfare and protection is the primary responsibility of a state.<sup>3</sup>

In India, the age range 0-14 years accounts for roughly 26.16 percent of the population.<sup>4</sup> Since the start of civilization, women and children have been seen as the most vulnerable members of society. They've been subjected to a number of sexual exploitations. There is no universal definition of child sexual abuse, although it includes both physical and psychological abuse. It includes children of all generations, regardless of age or socioeconomic status. There is no single reason for this, but poverty is the most common source of various social wrongs, and child sexual abuse is a byproduct of it.

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<sup>1</sup> AIR 1986 SC 1773.

<sup>2</sup> CHANDRA GUPT, S. SANON, WORKING CHILDREN: A SOCIOLOGICAL ANALYSIS (APH Publishing Corp., 1998).

<sup>3</sup> Hunny Matiyani, Sexual Abuse of Children: A Sociological Study in Delhi Metropolis (Feb. 24, 2021, 11:04 AM), <https://bprd.nic.in/WriteReadData/userfiles/file/201609221212533362863Report.pdf>.

<sup>4</sup> MINISTRY OF STATISTICS AND PROGRAMME IMPLEMENTATION, UN WORLD POPULATION PROSPECTS 2019 (March 3, 2021, 10:00 PM), <https://statisticstimes.com/demographics/country/india-population.php>.

“Child sexual abuse is the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws or social taboos of society. Child sexual abuse is evidenced by this activity between a child and an adult or another child who by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person. This may include but is not limited to: the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of a child in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performance and materials”.<sup>5</sup> Touching (both good and bad), genital penetration, molestation, and fondling are all included in the term.

Child sexual abuse is a social evil that is depicted in many stereotypes and myths all across the world. They are growing every day, posing serious obstacles to the assessment of the situation. Technology advancements are undoubtedly beneficial to the investigation process, but they can also contribute to the strengthening of our resources, particularly in places where there are little resources available.

There is no doubt that child sexual abuse is linked to a higher likelihood of harmful psychosocial and mental health consequences, but even stability processes revealed a number of protective factors, such as family support.

The perpetrators of this crime commit child sexual abuse or seek to commit child sexual abuse for monetary or other reasons by abusing their position of vulnerability, trust, and power (such as sexual gratifications). It's difficult to tell the difference between terminology like “child sexual exploitation” and “child sexual abuse” because they're so similar.<sup>6</sup>

When coping with social ostracism that emerges following sexual abuse as a result of societal stigma, the grievance redressal method frequently fails. Non-reporting of cases is also a

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<sup>5</sup> WHO, Report of the consultation on child abuse prevention, Geneva, World Health Organization, 1999, p. 15.

<sup>6</sup> SUSANNA GREIJER et al., TERMINOLOGY GUIDELINES FOR THE PROTECTION OF CHILDREN FROM SEXUAL EXPLOITATION AND SEXUAL ABUSE 25 (ECPAT *International and ECPAT Luxembourg* 2016).

significant difficulty, as many strive to conceal the situation in order to preserve their honour and family reputation.

Child sexual abuse has serious implications for children. It functions as a significant impediment to development and progress.<sup>7</sup> Child sexual abuse causes a variety of health behaviours that contribute to poor mental, physical, and social results throughout life.

There is evidence that CSA may have an impact on neurobiological systems. Apart from this, a number of interpersonal issues occur, such as an increased risk of domestic violence and violent conduct against child sexual abuse survivors.<sup>8</sup>

According to Childline 1908, during the lockdown in April 2020, the number of crisis calls climbed to 50%. The majority of the calls (92,105) were about child abuse and violence. In just eleven days, the Ministry of Women and Child Development received 3.07 lakh calls for children in distress.<sup>9</sup>

As it is important to note the main reasons for child sexual abuse in India, the following section of this chapter would specifically examine the prominent reasons for child sexual abuses in India.

### 1.1 AIM:

The aim of study is to study the loopholes and challenges in implementing the legislations for prevention of child abuse.

### 1.2 OBJECTIVE:

- To study the various forms of child sexual abuse in India and legislations to combat the same.

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<sup>7</sup> Goodman GS, Quas JA, Ogle CM., *Child maltreatment and memory*, 61 ANNUAL REVIEW OF PSYCHOLOGY 325–51 (2010).

<sup>8</sup> Putnam FW, *Ten-year research update review: child sexual abuse*, 42 JOURNAL OF THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY 269–78 (2003).

<sup>9</sup> Pallavi Arora, *Rise In Online Child Sexual Abuse Cases Amidst COVID-19 Pandemic*, HUMAN RIGHTS PULSE (March 26, 2021, 2:00 PM), <https://www.humanrightspulse.com/mastercontentblog/rise-in-online-child-sexual-abuse-cases-amidst-covid-19-pandemic>.

- To critically analyse the various legislations for protection of child sexual abuse.
- To analyse the effectiveness of National Commission on Protection of Child Rights (NCPCR).
- To suggest reforms so as to overcome the loopholes and challenges in the implementation of the child sexual abuse.

### 1.3 RESEARCH PROBLEM:

Whether the existing legislations in India on child sexual abuse and the recent amendments that brought in severe punishments help in reducing child sexual abuses?

### 1.4 HYPOTHESIS:

The legislations in India on child sexual abuse, the recent amendments made to them and their mode of implementation are not adequate enough to combat child sexual abuse in India.

### 1.5 RESEARCH QUESTIONS:

- What factors have contributed to the rise in child sexual abuse cases in India?
- Whether the existing legislations in India are adequate enough to combat child sexual abuses?
- Whether the introduction of severe punishment in the legislations would reduce child sexual abuse?
- Would changes in strategies of investigation bridge the gap between reported cases and actual conviction?
- Whether the judicial responses in India could be termed “progressive” in light of increased trend in cases of child sexual abuse?
- What are the loopholes and challenges in the implementation of legislations on child sexual abuse?

## 1.6 RESEARCH METHODOLOGY:

The research methodology of the current study would be carried by doctrinal and non empirical method to find out the fact-situations and grounds related to the topic of the research. The study would be based on the collection of data from primary and secondary sources. The primary sources of data would include statutes, case laws, and secondary sources would include books, journals, newspaper articles, online sources, research articles, reports and statistical data from NCRB, Ministry of health and family welfare, etc. which are available relating to the concerned study.

## 1.7 LIMITATIONS:

The research is based on reports and surveys which are already available related to child sexual abuse. No new empirical study would be conducted as due to the COVID -19 restrictions, empirical research would not be feasible. The study is particularly based on child sexual “abuse”, the definition of which is not readily available in most of the legislations. Hence, there is a possibility of overlap between the definitions of child sexual “assault”, child sexual “harassment” and child sexual “abuse”.

## 1.8 REASONS FOR CHILD SEXUAL ABUSES IN INDIA:

There are many factors which lead to instances of child sexual abuse in India. The reasons are deep rooted into the social fabric of the country. Children in India are socialized in a system where it is expected out of them to respect and obey the authority figures and their actions should not be questioned. The extreme sensibility that going against the opinion of adults is a sign of bad upbringing leads to a culture that encourages sexual predators.<sup>10</sup> In India children are been held over by adults and are being expected to have a complete obedience. Thus, silence of children and unquestioned obedience may well have the effect of making them compliant targets. The worst part here is that cases of sexual abuse against children are characterized by feeling of shame and silence.<sup>11</sup>

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<sup>10</sup> Neeta Lal, Hidden Darkness: Child Sexual Abuse in India, PAKISTAN DEFENCE ( Feb. 22, 2021, 1:00 PM), <https://defence.pk/pdf/threads/hidden-darkness-child-sexual-abuse-in-india.38580/>.

<sup>11</sup> Ministry of Women and Child Development, Government of India, *Study on Child Abuse: INDIA 2007*, 2007, 68.

### 1.8.1 DISABILITY

If a person in authority is sexually abusing a child then this undermines a person's power to seek protection. The persons with disabilities are often segregated from the common public, and thereby limiting their participation in common social settings. This isolation increases a person's dependence on service providers. This is the reason that the perpetrators take advantage of this in order to maintain authority and control over victims and sexually abuse them. People with disability are usually not educated enough and most of them are unaware about healthy relationships, legal rights and individual rights and hence are more prone to sexual abuse.<sup>12</sup>

### 1.8.2 POVERTY

The researchers all over the world have studied that there is a relation between poverty and child sexual abuse. The effect of child sexual abuse is adverse in poverty. Most of sexual abuse is committed by disadvantaged households.

Not all instances of sexual abuse of children are from poor families, others of whom are from the working class and wealthier families. Poor and vulnerable children are the prey of adult offenders, who claim to support them but ultimately exploit them.

### 1.8.3 DOMESTIC VIOLENCE

Child sexual abuse is directly related to domestic violence in a family. Continuous fights and disturbances in family greatly contributes to domestic violence and then leading to separation and divorces in families. These family disfunctions often form the context within which child sexual abuse occurs.

Children of all ages, genders can be victims of child sexual abuse but girls are more vulnerable to this abuse. As already discussed that poverty being one of the major factors which contributes to child sexual abuse however it is not the only factor.

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<sup>12</sup> Magwa Simuforosa, *Factors Contributing To Child Sexual Abuse: An Ecological Analysis*, 7 International Journal of Current Research 17591-17597(2015).

## 1.9 FORMS OF CHILD SEXUAL ABUSE:

### 1.9.1 INSTITUTIONAL CHILD SEXUAL ABUSE

Not all sexual abuses are committed by unknown people. There are many cases of Institutional child sexual abuses where the persons in authority and known to the child are abusers. These occur in institutions of trust such as schools, ashrams, orphanages etc. These abuses are actually very difficult to trace and hence are more serious. Most of them go unreported because of the fear of being stigmatized or even if they are reported, very few reach the stage of conviction. In the *Apna Ghar case*,<sup>13</sup> around three girls managed to escape from their shelter home due to sexual abuses, they had to face. After this, around 120 girls also reported their cases. The main accused was arrested who was Jaswanti Devi and his son-in-law.<sup>14</sup> This case is the perfect example of the fact that our children are not safe even in shelter homes.

### 1.9.2 CHILD SEXUAL ABUSE IN CYBER SPACE

Another important area that needs our attention is child pornography. During the COVID-19 pandemic the sexual abuses against children increased. As per the Indian Child Protection Fund (ICPF report) on the consumption of child pornography content in India they reported that there was a massive increase of almost 95%. The websites had significant traffic in India during the lockdown period as compared to pre-lockdown time. Most of the increase in traffic was attributed to demand for child pornography content.<sup>15</sup> A U.S based NGO, National Centre For Missing and Exploited Children (NCMEC) conducted a study in the year 2020, and as per that India is one such country where there are maximum number of web searches with the name “child pornography”. Also the reports submitted by the NGO stated that more than 25000 cases were reported of suspected child pornography material within a

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<sup>13</sup> Utsav Singh Bains v. CBI, 2012 SCC OnLine P&H 12237.

<sup>14</sup> Mark Dummett, Breaking The Silence Child Sexual Abuse In India, HUMAN RIGHTS WATCH (Feb. 22, 2021, 2:10 PM), <https://www.refworld.org/docid/5594f1ed4.html>.

<sup>15</sup> Report On Demand For Child Pornography & Pilot Deterrence Using Artificial Intelligence.

time span of just 5 months. Within India Delhi topped the list of states which was involved in uploading material for child pornography.<sup>16</sup>

### **Child pornography:**

Since past few years the term “child sexual abuse material” has been widely used in place of “child pornography” by many who are working in the area of child protection. It is actually considered to be more accurate and is believed to describe the crime in a better way. The term ‘child pornography’ not only covers child sexual abuse but also deals with the offences that involves production, preparation, sharing, disseminating such material.<sup>17</sup>

### **Online grooming:**

Child grooming means enticing a child for sexual purposes. It is explained as “a strategy in which an adult 'becomes a friend' of a minor with the intention of sexually assaulting her or him.” Studies show that the population of male perpetrators is more in comparison to female. However it would not be correct to say that only male population constitutes the perpetrators.<sup>18</sup>

Children use various social media platforms and communication modes, that can be used by the perpetrators to gain access to children’s account. They access the accounts according to the desires and appeals, “ease of access” (provided their privacy settings are used correctly on websites, apps etc.) and the things they post on social media.

After this selection of victims , they try to access him or her or try to initiate a friendship with the victim and here the perpetrator gains the information through online platforms and use this information to gain confidence of victim by sharing common hobbies and other similar situations. By doing so, he is able to gain the victims trust. Before sexual exploitation or abuse, the offender tries to detect the risk by inquiring whether that child

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<sup>16</sup> Child pornography: Pune received 542 cyber Tipline Reports, Indian Express. Last visited: 7<sup>th</sup> March 2021.

<sup>17</sup> Online Child Sexual Abuse And Exploitation: Guidelines for the Adoption of National Legislation in Latin America, ICEMC ( Feb. 26, 2021, 3:00 PM) , [https://cdn.icmec.org/wp-content/uploads/2020/09/Guidelines-for-Adoption-of-Natl-Legis-in-Latam\\_EN.pdf](https://cdn.icmec.org/wp-content/uploads/2020/09/Guidelines-for-Adoption-of-Natl-Legis-in-Latam_EN.pdf).

<sup>18</sup> Winters et al., *Stages of Sexual Grooming: Recognizing Potentially Predatory Behaviors of Child Molesters*, 38(6) DEVIANT BEHAVIOR 724-733 (2017).



victim is being monitored by parents or not. However there may be different approaches to it.<sup>19</sup>

### **Child sexual abuse material (CSAM):**

Despite of the fact that it has not been accepted, still the term child pornography features clearly in legal instruments (such as the Convention on the Rights of the Child of 1989 (CRC); the Optional Protocol to the Convention on the Rights of the Child 2000<sup>20</sup>; the Council of Europe's Convention on Cybercrime of 2001; and the Lanzarote Convention of 2007)

Since Indian Child Protection Fund (ICPF) works for social cause and so it is focused upon solving the issues such as child trafficking and child rape in India and few other countries such as Nepal and Bangladesh. It tends to protect to make the atmosphere safe for children and to end impunity of child traffickers and rapists, and create a culture which is safe for all children.

The biggest challenge in tackling the problem is the lack of empirical data available on the issue. Also lack of innovations in the technological capacity has posed another hindrance in the way of child protection bodies and other authorities to keep track of crimes against children. In October 2019 India Child Protection Fund (ICPF) conducted a research study to understand or get a clear picture of child sexual abuse material (CSAM or 'Child Pornography') in India and also how to curb its growing demand.

### **India Child Protection Fund (ICPF) 2019:**

The average demand for child pornography was over 5 million every month in over 100 cities and that too only on public web. Majority searches in generic CSAM content were related to terms such as 'school girl sex' and the demand for content with specific sexual

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<sup>19</sup> O'Connell, Rachel, *A Typology of Cyber Sexploitation and Online Grooming Practices*, UNIVERSITY OF CENTRAL LANCASHIRE (March 3, 2021, 5:12 PM),

<http://image.guardian.co.uk/sysfiles/Society/documents/2003/07/17/Groomingreport.pdf>.

<sup>20</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography of 2000.

actions and age groups have increased to as much as 200 percent. There was more than 90 percent male user base for CSAM content in India. The demand for CSAM was there across groups of all ages and it was prevalent across the nation and few cities even showed increased trend. The demand for such content was maximum in Chennai and Bhubaneswar on platforms like pornhub. And the demand for specific content with respect to specific age, action, groups etc., was highest in Kolkata, Siliguri, Howrah, Chandigarh, Guwahti, Indore, Bhubaneswar and Chennai. Maximum numbers were those who were using virtual private networks (VPN) to do away with the ban by Government on CSAM content. The data collected from one of the largest pornography website provided that the traffic on that website increased from India by 95% in March 2020 from the pre Covid-19 pandemic. During the lockdown the website provided free pornography content which led to the spike in web searches. This data provides a clear picture of the threat being faced by children in our society.

The huge demand for online CSAM creates a vulnerable category of children who gets easily influenced by online sexual predators. There have been reports from international agencies like United Nations and ECPAT that pedophiles and child pornography addicts have increased their activity so that they are able to target more children online and also for luring them to enter into these activities through photos and videos. The biggest fear here lies in the fact that they might use such content to distribute it and for extorting the child for committing further abuse and exploitation.

Vice President Venkaiah Naidu through Rajya Sabha Adhoc Committee on the issue of child pornography made recommendations for technological and legislative advancements in the area of child pornography. Two main issues were addressed i.e., keeping a track on material on social media related to child pornography and their access to children and secondly circulations of such material by which children are abused.

The report recommended amending the Protection of Children from Sexual Offences Act (POCSO) and the Information Technology Act, greater regulation of children online, government action to prevent the generation and dissemination CSAM, and making internet service providers and social media companies accountable for the safety of

children on their platforms. The Ministry of Home Affairs has also established the National Cyber Crime Reporting Portal which allows reporting of CSAM to the relevant authorities.<sup>21</sup>

As per the NCRB data released by Ministry of women and Child Development in 2020:

1. NCRB reported that there were 13244 complaints lodged on National Cybercrime Reporting (NCRP) from 1<sup>st</sup> March 2020 to 18<sup>th</sup> September 2020 regarding child pornography/rape and gang rape in India.
2. The online portals and other helplines reported 420 cases of child sexual abuses from 1.03.2020 till 31.08.2020 as per the National Commission for Protection of Child Rights (NCPCR).
3. Calls received by Childline India Foundation (CIF), 3941 calls regarding child sexual abuse cases from 1.03.2020 to 15.09.2020.<sup>22</sup>

### 1.9.3 CHILD MARRIAGE AND CHILD SEXUAL ABUSE

Child marriage is another serious concern which also leads to sexual abuse of child in some cases. The reporting of cases are quite low under PCMA 2006 and therefore studying the loopholes becomes very important.

As per the census of 2011, six percent of married men and 30 percent of married women were married before the age of 18 years<sup>23</sup>. It was reported that around twenty seven percent of women between the age group of 20-24 years were married before 18 years. The percentage of men between age group of 25-29 years who married before 21 years is twenty percent as per National Family Health Survey (NFHS)<sup>24</sup>

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<sup>21</sup> Posted On: 25 JAN 2020 1:13PM by PIB Delhi.

<sup>22</sup> Ministry of Women and Child Development, Sexual Abuse Cases of Children Reported Online-. PIB, Last visited:5<sup>th</sup> March 2021

<sup>23</sup> Ministry of Women and Child Development, Sexual Abuse Cases of Children Reported Online-. PIB, Last visited:5<sup>th</sup> March 2021.

<sup>24</sup> IIPS & ICF, (2017). National Family Health Survey (NFHS-4), 2015-16, International Institute for Population Sciences, Mumbai, India.

The issue of child marriage is not new in India because the structure of society is such that it promotes marriages of children. On the International girl child day the analysis of Prohibition of Child Marriage Act (PCMA) 2006 was made and it was found that despite of the legislation these marriages takes place in our society.

There have been many instances and evidences where the sexual exploitation of brides takes place<sup>25</sup>. The Hon'ble Supreme court in *Independent Thought vs. Union of India*,<sup>26</sup> stated that a girl who is below 18 then, sexual intercourse with her is rape. Before this judgment was passed sexual intercourse between a boy and a girl above fifteen years was not considered rape.<sup>27</sup>

During COVID-19 pandemic the number of child marriage cases increased as there was increase in economic insecurity. Progressive steps are required to be taken towards the sustainable development goal target by 2030 for which women's and girl's rights have to be considered. The estimates were made by various studies that the lockdown might increase the cases of sexual abuse against women and children and these estimates came out to be true<sup>28</sup> because if we go by the data from CHILDLINE 1098 from 1.03.2020 to 1.08.2020. It showed that there has been an increase in child trafficking and child marriage cases i.e., 1.92 lakh in 2020 which was 1.70 lakh in year 2019.

#### 1.9.4 CHILD TRAFFICKING AND SEXUAL ABUSE

The process of recruiting, transporting, transferring, harboring of a child for the purpose of exploitation is known as child trafficking.<sup>29</sup> Girls are trafficked for the purpose of commercial sexual exploitation. It is not just girls who are trafficked but also transgender are being trafficked for sexual exploitation. Boys for the purposes of agriculture, mining, armed labour etc. are being trafficked.

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<sup>25</sup> Population Council and IIPS, 2008.

<sup>26</sup> [2017] 10 SCC 800.

<sup>27</sup> STATUS AND DECADAL TRENDS OF CHILD MARRIAGE IN INDIA.

<sup>28</sup> The Global Girlhood Report 2020: How COVID-19 is putting progress in peril, Published by Save the Children.

<sup>29</sup> Commercial Sexual Exploitation And Trafficking Of Children "In A Nutshell"- – A Resource For Pacific Island Countries, International Labour Office, International Programme On The Elimination Of Child Labour (Ipec) – Geneva: Ilo, 2014.

Trafficking children and then exploiting them sexually is not new to anyone. There is no legal definition of child trafficking in India however The Immoral Traffic (Prevention) Act provides for trafficking of children for prostitution. In the case of *Bachpan Bachao Andolan V. UOI*,<sup>30</sup> Supreme Court held that missing child would be treated within the meaning of JJ Act. Commercial sexual exploitation on children (CESC) includes within its ambit, sexual activities in the streets or indoors in places like brothel, massage parlour etc.

The trafficking of male, female and transgender equally takes place. Here girl child is not the only victim. The study conducted by National Centre for Missing and Exploited Children (NCMEC) male and transgender are equally the victims of trafficking for purpose of child sexual abuse.<sup>31</sup> There are various reasons for which child trafficking is done in order to sexually abuse such as child tourism, prostituion. Using children in public or private sex shows is another reason why children are been trafficked and are sexually exploited.

As per the report published in the Indian express newspaper, there were 32,700 cases were intervention was to done by Childline. The executive director of Bachpan Bachao Andolan, Dhananjay Tingal, on being asked by the Indian express about the situation of trafficking of children during pandemic. He stated that one of the incident wherein a police received information that 10 children were spotted in three separate buses. They were suspected to be trafficked. Similar incidents were reported in many areas nearby. The concern for the authorities was to tackle the situation of lockdown due to Covid-19 and so the criminal elements got sufficient opportunity to commit child crimes.<sup>32</sup>

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<sup>30</sup> 2010 (12) Scc 180.

<sup>31</sup> An Analysis of Missing Male Victims of Child Sex Trafficking (CST), NATIONAL CENTRE FOR MISSING AND EXPLOITED CHILDREN , March 3, 2021, 5:45 PM.

<sup>32</sup> Dipankar Ghose, Untold story of lockdown: sharp surge in child trafficking, THE INDIAN EXPRESS (March 7, 2021, 3:00 PM ), <https://indianexpress.com/article/express-exclusive/covid-abuse-child-trafficking-6721333/>.

## CHAPTER-2

### **INTRODUCTION TO LEGISLATIONS DEALING WITH CHILD SEXUAL ABUSE IN INDIA**

#### INTRODUCTION:

In the previous chapter we have seen that what factors lead to child sexual abuse in India. This chapter highlights the legislative provisions with respect to the child sexual abuse in India. The child sexual abuse mentioned in the preceding chapter is not always because of the paucity of legislative enactments rather they occur due to lack of awareness with respect to child rights. Children have been provided with special laws at both national and international level because they fall within the vulnerable category. No doubt the term child has not been explicitly mentioned in the Indian Constitution but there are several provisions for their protection and welfare. Article 15(3)<sup>33</sup> and Article 24<sup>34</sup> are two examples of it. A country's constitution is meant to represent the people's goals and solve their concerns. The Fundamental Rights and Directive Principles of State Policy together form the Constitution's conscience and embody the fundamental human rights in our society. They are equally important in promoting the Constitution's aims and purposes, as stated in the Preamble. Because it is the supreme law of the land, it also contains some special measures for the welfare and protection of children. Fundamental Rights are the fundamental values that the people of this country consider important.

The Protection of Children against Sexual Offences Act was passed in the year 2012. This was a landmark step in the history of legislations with respect to the child protection. This legislation was the first ever legislation on child sexual abuse. It consisted of provisions for setting up

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<sup>33</sup> Article 15(3) of the Constitution states:

*“(3) Nothing in this article shall prevent the State from making any special provision for women and children.”*

<sup>34</sup> Article 24 of the Constitution: *“Prohibition of employment of children in factories, etc No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.”*

special courts<sup>35</sup> to deal with child rape cases, sexual harassment, assault and child pornography. Prior to this enactment, Indian penal code, 1860 was the only legislation which dealt with the punishments in cases of sexual abuses. There was no specific distinction between the adults and children.

Until 2012, the only sexual offences against children that were acknowledged by the law were those covered by three non-specific sections of the Indian Penal Code (hereinafter referred to as IPC). Rape (sexual intercourse without consent)<sup>36</sup>, outraging a woman's modesty (unspecified acts)<sup>37</sup>, and unnatural acts described as "carnal intercourse against a woman's will", with any man, animal (anal sex, homosexuality or bestiality)<sup>38</sup> were the only offences reported. As a result, sexual assaults, harassment, and exploitation that were non penetrative were not technically recognised as crimes, and hence were not recorded. Increased engagement in the media and public conversation around child protection concerns have contributed to India's government introducing "The Protection of Children from Sexual Offences (POCSO) 2012."

From time to time an attempt has been made to formulate provisions in various legislations to deal with child sexual abuse in India. The legislative provisions with respect to child sexual abuse in India have been dealt in this chapter.

## 2.1 CRIMINAL AMENDMENT ACTS:

In its illustrious legal history, India has witnessed a number of historic decisions, which resulted in few legislations which were not there earlier. *Tuka Ram and Others vs. the State of Maharashtra*<sup>39</sup>, more widely known as the Mathura Rape Case, was one of the most national-level crises that drew women's groups together. This case ushered in legislative enactments which were not there before. Justices P.S. Kailasam, A.D. Koshal, and Jaswant Singh constituted the bench that delivered the decision in this case. The bench's ruling was widely criticised and denounced, resulting in widespread public outcry and protest against the country's

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<sup>35</sup> POCSO ACT 2012 S. 35.

<sup>36</sup> INDIAN PENAL CODE 1860 S.376.

<sup>37</sup> INDIAN PENAL CODE 1860 S. 354.

<sup>38</sup> INDIAN PENAL CODE 1860 S.377.

<sup>39</sup> 1979 SCR (1) 810.

laws, and the day was termed "Black Day in the History of Women's Empowerment." A number of women's organisations, including SAHELI in Delhi, were created in direct response to the verdict. The first feminist anti-rape organisation in India, the 'forum against rape,' afterwards renamed the 'forum against the oppression of women,' called for a national conference, which kicked off the debate over legal reforms. This led to the criminal amendment Act being passed in 1983.

➤ **CRIMINAL LAW (SECOND AMENDMENT ACT) 1983:**

On December 25, 1983, a statutory provision was enacted in response to section 114(A) of the Evidence Act specifies that if the victim says she didn't consent to the sexual intercourse, there will be a presumption that she didn't consent.. The inclusion of 376(A), 376(B), 376(C), and 376(D) to IPC section 376 (punishment of rape under Indian penal code) changed the law, making custodial rape punishable. (which was changed again in 2013, following the Nirbhaya case). The burden of proof was also transferred from the victim to the criminal, and provisions for in-camera trials, the prohibition on the victim's name, and harsher sentences were added.

➤ **AFTERMATH OF NIRBHAYA CASE:**

The case sparked significant outrage and protests across the country. As a result, the justice Verma committee and the Usha Mehra committee were created. The committee's report recommended legal amendments as a result of several substantive and procedural modifications in the law. The scope of Section 375 of the IPC was expanded to include all forms of oral, vaginal, and anal intercourse that violates a woman's dignity. The provisions of Gang rape involved a punishment of 20 years in prison, with the possibility of a lifetime imprisonment. Repeated offenders could be penalised under 376E if they were convicted of crimes under 376A and 376D, which could result in life imprisonment or possibly death for the perpetrators. Sections 376(1) and 376(2) of the IPC were repealed, allowing judges to reduce sentences. The IPC was amended to include Section 166A, which penalises public workers who fail to record such information. Furthermore, hospitals were required to treat rape victims under section 166B of the IPC. Various sections of the criminal amendment make voyeurism, disrobing women, stalking, and voluntarily throwing acid unlawful. Another significant change was the addition of section 114A to the Indian Evidence Act. This move was made to preserve women's



dignity. As a result, section 53A of the Indian Evidence Act was enacted, stating that in situations of sexual assault and rape, the court will not consider evidence relating to the victim's previous sexual experience or character.

➤ **CRIMINAL LAW (AMENDMENT) ACT, 2018:**

On April 21, 2018, the criminal law amendment ordinance was promulgated, and it was passed by the Lok Sabha and Rajya Sabha on July 30, 2018 and 6 August, 2018, respectively. Following the Kathua rape and the Unnao rape events, several state legislatures, including Madhya Pradesh, Haryana, Rajasthan, and Arunachal Pradesh, implemented strict anti-rape legislations.

The Indian Penal Code (IPC), 1860, and the Protection of Children from Sexual Offenses (POCSO) Act, 2012 make it illegal to rape a woman and a minor child. Before the amendment, Section 376 dealt with the punishment for rape of women in two ways.

- (i) Except for the requirements mentioned, Section 376(1) dealt with the punishment for rape of a lady.
- (ii) The rape of a woman by cops, municipal officials, members of the military, and others was punishable under Section 376(2). This punishment has not been changed and is ten years which might extend to life imprisonment.

The amendment introduced three new offences:

1. Rape of a child under the age of 12 years imposes a sentence of at least 20 years in jail, with the possibility of life imprisonment, as well as a fine to compensate the person's medical and recovery costs, or death.<sup>40</sup>
2. The gang rape of a girl child under the age of 16 years has been made punishable by life imprisonment and a fine to cover the costs of medical treatment and restoration for the victim.<sup>41</sup>
3. Gang rape of a child under the age of 12 years is punishable by life in prison with a fine to cover the victim's restorative and recovery costs, or with death. Rape of a

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<sup>40</sup> INDIAN PENAL CODE ,1860 S. 376 AB

<sup>41</sup> INDIAN PENAL CODE, 1860 S. 376 DB.

girl under the age of 16 years carries a maximum sentence of life imprisonment, as well as a fine to cover the person's medical and restoration costs, or death.<sup>42</sup>

## 2.2 POCSO ACT 2012:

The objective as mentioned in the Act provides that India has ratified the United Nations Convention on the Rights of Children in the year 1992, which directs the States to prevent the children:

- Inducing a child to get into any unlawful sexual activity.
- Exploiting children by making them to enter into prostitution and other sexual activities.
- Using children in pornographic material and acts.

### 2.2.1 DISTINCTIVE FEATURES OF POCSO:

The Act focus upon all aspects of child's development whether it being the physical, emotional, intellectual and social development. Another very important feature of this Act is that it provides safeguards for children at all stages of judicial process because it consists of the child friendly procedures from reporting of case to the conclusion of the case. It is very important to note here that in order to avoid any stigmatization the term "rape" is not used in the legislation.

The Act traces its origin from Article 15(3) and Article 39 of the Constitution<sup>43</sup> and the role of effective implementation of this Act is on the Courts and investigative authorities. Most of the provisions of this Act differ significantly from those of the Penal Code in terms of criminal offences.

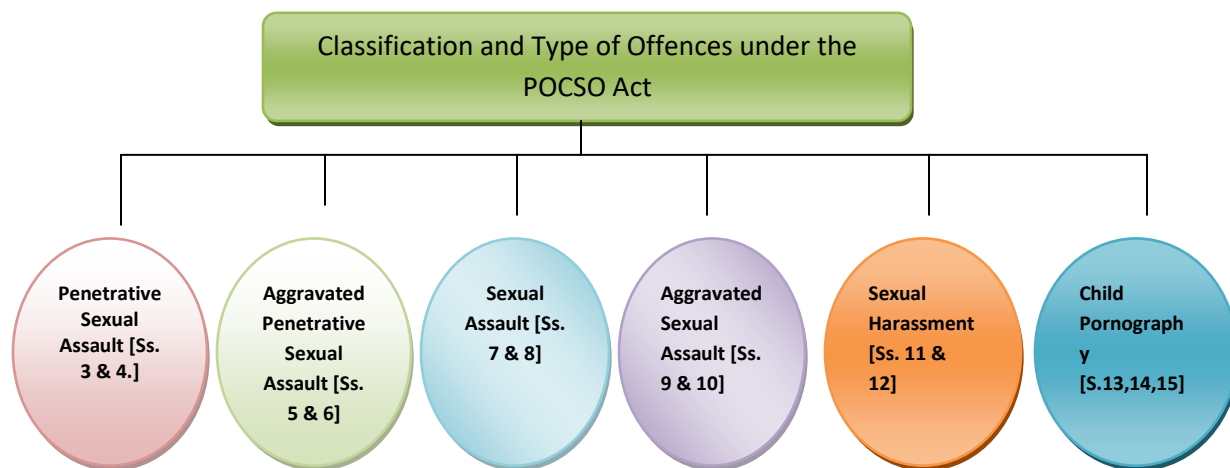
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<sup>42</sup> INDIAN PENAL CODE, 1860 S. 376 DA.

<sup>43</sup> Article 15 of the Constitution, *inter alia*, confers upon the State powers to make special provision for children. Further, article 39, *inter alia*, provides that the State shall in particular directs its policy towards securing that the tender age of children is not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

The reason as to why it is important to understand the objective of this Act is very well illustrated in the case of *Eera through Dr. Manjula Krippendorf v. State (NCT of Delhi)*<sup>44</sup> wherein the Hon'ble Court held that the reason of making a reference to the statement of object of the Act is to understand the intent of our legislatures to formulate the law, which is to protect children from any sort of sexual abuse. It is one of the essential features of criminal justice system that the interest of victim as well as witness should be protected and likewise POCSO makes provisions for children as victim and witnesses.<sup>45</sup>

## 1. CLASSIFICATION OF SEXUAL OFFENCES UNDER POCSO ACT:



The classification is based on 6 broad categories:

### i) Penetrative sexual assault-

It includes the acts where a person penetrates his penis into the mouth, vagina, urethra or anus of a child or either makes the child to do so with him or any person other than him. Insertion of an object or any part of body not being penis into vagina, urethra or anus of

<sup>44</sup> (2017) 15 SCC 133.

<sup>45</sup> Id. para 20.

child or either makes the child to do so with him or any person other than him also would fall within this definition. Manipulation of child's body part for penetrating the vagina, urethra, anus or any other part of body or either makes the child do this with him or any person other than him or application of his mouth to the penis, vagina, anus, urethra of child or similarly making the child do so with him or any person other than him would also fall within the definition of sexual assault.<sup>46</sup>

ii) Aggravated penetrative sexual assault:

There are various categories of instances listed in the definition of aggravated penetrative sexual assault. If a person who is a public servant or a police official, member of armed forces or any other security services, person who is either serving in hospitals or remand homes or even observation homes or any institution of education, if any of these mentioned persons commit the offence of penetrative sexual assault then it would amount to aggravated form. Apart from this the use of deadly weapon to cause penetrative sexual assault or using fire or causing bodily injury, grievous hurt, or causing incapacity to child physically would also fall within the aggravated penetrative sexual assault. The penetrative sexual assault is termed as aggravated if it is committed by a person who is related to the child by blood, adoption, marriage or the child is in foster care of such person, or is related to the parent of the child through domestic relationship or they share same house. This is also termed as 'institutional' child sexual abuse.<sup>47</sup>

iii) Sexual assault- non penetrative:

If a person with intention to abuse sexually touches vagina, breast, penis, anus of the child or makes the child do the same with that person or any other. Apart from this if any physical act is committed which involves physical contact other than penetration then also it amounts to sexual assault.<sup>48</sup>

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<sup>46</sup> POCSO ACT, 2012 S. 3, 4.

<sup>47</sup> POCSO ACT, 2012 S. 5, 6.

<sup>48</sup> POCSO ACT, 2012 S. 7, 8.

iii) Aggravated sexual assault- non penetrative:

The sexual assault is termed aggravated if it is committed by a person of trust to the child or the child is in foster care of such person or is in relation of blood, adoption, marriage etc.<sup>49</sup>

iv) Sexual harassment:

There are various type of acts which constitutes the sexual harassment such as:

- (a) Exhibits body or part of his body with an intention to make child see it, or
- (b) Make the child watch pornographic content.
- (c) Tries to contact the child through electronic or digital platforms or either tries to follow the child.
- (d) Tries to blackmail or threaten the child to use any content whether real or fabricated through digital or electronic form of any body part of the child.
- (e) Tries to entice the child for the purpose of making pornographic content.<sup>50</sup>

The important thing we can note here is that these are similar grounds which were also introduced by the 2013, Criminal (Amendment) Act in the Indian Penal Code in section 354.

v) Child pornography:

Using the child for pornography or storing pornographic content falls within this form of sexual abuse. It also includes the acts in which a child is used on media platforms to gain sexual gratification. Apart from this, commercial use of pornographic material also constitutes an offence under this Act.<sup>51</sup>

## 2. CHILD WELFARE COMMITTEE (CWC)

It is mandatory for the police authorities to bring the matter before Child Welfare Committee within a time period of twenty four hours. The reporting of case is made mandatory and any lodging of false case is made punishable. The first information report

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<sup>49</sup> POCSO ACT, 2012 S.9, 10.

<sup>50</sup> POCSO ACT, 2012 S. 11, 12.

<sup>51</sup> POCSO ACT, 2012 S. 13,14,15.

is to be registered by the police or special juvenile police. The police are required by Section 19(5) to provide urgent care and protection to the survivor child by transporting him or her to the nearest hospital or shelter home. The Special Court and the Child Welfare Committee must be notified of the incidence within 24 hours. Section 20 of POCSO Act requires the media, a lodge, a hotel, a hospital, or a firm to notify the police if they come across any object or material that could be used to sexually exploit a child. The failure to notify the incident is a criminal offence under section 21. Section 22 makes it illegal to report incorrect information or file a fraudulent complaint. Section 23 deals with the non-disclosure of a child victim's identify and the penalties for violating the provision.

### 3. GENDER NEUTRAL PROVISIONS:

The Act is gender neutral which means it applies equally to female as well as male child. Prior to this Act, Indian penal Code was followed to punish a person who committed sexual abuse on child. However it was not gender neutral. But after the commencement of this Act, sexual abuse against both male and female child has been given equal protection. The scope of the legislation has been broadened by inclusion of peno-urethral, fingering, peno oral, peno-anal also into the definition of sexual assault and is not just restricted to peno-vaginal acts.

### 4. CHILD FRIENDLY PROVISIONS:

There must be female police personnel who shall not be in uniform while recording the statement. This recording shall be done in presence of a person of trust to the child. Every possible attempt must be made that the provisions of section 157 CrPC<sup>52</sup> are being complied. The identity of the child should not be revealed whether it being the family details, name, photograph, school. However after a reasoned order by the Special Court it can be allowed and that too only when it is in the interest of the child.

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<sup>52</sup>CrPC 1973 S. 157 provides for Procedure for investigation preliminary inquiry.

The legislation has also ensured that the victim does not have to come in contact with the accused during trial in order to prevent the victim from any type of influence or fear.<sup>53</sup> The entire testimony is recorded via video conferencing which makes sure that the victim does not have to repeat her statements again.<sup>54</sup>

#### 5. SPEEDY TRIAL:

The time period to complete the investigation is two months as per section 173(1A) of CrPC<sup>55</sup>. And also the entire trial to be completed within one year so that the cases are not kept pending for long. Long pending cases might impact the mental health of the child and therefore this limitation as to time is considered to be another essential feature of this Act.

#### 6. MEDICAL EXAMINATION OF THE ACCUSED AND THE VICTIM:

The female doctor only should conduct the medical examination the victim child following the procedure given in section 164 A of code of criminal procedure and section 27 of POCSO Act, 2012. While such examination is in process, the presence of parent of child or any person of trust must be ensured. They must give in writing, the permission for conducting such medical examination and also for taking samples for forensic analysis.<sup>56</sup> Similarly section 53 A of code of criminal procedure would be followed which provides that the police officer not below sub inspector rank would collect DNA of the accused. Here the consent of accused is not mandatory.

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<sup>53</sup> POCSO ACT 2012, S. 36.

<sup>54</sup> POCSO ACT 2012, S. 37.

<sup>55</sup> CRIMINAL (AMENDMENT) ACT 2018, S.14(i).

<sup>56</sup> CODE OF CRIMINAL PROCEDURE 1973, S. 164-A .

## 7. PRESUMPTION:

The presumption is in favor of the victim which means that until the contrary is proved, if the person is prosecuted under Sections 3 and 5 the presumption shall be that of commission or attempt or abetment.<sup>57</sup> The culpable state of mind is another presumption of the accused, which however can be proved otherwise in defense.<sup>58</sup> However as per the equity principle, the accused must also be given some right. So there is a provision which requires the prosecution to prove the case beyond reasonable doubt and merely on the preponderance of probability.<sup>59</sup> Kerala High court in the case of *Joy v. the State of Kerala*<sup>60</sup>, through a single judge bench headed by Justice Sunil Thomas upheld the constitutionality of section 29 and 30 of the POCSO Act with respect to the reverse burden of proof. The issue was whether rule of presumption under section 29 and 30 violated fundamental rights under Article 14, 20(3) and 21 of the Constitution of India. It was held that the prosecution cannot be considered true everytime. It the duty of the Court to prevent miscarriage of justice by looking into the “improbabilities”, “infirmities” and “patent absurdities” which might reveal the falseness of the case by the prosecution. This means the presumption is not absolute and it becomes weak when the prosecution’s points create doubt which renders the case quite improbable.<sup>61</sup> In this case it was held that the Act is indeed a legislation for the protection of children from the sexual abuses and exploitation and is a landmark step. Also it is child friendly and lays complete emphasis in protecting the dignity of the child. But it is very important that the courts must uphold the spirit and meaning of the enactment while also ensuring that its provisions are not misinterpreted.<sup>62</sup> It should not act blindly to the all the facts presented before it.

To deal with the matters which involves publications and transferring of the material in which children are being portrayed as being sexually used, the POCSO Act provides for the trying such matters under section 67B of the IT Act, 2000. There are provisions in the

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<sup>57</sup> POCSO ACT 2012, S. 29.

<sup>58</sup> POCSO ACT 2012, S 30(1).

<sup>59</sup> POCSO ACT 2012, S. 30(2).

<sup>60</sup> 2019 SCC OnLine Ker 783.

<sup>61</sup> Id. para 10.

<sup>62</sup> Id. para 12.



Act such as section 42 of POCSO Act, which gives options to either file a case under POCSO or Indian Penal Code so that greater punishment can be awarded out of the two Acts.

## 8. MANDATORY REPORTING:

POCSO makes it mandatory for anybody, but notably those in the education, social, religious, and health sectors who work with children and young people, to report child sexual abuse (section 19). Failure to do so might result in legal penalties such as imprisonment for up to six months and/or fines, all of which are meant to encourage law-abiding behaviour.

### 2.2.2 ISSUES WITH REPECT TO POCSO ACT 2012:

#### (I) DETERMINATION OF AGE OF CHILD :

Both the POCSO<sup>63</sup> and JJ Act<sup>64</sup> defines a child who is below 18 years. So both the Acts are in conformity with respect to the chronological age. However the major concern now remains with respect to the mental age. The Hon'ble Supreme Court in the case of *Eera v. State (Govt. of NCT of Delhi)*<sup>65</sup> held that rape cases of mentally challenged victims cannot be shifted to POCSO Courts. In this case the victim was a woman who had been born with cerebral palsy. Her overall mental age was six years, according to her Intelligence Quotient (IQ) and eight social adaptation areas, according to a complete medical assessment. The major contention in this case was that the refusal to evaluate the mental age of victims would be a direct attack on the 2012 Act's core aim. The advocate Ms. Bhati argued in front of the Supreme Court that a purposive construction that includes both biological and mental age, rather than just biological age, would be a natural expansion of the POSCO Act's protective umbrella. This lacuna under POCSO Act creates creates a confusion.

Apart from this another challenge is the determination of age because trying to figure out how old the victim and the perpetrator are might be a difficult task. The ages of both the

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<sup>63</sup> POCSO ACT 2012 , S. 2(d).

<sup>64</sup> JUVENILE JUSTICE (Care and Protection of Children) Act 2015, S. 2.

<sup>65</sup> Supra note at 12.

victim and the perpetrator are crucial in evaluating if and how the Act applies, as well as impacting the outcome throughout the charging and trial stages, under POCSO.<sup>66</sup> The Special Court has the authority to ascertain age<sup>67</sup> but there are no clear instructions on how to do so. It is widely accepted that forensic methods for determining the age of a living individual can be imprecise and difficult<sup>68</sup>. *In the case of State of M.P. vs. Anoop Singh*<sup>69</sup> the Supreme Court of India ruled that determining age in cases where there are no documents available, it is extremely difficult to determine age. The Supreme Court goes on to say that a hyper-technical approach should be avoided.

## (II) MANDATORY REPORTING:

Mandatory reporting of child sexual abuse has had mixed results in other nations (the United States and Australia)<sup>70</sup>. According to the Report failures to report are rarely prosecuted in various jurisdictions because the goal of obligatory provisions is to encourage reporting rather than to regulate it. As a result, the law in New South Wales (Australia) has been changed to eliminate penalties for failing to report child sexual abuse.<sup>71</sup>

The requirement to report under POCSO creates three issues that are unique to India:

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<sup>66</sup> Belur, J. and Singh, B.B., *Child Sexual Abuse and the Law in India: A Commentary*, 4(1) CRIME SCIENCE 6 (2015).

<sup>67</sup> POCSO ACT 2012 S.34(2).

<sup>68</sup> Andreas Schmeling et al., Forensic Age Estimation in Unaccompanied Minors and Young Living Adults, FORENSIC MEDICINE- FROM OLD PROBLEM TO NEW CHALLENGES ( June 16, 2021, 2:00 AM), [https://www.researchgate.net/publication/221916188\\_Forensic\\_Age\\_Estimation\\_in\\_Unaccompanied\\_Minors\\_and\\_Young\\_Living\\_Adults](https://www.researchgate.net/publication/221916188_Forensic_Age_Estimation_in_Unaccompanied_Minors_and_Young_Living_Adults).

<sup>69</sup> *Criminal Appeal No :442 OF 2010*.

<sup>70</sup> Frank Ainsworth, Mandatory reporting of child abuse and neglect: Does it really make a difference? 7 CHILD AND FAMILY SOCIAL WORK 57 (2002).

<sup>71</sup> Katie Wright, Shurlee Swain, Kathleen McPhillips, *The Australian Royal Commission into Institutional Responses to Child Sexual Abuse*, 74 CHILD ABUSE & NEGLECT, 2017.

1. Making sex a crime for under the age of 18 years raises concerns with respect to awareness. Health professionals and school counselors who are meant to raise awareness might now be hesitant to provide safe sex advice .
2. The law poses dozens of new challenges for institutions, charities, and organisations who engage with disadvantaged and minority communities and children and are dedicated to creating trusting connections with them. If they are legally bound to report all cases of consensual, though underage sex, their efforts to interact with and work with young people would be jeopardised if there was a breach of trust.<sup>72</sup>
3. Mandatory reporting raises the question of who is or should be in charge of executing the law. The cops are overworked and barely have the resources to do their jobs. Prescribing a legal responsibility with criminal and financial penalties without considering how to implement it, and the accompanying lack of accountability, as a result, there are examples of complete failure to report. It's possible that the law will only be used retrospectively to punish violators, rather than ensuring that responsible authorities disclose suspected child sexual abuse in appropriate circumstances.

### (III) ISSUES WITH RESPECT TO CWC:

There are concerns related to CWC monitoring. The lack of a well-defined monitoring authority for CWCs resulted in a number of discrepancies in the system's operation. It is generally regarded as one of the most significant contributors to the current state of uncertainty and lack of accountability in the child protection system, consequently impeding its effectiveness. Internal reviews undertaken by individual CWCs was a fine decision, but are rarely followed.<sup>73</sup>

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<sup>72</sup> Marije Stoltenborgh et al., A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World, CHILD MALTREATMENT ( June. 16, 2021, 10:00 AM), [https://www.researchgate.net/publication/51068956\\_A\\_Global\\_Perspective\\_on\\_Child\\_Sexual\\_Abuse\\_Meta-Analysis\\_of\\_Prevalence\\_Around\\_the\\_World](https://www.researchgate.net/publication/51068956_A_Global_Perspective_on_Child_Sexual_Abuse_Meta-Analysis_of_Prevalence_Around_the_World).

<sup>73</sup> CHILD WELFARE COMMITTEES IN INDIA A comprehensive Analysis Aimed at Strengthening the Juvenile Justice System for Children in Need of Care and Protection, 2011, (Jul. 9, 2021 , 5:00 PM) [https://www.academia.edu/6825476/CHILD\\_WELFARE\\_COMMITTEES\\_IN\\_INDIA\\_A\\_comprehensive\\_Analysis\\_Aimed\\_at\\_Strengthening\\_the\\_Juvenile\\_Justice\\_System\\_for\\_Children\\_in\\_Need\\_of\\_Care\\_and\\_Protection](https://www.academia.edu/6825476/CHILD_WELFARE_COMMITTEES_IN_INDIA_A_comprehensive_Analysis_Aimed_at_Strengthening_the_Juvenile_Justice_System_for_Children_in_Need_of_Care_and_Protection).

### 2.3 POCSO (AMENDMENT) ACT 2019:

POCSO was amended in 2019 to broaden its scope and add new provisions. The Amendment Act of 2019 introduced severe punishments with respect to child sexual abuse. It provided for stricter punishment and the motive behind it was to prevent the rising cases of child sexual abuse. The amendment provides the central government with power to legislate on matters such as destruction of pornographic content, reporting them. The scope of definition of sexual assault was broadened and it included all those components which could act as a catalyst for early sexual maturity. These components could include drugs or other chemical substances or hormonal substances instituted in child.

For aggravated penetrative sexual assault against children, new provisions include a minimum sentence of 20 years in prison and, in exceptional situations, the death penalty. For perpetrating serious penetrative assault, the death sentence has been specified under section 6 of the POCSO Act, with the lowest limit of punishment increased from 10 to 20 years. It also includes stricter punishments for sexual assault, as well as massive fines and mandatory minimum sentences for child pornography.

The term "aggravated sexual assault" refers to situations in which the offender is a child's relative or a person in a position of trust. Cases in which the child's sexual organs are injured or the child gets mentally handicapped are also covered. This law also applies to anyone in positions of authority, such as police officers, members of the military forces, and public officers.

The modification to the special statute, which took effect on August 6, 2019, principally aimed to strengthen penalties for child sexual abuse and gave authority to our union Government for enacting rules on reporting, deleting, or destroying pornographic content involving children in whatever form. Administering any chemical compound, drugs or hormones to a child so that he/she attains early sexual maturity were included in the definition of 'sexual assault' by broadening its scope. . Under section 6 of the POCSO Act, the death penalty was also stipulated for serious penetrative assault, with the lower level of punishment being raised from 10 years to 20 years.

One stop centers to be established to give assistance to child. After discontinuing In 2017, the Ministry of Women and Child Development (MWCD) launched the Indira Gandhi Matritva Sahyog Yojna (IGMSY), a centrally sponsored scheme known as "SAKHI" which is funded through the Nirbhaya Fund and aims to care for women who have been victims of violence in public and private spaces, in the home, in the community, and at work. At OSC, aggrieved women of all ages would receive specialised services in the event offences like sexual harassment, domestic violence, sexual assault, acid attacks etc. These facilities are intended to provide emergency response and rescue services, medical assistance, assistance in filing a police report, counseling along with legal aid, shelter, and video-conferencing facilities, including other things.

#### 2.4 LOOPHOLES IN THE 2019 ENACTMENT:

There are no standards for how those in positions of authority (police officers or governmental workers) will be tried under the terms of aggravated assault. In a country where power and impunity are two sides of the same coin, laying out these details is critical. To make courts more child-friendly spaces, special sensitization training for fast track courts, including POSCO courts, prosecutors, and judges should be made a necessity. When it comes to dealing with the trauma of abuse, children's psychological counseling is critical. To treat the long-term repercussions of abuse, more rehabilitative services, including free mental health practitioners, are required.

Because the distinction between consensual and non-consensual sex is difficult to make, the term "age of consent" has to be redefined. As society's sexual mores advance, archaic conditions are a hindrance to freedom and sexual agency, and they are thus used by families to conceal elopement and inter-caste marriages.

The Bombay High Court's Nagpur Bench recently interpreted groping a minor's breasts over his clothes as being within the ambit of outraging a woman's modesty (Section 354 of IPC), rather than POCSO, because there was no skin-to-skin contact and hence is exceedingly problematic. Sexual assault is defined in Section 7 of the POCSO act as physical contact with sexual intent that does not result in penetration. It does not consider skin-to-skin contact to be necessary. Narrowing the scope of the law is both contradictory with the statute and establishes a

discouraging precedent for the protection of children who have been subjected to non-contact abuse.<sup>74</sup>

This decision devalues the impact of sexual harassment on adolescents and downplays molestation as a serious crime. In our country, it legitimises trauma and socialises women to be passive and complacent in the face of violence. It absolves men of responsibility for their acts while placing the duty of 'not being assaulted' on women. Fear of sexual assault, according to feminist Susan Brown Miller, is a type of mental violence in and of itself, and judgments like these amplify the mental violence that women endure in addition to the physical.<sup>75</sup>

## 2.5 POCSO RULES:

These rules defined key terms and made specific provisions for the National Commission for the Protection of Children's Rights (NCPCR) and the State Commission on the Protection of Children's Rights to monitor the Act's implementation. Child Commissions were also instructed under it to include a separate chapter in the NCPCR or SCPCR's Annual Report focusing on the implementation of the POCSO Act's various provisions. The POCSO Rules of 2012 have been repealed by Rule 13.<sup>76</sup>

On March 13, 2020, the Ministry of Women and Child Development of the Government of India, in support of the state policy of "zero tolerance" for violence against children, laid emphasis on awareness, providing compensation to victim children within 30 days of the Special Court's order, and medical care for victim children by issuing new POCSO Rules, 2020. The Rules of 2020 came into effect on March 9, 2020. Rule 7 provides the victim to receive legal counsel and assistance, while Rule 8 provides for specific remedies such as food, clothing, and other necessities.

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<sup>74</sup> Satish v. State of Maharashtra, CRIMINAL APPEAL NO. 161 OF 2020. The Court modified the order of Sessions Court, that made 39 year old man liable of sexual assault for groping the 12 year old girl and for removing her pants.

<sup>75</sup> Crovitz, Elaine, *Review Essay*, 39 JOURNAL OF MARRIAGE AND FAMILY 203 (1977).

<sup>76</sup> POCSO ACT, 2012 S. 45, provides that Central Governemnt may by notification make rules for carrying out functions of the Act.

## 2.6 CONCLUSION:

To summarise, a child's life is shaped by his or her family, schools/institutions, society, and state. It is the obligation of everyone concerned to take the appropriate precautions to ensure the protection and safety of children. In the last decade, India has made some progress in terms of policy and legislation. Despite all the legislations, there exist certain issues which even today lacks clarity. While this is an admiral ideal, cultural and societal traditions in India that encourage early marriages, combined with an individual's right to sexual autonomy, may make it difficult to achieve.

Child marriage has always been a problem in India, with socio cultural systems that today encourage the marriage of young girls and boys. Despite an almost 60 percent increase in the number of cases of child marriage that have been attended to, the number of cases pending each year has increased to 11 times to what it was in the year 2010.<sup>77</sup>

For the purposes of POCSO, child marriage and its consummation are considered illegal. However, we are still a long way from providing adequate state protection and ensuring child safety for vulnerable children. It is critical to develop and implement culturally sensitive and evidence-based prevention initiatives directed at all levels of society, including individuals, families, and institutions. To have a greater impact at a national level, regulations at national level for child abuse prevention should be implemented first, followed by successful implementation and translation into programmes and action plans.

Even though child marriage is illegal under secular law in India, it is legal under certain personal laws, resulting in a conflict between secular and personal laws. Section 2(d) includes anyone under the age of 18 years in the definition of "child." Under POCSO, the only criterion is age. Sections 4 and 6 of the law penalise offenders who engage in such sexual activity with a "child." A conflict between the two laws is likely to occur, with one allowing "child" marriage while the other criminalising it, with "child" defined as a person under the age of 18 years.

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<sup>77</sup> Child Rights and You (CRY), 2020, "Status and Decadal Trends of Child Marriage in India", October 2020; New Delhi.

On one hand, the POCSO makes no distinction between a male and a female child, yet the 2006 Act does, resulting in a dispute. Despite the fact that the 2006 Act makes such marriages voidable at the request of either party, the contradicting legal prepositions of the three laws, namely the 2006 Act, POCSO, and personal laws, cause a ruckus.

This divides the girls into two groups. A married girl child is believed to have consented to sexual contact with her husband between the ages of 15 and 18, even if she does not actually consent. Any sexual relationship, with or without agreement, between a 15 and 18-year-old unmarried girl child is considered statutory rape. The Protection of Children against Sexual Offenses Act of 2012 (POCSO) criminalises all sexual behaviour with children under the age of 18 years, based on the idea that a child's consent is regarded as no consent at all, even if he or she gave consent. As a result, it is clear that POCSO is incompatible with both PCM and IPC. This exemption was declared unconstitutional because it infringed on constitutional rights to equality, nondiscrimination, and life and personal liberty. The section of the IPC clashes with POCSO rules that define penetrative sexual assault and aggravated penetrative sexual assault. The Supreme Court affirmed the primacy of POCSO above the IPC, citing section 42A of the POCSO, which states that POCSO takes precedence over conflicting laws. Negative physical and psychological consequences, educational setbacks, lower employment/livelihood prospects, and limited agencial opportunities were all described in the judgement. According to the Supreme Court, such negative consequences may affect child-wives for the rest of their life, and some may even have an intergenerational influence. POCSO, on the other hand, is used to penalise guys who enter into love marriages with minors without parental authorization.<sup>78</sup>

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<sup>78</sup> W.P. (Civil) No. 382 of 2013.



## **CHAPTER -3**

### **ROLE OF STRATEGIC INVESTIGATION FOR CONVICTING CHILD**

#### **SEXUAL ABUSERS IN INDIA**

#### **INTRODUCTION:**

Evidence gathering is both an art and a science, and it is crucial in the administration of justice. A crime investigation is a thorough investigation of the facts surrounding a criminal charge in order to uncover the truth and allow the competent court to administer justice. To put it another way, the goal of an investigation is to gather multiple categories of evidence, including oral, physical, and digital evidence. Evidences are the mechanism by which justice is dispensed throughout the criminal justice administration process. During the legal process, a scientific examination supplemented by forensic inputs instills certainty, consistency, and inviolability in decision-making. Victims of sexual assault are stigmatised under patriarchal approaches, and law enforcement institutions are apathetic, exacerbating the situation. Various players in the Criminal Justice System (CJS), such as cops, prosecutors, defence lawyers, and judges, are accused of having a feudal attitude that fosters unfairness to victims and, in some cases, accused.

#### **3.1 IMPORTANCE OF EVIDENCE COLLECTION:**

Evidence is the corpus of facts or information used in court to determine whether a fact is true or legitimate. 'Evidence' as defined in The Indian Evidence Act means (1) all statements made before the Courts in relation to matters of fact under investigation by witnesses, following statements are referred to as oral evidence; and (2) all documents (including electronic records) produced for the Court's inspection; such documents are referred to as documentary evidence.<sup>79</sup> Procedural laws, which are considered to play vital role in the administration of diverse substantive laws, apply to any kind of "Evidence." The Indian Evidence Act addresses the legitimacy of evidence used for general purposes, regardless of whether the dispute is civil or criminal.

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<sup>79</sup> INDIAN EVIDENCE ACT, 1872 S. 3.

Similarly in the case of *NCT of Delhi v. Laxmi Kant Tiwari*,<sup>80</sup> the implications of defective investigation were highlighted. The trial court found some procedural flaws in the inquiry and determined that, as a result of these flaws, the accused was given the benefit of the doubt and acquitted.

### 3.2 CHALLENGES IN INVESTIGATION:

The figure below tries to list the various challenges that are faced during the investigation:



#### 3.2.1 DELAY IN REPORTING AND NON REPORTING:

It is necessary to report on time in order to have solid and credible oral and physical evidence. Delay denies distinctive evidence. As time passes without a crime being reported, a shadow of doubt descends on reliability, increasing the risk of evidence manipulation. As a result, excess delay can be fatal, calling into question the information's veracity, and the prosecution bears the responsibility of providing a credible explanation for the delay in reporting. The social stigma attributed to female victims of sexual offences and their families in the Indian community is the major cause of non-reporting or delayed reporting of such crimes. All bystanders and other child sexual abuse witnesses have a legal obligation to report the incident to the authorities, as outlined in section 21 of the POCSO Act. Section 20 requires hotels, hospitals etc. for mandatory

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<sup>80</sup> CRL.L.P. 469/2014.

reporting of any child sexual abuse or sexually exploitative behavior against a minor to the authorities. However, because sexual offences are considered "crimes in isolation," eyewitnesses may not be accessible in the majority of cases.<sup>81</sup>

The purpose of first information report (FIR) is to initiate the investigation process in criminal matters.<sup>82</sup> According to Justice Madan Lokur,<sup>83</sup> case reporting is hampered by two factors: first, social stigma, and second, obstacles in reporting cases of incest or if the offender is closely linked to the family of the child victims. It was also recommended that victims who are now adults but who were sexually abused as children be encouraged to open up and share their stories.

➤ IMPORTANCE OF MEDICO-LEGAL TEST IN INVESTIGATION:

Medico-legal opinion is crucial in determining guilt or innocence during the investigation of numerous bodily offences. The medical test is useful in a variety of ways, including determining the nature and severity of injuries as well as determining the approximate time when the injuries were inflicted on the body. Injuries to the private parts and other bodily injuries are extremely helpful in understanding the dynamics of the incident in sexual offences, such as penetrative sexual assault. In combination with the provisions entrenched under sections 164-A and 357 of Cr. PC, section 27 of the POCSO Act provides for the procedure and measures to be taken while performing a medical examination of a minor victim. The court goes on to explain in *Sri Kishan Poddar v. The State (Govt. of NCT of Delhi)*<sup>84</sup> that prosecutrix's medio legal test corroborated.

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<sup>81</sup> Jhon E Eck, The new detective: Rethinking criminal investigations, Criminology and Public Policy ( Jun. 30, 2021, 01:00 AM),

[https://www.researchgate.net/publication/334829283\\_The\\_new\\_detective\\_Rethinking\\_criminal\\_investigations](https://www.researchgate.net/publication/334829283_The_new_detective_Rethinking_criminal_investigations).

<sup>82</sup> Lalita Kumari v. State of Uttar Pradesh (2014) 2 SCC 1; Vinod Dua v. State (Govt. of NCT of Delhi) 2020 SCC OnLine Del 644.

<sup>83</sup> Independent Thought vs. Union of India (WRIT PETITION (CIVIL) NO. 382 OF 2013).

<sup>84</sup> CrI. A. No. 452/2006, here the prosecutrix used to work as a checker in a factory. Appellant who was on helper duty in the same factory forcibly engaged in sexual intercourse with her.

Similarly in another case, the High Court of Delhi held that conviction of the accused is more likely when the eyewitness and medical evidence are similar.<sup>85</sup>

➤ CONSEQUENCES OF DELAY IN CONDUCTING MEDICAL TEST:

Medical examination is undertaken long after a sexual abuse act on various occasions, which is likely to result in no reported injury to the private area, offering favorable defence grounds. “Because the woman came forward to the police after several days of physical attack, damage to her body could not be found, advantage cannot be given, the Delhi High Court stated in the case of *Durgesh Jha v. NCT Delhi*.<sup>86</sup> As a result, in late-reported cases of penetrative sexual assault, the absence of damage to the victim's body or private parts may not be enough to hinder the prosecution case, and the victim cannot be labelled a liar.

Different types of evidence, such as oral evidence, are employed in courtrooms around the world. Documentary evidence<sup>87</sup>, digital evidence,<sup>88</sup> and a variety of other forensic evidences all help corroborate the judicial process. During the course of a trial, there is no requirement of exact number of witnesses.<sup>89</sup> As long as the testimony is logical, consistent, and proportional to the probability, and it inspires implicit trust, it can be accepted.<sup>90</sup>

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<sup>85</sup> *Gurvinder Singh v. State of NCT of Delhi*, CRL.A. 659/2011, here complainant alleged to have received missed calls from two numbers continuously for one month. Over call, a person used sexually explicit words and tried to disrobe her. FIR was lodged under S. 354, 354B/ 509 IPC.

<sup>86</sup> 2017 SCC OnLine Del 9648 at para 17, in this case Durgesh was accused of S. 6 & 10 of POCSO. Here X's uncle tried to touch the breast of the minor girl with intent to sexually abuse her. Victim here was 13 years old. Thereafter several times also he did penetrative sexual assault on her. The victim's statements were recorded and IO also conducted medical examination.

<sup>87</sup> Hannah Maslen & Colin Paine, *When Should the Police Investigate Cases of Non-recent Child Sexual Abuse?*, 38 CRIMINAL JUSTICE ETHICS 65-102 (2019).

<sup>88</sup> Dodge A, Spencer D, Ricciardelli R, Ballucci D., *This isn't your father's police force: Digital evidence in sexual assault investigations*, 52(4), AUSTRALIAN & NEW ZEALAND JOURNAL OF CRIMINOLOGY, 499-515 (2019).

<sup>89</sup> INDIAN EVIDENCE ACT, 1872 S. 134.

<sup>90</sup> *Kunju v. State of Tamil Nadu* AIR 2008 SC 1381, in this case the accused's marriage to Selvi was arranged. The betrothal ceremony was also performed. The deceased fell in love with Selvi. When the accused came to know about it, he injured the deceased badly leading to his death.

“Under the subject of appreciating the law of evidence the quality of witnesses' evidence is more important than the number of witnesses, as there is no need to have a large number of witnesses,” the Supreme Court said.<sup>91</sup> Also the apex court on other instance said that “The criminal justice system in this country is at a cross road. In many cases, reliable, trustworthy, and credible witnesses to the crime rarely come forward to testify in court, and even the most hardened offenders manage to escape the law. Even the prosecution's most dependable witnesses become hostile due to intimidation, fear, and a variety of other factors.”<sup>92</sup> Evidence other than an eye witness is often regarded as secondary in nature, despite the fact that it clearly aids in corroborating and so strengthens the probity of a fact.

### 3.2.2 RELYING ON SOLE TESTIMONY IN INVESTIGATION:

Another challenge in the process of investigation comes into picture in cases of sole testimony. The Apex Court ruled in *Joseph v. State of Kerala*<sup>93</sup> that where there is a single witness to an incident, his testimony must be accepted with caution and after being tested against the touchstone of evidence offered by other witnesses or the material evidences on record. This Court also declared that section 134 of the Indian Evidence Act does not specify a minimum number of witnesses, and that the Court could record and uphold a conviction based on the testimony of a single eye witness. The Court concluded in the case of *State of Haryana v. Inder Singh*<sup>94</sup> that the quality of the witnesses, not the quantity, is what matters in assessing the guilt or innocence of the accused. The testimony of a single witness must be reliable and trustworthy and

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<sup>91</sup> Laxmibai v. Bhagwantbuva (2013) 4 SCC 97 at para 39, in this case a person descendant of Sant Eknath was vested with exclusive right to carry Palki on Ashadi Ekadashi, who died. The case involved the adoption of next successor. Till the matter was decided, the priest carried the palki. Here perpetual injunction was claimed.

<sup>92</sup> Dharam Deo Yadav v. State of U.P. 5 (2014) 5 SCC 509 para 30, in this case Diana (22 years) a visitor came to India with her father. On day she was found to be missing from her hotel. Later it was found that the tourist guide murdered her.

<sup>93</sup> (2003) 1 SCC 465, the appellants in this case were prosecuted under section 341, 307 and 302 IPC. Here the case rested solely on the injured witness.

<sup>94</sup> (2002) 9 SCC 537, the case is related to dowry death wherein most of the witnesses turned hostile. And the F.I.R was recorded on the single witness and the investigation also was based on his testimony.

should not leave any doubt in the mind of Court.<sup>95</sup> Similarly in case of *Ganesan V. State Represented by its Inspector of Police*<sup>96</sup>, Supreme Court held that conviction of accused is possible on sole testimony. So it is another challenge for the courts to figure out on what evidences to rely.

In case of *Rameshwar v. State of Rajasthan*<sup>97</sup> Justice Vivian Bose said “Many crimes that are frequently perpetrated between accomplices in secret, such as incest, misdeeds involving females (or unnatural acts), could never be brought to justice”. It is difficult to obtain an eyewitness in different conditions of crime, such as in sexual offence cases, because the crime is committed in a remote location. This circumstance can also be seen when a victim is killed after being raped or committed other crimes. In such cases, scientific (forensic) evidence plays a critical role in corroboration. So in the cases where there is a single witness the chances are that the evidences might be tempered with. Apart from this, the witness turning hostile might create another difficulty to take the investigation forward.

#### ➤ CHALLENGE AS TO ADMISSIBILITY OF HOSTILE WITNESS:

It is well established that the prosecution can rely on the testimony of hostile witnesses to the extent that it supports the prosecution account of the incident. Such witness's testimony cannot be considered "washed off the records," as it is still admissible in court, and there is no legal limit to basing an accused's conviction on such testimony provided it is substantiated by other trustworthy evidence.<sup>98</sup> The Court may, in its discretion, allow the person who calls a witness to ask any question that might be asked under cross-examination by the opposing party under Section 154 of the Indian Evidence Act. The argument that the testimony of a witness who has

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<sup>95</sup> Ramnaresh & ors. v. State of Chhattisgarh; 2012 (3) Supreme 81, here the appeal was against capital punishment to 4 accused charged under S. 499, 376(2) & 302 IPC.

<sup>96</sup> CRIMINAL APPEAL No. 680 of 2020, in this case victim was 13 years old and the accused was convicted under S. 7 of POCSO. He was sentenced to 3 years rigorous imprisonment. Aggrieved by the sentence he went to appeal.

<sup>97</sup> AIR 1952 SC 54, here appellant was charged for raping a young girl of 8 years. Learned Session judge held that evidences were sufficient for moral conviction but fell short of legal proof. Accused was acquitted giving benefit of doubt and so the matter went to H.C and then to S.C.

<sup>98</sup> Brajendra Singh v. State of Madhya Pradesh; AIR 2012 SC 1552, in this case husband suspected his wife to be having illicit relations with the neighbor. And so he killed his 3 children while they were sleeping.

been called and cross-examined by the party with the Court's permission cannot be believed or disbelieved in part and must be rejected entirely is incorrect. The courts may rely on much of the testimony that supports the prosecution's case and is backed up by additional evidence.

### 3.2.3 NARROW TIMELINES FOR INVESTIGATION: HOW EFFECTIVE?

According to the Criminal Procedure Code (CrPC), investigations into crimes punishable up to ten years must be completed within 60 days, and investigations into crimes punishable by more than ten years in prison (including rape) must be completed within 90 days of detaining the accused, or else the accused would be released on bail.<sup>99</sup> CrPC was amended in 2018 to speed up the process by reducing the investigation period for all rape cases from 90 to 60 days. Though every investigation shall be conducted without undue delay, but since the perpetrators are large in numbers so there can be no upper limit to the number of investigations.

Recently, some state governments have reduced the duration for the investigation of crime. Two major steps in this regard are Disha Act of Andhra Pradesh and Shakti Act of Maharashtra.

Disha Act envisions an investigation to be executed in 7 working days and a trial in 14 days from the date of filing the charge sheet, allowing for the collection of adequate evidence and the passing of judgement within a 21 days timeframe. Whereas Shakti Act calls for a case's probe to be completed in 15 days and a trial to be conducted within 30 days. In general, the length of an investigation is determined by the seriousness of the crime, the number of defendants, and the agencies involved. The investigation entails the investigating officer (IO) and forensic expert inspecting the scene of the crime; recording the victim's and witnesses statements (by the IO and the judicial magistrate); medical examination of the victim and accused persons; and collecting documents relating to age from parents, local bodies, and school. This is in addition to the fact that in many cases of rape, the victim is traumatised for a period of time and is unable to recount the incident in entirety. The duration and quality of an investigation are also affected by whether a police station has separate investigation and law and order divisions, which is another long-awaited police reform that is still awaiting compliance with the Supreme Court's directions. The

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<sup>99</sup> CODE OF CRIMINAL PROCEDURE, 1973 S. 167.

amount of available IOs and female police officers, as well as the size and growth of the FSL and its DNA unit, all play an important role.<sup>100</sup>

Sensitive offences should be investigated as soon as possible. However setting short investigation deadlines, leaves room for procedural flaws that could be exploited during the trial. Apart from this, there are also high chances that in such short span of time, quality evidences are not found and the accused is let off due to lack of evidences found against him. Instead of imposing unrealistic deadlines, the police should be given more resources to ensure that they can deliver effectively.

### 3.2.4 ROLE OF FORENSICS IN INVESTIGATION:

The legal definition of forensic or scientific evidence is not specified under Indian law. Several forensic inputs, such as DNA and voice matching, have long been regularly employed in courtrooms, but these professionals have been excluded from the Indian judicial system.<sup>101</sup>

#### ➤ ROLE OF EXPERT OPINION IN FORENSIC EVIDENCES:

“Section 45 of the Indian Evidence Act, 1872 provides for the ‘Opinions of experts,’ by which courts are able to formulate their opinion on various areas. The law goes on to say that an expert is not a fact witness and that his testimony is truly advisory in nature<sup>102</sup>

#### ➤ JUDICIAL RESPONSE ON EXPERT OPINION:

The opinion of an expert witness differs from the testimony of a fact witness. The expert's responsibility is to provide his or her view together with justification and

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<sup>100</sup>IPS A. Vij, *Give adequate time for Probe*, THE HINDU, Dec. 31. 2020.

<sup>101</sup> G.K Goswami , Forensic Law 2016, ENSURING JUSTICE IN SEXUAL OFFENCE CASES, ( Jun. 17, 2021, 5:00 PM), [https://www.researchgate.net/publication/325142155\\_Forensic\\_Law\\_2016](https://www.researchgate.net/publication/325142155_Forensic_Law_2016) .

<sup>102</sup> Section 293(4)(g) introduced by Act of 2005 [the Criminal (Amendment) Act, 2005], s. 26 (w.e.f. 23-06- 2006).



supporting evidence.<sup>103</sup> The court should neither cede its authority to a third party or subject its own decision to an expert, but rather treat expert testimony as any other evidence.<sup>104</sup> The Supreme Court in *Pattu Rajan v. State of Tamil Nadu*<sup>105</sup>, stated unequivocally that expert testimony is advisory in nature and that the court is not bound by expert testimony. Expert testimony is taken into consideration by the Court, but it is not binding. A government scientific expert, on the other hand, is not on the same level as an expert called by the opposing party to defend its position.

The matter of disputes between the eye witness and the expert opinion has been addressed by the Indian Supreme Court in a number of decisions. In case no opinion is present, the Supreme Court should seek assistance from an authorised textbook and apply its expertise and knowledge. In the absence of an expert opinion, the court should carry out its duties.<sup>106</sup>

➤ CHANCES OF FRAUD IN FORENSIC EVIDENCES:

One of the pillars of the legal system is the reliability of expert testimony. The idea that forensic evidence is perfect, is incorrect as even these leaves plenty of room for forensic fraud and manipulation.<sup>107</sup> It is a complex domain in which forensic solutions are specially designed to achieve the intended goal of leading an investigation.

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<sup>103</sup> Prem Sagar Manocha v. State (NCT of Delhi) (2016) 4 SCC 571, in this case the appellant was aggrieved by H.C's decision under S. 340 CrPC. In reference to Jessica Lal's murder case, the police sought expert opinion from state Forensic Science Laboratory.

<sup>104</sup> State of Karnataka v. Jayalalitha (2017) 6 SCC 263, the case is an appeal against H.C's order which acquitted charges u/s 120B, 109 IPC and 13(1)(e) & 13(2) PCA. The charges were against former CM of Tamil Nadu.

<sup>105</sup> 2019 (2) SCC (Cri) 354, in this case the accused was proprietor of various hotels. On advice of astrologer he wanted X to be his 3<sup>rd</sup> wife. X was already married to Y. In order to break their relationship they (X and Y) were abducted and later Y was murdered.

<sup>106</sup> Ajay Kumar Parmar v. State of Rajasthan (2012) 2 SCC (Cri) 201, in this case it was alleged that appellant here raped a lady. During investigation the appellant was medically examined and prosecutrix clothes were also sent to FSL. In medical report it was opined that she was habitual.

<sup>107</sup> Du M, Analysis of errors in forensic science, J FORENSIC SCI MED, (Jun. 17, 2021, 6:00 PM)

<https://www.jfsmonline.com/text.asp?2017/3/3/139/215815>.

When an expert witness knows he or she is a fake or is otherwise giving misleading testimony, the situation is similar to that of any other witness who is defrauding the court. Such behaviour is both illegal and unethical.<sup>108</sup>

Several instances of forensic tampering have been reported in India.<sup>109</sup> The Delhi High Court ordered a CBI investigation in relation to fake DNA tests presented by a forensic expert in various instances.<sup>110</sup> In *Nisha Thakur v. Union Public Service Commission*,<sup>111</sup> the same expert's educational qualifications were challenged before the same high court. India, like other nations, requires an ethical standard to ensure the integrity of expert advice.<sup>112</sup>

### 3.2.5 USE OF SCIENTIFIC TECHNOLOGIES FOR EVIDENCE COLLECTION:

Forensic professionals assess physical artefacts such as biological samples acquired from various sources such as crime scenes and other sources, as well as medico-legal exams, utilising a variety of forensic technology.

#### 1. DNA EVIDENCES:

The relevance of DNA was highlighted by the then Chairman of the Law Commission of India, he emphasized on the DNA evidences by stating that if the DNA does not match

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<sup>108</sup> M. Wallace et al., *Thibedeau, Forensic DNA databases—Ethical and Legal Standards: A global Review*, 4 EGYPTIAN JOURNAL OF FORENSIC SCIENCES 57 (2014).

<sup>109</sup> *Rajiv Singh v. State of Bihar*, 2015 SCC OnLine SC 1336, in this case a couple was retuning from their honeymoon. While returning, the wife disappeared from husband's appearance. The husband was convicted under S. 304B, 201, 498A IPC.

<sup>110</sup> *State (NCT of Delhi) v. Khursheed* 2018 SCC OnLine Del 10347, the case involves a women who lived with her 2 daughters and 3 sons. One day on of her daughter went missing. Later she was found naked lying on floor in x person's house. The person tried to sexually assault the girl.

<sup>111</sup> 2015 SCC OnLine Del 14324, in this case complaint was made against FSL( Forensic Science Laboratory) officer for their document verification. It was being alleged that their documents relating to their experience and educational qualification were not verified.

<sup>112</sup> National Institute of Standards and Technology , National Code of Ethics and Professional Responsibility for the Forensic Sciences, NATIONAL COMMISSION ON FORENSIC SCIENCE ( Jun. 19, 2021, 2:00 PM), <https://www.crime-scene-investigator.net/print/national-code-of-ethics-andprofessional-responsibility-for-the-forensic-sciences.pdf> .

then the person cannot be held guilty. If there is corroborative evidence, either circumstantial or direct, where the DNA matches, guilt can be proven. “In the coming years, DNA should be employed extensively, and I am confident that doing so would allow us to overcome the current dilemma caused by hostile witness.”<sup>113</sup> DNA aids in the identification of the offender as well as the victim in a variety of ways in sexual crime cases. However, the inviolability of the DNA sample is critical since it can be contaminated for a variety of reasons.

Under sections 53-A and 164-A of the Criminal Procedure Code, the investigator of a rape case must expressly request that the offender's or victim's medical examiner acquire blood samples for DNA testing. DNA is a powerful forensic tool for both proving guilt and proving innocence. DNA proved to be crucial in redressing injustice by convincingly showing the innocence of wrongfully condemned defendants.

## 2. NON DNA EVIDENCES:

Non-DNA evidence such as hair, fibres, soils, and paint, toxicology, digital forensics including telephony, and impression and pattern evidence like fingerprints, handwriting, footprints etc. are all significant for corroboration in sexual offences.<sup>114</sup> Another set of evidence is CCTV footage and Spectrograph (voice match), both of which are quite useful for human identification and other uses.

### ➤ DIGITAL EVIDENCES:

Cyber footprints are mostly used to enhance crime investigation in today's digital world. Manipulation and tampering with digital data are difficult for law enforcement organisations to identify, but digital forensics comes to the rescue.

The Information Technology Act of 2000, Chapter XI, makes it illegal to tamper

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<sup>113</sup> Saranya v. State of Tamil Nadu 2016 SCC OnLine Mad 23294, in this case , a complaint was lodged by All Women Police station under S. 417, 506(i) of IPC and S.4 of POCSO 2012, S. 9,10 of PCMA. Here a 21 year old girl was in love with a boy of 27 years. It was alleged by the girl that the man seduced her and took her away from her residence and committed wrong with her.

<sup>114</sup> Heather Waltke et. al., Sexual Assault Cases: Exploring The Importance Of Non-Dna Forensic Evidence, INDIAN INSTITUTE OF JUSTICE JOURNAL ( Jun. 20, 2021, 5:00 PM), <https://nij.ojp.gov/topics/articles/sexual-assault-cases-exploring-importance-non-dna-forensic-evidence> .

with computer source documents (section 65), hack a computer system (section 66. Call Detail Records (CDRs) analysis provides crucial connecting links such as geo-location, conversations, movements, and numerous behavioral patterns that can be used to corroborate statements. Digital inputs are a trustworthy and admissible kind of evidence, as defined by Indian law.<sup>115</sup>

However, because digital inputs only reflect activities performed on a machine (electronic device), linking a digital device to an offender remains a difficult task for an investigator. As a result, transforming digital material into admissible evidence in a court of law necessitates extensive practice thereby acting as a challenge in the investigation.

The use of electronic evidence in courtrooms has a long history in the global legal landscape; however, the trustworthiness of digital evidence has been recognised by all jurisdictions.<sup>116</sup> In India, in addition to the Information Technology Act of 2000, a series of procedural laws govern the relevance and admissibility of electronic evidence. There are various concerns to address, such as certification under Sections 65-A and 65-B of the Information Technology Act.

The extent of cyber forensics is vast and the usage of diverse tools and techniques, as well as their varying methods of operation, poses plenty of concerns for legal and technical specialists equally. The lack of proper guidelines for the collection, acquisition, and presentation of electronic evidence, rapid technological change, big data, use of anti-forensic techniques by criminals, and the use of free online tools for investigation, among other issues, all point to the need for current technologies to be amended.

#### ➤ EVIDENCE COLLECTION FOR AGE DETERMINATION:

The determination of age below the age of 18 years is still a critical aspect in child sexual abuse's legal argument.

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<sup>115</sup> Evidence includes all documents including electronic records produced for the inspection of the Court are called documentary evidence. S. 92 and Sch. II of the Act 21 of 2000; INDIAN EVIDENCE ACT, 872 S. 3.

<sup>116</sup> R. v. Wood (1983) 76 Cr App R 23; Castle v. Cross [1985] 1 All ER 87; R. v. Shephard [1993] Crim LR 295.

The JJ Rules, 2016, were enacted by the Central Government. The Supreme Court has also asked lower courts, boards, and committees not to undertake robing inquiries. Only when other documentation of age evidence such as birth certificate from school etc. are unavailable, as stipulated in section 94 of the JJ Act, 2016, must a medical examination for age estimation be done.

The age of a person can be determined by a medical specialist using:

- (i) the Ossification test, or
- (ii) any other current medical procedure accessible, such as the status of pubic hair, the growth of secondary sexual features, and so on.

### 3.2.6 ROLE OF MAGISTRATE TO ENSURE EFFECTIVE INVESTIGATION:

Hon'ble Supreme Court, in *State of Karnataka v. Shivanna @ Tarkari Shivanna*<sup>117</sup>, has issued comprehensive guidance to Investigation officer (IO) for obtaining the victim's statement recorded before the Magistrate, by exhorting special powers enshrined under Article 142 of the Indian Constitution.

### 3.3 OUTCOME OF LAPSES IN INVESTIGATION:

“Investigators are overburdened with vast numbers of cases, and there is a pressing need to separate the investigating wing of the police from the segment responsible for maintaining peace and order,” Justice Madan Lokur said.<sup>118</sup>

The Kerala High Court, while ordering a retrial in the Walayar rape-death cases, noted that the acquittal of the defendants was due to errors in the initial investigation, untrained prosecution, and the trial judge's passive involvement. The High Court went so far as to call the trial a "mock trial" because of the faults. In 2017, a rape and death case involving two sisters, ages 13 and 9

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<sup>117</sup> (2014) 8 SCC 913, in this case the emphasis was laid on the disposal of cases by fast track courts. SLP was filed by Stae of Karnatka assailing judgment passed by H.C by which life imprisonment for offence of rape was reduced to ten years.

<sup>118</sup> Conference proceeding of National Initiative to Reduce Pendency and Delay in Judicial System, by Supreme Court of India, 2018.

years, occurred in Walayar, Kerala. On January 13, 2017, the 13-year-old sister was discovered hanging in her home. On March 4, 2017, the younger sister, who was nine years old at the time, was found hanged in her home. They were both from the Scheduled Caste community. Both girls were sexually assaulted, according to postmortem investigations. In the instance of the younger girl, the autopsy findings even supported the possibility of homicidal hanging. "We are compelled to note that the first phase of the investigation in these cases was completely filthy," Justice Hariprasad wrote in his decision. The early faults in the inquiry, according to the Court, destabilised the case. The investigating officer, who was delegated to investigate these instances approximately a week after the younger girl's death, doing a relatively decent job, he was unable to acquire any proper scientific proof. High Court held that "The police officers investigating crimes against women and children, particularly those under the POCSO Act, must have high standard of integrity and skill. They should receive sufficient legal training in order to comprehend the complexities of the law. Furthermore, they should be given clear instructions on how to obtain scientific data in such situations. More importantly, they should be sympathetic to the victims', their families', and society's emotions and sentiments when investigating such serious crimes ".<sup>119</sup>

### 3.4 CONCLUSION:

In cases of sexual offences wherein either the victim is a child or a child is required to appear as a witness in support of the prosecution, directions have been made and guidelines have been laid down in different judgments which have not received the attention they deserve. It would be in the interests of justice to therefore compile the same to facilitate their implementation. Children who have been sexually assaulted or raped suffer a heavy burden of unjustified guilt and violations for which they are not to blame. The humiliation, shame, and embarrassment that cloud their emotions as a result of the worst kind of violation they've experienced, which is amplified when they're forced to tell outsiders about it in a formal setting. The agony of a child victim is compounded by the fact that she must continually recount her horror to investigators, prosecutors, and ultimately in court. In the case of *Virender v. The State of NCT*<sup>120</sup>, Delhi High

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<sup>119</sup> State of kerala V. Madhu @ Kutti Madhu, CRL.A.No.1357 OF 2019.

<sup>120</sup> Delhi 2009 SCC OnLine Del 3083, the appeal here is a challenge to earlier judgment passed by Addl. Session Judge who returned the finding of guilt. Here the rape was committed by sexual intercourse by the appellant. Total

Court outlined precise standards for police to follow while investigating sexual offences involving children. High court here relied on two important judgments and tried to consolidate the procedure to be followed by the police authorities for the proper and effective investigation. Immediately after receiving a complaint or filing a FIR for any of the sexual offences, efforts must be made to enlist the assistance of a scientist from the Forensic Science Laboratory or another laboratory or department in the investigation. Under his guidance and recommendations, the Investigating Officer will conduct investigations into the topics he has indicated.<sup>121</sup>

The backbone of a fair and quick trial is an impartial and scientific investigation. Following proper processes is just as crucial as following the core legal provisions in criminal cases. A haphazard approach to evidence gathering and incurable irregularities could prove fatal during trial processes. The routine manner in which police record a juvenile victim's statement without taking necessary measures as required by the special statute also leaves plenty of room for the defence to object, specifically during minor victim's cross-examination. Evidences are often readily available, specially forensic evidence, yet they are rarely collected by IOs for reasons best known to them. IO frequently refuses to interrogate witnesses despite their availability for adducing critical facts.

IOs generally hush up evidence collecting under the guise of being overburdened, resulting in a miscarriage of justice. During the investigation, the victim plays a role that is quite similar to that of an eyewitness. When it comes to dealing with victims of sexual assault, the police in general are lacking in experience. The problem is supposedly exacerbated by police officers' patriarchal attitudes, even those held by women officers, as well as the power dynamic between the IO and the victim. The IOs are never held accountable to the victims or informed about the status of the

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of 13 witnesses were examined. The conviction in this case rested solely on the evidence of prosecutrix who examined the witnesses. Appellant contended that there were contradiction on all material particulars in statements given by prosecutrix.

<sup>121</sup> Court On Its Own Motion v. State and Anr, (2007) 4 JCC 2680, here the case was initiated on a complaint but was forwarded to a different bench. On communication it was revealed that various authority were insensitive towards dealing with sexual abuse of children.

investigation.<sup>122</sup> For a fair, transparent, democratic, and responsive investigation, it is necessary to provide victim and accused participation throughout evidence collection as a right to be heard. The right to be heard for both the victim and the accused can be used to counteract the existing hegemonic investigation method.

Access to justice for sexual abuse victims has been delayed or denied for a variety of reasons, and stigmatisation of victims of sexual abuse under the canopy of patriarchal approaches and law enforcement ignorance has worsened the situation. In India, different actors in the Criminal Justice System (CJS), such as police, prosecutors, defence lawyers, and judges, are accused of having a feudal attitude, which leads to injustice against victims and, in some cases, accused. In an inquisitorial justice system, the courts are usually silent spectators, and evidence gathering becomes a tool of prosecution rather than a means of nurturing justice. The investigating officer (IO) assumes possession of the scene of the crime on behalf of the state, and both the victim and the accused have no defined role in the investigation as a matter of right.

Evidence gathering, which is typically done by police in an adversarial criminal justice system (CJS), lays the way for the truth to be discovered during a court trial and justice to be administered. In an ideal world, the investigating officer (IO) would be impartial and provide the accused ample opportunity to present evidence in his favour, however in India, both the victim and the accused are excluded from evidence collecting as a matter of right, causing dissatisfaction with the CJS. In general, IOs believe that during a trial, the accused should be given the opportunity to defend himself in court.

As a result, in the vast majority of cases, both the victim and the accused are unsatisfied with the inquiry because they feel robbed of their right to participate in the gathering of evidence. Fairness in justice necessitates the protection of the "right to be heard" not only during the course of the trial, but also during the gathering of evidence. Along with liberty and equality, 'fairness

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<sup>122</sup> G.K Goswami, Role Of Forensics In Strengthening Child Rights Under The Pocso Act, 2012, ENSURING JUSTICE IN SEXUAL OFFENCE CASES ( Jul. 4, 2021, 02:00 AM), [https://www.researchgate.net/publication/348588618\\_Role\\_of\\_Forensics\\_in\\_Strengthening\\_Child\\_Rights\\_under\\_the\\_POCSO\\_Act\\_2012](https://www.researchgate.net/publication/348588618_Role_of_Forensics_in_Strengthening_Child_Rights_under_the_POCSO_Act_2012) .



and justice' are the epitome of human dignity.<sup>123</sup> Normally, in an inquisitorial justice system, the courts are mute spectators, and evidence becomes a tool of prosecution rather than a tool of nurturing justice.

The investigating officer (IO) has unrestricted evidence-gathering abilities, which frequently encourages corruption and injustice. Due to a variety of factors, including a lack of IO aptitude or understanding, public and media intervention in crime scenes, a lack of forensic facilities, a lack of diverse databases for matching, and so on, scientific evidence collection is rarely prioritised.

### 3.5 CORRECT PROCEDURE OF INVESTIGATION TO BE FOLLOWED:

- The police officers on duty at the police station should quickly register the complaint without questioning whether it is true or not. Suspecting the complainant should not be a block in finding out the truth. The police officials are not to test or verify the complaint's falsehood at the time of filing the FIR. Recording the reasons for delay in filing FIR is another area which might be helpful in improving the situation. This might reduce the chances of tampering of evidences.
- In addition to appearing at the crime scene, investigators should ensure that the crime scene is not disrupted by the general public before police arrives, ensuring that critical evidence such as finger prints, hair follicles, and other items are preserved and documented.
- By all means, a systematic and coordinated effort should be made to significantly shorten the time it takes to file a charge sheet. This is one of the main reasons for the erroneous acquittal.
- There is a need for frequent training in law (IPC and CrPC) as well as local laws, special laws, special processes, and associated elements for police officers. As a key component of the material, many training programmes must contain an aptitude test. This may aid police officers in gaining a better understanding of the public and would be more attentive to their needs. The training standards must be improved.

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<sup>123</sup> Gabriele Badano, Political Liberalism And The Justice Claims Of The Disabled: A Reconciliation, CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY ( Jul. 5, 2021, 6:00 AM), <https://www.tandfonline.com/doi/full/10.1080/13698230.2013.775734>.

- To avoid witnesses becoming hostile and disrupting the entire criminal justice system, including police efforts, every effort should be taken to support witnesses, maintain their morale, ensure their physical safety, and make it simple and respectful for them to testify in court. Witness support systems are required and apart from this ,recognizing their requirements and valuing their time also should be the area of focus.

## **CHAPTER- 4**

### **JUDICIAL RESPONSES TOWARDS CHILD SEXUAL ABUSE IN INDIA**

#### **INTRODUCTION:**

The chapter highlights the judicial approach towards child sexual abuse in India on various occasions. The first part of the chapter deals with the judicial approach prior to commencement of POCSO Act 2012. The second half of the chapter deals judicial response on various occasions after the introduction of POCSO Act. In *Akil @ Javed v. State (NCT of Delhi)*<sup>124</sup>, the Supreme Court of India declared that all criminal matters should be tried on a day-to-day basis, and that any deviation from the necessary provisions of Section 309 Cr. PC would be a major lapse that would be dealt with administratively by the competent High Court.

The role of judiciary can be highlighted by the Malimath Committee recommendations in order to strengthen the adversarial system by adopting essential features of inquisitorial system. Making it a court's duty to assign judges a proactive role, giving directives to investigating officers and prosecution agencies in the area of investigation, and leading evidence with the goal of uncovering the truth and focusing on victim's justice are among the recommendations.

#### **4.1 PRIOR TO POCSO ACT 2012:**

*Ghanshyam Misra v. the State of Orissa*<sup>125</sup>, a case decided by the Orissa High Court in 1956, clarified several questions. The prosecutrix was also ordered to be compensated by the Supreme Court. In *Gurcharan Singh v. the State of Haryana*<sup>126</sup>, the issue of marks on a rape victim's body was examined where the Indian Supreme Court stated that marks of violence are not a sine qua

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<sup>124</sup> (2013) 7 SCC125, the case is related to Sections 392/354/302 read with Section 34 IPC. Here robbery was done at a house and thereafter the lady of the house was molested. When he friend tried to stop the robbers, they fired at him.

<sup>125</sup> AIR 1987 Ori 78 : 1957 CriLJ 469.

<sup>126</sup> 1973 SCR (1) 197.

non for establishing a rape complaint. The victim cannot be considered a co-conspirator in the crime, the court added.

In famous '*Mathura Rape Case*'<sup>127</sup>. The prosecutrix was called a "shocking liar" whose testimony was "riddled with falsity and improbabilities," according to the District Session Judge, who exonerated both defendants.<sup>128</sup> This reversal sparked outrage and protests across the country, leading to the introduction of the Criminal (Amendment) Act No. 46 of 1983, which amended rape statutes.

The Delhi high court addressed several key issues of rape jurisprudence, during the appeal of this case, including:<sup>129</sup>

- (i) Is it rape if the penis or another part of the body or an object penetrates a bodily opening (vagina, anus, mouth)?
- (ii) Does it fall under the definitions of "sexual intercourse" and "penetration" in the aforementioned provision? and
- (iii) What care should be taken with regard to recording the child witness's statement?<sup>130</sup>

These issues were dealt in length by the high court. Referring the case of *Robinson*,<sup>131</sup> Finger penetration into the vaginal canal was not included in the definition of "sexual intercourse" or "penetration" by the Delhi high court. In the social interest litigation *Sakshi v. Union of India*<sup>132</sup> the same issue of expanding the definition of rape was raised. The Supreme Court held that it would lead confusion in minds of people. As a result, we consider that judicial interpretation of the definition of "rape" as stated in Section 375 IPC, as sought in the current writ petition, will not be in the best interests of the State or the people."<sup>133</sup>

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<sup>127</sup> Tuka Ram v. State of Maharashtra (1979) 2 SCC 143.

<sup>128</sup> (1979) 2 SCC 143 para 10.

<sup>129</sup> Sudesh Jhaku v. K.C.J. 1996 SCC OnLine Del 397.

<sup>130</sup> Ibid para 1.

<sup>131</sup> State v. Robinson 496 A 2d 1067.

<sup>132</sup> AIR 2004 SC 3566.

<sup>133</sup> (2004) 5 SCC 518 at para 22 and 26, pp. 541-542.

#### 4.2 INTRODUCTION OF POCSO ACT 2012:

Prior to the introduction of POCSO Act all the child sexual abuses were dealt under provisions of IPC. In the year 2012, first time a legislation specifically for child sexual abuse was formulated.

On the 13th of March 1991, In Goa, an allegation of recurrent group sexual abuse of 27 juvenile shelter boys was made. The Bombay High Court upheld the conviction of life imprisonment.<sup>134</sup>

The apex court did, however, provide some unique measures for dealing with sexual abuse:<sup>135</sup>

- (i) After reviewing the child's testimony, the judge should undertake cross-examination of the minor using written questions given by the defence.; and
- (ii) situations where a child is required to give testimony, breaks should be given as and when the child requires them.

The Criminal (Amendment) Act, 2013<sup>136</sup> has broadened the term of "rape," and the POCSO Act, 2012, has integrated several of the problems stated above.

#### 4.3 JUDICIAL APPROACH ON RELIABILITY OF EVIDENCES:

1. In case of variation in testimony:

In the case of *State of Andhra Pradesh v. Gangula Satya Murthy*,<sup>137</sup> a 16-year-old girl was raped and killed by being throttled. “The Courts should analyse the larger possibilities of a case and not be convinced by minor discrepancies or trivial changes in the evidence of the witnesses, which are not of a fatal kind to throw out charges of rape,” the court said.<sup>138</sup>

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<sup>134</sup> In *Sate of Goa v. Freddy Peats*, District Session Judge convicted for Life imprisonment on 15 March 1986, and upheld by Bombay High Court, Goa Bench on 2 April, 2000.

<sup>135</sup> (2004) 5 SCC 518, para 27, p. 542.

<sup>136</sup> Subs. by Act 13 of 2013, s. 9, for sections 375, 376, 376A, 376B, 376C and 376D (w.e.f. 03-02-2013).

<sup>137</sup> (1997) 1 SCC 272.

<sup>138</sup> *ibid.* at para 27, p. 279.

2. Previous sexual activity of victim:

The victim's character or reputation, as well as the prosecutrix's previous sexual activity, have no influence on the evidence and are irrelevant for extenuating or mitigating factors.<sup>139</sup>

3. Sexual abuse in child care institutions:

In a PIL filed in the *Prem Sagar case*,<sup>140</sup> abuse by a person in a position of authority and trust was brought to light. The writ drew attention to a number of heinous crimes involving teenage girls kept in a institution. Court issued an order requiring the Juvenile Justice Board to follow the licencing procedure and to be established.<sup>141</sup>

4. Role of judges in delayed investigations:

Incidence of sex tourism and CSA in a Mumbai orphanage was reported in which the Supreme Court overturned the high court's acquittal verdict, stating that corroboration is not required in sexual abuse cases if the judge believes the evidence is likely.<sup>142</sup> The medical hospital refused to conduct a medical examination of a rape victim since the case had not been reported to them. The top court addressed this issue in *State of Karnataka v. Manjanna*<sup>143</sup>, where a delayed medical examination of a 15-year-old prosecutrix resulted in the loss of crucial evidence. The constitutional courts have handed down a number of decisions regarding court procedures and sex trafficking.<sup>144</sup> The burden of proof is on the defence to show that there was a reason for the delay in recording a witness's statement.<sup>145</sup> It is necessary to demonstrate the existence of an "interested witness" accusation.<sup>146</sup> Minor inconsistencies in the rape victim's storey are untrustworthy,

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<sup>139</sup> *State of Haryana v. Prem Chand* 1990 AIR 538.

<sup>140</sup> *Sangeeta Punekar v. State of Maharashtra* 2002 (2) BomCR 468.

<sup>141</sup> section 29 of the Juvenile Justice (Care and Protection of Children) Act, 2000.

<sup>142</sup> *Childline India Foundation v. Allan John Waters* (2011) 6 SCC 261 : (2011) SCC (Cri) 900. The apex court observed: "Children are the greatest gift to humanity. The sexual abuse of children is one of the most heinous crimes. It is an appalling violation of their trust, an ugly breach of our commitment to protect the innocent. There are special safeguards in the Constitution that apply specifically to children. The Constitution has envisaged a happy and healthy childhood for children which is free from abuse and exploitation." ( para 57, p. 277).

<sup>143</sup> AIR 2000 SC 2231.

<sup>144</sup> *Sex Trafficking: Case Laws International Justice Mission (IJM)*, Mumbai (2015).

<sup>145</sup> *State of Uttar Pradesh v. Satish* (2005) 3 SCC 114.

<sup>146</sup> *Bhupendra Singh v. State of Uttar Pradesh* AIR 2009 SC 3265.

according to the Supreme Court. In the matter of professional witnesses, the Bombay high court held that the fact that a witness had testified in previous cases is not a sufficient reason to dismiss him.<sup>147</sup>

The public-spirited organisation challenged a gang rape case in which six teenage workers were sexually attacked by army men while travelling by train.<sup>148</sup> The Supreme Court established many ground-breaking principles for dealing with sexual offences:<sup>149</sup> (1) Appropriate legal representation for sexual assault victims should be supplied (2) Legal aid should be offered at the police station (3) Before any inquiries are made of the victim, the police should inform her of her right to representation. (4) Victims of rape should be compensated adequately and fairly. (8) Whether or whether a conviction has occurred, the court must pay compensation to victims.

Thus, a variety of concerns about the investigation and trial of CSA occurrences have been addressed by constitutional courts.

#### 4.4 JUDICIAL RESPONSE IN TRAFFICKING AND CHILD SEXUAL ABUSE CASES:

In *Sakshi v. Union of India*<sup>150</sup> Apex Court gave instructions on how child sexual assault cases should be tried. The Court ruled that a screen or other arrangement can be created so that accused's body or face is not seen. It is every Indian citizen's Fundamental Right to be free of human trafficking. Such an act represents the most heinous violation of the victim child's human rights. Because the Applicant is proved to be a brothel owner and so carries on the business of maintaining a brothel, in which, among other things, a child was kept, the offence is prone to repetition.

The Bombay High Court decided in *Munni v. State of Maharashtra*<sup>151</sup> that the threat of sexual abuse by immoral trafficking of children to compel them into the business of prostitution is an age-old phenomenon that requires utmost care and caution on the part of both the federal and

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<sup>147</sup> Narayan Maruti Waghmode v. State of Maharashtra 2011 MANU Bom. 0439.

<sup>148</sup> Delhi Domestic Working Women's Forum v. Union of India (1995) 1 SCC 14 at para 15(8).

<sup>149</sup> Ibid. at para 15, pp.19-20.

<sup>150</sup> AIR 2004 SC 3566.

<sup>151</sup> Writ Petition (Criminal) No. 227 of 2011.

state governments. Poverty, illiteracy, or parental helplessness may expose a minor girl to sexual abuse or exploitation. It is vital to protect children from any perceived or real danger/risk to their life, personhood, or childhood. It's all about limiting their vulnerability to injury or dangerous conditions. It's also about preventing social, psychological, and emotional uncertainty and misery in youngsters. It must ensure that no child goes outside of the social security and safety net, and that those who do are given the care and protection they need to be reintegrated into the system through child-friendly measures.

#### 4.5 JUDICIAL APPROACH TOWARDS DETERMINATION OF AGE OF VICTIM:

The Supreme Court of India has held<sup>152</sup> that JJ Act<sup>153</sup> should be used to resolve the dispute over the age of a rape victim in the event of a discrepancy between the birth certificate and the school certificate. This problem emerged in a Madhya Pradesh criminal appeal. Here the prosecutrix was walking to school with her sister on January 3, 2003, at 10:30 a.m. She returned after discovering she had forgotten her practical note book and, after retrieving it, proceeded back to school. When she arrived to Tar Badi (wire fence) near Hawaii Patti, she noticed a vehicle parked nearby. The prosecutrix felt discomfort in her private regions as she regained consciousness. On the same day, she was admitted to the District Hospital in Satna in an unconscious state, and the prosecutrix's uncle, Laxmikant Sharma, was informed of the event. The prosecutrix was released from the hospital on January 10, 2003, and returned to her home, where she described the event and filed an F.I.R. The prosecutrix was sent for a medical checkup during the inquiry, and her clothing were confiscated and slides were prepared. F.I.R was registered after receiving the medical report, and a site map of the location was created. The Investigating Officer seized a number of items, including the prosecutrix's birth certificate and her Middle School Examination certificate from 2001. The girl was deemed to be over the age of 18 at the time of the event, according to the High Court. The High Court came to the judgement that the girl was a willing participant who was over the age of 18 years at the time of the occurrence, and that no crime had been committed against the accused. Following the High Court's judgement and order, the State filed a Criminal Appeal with the Supreme Court, claiming that the High Court placed undue

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<sup>152</sup> State of M.P. vs. Anoop Singh - Criminal Appeal No :442 OF 2010.

<sup>153</sup> Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Act.



emphasis on the difference of two days between the prosecutrix's birth certificate and the certificate of the Middle School Examination 2001, and erroneously held that this difference is sufficient to dilute the prosecutrix's sentence. Furthermore, the High Court should have recognised the legislation established by this Court, which states that the birth certificate is the deciding evidence for assessing age. "We are of the opinion that the High Court should have relied first and foremost on the papers as specified under Rule 12(3)(b) and only in the absence of those documents should the medical opinion have been sought," the Apex Court held.

#### 4.6 AGE OF CONSENT : A GREY AREA IN POCSO ACT

The Bombay High Court stated that while the POCSO Act was a "major and progressive step" in safeguarding children's rights, occurrences of consenting sex between minors have remained a grey area under the legislation since minor consent is not legitimate in the eyes of the law. Justice Sandeep K. Shinde made the remark while giving bail to a 19-year-old male charged with repeatedly raping her minor relative under sections 4 and 6 of the POCSO Act, as well as sections 376(2)(n) and 354 of the Indian Penal Code, 1860. The incidents occurred in September 2017, when the victim was in eighth grade and had been living with the accused (son of her paternal uncle) for two years. While considering the case's peculiar characteristics, the court noted that the victim had stated in her sec. 164 Cr.P.C. statement that "it was a consensual act, not once but at least 4-5 times" over the course of the investigation. Further it was observed "I am aware that the passage of POCSO was an important and forward-thinking move in guaranteeing children's rights and promoting the cause of child sexual abuse prevention. The legislation, which defines a child as anybody under the age of 18, is intended to protect minors from sexual abuse in both text and spirit."

The single judge proceeded to observe the proceedings. "I'm also aware that consenting sex between minors has long been a legal grey area, as the permission granted by the minor is not deemed genuine in the eyes of the law."<sup>154</sup>

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<sup>154</sup> Arhant Janardan Sunatakri V. State of Maharashtra, delivered on 04.02.2021.

#### 4.7 JUDICIAL APPROACH TOWARDS COMPOUNDING OF CHILD SEXUAL OFFENCES

The Madras High Court ruled on 16th March that once a victim girl files a complaint under the POCSO Act and the case is filed, it becomes a crime against the state, and any subsequent compromise will not absolve her of the charge. "The ambit of the (POCSO) Act is quite clear, just falling in love is not an offence," the Bench of Justice P. Velmurugan said, emphasising that any offence committed under the POCSO Act is not compoundable. The Petitioner was charged with an offence under Section 5(1) r/w 6 of the POCSO Act, and after a trial, he was found guilty and sentenced to 10 years rigorous imprisonment. The appellant/petitioner appealed the above judgement to the Madras High Court, and while the appeal was pending, he filed the instant application under S. 482 and 391 Cr.P.C. While Section 482 of the CrPC deals with the High Court's inherent powers, Section 391 deals with the Appellate Court's power to take or order the taking of additional evidence. The current application sought to obtain further evidence from the victim by recording her deposition in front of the court and marking the victim's affidavit.

The Court further noted that after the prosecution witnesses were examined, the appellant persuaded the victim girl and filed an affidavit, and that even in the affidavit, the victim girl did not indicate that no such occurrence occurred, but just that they had been living together for four years. The Court's decision was significant in that it stated, "Even if the victim girl had fallen in love with the appellant and admitted that they had been living together for four years at the time of the offence, the provisions of the POCSO Act apply. It is not a reoccurring offence. As a result, she is unable to use it to aggravate the offence."<sup>155</sup>

Thereafter a petition was moved to Supreme Court challenged a Madras High Court ruling in *Maruthupandi v. State*, which held that even if a juvenile girl falls in love and has a consensual relationship with her boyfriend, the POCSO Act will be invoked against her. In the interim, a bench comprised of Justices Indira Banerjee and Krishna Murari issued notice to the Tamil Nadu government on the SLP and safeguarded the petitioner from coercion. The judge urged that more permissive provisions be added to the Act to separate cases of teenage relationships above the age of 16 years from cases of sexual assault on children under the age of 16 years. "It's always a question mark as to how such a relationship may be described when a female under the age of 18

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<sup>155</sup> CrI.A.No.258 of 2019.

years is involved in a relationship with a teen age guy or a bit older than a teen age boy, even though such a relationship would be the consequence of mutual innocence and biological desire." Such a partnership cannot be considered as abnormal or out of the ordinary in a relationship between opposing sexes. However, in cases where the girl is under the age of 18 years, even though she is mentally mature and capable of giving consent for a relationship, the provisions of the POCSO Act are attracted if the relationship goes beyond platonic limits, attracting the strong arm of law sanctioned by the provisions of the POCSO Act, awarding punishment more than seven to ten years as stated by Justice Prathiban.<sup>156</sup>

Another type of approach can be seen from the two separate judgements delivered by the Nagpur Bench of the Bombay High Court, *Libnus v. State of Maharashtra*<sup>157</sup> and *Satish v. State of Maharashtra*<sup>158</sup>, in less than a week in January 2021, that have been harshly criticised by almost everyone as being bad in law. In fact, the Satish case sparked such indignation that the National Commission for Women and the National Commission for the Protection of Child Rights wrote to Maharashtra's government, urging them to appeal the Supreme Court's decision. Until the Attorney General's request, the Supreme Court suspended the controversial judgment's operation on January 27, 2021. The Single Bench of Justice Pushpa Ganediwala acquitted a 32-year-old man of charges under Sections 7/8 of the POCSO Act, 2012, holding that the offence of sexual assault was not made out because there was no "skin-to-skin" contact. Sexual assault is defined in Section 7 of the POCSO as any non-penetrative sexual contact with the victim. Sexual assault carries a mandatory minimum sentence of three years in jail. The appellant's conviction under Section 354 of the India Penal Code, 1860 (IPC), which imposes a minimum sentence of one year in jail, was upheld by the Court. Prior to the post-Nirbhaya revisions to the country's criminal legislation, Section 354 stipulated a maximum sentence of two years with no mention of minimum. In this case, the accused-appellant was accused of "pressing the breast" of the 12-year-old prosecutrix. The Court stated that Section 7 conditions were not met because the victim's garments were not removed and the appellant was unable to remove her underpants because she screamed and he bolted the room from the outside when he sought to do so. The act of the appellant would, at best, be an act of "outraging modesty of a woman" as defined in

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<sup>156</sup> (CrL.) No(s). 2782/2021

<sup>157</sup> 2021 SCC OnLine Bom 66.

<sup>158</sup> CRIMINAL APPEAL NO. 161 OF 2020.

Section 354 of the IPC, according to the Court. The judge further stated that the punishment imposed under Section 8 of the POCSO for the offence outlined in Section 7 is "disproportionate" to the gravity of the act, and hence upheld the conviction only under Section 354, IPC. In this case, the judge took into account the severe minimum obligatory punishment specified in Section 10 of the POCSO Act and decided to convict under Section 354A (3) of the IPC, which has a maximum jail term of three years and no statutory minimum sentence. The Court also recognised that the appellant had already served five months in jail, which was "adequate" in light of the nature of his crime, and granted his release.

#### 4.8 INTERPRETATION OF NON-PENETRATIVE SEXUAL ASSAULT:

The term "assault" is not defined in the POCSO Act, it must take its definition from Section 351 of the IPC, which states that no physical contact is required for the offence of assault, with the exception of "skin-to-skin" contact. The concept of "force"<sup>159</sup> merely requires some physical contact with the other's "body" or even "with anything that that other is wearing.....that such contact affects that other's sense of emotion...". Intentional use of force is defined as force used "in order to commit any offence," according to S. IPC is 350. Interestingly, despite the fact that title of section 7 includes the word "assault," the provision's ingredients require physical contact with the victim, implying that force must be used to bring the case within the scope of this section. As a result, notwithstanding the title's use of the word "attack," Section 7 refers to the use of unlawful force. The Court has offended both the legislative meaning of "force" and "criminal force," as well as the long-established judicial interpretation of these expressions, by misinterpreting Section 7 to require "skin-to-skin."

Similarly, Section 354A (1)(i) of the IPC, which the Court found to be made out against the appellant in the *Libnus case*, required "physical contact and advances involving uninvited and explicit sexual overtures," according to the Court. Both vocal and nonverbal sexual overtures are possible. As a result, what is a crime under Section 354A (1) (i) is also an offence under section 7 of POCSO Act. Furthermore, based on the testimony of the survivor's mother, that the appellant had shown his penis to her daughter, the appellant's behaviour is covered by Section 11/12 of POCSO, and the appellant's conviction should have been upheld. Holding a child's hand

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<sup>159</sup>INDIAN PENAL CODE 1860 S. 349.

when the pant zip is exposed plainly falls under the definitions of sexual assault<sup>160</sup> and sexual harassment.<sup>161</sup>

While the desirability, utility, and constitutionality of mandatory minimum jail terms are controversial, no Court has the authority to reject to convict an accused for any crime that falls precisely within the four corners of the statutory definition. Even if the Court had been hesitant to grant the more severe punishment under Section 8 of POCSO in the *Satish* case, it may have upheld the conviction under both POCSO and IPC while choosing the latter's punishment. Surprisingly, Section 42 of the POCSO Act, which lists IPC offences punishable, among other things, by Sections 354A, 354B, 354C, 354D does not mention Section 354, allowing the Court to pick the lower of the two sentences. This discretion would be unavailable if the offence was punished under both the POCSO and the IPC provisions specified here, in which case only the more severe sentence might be imposed.

The two verdicts have the alarming connotation that the perpetrator would not be punished at all in such a case: first, since the Court did not believe the POCSO laws apply, and second, because Section 354 and 354A only apply to female victims. While the Supreme Court's stay of the *Satish case* is welcome, the message delivered by the Bombay High Court is still harmful. While a punitive act should be understood strictly, no one who is plainly affected by the plain terms of a penal statute should be let off lightly or penalised unduly for extraneous considerations and misinterpretation of law. High Court decisions form and unshape the law of the land, and this cannot be done without careful consideration of statutory and case law. If we compare with other countries then UK sexual offences Act 2003 specifically mentions touching as an offence.<sup>162</sup> We, too as a society, undoubtedly deserve better legal and rational judgements.

#### 4.9 JUDICIAL APPROACH IN US ON CHILD SEXUAL ABUSE:

Child sexual abuse, including incest, is prohibited by both state and federal law in the United States. The Federal legislation, the Child Abuse Prevention and Treatment Act (CAPTA)<sup>163</sup> of

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<sup>160</sup> POCSO ACT 2012 S. 7.

<sup>161</sup> INDIAN PENAL CODE 1860 S. 354A (1)(i).

<sup>162</sup> SEXUAL OFFENCES ACT 2003, UK.

<sup>163</sup> Public law 93-247 of the United States was originally enacted in 1974.

1988, establishes basic baseline criteria that States must implement into their legal structure. “Any recent act or failure to act on the part of a parent or caretaker that results in death, major bodily or emotional harm, sexual abuse, or exploitation, or an act or failure to act that poses an imminent danger of serious harm,” according to the CAPTA.<sup>164</sup> As per CAPTA “sexual abuse” means “the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or the rape, and in cases of the caretaker or interfamilial relationships, statutory rape”.<sup>165</sup>

In *Esquivel-Quintana v. Sessions*,<sup>166</sup> the US Supreme Court ruled that "sexual abuse of a minor" requires the prosecutrix to be under the age of 16 years. CSA punishments have become more severe in many states around the United States over time. However, Justice Anthony Kennedy ruled that capital punishment would only be applied to crimes involving the death of a child victim of sexual abuse.<sup>167</sup>

To protect children from sexual exploitation, the age of consent is a valuable legal instrument, as it establishes a barrier below which a carnal act is considered statutory rape, regardless of the consent of the persons involved.<sup>168</sup> When the age gap between teenage consensual sexual partners is less, the question of age becomes more important. Under the Sexual Offences Act of 2003, the state intends not to prosecute teenagers under the age of 16 who participate in mutually consented sexual conduct.<sup>169</sup> However, if a person over the age of 18 is in a position of trust and engages in sexual behaviour with someone under the age of 18, it is illegal. The Act of 2003 also offers total protection to children under the age of 12 years who are incompetent to consent.<sup>170</sup>

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<sup>164</sup> 42 U.S.C.A. S. 5106g(2).

<sup>165</sup> 42 U.S.C.A. S. 5106g(4).

<sup>166</sup> 581 U.S. (2017).

<sup>167</sup> *Kennedy v. Louisiana* 554 U.S. 407 (2008). In this case Patrick Kennedy raped his eight years old stepdaughter

<sup>168</sup> Manlove, J., Ryan, S. & Franzetta, K, *Contraceptive use patterns across teens' sexual relationships: The role of relationships, partners, and sexual histories*, 44 *DEMOGRAPHY* 603–621 (2007).

<sup>169</sup> Home Office, *Children and Families: Safer from Sexual Crime – The Sexual Offences Act 2003*, London: Home Office Communications Directorate, 2004.

<sup>170</sup> SEXUAL OFFENCES ACT 2003, UK, S.5-8.

#### 4.10 CONCLUSION:

The role of a trial judge has been very aptly stated by the Kerala High Court in one of the case.

*“Faulty initial investigation and slipshod prosecution throughout are the established reasons prompting us to find that the trial was an empty formality. Besides, lack of involvement by the trial Judge has also contributed to a great extent in not digging out the true facts.”*<sup>171</sup>

Judges cannot act as silent spectators. As stated in this case judge here “did not play a proactive role “. The court's decision cited Section 165 of the Evidence Act, which allows a judge to examine witnesses. A trial judge may exercise broad powers in order to find or obtain adequate proof of pertinent facts. He has the right to ask (1) any question he wants, (2) in any format, (3) at any time, (4) of any witness, (5) or the parties, and (6) about any relevant or irrelevant fact. The goal of Section 165 is to provide the Judge with as much power as possible in order to obtain the truth. The impact of this Section is that, in order to get to the bottom of the case before the court, he will be able to look at and enquire into every fact whatever - the ruling quoted Sir James Stephen, the Indian Evidence Act's draftsman.<sup>172</sup>

The United States Supreme Court broke uncharted ground in addressing the specific requirements and qualities of child witnesses in a landmark child sexual assault case. *White v. Illinois*<sup>173</sup>, a 1992 case, concerned a 4-year-old child who was sexually molested by a family acquaintance. The girl's mother alerted the authorities, and she was rushed to the hospital. The prosecutor attempted to summon the child as a witness twice during the trial, but the child had emotional difficulties in the courtroom both times and had to leave without testifying. Based on statements made by the kid to the babysitter, her mother, police, and doctors, the trial court found White guilty as charged. White argued that the girl's right to the confrontation clause had been violated because the youngster was unable to testify and he could not cross-examine his accuser. The United States Supreme Court unanimously determined that an abused child's spontaneous confession made outside of the courtroom while obtaining medical treatment for molestation is reliable and may be introduced as evidence at trial. The court restricted a defendant's right to confront an accuser face to face, stating that a victimised child's statement made when

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<sup>171</sup> State of kerala V. MADHU @ KUTTI MADHU (CRL.A.No.1357 OF 2019) para 86.

<sup>172</sup> Ibid.

<sup>173</sup> 502 U.S. 346.

emotionally traumatised has significant value that cannot be recreated simply by testifying later in court.

In India, delayed justice is regarded as "justice denied," which is a severe matter, and the POCSO courts are no exception. Fast track trial proceedings are required because a fair trial is a fundamental component of the administration of justice. Despite having procedures to resolve trials within one year on the date of framing accusations, approximately 90% of CSA cases are still pending. Another saying that needs consideration in the administration of justice in India is, "Justice hurried is justice buried." The judge's onerous duty is to conduct the procedures in order to achieve two goals: first, to find the truth, and second, to make a just verdict as quickly as possible.



## **CHAPTER- 5**

### **CHALLENGES FACED IN THE IMPLEMENTATION OF LEGISLATIONS** **DEALING WITH CHILD SEXUAL ABUSE IN INDIA**

#### **INTRODUCTION:**

Despite the POCSO Act's provision for the creation of exclusive Special Courts to deal with offences, the backlog is quite severe. Although courts appear to make no distinction in terms of pendency based on the nature of the offence, the pendency percentage for specific kind of offences is likewise high and alarming. The data with respect to child sexual abuse conviction is published in NCRB.

This chapter is based on the statistics and information provided in the National Crime Records Bureau's report (NCRB) for crimes in India. For the years 2017, 2018, and 2019, the pattern of police disposition of cases recorded under the Protection of Children from Sexual Offences Act, 2012 has been analysed through the data.

One of the most significant aspects of the Criminal Justice System is police investigation, which is carried out independently by the police under the supervision of the judge. The police investigation is conducted in accordance with the procedures outlined in Chapter 12 of the Criminal Procedure Code of 1973, which governs the provision of information to the police and their investigative authorities. When the investigation is over, the officer in charge of the police station sends the report, along with all supporting papers, to a Magistrate who has the authority to take cognizance of the crime. The results of a police investigation can lead to the case being closed by filing a final report, or it can lead to the filing of a charge sheet in court, which will lead to the start of the trial. As a result, it is critical for the police to conclude their investigation without undue delay and with sufficient attention in order to submit an appropriate "final report" to the Magistrate in the form of a charge sheet or closing report. The most important aspects of the justice delivery system are timely and thorough investigations and the filing of charge sheets.

## 5.1 DIFFERENCE BETWEEN CHARGESHEETED CRIMES AND ACTUAL CONVICTIONS:

POCSO is a comprehensive statute designed to protect minors from sexual abuse and harassment, including pornography. The Act protects a child's best interests throughout the legal process by establishing a child-friendly judicial process that includes reporting, evidence recording, investigation, and a timely trial, among other things. Sexual exploitation and sexual abuse of minors are horrible crimes that must be effectively addressed, according to the Preamble of the POCSO Act, 2012. As a result, it is critical for the police to perform their investigation thoroughly and promptly.

However, according to NCRB data from the last three years (2017, 2018, 2019), there are a significant number of cases filed under the POCSO Act, 2012, in which the police concluded the investigation but did not file a charge sheet. In 2017 and 2018, 6% of all POCSO cases under investigation were resolved at the police level, a figure that was somewhat higher in 2019. Although the percentages appear to be low, the actual figures are alarming, as around 3,000 POCSO cases were resolved without a charge-sheet being filed in 2019.

YEAR	CHARGE SHEET (RATE)	CONVICTION (RATE)
2019	93.8 %	42.6%
2018	94.3%	34.2%
2017	94.1%	33.2%
2016	94.2%	29.6%

**FIGURE 1**

Furthermore, according to the crime in India study, numerous cases were dismissed by police in 2017-19 for the following five reasons<sup>174</sup>:

- Cases concluded with a non-cognizable final report.
- Cases ended with a bogus final report.
- Cases that terminated in a factual, legal, or civil conflict.
- Cases that were true but lacked evidence, were untraced, or had no clue.
- Cases that abated during the investigation.

Generally speaking, there are two reasons for the police to close or cancel a case. These include<sup>175</sup>:

1. Cases involving a family member as the accused. The victim and their parents deviate from their original statements made during the registration of the FIR in the name of the family's honour.
2. Cases in which the victim is a member of a marginalised group. Victims from low-income families, domestic staff, children of poor parents, and children from Scheduled Caste and Scheduled Tribe communities all encounter difficulties in pursuing their original complaints.

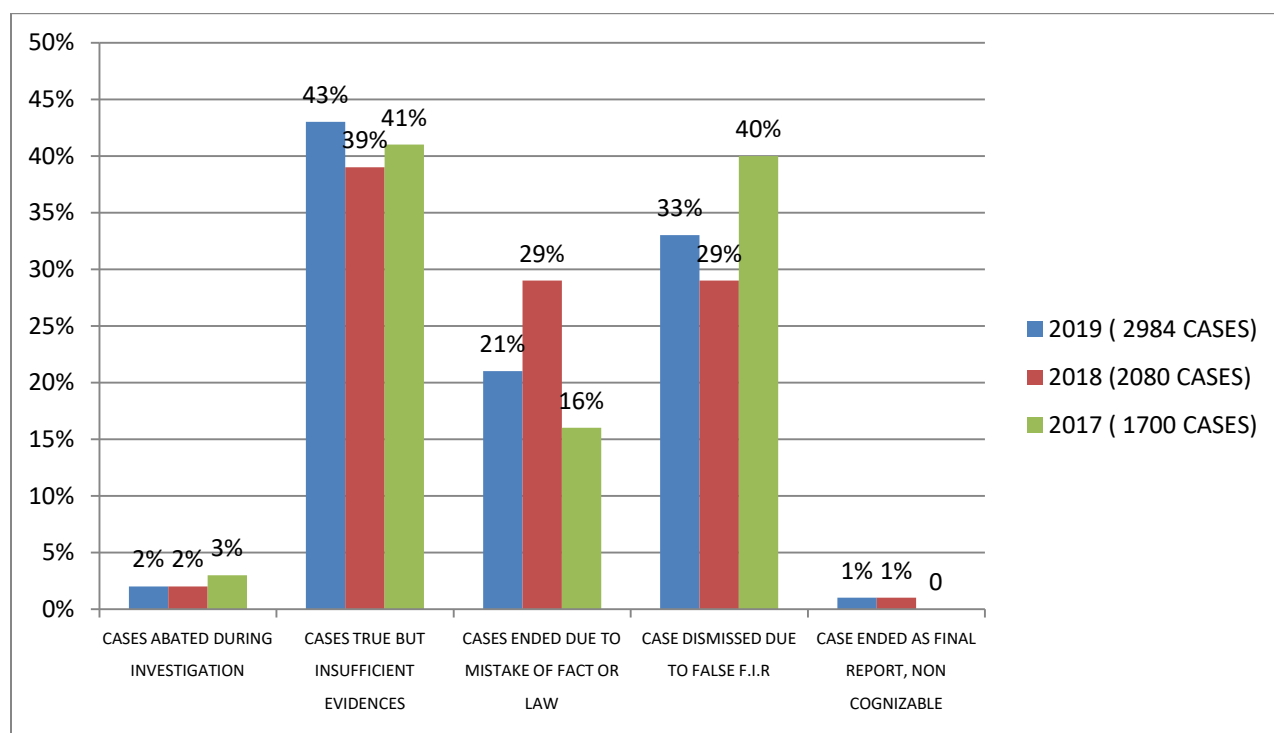
**Figure 2** shows that 'cases true but insufficient proof, or untraced, or no clue' was claimed as the explanation for the most of cases under POCSO cases that wherein police closed the case without filing chargesheet. In 2019, police disposed of 43 percent of cases on this reason in their final report, slightly higher compared from 37 percent in 2017 and 2018. In 2019, 1,296 cases (43 percent) were closed due to "cases concluded as a mistake of fact, or law, or civil disagreement" out of 2,984 cases for which the final report was submitted. The second most common reason for POCSO cases being dismissed was false reporting.<sup>176</sup>

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<sup>174</sup> NCRB Annual Report, 2019.

<sup>175</sup> Police Case Disposal Pattern: An enquiry into the cases filed under POCSO Act, Kailash Satyarthi Children's Foundation, March 2021, ( Aug. 17, 2021, 2:20 PM), <https://satyarthi.org.in/wp-content/uploads/2021/03/Police-Case-Disposal-Pattern.pdf>.

<sup>176</sup> NCRB Annual Report, 2019.



**FIGURE 2.**

## 5.2 CHALLENGES IN IMPLEMENTATION:

The implementation of the death sentence for the rape of minors is the Act's highlight. The Act explains this in its objective clause by citing Supreme Court decisions in *Machhi Singh*<sup>177</sup>(1983) and *Devender Pal Singh*<sup>178</sup>(2002), in which the court declared that the death penalty should only be applied in the rarest of circumstances. Thus, the Act's goal is to serve as a deterrence; yet, it might be argued that introduction of the death sentence in situations of child sexual abuse could backfire and even have disastrous consequences. Family members are frequently the perpetrators of abuse, and having such a penalty in the statutes may deter the crime from being reported. Now the question is that would introducing the death penalty actually reduce the crimes against children in India. In order to understand this we first need to address the major problems and

<sup>177</sup> 1983 AIR 957.

<sup>178</sup> AIR 2002 SC 1661.

deterrences in the implementation mechanisms. Below are the some of the major challenges faced in the proper execution of legislations for prevention of child sexual abuse in India.

#### 5.2.1 AGE OF CONSENT AND “ROMANTIC RELATIONSHIPS”:

All arguments against lowering the age of consent on the grounds that it will encourage child marriage, according to women's rights activists and lawyers like Flavia Agnes, "totally disregard the sociological trend that the age of marriage for females increases only when the standard of living is raised, and when public spaces are safe for them to pursue their education."<sup>179</sup> Another instance is where a Special Court judge in Delhi said in deciding one such case,<sup>180</sup> “Of course WE, the so-called mature people (who have made this country highly volatile) speak from experience that youngsters should not do this or that,” yet, at great personal expense, the teen/adolescent takes such chances. Stopping them from experimenting with such a connection is an overwhelming challenge. Above all, the Justice System operates in an unjust, inhumane, and insensitive manner.” “Sexual intercourse with a minor is punishable u/s 4 of the POCSO Act provided it is in the form of an ‘assault,’ the judge said. He relied on the definitions provided in the IPC to conclude that since the girl's testimony does not suggest that she was subjected to any kind of cruelty, fear, coercion, undue influence, intimidation, or exploitation in any way, he was not subjected to any kind of cruelty, fear, coercion, undue influence, intimidation, or exploitation in any way.

In another similar case, while recognising the need to spread awareness “about the impact of girl or boy marrying at a tender age or indulging in unsafe sexual activities”, the same judge held that strict interpretation of the law “would mean that the human body of every individual under 18 years of age is the property of State”. But after these two cases, the situation changed in the case of *Independent Thought vs. Union of India*<sup>181</sup> where it was held that the even the child marriage is valid until and unless there is a sexual intercourse with the minor wife, in which case the provisions of POCSO would be attracted. In order to deal with such cases, Special Court judges must interpret the law in a way that does not

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<sup>179</sup> Agnes, Flavia, *Controversy over Age of Consent*, 48, ECONOMIC AND POLITICAL WEEKLY, 29 (2013).

<sup>180</sup> In Re: vs . on 8 October, 2013.

<sup>181</sup> Writ Petition (Civil) No. 382 of 2013.

criminalise love relationships and allows the accused to be acquitted. When the victim and the accused are married, or the girl is pregnant, courts often find it difficult to deal with cases of “romantic relationships”, especially because special courts have lost their discretion on the amount of punishment. The POCSO Act's sections dealing with penetrative and aggravated sexual assault are strict liability provisions, with the accused facing a presumption of guilt. As a result, any sexual conduct with a juvenile is a statutory offence, and the victim's consent or discretion are irrelevant.

In a decision, the High Court of Delhi found that the victim had misrepresented her age to the respondent-accused, and that as a result, the "respondent-accused had not willfully committed any violation." The Court concurred with the learned Assistant Public Prosecutor (APP) for State that, while the prosecutrix was a minor at the time of the incident, “the element of mens rea, which is an important aspect of Sections 363/366/376 IPC is missing.”<sup>182</sup> Recognizing that such cases clog the criminal justice system, delaying justice for all young victims, the Madras High Court observed in “*Sabari @ Sabarinathan @ Sabarivasan vs. The Inspector of Police and Others*”<sup>183</sup> that the lack of clarity over such matters acts as one of the biggest challenge for dealing with child sexual abuse cases.

### 5.2.2 BACKLOG OF CASES:

Another major challenge in the proper implementation of child sexual abuse legislations is the pending investigations and then pending cases in courts. Section 309 of the procedural law mandates that rape trials under section 376 of the penal code be completed within two months, if at all possible. These legal requirements clearly emphasise the importance of avoiding unjustified adjournments throughout trial processes.

The Supreme Court has taken notice of the growing backlog of cases, various charges held by Special Courts, and the accompanying caseload. The court on one instance issued

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<sup>182</sup> State vs Kaishar Ali, CRL.L.P. 188/2018, Decided on 30 August 2019.

<sup>183</sup> Criminal Appeal No.490 of 2018.

an order in this respect.<sup>184</sup> The Supreme Court took notice of an increasing number of child rape cases and their low court disposition rate on July 12, 2019. The court instituted a writ petition on its own motion to establish guidelines and directives to avoid delays. V Giri, a senior counsel, was appointed as an Amicus Curiae to help in the formulation of directions. By establishing unique processes for reporting incidents and establishing special courts to hear cases, the Act strives to ensure that justice is delivered quickly. It stipulates that cases must be resolved within a year of the offence being recorded. V Giri, Amicus Curiae, provided a detailed report in support of a prompt investigation and trial of child rape cases. Under the POCSO Act, the court ordered the Union government to allocate funding for the construction of special courts in each district with 100 or more pending cases. The special courts were to be established within 60 days, according to the order.

The clauses of mandatory reporting, rigorous minimum and maximum punishments, and the rising of the age of consent to 18 years raise the most concerns about child sexual abuse and the current law.

### 5.2.3 NON REPORTING OF CASES:

The NCRB does not collect information on the various situations in which children are sexually abused, or on sexual abuse by school teachers or other members of an institution's staff. Sexual abuse of 34 of the 44 girls at the Muzaffarpur shelter home<sup>185</sup>, as well as widespread sexual exploitation of girls in the Deoria shelter home,<sup>186</sup> demonstrate the lack of obligatory reporting. Unlike in other countries, where mandatory reporting procedures involve child protection agencies, in India, the first agency to report to is the police, making mandatory reporting uncomfortable for schools/institutions and

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<sup>184</sup> *Re: Alarming Rise in Number of Reported Child Rape Incidents*, Suo Moto Writ Petition (Criminal) No. 1/2019.

<sup>185</sup> Singh, Santosh and Dwivedi, Johri Ankita, Muzaffarpur shelter home case: Brajesh Thakur- under his care 34 girls were 'sexually assaulted', THE INDIAN EXPRESS, Aug. 5, 2018, <https://indianexpress.com/article/india/bihar-muzaffarpurshelter-home-case-bihar-scandal-brajesh-thakur-paratah-kamal-sexual-abuse-under-his-care-5292021/>.

<sup>186</sup> Chakraborty, Pathikrit, UP: CBI takes up Deoria shelter home case, TIMES NEWS NETWORK, Aug. 30, 2019, <https://timesofindia.indiatimes.com/city/lucknow/up-cbi-takes-up-deoria-shelter-home-case/articleshow/70907669.cms>.

agencies working with or in a school/institutional setting. Because false reporting is also a crime, and most victims become hostile as the fear grows.

No individual or agency wants to take the risk unless a victim, or in the case of minors, their parent(s)/guardian(s), is willing to report. The situation is exacerbated by a lack of trust in the authorities, delays in justice, and the stigma and humiliation connected with sexual assault. One of the most common objections of mandatory police reporting is that it eliminates the chance for victims to seek other sorts of aid, which are sometimes the most immediate types of comfort they needed. Some children share their experiences with their instructors or programme facilitators as a result of school awareness programmes, but the majority of children seek support in ways other than registering for a police case.

Children and families are refusing to seek medical treatment and care for fear of the case being reported to the authorities, according to medical practitioners and psychologists. Medical practitioners have little choice but to report cases of pregnancy to the police because any intercourse under the age of 18 is considered non-consensual and is a statutory offence punishable under the POCSO Act.

This can deter girls and their families from getting an abortion when it is needed. While the MTP Act requires medical practitioners to keep their patients' information private, the POCSO Act requires them to report all pregnancies.<sup>187</sup> The most serious consequences of the mandatory reporting requirement are in circumstances of child marriage and love connections, where going to the doctor for a routine gynaecological examination could end in a police investigation.

#### NON REPORTING IN CHILD MARRIAGE AND SEXUAL ABUSE:

The problem of non reporting of cases is much more in cases of child marriages. Inter-linkages Child marriage is the early end to a child's childhood. It has an impact on both girls and boys' lives, but it disproportionately impacts girls. According to UNICEF, at

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<sup>187</sup> Cehat and Lawyers Collective, Joint Submissions on the MoWCD National Child Protection Policy, 2019, [https:// www.lawyerscollective.org/wp-content/uploads/2017/07/Joint-Submission-to-MoWCD.pdf](https://www.lawyerscollective.org/wp-content/uploads/2017/07/Joint-Submission-to-MoWCD.pdf).



least 1.5 million Indian girls marry before they reach the age of 18 years old.<sup>188</sup> It demonstrates that case reporting under the PCM Act is minimal. Following the Supreme Court's decision in *Independent Thought v. Union of India*,<sup>189</sup> every child marriage is now considered illegal from the start, and any sexual conduct with a minor bride is considered a violation of the POCSO Act. It is the state's onerous obligation to carry out the apex court's decision in letter and spirit in order to rescue the lives of minor girls who are being pushed into prostitution. The number of cases still pending in court is particularly concerning.

#### 5.2.4 LACK OF JUDICIAL STAFF:

According to NCRB data, over 90% of cases registered in 2014 and 2015 were pending trial.

Under the POCSO Act, the Supreme Court directed districts with more than 100 ongoing cases to establish fast-track courts with a 60-day settlement limit. The bill that was introduced in the Rajya Sabha, stated that 1,023 fast-track special tribunals for POCSO cases would be established. Fast-track courts, for example, do not solve the issue of court vacancies. Judges on special courts established under the POCSO Act shall be appointed from the same pool of judges and will not be below the rank of a sessions judge.

According to the 2018-19 Economic Survey,<sup>190</sup> there are presently 17,891 judges in district and subordinate courts, with 28.7 million cases pending, compared to the required strength of 22,750. Over 4 million cases are outstanding in the country's high courts, requiring 8,152 additional judges to resolve. According to the economic report, high courts have 62 percent of sanctioned judges, with just 671 out of 1,079 judge posts filled.

According to activists, creating a child-friendly environment in courts is crucial so that legal and administrative processes do not add to a child's stress. In India, both judges and

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<sup>188</sup> End Child Marriage, Unicef- for every child, <https://www.unicef.org/india/what-we-do/end-childmarriage>.

<sup>189</sup> Writ Petition (Civil) No. 382 of 2013.

<sup>190</sup> Press Information Bureau Government of India Ministry of Finance, Economic Survey 2018-19, Jul, 4, 2019, [https://www.ibef.org/download/Key\\_Highlights\\_of\\_Economic\\_Survey\\_2018-19.pdf](https://www.ibef.org/download/Key_Highlights_of_Economic_Survey_2018-19.pdf).

special public prosecutors require more training to deal with sensitive cases. For example, the Juvenile Justice Board is led by a chief magistrate who exclusively handles cases involving children, allowing them to be more sensitive and devote all of their time to such cases.

Furthermore, the measure should have attempted to establish guidelines for better police investigation of these incidents.

#### 5.2.5 PITFALLS IN JUDICIARY AND DELIVERY OF JUSTICE:

The POCSO Act's method for providing swift justice to children who have been sexually assaulted is one of its cornerstones. Many major institutional impediments, on the other hand, impede the legal protection of children under the age of 18 years.

The timeline established in Section 35 of the POCSO Act for child testimony and trial conclusion is an obvious example. This necessitates the child's evidence taking place within a month after the Court's notification, and the trial taking place within a year of that notification. Due to the overcrowded nature of Indian courts, these regulations are more commonly flouted than followed.

The tendency of lawyers to take adjournments, or adjournments caused by external events such as strikes in court, is a similar topic. The role of the child's lawyer is equally critical. The lawyer's job is to support the prosecution. This will necessitate close collaboration between the Public Prosecutor and the child's attorney. Furthermore, while the Public Prosecutor and defence lawyer have well defined roles in our adversarial judicial system, the role of the child victim's counsel must be assessed.

#### 5.2.6 ADMINISTRATIVE PITFALLS:

When it comes to POCSO, there are three major administrative mistakes to avoid. To begin with, despite their best efforts, police officers encounter numerous obstacles in completing a thorough investigation into POCSO incidents. The registration of the FIR is

the first step. The police must ensure that the filing of the FIR and the investigation of the Medico-Legal Case are completed as quickly as possible (MLC).

Second, the victim's MLC is usually avoided because the victim's family is given inaccurate information about the MLC's long-term detrimental health implications on the child. The hospital setting is typically severe when a child is forced to undergo an MLC or an abortion. To avoid further stress, doctors must be taught on how to speak with the child in a sensitive manner about what that minor is going through. Furthermore, due to inappropriate storage, forensic samples acquired by the police frequently get tainted or putrefied. The best ways for collecting forensic evidence must be known to the police, so that the evidence can be appreciated can go off without a hitch during the testing.

Finally, institutions to protect children should regularly monitor and examine the Act's implementation, as well as raise public knowledge about the Act's provisions, under Section 43-44 and Rule 6 of the POCSO Act. The operation of such departments, as well as their monitoring and assessment mechanisms, have not, however, been made public. To this end, it is critical to examine the methods established by such groups and assess their effectiveness in producing meaningful results.

### 5.3 INTRODUCTION OF DEATH PENALTY: HOW FAR EFFECTIVE?

The POCSO Act was revised in 2019 to include a mandatory minimum penalty of twenty years in prison, with the maximum punishment being imprisonment for the remainder of a person's life or death. According to the Law Commission's 2015 study on the death penalty, there is no empirical proof that the death penalty has a deterrent effect over and above life imprisonment. The report proposed that the death penalty be abolished in all circumstances except terrorism.

According to the Law Commission's 2015 study on capital punishment, there is no empirical proof that the death penalty has a deterrent effect over life imprisonment. The Justice J.S. Verma Committee, which was formed in the aftermath of the terrible 2012 Nirbhaya gang rape case, did not believe that adding the death penalty to rape cases would make India more safe for women.

There could be a significant drop in case reporting, since families frequently compel children into keeping the situation to themselves in order to save a relative or friend from the death penalty. Furthermore, because the maximum punishment for murder is also the death penalty, it may endanger the minor's life. After careful consideration, the Justice J.S. Verma Committee, which was established in 2013 in the aftermath of the Nirbhaya case, decided against the implementation of the death penalty in rape cases. The 262nd Report of the Law Commission of India <sup>191</sup>, similarly calls for the death sentence to be abolished, save in circumstances of terrorism. On August 31, 2015, the Law Commission of India, chaired by Justice A.P. Shah, released its 262nd report on the death sentence in India. In *Santosh Kumar Satishbhushan Bariyar v. Maharashtra*<sup>192</sup>, and *Shankar Kisanrao Khade v. Maharashtra*<sup>193</sup>, the Supreme Court submitted the subject to the Law Commission. The Law Commission had earlier supported the death penalty's retention in India in its 35th report ("Capital Punishment," 1967). In *Bachan Singh v. Union of India*<sup>194</sup>, the Supreme Court maintained the death penalty's legitimacy, but limited its application to the "rarest of rare situations" to decrease the penalty's arbitrariness. However, since the 35th report, the country's social, economic, and cultural surroundings have changed dramatically, and arbitrariness has remained a serious worry in the adjudication of death sentence cases in the 35 years after the most important precedent on the subject was established. Recognizing that the death penalty is a highly sensitive issue, the Commission resolved to conduct a thorough investigation into the matter. After thorough research, the Commission came to the conclusion that the death sentence, like life imprisonment, does not achieve the penological purpose of deterrence. In fact, it accomplishes no constitutionally permissible judicial objectives. The death sentence has evolved into a major weapon of symbolic legislation, making a powerful political statement.

The issue here is not whether the death penalty should be retained or abolished, but rather the potential consequences of its inclusion in the Act. The impact of capital punishment as a deterrence appears to be fading. There is evidence to support the assumption that, despite harsh

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<sup>191</sup> Report No.262 titled "The Death Penalty, Law Commission of India, August 2015, <https://lawcommissionofindia.nic.in/reports/report262.pdf>.

<sup>192</sup> (2009) 6 SCC 498.

<sup>193</sup> (2013) 5 SCC 546.

<sup>194</sup> (1982) 3 SCC 24.

sanctions, the rate of criminal activity does not decrease. In his book, “Confronting the Death Penalty”, Robin Conley observes that while the death penalty may appear right and acceptable in theory, it loses its attractiveness once you see how it works in practise<sup>195</sup>. Deterrence has its own limitations, and it must be complemented by comprehensive measures, such as a reorganisation of the criminal justice system.

As previously stated, activists are afraid that the imposition of the death sentence will diminish the number of reported cases of sexual assault against children. According to Mohd Ikram, manager of child safeguarding policy, a women's rights organisation in Delhi. “In situations of child sexual assault, 94 percent of the perpetrators are known to the victims.”<sup>196</sup>

In 28.9% of situations when a trial court handed down a death sentence, the case was overturned by a higher court. According to the research, the death penalty was only delivered definitively in 4.3 percent of cases, with trial judges erroneously imposing the death penalty in 95.7 percent of cases.<sup>197</sup>

In the Kathua case, in January 2018, in a village near Kathua, Jammu & Kashmir, an eight-year-old girl was kidnapped, raped, and murdered. Six of the seven defendants were found guilty in the case, with three receiving life sentences and three receiving five-year sentences.

A 17-year-old girl was gang-raped in April 2017 in Unnao. The investigation hasn't come to a conclusion yet. Instead of acting prematurely, the administration should have considered how the public would react to the modifications and grasped the Act's implementation challenges. It is insufficient to simply increase the penalty for serious sexual assault.

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<sup>195</sup> Anubhav Kumar, A point to ponder over in the POCSO bill, THE HINDU, Aug. 12, 2021.

<https://www.thehindu.com/opinion/op-ed/a-point-to-ponder-over-in-the-pocso-bill/article28984831.ece>.

<sup>196</sup> Sana Ali, Death penalty in POCSO cases Imperils child victims of sexual offences, INDIA SPEND ( Aug 19, 2021, 05:00 AM), <https://www.indiaspend.com/death-penalty-in-pocso-act-may-imperil-child-victims-of-sexual-offences/>.

<sup>197</sup> Law Commission of India report , 262, THE DEATH PENALTY, Aug.2015, <https://lawcommissionofindia.nic.in/reports/report262.pdf>.

#### 5.4 POSITION OF DEATH PENALTY IN U.S.A:

On January 4, 2008, the United States Supreme Court decided to hear the case of a man condemned to death in Louisiana for the rape of a child who did not die. Only two of the approximately 3,350 inmates on death row in the United States had been sentenced to death for this type of crime. Patrick Kennedy was found guilty of raping his 8-year-old stepdaughter and sentenced to death in 2004. On May 22, 2007, the Louisiana Supreme Court upheld that decision in *Louisiana v. Kennedy*<sup>198</sup>.

Due to the rarity of a death sentence for this offence, Kennedy appealed his punishment as a breach of the Eighth Amendment. (Another man on Louisiana's death row, Richard Davis, was convicted of a similar crime.) Since 1964, no one has been executed in the United States for a crime other than murder. In *Coker v. Georgia*<sup>199</sup>, the Supreme Court addressed a similar issue in 1977, prohibiting capital punishment for adult rape. While the decision in that case did not expressly address the rape of children under the age of 12, others interpreted it as limiting the death sentence to homicide. The first issue was whether the Cruel and Unusual Punishment Clause of the Eighth Amendment allows a state to punish rape of a child with the death penalty. Second, whether Louisiana's capital rape statute violates the Eighth Amendment by failing to narrow the class of defendants eligible for the death penalty.

The brief filed by a number of social-worker organisations stated that, “The Court Should Intervene Now To Eliminate The Death Penalty For Child Rape, A Penalty That Harms Abused Children Instead Of Helping Them,” for three primary reasons:

1. “Allowing the death sentence for child rape will exacerbate the problem of sexual abuse underreporting.”
2. “Allowing Louisiana to execute child rapists will boost child molesters' incentives to murder their victims.”
3. “The Louisiana legislation would subject child victims to more trials and appeals, forcing them to relive horrific experiences over and over and interrupting the healing process.”

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<sup>198</sup> 554 U.S. 407 (2008).

<sup>199</sup> 433 U.S. 584.

The Supreme Court decided here that all such laws, when the crime was against an individual and no murder was committed, were in violation of the national consensus that the death penalty should be reserved for the most serious crimes.

#### 5.5 NCPCR HOW EFFECTIVE?

The creation of special commissions to protect children's rights was deemed necessary. The Commissions for the Protection of Child Rights Act of 2005 (hence referred to as the "CPCR Act") was passed by Parliament. Section 3 of the CPCR Act provides for the establishment of a National Commission for the Protection of Child Rights and State Commissions for the Protection of Child Rights (hereinafter referred to as "State Commissions"), and Section 17 provides for the establishment of a National Commission for the Protection of Child Rights (hereinafter referred to as "NCPCR/National Commission").

Section 13 of the CPCR Act defines the functions and powers of both the NCPCR and the State Commissions. A reading of Section 13 reveals that the National Commission and the State Commissions have been given the same powers and responsibilities. The Commissions were established with the goal of not only protecting children's rights, but also suggesting methods to improve children's rights and ensuring that legislation designed to protect children are adequately enforced. These commissions have a great deal of authority. They must solely serve to safeguard and improve the lives of children. Examining and analysing the legal provisions enacted for the protection of children in order to ensure that they are effectively implemented are the key responsibilities and powers that a commission is obliged to fulfill. Inquire into cases of child rights violations and recommend that legal action be taken; examine the causes that prevent children from exercising their rights in the circumstances described in Section 13(d) and recommend corrective measures; examining issues of children in need of care and protection, children in distress, children from marginalised and disadvantaged groups, and children in legal dispute etc.

*Justice Deepak Gupta while dealing with the a showed concern on the working of NCPCR and SCPCR and said "It's so sad! We start with a lament because institutions set up to protect*

*children have virtually forsaken them in a fight over their so called jurisdictions.”*<sup>200</sup> He further observed that these commissions cannot become sources of authority, self-promotion, or a method of collecting the trappings of status, such as official cars and bungalows. People nominated to such commissions must be sincere friends of children, eager to devote their time and energy to helping children rather than promoting their own personal or political interests.<sup>201</sup> Therefore it becomes very important for the government to look into the working of NCPCR for protection of child sexual abuse.

## 5.6 CONCLUSION:

The research of criminal data on sexual abuse cases in India indicated that, despite clear harsh legislative provisions, investigation and trial processes take longer than the law allows. The massive backlog of sexual assault cases in trial courts and the low conviction rate are alarming realities that demand attention and solutions. Crime data is not available for extensive research in some key areas, making it difficult to understand cause-and-effect relationships. The Indian National Crime Record Bureau may consider compiling annual crime statistics on a range of themes, including victim and defendant socioeconomic backgrounds, as well as time frames. The time between the conduct of a crime and its registration, the provision of legal assistance, the nature of broad categories of forensic evidence acquired, the most common reasons for acquittals, the amount of compensation, and so on. Official crime statistics in the public domain may help to speed up analytical research skills, allowing for the development of evidence-based remedies. More information about filing appeals in constitutional courts, as well as the time it takes for these appeals to be resolved and the outcome of these appeals, may be gathered to provide a complete picture of the criminal justice system in India.

Many times, the government portrays itself as strict and serious when it introduces the death penalty for such crimes. It mostly deflects attention away from the core concerns of infrastructure apathy, procedural lapses, and trial delays, while neatly avoiding the fact that "it is

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<sup>200</sup> NCPCR V. Rajesh kumar , Civil Appeal No. 7968 of 2019.

<sup>201</sup> Ibid para 7.



the certainty of punishment rather than its severity that has deterrent in the actual sense."<sup>202</sup> It's worth noting that, despite the adoption of the Criminal Law (Amendment) Bill, 2018, which included the death sentence for rape of an underage girl, such incidences have not been curtailed. There are so many areas where the government needs to look upon. Merely introducing the death penalty would not act as a deterrent in the increasing number of child sexual abuse cases.

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<sup>202</sup> Daniel S. Nagin, *Deterrence in the Twenty-First Century*, August, 42(1) CRIME AND JUSTICE, 199-263, (2013).

## **CHAPTER- 6**

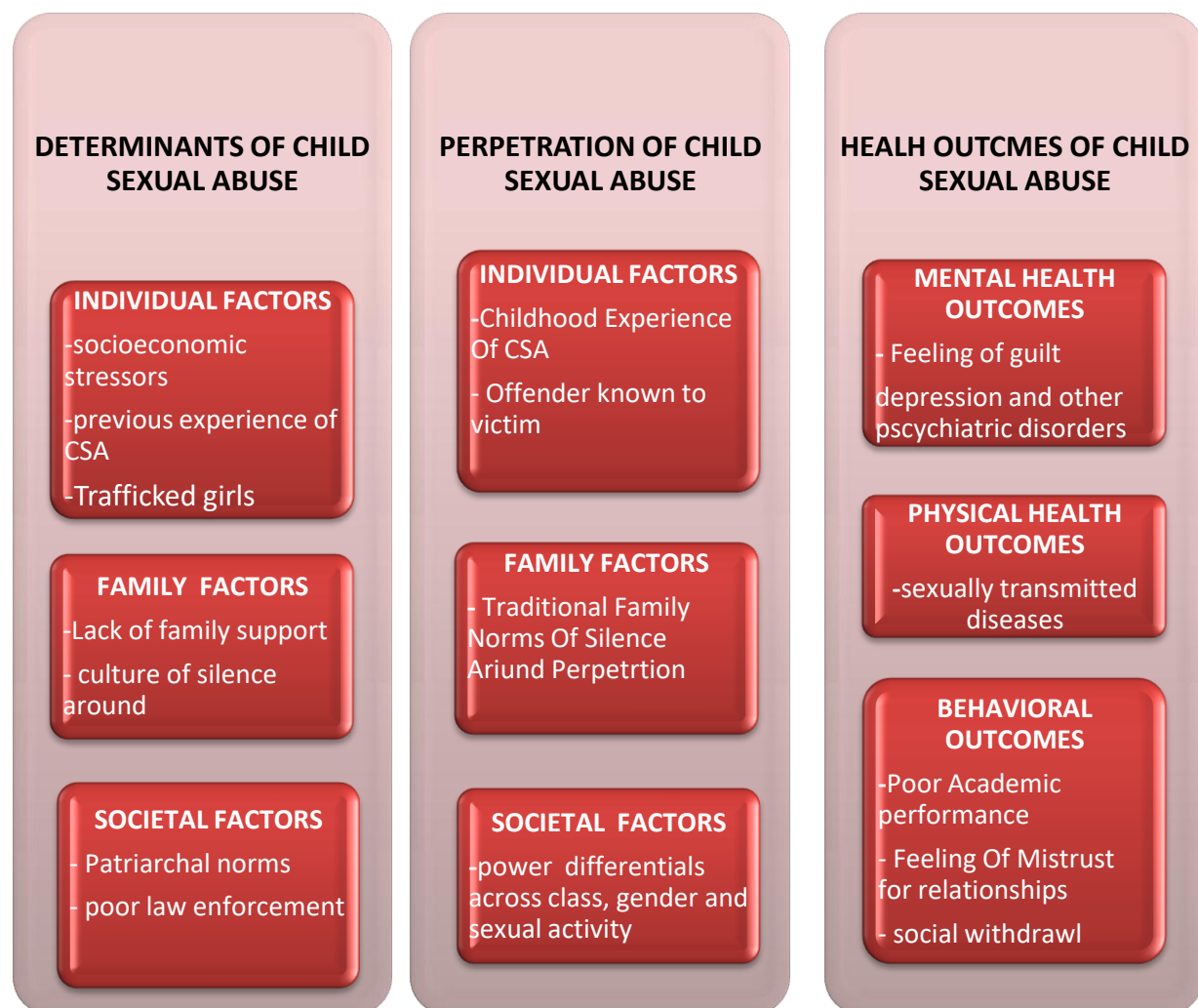
### **FINDINGS AND SUGGESTIONS**

Sexual offences against children have reached epidemic proportions and POCSO is unlikely to be able to address the problem unless the Indian government and state governments take effective measures to ensure that it is properly implemented.

The initial chapters dealt with what factors are responsible for child sexual abuse and also what legislations are there for its prevention. Chapter 3 covered the loopholes in the investigation process which leads to non conviction of the accused. Further the judicial approach towards child sexual abuse has been discussed. Recently there have been few controversial judgments by the High Court which forces us to think that whether children can really expect justice from judiciary. Chapter 5, dealt with various major challenges faced in the implementation of legislations meant for prevention of child sexual abuse in India. The introduction of death penalty has not contributed in the reduction of child sexual abuse, rather it has been realized that its introduction might be a threat for the child's life. The Special Act's legislative goal is not being fulfilled in terms of providing justice to juvenile victims of sexual offences. Every step of the process, from reporting the occurrence to going to trial, is fraught with difficulties.

This chapter lays down few suggestions based on the above problems. It provides suggestions which can be adopted to improve investigation process, working of child welfare committees, and working of trial and appellate Court.

The figure below summarises the impact of child sexual abuse from various aspects.



## 6.1 DETERMINANTS OF CHILD SEXUAL ABUSE:

According to the findings, child sexual abuse is a multidimensional phenomenon involving the interaction of individual, family, community, and society influences. Patriarchal cultural norms and power disparities based on class, gender, and sexual preferences emerged as prevalent descriptive themes that elevated the risk of child sexual abuse.

Early childhood child sexual abuse exposure has also been linked to a higher risk of re-victimization and entry into commercial sex work.<sup>203</sup>

<sup>203</sup> Jangam K, Muralidharan K et al., *Incidence of childhood abuse among women with psychiatric disorders compared with healthy women: Data from a tertiary care centre in India*, 50 CHILD ABUSE NEGLIGENCE 67–75 (2015).

## 6.2 PERPETRATION OF CHILD SEXUAL ABUSE

The perpetrators of child sexual abuse in India are known to the abused children, and many of them are family members, according to research conducted.<sup>204</sup> Multiple elements at the individual, family, and social levels play a substantial influence in child sexual abuse perpetration. The perpetrators, who are frequently known to the victims, take advantage of their proximity to potential victims, and the lack of severe punishment by family members, as well as the protective mentality of family members toward the abuser, frequently leads to the occurrence going unreported.<sup>205</sup>

Precocious exposure to sexual behaviors and acts, traumatic sexual experiences in childhood, sexual interests and exploration, deprivation and failure in romantic relationships, and young boys who have been coerced into homosexual acts are all factors that contribute to the development of young sexual offenders.

## 6.3 HEALTH OUTCOMES OF CHILD SEXUAL ABUSE IN INDIA:

The health outcomes of child sexual abuse can be grouped into mental health, physical health, behavioral and interpersonal. The studies, both quantitative and qualitative, reported high risks for psychiatric disorders including obsessive compulsive disorders, suicidal behaviors, and depression.<sup>206</sup> The victims of child sexual abuse were also found to have increased risks for temperamental problems, poor social adjustment, lack of trust, and insecure relations with parents.<sup>207</sup> Lower academic performance was also associated with reporting child sexual abuse in

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<sup>204</sup> Jaya J, Hindin MJ, *Nonconsensual sexual experiences of adolescents in urban India*, 40(6) THE JOURNAL OF ADOLESCENT HEALTH: OFFICIAL PUBLICATION OF THE SOCIETY FOR ADOLESCENT MEDICINE 573 (2007).

<sup>205</sup> Sahay S, *Socio-Cultural Factors and Young Sexual Offenders: A Case Study of Western Madhya Pradesh (India)*, 14(2) INTERNATIONAL JOURNAL OF ADOLESCENCE AND YOUTH, 113–34 (2008).

<sup>206</sup> Pillai A, Andrews T, Patel V, *Violence, psychological distress and the risk of suicidal behaviour in young people in India*, 38(2) INTERNATIONAL JOURNAL OF EPIDEMIOLOGY 459–69 (2009).

<sup>207</sup> Tara S. Beattie et al., *Mental health problems among female sex workers in low- and middle-income countries: A systematic review and meta-analysis*, PLOS GLOBAL HEALTH JOURNAL, (2020).

one study.<sup>208</sup> Only one quantitative study evaluated the associations between increased risk of Sexually Transmitted Infections (STI) and child sexual abuse.<sup>209</sup> The studies suggest that sexually trafficked women or the one involved in commercial sex work and had experienced child sexual abuse report high prevalence and risk behaviors for HIV infection.<sup>210</sup>

#### 6.4 INTERVENTIONS FOR CHILD SEXUAL ABUSE IN INDIA:

According to NCRB figures for 2019, India's legislative framework, the POCSO Act of 2012 has led in higher reporting of child abuse cases.<sup>211</sup> However, concerns like mandatory reporting of child sexual abuse instances, a lack of clarity on legislation among professionals (medical officers and police), and a general lack of professional support for child sexual abuse victims in India<sup>212</sup> pose possible implementation challenges.

Fear of indignity, guilt, community denial, associated socio-cultural stigma (especially if the abuse occurs within the family). Another important issue in India is the lack of effective supervision of numerous sectors.

#### 6.5 SUGGESTIONS:

##### 1. IMPROVEMENTS TO BE MADE IN INVESTIGATION PROCESS:

The true essence of a fair trial is fairness in the investigation and gathering of evidence. The investigation's quality, particularly the collection of scientific evidence, is poor and needs to be improved. The numerous penalties for procedural lapses haven't been used very often. In the vast majority of cases, the police file charge sheets, but the evidence frequently fails to meet the standard of proving guilt "beyond a reasonable doubt," resulting in acquittals in an apparent huge percentage of cases. The problem of witnesses,

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<sup>208</sup> Deb S, Modak S, *Prevalence of Violence against Children in Families in Tripura and Its Relationship with Socio-economic Factors*, 2(1) JOURNAL OF INJURY AND VIOLENCE RESEARCH 5–18 (2010).

<sup>209</sup> The Forensic Evaluation of Sexually Transmitted Diseases, VFPMS seminar 2016 Jo Tully, THE ROYAL CHILDREN'S HOSPITAL MELBOURNE.

<sup>210</sup> Tomori C et al., *The prevalence and impact of childhood sexual abuse on HIV-risk behaviors among men who have sex with men (MSM) in India*, 16 BMC PUBLIC HEALTH 784 (2016).

<sup>211</sup> NCRB Annual Report, 2019.

<sup>212</sup> Belur, J., Singh, B.B. *Child sexual abuse and the law in India: a commentary*, 4 CRIME SCIENCE JOURNAL 26 (2015).

especially victims, being hostile as a result of threats and intimidation exacerbates the situation, defeating the objective of special legislation.

The child sexual abuse can take several forms, as mentioned in Chapter 1, including penetrative and nonpenetrative sexual assaults, as well as child pornography abuse. Because each sort of sexual abuse requires a separate gathering of evidence and each case has its own set of circumstances, there is no one set criteria that fit all list of behaviours that can be used in an investigation. In fact, scientific research necessitates an open mind and a thirst for information in order to connect the dots and prove beyond a reasonable doubt that a crime was committed. However, the following are some of the broad activities related with conducting a child sexual abuse investigation:

**i) Police Officers**

- Each district must identify and train a specific team of police officers to undertake scientific investigations, as outlined in the initial chapters, and they must be placed in accordance with the number of cases to minimise case overcrowding.
- For collecting of forensic evidence and sampling of physical evidence relevant to sexual offences, investigating personnel must be given specialised inputs.
- Erring police personnel who intentionally engage in mischief during the investigation of child sexual abuse cases must face legal punishment under section 166 A (a) (b) of the IPC.
- Supervisory officers' roles must be well defined in order for them to contribute meaningfully to quality investigation. The superior officers of police have the same authority as the jurisdiction's station house officer under Section 36 of the CrPC. Superior officials, such as Deputy Superintendents of Police (Dy.SP) and Superintendents of Police (SP), must have received proper training to supervise child sexual abuse investigations and trials. They must be up to date on the most recent judgments on the issue.

**ii) Forensic and Medical Experts:**

- The medico-legal examination must be video recorded and saved as live evidence in order for the court to help them throughout the trial.
- Incorporating forensic insights into the evidence collection process instills a scientific mindset and improves the validity of judicial decision-making. In each state, forensic facilities must be improved with regard to both trained professionals and machines so that expert opinions may be supplied within a reasonable amount of time.
- Taking a child to the doctor and having him or her undergo medical and legal testing. If necessary, the IO must offer written instructions to the medical expert regarding the age opinion. If necessary, age can also be determined through a medical test later.
- If the accused is known, genuine attempts must be made to apprehend him as quickly as possible after receiving child sexual abuse information. If the criminal is unknown, every attempt should be made to identify him as soon as possible. For this purpose, CCTV footage or human intelligence may be useful. The last seen approach is very important in linking crime to the perpetrator.
- If a dispute emerges during an investigation over the age of a victim child under the age of 18, the age in such a case can be decided by court meant to deal with such matters.

2. **NEED FOR PROPER INFRASTRUCTURE AND DEDICATED JUDICIAL OFFICERS:** The trial process is extremely slow, resulting in a significant amount of pending cases in the courts, directly contradicting the POCSO Act's aim. It has been observed that judges had broad latitude in determining the severity of punishment and other areas of adjudication without providing adequate justifications. The constitutional courts have been sitting on appeals for a long time, causing the cases to drag on indefinitely.

Stringent measures are required to contain the rising trend of crime against children and deterrent effect must be achieved through the strict laws. Rules dealing with child pornographic material are needed to be framed and liability of each person responsible

for the crime must be fixed. Death penalty has been added to the act and most of the perpetrators are the known family member of the victim, this may give reason to the family for not reporting the case. One of the priorities of the criminal justice system has to be speedy disposal of the case to ensure that victim does not go through the same ordeal of trial and event continuously, which will enhance the pain of the victim and trauma which she has suffered will continue. Speedy investigations can sometimes deteriorates the quality of investigations and thus accused is let off free. Conviction rate has been less and to address this issue Supreme Court has also directed the state for setting up of special court dealing with POSCO Act cases. This can only be achieved if proper infrastructure and dedicated manpower is built to tackle the issue at hand. Appointment of judicial officers and special public prosecutor should be made priority.

**i) Lawyers:**

- The number of Special Prosecutors must be determined by the amount of cases. Prosecutors who are overburdened jeopardise the quality and efficiency of trials.
- Hostile witness cases, especially prosecutrix hostility, must be handled with prudence and attention. The prosecution should conduct a more reasonable cross-examination of such witnesses.
- Prosecution is responsible for effective follow-up in the courts. Every court must assemble a team of officers for this reason.

**ii) Courts:**

Several unique measures in trial processes are desired as a result of the POCSO Act. These are following recommendations:

- If the age of the child is in dispute, it must be decided in accordance with the law, particularly the principles set forth in *Jarnail Singh v. the State of Haryana*.<sup>213</sup> Court in this case the procedure of age determination is codified in JJ Act<sup>214</sup>, which can be referred in cases of when there is a reasonable ground to doubt child's age.<sup>215</sup>

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<sup>213</sup> (2013) 7 SCC 263.

<sup>214</sup> JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015, section 94(2).

<sup>215</sup> Ibid para 12.



- The Special Court's infrastructure must be strengthened in accordance with the POCSO Act's requirements.
- For court officials handling child sexual abuse matters, a training and sensitization programme must be undertaken.
- During the trial, it is necessary to ensure uniformity in decision-making. Judges offer drastically different decisions under similar situations, demonstrating an overly judge-centric approach to legal interpretation. Reasoned and speaking judgments are required.
- During the proceedings, the court must maintain a child-friendly environment. The accused should never be allowed to interact with the victim. Direct interviewing of the child by the prosecution or defence should be prohibited.
- Every Special Court should keep a list of certified translators, interpreters, and experts on hand to assist in the recording of the child victim's testimony.
- Despite having obvious medical injuries to private areas, the constitutional courts have exonerated the rape accused without providing any logical rationale. To contradict the conclusion of the medico-legal expert or a convincing forensic judgement, logic must be expressed (speaking orders) in the interest of justice.
- At the level of each high court, a third-party assessment of the Special Courts' operation is required, and the assessment report may be kept confidential, although general remarks may be shared with these courts for improvement.
- To grant capital sentence, the Supreme Court must decipher the theory of "rarest of rare."
- Under the special enactment, the term of "child" under section 2(d) of the POCSO Act to be expanded to include mentally challenged victims of sexual abuse. This has been one grey area which requires more practical approach.

iii) **Court's infrastructure:** Pendency and vacancy have traditionally been used to examine the relationship between access to justice and judicial infrastructure. As a result, infrastructure debates have mostly focused on numbers, such as the construction of more courtrooms. While new courtrooms and residential complexes are necessary, existing courtrooms and their facilities are rarely updated. Because current courtrooms have received significant funding, conversations should focus on developing plans to modernise them and equip them with improved technology and infrastructure.

- The Department of Justice should collaborate with state law departments to develop a plan for renovating and maintaining old courthouses.
- All High Courts should be required to submit annual infrastructure status reports, including information on budgetary expenditures and activities taken to maintain and renovate existing court complexes as well as buildings new ones, to the Supreme Court. Similarly High court should mandate District courts to do the same.
- Oversee the establishment of infrastructure grievance redressal cells in District Courts, as well as an online complaint site where the general public can file complaints.

3. **REGISTRATION OF FIR:** Once a crime has been reported, time is critical for gathering evidence. As a result, excessive delay in filing a FIR not only compromises the evidence, but also gives the defence a chance to rebut the claim.

- If the victim child arrives at the police station, she should be treated with care, ideally by a female officer. Her parents, family members, or a trusted person must be notified.
- The details of the crime must be shared with the 'One Stop Centre' and the relevant senior police personnel.
- If the police get information but no complainant comes forward, they can record a case as a complaint on their own initiative.

4. **NON FUNCTIONAL CHILD WELFARE COMMITTEES:** Though every district in every state is obligated to create a Child Welfare Committee which will be solely responsible for any offences involving children.<sup>216</sup> But merely providing it in the statute is not enough. In a few cases, the State Governments have been restricting surprise inspections by the CWCs. The State Government of Karnataka while appointing the CWC members in October 2010 put the conditions that “members cannot visit child care institutions, when they are not holding a sitting, without prior permission of the heads of these institutions”<sup>217</sup>. This effectively prohibits random and surprise inspections which is essential for the CWC to certify whether the institutions are “fit” as per the JJ(C&PC) Act. On 16 April 2012, the Allahabad High Court while hearing the matter of sexual abuse at Rajikiya Shishu Grih, Allahabad observed as under<sup>218</sup> :

“The Court must also express its disappointment that the Child Welfare Committees consisting mainly of Social Workers which have been constituted under the Juvenile Justice Act (2000) [JJ Act] for attending to the welfare of children, have shown little proactive sensitivity for addressing the myriad problems relating to children, but have simply been passing orders in a mechanical and bureaucratic manner, with no sense of mission and thus have given little relief to children in distress.”

5. **NEED FOR TRACKING LICENCES GRANTED TO CHILD CARE HOMES:** It will not be an understatement to state that juvenile justice homes, established to provide care and protection as well as re-integration, rehabilitation and restoration of the juveniles in conflict with law and children in need of care and protection, have become India’s hell holes where inmates are subjected to sexual assault and exploitation, torture and ill treatment apart from being forced to live in inhuman conditions.

Majority of privately/NGO run homes are not registered under Section 34(3),<sup>219</sup> which provides that “all institutions, whether State Government run or those run by voluntary

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<sup>216</sup> Section 29 of the Juvenile Justice (Care and Protection of Children) Act of 2015.

<sup>217</sup> Juvenile justice in Karnataka : A case for systematic change, by Concerned for working children and Asian centre for human rights.

<sup>218</sup> Matter Of Government Childrens Home At Shivkuti Allahabad v. Manju R. Chauhan, PIL No. 4207 Of 2012.

<sup>219</sup> JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT.

organisations for children in need of care and protection shall, be registered under this Act in such manner as may be prescribed.”

Oblivious to the systematic sexual assaults in the juvenile justice homes, Section 19(5) of the POCSO provides that reasons needs to be recorded as soon as possible after the report. Section 19(6) of POCSO further provides that without unnecessary delay report the matter to CWC.

The sexual assault on children in the juvenile justice homes continues unabated as the Government of India i.e. the Ministry of Women and Child Development and the State Governments have failed to implement the JJ(C&PC) Act in letter and spirit. It failed to address four critical areas indispensable for addressing child sexual abuse in juvenile justice institutions i.e. functional Inspection Committees, registration of all juvenile justice homes, effective and functional Child Welfare Committees and separation of inmates on the basis of the nature of the offences, sex and age.

6. **NON ESTABLISHMENT OF INSPECTION COMMITTEES:** Most State governments have not formed Inspection Committees which are mandated to inspect the juvenile justice homes under the JJ(C&P) Act as provided under Section 65 of the JJ(C&PC) Act. Rule 63 of the Juvenile Justice (Care and Protection of Children) Rules, 2007<sup>220</sup> mandates the Inspection Committees to “visit and oversee the conditions in the institutions and appropriateness of the processes for safety, well being and permanence, review the standards of care and protection being followed by the institutions, look out for any incidence of violation of child rights, look into the functioning of the Management Committee and Children’s Committee”.

The Ministry of Women and Child Development itself has repeatedly failed to raise the need for establishment of the Inspection Committees while approving projects for all the States and Union Territories under the Integrated Child Protection Scheme (ICPS). The Project Approval Board (PAB) of the ICPS indeed never raised the issue of inspection

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<sup>220</sup> RULE 63, Juvenile Justice (Care and Protection of Children) Rules, 2007, State Government shall constitute State, District or city level inspection committee on the recommendation of the Selection Committee constituted under rule 91 of these rules.

Committees with a number of state governments despite holding discussions for approval of grants since 2010.

## 7. NEED FOR SEX EDUCATION:

Sex education is not a subject taken up with seriousness with children in school or at home in the community. Most public and private schools in India do not provide any kind of sexuality education. There are very few schools that do focus on health and hygiene in those classes. A study<sup>221</sup> shows that a majority of Indian parents also do not discuss sexuality with their children. This is because the family's conservative social fabric does not allow for an open space wherein conversations about issues related to sexuality can be initiated.

And since the adults did not receive sexuality education themselves, and do not have a culture of discussing their own sexuality issues with others, they fail to see the need for formal comprehensive sexuality education. There is also a common concern that these 'unnecessary' talks will disrupt the social order or affect family values and culture that has been held strongly for all these years. It covers the physical, biological, psychological and social aspects of a person's being and sexuality. It covers issues like bodily changes and differences, and relationships with other youngsters, teachers, and society at large, to discussing important social issues like bullying, abuse, infections, and breakups. And yes, it also provides information about sex along with the importance of consent and safety, all in age and stage appropriate terms.<sup>222</sup> In an environment where crimes against women and children are increasing, where there is also an apparent increase in cases of young people eloping, and where the patriarchal system remains intact, sex education will enable young people deal with their sexuality maturely, stay physically and mentally

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<sup>221</sup>Shahjahan Ismail et al., *Adolscnt Sex Education In India : Current Perspectives*, INDIAN JOURNAL OF PSYCHIATRY ( Aug. 26, 2021, 5:00PM), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4711229/>.

<sup>222</sup> Aishwarya Javalgekar, *Is Sexuality Education Against Indian Culture?*, FEMINISM IN INIDA ( Aug. 20, 2021, 3:00 PM), <https://feminisminindia.com/2017/08/29/sexuality-education-indian-culture/>.

healthy, make responsible and informed decisions, and also develop mutual respect for themselves as well as other people across the gender spectrum.

#### 6.6 RECOMMENDATIONS TO THE MINISTRY OF WOMEN AND CHILD DEVELOPMENT, GOVERNMENT OF INDIA:

- Issue direction to the effect that no funds are to be given to any juvenile justice homes whether run by the State Governments or NGOs unless the latest quarterly report of the Inspection Committees is submitted for consideration of further grants.
- Issue necessary guidelines to ensure that Inspection Committees or Child Welfare Committees or any other authorities during their inspection provide an atmosphere where the inmates could give their opinion about the status of the homes or their situations to the inspecting team without fear of retribution or punishment by the staff which therefore requires conducting interviews without the presence of any staff of the juvenile home and the Inspection Committees mandatorily inquire about sexual assault and the same is reflected in the Inspection Reports;
- Instruct all the state governments to transfer the staff posted in the Juvenile Justice Homes at regular period with a view to rule out vested interests and possible criminal nexus.
- Set up separate residential facilities for boys and girls up to 12 years, 13-15 years and 16 years and above;
- Direct the State government to conduct a survey of the unregistered homes to be completed within six months and register cases against the authorities of the unregistered juvenile justice homes for any violations of the Section 23.<sup>223</sup> of the Juvenile Justice (Care and Protection of Children) Act.
- Create a Special Fund under the Integrated Child Protection Scheme to provide financial assistance for prosecution of the offenders under the POCSO.
- Provide adequate financial and human resources to NCPCR and SCPCR for Protection of Child Rights for implementation of the role.

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<sup>223</sup> JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015.

## 6.7 CONCLUSION:

Sexual abuse of a child is a violent act of cruelty, not a display of sexuality or tenderness, and it leaves a lasting scar on the lives of victims. So many children are abused, and they are alone in their suffering. Incest and child abuse is very common but an unnoticed evil. The child sexual abuse is an atrocious social crime that leaves a psychological scar on humanity's future, only a multi-pronged approach addressing all interconnected issues can achieve the intended results, and we must continue to strive and attain that goal for future generations

The letter of the law will remain a dead letter until the spirit of the law is followed, which can only be accomplished by a paradigm shift in the approach of all law enforcement and judicial officials.

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## Document Information

Analyzed document	DISSERTATION COMBINED CHAPTERS.docx (D114395196)
Submitted	2021-10-06 11:42:00
Submitted by	Sandeep Menon
Submitter email	sandeepmn@nuuals.ac.in
Similarity	10%
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## Sources included in the report

<b>W</b>	URL: <a href="https://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap7.pdf">https://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap7.pdf</a> df Fetched: 2021-10-06 11:42:00		1
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