

**LEGAL IMPLICATIONS OF CHILD SEXUAL ABUSE IN
INDIA-WITH SPECIAL REFERENCE TO THE
PROTECTION OF CHILDREN FROM SEXUAL
OFFENCES ACT, 2012**

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**BY
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DECLARATION

I hereby declare that this thesis entitled '**Legal Implications of Child Sexual Abuse in India – with special reference to the Protection of Children from Sexual Offences Act, 2012**' is the outcome of the original work carried out by me under the guidance and supervision of Dr. Bindumol V. C, Research Guide, NUALS, Kalamassery. This has not been submitted either in part or whole, for any degree, diploma, associate ship, or any other title or recognition from any University/ Institution.

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LIST OF ABBREVIATIONS

Addl. P.P.	-	Additional Public Prosecutor
CEDAW	-	Convention on Elimination Of all forms of Discrimination against Women and Children
CMRA	-	Child Marriage Restraint Act
CPHCSA	-	Centre for Prevention and Healing of Child sexual Abuse
Cr.P.C	-	Criminal Procedure Code
CSA	-	Child Sexual Abuse
CSEC	-	Commercial Sexual Exploitation of Children
CST	-	Child Sex Tourism
CWC	-	Child Welfare Committee
DCPO	-	District Child Protection Officer
DCPU	-	District Child Protection Unit
DLSA	-	District Legal Services Authority
DPSP	-	Directive Principle of State Policy
ESCAP	-	Economic and Social Commission for Asia and the Pacific
Ex.	-	Exhibit
FR	-	Fundamental Rights
FSL	-	Forensic Science Laboratory
HIV	-	Human Immunodeficiency Virus
HRLN	-	Human Right Law Network
HRW	-	Human Right watch
ICCPR	-	International Covenant on Civil Political Rights
ICESCR	-	International Covenant on Economic Social Cultural
ICPS	-	Integrated Child Protection Scheme

IEA	-	Indian Evidence Act
ILO	-	International Labour Organization
IO	-	Investigating Officer
IPC	-	Indian Penal Code
IRWPA	-	Indecent Representation of Women (Prohibition) Act
ITA	-	Information Technology Act
ITPA	-	Immoral Traffic (Prevention) Act
JJ Act	-	Juvenile Justice (Care and Protection of Children) Act 2015
JJB	-	Juvenile Justice Board
NCPCR	-	National Commission for Protection of Child Rights
NCRB	-	National Crime Record Bureau
NGO	-	Non-Government Organizations
NHRC	-	National Human Rights Commission
NLSIU	-	National Law School of India University
POCSO	-	Protection of Children from Sexual Offences
PP	-	Public Prosecutor
PTSD	-	Post Traumatic Stress Disorder
PW	-	Prosecution Witness
r/w	-	read with
RI	-	Rigorous Imprisonment
RTI	-	Right to Information
SC	-	Supreme Court
SCC	-	Supreme Court Cases
SCPCR	-	State Commission for Protection of Child Right
Ss.	-	Sections
STD	-	Sexually Transmitted Diseases
u/s or u/sec.	-	Under section
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations

UNCRC	-	United Nations Convention on Child Rights
UNICEF	-	United Nations International Children's Emergency Fund
US	-	United States
UT	-	Union Territory
WHO	-	World Health Organization.

Chapter 1

INTRODUCTION TO CHILD SEXUAL ABUSE

1.1 Introduction

Children are the first individual of a society, and are considered as supremely important asset of nation¹. They are to be nurtured and deserve love, care and all kinds of protection. They are born with indivisible and inalienable human rights of “right to justice, freedom and opportunity for development irrespective of their nationality, caste and sex”. Justice Subbah Rao the former chief justice of India emphasized this in the following words:

“Social justice must begin with children. Unless the tender plant is not properly tended and nourished it has little chance to growing in to a strong and useful tree. So the first priority in the scale of social justice must be given to the welfare of children.”²

Hence the proper development of the children is imperative for the proper growth and development of a nation. So the protection and welfare of children is almost importance to the society. And also all children have the right to be protected from violence, exploitation, and abuse. But the protection of children seems to be a myth than a reality. Since millions of children worldwide from all socioeconomic backgrounds, across all ages, religion and cultures suffer

¹ *Laxmi Kant Pandey v. Union of India*, (1984) 2 SC 244, 249.

² Subbah Rao J, *Social justice and Law* ,110,DELHI NATIONAL PUBLISHING HOUSE ,1974

exploitation and abuse every day. Child sexual abuse (CSA) is one of the worst form of such abuse and exploitation against children.

1.2 Concept of Child

The word 'child' first brings to mind a picture of the miniature human being. In ancient time this physical difference was the only factor which distinguishes a child from an adult. Child is a person who is unable to maintain itself. With the development of information and knowledge the society realized that the children are different from adults not only in size but also in other aspects. A child's mind is not mature enough to understand the nature of all acts of themselves and others. Children are dependent on elders for the satisfaction of their own needs. This physical and mental immaturity and dependency on the others are most outstanding features of childhood. Most often the child is exploited and abused because of its physical and mental immaturity. Normally a child attains physical maturity at puberty but puberty attaining age is different in different individuals. There is no uniform point to determine the mental maturity of a person. It is influenced by the familial and social circumstances of the child, which also have a direct role in the proper development of the child. Childhood experiences last a life time and therefore a good and healthy environment is necessary for their proper growth and development.

The various stages of childhood which have recognized are the parental, the post natal, infant, and the preschool and school stage. It is a fact that the younger child is more vulnerable and he is physically and psychologically less able to defend for himself. Age limits are a formal reflection of society's

judgment about the evolution of children's capacities and responsibilities and differ from activity to activity. The United Nations Convention on the Rights of the Child 1989³ (referred to as UNCRC) defines a child as "*every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.*"⁴The definition thus grants individual nations the discretion to fix the age at which the childhood ceases by law. In India there is no uniform definition of child and the word indicates persons of different ages for different purposes. The factors taken into account for choosing the cut off age to define a child varies according to various subjects.

1.2.1 Definition of child in India

An examination of the various existing legislations in India with regard to children specifies different age criteria. The cut off age for childhood is depending on the law, administrative policy and other factors which suppose the physical and mental maturity of the child. For example, in labour matters physical growth, body strength and capacity for a specific kind of work should be the prime determinant factor. But in criminal law purposes, the mental ability of the person to understand the nature and consequences of activities is more important. Several provisions in the Constitution of India impose on the State

³ United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by GA Resolution 44/25 of 20 November 1989, 1577 UNTS 3. UNCRC entered into force 2 September 1990.

⁴ Art 1 UNCRC.

the primary responsibility of ensuring the protection of child rights and provide various age limits for various purposes.⁵

Table 1.1 : Legal age of children under various legislations	
The Indian Penal code, 1860	For the purpose of criminal liability the age limit is “7 and 12 ⁶ ”, but for the purposes of protection against kidnapping, abduction and related offences, it’s “16 years for boys and 18 for girls.” ⁷
The Indian Majority Act 1875	Every person domiciled in India shall attain the age of majority on completion of 18 years and not before. ⁸
The Factories Act , 1948	Child means “a person who has not completed his fifteenth year of age.” ⁹ Adolescent means a person, who has completed his fifteenth year of age but has not completed his eighteenth year” ¹⁰
Immoral Traffic (Prevention) Act 1956	Child means “a person who has not completed the age of sixteen years” ¹¹
The Protection of Women from Domestic violence Act 2005	child means “any person below the age of eighteen years and includes any adopted, step or foster child” ¹²
Prohibition of child marriage Act 2006	child means “a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age” ¹³
The Protection of Children from sexual Offences Act, 2012	child means “any person below the age of eighteen years” ¹⁴
The Juvenile Justice (Care and Protection of Children) Act 2015	child means “a person who has not completed eighteen years of age” ¹⁵
The Child Labour (Prohibition and Regulation) Amendment Act, 2016	Child means “a person who has not completed his fourteenth year of age or such age as may be specified in the Right of Children to Free and Compulsory Education Act, 2009, whichever is more”. ¹⁶

⁵ For example Article 21 A of the Constitution of India says that “the State shall provide free and compulsory education to all children within the ages of 6 and 14”. Article 45 of the Constitution specifies that “the State shall endeavour to provide early childhood care and education for all children until they complete the age of 6”. Article 51 (k) lays down “a duty that parents or guardians should provide opportunities for education to their child between the age of 6 and 14 years”.

⁶ Ss 82 & 83

⁷ s 361

⁸ Subs. by Act 33 of 1999, s. 4, for Ss 3 and 4 (w.e.f. 16-12-1999).

⁹ The Factories (Amendment) Act, 1987, s 2(c)

¹⁰ Id, s 2(b)

¹¹ s 2aa

¹² s 2(b)

¹³ s 2a

¹⁴ s 2(d)

¹⁵ s 2(12)

¹⁶ s 4(ii)(b), The Child Labour (Prohibition and Regulation) Amendment Act, 2016

The table 1.1 shows the variation in age limits of child provided by various legislations. Besides this variation in defining the child the word minor is used as synonymous of child in various acts like Indian Contract Act and Code of Criminal Procedure (referred to as CrPC). *“The word ‘child’ has therefore been used in law as a term denoting relationship; as a term indicating capacity; and as a term of special protection”*.¹⁷ The difference in these specifications is underlying various concepts regarding the term ‘child’. These include considering a child as a burden, which invokes the right to maintenance and support; regarding children as individuals with temporary disabilities, making for rights to special treatment and special discrimination; treating children as especially vulnerable, to ensure rights to protection; and recognising children as resources for the country’s development, necessitating nurturing and advancement.¹⁸ Thus there do not appear any criteria or scientific parameters for determining a child’s age that the age limit in some laws appear arbitrary or based on socio-cultural perceptions.

From the perusal of definition of child under various Acts it reveals that the age is supreme consideration to see whether a person falls within the category of child or not. A working group appointed by the department of social welfare, Government of India, in 1974 discussed the question of standardization of the

¹⁷ Bhajpai Asha, *The Legislative and Institutional Framework for Protection of Children in India*, 5 Institute for Human Development India - UNICEF Working paper series, Children of India Rights and Opportunities, (Sep.24,2010,4.59pm), http://www.ihdindia.org/pdf/IHD-UNICEF-WP-5-asha_bajpai.pdf

¹⁸ Initial reports of States parties due in 1995: India, UN Doc. CRC/C/28/Add.10, Para 66, 7 July 1997, (Nov.25, 2016 9.30 a.m.), https://www.unicef-irc.org/portfolios/documents/394_india.htm

definition of child. It concluded that it was not possible to do so for all purposes though it might be possible to have uniformity of age in particular fields for certain specific purposes. "It is necessary that the definition of 'child' be brought in line with the Convention on the Rights of the Child" that all individuals those below 18 years of age.¹⁹ If the best interest of the child is the guiding norm, in case of protective care to the child the higher age limit should be maintained and with respect to civil and cultural matters, a lower age limit should be prevailed".²⁰ The law commission of India referred the definition of 'child' as described in Article 1 of the CRC, with the review of criminal substantive and procedural statutes in India. A positive trend can be notice in defining child as a person below 18 years in recent legislative measures²¹ for the purpose of protection of children.

1.3 Development of human rights of children

The concept of the rights of the child was never recognized earlier. In common law system father had given absolute rights over his own children. It was not until the eighteenth century Enlightenment that any substantive changes in the perceptions of children occurred.²² In those days the child was considered as human property, chattel of the parents, the parents enjoying an absolute right over the child's services and earnings and total control over the child's person

¹⁹ Bhajpai Asha, *Who is a child?*, (Jan-12, 2018, 9.50 am) <http://infochangeindia.org/agenda-issues/child-rights-in-india/6472-who-is-a-child>

²⁰ Id

²¹ See Table 1.1, p 4

²² Rebeca Sturn, *The Child's right to participation: reality or rheotic?* 28(sep.13, 2014, 10.30 am), <https://www.diva-portal.org/smash/get/diva2:168647/FULLTEXT01.pdf>

and property. After this, a welfare principle was established in the one dominant family structure which was developed by Victorian judges.²³ In India also it was believed that the wellbeing of children depended on some values of *daya, dana, dakshina, bhiksha, ahimsa, samya-bhava, swadharma and tyaga*, and those values are cream of principles of *self-discipline, self-sacrifice and consideration for others*.²⁴

During the mid-nineteenth century two articles on concept of child rights were published by Slagvock in 1852 and Kate Kliggins in 1892 titled “*The Rights of the children*” and “*Childrens rights*” respectively. It was only during the 20th century that the international concern of the rights of the child came to existence. The International childrens’ rights movement has been traced to the work of the British born Eglantyne Jebb, who founded “*Save the children International Union*” in Geneva in 1919.²⁵ In the year 1923, for the first time International attention was drawn concerning the situation of children when the council of this newly established NGO adopted a five point declaration on the rights of the children. Gradually there was shifting of working conditions of children and the legal position of children in England began to change with the introduction of factory laws, which concentrated on the improvement of the working conditions of employees especially children.²⁶

²³ BHAJJPAI ASHA, CHILD RIGHTS IN INDIA: LAW, POLICY, AND PRACTICE, oxford university press third edn 201, p 1

²⁴ Id

²⁵ *The State of the World’s Children*, p14, UNICEF, 2000, (Jan.11, 2017, 3.45pm), <https://www.unicef.org/sowc/archive/ENGLISH/The%20State%20of%20the%20World%27s%20Children%202000.pdf>

²⁶ MAMATA RAO, LAW RELATING TO WOMEN AND CHILDREN, 2nd edn New Delhi: Eastern Book Company, 2008, p.414.

The development of child rights in international law is outlined by Professor Geraldine Van Bueren through three stages. According to him, “*the first stage was the recognition by the international community that all individuals, including children, were the objects of international law requiring international legal protection. The second stage, which is still evolving, is the granting of specific substantive rights to individuals, including children. The third stage, which is also still developing, is the acknowledgement that in order to ensure that individuals are able to enjoy the exercise of their fundamental rights they must be acknowledged to possess the necessary procedural capacity to exercise and claim these rights and freedoms*”.²⁷

The rights perspective created specialised human rights instruments at the international level protecting children’s specific interests and rights²⁸. In those international instruments UNCRC is the most pioneering attempt to create a universal standard for the rights of the child, and the first instrument to present children’s rights as a legally binding one. The convention embodied rights perspective and established the status of children as rights holders and considered their rights equally important to respect and fulfil as those of adults and it also brings together the children’s human rights articulated in other international

²⁷ BUEREN, GERALDINE VAN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD, (Martinus Nijhoff Publishers) (1998), p-51

²⁸ The Geneva Convention on the Rights of the child 1924, The Declaration of the rights of the child 1959, and the Convention on the rights of the child 1989 are the significant international instruments dealing with the rights of the child. Various provisions for the protection of children in general documents are Art 25(2) of the Universal Declaration of Human Rights 1948, Art 10(3) of the International covenant on economic social and cultural rights 1966, Art 24 of the International covenant on civil and political rights 1966, and the Convention on elimination of all forms of discrimination against women 1979.

instruments. This Convention articulates the rights more completely and provides a set of guiding principles that fundamentally shapes the way in which we view children.²⁹ The child rights are defined by the UNCRC that are minimum entitlements and freedoms that should be afforded to all children “regardless of race, color, gender, language, religion, opinions, origins, wealth, birth status or ability and therefore apply to all people everywhere”.³⁰ These rights are interdependent and indivisible, that is one right cannot be fulfilled at the expense of another right.

The UNCRC provides all basic human rights to the children include all civil, political, social, economic and cultural rights. These rights can be broadly classified in to right to survival,³¹ protection,³² participation³³ and development.³⁴ Thus the UNCRC effectively codifying universal rights of children by creating a uniform standard and requires state parties to take measures for protection of children. It is the obligation on all government and state parties to take measures for protection of children against all kinds of abuse

²⁹ Understanding the CRC, UNICEF,(Feb.12,2016,2.30 pm)
https://www.unicef.org/crc/index_understanding.html

³⁰ Article 2(1) UNCRC

³¹ “A child’s right to survival begins before a child is born. The right to survival is inclusive of the child rights to be born, right to minimum standards of food, nutrition shelter and clothing for a dignified life. It also includes right to have a name and nationality.”

³² “A child has the right to be protected from neglect, exploitation and abuse at home, and elsewhere and special protection during the emergency situations and armed conflicts”.

³³ “A child has a right to participate in any decision making that involves him/her directly or indirectly. There are varying degrees of participation as per the age and maturity of the child which includes respect to child’s view, freedom of expression, thought, conscious and religion and right to access to appropriate information”.

³⁴ “Children have the right to all forms of development: Emotional, Mental and Physical. Emotional development is fulfilled by proper care and love for childhood and social security, mental development through education and learning and physical development through recreation, plays etc.”

and exploitation and to provide a remedy where fundamental protections have been violated. Regarding the protection of these rights and freedoms the convention also gives four general principles. The principles can be asserted as nondiscrimination³⁵, best interest of the child³⁶, right to survival and development³⁷, and respect for the views of the child³⁸.

1.4 Child Protection

The two notions with respect to child protection are, in one hand children are vulnerable hence need protection but on the other hand what are the

³⁵ Article 2 UNCRC reads as

“1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. *States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family member.”*

³⁶ Article 3 UNCRC reads as

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

3. *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”*

³⁷ Article 6 UNCRC reads

“1. States Parties recognize that every child has the inherent right to life.

2. *States Parties shall ensure to the maximum extent possible the survival and development of the child.”*

³⁸ Article 12 UNCRC reads as

“1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”*

parameters to decide best interest of child. The “*best interest of the child principle*” enshrined by international child rights instruments that the children are entitled to special protection³⁹ and the child shall be protected against all forms of neglect, cruelty and exploitation. Child protection means “*the prevention of or responding to the incidence of abuse, exploitation, violence and neglect of children*”.⁴⁰ It also allows children to have access to their other human rights of survival, development, growth and participation.⁴¹ If the protection fails children have a higher risk of death, poor physical and mental health, HIV/AIDS infection, educational problems, displacement, homelessness, vagrancy and poor parenting skills later in life.⁴² Child protection is the recognition of the fact that children are vulnerable and reducing their vulnerability by providing protection from every harm and harmful situations.⁴³ Hence when the protection fails because of the vulnerability of the children, they get abused and exploited in several ways including sexual abuse and exploitation.

There is some sort of difference in the concept of child rights and child protection. Rights are entitlements and enforceable through a court of law but the protection is one of these rights. It is a system through which all other rights

³⁹ As per provision of Article 2 of the Declaration of rights of the child 1959, “*the child shall enjoy special protection and shall be given opportunity and facilities, by law and by other means to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner in the conditions of freedom of dignity*”.

⁴⁰ *What is child protection* –UNICEF, (Aug.10, 2015, 12.00 pm) https://www.unicef.org/protection/files/What_is_Child_Protection.pdf

⁴¹ *CHILD Protection & Child Rights*, CHILD LINE INDIA FOUNDATION, (Aug.14, 2015, 10.45 am), <https://www.childlineindia.org.in/child-protection-child-rights-india.htm>

⁴² *What is child protection* –UNICEF, (Aug.10, 2015, 12.00 pm) https://www.unicef.org/protection/files/What_is_Child_Protection.pdf

⁴³ *CHILD Protection & Child Rights*, CHILD LINE INDIA FOUNDATION, (Aug.14, 2015, 10.45 am), <https://www.childlineindia.org.in/child-protection-child-rights-india.htm>.

of a child can come true. The framework consists of various duty bearers such as government departments including police, school, and civil society. If there is any violation of any of these rights the violator will be brought in front of law. For example a child has a right to live a normal childhood in a family environment. The protection framework for children need to first take steps to ensure families are able to survive by providing them with adequate health, education, and food.⁴⁴ The next step is to address the necessities of children in need special protection including abandoned and orphan children. The protection framework includes the mechanisms to relocate these children into caring families either through adoption or foster care and provide these children with access to health, nutrition and education services.⁴⁵ So the protection framework is the coordination and interlinked activities of various systems and governmental bodies.

1.5 General understanding of Child abuse

The question of child protection has emerged as one of the most vibrant issues in this era because the instances of child abuse and exploitation increase day by day. Child abuse has existed in all societies for centuries. Generally children are vulnerable but some children are particularly vulnerable because of their gender, race, ethnic origin or socio-economic status. The vulnerability level increases with the children who are disabled, orphaned, and indigenous from ethnic or marginalized groups and children living in streets. The risk of abuse

⁴⁴ *Child Protection & Child Rights*, CHILD LINE INDIA FOUNDATION, (Aug.14, 2015, 10.45 am), <https://www.childlineindia.org.in/child-protection-child-rights-india.htm>

⁴⁵ Id

and exploitation increases in cases of natural disasters, displacement and also armed conflicts.⁴⁶ Many of the children across all over the world exposed to various kinds of abuse and exploitation “including sexual abuse and exploitation, armed violence, trafficking, child labour, gender-based violence, bullying⁴⁷ cyber-bullying, gang violence, female genital mutilation/cutting, child marriage, physically and emotionally violent child discipline, and other harmful practices”.⁴⁸

The definition of child abuse varies from country to country. Acts that result in physical, sexual or emotional abuse or neglect of children fall under the purview of law in almost all developed nations. In India, child abuse exists in many forms, but the laws are still ambiguous and a universal definition of child abuse in the Indian context does not exist⁴⁹ and most children suffer in silence. Child abuse is “the physical, sexual or emotional mistreatment or neglect of a child or children”⁵⁰ and is globally prevalent phenomenon. Child abuse is the “intentional, non-accidental use of physical force, or intentional, non accidental

⁴⁶ *Child protection from violence, exploitation and abuse*, UNICEF, (12 Nov 2018, 11 am), https://www.unicef.org/protection/57929_57972.html

⁴⁷ ‘*Too often in silence*’ is a report published by UNICEF on school based violence in west and central Africa, 2010, (02 Jan 2019, 9.30 am), <https://www.planusa.org/docs/education-often-in-silence-2010.pdf>

⁴⁸ *Child protection from violence, exploitation and abuse*, UNICEF, (12 Nov 2018, 11 am), https://www.unicef.org/protection/57929_57972.html

⁴⁹ Kakkar, L., Varadan, S., & Kumar, P. *A Study on Child Abuse: India*. MINISTRY OF WOMEN AND CHILD DEVELOPMENT, Government ohild-Abuse-Report.pdf.

⁵⁰ Child abuse–definition of child abuse by the Free Online Dictionary, Thesaurus and Encyclopedia". The freedictionary.com.

acts of omission on the part of a parent or other caretaker interacting with a child in his care aimed at hurting, injuring or destroying that child."⁵¹

According to WHO

*“Child abuse or maltreatment constitutes all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child’s health, survival, development or dignity in the context of a relationship of responsibility, trust or power.”*⁵²

Thus child abuse can be classified into four categories as physical abuse, emotional abuse, sexual abuse and neglect which are potentially or actually harmful to a child's health, survival, and dignity and development.⁵³

1.6 The problem of Child Sexual Abuse

Child sexual abuse is the most aggressive form of child abuse and exploitation and an utter violation of children rights as both the emotional and physical abuse occurs in sexual abuse. It is a worldwide problem and not limited to a particular region, culture or country. According to WHO, *“one in every four girls and one in every seven boys in the world are sexually abused”*. India is second most populous country in the world and 2011 Census reveals that it’s a home to 17% of the world's population. Indian children constitute 39 percentages

⁵¹ Gil, D.G.), *Violence against children*. JOURNAL OF MARRIAGE AND FAMILY, 33, 637-648(1971).

⁵² *Report of the Consultation on Child Abuse Prevention; World Health Organization, Geneva, 29–31 March, 1999, Document WHO/HSC/PVI/99 (Feb 12 1013), http://www.who.int/violence_injury_prevention/violence/neglect/en/*

⁵³ *Child protection and child rights, CHILD LINE INDIA (Jan 1 2019) <http://childlineindia.org.in/child-abuse-child-violence-india.htm>*

of India's total population⁵⁴ and 20% of world's child population. WHO found that "at any given time, one of ten Indian children is the victim of sexual abuse".⁵⁵ But it is a fact that the whole concept of child sexual abuse is not talked about openly in our society, it has several social inferences. Child sexual abuse especially rooted in secrecy. Unlike most other Asian countries, Indian children are socialized into a system where they are expected to obey and respect authority figures without ever questioning their actions⁵⁶. This social fabric system is deeply implanted to the reasons for child sexual abuse is not properly reported.⁵⁷ In Indian context acceptance of child rights as primary absolute right is recent as in the case of international understanding of it. Indian culture strongly follows family oriented system, when a child is abused by an elder in the home, children will not disclose the matter, or adults silence them. Another context is that child sexual abuse is shrouded in secrecy. The topic itself is in such a nature that sex is portrayed as perverting and children are discouraged to speak about sex. When children lack sexual education they cannot comprehend the extent of the abuse.

Child sexual abuse can be defined as "*inappropriate sexual behavior with a child, it happens when the child is being used as an object of gratification*

⁵⁴ Child rights in India. Child in India statistics and Children in India,(Nov 13 2016 , 11 am) www.childlineindia.org.in/child-in-india.htm

⁵⁵ VIRANI PINKI. (2000). BITTER CHOCOLATE: CHILD SEXUAL ABUSE IN INDIA. New Delhi: Penguin Books.

⁵⁶ Neeta Lal, *Hidden Darkness: Child Sexual Abuse in India*, May 2, 2007 (December 15, 2017, 9. a.m. at http://www.asiasentinel.com/index.php?option=com_content&task=view&id=476&Itemid=3

⁵⁷ See chapter 3 for details

for an older child's or adult's needs and can be carried out against the child using force, trickery, bribes, threats or pressure". As defined by WHO

"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 and the exploitative use of children in pornographic performance and materials".⁵⁸

Child sexual abuse can be due to various reasons such as poverty, ignorance, the lack of proper sex education, pervert sexual orientations and discriminations on the basis of gender and in all exploitative situations.⁵⁹ Always the mind of the society feels that the child sexual abuse is limited to the rape of a girl child by a man. But actually it involves a wide range of sexual activities. It may include *"fondling of the child's genitals (or getting the child to fondle the perpetrator's genitals); masturbation (with the child as either observer or participant); oral sex (either fellatio or cunnilingus⁶⁰); vaginal or anal penetration by a penis, finger, or any other object; fondling of breasts;*

⁵⁸ World Health Organization (1999): *Report of the consultation on child abuse prevention*; Geneva

⁵⁹ See for details, *Causes of Child Sexual Abuse*, Chapter 2

⁶⁰ Collins dictionary defines 'Fellatio' is a sexual activity in which the penis is stimulated by the partner's mouth whereas 'Cunnilingus' is a sexual activity in which the female genitalia are stimulated by the partner's lips and tongue

voyeurism (regular observation of the child) or exhibitionism”.⁶¹ Studies on who commits sexual abuse varies but with sexual abuse in India like worldwide, the perpetrators are usually known to the victim.⁶² The abuser is someone known to the child, and may be part of his/ her day-to-day life as a father, brother, cousin, servant, or friend.

Child sexual abuse includes the coercing of child to engage in sexual activities with a parent or caregiver or with a stranger for the purpose of sexual gratification of the other. Sometimes the term also indicates commercial sexual exploitation of children, including pornography and prostitution, sexual assault as a tool of ‘hate crimes’⁶³ against a particular community or religion⁶⁴, political oppression, genocide and as a weapon of war by hostile, friendly and even neutral parties⁶⁵; and cultural practices including female genital mutilation⁶⁶,

⁶¹ “Child sexual abuse; understanding and responding for professionals working with children who have experienced sexual abuse.” Office for Children, Victorian Government Department of Human Services Melbourne, Victoria, May 2009,p 2

⁶² A 2007 study by the Ministry of Women and Child Development on the sexual abuse o children found that 54% had been violated at some point in their lives; 50% knew the offenders.

⁶³ Cambridge English Dictionary defines the term *hate crime* as a crime or crimes, usually involving violence, committed against someone because of their race or religion, because they are gay, etc.(22 Dec 2018, 12 pm), <https://dictionary.cambridge.org/dictionary/english/hate-crime>

⁶⁴ Amnesty International released data through its interactive website named ‘Halt the Hate’ and listed ‘Kathwa rape case’ occurred at Jammu and Kashmir as an example of ‘hate crime’ in India, (12Dec 2018, 3 AM), <http://haltthehate.amnesty.org.in/map.html>. / *Asifa: The Anatomy of a Hate Crime*, (10 Jun 2019, 4.30 pm), <https://www.openthemagazine.com/article/crime/asifa-the-anatomy-of-a-hate-crime>. The 15 page charge sheet framed by Jammu and Kashmir police against eight accused reveals that “the abduction, rape and killing of the child was part of a plan to remove the minority nomadic community from the area.”

⁶⁵ Reports allege that UN peacekeepers engaged in child sexual abuse and exploitation in southern Sudan. UN News, Joint UN-Sudan Government task force to deal with issue of sexual exploitation, (14 Jan 20018, 9 am), <http://www.un.org/apps/news/story.asp?NewsID=21274&Cr=sudan&Cr1>

⁶⁶ World Health Organization, *Female genital mutilation: A joint WHO/UNICEF/UNFPA Statement*, Geneva (1997)

virginity exams, and early and forced marriages. The national study report defined sexual abuse as inappropriate sexual behavior with a child. To be considered child abuse, these acts have to be committed by a person responsible for the care of a child or related to the child (for example, a babysitter, parent, neighbor, relatives, extended family member, peer, older child, friend, stranger, or a day-care provider). Sexual abuse occurs in rural, urban and suburban areas and among all ethnic, racial, and socioeconomic groups.⁶⁷

To find out the extent of child abuse in India, the first official National Study on Child Abuse⁶⁸ was conducted by the Ministry of Women and Child Development, covering 12447 children, 2324 young adults and 2449 stakeholders encompassing 13 states. In 2007 the study report was published as “*Study on Child Abuse: India 2007.*” The study covered various forms of child abuse and also revealed some shocking facts regarding child sexual abuse. The major finding of this study says that “*Sexual abuse was reported by 53.22% children. Among them 52.94% were boys and 47.06% girls 21.90% of child respondents faced severe forms of sexual abuse, 5.69% had been sexually assaulted and 50.76% reported other forms of sexual abuse*”. Across the country, every second child was being subjected to other forms of sexual abuse and every fifth child was facing severe forms of sexual abuse⁶⁹.

⁶⁷ The national resource centre on child sexual abuse, “fact sheet on child sexual abuse”, Huntsville: NRCCSA, 1994.

⁶⁸ Kakkar, L., Varadan, S., & Kumar, P. *A Study on Child Abuse: India*. MINISTRY OF WOMEN AND CHILD DEVELOPMENT, GOVERNMENT OF INDIA, 2007, p 3. (Dec.12, 2012, 9.30 am) <http://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf>.

⁶⁹ Id

1.7 Context of the Research

In India even after two decades of acceptance of the *UNCRC* there was no specific legislation against sexual offences against children until the enactment of *Protection of Children from Sexual Offences Act, 2012*⁷⁰ (referred to as *POCSO*). Punishments for sexual abuse of children were under the general criminal law of the *Indian Penal Code 1860* (referred to as *IPC*). Under this general criminal law it was not mandatory to report the sexual crimes against children to the authorities. Hesitation of victims and his /her family members to report and lacunas in laws to effectively punish child sexual abuse offenders lead to a glaring deficiency of reported cases in India. A National Commission for Protection of Child Rights came into existence in 2007, after the passing of the *Commissions for Protection of Child Rights Act, 2005*.⁷¹ Thereafter, various states established their State Commissions for Protection of Child Rights. After the publication of first national study on prevalence of child abuse, the government enacted an exclusive law dealing with various kinds of child sexual abuse. The *POCSO Act* has been enacted to fulfill the lacunas in the legal provisions for the protection of children from sexual abuse and exploitation. The *Act* for the first time, a special law has been passed to address the issue of sexual offences against children. This law is a landmark stone in the history of child rights in India because various sexual offences against children which previously

⁷⁰ The Protection of Children from Sexual Offences Act, 2012, Ministry of Women and Child Development Press Information bureau, Govt. of India (May 22, 2012), <http://pib.nic.in/newsite/erelease.aspx?relid=84409>.

⁷¹ The Commissions for Protection of Child Rights Act, 2005, No 4 of 2006, (20th January, 2006). <https://wcd.nic.in/sites/default/files/TheGazetteofIndia.pdf>

did not exist in Indian criminal law were defined and criminalized for the first time.

The POCSO Act is enacted in response to the rapid increase in the instances of grave sexual offences against children and low rates of conviction for the same. The Act provides for the provisions to safeguard children from various kinds of sexual offences by clearly define them and special procedures to be adopted by various law enforcement agencies in dealing with cases of child sexual abuse. Under Section 28 of POCSO Act, *“the State Governments should, in consultation with the Chief Justice of the High Court, designate a Sessions Court to be a Special Court to try offences under the POCSO Act”*. This is with the intention of facilitating speedy trial and disposal. The POCSO Act envisages powers and child friendly procedures to be adopted by the special courts in recording of evidence, age determination, mandates in camera trial and speedy trial. To meet the objectives of the special law for children it is necessary to collect evidence on the implementation of the Act through systematic and empirical research for strengthening the legal protection of children against sexual offences. Hence in this context it is essential to analyze the legislative framework in India against child sexual abuse and to examine whether the law is adequate and effective enough to prevent the problem of child sexual abuse in India. The study also specially aims to find out the barriers and evaluate the implementation of POCSO Act in prosecuting child sexual abuse and the working of POCSO Courts in dealing with child sexual abuse cases.

1.8 Objectives of the study

- 1) To understand the concept and kinds of child sexual abuse India
- 2) To analyze the nature and prevalence of CSA in India
- 3) To examine and review the legal frame work in India against child sexual abuse
- 4) To analyze the legal procedures and role of various stakeholders in prosecution of CSA in India
- 5) To review the working of special courts under POCSO Act
- 6) To explore the barriers in implementation of POCSO Act in India
- 7) To identify the areas requiring improvement and make suggestions

1.9 Research Hypothesis

In light of the objectives mentioned above the following hypothesis shall be tested through this research:

“The legal measures in India including POCSO Act 2012 are not effectively implemented for the protection of children from sexual abuse and exploitation.”

1.10 Research questions

The following research questions raised in the study:

- 1) Whether the law in India is adequate and effective enough to prevent the problem of child sexual abuse?
- 2) Whether there is any gap in implementation of POCSO Act in prosecuting child sexual abuse?

1.11 Research methodology

Research methodology for the study is mixed with doctrinal and non-doctrinal. One chapter is devoted for an empirical study on the analysis of judgments of POCSO Court in Ernakulam district, Kerala. Primary Data for the doctrinal research is Indian legislations and case laws from reported Supreme Court and High Court decisions. Primary data for the empirical analysis is based on the case records and judgments of Ernakulam POCSO Court collected from official sources. Secondary Data for the research is existing studies and reports published by government bodies, such as the NCPCR, academic institutions and NGOs, besides referring to newspaper reports and other journal documents.

Data also collected by unstructured interviews with certain stakeholders who participate in legal proceedings of CSA cases to identify the barriers in implementation of POCSO Act. Interviews were carried out during February-April 2018 by the researcher in various districts of state of Kerala. A total 21 interviews were carried out with a range of stakeholders including such as police officers, judges, defence lawyers, prosecutors, medical professionals, support persons, NGOs, and CWC members, court staffs, member of District Legal Services Authority and private advocates.

1.12 Research design for the empirical study

The study is quantitative in nature and the focus is on the analysis of judgments of special court designated under POCSO Act in Ernakulam district Kerala. Judgments are analyzed to ascertain child friendly procedures in determining competence of victims, appreciation of testimony of the victim,

compensation and disposal of the case. For this study the in-depth analysis of judgments delivered by this court since February 2013 to October 2017 has been done. All the judgments are downloaded from the district court website as well as <http://ecourts.gov.in//services>. Unstructured interviews with certain stakeholders such as police officers, judges, lawyers, prosecutors, medical professionals, support persons, NGOs, and CWC members to identify the barriers in implementation of POCSO Act.

1.12.1 Sampling

Chart 1.1

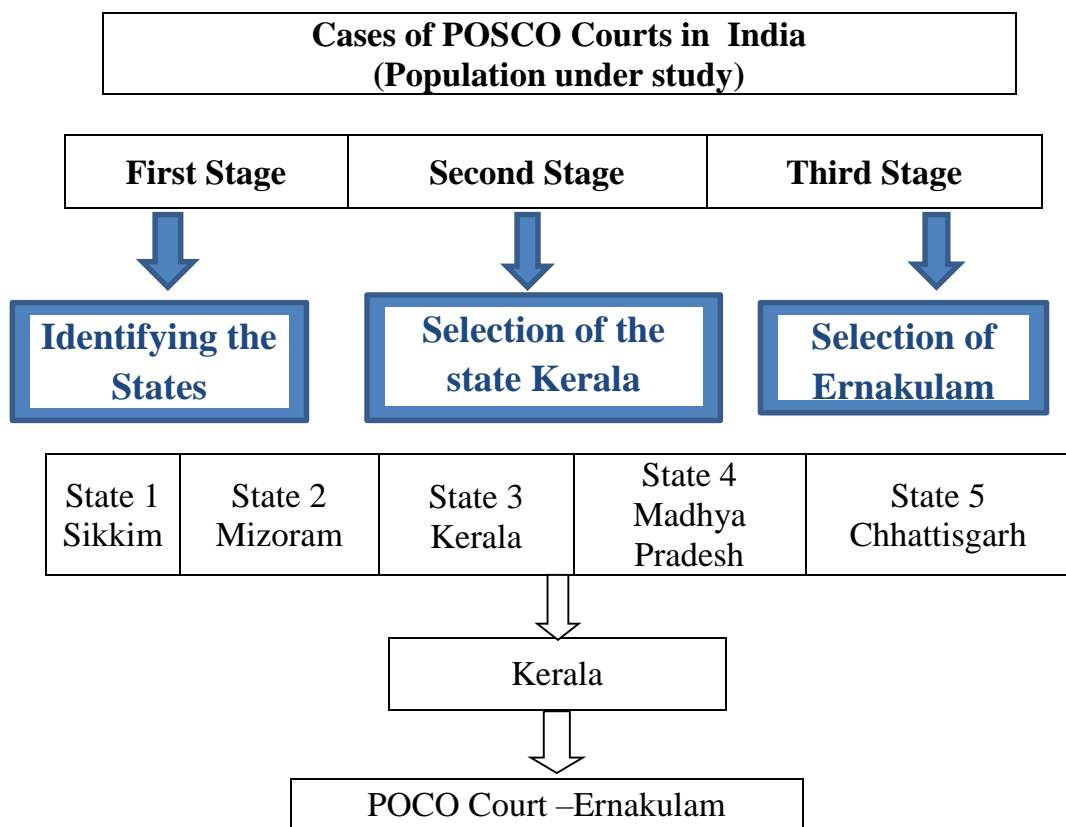
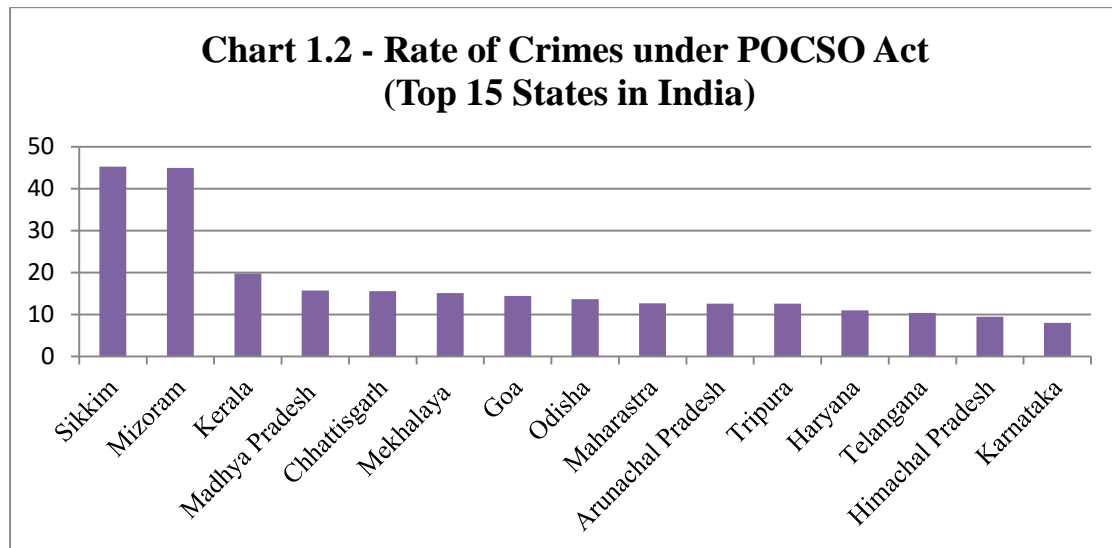


Chart 1.1 shows the structure of sampling method adopted for empirical study. Cases in POCSO Courts in India constitute the population under study. A multi stage purposive sampling technique is adopted by the researcher to select the sample under study. In the first stage, 15 states were identified where rate of

crimes under POCSO Act highest during the period of study. Chart1.2 shows the rate of crimes under POCSO Act in various states in India in 2016. In which state of Kerala holds third position in the highest rate of crimes under POCSO Act.



Source: Crime in India, 2016, NCRB

In the second stage, the state Kerala has been selected because the review of literature shows that there is a dearth of relevant studies on working of POCSO courts in the context of Kerala. Though a few studies are available on the functioning of POCSO courts in some other states such as Assam and Karnataka, not even a single study is found in the context of Kerala⁷². Majority of the reports and articles on the implementation of POCSO Act is doctrinal and descriptive in nature without any empirical data. The convenience of the researcher is also considered for the selection of the state. In the third stage, Ernakulum district

⁷² Centre for Child and the Law, National Law School of India University, Bangalore conducted different studies to assess the working of POCSO Courts in five states (Delhi, Assam, Maharashtra, Andhra Pradesh and Karnataka) in India. <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf> (Delhi Report), <https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourtassamPOSCOAct2012.pdf> (Assam Report), <https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf> (Maharashtra Report). <https://www.nls.ac.in/ccl/POSCOAP2017study.pdf> (Andhra Pradesh Report). <https://www.nls.ac.in/ccl/jjdocuments/posco2012karnataka.pdf> (Karnataka Report).

was selected as it is in this district the first exclusive POSCO court in Kerala was set up.

A total of 185 judgments of special court under POCSO Act, Ernakulam from February 2013 to October 2017 were collected in which the proceedings of 7 cases were quashed by producing High Court order by the accused, 4 cases were transferred to JFCM Court, 12 cases were transferred to LP cases as the accused was absconding and in 3 cases the charge abated by the death of accused. The reason for transferring cases to JFCM Court is that the sexual offences are not charged and the special Court applied the rule in *Thressiamma Varkey v. State of Kerala*⁷³. The judgments of 8 cases were not available in the website. Thus a total of 151 judgments from February 2013 to October 2017 were selected for in-depth analysis and study.

1.13 Scope of the research

In a country like India which characterized by the existence of multicultural, multi ethnic and multi religious population, the problem of socially

⁷³ 2017 (3) KHC 656, The Hon' High Court of Kerala issued following directions for compliance by the subordinate courts:

- "a) All cases pending before the Children's Court, where the proceedings are not concluded shall be transferred to the Magistrate Court concerned as provided under Section 228 (1)(a) Cr.P.C. for trial and disposal in accordance with law, unless at least one of the offences for which the accused is being tried is punishable with imprisonment of more than seven years.
- b) In cases where the proceedings are concluded under the Old Act, the same cannot be re-opened for the purpose of complying with the new procedure.
- c) No case against the children or violation of child rights shall be committed to the Sessions Court for being tried before the Children's Court unless at least one of the offences for which the accused is being tried is punishable with imprisonment of more than seven years.
- d) If none of the offences for which the accused is being tried is punishable with imprisonment of more than seven years, then, even if the case has been already numbered as C.P., the trial can be conducted by the Magistrate Court concerned by changing the nomenclature as C.C. or S.T. as the case may be, as the change in nomenclature does not affect the substantive right of the parties."

marginalized and economically vulnerable sections are enormous. Our country has a large child population exposed to all types of abuse, neglect and exploitation. The increased awareness and attention on the matter of child sexual abuse and child protection has created wide spread discussion and activism in the public arena which has led to the passing of POSCO Act by the Government of India in 2012. Since then, POCSO courts are functioning exclusively for the trial and prosecution of child sexual abuse cases in all most all the states in the country. Even after the enactment of special legislation and procedures for curbing the menace, the instances of child sexual abuse and exploitation are still in the main heading of the daily news in our country. Not a single day is exempted without reporting the grave sexual offences against the children.

Thus the study attempts to highlight the extent of the problem of child sexual abuse in India and its legal implications. The study includes a critical analysis of legislative framework in India for prosecuting child sexual abuse cases before and after the enactment of the POCSO 2012. It examines the effectiveness of the Act by analysing procedures and role of various stakeholders under the Act to find out the barriers in the implementation of the Act. For this an empirical study is conducted on the procedural compliance of POCSO court in the state of Kerala (Ernakulam district) and examines how far these courts are victim friendly and successful in punishing the offenders. Thus the present study helps in understanding the challenges in the implementation of the Act and will throw light on evolving policy decisions that can strengthen the legal framework against child sexual abuse in the country. The term 'legal implications' used in

the title refers to substantial and procedural laws against child sexual abuse and reported case law decisions of the Supreme Court of India and various High Courts.

1.14 Limitations of the study

- 1) The study mainly deals with legal implications of non-commercial forms of sexual abuse and exploitation against children by adult offenders. Commercial forms of sexual exploitation of children such as child sex tourism, child prostitution, child trafficking and child marriage etc are neither analysed nor the trial and prosecution of such grave forms of CSA covered under the study.
- 2) The empirical study is restricted only to the analysis of judgments of POCSO court in Ernakulam district in Kerala. In fact there are some other states where the crime rate under POCSO Act is higher than that of Kerala. Hence the inference about the working of POCSO courts and prosecution of CSA in the courts of such states to be taken with due consideration.
- 3) The primary data for the empirical study is mainly taken from what was available on the district courts' websites and not from the actual case files. Hence certain facts and procedural aspects of trial could not be ascertained or accessed. As a result, certain information remained incomplete regardless of the best efforts of the researcher.
- 4) Even though various stakeholders were interviewed for the study to identify the crucial barriers in implementation of POCSO Act and to know their

experiences in the legal process of sexual offences against children, the study does not highlight on the working of this administrative functionaries thoroughly. Despite of the fact that these aspects of implementation of the Act are similarly significant, it is beyond the reach of the study.

1.15 Chapter Design

The study on “Legal implications of Child sexual abuse in India with special reference to Protection of children from Sexual offences Act’ has been presented in nine chapters and structured as follows:

The Introductory chapter is devoted to the study of scope, objectives and utility of the topic. The chapter gives a brief idea of concept of child and legal age of children in Indian scenario and also the development of child rights and the concept of child protection against sexual abuse and exploitation of children. In addition to this, the chapter explains the context of this research work, the scope and objectives of the study, the main research questions methodology adopted and scheme of the research for the study.

The second chapter titled ‘Concept of child sexual abuse: Kinds, causes and effects’ provides a comprehensive overview of concept and various definitions of the child sexual abuse. The chapter also throws light upon various kinds of child sexual abuse and examines the reasons for the issue. The short term and long terms effects of child sexual abuse is also described in this chapter.

The third chapter is a comprehensive analysis of various study reports in India to understand the extent and prevalence of the problem of child sexual abuse in the country. The chapter gives a brief outlook of the extent of CSA in a

global perspective and also analyses the magnitude of problem in India by reviewing various literatures, studies conducted by NGOs, the government study related to child sexual abuse, and also NCRB statistics on CSA in India during the period of study. A small idea of prevalence of CSA cases in state of Kerala also illustrated in the chapter.

The fourth chapter is an analysis of legal framework regarding child sexual abuse in India with an analysis of international instruments like UNCRC, Indian constitution, general criminal law against sexual offences against children prior to POCSO Act, various judicial decisions and law commission reports. The impact of Criminal Law amendment Act 2013 upon the law against child sexual abuse also has been discussed.

The fifth chapter is a detailed statutory analysis of Protection of Children from Sexual Offences Act 2012. Salient features of the Act and effective criticism on certain gaps in the legislation are included in this chapter.

Chapter six examines how Indian legal system punishes a sexual abuse offender by analysis of various procedures in prosecuting child sexual abuse cases and role of various stakeholders under POCSO Act.

Seventh chapter is devoted for an empirical study regarding the court proceedings of child sexual abuse cases and it has been conducted by analysis of judgments of POCSO Court in Ernakulam district, Kerala.

Chapter eight examines the major barriers in the effective implementation of POCSO Act in India and also analyses difficulties faced by various stakeholders to fulfil their duties under the Act.

The ninth chapter summarizes the findings and conclusions of the research and suggestions for the effective implementation of law for the prevention of child sexual abuse. Original proposals resulting from the research are submitted in this regard.

CHAPTER 2

CONCEPT OF CHILD SEXUAL ABUSE: KINDS, CAUSES AND EFFECTS

2.1 Introduction

Child sexual abuse constitutes gruesome trauma that causes lifelong impacts on the victims. While searching the history of child sexual abuse it is a fact that the phenomenon was continually denied by the society, clinical practitioners, and medical specialists during earlier ages. The history and recognition of prevalence of CSA in the modern society has undergone 'three discoveries'.¹ Firstly Sigmund Freud identified the occurrence of childhood sexual abuse as a traumatic experience for the victims. When large number of female patients shared the experiences of childhood sexual abuse, he endorsed it to hysteria, which is known as "*seduction theory*". But to safeguard the patriarchal system, Freud acknowledged the perpetrators "*to other children, caretakers and distant relatives but not the father*". After that because of peer pressure Freud, disclaimed the "*seduction theory*" and claimed his patient's experiences to 'incestuous fantasies' than sexual abuse. For decades after Freud and his seduction theory professionals kept silent on the topic of prevalence of childhood sexual abuse.² Second recognition was during the 1940's, by social scientists who conducted large scale survey studies of sexual practices, including

¹ HERMAN, J. L. FATHER-DAUGHTER INCEST. Cambridge, MA: Harvard University Press (1981).

² Id p 10

Kinsey studies³. These studies revealed that 20% to 30% of the women participated in survey had a sexual experience with a male during their childhood. About 4% and 12% reported a sexual experience with a relative and 1% reported such experience with their own father. The third discovery of childhood sexual experience is during 1970's and says that the feminist movement all over the world brought up the problem of CSA into the public awareness, along with other issues of "*wife battering and rape*". This was followed by many systematic and scientific studies of prevalence, causes and impacts of this social problem.⁴ The chapter discusses the concept and various kinds of CSA and a close analysis of causes and impacts of this problem.

2.2 Defining child sexual abuse

Millions of children are victims of sexual abuse and exploitation each year. There have been a number of definitions of the phrase "*child sexual abuse*". Cultural differences are the main reason for the varied child sexual abuse definitions.⁵ Perceptions regarding definition of CSA are determined by various cultural and social factors as some offensive acts in one culture may be quite usual in another.⁶ Not only had this but the legal age of ending of childhood and age of consent for sexual activity also differed from country to country. However there is lack of uniformity in the various definitions of word sexual that led to

³ KINSEY AC & POMEROY WB & MARTIN CE & GEBHARD PH., SEXUAL BEHAVIOR IN THE HUMAN FEMALE. Saunders; Oxford: 1953. Google scholar

⁴ Id p 17

⁵ REKHA WAZIR & NICO VAN OUDENHOVEN INT'L CHILD DEV. INITIATIVES, CHILD SEXUAL ABUSE: WHAT CAN GOVERNMENTS Do? 3 (eds., 1998).

⁶ Id

many generalized definitions of child sexual abuse that attempt cross-cultural application.⁷ CSA could be termed as “*an activity relating to the engaging of sex organs for sexual gratification, which takes advantage of, infringes the children*”.⁸ It is a form of child abuse in which an adult or elder child or adolescent uses a child for sexual motivation or enjoyment.

The **United Nations** has defined child sexual abuse as

*“contacts or interactions between a child and an older or more knowledgeable child or adult (a stranger, sibling or person in position of authority, a parent or a caretaker) when the child is being used as an object of gratification for the older child's or adult's sexual needs. These contacts or interactions are carried out against the child using force, trickery, bribes, threats or pressure.”*⁹

As defined by **WHO**

“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:

⁷ Jennifer Bays Beinart, *Beyond trafficking and sexual exploitation: protecting India's children from inter and intra-familial sexual abuse*, IND. INT'L & COMP. L. Rev, Vol.21:1, p 52.

⁸ Bhajpai Asha, *The Legislative and Institutional Framework for Protection of Children in India*, IHD-UNICEF WORKING PAPER SERIES CHILDREN OF INDIA: RIGHTS AND OPPORTUNITIES, Working Paper No. 5, (2010)

⁹ *Sexually abused and sexually exploited children and youth in south Asia : A qualitative assessment of their health needs and available services*: UN ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC, New York :UN ESCAP (1999)

- *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”.*¹⁰

This definition covers both the commercial and non-commercial forms of child sexual abuse and exploitation. The term includes any sexual activity of an adult or adolescent child with another child, any unlawful sexual activity with a child, child prostitution, child pornography, and also any unlawful sexual practices with child.

The National Society for the Prevention of Cruelty to Children defines that

*“sexual abuse involves forcing or enticing a child or young person to take part in sexual activities, including prostitution, whether or not the child is aware of what is happening. The activities may involve physical contact including both penetrative and non-penetrative acts such as kissing, touching or fondling the child's genitals or breasts, vaginal or anal intercourse or oral sex. They may include non-contact activities, such as involving children in looking at, or in the production of, pornographic material or watching sexual activities, or encouraging children to behave in sexually inappropriate ways”.*¹¹

In sexual abuse of children the child is used or exploited for the sexual gratification of an adult or an elder child.

¹⁰ Report of the Consultation on Child Abuse Prevention; World Health Organization, Geneva, 29–31 March, 1999, Document WHO/HSC/PVI/99 (Feb 12 2016, 10.30 a.m.), http://www.who.int/violence_injury_prevention/violence/neglect/en/, p 62

¹¹ NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN· UK (Mar 12 2018), <http://www.nspcc.org.uk>

The American medical association defines the term as *the engagement of a child in sexual activities for which the child is developmentally unprepared and cannot give informed consent.*¹² The fact is that it is often characterized by deception, force or coercion. Sexual abuse is never the child's fault regardless of the child's level of maturity or the child's behaviour. These are of either may be in the form of contact types including abuse by "*penetration*¹³, *non-penetrative acts such as masturbation, kissing, touching or non-contact forms of sexual abuse, such as engaging children in looking into sexual images, watching sexual activities, encouraging children to act in sexually improper ways, or grooming a child via offline or online*".¹⁴

The council of Europe defines Sexual abuse as

*"a) engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities (this does not apply to consensual sexual activities between minors); and b) engaging in sexual activities with a child where use is made of coercion, force or threats; or abuse is made of a recognized position of trust, authority or influence over the child, including within the family; or abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence"*¹⁵.

¹² *Diagnostic and treatment guidelines on child sexual abuse: AMERICAN MEDICAL ASSOCIATION, Chicago: March 1992.*

¹³ For example rape and oral sex

¹⁴ Supra n 11

¹⁵ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, Article 18

National Human Rights Commission of India identifies the instances of child sexual abuse as follows:

- 1) *“showing ones genitals to child or persuading one child to do the same*
- 2) *An adult touching the child’s genitals with a hand or any other objects, or making a child touch genitalia*
- 3) *An adult making an verbal or other sexual suggestion to a child*
- 4) *An adult persuading a child to engage in sexual activity*
- 5) *An adult making a child witness any sexual act and*
- 6) *An adult inducing or encouraging a child to hear view or read any pornographic material”*.¹⁶

The **MWCD Report** defines sexual abuse as

*“inappropriate sexual behavior with a child. It includes fondling a child's genitals, making the child fondle an adult's genitals, sexual assault (intercourse, incest, rape, and sodomy), exhibitionism and pornography. To be considered child abuse, these acts have to be committed by a person responsible for the care of a child or related to the child (for example, a babysitter, parent, neighbour, relatives, extended family member, peer, older child, friend, stranger, or a day-care provider).”*¹⁷

The Report classifies sexual abuse of children into two categories as severe forms and other forms. Severe forms of sexual abuse include sexual assault, including rape and sodomy, touching or fondling a child, exhibitionism that forcing a child to exhibit his/her private body parts and photographing a child in nude. The other forms of sexual abuse include forcible kissing, sexual

¹⁶ *A Guidebook for the Media on sexual Violence against Children*, NATIONAL HUMAN RIGHTS COMMISSION, pp 7-8, www.nhrc.nic.in/Documents/publicatiobns/MedGuideChild.pdf.

¹⁷ Kakkar, L., Varadan, S., & Kumar, P. *A Study on Child Abuse: India*. MINISTRY OF WOMEN AND CHILD DEVELOPMENT, Government of India, 2007, p 13. (Dec 12 2012) <http://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf>.

advances towards a child during travel, sexual advances towards a child during marriage situations, exhibiting before a child and exposing a child to pornographic materials.¹⁸

Inherent in the various definitions are concepts of violation of trust, abuse of power, the child's inability to consent, the age differential between the abuser and the child, the cognitive, emotional, psycho-sexual development level of the child and the sexual intent of gratification.¹⁹ Various definitions differ on determining whether a particular behaviour is sexually abusive or not. This definitional difficulty arose because of the following reasons;

- 1) *“There is no uniformity in determining ending age of childhood”*.²⁰
- 2) Different observations about the question whether non contractual activities included in definition of CSA.
- 3) *“Variations in age of consensual sex between minors”*.²¹
- 4) *“To decide whether a particular behavior is abusive or not the context of such acts should also be considered”*.²²

Thus there is a gap in definitional discussions on the point of development of children and sexuality and also an uncertainty regarding the normal sexual activities in children and adolescents. This is because the varying

¹⁸ *Id* p 73

¹⁹ *Child sexual abuse*, CHILDLINE INDIA, <http://www.childlineindia.org.in/Understanding-Child-Sexual-Abuse.htm>hing.

²⁰ Finkelhor, D. (1994). *Current Information on the Scope and Nature of Child Sexual Abuse. The Future of Children. Sexual Abuse of Children*,4(2), 31-53

²¹ Lator, K., & McElvaney, R. (2010). *Overview of the nature and extent of child sexual abuse in Europe*. In Council of Europe, *Protecting children from sexual violence - A comprehensive approach* (pp. 13-43).Strasbourg: Council of Europe.

²² Haugaard, Jeffrey, *The Challenge of Defining Child Sexual Abuse*. J. AMERICAN PSYCHOLOGIST, v55 n9 p1036-39 Sep 2000.

concepts of children and sexuality and the ethical limitations in conducting empirical research on childhood sexuality.²³

Government of India study report contradicts various existing perceptions regarding child sexual abuse. For example “53.22% of children in India had been sexually abused at some point in their lives and 50% of the victims knew the offenders”.²⁴The abuser is someone known to the child, and may be part of her day-to-day life as a father, brother, cousin, servant, or friend. More offenders are male than female but it is not solely perpetrated by adult males. Women and other children can also perpetrate sexual abuse against children. It is not limited to any particular religion, class, age, educational background, etc but it covers all class of society. Sexual abuse of children is committed in all rural or urban areas and among all cultural and socioeconomic groups.²⁵

2.3 Kinds of child sexual abuses

Various kinds of child sexual abuse encompasses the practice of physically or psychologically coercing children to participate in activities, commonly with a parent or caregiver for the purpose of sexual gratification (inter and intra familial sexual abuse of children); the commercial sexual exploitation of children, including pornography and prostitution; and sexually abusive cultural practices including early and forced marriages, female genital

²³ Vizard, E. *Sexually Abusive Behaviour by Children and Adolescents*. *Child and Adolescent Mental Health*, (2006). 11(1), 2-8.

²⁴ *Supra* note 17

²⁵ *Fact sheet on child sexual abuse*, THE NATIONAL RESOURCE CENTRE ON CHILD SEXUAL ABUSE, Huntsville: NRCCSA,1994.

mutilation²⁶, and virginity exams.²⁷ Sexual assault against children can be committed as a tool of political oppression, genocide and as a weapon of war by hostile, friendly and even neutral parties.²⁸

2.3.1 Child sexual abuse by family members and caretakers

*“Family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.”*²⁹ A majority of child sexual abuse cases occur in the home, school or the neighborhood next door. In India, many gruesome incidents have been recorded in the past ranging from *“incest, rapes, sexual abuse, digital rape, sodomy and also inappropriate touch to sexual assaults”*.³⁰ The kind of incest which involves an adult and a child, is generally considered to be a type of child sexual abuse.³¹ Incest between a child or adolescent and a related adult has been identified as the most widespread form

²⁶ *Female genital mutilation*, WORLD HEALTH ORGANIZATION,: A joint WHO/UNICEF/UNFPA Statement, Geneva (1997)

²⁷ A virginity test is the practice and process of determining whether a person, usually a female, is a virgin. It is usually includes a gynaecological examination conducted under the belief that it determines whether a woman or girl has had vaginal intercourse — must end, United Nations agencies call for ban on virginity testing, <https://www.who.int/news-room/detail/17-10-2018-united-nations-agencies-call-for-ban-on-virginity-testing>

²⁸ Reports allege that UN peacekeepers engaged in child sexual abuse and exploitation in southern Sudan. UN News Service, Joint UN-Sudan Government Task Force to Deal with Issue of Sexual Exploitation, (3 April, 2014, 9. A.m.) <http://www.un.org/apps/news/story.asp?NewsID=21274&Cr=sudan&Cr1>.

²⁹ Preamble to Convention on the Rights of the Child, 1989.

³⁰ Alok Kumar, Asha Pathak, Sandeep Kumar, Pooja Rastogi, & Prateek Rastogi, *The Problem of Child Sexual Abuse in India Laws, Legal Lacuna and the Bill – PCSOB-201*, J INDIAN ACAD FORENSIC MED. April-June 2012, Vol. 34, No. 2, p 170

³¹ Lorie Fridell, *Decision-making of the District Attorney: Diverting or Prosecuting Intra-familial Child Sexual Abuse Offenders*, CRIMINAL JUSTICE POLICY REVIEW, vol.4, 1990.p 249

of child sexual abuse with a huge capacity for damage to a child. It is a physically and emotionally damaging form of sexual assault, in which the child's trust is violated by a family member. A child sexual abuse offense where the perpetrator is related to the child, either by blood or marriage, is a form of incest described as intra- familial child sexual abuse.³²

The incest and child sexual abuse includes exploitative sexual activity, whether or not they involve physical contact between child and another person, who by virtue of his power over child due to age, strength, position or relationship uses the child to meet his own sexual and emotional needs.³³ The act, therefore, not only a gross violence on child's body but also on the trust implicit in a care giving relationship.³⁴ Obtaining data on the prevalence of this type of child sexual abuse is particularly difficult given that the offenders are often the persons asked to report on the problem. However, prominent international studies point out that "*one in every four girls in the world is sexually abused*".³⁵ The worst part is that such abuse is inflicted upon a child by a person in his immediate circle and a stunning majority of these cases go unnoticed or unreported.³⁶ Child sexual abuse especially when it is intra-familial

³² *id*

³³ *Voices from the silent zone: Women's experiences of incest and child hood sexual abuse, Recovering and Healing From Incest, RAHI, New Delhi 1998.*

³⁴ ADENWALA MAHARUKH, CHILD SEXUAL ABUSE AND THE LAW, India centre for human rights and law,14 (1ed 2000)

³⁵ *World Report on Violence and Health*, WORLD HEALTH ORGANIZATION (WHO), Geneva, (2002) (12 Feb.2015, 9.30 a.m.), www.who.int/violence_injury_prevention/violence/world_report/.

³⁶ Alok Kumar, Asha Pathak, Sandeep Kumar, Pooja Rastogi, & Prateek Rastogi "*The Problem of Child Sexual Abuse in India Laws, Legal Lacuna and the Bill – PCSOB-2011*" J OF INDIAN ACAD FORENSIC MED. April-June 2012, Vol. 34, No. 2

always covered in secrecy. About 70% of such cases goes unreported and the reasons are probably the tight-knit family structure, the dominating role of the fathers and uncles in the family, the women's defenselessness to speak against injustice and the deep rooted tendency not to tolerate "family shame" to be exposed at anyway.³⁷ Adults in India are often seen to exercise a near feudal hold over children demanding their unquestioned and complete obedience. What is worse is that a feeling of shame and silence characterizes cases of sexual violence against children and this often comes in the way of bringing offenders to justice. In this kind of sexual abuse it is necessary to have direct state intervention whereby the state takes over the responsibility to care for the child.³⁸ There is a hesitant attitude towards family member one who sexually exploit and abuse children and a reluctance to impose sanctions on them.³⁹ The state machinery justifies non actions in such cases on the grounds of privacy of family.⁴⁰ *Smt. Sudesh Jhaku v. K.C. Jhaku*⁴¹ is a case related with sexual abuse of 8 years old girl child by her own father and colleagues of her father. Her father was then Under Secretary in the Ministry of Home Affairs. In this case that little girl used to be taken by her father to his office and from there to a hotel room in or around the Pavilion restaurant. The others to accompany them were the persons who were colleagues of her father. Enclosed there, they would consume alcohol,

³⁷ Shoma Chatterji, *Incest and conspiracy of silence*. INDIA TOGETHER, (April 30 2015) www.indiatogether.org/2009/apr/chi-incest.htm

³⁸ Supra n. 29

³⁹ Id

⁴⁰ Id

⁴¹ 1998 Cr LJ 2428 Delhi.

watch what are generally known as “blue films” and revel in sex organs. And, during those games of sexual anarchy KCJ would give his own daughter alcohol, remove her clothes, and force his fingers in her vagina and anus. The C.B.I. filed charge-sheet not only against KCJ but against his office colleagues as well. It was under Sections 376, 377, 354, 366-A read with Section 109 of the Indian Penal Code. On February 7, 1996 the learned Additional Sessions Judge charged KCJ under Sections 354, 377 and 506 of the Indian Penal Code. The others were charged under Section 109 for having abetted the commission of offences under Sections 354 and 377. The mother of the child on whose complaint the case was registered was not satisfied with the order of charge. She felt that besides the Sections referred to above, the accused ought to have been charged under Sections 376 and 366-A of the Indian Penal Code also and therefore she filed revision petition in the Delhi High Court. Dismissing the revision petition the High Court refused to give wider interpretation to definition of ‘rape’ so as to include penetration of a bodily orifice (vagina, anus or mouth) by a penis or other part of the body, or by an object.

In *Kamta Tiwari v. State of Madhya Pradesh*,⁴² a case related with kidnapping, cruel rape and murder of 7 years old girl. The Supreme Court while dismissing the appeal held that when an innocent helpless girl of 7 years was subjected to such barbaric treatment by a person who was in a position on her trust, his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of common man. The Court, in view of the

⁴² AIR 1996 SC 2800

motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof opined that this was a “rarest of rare” case where the sentence of death was eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society’s abhorrence of such crimes. In *Delhi Commission for Women v. Delhi Police*,⁴³ the Delhi Commission for Women in pursuance of order of the Delhi High Court had filed draft guidelines to enable the authorities to effectively tackle sexual offences including incest and child sexual abuse offences. So, guidelines were issued by the Court to police, hospitals/doctors, Child Welfare Committees, Sessions Court, Magistrate Courts, Prosecutors and other concerned authorities.

⁴³ W.P. (CRL) 696/2008, Delhi High Court. Date of Order April 23, 2009. The court issued following guidelines:

- “(i) In cases of incest and child in need of care and protection, the Child Welfare Committee shall examine the victim to ascertain the nature of support she is getting from her family and initiate steps for ensuring best interest of the child. In such cases the Child Welfare Committee shall conduct a home study to assess and ensure the safety of the victim*
- (ii) In cases where the child is placed in the shelter, the Committee shall monitor the condition of the victim closely.*
- (iii) In cases of incest, while the victim stays in the foster home the family members should be allowed to meet the victim only in the presence of the support person and care be taken by the staff of the home that the meeting be not used to pressurize/ influence the victim to change for statement.*
- (iv) Child Welfare Committee shall ensure that rehabilitation facilities are provided to the victim in appropriate cases. In cases of a prolonged stay, the victim should be given educational and vocational training in order to enable the victim to support herself after she leaves the foster home. The Social Welfare Department and Child Welfare Committee will develop and implement Foster Care Services within two months.*
- (v) Before passing any order of restoration of custody of child to the family, the Child Welfare Committee shall conduct an inquiry to assess the suitability of the victim being restored to the family. The custody of the child will be altered by the Child Welfare Committee only after consultation with the stakeholders.*
- (vi) Child Welfare Committee shall ensure that the victim is provided with necessary medical and psychological aid during her stay in foster home for the purpose of her rehabilitation.*
- (vii) Child Welfare Committee shall maintain a list of all registered Foster Homes providing residential support, special services and rehabilitation facilities to the victim”.*

Recently instances of child sexual abuse within the four walls of child care institutions have also come to light. Under law the institution is directly liable for the commission of the offence and is also liable for damages. Those responsible for managing the child care facility are also liable. In most cases the management attempts to conceal the abuse and instead of punishing the abuser transfers the victim child to another institution.⁴⁴ Children in these institutions are sometimes sexually abused by other children in the institution. It is the responsibility of the institution to take steps to ensure that this does not happen.⁴⁵ In *Kriest Periera v. State of Maharashtra*⁴⁶, the Maharashtra High Court has used innovative methods to ensure justice to the child. This was a public interest litigation, which was filed after the death of a child in a remand home in Bhiwandi under mysterious circumstances. The Mumbai High Court constituted a committee of experts to examine the conditions in different juvenile remand houses, children's homes, and special homes in the state of Maharashtra and to make appropriate recommendations for improving their standards. The report of the committee brought to light the extremely distressing and pathetic conditions including sexual abuse of children prevailing in the various homes in the state. *State of Goa v. Freddie Peats and others*⁴⁷, is a case of sexual exploitation of children by the accused, a medical doctor and social worker who ran a 'boarding' or 'orphanage for boys generally from broken home and deprived families. The

⁴⁴ Supra n.34, p 19

⁴⁵ Supra n. 34, p 20

⁴⁶ Cr.writ petition No.1107 of 1996, High Court of Bombay

⁴⁷ Sessions Case No. 24/1992. Criminal Appeal No. 4/1996. (Goa Bench of Mumbai High Court).

accused used to sexually abuse and assault boys. The Sessions Court held that *“the accused is guilty of various offences under the Indian Penal Code, the Immoral Traffic Act and the Juvenile Justice Act. He was ordered life imprisonment and fine”*.

2.3.2 Commercial Sexual Exploitation of Children (CSEC)

The International Labour Organization (ILO) has condemned the commercial sexual exploitation of children as one of *“the worst forms of child labour”*.⁴⁸ A declaration of the World Congress against Commercial Sexual Exploitation of Children, held in Stockholm in 1996, defined CSEC as *“sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons. The child is treated as a sexual object and as a commercial object.”* It constitutes a form of coercion and violence against children and amounts to forced labour and a contemporary form of slavery.

2.3.2.1 Child Trafficking

The US Trafficking Victims Protection Act of 2000 defines severe forms of trafficking in persons include *“any commercial sex act performed by a person under 18”*. This means that *“any child who is commercially sexually exploited is defined as a trafficking victim”* whether or not movement has taken place. CSEC is a part of but distinct from child abuse or child sexual violence.⁴⁹ Child trafficking is one of the biggest industry in the commercial sexual exploitation and it itself is a *“worst form of sexual exploitation of children”*. UN

⁴⁸ Worst Forms of Child Labor Convention (Convention No. 182).ILO

⁴⁹ Victims of Trafficking and Violence Protection Act of 2000. US Department of State.

Convention against Transnational Organized Crime defines Child Trafficking “as the recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation”.⁵⁰ Child trafficking includes exploitation for prostitution or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery or the removal of organs. What is very disturbing is that “the available evidence indicates that one third of people exploited in flesh trade are children or minor.”⁵¹ All forms of commercial sexual exploitations are correlated through trafficking of children and the child prostitution is an unavoidable ingredient of child sex tourism. Approximately 150,000 women and children are trafficked from South Asia every year and most of them from, via and to India. Trafficking in children for commercial sexual exploitation exists on a large scale in India and in many forms. It cannot be eradicated without much strain especially from a country where the gaps between the rich and the poor is wide, such as India and other Asian countries.

The UNICEF defines that “child sexual abuse becomes sexual exploitation when a second party benefits a profit or quid pro co through sexual activity involving a child”.⁵² This includes the prostitution of children, child pornography, child sex tourism where a child engages in sexual activities to fulfil his basic needs such as food, shelter or access to education. The Optional

⁵⁰ Art 3 “UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,” 2000

⁵¹ Shayan Dasgupta, *Protection of Children from Sexual Abuse* BBA, IOSR Journal OF HUMANITIES AND SOCIAL SCIENCE (IOSR-JHSS) Volume 7, Issue 2 (Jan. - Feb. 2013), PP 64-71, www.Iosrjournals.Org

⁵² UNICEF Child protection programme homepage, www.unicef.org/programme/protection 2011

Protocol to the Convention on the Rights of Child on the sale of children, child prostitution and child pornography was signed on 15th November 2004 and ratified on August 2005.

2.3.2.2 Child Pornography

Legal definitions of child pornography generally include “*sexual images involving pre-pubescent and pubescent or post-pubescent minors and computer-generated images that appear to involve them*”.⁵³ The European Convention on the Protection of Children against Sexual Exploitation and Abuse 2007 defines the term Child pornography to mean “*any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes*”.⁵⁴ It criminalizes the participation, preparing to participation and coercing to participation of child in pornographic practices and profiting from or otherwise exploiting a child or knowingly attending pornographic purposes involving the participation of child. Child pornography can be of two types that are “*simulated child pornography and pornography which was produced with direct involvement of the child*”. It is among the fastest growing criminal segments on the Internet. With the aid of internet technologies, child pornography is readily available and relatively easily concealed. Pornographers use web chats and postings to create

⁵³ Wells, M., Finkelhor, D., Wolak, J. & Mitchell, K. *Defining Child Pornography: Law Enforcement Dilemmas in Investigations of Internet Child Pornography Possession*, POLICE PRACTICE AND RESEARCH 8 (3): 269–282.(2007)

⁵⁴ Art 20

sophisticated, international, underground networks through which images and videos can be shared, and victims can be exploited.⁵⁵

Despite international condemnation and sweeping legislation, the child pornography industry continues to generate billions of dollars a year.⁵⁶ Producers of child pornography try to avoid prosecution by distributing their material across national borders, though this issue is increasingly being addressed with regular arrests of suspects from a number of countries occurring over the last few years.⁵⁷ The prepubescent pornography is viewed and collected by pedophiles for a variety of purposes, ranging from private sexual uses, trading with other pedophiles, preparing children for sexual abuse as part of the process known as child grooming, or enticement leading to entrapment for sexual exploitation such as production of new child pornography or child prostitution. Child pornography is illegal and censored in most jurisdictions in the world.⁵⁸

2.3.2.3 Child Prostitution

Child prostitution is a part of the commercial sexual exploitation of children in which a child performs the services of prostitution, for financial benefit. It is defined as *“the practice whereby a child hires out his or her body for sexual activities in return for remuneration or any other form of*

⁵⁵ www.humanrightsadvocates.org/wp.../05/DahlstromReportFinal.doc

⁵⁶ ROGER J.R. LEVESQUE, *SEXUAL ABUSE OF CHILDREN: A HUMAN RIGHTS PERSPECTIVE* 56-7 (Indiana University Press 1999).

⁵⁷ *Child porn among fastest growing internet businesses*". NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, USA; / supra n 30.

⁵⁸ World congress against commercial sexual exploitation of children, www.Csecworldcongress.org. 2002

consideration".⁵⁹ The remuneration or other consideration could be provided to the prostituted child, or to another person. The European Convention on the Protection of Children against Sexual Exploitation and Abuse 2007 defines the term child prostitution to mean "the fact of using a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment, regardless if this payment, promise or consideration is made to the child or to a third person".⁶⁰ Child prostitution is found in both developed and developing countries despite attempts to control the practice. The number of child prostitutes has been gradually increasing and age of child prostitutes has been decreasing. The vast majority of these children do not enter into prostitution voluntarily they are enticed or coerced or are utterly desperate.⁶¹ Two of the main modes by which children are brought in to prostitution are (a) abduction and trafficking, and (b) children of prostitutes through their mothers, pimps or brothel keepers. In urban areas criminal gangs are increasingly on the hunt to lure young girls in to prostitution, especially as they are advertised as posing a lesser AIDS risk to the clients.⁶² In *Vishaljeet v. Union of India and others*,⁶³ public interest litigation was filed by an advocate seeking certain

⁵⁹ Art 2(b) of the Optional Protocol (on the sale of children, child prostitution and child pornography) to the CRC reads as "Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration." Also defined under The Worst Forms of Child Labour Convention, 1999 (Convention No 182) of the International Labour Organization (ILO) provides that the "use, procuring or offering of a child for prostitution" is one of the "worst forms of child labor."

⁶⁰ Art 19

⁶¹ *Child Prostitution: The Commercial Sexual Exploitation of Children*, <http://gvnet.com/childprostitution/00-CP.htm>

⁶² Supra n 20 p31

⁶³ AIR 1990 SC 1412

directions to the Central Bureau of Investigation to institute an enquiry against those police officers under whose jurisdiction “Red Light areas” as well as “Devadasi and Jogin” traditions are flourishing and to take necessary action against such arising erring police officers and law breakers; to bring all inmates of the red light areas and also those who are engaged in ‘flesh trade’ to protective homes of the respective states and to provide them with proper medical aid, shelter, education and training in various disciplines of life so as to enable them to choose a dignified way of life and further to bring the children of those prostitutes and other children found begging in streets and also the girls pushed into ‘flesh trade’ to protective homes and then to rehabilitate them. The Supreme Court added that *“it is deplorable to note that many poverty-stricken children and girls in their prime youth are taken to the “flesh market” and forcibly pushed into the flesh trade which is being carried on it utter violations of all canons of morality, decency and dignity of human kind. Further this malignity cannot be eradicated either by banishing, branding, scourging or inflicting severe punishments on these helpless and hopeless victims most of whom are unwilling participants and involuntary victims of circumstances”*.⁶⁴

The child prostitution industry has been maintained and promoted, due in no small part to actions of the citizens of Western Europe and the United States. For one, the clients of the child prostitution industry are mainly men from the U.S. and other economically developed countries. The UN has reported that U.S. citizens are intensely involved in child prostitution syndicates. United

⁶⁴ ID

States military forces have also long perpetuated the problem of child prostitution through both official state Rest and Recreation agreements and through the unofficial acts of individual servicemen which create similar demands.⁶⁵ The term child prostitution normally refers to prostitution by a minor, or person under the legal age of maturity or sometimes the legal age of consent. In this modern era where the consensual sex and extra marital relationships are not crimes, it is not easy for every jurisdiction to prohibit the practice of prostitution. The ongoing debate on prohibition of prostitution versus regulation of prostitution has no bearing on child prostitution- the sexual exploitation of children must be recognized internationally as a contemporary form of slavery meriting a universal prohibitionist response.⁶⁶

2.3.2.4 Child Sex Tourism

The World Tourism Organization has defined sex tourism as “*trips organized with the primary purpose of effecting a commercial sexual relationship by the tourists with the residents at the destination*”⁶⁷ Child sex tourism is tourism for the purpose of engaging in the prostitution of children, that is commercially-facilitated child sexual abuse, devastating the lives of countless poor children around the world, while governments routinely fail to prosecute perpetrators. Generally the term include the “*tourism organized with the*

⁶⁵ *Child Sex Tourism* ECPTA-USA (2003) http://www.ecpatusa.org/travel_tourism.asp.
/www.humanrightsadvocates.org/wp.../05/DahlstromReportFinal.doc

⁶⁶ Supra n. 21 p30

⁶⁷ The World Tourism Organization’s Statement on the prevention of organized sex tourism, adopted by resolution A/RES/338 (XI) of the General Assembly at its eleventh session (Cairo, Egypt, 17-22 October 1995).

primary purpose of facilitating a commercial sexual relationship with a child”,⁶⁸ but it may also include the “*opportunistic use of prostituted children while travelling or business or for other purposes*”.⁶⁹

Child sex tourism, part of the multi-billion-dollar global sex tourism industry, is a form of child prostitution within the wider issue of commercial sexual exploitation of children. India is also turning into “*sex tourism hot spot*”. More than two million children are forced into the \$10-billion-a-year global sex industry.⁷⁰ The problem is especially alarming in Asian countries. Economic conditions have considerable influence over the destiny of children, especially for children in developing countries.⁷¹ United States and European travel agencies financially benefit and further perpetuate the problem by catering to this clientele in organizing thousands of sex tours every year.⁷² The children who perform as prostitutes in the child sex tourism trade often have been lured or abducted into “*sexual slavery*”.⁷³

2.3.3 Sexually abusive cultural practices

The perspective of an emerging culture of international law recognizes some practices which are embedded in and condoned by indigenous

⁶⁸ UN Economic and social council (ECOSOC), Commission on human rights, Rights of the child: Report of special reporters on the sale of children, child prostitution and child pornography, 56, UN.Doc.E/CN.4/1996/100(jan 17, 1996)

⁶⁹ Naomi L Svensson, “Extraterritorial accountability: An assessment of the effectiveness of child sex tourism laws” 28 *Layola of Los Angeles international and comparative law review* 641(2006)

⁷⁰ *Supra* n.62

⁷¹ *Supra* n. 21 p33

⁷² *The Commercial Sexual Exploitation of Children: An Overview*, ECPAT-USA, (2003), <http://www.ecpatusa.org/background.asp>

⁷³ http://en.wikipedia.org/wiki/Child_sex_tourism

cultures as maltreating of children. It actually challenges numerous practices that sexually involve children or that affect the children's development in ways inconsistent with emerging international norms yet fully consistent with indigenous theories of sexuality and cultural life.⁷⁴ Such practices include the female genital mutilation, religious practices which lead to the encouragement of child prostitution, child marriages, and the use of "virginity exams" to determine and control girls' sexual purity. The 2007 MWCD Report states that *"harmful traditional practices like child marriage, the caste system, discrimination against the female child, child labour and the Devadasi tradition increase the vulnerability of Indian children to abuse and neglect"*.

2.3.3.1 Female genital mutilation

The World Health Organization defines the female genital mutilation as *"all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons,"*⁷⁵ and it includes *"circumcision, excision or clitoridectomy, infibulations and introcism"*.⁷⁶ The WHO estimates that *"two million girl children are subject to some form of genital mutilation each year, which is equal to approximately 6,000 per day"*.⁷⁷ It is practiced in more than forty countries around the world, though primarily in Africa and the Middle East. The Centers for Disease Control and Prevention estimates that more than *"168,000 women*

⁷⁴ Supra n 31 p 100

⁷⁵ *Female genital mutilation*, WORLD HEALTH ORGANIZATION, February 2010.

⁷⁶ <http://www.circumstitions.com/FGM-defined.html>.

⁷⁷ *World Report on Violence and Health*, WHO, supra n 17

and girl children in the U.S. have undergone or are at risk of being subject to female genital mutilation”.⁷⁸The procedures are often performed as a “rite of passage or prerequisite to marriage”, or to ensure or preserve a “girl’s chastity”, or in some extreme cases to avoid what is perceived to be a health risk to the fetus.

2.3.3.2 Religious practices

Generally religious values concentrate on preventing tendencies of moral corruption but certain malpractices are known to take place in the name of religion with parental and family support which amount to child sexual exploitation. An example of such practice is the “*devadasi*” custom⁷⁹ of dedicating poor girl children from lower castes to goddesses and the religious prostitution practiced in various parts of India and Nepal. “*Devdasicults*” who are spread over the southern regions and the regions of Uttar Pradesh and Orissa constitute girls of 5-9 years of age. They are auctioned to the highest bidder, after the girl has been branded with red-hot iron rods on the shoulders and the breasts, as he has the privilege of taking the girl child’s virginity. Even today “almost 95% of the Harijan communities force their girl children in to this religious prostitution which easily circumvents our legal framework”.⁸⁰

⁷⁸ Wanda K. Jones., *Female Genital Mutilation/Female Circumcision: Who Is at Risk in the U.S.?*, PUB. HEALTH REP. 368, 372 (1997).

⁷⁹ *Devadasi* system in India is a religious practice in the states of Maharashtra, Karnataka, Andhra Pradesh, Orissa and Tamil Nadu, whereby parents dedicate a daughter to worship and service of a Hindu deity for the rest of her life. The marriage usually occurs before the girl reaches puberty and requires the girl to become a prostitute for upper-caste community members. They are forbidden to enter into a real marriage.

⁸⁰ *Supra* n 27, p 67.

2.3.3.3 Child marriages

The term child marriage includes a number of different practices in which at least one of the parties is under the age of 18. It refers to marriages that are physically forced, or arranged with or without consent between parties of like age or where one party is considerably older than the child bride.⁸¹ It is a socially established practice that has been carried on for centuries and of course with the support of religion and family. It is important that according to the report of UNICEF it is found as *“a universal phenomenon. But it is common in Sub Saharan Africa and South Asia. In south Asia it is widely prevalent in Bangladesh, Afghanistan, Nepal, Pakistan and India”*.⁸² In child marriages the girl child is subjected to more abuses than the boy child. Because child marriage ultimately determines the girl child’s eventual sexual partner, it also determines her sexual relations. For this reason, child wives are at a greater risk of both physical and sexual abuse.

Although child marriage is a cultural practice, it is condoned by states to the extent that they allow children or their parents to consent to marriage.⁸³ Because international law defines children as *“those under the age of 18, laws that set the age of consent at any age less than that”* violates of Article 16(1) of the Women’s Convention,⁸⁴ which recognizes the *“right freely to choose a*

⁸¹ Supra n 30, p 12

⁸² *The State of the World’s Children*, UNICEF, (2007) <http://www.unicef.org/sowc07/report/report.php>.

⁸³ Supra n 30, p 14

⁸⁴ Art 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 reads as: *“States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

*spouse and to enter into marriage only with their free and full consent.” Child marriage reflects “the commodification of women and girls, without regard to their rights as individuals, best interests, and legal capacity to provide consent to marriage”.*⁸⁵

2.3.3.4 Virginitv exams

The practice of imposed virginitv exams involves the intrusive examination of a girl child and it is conducted for control and determines girls’ “*purity and virginitv*”. To varying degrees, the virginitv of a bride is still considered a virtue in communities throughout the world. Virginitv testing, the examination of the genitals as a way to determine sexual chastity, remains popular in communities that place a high premium on virginitv for social, economic, and religious reasons. Virginitv tests take various forms, many of which are without scientific support. Although physicians have noted the unreliability of this test, the most common test for female virginitv is the presence of an “*intact hymen*”.⁸⁶ Girl children in South Africa, Turkey and Palestine continue to report being subject to the physical and emotional trauma of such examinations.⁸⁷ In India also different cultural practices have been

(a) *The same right to enter into marriage;*

(b) *The same right freely to choose a spouse and to enter into marriage only with their free and full consent”;*

⁸⁵ Center for Reproductive Rights, *Child Marriage in South Asia: International and Constitutional, Legal Standards and Jurisprudence for Promoting Accountability and Change*, 2013

⁸⁶ http://www.stopvaw.org/harmful_practices_virginitv_tests

⁸⁷ Turkey provides the best-documented examples. For example, in a 2002 report, Human Rights Watch notes that despite a 1999 ban, virginitv exams continue. HRW, Human Rights Watch World Report 2002 (2002), (Jan. 13 2015, 9) hrw.org/wr2k2/pdf/turkey.pdf. See also, HRW, *A Matter of Power: State Control of Women’s Virginitv in Turkey* (June 1994) available at <http://www.hrw.org/reports/1994/turkey/>. For information on virginitv

developed to protect a girl's virginity because female virginity before marriage is prized in India. These cultural practices include child marriage, segregating the sexes except in situations that can be observed by elders, and opposing marriage with a non-virgin female.⁸⁸

Virginity exams reflect a cultural expectation that to uphold their reputation and avoid dishonoring their families, women and girl children must remain chaste. At the root of the imposition "is the presumption that female virginity is a legitimate interest of the family, the community and, ultimately, the state."⁸⁹ However and for whatever reason virginity testing is practiced, it constitutes a clear violation of women's and girls' right to privacy and bodily integrity and are therefore a violation of Article 16 of the CRC.⁹⁰ The Convention also prohibits virginity exams under Article 37, as they are a form "of cruel, inhuman or degrading treatment of girl children".

exams in South Africa see, A. Widney Brown, WHO Background Paper: Obstacles to Women Accessing Forensic Medical Examinations in Cases of Sexual Violence, available at <http://hrw.org/backgrounder/wrd/who-bck.pdf>. For information on virginity exams in Palestine see, Nadera Shalhoub-Kevorkian, Imposition of virginity testing: a life-saver or a license to kill?, *Social Science & Medicine* 60 (2005) 1187-1196.

⁸⁸ Beinart, J.B. (2011). *Beyond Trafficking and Sexual Exploitation: Protecting India's Children From Inter and Intra-Familial Sexual Abuse*. *IND. INT'L & COMP. L. REV.*, 21, 47-78

⁸⁹ HRW, *A Matter of Power: State Control of Women's Virginity in Turkey*, supra n 58

⁹⁰ Art 16 of the Convention on rights of child 1989 reads as:

"1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation.

2. The child has the right to the protection of the law against such interference or attacks."

2.4 Causes of child sexual abuse

Traditionally, the family and community in India have been insular, authoritarian and patriarchal, with parents, guardians/ caretakers having full right over their children, to treat them in whichever way they deem fit. Traditional child rearing practices accept physical force or punishment as means of disciplining. Child beating and corporal punishment by the parents/guardians or even teachers are considered to be in the “*interest of the child*”⁹¹ The question why children are abused is not so difficult to answer⁹². The relative lack of viability of the human infant, the helplessness and defenselessness of young children, make them easy targets for sexual abuse, molestation, prostitution, pornography and therefore, destruction. Values and beliefs about issues pertinent to child sexual abuse are, “*sexuality, nudity, discipline practices, family boundaries, respect for elders, personal and familial privacy, family roles, acceptance of strangers, and help-seeking attitude are all influenced and often guided by the family’s and society’s cultural, religious and racial or ethnic identification*”.

Child sexual abuse is never victim’s fault but the offender’s. It is associated with discriminatory attitudes to women and sex that men learn from a young age, as well as unique power relationships between men and women and adults and children. There is not any single fact which causes child abuse; child sexual abuse usually occurs where there is a combination of risk factors like

⁹¹ *India country report on convention on the rights of the child*, 1997. Para 9.7 at: nipccd.

⁹² <http://www.child-abuse-effects.com/definition-of-sexual-abuse.html>

parental inadequacy, unavailability, conflict, harsh punishment, and emotional deprivation. But race and socio-economic factors are not relevant regarding causes of child sexual abuse. It is perpetrated against children and young people of all ages and in families from all backgrounds, religions and economic situations. Sexual urges and willingness to act on these, power and control issues, “*Traumatic childhood experiences*” leads to sexual abuse of children. Troubled families and the absence of one or both parents are also the reasons. Presence of a stepfather in the home doubles the risk for girls, not only for being abused by the stepfather but also for being abused by other men prior to the arrival of the stepfather in the home. Parental impairments, particularly maternal illness, maternal alcoholism, extended maternal absences, serious marital conflicts, parental substance abuse, social isolation and punitive parenting have all been associated with increased risk.⁹³

In India, child sexual abuse occurs both within and beyond the family system. The problem of child sexual abuse extends into India's early history and is considered a deep-rooted societal concern. Although child sexual abuse is a major concern in India, there is an inadequate amount of research that has specially examined child sexual abuse in Indian children and the relevant cultural factors. A significant number of India's children are at-risk for sexual trauma or already suffering the negative ramifications of abuse.⁹⁴

⁹³ Putnam, F.W. *Ten Year Research Update Review: Child sexual abuse*. J AM ACAD OF CHILD ADOLESC PSYCHIATRY, (2003). 42, 269-278.

⁹⁴ CARSON, D.K., CARSON C.K., & CHOWDHURY, A. (eds.) *INDIAN FAMILIES AT THE CROSSROADS: PREPARING FAMILIES FOR THE NEW MILLENNIUM.*, (2007). (pp.107-121), New Delhi: Gyan Pub. House.

Acts of child sexual abuse are committed by men, women, teenagers, and other children. Sex offenders are found in all areas of society and come from a variety of backgrounds. In cases of child prostitution and pornography the sexual abuse is motivated by money.

2.5 Factors Affecting the Impacts of Child Sexual Abuse

Not all abused and neglected children will experience “*long-term*” consequences. Outcomes of individual cases vary widely and are affected by a combination of factors, including:

- “*The child's age and developmental status when the abuse or neglect occurred*”
- *The type of abuse (physical abuse, neglect, sexual abuse, etc.)*
- *The frequency, duration, and severity of abuse*
- *The relationship between the victim and his or her abuser*”.⁹⁵

2.6 Effects of child sexual abuse

The effects of the sexual abuse of children are wide ranging. When we deeply enquire into the impacts of child sexual abuse on the perspective of human rights all forms of sexual abuse violate the rights of “*children to liberty and security, privacy and integrity, health*” and, in some cases, even the “*right to life*”. On a close scrutiny of the effects of the sexual abuse it is shocking that children suffering from sexual abuse develop a range of maladaptive anti social and self destructive behaviours and thoughts by trying to cope with the abuse. The secrecy shrouded around the problem prevents the child from actual

⁹⁵ English, 2005; Chalk, Gibbons, & Scarupa, 2002, (October 15, 2015 8 a.m.) https://www.childwelfare.gov/pubs/factsheets/long_term_consequences.cfm#factors

disclosing the issue which always leads to several lifelong effects and causes to deprive the child from having real and healthy social relationships. In addition to being a gross human rights violation, child sexual abuse and exploitation also causes a myriad of physical and psychological health problems and also worse impact on familial and social relationships.

2.6.1 Physiological Impacts

In most case the victim of child sexual abuse is identified by the physical indications and signs that results from being abused sexually. Child victims carry many of these health problems into adulthood and, in fact, recent studies suggest that many illnesses in adults are related to experiences of childhood abuse.⁹⁶

The physiological impacts of child sexual abuse can be classified as physical injury, infections and neurological damages. Some of the physical indications would include “*urinary tract infections*”, unusual smell, pain or itching in the genital area, bruising or bleeding near genital area, vaginal discharge, stomach pains, discomfort when walking or sitting down, early pregnancy, other wounds on the body of victim etc. Depending on the age and size of the child, and the degree of force used, child sexual abuse may cause “internal lacerations” and bleeding. In severe cases, damage to internal organs may occur, which, in some cases, may cause death.⁹⁷ Causes of death included

⁹⁶ Jennifer J. Freyd, *The Science of Child Sexual Abuse* (Science/AAAS, 2007) www.sciencemag.org.

⁹⁷ Anderson, James; Mangels, Nancie; Langsam, Adam (2004), *Child Sexual Abuse: A Public Health Issue*. THE JUSTICE PROFESSIONAL 17: 107, (Jan.5 2016 1030 p.m.) http://en.wikipedia.org/wiki/Child_sexual_abuse#cite_

trauma to the genitalia or rectum and sexual mutilation.⁹⁸ There are chances of infections are higher in children than adults due to sufficient vaginal fluid. “Vaginitis” has also been reported.⁹⁹ There are neurological damages also caused by sexual abuse, the effect of which is felt throughout the life often leading to pronounced general debility. Research has shown that traumatic stress, including stress caused by sexual abuse, causes notable changes in brain functioning and development. Various studies indicate that severe child sexual abuse may have deleterious effect on brain development.

An important physiological impact of child sexual abuse is the “*sexually transmitted diseases*” (STDs). Early pregnancy has so many risks for the girl child. Cohabitation before attaining sufficient physical maturity will lead to underdevelopment of child’s reproductive organs and expose her to several diseases.

2.6.2 Psychological Impacts

The finding and remedy of psychological impacts of child sexual abuse are very difficult. A victim of sexual abuse would have suffering a lot on such an age this could cause several psychological disorders such as behavioural problems and high risk of mental health and social functioning problems. And they may also have a tendency to suicide.

⁹⁸ Herman-Giddens ME, Brown G, Verbiest S, *et al.* (August 1999), *Under ascertainment of child abuse mortality in the United States*, *JAMA* 282 (5): 463–7.

⁹⁹ De Jong AR (1985). "Vaginitis due to *Gardnerella vaginalis* and to *Candida albicans* in sexual abuse". *Child Abuse & Neglect* 9 (1): 27–9. Vaginitis is an inflammation of the vagina caused by infections.

2.6.2.1 Behavioral problems

Behavioral problems such as “aggression, clinginess, and sleeping disorders and school problems, school refusal” are easy to note but are difficult to remedy. Extended counselling sessions with a very qualified and able counsellor would be able to remedy this. Some “behavioral signs are sudden or unexplained changes in behavior. For example the child becoming aggressive or withdrawn and fear of being left with a specific person or group of people. The child may have nightmares, bed wetting, a tendency to running away from home, eating problems such as overeating or anorexia, self-harm or mutilation, sometimes leading to suicide attempts also¹⁰⁰”. The child suddenly acting sexually explicit way towards adults, draw sexual images are also some behavioral problems attached to child sexual abuse.

Other psychological effects of child sexual abuse are the victim is shows fear and having a thought of guilt and shame. The child knows something is wrong and blames him or herself not others. The offender often makes the child feel responsible for keeping the abuse a secret. Victims feel different from other children. They must usually be secretive. Victims may become isolated from others and feel betrayed because they are dependent upon adults for nurturing and protection and the offender is someone who they should be able to love and trust. Children may feel anger against the perpetrator and also against others who

¹⁰⁰ Child protection fact sheet –“Definitions and signs of child abuse”, NSPCC, 2010 .available at www.nspcc.org.uk/inform

they feel failed to protect them. Children may feel grief due to a sense of loss, especially if the perpetrator was loved and trusted by the child.¹⁰¹

2.6.2.2 Long term effects

In the long term the child may also experience a number of effects as an adult. These may include *“expression, anxiety, trouble in sleeping, Low self-esteem, ‘Damaged goods syndrome’,¹⁰² dissociation from feeling, social isolation, relationship problems such as an inability to trust, poor social skills or reluctance to disclose details about themselves, self-destructive behavior such as substance abuse or suicide attempts, sexual difficulties such as fear of sex or intimacy, indiscriminate multiple sex partners or difficulty in reaching orgasm, parenting problems such as fear of being a bad parent, or fear of abusing the child or being over protective, an underlying sense of guilt, anger or loss, flashbacks and/or panic attacks, eating disorders, and also ‘Post Traumatic Stress Disorder’¹⁰³ etc.”*¹⁰⁴

2.6.3 Impacts on family and society

The child sexual abuse has tremendous impact on the economy and social fabric of our society. Child sexual abuse is at the root of many societal

¹⁰¹ <http://www.secasa.com.au/pages/the-effects-of-childhood-sexual-abuse/psychological-effects/>

¹⁰² Negative body image due to self-blame. This may be intensified if physical pain was experienced during the abusive incidents.

¹⁰³ Post Traumatic stress disorder (PTSD) is a severe anxiety disorder that can develop after exposure to any event those results in psychological trauma: This event may involve the threat of death to oneself or to someone else, or to one's own or someone else's physical, sexual, or psychological integrity.[see http://en.wikipedia.org/wiki/Post-traumatic_stress_disorder]. The term is used by psychologists and psychiatrists as a framework for the treatment of sexually abused children.

¹⁰⁴ Supra n. 102 “Long term effects”

problems. Teen pregnancy is a long-term, expensive societal problem and it is a major factor in teenage pregnancy rates. Over-sexualized behavior which is common for child sexual abuse victims, can lead to an increased risk of “sexually-transmitted diseases including HIV/AIDS” and it adversely affects the sexual health of the society.¹⁰⁵ For example, because pregnancy suppresses the immune system “pregnant girls are at increased risk of acquiring diseases like malaria,”¹⁰⁶ which kills more than one million people each year.

As a long term impact sometimes the victims of intra familial sexual abuse leads the victims to notable social issues like running away from home and finally to commercial forms of sexual exploitation. Childs of prostitutes and other children who had an experience of recurrent child hood abuse to a greater extent reaches to the circumstances of prostitution and child pornography. Child sexual tourism always a threat to criminal justice system and finally leads to the destruction all virtues of tourism sector. The child sexual abuse causes to the growth of criminality in society and increase in the number of juvenile offenders who addicts of drugs and sexual anarchy. Increase in the number of earlier teenage pregnancies always caused to increase on infanticide and especially female feticide. Thus the impacts of child sexual abuse on the society are innumerable and damage caused to society is irreparable.

¹⁰⁵ Child Sexual Abuse Statistics - Darkness to Light. Available at www.d2l.org › Prevent Child Sexual Abuse › the Issue

¹⁰⁶ Nawal M. Nour, *Health Consequences of Child Marriage in Africa*, Centers for Disease Control and Prevention (November 2006) (Feb 2 2015 12 a.m.) <http://www.cdc.gov/ncidod/eid/vol12no11/06-0510.htm>.

2.7 Preventing Re-victimisation

Child sexual abuse is a dark reality that routinely inflicts our daily lives but in a majority of cases it goes unnoticed and unreported on account of the innocence of the victim, stigma attached to the act, callousness and insensitivity of the investigating and the law enforcement agencies, etc.¹⁰⁷ The significant impact of childhood sexual abuse is unquestionable. This impact, however, speaks not only to the individual child victim of the crime, but also to the mental health community. There is no longer a question of whether child sexual abuse is a criminal justice problem or a social services problem or a mental health problem, for its power crosses the territory of each.¹⁰⁸

The introduction of adequate mental health support systems is necessary in the Indian context in order to prevent re-victimization of the child by the criminal justice system. The need for removal of “*structural barriers*” with regard to the lack of access to adequate physical and mental health support systems. Access to mental health support for both the child and the non-offending family members makes the passage through disclosure, evaluation and examination and often involvement with social workers and the police less onerous and has been shown to positively impact long-term emotional outcomes.¹⁰⁹ The definitive signs of “*genital trauma*” are seldom seen in cases

¹⁰⁷ Supra n 22 p 175

¹⁰⁸ *Child Sexual Abuse: A Mental Health Issue?* (Jan 10, 2014, 9.30 a.m.) [chfs.ky.gov/NR/./0/Child Sexual AbuseAMentalHealthIssue.htm](http://chfs.ky.gov/NR/./0/Child%20Sexual%20AbuseAMentalHealthIssue.htm)

¹⁰⁹ HEGER, A.H. (2014). CHILD SEXUAL ABUSE: THE HISTORY, CURRENT STATE OF THE ART AND THE CHALLENGES FOR THE FUTURE: A PEDIATRIC PERSPECTIVE.

J.E. KORBIN & R.D. KRUGMAN. (Eds) HANDBOOK OF CHILD MALTREATMENT CONTEMPORARY ISSUES IN RESEARCH AND POLICY (pp. 81-97).USA: Springer.

of child sexual abuse¹¹⁰. Hence, the evaluation of child sexual abuse victim requires special skills and techniques in history taking, forensic interviewing and medical examination. The role of mental health professional is crucial in interviewing the child in the court of law. Child sexual abuse can result in both short-term and long-term harmful mental health impact. Mental health professionals need to be involved in “*follow up care of the victim with regard to emergence of psychiatric disorders, by providing individual counselling, family therapy and rehabilitation*”.

In cases of legislations concerning children and their rights, mental health considerations must become an inextricable component of law, and therapists must be included in the legal framework for the future benefit of the child as a long-term remedy. Such an inclusion and institutionalization would distant the risks attached to the common blunders committed by lawyers dealing with child victims in trauma.¹¹¹

¹¹⁰ ADAMS JA, HARPER K, KNUDSON S & REVILLA J. EXAMINATION 11. FINDINGS IN LEGALLY CONFIRMED CHILD SEXUAL ABUSE: IT’S NORMAL TO BE NORMAL. *Pediatrics* 1994; 94 : 310-7.

¹¹¹ Sharma, P. (2005). *Mental Health Aspects of Victims of Crime with Special Reference to Children*. JOURNAL OF INDIAN ASSOCIATION FOR CHILD AND ADOLESCENT MENTAL HEALTH, 1(4).

CHAPTER 3

NATURE AND PREVALENCE OF CHILD SEXUAL ABUSE IN INDIA

3.1 Introduction

The starting point of the journey to recognise the gaps and challenges in the implementation of a law is to understand the prevalence and extend of the problem which is to be addressed. Even though the problem of child sexual abuse is caused to greater societal concern and reporting has increased in recent years, a large amount of CSA is continues to be unreported and covered by secrecy. The international and national statistics on the prevalence of CSA are shocking. In 2002, the WHO reported “*that 150 million females and 73 million males under the age of 18 years suffered sexual abuse in all over the world*”.¹ In this chapter an attempt is made to examine the nature and prevalence of CSA by reviewing meta analysis studies from global perspective and analysing different studies conducted in past years in India. This chapter also concentrates on measuring existing data on extend of the problem and understanding important gaps in data management.

3.2 Global Perspective

There are various meta analysis studies have been done on the prevalence of CSA in gender basis from a global perspective during last decades. For example a study by Pereda, Guilera, Forns, & Gomez-Benito on international

¹ World Health Organization. Child Maltreatment. Geneva, (02 Aug. 2016, 10.30 a.m.) http://www.who.int/topics/child_abuse/en/.

literature revealed that “about 20% of women and 8% of men experienced childhood sexual abuse”.² Another meta analysis review is by Lalor & McElvaney on studies in 11 countries. This study found that the rate of “penetrative sexual abuse” is higher in girls (ranges from 0.3% to 18%) than boys.³

A meta-analysis of systematic review of 65 studies from 22 countries by Wihbey J in 2009 found the prevalence of CSA in international level. The study says that about “7.9% of males and 19.7% of females globally experienced sexual abuse under the age of 18 years.”⁴ Africa holds highest position in the rate of prevalence of CSA and Europe, America, and Asia had CSA rate of 9.2%, 10.1%, and 23.9%, respectively. In case of Prevalence of sexual abuse against female children seven countries reported as more than one fifth. That is “24.2% in Switzerland, 25.3% in the US, 28.1% in Sweden, 30.7% in Israel, 31% in Tanzania, 32.2% in Costa Rica and 37.8% in Australia” .The study comments that the lowest rate of male sexual abuse may because of underreporting and concludes that sexual abuse of children is a widespread problem all over the world.

A study conducted by Stoltenborgh, M., Van Ijzendoorn, M.H., Euser, E.M., & Bakermans-Kranenburg M.J is a review of 217 population based studies

² Pereda, N., Guilera, G., Forns, M., & Gomez-Benito, J. (2009). *The prevalence of child sexual abuse in community and student samples: A meta-analysis*. CLINICAL PSYCHOLOGY REVIEW, 29, 328-338.

³ Lalor, K., & McElvaney, R. (2010). “Overview of the nature and extent of child sexual abuse in Europe”. In Council of Europe, *Protecting children from sexual violence - A comprehensive approach* (pp. 13-43). Strasbourg: Council of Europe.

⁴ Wihbey J. *Global prevalence of child sexual abuse*. JOURNALIST RESOURCE (15 Jan., 2018, 11 a.m.) : Journalistsresource.org/studies/.global-prevalence-child-sexual-abuse

on childhood sexual abuse published from 1980 to 2008 and found that overall prevalence rates for CSA below “18 years is 18.0% for girls and 7.6 % for boys”.⁵ The study collected evidence on both the self reported and informant studies. Self-reported childhood sexual abuse was highest among female (180/1000) than among male (76/1000). The rate of self-reported CSA for both girls (113/1000) and boys (41/1000) were found least in Asia, and high in Australia (215/1000) for girls and high in Africa (193/1000) for boys.

A study conducted by Collin-Vezina, Daigneault I, Hébert M estimated that CSA is a key concern which adversely affects more than “one out of five females and one in 10 males worldwide”.⁶ A review of prevalence studies on CSA between 2002 and 2009 throughout the world has been conducted by Barth, Bermetz, Heim, Trelle, & Tonia which was included a total of 55 studies from 24 countries.⁷ The study established prevalence rate of CSA is high in girls “ranges from 8% to 31 %” than in boys “ranges from 3%” to 17% worldwide and also found that 9 girls and 3 boys out of 100 children are subjected to “forced sexual intercourse”.

⁵ Stoltenborgh, M., van IJzendoorn, M.H., Euser, E.M., & Bakermans-Kranenburg, M.J. (2011). *A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World*. *Child Maltreatment*, 16(2), 79-101, (10 Jan. 2018, 2.30p.m.) <https://journals.sagepub.com/doi/10.1177/1077559511403920>

⁶ Collin-Vézina D, Daigneault I, Hébert M. *Lessons learnt from child sexual abuse research: Prevalence, outcomes and preventive strategies*. *CHILD ADOLESCENT PSYCHIATRY MENTAL HEALTH*. 2013 7:22, (02. March 2018, 10a.m.) <http://www.capmh.com/content/7/1/22>

⁷ Barth, J., Bermetz, L., Heim, E., Trelle, S., & Tonia, T. (2013). *The current prevalence of child sexual abuse worldwide: a systematic review and meta-analysis*. *INT J. PUBLIC HEALTH*, 58, 469–483

The prevalence rate of CSA is slightly differs in various studies because the each study uses different methodologies including definition of child sexual abuse. So it is a hard task to determine the actual number of sexually abused children in the world due to the variations in prevalence reported studies.⁸ However all of the studies reveal that CSA is globally extensive problem and even the least prevalence of CSA includes a large number of victims.⁹

3.3 Different studies in India on the prevalence of CSA

According to 2011 census, “Indian children constitute 42% of the total Population in India”.¹⁰ “A total of 33,098 child sexual abuse cases and 7,112 child rape cases were reported in the country during the year 2011”.¹¹ India has the world's largest number of CSA cases even though there is underreporting of such cases. “For every 155th minute a child, under 16 years and, for every 13th hour a child below 10 years, and one in every 10 children is undergone sexual abuse at any point of time”.¹² Studies suggest that over 7,200 children, including infants, are raped each year and a number of cases go unreported. The

⁸ Miller KL, Dove MK, Miller SM. (2007, October). *A counselor's guide to child sexual abuse: Prevention, reporting and treatment strategies.* (10 Jan., 2017, 9.30 a.m.) Available from: www.ncbi.nlm.nih.gov/pubmed/1186016 .

⁹ Mannat Mohanjeet Singh, Shradha S. Parsekar, and Sreekumaran N. Nair, *An Epidemiological Overview of Child Sexual Abuse*, J FAMILY MED PRIM CARE, 3(4): 430–435 (15 March 2018, 12 p.m.), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4311357/#ref10>

¹⁰ REGISTRAR GENERAL & CENSUS COMMISSIONER OF INDIA. *Census of India* New Delhi 2011, (12 Aug.2014,3 p.m.) <http://www.censusindia.gov.in>.

¹¹ *Study on Child Abuse: India 2007*. MINISTRY OF WOMEN AND CHILD DEVELOPMENT Government of India. 2007. wcd.nic.in/childabuse.pdf & Behere P, Sathyanarayana Rao T, Mulmule A. *Sexual abuse in women with special reference to children: Barriers, boundaries and beyond*. INDIAN J PSYCHIATRY. 2013;55 (4):316.

¹² S. Vidhya. *Impact of sexual abuse on children and intervention strategies*. RESEARCH ON HUMANITIES AND SOCIAL SCIENCES. ISSN 2225-0484. 2017;7(17):36

government estimates that 40% of India's children are vulnerable to threats like “homelessness, trafficking, abuse by drugs, forced labor, and various crimes”.¹³ In India, “every 2nd child is being exposed to one or other forms of sexual abuse and every fifth child faces critical forms of sexual abuse”.¹⁴ A survey by UNICEF on demographic and health was conducted in India from 2005 to 2013 which stated that “10% of Indian girls have experienced sexual violence when they were 10–14 years of age and 30% during 15–19 years of age. Thus in general almost 42% of Indian girls have gone through the sufferings of sexual violence before attaining the age of adulthood”.¹⁵

In India a few studies on prevalence of CSA has been carried out by certain NGOs and only one official study has been conducted by the government with this regard. It is discussed under the following sections:

3.3.1 Samvada study, 1996

A study by a NGO named Samvada conducted among 348 girls from 11 schools and colleges in Bangalore reported that “47% of the participants had been sexually abused and 15% among them were under 10 years of age”.¹⁶ . Of these, “62% had been raped once and 38% had suffered repeated abuses”. And

¹³ HRW, *Breaking the silence*. Child sexual abuse in India. USA, 2013., <http://www.hrw.org/sites/default/files/reports/india0113ForUpload.pdf>

¹⁴ Behere PB, Sathyanarayana Rao TS, Mulmule AN. *Sexual abuse in women with special reference to children: Barriers, boundaries and beyond.*; INDIAN J PSYCHIATRY.2013 55:3169.http://www.indianjpsychiatry.org/temp/IndianJPsychiatry554316.1837618_050616.pdf

¹⁵ Ray A. 42% of Indian girls are sexually abused before 19: Unicef. THE TIMES OF INDIA. 2014. Sep 12, <http://timesofindia.indiatimes.com/india/42-of-Indian-girls-are-sexually-abused-before-19-Unicef/articleshow/42306348.cms?>

¹⁶ *Between the lines – An analysis of media reportage in child sexual abuse*, ARPAN MEDIA REPORT 15012018.cdr, www.arpan.org.in/wp-content/uploads/2018/07/MEDIA-REPORT.pdf

“86% of them had eve teased, 67% had molested and 61% had seriously abused. 15% of participants were used by male family members for masturbation when they were below 10 years”. The study also revealed that 75% of the abusers were adult family members.

3.3.2 Sakshi study, 1997

In a survey conducted by NGO called Sakshi in 1997 among 350 school going girls in New Delhi found that “63% had experienced child sexual abuse by the family members and 25% of the girls had experiences of either being raped, making the perpetrator to masturbate, or engaging in oral sex”.¹⁷

3.3.3 RAHI study, 1998

The NGO named RAHI (Recovery and Healing from Incest) conducted a study entitled “*Recovery and Healing from Incest, Voices from the Silent Zone*” in New Delhi in 1998.¹⁸ About 600 English-speaking middle and upper class women had been interviewed in this study, out of which “76% revealed that they had been abused in their childhood or adolescence. 40% of the participants said they had been abused by a relative, mainly by an uncle or a cousin”.

3.3.4 Tulir study 2006

A NGO called “*Save the Children*” and Tulir in 2006 carried out a study on prevalence and dynamics of child sexual abuse among 2211 school children

¹⁷ *Between the lines – An analysis of media reportage in child sexual abuse*, ARPAN MEDIA REPORT 15012018.cdr, www.arpan.org.in/wp-content/uploads/2018/07/MEDIA-REPORT.pdf

¹⁸ RAHI (1998), *Voices from the silent zone – A study on women’s experiences of incest and childhood sexual abuse*, Delhi

in Chennai.¹⁹ The study stated that “42% of children had experienced at least one form of sexual abuse, of which 48% were boys and 39% were girls”. The sexual abuse in upper and middle class families were found to be proportionately higher than in lower or lower middle class in the survey. The majority of the perpetrators were persons who are known to the child.

RAHI and TULIR studies revealed the prevalence of CSA in upper and middle class families and helped to combat the general myth that CSA is more prevalent among the lower classes.

3.3.5 Ministry of woman and child development study, 2007

In 2006, The United Nations appointed an autonomous expert²⁰ to conduct a detailed study on violence against children all over the world followed by the general assembly resolution.²¹ As a part of this the team also visited India and recommended ‘a national strategy, policy or plan of action on violence against children’, and that “national laws... should comply with international human rights”²² in its report.²³ And also India was a party to “*South Asian Regional Conference on Violence against Children*” held in May 2006 in Pakistan and India’s committed to review of existing child-related laws, and to “develop legislation against child abuse with adequate infrastructural support

¹⁹ Save the Children and Tulir(2006), Research on prevalence and dynamics of child sexual abuse among school going children, Chennai. *TULIR – CPHCSA and Save the Children Sweden* at p. 10

²⁰ Paulo Sergio Pinheiro from Brazil was the expert .

²¹ GA Resolution No. 57/90 of 2002.

²² UN Secretary General’s *Global Study on Violence against Children*, 2006, Study recommendations 3, https://www.unicef.org/violencestudy/.../3%20Recommendations_Press%20kit%20EN.p

²³ United nations *World report on Violence against Children*, 2006,

for its implementation".²⁴ And the government started the process of drafting a special law for protection of children from abuse but it was suggested in the discussions with various NGOs that it is necessary to conduct an empirical study in all India level to estimate the prevalence and nature of child abuse before jumping into the enactment of legislation.²⁵ Thus in response to this suggestions a large scale study was conducted in 2007 by Ministry of women and child development in India covering 13 states in the country to measure the extent and nature of child abuse in India and to recommend proper and urgent responsive actions to be undertaken by families, community, government and civil society organisations for the protection of children from abuse.²⁶

Among the 12,447 child participants of the study who reported being abused, "57.3% were boys and 42.7% were girls and about 40% were between 5–12 years of age". Participants included children (5–18 years), young adults (18–24 years), and also various stakeholders. There were five categories of children were included in the study; they are (1) children in a family environment, who are not attending school (2) children in schools, (3) working children, (4) street children and (5) children in institutional care. Fifty children were selected from each of the groups and ensured equal number of boys and girls in each evidence group.

²⁴ *Implementation of the POCSO Act- Goals , gaps and challenges*, UNICEF &HAQ, p 18 (11. July, 2018, 2p.m.) <http://haqrc.org/publication/implementation-pocso-act/>

²⁵ Id

²⁶ *Study on Child Abuse: India 2007*. India, MINISTRY OF WOMEN AND CHILD DEVELOPMENT GOVERNMENT OF INDIA. 2007.<http://wcd.nic.in/childabuse.pdf> .

Table 3.1 shows the prevalence of severe forms of child sexual abuse reported in the study.

Table: 3.1 Prevalence of severe forms of sexual abuse against children in India



Types of sexual abuse	Rate of prevalence	Abuser	Gender data	Not disclosed
sexual assault	5.67%	Uncle/ Neighbour 31 Friend 38.5	Boys : 54.4% Girls : 45.6%	72%
Forced to touch or fondle private parts	14.5%	Friend 38.5%	Boys : 58.4% Girls : 41.6%	77%
Forced to exhibit private body parts	12.6%	Friend 44.4%	Boys : 60.2% Girls : 39.7%	82%
being photographed in the nude	4.5	Friend, Uncle and neighbour	Boys : 52% Girls : 48%	71.4%

This study concentrated on four kinds of child abuse, including physical abuse, sexual abuse, emotional abuse; and child neglect. The findings of the study with regard to child sexual abuse are described here.

The stunning facts on the extend of problem of sexual abuse against children is also revealed by the study that “53.22% of the participants were exposed to one or more forms of sexual abuse, and 20.9% reported severe sexual abuse”. The study also says that street children, children at work and institutional care reported highest prevalence of sexual assault and **50%** abusers are persons known to the victims or in a position of trust or responsibility. The states of Andhra Pradesh, Assam, Bihar and Delhi reported the highest prevalence rate of sexual abuse among both boys and girls. The study also pointed out that sexual

crimes against children not often get reported that is only 3% of CSA offences are reporting to authorities. Renuka Chowdhury, the then minister of women and child development, in her introduction to this study report commented as CSA “shrouded in secrecy with a conspiracy of silence around the entire subject”.²⁷ Table 3.2 illustrates the prevalence rate of “other forms of sexual abuse” of children in India as per the study.

Table: 3.2 Prevalence of other forms of sexual abuse against children in India



Types of sexual abuse	Rate of Prevalence	Abuser	Gender data	Not disclosed
Forcible kissing	21%	Friend 35%	Boys: 44.98% Girls :55.02%	72%
Sexual advances during travel	27.9%	Unknown, friends	Boys : 39.11% Girls : 60.89%	64%
Forced to view body parts of abuser	17%	Friend 40.7%	Boys: 55.9% Girls: 44.4%	79%
Exposing pornographic materials to child	30.2%	Friend 66%	Boys :67.03% Girls: 33	80%

Almost more than 60 % of all forms of sexual abuse the children did not disclose the matter to anyone. While these statistics need to be understood with foremost care as it was conducted in a convenience rather than nationally representative sample, the statistics reveals the importance of the problem and specifically pointing out high risk classes. Further minor studies in India have also reported very high prevalence of CSA in various states.

²⁷ Kacker Loveleen, Vardan Srinivas, Kumar P. *Study on Child Abuse: India 2007* MINISTRY OF WOMEN AND CHILD DEVELOPMENT, GOVERNMENT OF INDIA, 2007

3.3.6 Some other studies

Carson DK, Foster JM, Tripathi N states that *“the uncovering of cases of CSA is high in India: One-fifth to half of the country's population might have faced some form of sexual abuse at least once in their life, but these detection is not includes children (1 in 5) because they do not reveal their sexual abuse to anyone within or outside the family”*.²⁸

Another study carried out is among 1614 by adolescents in plus one and plus two grades of 17 randomly selected schools from 12 districts of Kerala by Krishnakumar, Satheesan, Geeta, & Sureshkumar in 2014.²⁹ Among the respondents, 1,610 were in the 15–18 age group and 4 of them were of 19 years including 688 boys and 926 girls. Around *“35.3% of participants reported experiencing one or more forms of sexual abuse. 35% of girls and 36 % of boys reported lifetime experience of sexual abuse”*. Sexual advances during travel by bus or train constitutes the higher prevalence. *“Forcible kissing, forcing to touch and exhibit private parts, taking nude photos of the child and exhibiting pornographic pictures”* were the main forms of sexual abuse.

3.3.7 Prevalence of reported incidents of CSA to police (NCRB Data- all India)

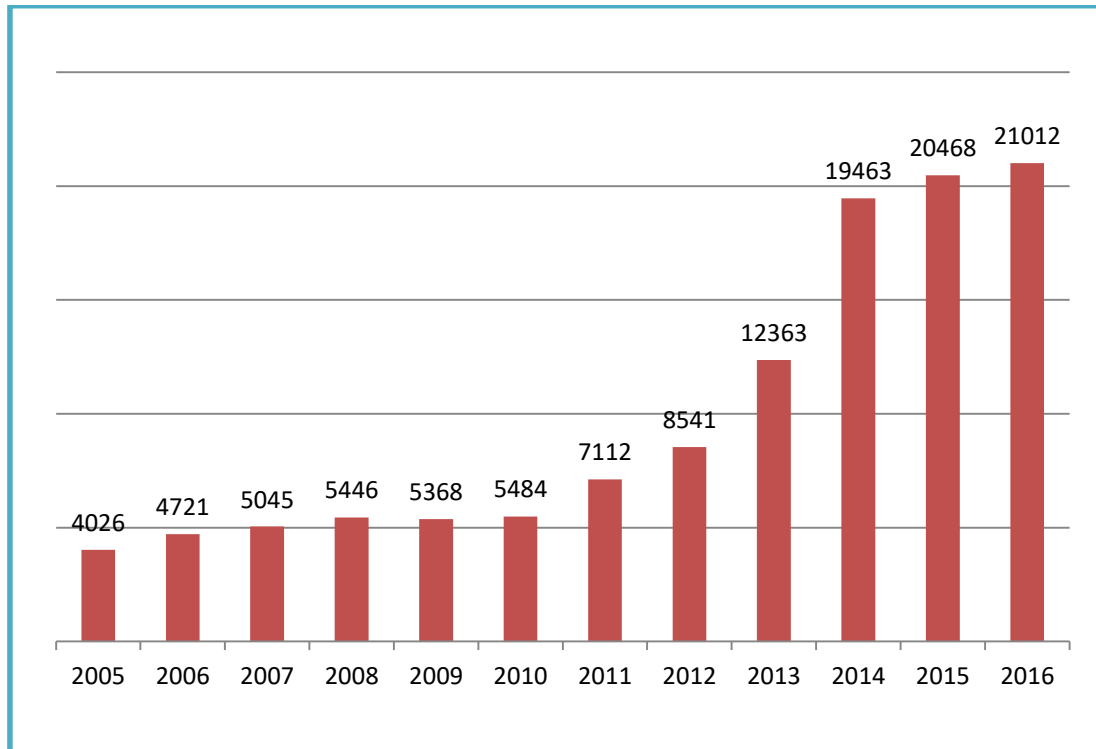
The *National Crime Records Bureau* is the governmental agency which is accountable for maintaining the statistics of incidence various kinds of crimes

²⁸ Carson DK, Foster JM, Tripathi N. *Child sexual abuse in India: Current issues and research*. PSYCHOL STUDY. 2013 58:318–25 13 Sep.,2017,4 p.m.) .springer.com/article/10.1007%2Fs12646-013-0198-6

²⁹ Krishnakumar, P., Satheesan, K., Geeta, M.G., & Sureshkumar, K. (2014). *Prevalence and spectrum of sexual abuse among adolescents in Kerala, South India*. INDIAN JOURNAL OF PEDIATRICS, 81, 770-774.

in India. According to the NCRB total crimes against children increased *more than five times* and sexual crimes against children increased over four times within 10 years (from 2005 to 2015).

Chart 3.1 Number of incidents of ‘Rape and Penetrative sexual abuse against children’ in India 2005 -2016



Source: NCRB data on Crime in India statistics, 2005-2016

The Chart 3.1 shows the graph of rape and penetrative sexual assault against children in India from 2005 to 2016. NCRB compiled data on sexual offences against children under the POCSO Act for the first time in 2014. Until then, the same was documented under the heading of ‘child rape’. From the chart we can see almost steady graph during the years of 2005 to 2012. But there was a raise of 44.7% in reported ‘child rape’ cases under Section 376 IPC between 2012 and 2013. Even though the POCSO Act came into force in 2012 the expanded definition of ‘penetrative sexual assault’ as per POCSO Act was not

considered in 2012 and 2013 data compilation. This 47.7% increase may be attributed to higher reporting and registration of such offences.³⁰

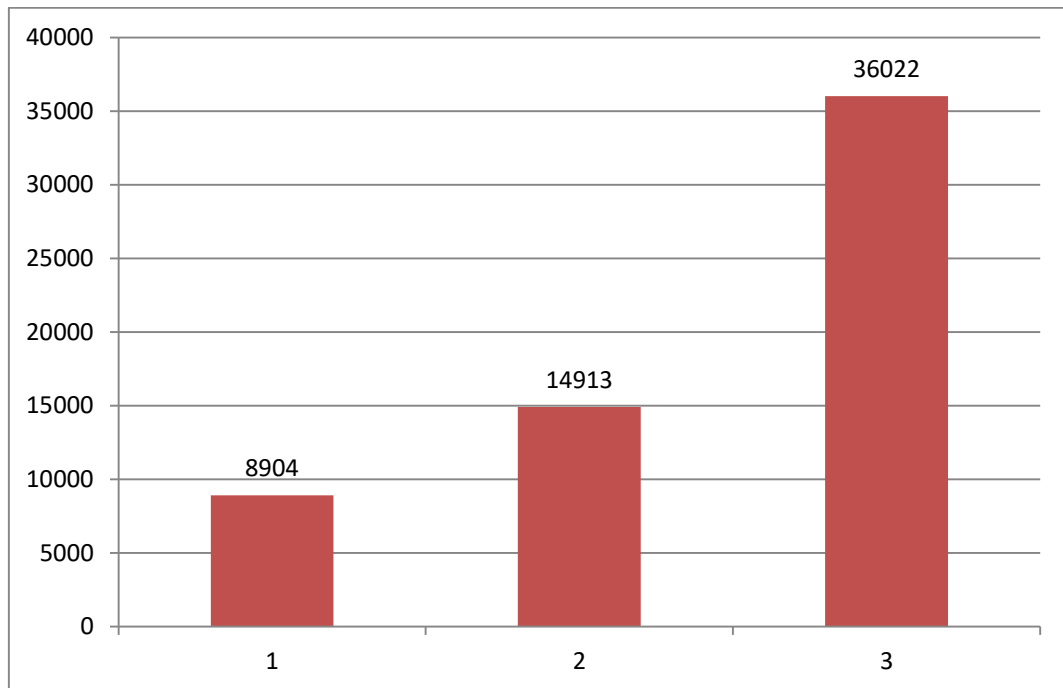
From 2014 onwards the NCRB has changed its methodology for data collection, and computation of child sexual abuse crimes. Chart 3.1 specifies the increased recording of these crimes between 2013 and 2014 that is 57%. The statistics of 2014 contain the sexual assault crimes including “*rape, unnatural offences, Section 4 & 6 of the POCSO Act*”. Hence, this raise may be credited to high reporting of such crimes as well as the broadening of the definition of “*penetrative sexual offences*” as an after effect of enactment POCSO Act.

In 2016, the data compiled under the heading of child rape includes crimes under Sections 4 & 6 of POCSO Act, Section 376 IPC), and special category for “*Unnatural Offences*” under Section 377 IPC. The report of NCRB states that “*In order to avoid the duplicity of data, cases registered under section 376 of IPC exclude the cases registered under sections 4 & 6 of the POCSO Act 2012. Similarly cases reported under different sections of IPC like 354, 509 etc. exclude related section of the POCSO Act.*”³¹ So if there was any double counting of child rape under both IPC and POCSO Act, it was kept addressed from 2015 crime statistics. This is reflected in the figures of 2014 to 2016 as we can see trivial increase of “*5.4% between 2014 and 2015 and 2.7% between 2015 and 2016*”.

³⁰ *Implementation of the POCSO Act- Goals , gaps and challenges*, UNICEF & HAQ, p 42, (11. July, 2018, 2p.m.) <http://haqrc.org/publication/implementation-pocso-act/>

³¹ *Crime in India statistics 2015*, NATIONAL CRIME RECORDS BEURO, Ministry of Home affairs, ncrb.gov.in/StatPublications/CII/CII2015/FILES/CrimeInIndia2015.pdf

Chart 3.2 Reported cases under POCSO Act from 2014 to 2016

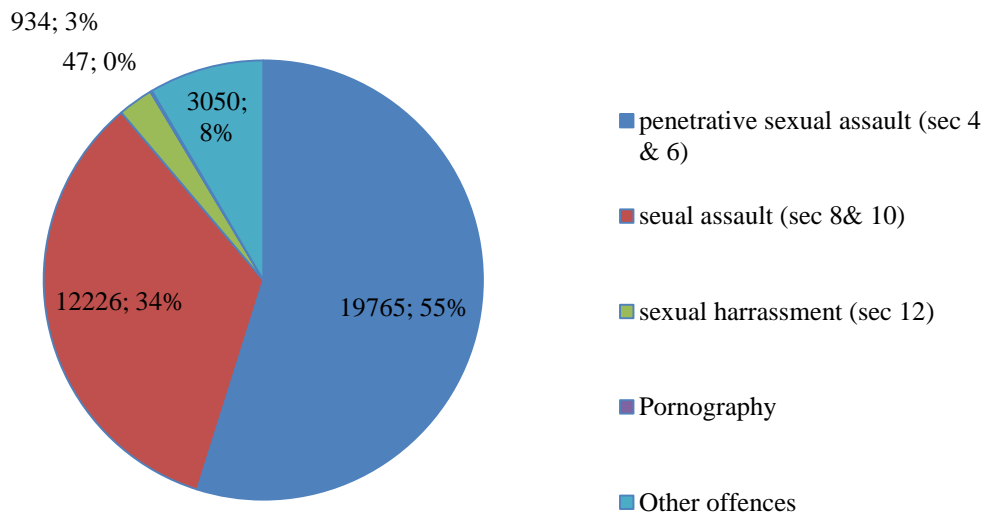


Source: NCRB data, Crime in India statistics 2014 to 2016

Chart 3.2 indicates the increase in the reporting of sexual offences under POCSO Act from 2014 to 2016. There is significant increase in reporting of sexual crimes under POCSO each year. In 2014, 8904 cases reported under POCSO Act are up to 9.95% of total crimes against children. In 2015, the 14,913 cases registered under the POCSO Act made up for 15.8% of crimes against children in 2016, 36022 cases registered under POCSO Act are about 34.4 % of total crimes against children. The data of NCRB after the year of 2016 is not available because NCRB failed to publish crime in India statistics from the year 2017 onwards.³²

³² NCRB fails to publish 'Crime In India' report even after year, http://timesofindia.indiatimes.com/articleshow/67445165.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

Chart 3.3: Prevalence of various offences under POCSO Act (2016)



Source: NCRB, Crime in India 2016, table related to ‘crime against children’, chapter 4

The highest number of cases recorded under the POCSO Act in 2016 was of “penetrative sexual assault (55%), followed by sexual assault (34%) and other offences including abatement and attempt to commit offences (8%)”. But the cases relating to “child pornography” made up for a trivial value of 47 cases only. The offence of “sexual harassment” accounted for 3% of all cases under the POCSO Act. In order to avoid overlapping of data on sexual offences against children the statistics figures out clubbed data on IPC and POCSO offences.

In 2015, as per Table 5.3 under the chapter “Crimes against Women”, the total number of child victims of ‘incest rape’ was 306 in all India level (54.5% of total incest rape victims ³³in India is children under the age of 18). But a new table on the figures of child victims of ‘incest³⁴’ included under the chapter 6

³³ Crime in India, 2015, NATIONAL CRIME RECORDS BUREAU, Ministry of Home Affairs, Government of India, <http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf>, Chapter 5, Crimes against Women, page 85

³⁴ Incest Rape means rape by blood relatives like Grand Father/Father/Brother/Son etc.

entitled “*Crimes against Children*” which indicates the total number of child victims of “*incest*” at the all-India level as only 138.³⁵ This deficit in data is because certain states³⁶ did not provide data on child rape reported under the POCSO Act. But no such information on “*incest*” has been recorded in Crime in India 2016 statistics, instead the report says Table on “*State/UT-wise and Age Group-wise Victims of Incest Rape*” is available in NCRB Portal. Up to 2015 NCRB has been put out a disclaimer the NCRB “*follows ‘Principal Offence Rule’ for counting of crime. Hence among many offences registered in a single case, only most heinous crime is considered as counting unit, thereby representing one case.*” However there is nothing to explain which offence is to be treated as more heinous crime when the punishment for both the offences mentioned in the FIR is the same, for example a case registered under Section 376 of IPC as well as Section 4 of the POCSO Act. But in “*Crime in India 2016*” it is attempted to rectify this difficulty and states that “*the Principle Offence Rule is not applicable for chapters of Crimes against Women, Crimes Against Children, Crimes Against SC/ST, juveniles in conflict with law, crime against senior citizens*”.³⁷

3.4 Statistics in Kerala

3.4.1 NCRB statistics (Kerala)

Since the state of Kerala is selected for empirical study regarding working of POCSO Courts it may be worth analysing the data for the state specifically. Chart 3.3 illustrates the growth of number of sexual abuse cases

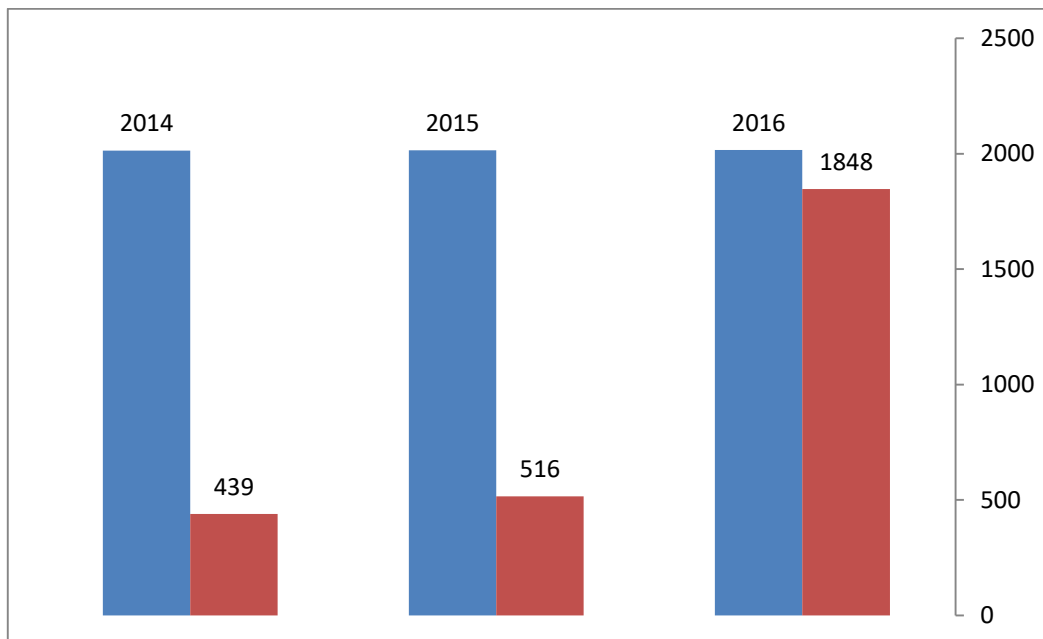
³⁵ *Crime in India, 2015*, NATIONAL CRIME RECORDS BUREAU, Ministry of Home Affairs, Government of India, <http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf>, Table 6.7

³⁶ States of Andhra Pradesh, Arunachal Pradesh, Assam, Bihar, Goa, Himachal Pradesh, Jammu & Kashmir, Jharkhand, Madhya Pradesh, Nagaland, Odisha, Punjab, Rajasthan, Telangana and Tripura and Union territories of A & N Islands, Chandigarh and Lakshadweep reported zero number of incest crimes under POCSO Act.

³⁷ *Crime in India, 2016*, NATIONAL CRIME RECORDS BUREAU, Ministry of Home Affairs, Government of India, <http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf>, p xi

against children in Kerala from 2014 to 2016. Reason for the boosting figure of the year 2016 is indicates increase in the reporting of sexual offences against children in Kerala.

Chart 3.4 Number of offences registered under POCSO Act in Kerala (2014 – 2016)



Source: NCRB, *Crime in India statistics 2014 to 2016*

Kerala holds third position in the states of highest rate of sexual offences against children in the country.³⁸ According to NCRB data on the rate of sexual offences against children, the national crime rate of sexual abuse of children in 2016 was 8.1%, Kerala however, recorded a rate of 19.8% (other two states which possess highest rate are Sikkim 45.3% followed by Mizoram 45%). In 2016 the total number of sexual offence cases against children in Kerala is 1848 (including POCSO and IPC) is the 64.1% of total crimes against children in Kerala (2879).³⁹

³⁸ see Chart 1.2, chapter 1 p.24

³⁹ *Crime in India, 2016*, NATIONAL CRIME RECORDS BUREAU, Ministry of Home Affairs, Government of India, <http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf>, table s 4A.2(ii) and 4A.1

**Table 3.3 Prevalence of various kinds of sexual offences
against children in Kerala**

Types of sexual offences against children (POCSO act r/w ss 376, 354, 509 IPC)	Number of cases (Total - 1848)	Percentage share
Child Rape (Sec 4 & 6 of POCSO Act) / Section 376 IPC	957	51.7%
Sexual Assault of Children (Section 8 & 10 of POCSO Act) / Section 354 IPC)	517	27.9%
Sexual Harassment (Section 12 of POCSO Act) / Section 509 of IPC	39	2.1%
Use of Child for Pornography/Storing Child Pornography Material (Section 14&15)	4	0.21%
Under Other Sections of POCSO Act	331	17.9%

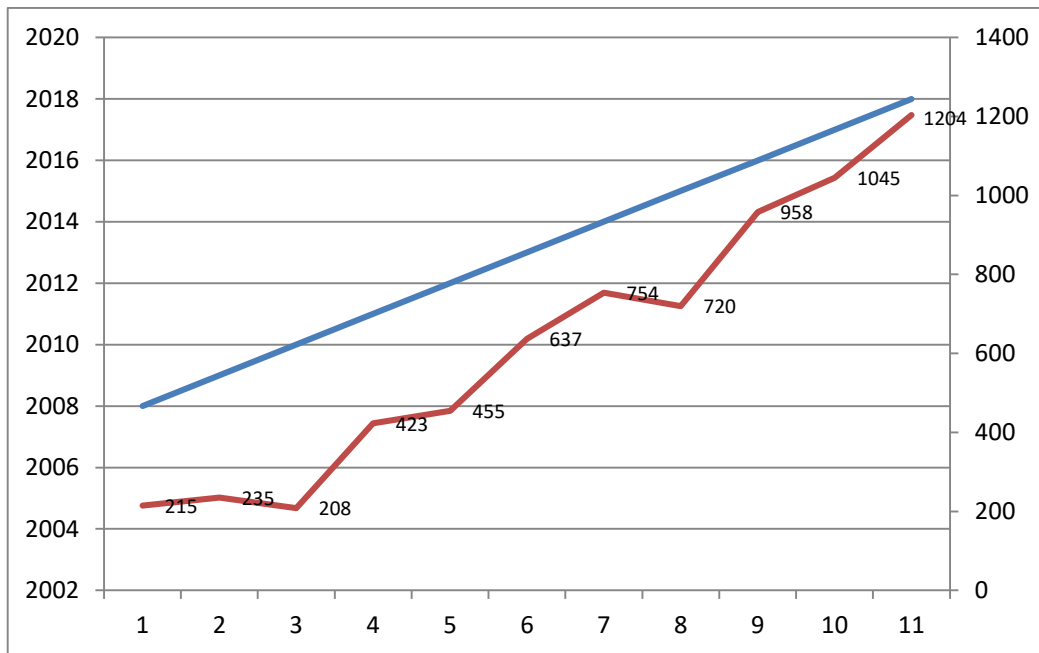
Source: NCRB, Crime in India 2016, Table 4A.2 (ii), Chapter 4

Table 3.3 figures out the various sexual offences against children in the year 2016 under POCSO Act read with Section 376, 354, 509 IPC. The highest number of cases recorded in Kerala in 2016 was of “*penetrative sexual assault/ child rape (51.7%), followed by sexual assault (27.9%) and other offences including abatement and attempt to commit sexual offences (17.9 %)*”. But the cases relating to “*child pornography*” made up for a trivial value of four cases only. The offence of “*sexual harassment*” accounted for 2.1 % of total sexual offences against children. In order to avoid overlapping of data on sexual offences against children the statistics figures out clubbed data on IPC and POCSO offences.

3.4.2 SCRB Statistics, Kerala

According to SCRB data compiled by Police department of Kerala there has been 600% increase in total crimes against children and a 500% increase in child rape in the state over last 10 years.

Chart 3.5: The child rape cases in Kerala during the year 2008 to 2018

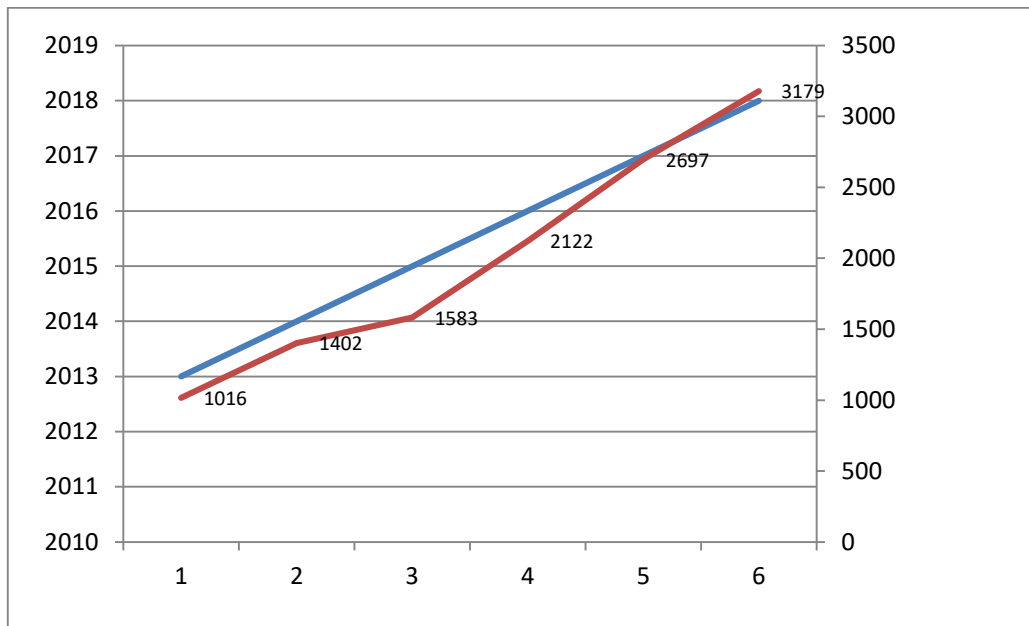


Source: SCRB data, <https://keralapolice.gov.in/public-information/crime-statistics/crime-against-children>

The increase in the rate is scandalous that the total number of child rape cases in 2008 was 215 and in 2018, it is about 1204(chart 3.5). In 2016, 33.25% of all crimes against children in Kerala were under the category of child rape (958 out of 2881). Apart from the small decrease of 27 cases in 2010 compared to 2009 the child rape cases have raised steadily during the years since 2008.

Cases registered under POCSO Act since 2013 to 2018 illustrates in the chart 3.6.which shows a phenomenal raise. In 2013 the number of POCSO cases registered was 1016 and it has been increased up to 3729 in 2018.

Cart 3.6: Cases registered under POCSO Act (Kerala, 2013– 2018)



Source: SCRБ, cases under POCSO 2013 to 2018 statistics

Comparing SCRБ data with NCRB Data on cases registered under POCSO Act during the period of 2014 to 2016 is largely varies in number. In table 3.4 a comparison on both data is provided.

Table 3.4: NCRB, SCRБ data comparison

Year	NCRB statistics	SCRБ statistics
2014	439	1402
2015	516	1583
2016	1848	2122

Data provided under SCRБ data shows highest prevalence of POCSO case reporting in the years. The statistics of each districts as well as each month from January to December in each year has been separately provided in the crime statistics of Kerala Police website. The decreased number in NCRB data can be

analysed by the disclaimer provided by NCRB in crime in India statistics, it can be read that “*as per the International Standard, the Bureau follows ‘Principle Offence Rule’ for counting of crime. Hence among many offences registered in a single FIR case, only most heinous crime (maximum punishment) will be considered as counting unit. Hence, there is likelihood of some IPC/SLL cases getting under reported as they are hidden under major IPC crimes*”⁴⁰.

Data collection and analysis by NCRB need to be urgently updated to include omitted areas. For example, with a change in law on sexual offences against children (after the enactment of POCSO Act) it had taken 3 years to compute data on sexual abuse of children under the head of POCSO Act. It is essential to maintain data on: how many cases of different kinds of sexual offences dealt by the Special Courts. It requires better coordination between NCRB and the States / Union Territories and larger improvements in patterns of data collection and computation. With respect to child sexual abuse the State Governments / UTs should collect information from various stakeholders, including police and other investigating agencies, Special Courts, and Juvenile Justice Boards. NCRB should persist on analysing city-wise crime statistics under POCSO Act as well as data regarding “*Offenders Relation and Proximity to victims*” in cases of sexual offences under the POCSO Act ⁴¹

⁴⁰ *Crime in India, 2016*, NATIONAL CRIME RECORDS BUREAU, Ministry of Home Affairs, Government of India, <http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf>, p xi

For example, Murder with Rape is accounted as Murder & *Dowry Prohibition Act* when applied along with 304B of IPC will be counted as Dowry Death only in NCRB data.

⁴¹ Done by NCRB only in crime in India statistics, 2015.

3.5 Conclusion

A regular review of prevalence of CSA is imperative for the improvement of prevention and support programs. Even though some studies on CSA, from India, has been published some descriptive reviews, and in international level some empirical studies have been conducted, there is no systematic review on the prevalence of CSA in India. For understanding the actual prevalence empirical studies on the topic should be carried out by government and other agencies. Both micro and macro research studies should be encouraged by national institutions including NCPCR, to get crucial evidence on the prevalence of CSA and implementation of the POCSO Act. And the universities and academic institutions should also engage in socio- legal researches on CSA.

CHAPTER 4

LEGISLATIVE FRAMEWORK AGAINST CHILD SEXUAL ABUSE IN INDIA PRIOR TO POCSO ACT

4.1 Introduction

In this chapter, the researcher proposes to discuss some key aspects of the legal framework governing the protection of children against sexual abuse in India. The chapter discusses the Indian constitutional provisions for child protection, various legislations, case laws and law commission reports in connection with child sexual abuse. The chapter also discusses the impact of Criminal law amendment Act 2013¹ on various legislations in India on sexual offenses against children. The chapter also tries to compare the nature of legislative provisions regarding child sexual abuse after the enactment of Criminal law amendment Act and Protection of Children from Sexual Offences Act.

4.2 The United Nations Convention on the Rights of Child 1989

As regards the international instruments and Declarations pertaining to the rights of children “*to protection, security and dignity*”, India is a signatory

¹ Criminal Law (Amendment) Act, 2013 passed “*to amend the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973, the Indian Evidence Act, 1872 and the Protection of Children from Sexual Offences Act, 2012. It amends sections 100, 228A, 354, 370, 370A, 375, 376, 376A, 376B, 376C, 376D and 509 of Indian Penal Code, 1860. It also inserts new sections 166A, 166B, 326A, 326B, 354A, 354B, 354C and 354D in Indian Penal Code, 1860. It also amends sections 26, 54A, 154, 160, 161, 164, 173, 197, 273, 309, 327 and First Schedule of Code of Criminal Procedure, 1973. It also inserts new sections 357B and 357C of Code of Criminal Procedure, 1973. It also amends sections 114, 119 and 146 of Indian Evidence Act, 1872. It also inserts new sections 53A in Indian Evidence Act, 1872. It also amends section 42 of Protection of Children from Sexual Offences Act, 2012.*”

to the core international human rights treaties that protect children. India is always fully committed to implementation of all provisions of the UNCRC. Article 35 of which stipulates that “*States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form*”. In addition, Article 11(1) provides that “*States Parties shall take measures to combat the illicit transfer and non-return of children abroad*”. To the extent that trafficking in children may be conducted for the purposes of sexual exploitation, Article 34 highlights three specific aspects of sexual exploitation of children:

- (a) “*The inducement or coercion of a child to engage in any unlawful sexual activity;*
- (b) *The exploitative use of children in prostitution or other unlawful sexual practices;*
- (c) *The exploitative use of children in pornographic performances and materials*”.

State Parties are also required to “*take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form*”.

To confronting and combating the growing abuse and exploitation of children worldwide and for better protection the United Nations General Assembly in 2000 adopted the “*Optional Protocol on the rights of the child on the sale of children, child prostitution and child pornography*”. It requires member states “*to ensure that the domestic legislation allows the prosecution of its nationals for crimes of child sexual exploitation regardless of whether*

committed domestically or internationally".² In 2005 India accepted the two Optional protocols to the UNCRC, addressing the involvement of children in armed conflict and the sale of children, child prostitution, and child pornography.³ For the purposes of the Optional Protocol, Article 2(a) specifies that "*sale of children*" means "*any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration*". In the context of the sale of children, the Optional Protocol requires States Parties to ensure "*that their criminal law fully covers offering, delivering or accepting a child for the purpose of sexual exploitation, transfer of organs of the child for profit, or engagement of the child in forced labour*"⁴. It also requires that "*States Parties criminalize the improper*

² As per Art 3 of optional protocol to CRC

"1. Each state party shall ensure that as a minimum ,the following acts and activities are fully covered under its criminal and penal law, whether such offenses are committed domestically or transnational or on an individual or organized basis:(a) In the context of sale of children as defined in article 2: (i) Offering, delivering or accepting, by whatever means, a child for the purpose of: a. Sexual exploitation of the child; b. Transfer of organs of the child for profit;

c. Engagement of the child in forced labour; (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of (b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article

2; (c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.2. Subject to the provisions of the national law of a State Party, the same shall apply to an attempt to commit any of the said acts and to complicity or participation in any of the said acts.

3. Each State Party shall make such offences punishable by appropriate penalties that take into account their grave nature.

4. Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.

5. States Parties shall take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments."

³ Signed on 15 November 2004 and ratified on 16 August 2005.

⁴ Id, Art. 3(a)(i).

inducement of consent for adoption of a child in violation of the applicable international legal instruments on adoption"⁵. In addition, the Protocol states that "*parties may take measures to establish jurisdiction over such offences when either perpetrator or victim is a national of that party state*"⁶.

4.3 Constitutional protection for children

The constitution of India to incorporate almost entirely the spirit of the UNCRC by encompasses most rights included in the Convention as Fundamental Rights and Directive Principles of State Policy. The Indian Constitution contains certain provisions specifically aimed for "*protection, survival, development and welfare of children*". Constitution recognizes vulnerable position of children and their right to protection. In *Bachpan Bachao Andolan v Union of India*⁷ the Court has ordered "*for implementation of suggestions put forth during the hearing of this case, which will introduce significant reforms in existing child protection regime*". The Court has made clear its intention to deal with issue of children's exploitation in a systematic

⁵ Id, Art 3(a)(ii)

⁶ As per Art 4 of optional protocol to CRC,
 "1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, when the offences are committed in its territory or on board a ship or aircraft registered in that State.
 2. Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, in the following cases: (a) When the alleged offender is a national of that State or a person who has his habitual residence in its territory; (b) When the victim is a national of that State.
 3. Each State Party shall also take such measures as may be necessary to establish its jurisdiction over the aforementioned offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.
 4. The present Protocol does not exclude any criminal jurisdiction exercised in accordance with internal law."

⁷ (2011) 5 SCC 1

manner. Assuring to deal with children's exploitation firmly, Supreme Court has observed: "*We plan to deal with the problem of children's exploitation systematically*". The rights of children are included both in Part III and Part IV of the Constitution pertaining to "*Fundamental Rights*" and "*Directive Principles of State Policy*", important among there are Article 14, 15(3), 21A, 23, 24, 39(f), and 45.

Article 14. "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Thus nobody including the children should be denied of equality of status, opportunity and protection". In *Gaurav Jain v Union of India*⁸ the Supreme Court held that "*the children of the prostitutes have the right to equality of opportunity, dignity, care, protection and rehabilitation so as to be part of the mainstream of social life without any pre-stigma attached on them*". The Court directed for the constitution of a committee "*to formulate a scheme for the rehabilitation of such children and child prostitutes and for its implementation and submission of periodical report of its Registry*".

Article 15(3) which provides for "*protective discrimination*"⁹ in favour of children, says: "*Nothing in this Article shall prevent state from making any special provisions for women and children.*" Thus in explicit terms, Article

⁸ (1997) 8 SCC 114; AIR 1997 SC 3021

⁹ "*The doctrine of protective discrimination, also known as positive discrimination, provides special privileges to a particular group to offset societal discrimination. This doctrine is most often invoked for women and the scheduled castes of India*". TAMESHNIE DEANE, AFFIRMATIVE ACTION: A COMPARATIVE STUDY 264-70 (2005) (J.D. Thesis, University of South Africa), <http://uir.unisa.ac.za/dspace/bitstream/10500/2012/2/09chapter8.pdf>.

15(3) empowers “*the State to make special provisions for children as and when it is necessary for the well being of children*”.¹⁰ In *Sakshi v. Union of India*¹¹, the Supreme Court of India asked the Law Commission “*to consider certain important issues regarding sexual abuse of children submitted by the petitioner and the feasibility of amendment to 375 and 376 IPC*”. The petitioners in this case had put emphasis on Article 15 (3) of the Constitution which provides for special provisions for women and children which necessarily implies “*adequate provisions*”.¹² In fact, the provision of Article 15(3) of the Constitution, being an enabling provision, “*is a clear indication of the obligation of the State to adopt and strictly enforce preferential measures in relation to matters affecting women and children*”.

The right to life in *Article 21*¹³ encompasses all sections of the society including women and children. And this right to live with human dignity is available to children also. In *Vikram Deo Singh Tomar v. State of Bihar*,¹⁴ the Supreme Court has taken note of “*the pitiable conditions prevailing in care homes maintained by the State of Bihar for women and children*” and has directed the “*State to improve matters in these homes and provide at least the minimum living conditions ensuring human dignity*”. In *Avishek Goenka v.*

¹⁰ M.P. JAIN, INDIAN CONSTITUTIONAL LAW, Vol.1. 5th edn., Wadhwa & Co., Nagpur, 2003 at p. 1060

¹¹ AIR 2004 SC 3566

¹² *Id*

¹³ *Maneka Gandhi v. Union of India* AIR 1978 SC 597. “*The concept of procedural due process of law has been incorporated into the Indian Constitution by judiciary, so that the words procedure established by law in Article 21 should mean fair, just and reasonable procedure in accordance with the principles of natural justice; namely, the right to fair hearing and the rule against bias.*”

¹⁴ AIR 1988 SC 1782

Union of India the Supreme Court observed “that alarming rise in heinous crimes like kidnapping, sexual assault on women and dacoity have impinged upon the right to life and the right to live in a safe environment which are within the contours of Article 21 of the Constitution of India”.

Article 23 (1) provides that “Traffic in human beings and beggar and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law”. This provision includes trafficking of children also.

Article 24 specifically “prohibits employment of children below the age of 14 years in any factory, mine or in any other hazardous employment”. This provision is incorporated in the Constitution for the safety of the life of children. In *Vishal Jeet v. Union of India*¹⁵ the SC looked in to the problem of Child Prostitution: The petition brought out the fact that “poor parents on account of acute poverty were selling their children and young girls hoping that their children would be engaged only in household duties or manual labour”. However, “pimps – brokers – keepers” either purchase or kidnap them by deceitful means and unjustly and forcibly inveigle them into “flesh trade”.¹⁶ The SC issued certain directions¹⁷ to the State Governments and Union Territories

¹⁵ 1990 (3) SCC 318 https://www.unodc.org/cld/caselawdoc/traffickingpersonscrimetype/ind/1990/vishal_jeet_v._union_of_india.html

¹⁶ *Id*

¹⁷ “1) Direct concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution.
2) Take steps in providing adequate and rehabilitative homes.
3) Set up separate Advisory Committee consisting of relevant government officials, sociologists, criminologists, members of the women/ child welfare/ voluntary social organizations to make suggestions for eradicating child prostitution; and measures for care, protection, treatment, development and rehabilitation of victims”.

for eradicating child prostitution which is being carried on “*in utter violation of all cannons of morality, decency and dignity of mankind*”.

The Directive principles of state policy under part IV of the constitution also clearly provides for policies directed towards the welfare of the children, as this part has been designed to “*strive to promote the welfare of the people by securing and protecting as effectively...¹⁸Article 39(a), (e) and (f) specifically provide certain policies to be followed by the State for the welfare of the children*”.

Article 39(f) states “*that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment*”.

Article 45 of the Constitution specifies that “*the State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years*”. It’s a state responsibility to protect the children and it is embed well in the constitutional roots.

In *Childline India Foundation v. Alan John Waters and Ors.*¹⁹ complaints of physical and sexual abuse of children kept in “*shelter homes in Mumbai*” were before the Supreme Court. Convicting the accused who deserved no leniency the court observed as follows:

¹⁸ INDIA.CONST. Art. 38

¹⁹ (2011) 6 SCC 261

*“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”.*²⁰

The above analysis of various provisions of constitution shows that our Constitution provides several measures to protect our children. It obligates *“both Central, State and Union Territories to protect them from the evils, provide free and good education and make them good citizens of this country. Several legislations and directions of this Court are there to safeguard their intent. But these are to be properly implemented and monitored. We hope and trust that all the authorities concerned through various responsible NGOs implement the same for better future of these children.”*²¹

4.4 General legislative context in India

In India, there was no legislation on sexual offences until the enactment of Protection of Children from Sexual Offences Act 2012. But there were various general statutes but no law existed which specifically addresses the issue of CSA. The provisions and procedures pertaining to the sexual abuse of children were dealt by various statutes namely *“the Indian Penal Code (IPC), 1860*²², *the*

²⁰ *Id*

²¹ *Id*

²² The Indian Penal Code 1860., ss 375, 376, 354, 509, 377

*Indian Evidence Act, 1872*²³, *the Code of Criminal Procedure (CrPC), 1973*²⁴, *the Indecent Representation of Women (Prevention) Act, 1986*²⁵, *the Juvenile Justice act (JJ Act) 1986, the Information Technology Act (IT Act), 2000*²⁶. The general criminal law, the IPC defines various sexual offences. The IPC applied to cases of sexual offences against children came under the category of “*outraging modesty of a woman, rape of a woman and unnatural sexual offences*”. And the punishment provided for these offences are inadequate and was not sufficient to eradicate the sexual offences against children.

The Supreme Court of India, in *M.C. Mehta v. State of Tamil Nadu and Ors*,²⁷ emphasized “*the obligation of state and society towards the children of India*”. The court recalled the importance of UN convention on the Rights of the Child²⁸ and the commitment that India made to the world community by acceding to the Convention. The Central government has not made any comprehensive legislation to implement the U.N. Convention and protect child

²³ The Indian Evidence Act, 1872, s 114(A). “*The section providing that in cases of custodial rape, rape of a pregnant woman, and gang rape if the woman states before the court that she did not consent, the court shall presume that she did not consent. S 146 also states that it is not permissible to put questions in cross-examination of the prosecutrix about her general moral character.*”

²⁴ Criminal Procedure Code (Amendment) Act, 2005, No. 25, Acts of Parliament, 2005, s 164(A) “*for medical examination of victims of rape*”, s 53(A) “*for medical examination of accused of rape*” and s 176(1A)(a)(b) “*for investigation by judicial magistrates of custodial rape and deaths*”; And CrPC (Amendment) Act, 2008, No. 5, Acts of Parliament, 2009, s 357(A) “*providing for victim compensation scheme*”.

²⁵ The Indecent Representation of Women (Prevention) Act, No. 60 of 1986, s 3 and s 4 “*pertaining to the prohibition of advertisements, books or posts containing indecent representation of women*”.

²⁶ The Information Technology Act, No. 21 of 2000, INDIA CODE (2000), s 67 “*it provides that publication and transmission of pornography through the internet is an offence*”.

²⁷ AIR 1997 SC 699

²⁸ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by GA Resolution 44/25 of 20 November 1989, 1577 UNTS 3. The Convention on the Rights of the Child entered into force 2 September 1990. see also chapter 3, p

victim. So it is inferred the UNICEF to appoint a commission under the chairmanship of the Justice V.R. Krishna Iyer, and Margaret Alva and Justice A.M. Ahmadi were members, “to examine how best to give effect to the CRC”. The commission submitted a report to the Government of India in 2000 which suggested the idea of a Children’s Code for guaranteeing various rights to children. This Code marked the functions of a “*National Commission and State Commissions for Children*” and put forth a system of Special Courts for children. Until 2012, Goa was the only state in India which has a statute covering various rights of children including problems of “*trafficking, child labor and child abuse*”.²⁹

²⁹ Goa children’s Act 2003, Under Section 2 (m)(i), “*child abuse is defined to include sexual abuse; however, definition of sexual abuse is not provided under the Act.*” Section 2 Clauses (x) and (y) of the Act and Sec 8(2) “*provides for sexual offences and its punishments*”. Ss can be reads as :

“*Section 2(x) states:*
Sexual Offence covers all forms of sexual abuse which constitute offences under the Act.
Section 2(y) states:
Sexual offences for the purposes of awarding appropriate punitive action means and includes

(i) *Grave Sexual Assault which covers different types of intercourse: vaginal, oral, anal, use of objects, forcing minors to have sex with each other, deliberately causing injury to the sexual organs, making children pose for pornographic photos or films;*

(ii) *Sexual Assault which covers sexual touching with the use of any body part or object, voyeurism, exhibitionism, showing pornographic pictures or films to minors, making children watch others engaged in sexual activity, issuing of threats to sexually abuse a minor, verbally abusing a minor using vulgar and obscene language;*

(iii) *Incest which is the commission of a sexual offence by an adult on a child who is a relative or is related by ties of adoption .*

Section 8(2) : Whoever commits any child abuse or sexual assault as defined under this Act, shall be punished with imprisonment of either description for a term that may extend to three years and shall also be liable to fine of Rs. 1,00,000/-. Whoever commits any Grave Sexual Assault shall be punished with imprisonment of either description for a term that shall not be less than ten years but which may extend to life imprisonment and shall also be liable to a fine of Rs. 2,00,000. Whoever commits incest shall be punished with imprisonment of either description for a term that shall not be less than ten years but which may extend to life imprisonment and also a fine which may extend to Rs.2,00,000. Statement of the child victim shall be treated on par with the statement of a child rape victim under Section 375 of the IPC, as laid down by the Supreme Court of India.”

The alarming result of 2007 government study³⁰ clearly proved the necessity of a special legislation on sexual offences against children. Thus in 2012 for the first time in India POCSO Act defined various sexual offences against children and provided provisions for punishments. The legislation came to force on 14th november 2012. Subsequently the Criminal Law (Amendment) Bill 2012 was introduced in the *Rajya Sabha* on 4 December 2012 “*for the amendment of various criminal laws of sexual offences in india*”. After that in December 2012 a 21 year old student brutally raped and killed in Delhi³¹ and the incident strengthened the call for amendment of rape laws in the country. In the light of nationwide protest against the infamous “Delhi gang rape”³² government of India immediately appointed a three member committee to recommend to

³⁰ Ministry of Women and Child Development releases a study on Child Abuse, Press Information Bureau, Govt. Of India(Apr. 09, 2007), <http://pib.nic.in/newsite/erelease.aspx?relid=26737>

³¹ *State v. Ram singh* decided on 10 September 2013, <https://indiankanoon.org/doc/175704516/>

³² “*The incident was in Delhi took place on the night of 16th December 2012. The victim, a 23 year old physiotherapy student along with his male friend took a ride to home in a private bus at 9.30 pm. There were six other people on the bus, including the driver. The victim and her friend were beaten up when they raised their suspicions as to route of the bus to the destination. The woman was later raped by all the men while the bus was moving and her friend was beaten unconscious. After the beatings and rape, both the victims were thrown out of the moving bus by their perpetrators and left on the side of the road, partially clothed. Later the victims were taken to the Safdarjung Hospital in Delhi for treatment. Medical investigation of the woman suggested she was penetrated by a blunt object, probably a rod-like object that had caused extensive damage to the internal organs of the victim. Two blood-stained metal rods were retrieved from the bus on police inspection, which the medical staff later confirmed to be the object used for penetration that had caused serious injuries to the victim’s uterus, genitals and the abdomen. On 26 December, the Indian Government, send the victim to a multi-organ transplant hospital in Singapore. She had a cardiac arrest during the six hour flight to Singapore. The hospital authorities at Singapore stated that she had suffered brain damage, pneumonia and abdominal injury. She died in Singapore on 29 December 2013*”.

amend criminal laws for the speedy trial and stringent punishments for the offenders of sexual offences against women.³³

4.4.1 Justice Verma Committee

Justice Verma committee was constituted on 22 December 2012, headed by justice J.S Verma, former Chief Justice of Supreme Court and two other members Justice Leila Seth, former judge of High Court of Delhi and Gopal Subramaniam former Solicitor General of India. The Committee submitted its report on January 23, 2013³⁴ which containing key recommendations on “*amendments to various criminal laws*”.³⁵ The report contains key recommendations on some of the offences like “*marital rape, sexual assault and acid attack and also sexual harassment at workplaces*”. The report contains a chapter especially deals with child sexual abuse.³⁶ And supremely, there were recommendations regarding “*witness protection for complainants of sexual violence*”. The committee looks at child sexual abuse from two detailed perspectives. “*Firstly, it addresses the concern of child trafficking where it looks at the history of child trafficking empirically and acknowledges the lack of efforts from the state to prevent the same*”. It also successfully understands that child

³³ Government of India Ministry of Home Affairs Notification No. S.O.(3003)E, dated 23 December 2012. http://mha.nic.in/sites/upload_files/mha/files/JS-VermaCommittee-2013.pdf.

³⁴ “*The comprehensive 630 page report, which was completed in 29 days, was appreciated both nationally and internationally*”. Yamini, Criminal Law (Amendment) Act, 2013: Sexual Offences, Available at <https://www.lawctopus.com/academike/criminal-law-amendment/>

³⁵ Verma, J.S., Justice, Seth, L., Justice, & Subramaniam, G. (2013). “*Report of the Committee on Amendments to Criminal Law*”. NEW DELHI: GOVERNMENT OF INDIA. <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committee%20report.pdf>

³⁶ Id chapter 7, at p 200

trafficking is not an isolated phenomenon and is definitely the result of “*real problems of life such as impoverishment, nutrition, child abuse, lack of physical protection, destitution, lack of access to education and corruption*”. Thus, it urges the state to look at all these issues with an attempt to take an affirmative action against child trafficking. The second perspective of the committee is with respect “*to the increasing number of cases in child sexual abuse and the failure of the state to prosecute such cases and committee also offering solutions to the survivors of child sexual abuse in the form of rehabilitation centers, intensive psychotherapy etc*”. It stated that “*sexual assault upon women and children in situations of communal violence, regional conflicts and armed conflicts on account of their identity deserve to be treated as aggravated sexual offence at law*”. In a chapter on education and perception reform, the Report dealt with the psycho-social effects of child sexual abuse. Its detailed comments on rape and sexual assault are important. The Committee also recommended for “*the inclusion of the definition of the terms harm and health under the Juvenile Justice Act, 2000*”.³⁷ The report also pointed out the necessity for prohibition of “*two finger test*” which normally conducts for examining “*laxity of vagina*” to know whether the women is “*habituated to sex*”³⁸ and the need for police reforms. These include establishment of State Security Commissions to ensure that state governments do not exercise influence on the state police. Such commissions must be directly headed by the Chief Minister of the state. It also plans to lay

³⁷ *Id*, Chper 7, at p 216

³⁸ *Id* chapter11, at p 272

down broad policy guidelines to ensure that the police act according to law. It looks at training the police to try and make them more gender sensitive. The J.S. Verma Committee Report also recommended “*the promulgation of a presidential ordinance to incorporate amendments to the Criminal Law Amendment Bill 2012*”.³⁹ A Presidential Ordinance was promulgated on 3 February 2013 and Criminal Law (Amendment) Bill 2013 was placed before the Lok Sabha. A Parliamentary Standing Committee Report on the Criminal Law (Amendment) Bill 2012 was laid before the Rajya Sabha on 1 March 2013 and before the Lok Sabha on 4 March 2013. Finally *Criminal Law (Amendment) Act, 2013*, has been passed by the Lok Sabha on 19 March 2013, and by the Rajya Sabha on 21 March 2013 which brought landmark amendments to “*the IPC, the Indian Evidence Act 1872, and the CrPC 1973*” on laws related to sexual offences.

4.5 Indian Penal Code 1860 (IPC)

Until the enactment of Criminal law amendment Act 2013, sexual offences against children were not specifically defined by IPC. Certain sexual offences including rape were defined by IPC but were not sufficient to protect even women and girl children. Rape laws were confusing and problematic when applied to adult women but they are even more difficult when applied to children. Any sexual offence less than rape or sodomy was amounts to outraging modesty of a woman as defined by the law. The legal measures were only available “*under*

³⁹ Id Chapter 3, Para 71. at p. 113.

Sections 375, 354 and 377 which covered rape, sexual molestation and unnatural sex". These limited provisions of the IPC largely focused on offences committed against the female child and was not sufficient to deal with the sexual offences against a male child. The amendment introduced some new offences like "sexual harassment, voyeurism and stalking in the IPC" but the sexual offences against male children is not properly recognized even after the amendment.

4.5.1 Insulting Modesty

Sec 509 IPC punishes *a word, gesture or act intended to insult the modesty of a woman*.⁴⁰ The term outraging modesty was not defined by the act and the punishment provided was simple imprisonment up to one year duration, or with fine, or with both. But J. Verma committee recommendation was to repeal the provision and include the "offence in the non penetrative forms of sexual assault".⁴¹ Now the section amended to raise the term of imprisonment from a maximum of one year to three years⁴² and the term of insulting the modesty of woman retained as same.

⁴⁰ S.509 IPC reads as: "Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both".

⁴¹ Chapter 3 paragraph 67, Verma, J.S., Justice, Seth, L., Justice, & Subramaniam, G. (2013). *Report of the Committee on Amendments to Criminal Law*. NEW DELHI: GOVERNMENT OF INDIA.

⁴² The provision reads as: "Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, of that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years and also with fine".

4.5.2 Outraging Modesty

Sec 354 IPC⁴³ punishes a person who assaults or using criminal force to outrage the modest of a woman. Before the 2013 Amendment Act the punishment prescribed was with imprisonment of either description up to two years duration, or with fine, or with both⁴⁴. The term outraging modesty is not defined by the section.

There are many occasions where the India judiciary tried to define the term modesty of woman and with reference to child sexual abuse the question whether a child posses modesty. In *State of Punjab v. Major Singh*⁴⁵ the question before the SC was that “*a seven and half month old female child posses modesty*” In this case “*the accused inserted his finger and caused injury on the private parts of a female child. He was stripped to the waist at the time the child’s mother entered the room and put on the light, after which he fled from the room. The trial court convicted the respondent under section 323 of the IPC for voluntarily causing hurt to rigorous imprisonment for one year and Rs. 1000/- fine and a further period of three months for non- payment of fine*”. In appeal before the Punjab High Court, the judges differed in the view of whether the person could be said to have outraged the modesty of a child under section 354 of the IPC.

⁴³ S.354 reads as: “*Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both*”.

⁴⁴ The section reads as : “*Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both*”.

⁴⁵ AIR 1967 SC 63.

The majority took the view that *“the offence could be committed only when a woman felt that her modesty was outraged. The child upon whom the criminal force was used was of too tender an age to be capable of having any sense of modesty”*. One of the judges who differed and answered the question in the affirmative, held that the word *“modesty meant accepted notions of womanly modesty and not the notions of the woman against whom he offence was committed and that the section was intended as much in the interest of the woman concerned as in the interest of public morality and decent behaviour. Further, that the object of the provision could be achieved only if the word “modesty” was considered to be an attribute of a female irrespective of whether she had developed enough understanding to realize that an act was offensive to decent female behavior or not”*. The High Court did not alter the sentence.

The matter went to the Supreme Court. The three-judge bench felt the need to deliberate on whether a girl who was 7.5 months of age could be said to possess the requisite modesty that was capable of being outraged. Divided opinion also prevailed there. Chief Justice Sarkar, in his dissenting judgment, stated that *“under the section the accused would be guilty of an offence if he assaults or uses criminal force intending to outrage or knowing it to be likely that he will thereby outrage the modesty of a woman. This intention or knowledge is the ingredient of the offence and not the woman's feelings or reaction. The test therefore would be whether a reasonable man would think that the act of the offender was intended to or was known to be likely to outrage the modesty of the woman”*. In the present case, there could be no question of the accused having

intended to outrage the modesty of the child or having known that his act was likely to have that result, because, although the victim is a "woman" under the IPC, no reasonable man would say that a female child of that age was possessed of womanly modesty. However, on equally strong reasons, two judges differed with this view and interpreted the word "modesty" in such a manner so as to bring the offence committed by the accused under section 354 IPC. As per Mudholkar J, "*under section 354 IPC, while the individual reaction of the victim to the act of the accused would be irrelevant, when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind, that act must fall within the mischief of the section and would constitute an offence under the section. Since the action of the accused in interfering with and thereby causing injury to the vagina of the child, who was 7.5 months old, was deliberate, he must be deemed to have intended to outrage her modesty*".

Bachawat, J went on to make the famous statement: "*The essence of a woman's modesty is her sex. Even a female of tender age from her very birth possesses the modesty which is the attribute of her sex. Under the section the culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. The respondent is punishable for the offence under the 114 section because, by his act, he outraged and intended to outrage whatever modesty the little victim was possessed of.*" The Supreme Court altered the conviction of the respondent under section 323 IPC to one under section 354 IPC, and awarded the respondent

rigorous imprisonment for a term of two years and a fine of Rs. 1,000/-, and in default, rigorous imprisonment for a period of.

J. Verma committee on sec 354 recommended for including of all non penetrative forms of sexual contacts and assault into the same section 354.⁴⁶ The Committee recommended the drafting of section 354 IPC as in the form of “*actual touch*” as well as “*use of threatening words, acts or gestures*”.⁴⁷ Thus the sexual nature of an act would be determined on the basis of the circumstances. Sexual gratification as a motive for the act would not be a prerequisite for proving the offence. The amended version of 2013 stipulated minimum punishment to one year and raised the maximum punishment for the offense to 5 years from two years⁴⁸. But even after the amendment the term “*outraging modesty*” is still existing in the Act without clearly stating what

⁴⁶ Chapter 3, Para 67 and Para 69,

⁴⁷ Section 354, Sub-heading 4, Appendix 4, Verma, J.S., Justice, Seth, L., Justice, & Subramaniam, G. (2013). Report of the Committee on Amendments to Criminal Law. New Delhi: Government of India.p.436.reads as : “*Sexual assault and punishment for sexual assault:*

(1) *The following acts shall constitute the offence of sexual assault:*

- (a) *Intentional touching of another person when such act of touching is of a sexual nature and is without the recipient’s consent;*
- (b) *Using words, acts or gestures towards or in the presence of another person which create an unwelcome threat of a sexual nature or result in an unwelcome advance.*

Explanation: For the purposes of this section, ‘acts’ shall include the display and dissemination of pornographic material.

- (2) *Any person who commits the offence described in sub-clause (a) of sub-section (1) above shall be punishable with rigorous imprisonment that may extend to five years, or with fine, or both.*
- (3) *Any person who commits the offence described in sub-clause (b) of sub-section (1) above shall be punishable with imprisonment of either description that may extend to one year, or with fine, or both.”*

⁴⁸ The section reads as: “*Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine.*”

would constitute offences which “*outrage the modesty of a woman*” under section 354, which would not come under the ambit of section 509.

4.5.3 Sexual Harassment

Sec 354 A⁴⁹ is a new section inserted by 2013 amendment Act. It was not recommended by J. Verma Committee. “*When a man commits an act involving physical contact and advances involving unwelcome and explicit sexual overtures, or commits an act involving a demand or request for sexual favors, or commits an act of showing pornography against the will of a woman, he shall be punished with rigorous imprisonment for a term up to three years and/or with fine*”. This is the first category of offences and punishment stipulated under the provision. “*When a man commits an act of making sexually-coloured remarks, he shall be punished with imprisonment of either description for a term which may extend to one year, and/or with fine*”. This is in tune with the pre-2013 punishment awarded for insulting the modesty of a woman under section 509 IPC. The two different punishments for acts comprising sexual harassment are both “*cognizable, bailable offences, and can be tried by any magistrate.*”⁵⁰

⁴⁹ s. 35A reads as:

“(1) *A man committing any of the following acts*

- (i) *physical contact and advances involving unwelcome and explicit sexual overtures; or*
- (ii) *a demand or request for sexual favours; or*
- (iii) *showing pornography against the will of a woman; or*
- (iv) *making sexually coloured remarks, shall be guilty of the offence of sexual harassment.*”

(2) *A man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.*

(3) *Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.*”

⁵⁰ As per the First Schedule of the Code of Criminal Procedure 1973.

As per section 320 CrPC, it is not included under “*Compoundable offences*”. Hence it may be understood to be non-compoundable, unlike section 354 IPC. Formerly this offence would have come under the ambit of section 509 IPC. However, the punishment awarded under section 509 IPC for sexual harassment was only up to one year and/or with fine.

4.5.4 Sexual Assault

This is also a new offence inserted by the Criminal Law (Amendment) Act 2013. Previously, this offence would have come under the ambit of section 354. The Report suggested the inclusion of “*a new offence punishing assault of a woman intending to disrobe her*”⁵¹ and this recommendation found a place in the 2013 amending statute.⁵² Under section 354B IPC⁵³ “*both the actual doer of the act of disrobing and the abettor of the act of disrobing are to be given a minimum mandatory punishment of three years simple or rigorous imprisonment and fine, and a maximum punishment of seven years simple or rigorous imprisonment and fine*”.

⁵¹ Appendix 4, Verma, J.S., Justice, Seth, L., Justice, & Subramaniam, G. (2013). *Report of the Committee on Amendments to Criminal Law*. New Delhi: Government of India, p.437.

⁵² Section 354A: “*Assault or use of criminal force to woman with intent to disrobe her: Whoever assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked in any public place, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.*”

⁵³ Section reads as : “*Assault or use of criminal force to a woman with intent to disrobe. Any man who assaults or uses criminal force to any woman or abets such an act with the intention of disrobing or compelling her to be naked shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.*”

4.5.5 Voyeurism

This is also a new offence inserted by the Criminal Law (Amendment) Act 2013. This offence would have previously come under the ambit of section 509. J.Verma Committee Report suggested the inclusion of a new provision “*defining and punishing the offence of voyeurism*”⁵⁴ in the IPC. Thus the Criminal law Amendment Act also contains this offence and its punishment under the section 354C.⁵⁵ It is a notable fact that various school-aged girls in India have committed suicide due to blackmail when images of them carrying on acts pertaining to bodily functions are captured by cameras placed in bathrooms and disseminated through the internet. “*Private acts*” has been defined in Explanation 1 “*as acts carried out in a place which would reasonably be expected to provide privacy and where the victim’s genitals, posterior or breasts*

⁵⁴ Section 354B: “*Voyeurism: Whoever watches a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator, or by any other person at the behest of the perpetrator shall, be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but may extend to three years, and with fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but may extend to seven years, and also with fine.*”

⁵⁵ Voyeurism. “*Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and shall be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine. Explanation 1: For the purpose of this section, “private act” includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim’s genitals, posterior or breasts are exposed or covered only in underwear, or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public. Explanation 2: Where the victim consents to the capture of the images or any act but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.*”

are exposed or covered only in underwear, or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public. Watching, capturing images of such private acts and dissemination of such images, all come under the same category of voyeurism". Privacy laws are generally deficient in India, leading to difficult situations where even the public media does not hesitate to publish photographs and films which affect the privacy of the people involved in such photograph or film. Hence, Explanation 2 of this section would come as a relief to many women. "Where the victim consents to the capture of the images or any act but not to their dissemination to third persons and where such image or act is disseminated without her permission, such dissemination is also considered an offence" under this section as per Explanation 2.

4.5.6 Stalking

This is also a new offence inserted by the Criminal Law (Amendment) Act 2013 which was formerly would have come under the ambit of section 509 IPC. J Verma Committee report suggested the inclusion of a new provision defining and punishing the offence of stalking⁵⁶ in the IPC. This

⁵⁶ Appendix 4, Verma, J.S., Justice, Seth, L., Justice, & Subramaniam, G. (2013). *Report of the Committee on Amendments to Criminal Law*. NEW DELHI: GOVERNMENT OF INDIA, p.437. Stalking defines as under 354C

"(1) Whoever follows a person and contacts, or attempts to contact such person to foster personal interaction repeatedly, despite a clear indication of disinterest by such person, or whoever monitors the use by a person of the internet, email or any other form of electronic communication, or watches or spies on a person in a manner that results in a fear of violence or serious alarm or distress in the mind of such person, or interferes with the mental peace of such person, commits the offence of stalking. Provided that the course of conduct will not amount to stalking if the person who pursued it shows:

recommendation was couched in gender-neutral terms for both offender and victim. However, it was incorporated into the 2013 amending statute in gender-specific terms of man as offender and woman as victim. While this recommendation put a minimum term of one year imprisonment as punishment and a maximum term of punishment as three years imprisonment, the amending statute made the term of punishment for first conviction as up to three years imprisonment and for subsequent conviction, the term of punishment as up to five years imprisonment. The offence of stalking⁵⁷ under the new Amendment Act is committed “*when a man follows a woman and contacts, or attempts to contact such woman in order to foster personal interaction repeatedly without*

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- i. that it was pursued for the purpose of preventing or detecting crime and the person accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the state; or,*
 - ii. that it was pursued under any enactment or rule of law, or to comply with any condition or requirement imposed by any person under any enactment; or,*
 - iii. that in the particular circumstances the pursuit of the course of conduct was reasonable*

(2) Whoever commits the offence described in Section 354C(1) shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to three years, and shall also be liable to fine.”

⁵⁷ Section 354D states thus

“1) Any man who-

- (i) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or*
- (ii) monitors the use by a woman of the internet, e-mail or any other form of electronic communication, commits the offence of stalking: provided that such conduct shall not amount to stalking if the man who pursued it proves that –*
- (iii) it was pursued for the purpose of preventing or detecting crime and the man accused of stalking has been entrusted with the responsibility of preventing and detection of crime by the State; or*
- (iv) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or*
- (v) in the particular circumstances such conduct was reasonable and justified.*

2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.”

her consent, or monitors the woman's use of any form of electronic communication". However, if such man can prove that such following and contacting of the woman was done legally, or under reasonable circumstances, then he would not have committed the offence under this section.

4.5.7 Rape

Sec 375 of IPC⁵⁸ defines the offence of Rape. Before the 2013 amendment Act the definition was covering only "*penile penetration of the vagina of a female*"⁵⁹ without her consent.⁶⁰ The third description states that "*a man is guilty of rape when he has sexual intercourse with a woman against her will or without her consent*". When a man has sexual intercourse with a woman below the age of sixteen, then the issue of consent is immaterial, and that such sexual intercourse is considered to be rape irrespective of consent.

⁵⁸ "*Rape.—A man is said to commit rape who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—
First— Against her will.
Secondly—Without her consent.
Thirdly— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
Fourthly—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
Fifthly— With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
Sixthly— With or without her consent, when she is under sixteen years of age.
Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
Exception: Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.*"

⁵⁹ *Sakshi v. Union of India.*

⁶⁰ Age of consent was provided as 16 years.

4.5.7.1 Age of consent under sec 375

Originally the age of consent in cases of marital rape was 10 years. In *Queen Empress v. Hurree Mohun Mythee*⁶¹, a 11 year old girl named Phulmoni died of rape committed by her husband. “*The husband found guilty for offence of murder but the charge of rape did not arise because she was clearly over 10 years of age*”. After independence in 1949 amendment to clause fifth of section-375 raised the age of consent to 16 years in cases of rape and 15 years in cases of marital rape. The 42nd Law Commission Report of 1971 regarding amendments to the *IPC* characterized rape into three categories: “*rape proper, rape with child-wife, and illicit intercourse with the girl between 12 to 16 years of age with her consent*”. It recommended that the words “*either to herself or to anyone else present at that place*” be added after the words “(c) *with her consent when it has been obtained by putting her in fear of death or of hurt*” in description (3) of section 375 *IPC*. The report also suggested a separate “*section 376A in IPC punishing sexual intercourse with a child-wife below twelve years of age with heavier punishment of seven years imprisonment and fine and if the child-*

⁶¹ (1891) ILR 18 Cal 49 quoted in Kannabiran, K. (2009). “*Sexual assault and the Law*”. Kannabiran, K. & Singh, R. (Eds.), “*Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India*”. (pp. 78-118 at 82-83), New Delhi: SAGE. “*The facts of the case were that Phulmonee Dasse, eleven years and three months old girl died as a result of rape committed on her by her 35 years old husband. The women of Phulmoni's family testified in court that since caste codes did not permit premenstrual cohabitation, the couple had been kept apart until; her husband had stolen into Phulmoni's room and forced himself on her. Yet the English judge, Wilson J., accepted the husband's version that they had cohabited several times earlier, and hence intercourse was not the cause of death*”.

wife is between the ages of 12 and 15, with a milder punishment of two years and fine.”⁶²

In *Tukaram & Another v. The State of Maharashtra*⁶³ which is known as “*Mathura rape case*” the question of consent of a girl below 16 years was considered by the SC. This case involved the instance of custodial rape on 26 March 1972, wherein Mathura, a young tribal girl, was raped by two policemen in the police station compound. Unfortunately SC in this case set aside the conviction of accused by high court on the ground that “*the said sexual intercourse was not proved to have amounted to rape thus the accused acquitted*”. As per the facts of the case, “*a dalit girl of 14 to 16 years of age named Mathura lived with her brother. A young man named Ashok wanted to marry her, but his match was initially rejected. Later on, they decided to marry. After Mathura left her home with Ashok, her brother lodged a complaint at a police station stating that Mathura had been kidnapped by Ashok and his family members. Later on, all of them went to the police station. After the recording of statements, they were permitted to leave. However, a constable directed Mathura to stay back and her family to proceed out. She was raped by the two police constables present there. When her family came searching for her, she informed them immediately about the rape*”. The sessions court failed to believe in this story and said that because Mathura was “*habituated to sexual intercourse*”, her consent was voluntary; under the circumstances rape could not be proved.

⁶² Law Commission of India (1971). *42 nd Report Indian Penal Code 1860*. (Para 16.119 at 278) <http://lawcommissionofindia.nic.in/1-50/Report42.pdf>.

⁶³ AIR 1979 SC 185.

On appeal, the High Court reversed the decision of the lower court and convicted the accused, observing that *“her subsequent conduct in making a statement immediately, not only to her relatives, but also to the members of the Crown, leaves no manner of doubt that she was subjected to forcible sexual intercourse. It said that mere passive or helpless surrender of the body and its resignation to the others’ lust, induced by threats or fear, cannot be equated with desire or will, nor can it furnish an answer by the mere fact that the sexual act was not in opposition to such desire”*. The Court stated that *“the fact that the only reason Mathura was in the police station was because of the complaint filed by her brother makes it more probable that any effort to have sexual intercourse was made by the accused and was without the consent of the prosecutrix”*. In appeal to SC it was held that *“there were no circumstances available which made out a case of fear on the part of the girl and there was no finding that she was put to fear of death or hurt”*. The Supreme Court pointed out that *“Mathura had raised no alarm and there were no visible marks of injury on her person, suggesting no struggle and therefore no rape. It said that unless the fear was of hurt or death, it would not vitiate consent and in this case the circumstantial evidence proves that the fear, if any, was not the kind to vitiate consent”*. The medical evidence adduced also proved that Mathura was used to sexual intercourse. Therefore, section 375 (3) IPC was held not apply in this case.

The SC judgment in Mathura case caused to great protest by women’s organizations in various cities in India. Thereafter, the 84th Law Commission Report of 1980 on *“Rape and Allied Offences: Some Questions of Substantive*

Law, Procedure and Evidence” was submitted to the government. It stated that “consent is vitiated not only when a woman is put in fear of death or hurt, but also when she is put in fear of any injury being caused to any person (including herself) in body, mind, reputation or property and also when her consent is obtained by criminal intimidation – that is to say, by any words or acts intended or calculated to put her in fear of any injury or danger to herself or to any person in whom she is interested or when she is threatened with any injury to her reputation or property or to the reputation of anyone in whom she is interested. Thus, if the consent is given after threatening to spread false and scandalous rumours about her character, or destruction of her property, or injury to her children or parents, or by holding out threats of other injury to her person, reputation or property that consent will not be consent under the third description of Section 375 IPC”.⁶⁴ The Report also recommended punishment of all instances of rape of girls below the age of 18. As marriage of girls below the age of 18 is now prohibited by law, section 375 should reflect this changed mentality.⁶⁵ Pursuant to the 84th Law Commission Report, the third description of section 375 IPC was widened by the *Criminal Law (Amendment) Act 1983* by the insertion of the words “or any person in whom she is interested” after the words “putting her” in fear of death or hurt in the clause. Consent to sexual intercourse obtained by putting the woman or anyone she is interested in – such

⁶⁴ Law Commission of India (1980). “84th Report on Rape and Allied Offences Some Questions Of Substantive Law, Procedure and Evidence”. (Para2.9 atp.6). <http://lawcommissionofindia.nic.in/51-100/Report84.pdf>.

⁶⁵ Id para 2.20 at p 9

as her children, husband or parents – into fear of death or hurt is treated as no consent. Hence, such kind of sexual intercourse would be treated as rape of the woman.⁶⁶

In *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*⁶⁷ Justices M.P. Thakkar and A.P. Sen made a number of crucial observations on victim of sexual assault. The Supreme Court observed that “rarely will a girl or woman in India make false allegations of sexual assault, regardless of her position in society. An exception or two may exist, possibly from the urban elites.” The learned judges of the Supreme Court listed several reasons for this observation:

- (1) “A girl or woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.
- (2) She would be conscious of the danger of being ostracised by the society or being looked down by her own family members, relatives, friends and neighbours.
- (3) She would have to brave the whole world.
- (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.
- (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.

⁶⁶ The *Criminal Law (Second Amendment) Act 1983* also added section 114 (A) of the *Evidence Act* to state that “if the victim says that she did not consent to the sexual intercourse, the Court shall presume that she did not consent, which shall be a rebuttable presumption. New sections were added to the *Indian Penal Code 1860*: sections 376(A), 376(B), 376(C) and 376(D), which made custodial rape punishable. It also added provisions for in-camera trials, the prohibition on the victim identity disclosure, and tougher sentences in the *Code of Criminal Procedure*.”

⁶⁷ 1983 (3) SCC 566.

- (6) *It would almost inevitably and almost invariably result in mental torture and suffering to herself.*
- (7) *The fear of being taunted by others will always haunt her*
- (8) *She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where, by and large, sex is a taboo.*
- (9) *The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy.*
- (10) *The parents of an unmarried girl, as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and the family honour.*
- (11) *The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence.*
- (12) *The reluctance to face interrogation by the investigating agency, to face the court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.*⁶⁸

*State of Punjab v Gurmit Singh*⁶⁹ was the first case in which the Supreme Court laid down guidelines to be followed by trial courts in cases of rape, due to the trial court adding to “*the trauma of the victim by branding her as a person of loose morals and acquitting the accused on the basis of her delay in filing the case*”. This case is a good example of re-victimization when the victim, who is being “*protected*” by the criminal justice administration system, finds this experience more traumatic than the alleged abuse. The Supreme Court bench comprising of Justice A.S. Anand and Justice Ahmad Saghir S. observed that

⁶⁸ Id para 10

⁶⁹ SC/0366/1996.

“the appreciation of evidence by the trial court was not only unreasonable but perverse”. The Supreme Court held that *“the sexual intercourse was against the girl’s will for which the accused were liable for rape under section 376 of the IPC.”* *Gurmit Singh* case is important because it was the first time the Supreme Court laid down guidelines for trial in cases of rape:

1. *Delay in lodging First Information Report is not material when properly explained.*
2. *The Court should find no difficulty in convicting the accused on the prosecutrix’s testimony alone. Corroboration of the victim’s testimony would be necessary only if there are compelling reasons.*
3. *The trial of sexual offences should be in camera and invariably by a lady judge whenever available.*
4. *The Court must refrain from making derogatory observations of the prosecutrix.*
5. *In a rape trial, the Court is under an obligation to ensure that the prosecutrix is not harassed and humiliated in cross-examination.”*

However, the courts in many cases have not relied on the sixth description in the definition of rape under s 375 for convicting the accused. Instead, the issue of the consent of girl child has been given greater importance. In *Madan Gopal Kakkad v. Naval Dubey and Another*⁷⁰ the SC clearly stated *“the meaning of the term penetration for rape under section 375 IPC”*. The SC observed that *“even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial”*. The Court held that, *“having regard to seriousness of crime, the respondent was to be convicted under section*

⁷⁰ (1992) 3 SCC 204.

376 and was sentenced to undergo rigorous imprisonment for period of seven years with fine of Rs.25000.” In a similar case *State of U.P. v. Babul Nath*⁷¹ where a five year old girl was raped by the accused, it was laid down by the Supreme Court that “in order to constitute the offence of rape neither Section 375 of IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. To constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen of even an attempt at penetration into the private part of the victim would be quite enough for the purpose”. *Sudhesh Jhaku v KC. Jhaku*⁷² the Supreme Court was asked to determine “whether the definition of rape could include non-penetrative sexual acts”. The Court stated “it was for the legislature to make such an interpretation”.

The 156th Law Commission Report put forth a definition of child sexual abuse⁷³ and stated that “child sexual abuse may be committed in various forms, such as sexual intercourse, carnal intercourse and sexual assault. The cases involving penile penetration into vagina are covered under section 375 of the

⁷¹ (1994) 6 SCC 29

⁷² MANU/DE/0153/1996.

⁷³ s. 9.52 of the 156th Law Commission Report (1997) on the *Indian Penal Code 1860* at p.175 quoted in *Child Sexual Abuse: The initial effects*, Newbury Park, CA: Sage Publications, pp.58-59. “Accordingly, child sexual abuse could be any kind of ‘physical or mental violation of the child with sexual intent usually by an elder person who is in a position of trust or power viz-a-viz the child”.

IPC. Cases of penile/oral penetration and penile penetration into the anus are covered under section 377 of the IPC, whereas acts such as penetration of finger or any inanimate object into vagina or anus against a woman or a female child would be covered under an amended section 354 of the IPC". The Commission felt that a "distinction has to be naturally maintained between sexual assault/use of criminal force falling under section 354, sexual offences falling under section 375 and unnatural offences falling under section 377 IPC". It stated that "it would not be appropriate to bring unnatural offences punishable under section 377 or mere sexual assault or mere sexual use of criminal force which may attract section 354 within the ambit of rape, as rape is a distinct and grave offence with a definite connotation". The penetration referred to, before the Criminal Law Amendment 2013, was exclusively "penile penetration of the vagina of the woman". Section 375 of the IPC extends only to heterosexual intercourse involving penetration of the vagina by the penis, which is explained by a statement that "penetration is sufficient to constitute the sexual intercourse necessary for the offence of rape".⁷⁴ In 1999 Sakshi case sought clarification of the meaning of the term "sexual intercourse" used in section 375 IPC, the Supreme Court directed the Law Commission to make recommendations regarding the same.⁷⁵

⁷⁴ Sakshi v. Union of India AIR1999.

⁷⁵ "to examine the issues submitted by the petitioners and examine the feasibility of making recommendations for amendment of the Indian Penal Code 1860 or deal with the same in any other manner so as to plug the loopholes".

The Law Commission submitted its 172nd report in 2000 recommending an expanded definition to the offence under section 375 IPC⁷⁶, and proposed renaming it as “Sexual Assault” instead of “Rape” and also recommended that “the law relating to rape is to be made gender-neutral, wider, and more comprehensive in order to bring it in line with current thinking”. Various other changes were recommended to sections 376, 376A to 376D IPC. It recommended “the insertion of a new section 376F dealing with unlawful sexual contact, deletion of section 377 IPC and enhancement of punishment in section 509 IPC”. The Supreme Court in *Sakshi V Union of India*⁷⁷ Chief Justice S. Rajendra Babu

⁷⁶ The proposed section 375 IPC read as:

“Sexual assault means-

- (a) penetrating the vagina (this term shall include the labia majora), the anus or urethra of any person with any part of the body of another person, or an object manipulated by another person except where such penetration is carried out for proper hygienic or medical purposes;
- (b) manipulating any part of the body of another person so as to cause penetration of the vagina (which shall include the labia majora), the anus or urethra of the offender by any part of the other person’s body;
- (c) introducing any part of the penis of a person into the mouth of another person; (d) engaging in cunnilingus or fellatio; or
- (e) containing sexual assault as defined in clauses (a) to (d) above in circumstances falling under any of the six following descriptions: First - Against the other person’s will. Secondly - Without the other person’s consent. Thirdly - With the other person’s consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or hurt. Fourthly - Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be lawfully married. Fifthly - With the consent of the other person, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent. Sixthly - With or without the other person’s consent, when such other person is under sixteen years of age.

Explanation: Penetration to any extent is penetration for the purpose of this section.

Exception: Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault.”

⁷⁷ AIR 2004 SC 3566

and Justice G. P. Mathur held that “*only penile penetration would constitute rape, and no other forms of penetration would attract the offence under section 375 IPC*”. The Supreme Court held “*that prosecution of an accused for an offence under section 376 IPC on a radically enlarged meaning of section 375 IPC may violate the guarantee enshrined in Article 20(1) of the Constitution, which states that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.*” The Supreme Court held “*it will not be in the larger interest of the State of the people to alter the offence of rape as contained in Section 375 IPC to include penetration other than penile penetration, by a process of a judicial interpretation as is sought to be done by the petitioner*” in that case.” Thus, despite the recommendations of the 172nd Law Commission, the Supreme Court refused to tamper with the existing interpretation of the offence of rape in section 375 IPC

In *Koppula Venkatrao v State of AP*⁷⁸ stated that the “*definition of rape as contained in section 375 of the IPC refers to sexual intercourse and the Explanation appended to the section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. The girl above the age of 16 has right to get marriage nullified under section 3 of the Prohibition*

⁷⁸ (2004)3 SCC 602 “*to examine the issues submitted by the petitioners and examine the feasibility of making recommendations for amendment of the Indian Penal Code 1860 or deal with the same in any other manner so as to plug the loopholes*”.

⁷⁸ MANU/DE/0153/1996.

against Child Marriage Act 2006. In cases of marriage of a girl below the age of 16 years, her consent would be immaterial". Most importantly, the Court also held that "consummation with a wife below the age of 15 years is an offence and it is irrelevant whether she is married or applicable personal law provides otherwise."⁷⁹ According to CrPC sec 198 subsection 6 "in cases of prosecution of offences against marriage the courts cannot take cognizance of an offence of rape." Under section 376 IPC one year after the lapse of an offence regarding "sexual intercourse by a man with his own wife who is below 15 years of age". In 2008 amendment to CrPc the word "15 years of age substituted with 18 years in subsection 6".⁸⁰ In 2006 Prohibition of Child Marriage Act has been enacted "to restrain and prevent the solemnization of child marriages". Even after this legislation the age of consent provision in IPC under sec 375 is remained unchanged that the sexual intercourse by a man with his wife above the age of 15 and below the age of 16 years will not amounts to rape. In *Lajjadevi V. state*⁸¹ the Delhi High Court observed that "it is distressing that the IPC acquiesces child marriage by stating that sexual intercourse by a man with his wife above the age of 15 and below the age of 16 years is not rape". The Court lamented the distressing fact that various legislations – like the Indian Majority Act 1875, Hindu Minority and Guardianship Act 1956 and the Dowry

⁷⁹ Raha, S. & Giliyal, A. (2013). "Child Marriage and the Protection of Children from Sexual Offences Act", 2012. (p. 3), Bangalore: CCL-NLSIU <https://www.nls.ac.in/ccl/justicetochildren/poscoact.pdf>.

⁸⁰ Section can be reads as: "No court shall take cognizance of an offence under section 376 of the Indian Penal Code 1860 (45 of 1860), where such offence consists of sexual intercourse by a man with his own wife, the wife being under eighteen years of age, if more than one year has elapsed from the date of commission of the offence".

⁸¹ 2012 VIAD (Delhi) 465.

Prohibition Act 1961– also recognize child marriages and thereby destroy the very purpose and object of the Prohibition of Child Marriage Act 2006. The Court then distinguished the position of girls below and above 16 years of age. With respect to girls above the age of 16 years, it held that

“if the girl is more than 16 years, and the girl makes a statement that she went with her consent and the statement and consent is without any force, coercion or undue influence, the statement could be accepted and Court will be within its power to quash the proceedings under section 363 or 376 IPC. Attending circumstances, including the maturity and understanding, social background, and the age of the girl and male, have to be taken into consideration.”

Unfortunately, the recommendations of the Law Commission were not taken into consideration by the Indian Parliament and no amendments to the *IPC* and allied laws were made. It took almost 13 years for parliamentary change to be wrought in the *IPC* and related laws regarding sexual offences, mainly due to the public outrage raised through social media regarding the Delhi gang Rape in 2012. Justice Verma Committee objected to the use of the term “*sexual assault*” over “*rape*” in section 375 *IPC*. It stated that “*the Criminal Law (Amendment) Bill 2012 uses the term sexual assault in lieu of rape to cover a wider gamut of offences including penetrative sexual assault which has thus far been called rape in the IPC. The Committee recommended that the term rape⁸² be retained in the*

⁸² The report defines rape as: “A man is said to commit rape if he—
 (a) penetrates the vagina or anus or urethra of a person with—
 (i) any part of his body including his penis or, (ii) any object manipulated by him, except where such penetration is carried out for proper hygienic or medical purposes; or,
 (b) manipulates any part of the body of a person so as to cause penetration of the vagina or anus or urethra of another person; or,

*IPC to denote the highest categorisation of sexual assault of penetrative sexual assault.”*⁸³

The Criminal Law (Amendment) Act 2013 gave the offence of rape under sec 375⁸⁴ a wider definition. Rape is no longer confined to “*penile-vaginal*

- (c) *engages in cunnilingus or fellatio, under the circumstances falling under any of the following six descriptions:— Firstly.—Against the person’s will; or”, “Secondly.— Without the person’s consent; or, Thirdly.—With the person’s consent, where such consent has been obtained by putting the person, or any other person in whom the person is interested, in fear of death or of hurt; or, Fourthly.— With the person’s consent, when the man induces the person to consent to the relevant act by impersonating another man to whom the victim would have otherwise knowingly consented to; or, Fifthly.— With the person’s consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the man personally or through another of any stupefying or unwholesome substance, the person is unable to understand the nature and consequences of the action to which he/she gives consent; or, Sixthly.— When the person is unable to communicate consent either express or impliedly. Explanation I.— For the purposes of this section, penetration means penetration of the vagina, anus or urethra to any extent. Explanation II.—For the purposes of this section, vagina shall also include labia majora. Explanation III.—Consent will not be presumed in the event of an existing marital relationship between the complainant and the accused. Explanation IV.—Consent means an unequivocal voluntary agreement when the person by words, gestures or any form of non-verbal communication, communicates willingness to participate in the specific act. Provided that, a person who does not offer actual physical resistance to the act of penetration is not by reason only of that fact, to be regarded as consenting to the sexual activity.”*

⁸³ Verma, J.S., Justice, Seth, L., Justice, & Subramaniam, G. (2013). *Report of the Committee on Amendments to Criminal Law*. New Delhi: Government of India, p.434

- ⁸⁴ Rape: “A man is said to commit rape if he-
- (a) *penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her do so with him or any other person; or*
- (b) *inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*
- (c) *manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*
- (d) *applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under circumstances falling under any of the following seven descriptions:First.— Against her will. Secondly.— Without her consent. Thirdly.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt. Fourthly.— With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly.— With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly.— With or without her consent, when she is under eighteen years of age. Seventhly.— When she is unable to communicate consent.*

penetration”. It includes “*penile penetration, or insertion of any object or non-penile body part, or manipulation of a body part of a woman, by a man, or application of his mouth, into the vagina, mouth, urethra and anus of the woman. When a woman is forced to perform such penetration, insertion etc. with him or any other person, this would also amounts to rape*”. The sixth instance, the age of the consent has been raised to 18 years in amendment Act. Hence, “*whether she consents or not, if she is under 18 years of age, her consent to sexual intercourse is immaterial and such sexual intercourse with a girl under the age of 18 will be construed as rape*”. A seventh instance of rape has been added in the amendment Act. “*If a woman is unable to communicate her consent, it will be deemed that she did not consent and hence the act of sexual intercourse will be construed as rape*”. The first Explanation to Section 375 states that vagina includes “*labia majora*”. The second Explanation defines the term consent as an “*unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act*”. A provision to the Explanation states that “*just because a woman does not physically resist the act of penetration, she shall not, by the reason only of that fact, be regarded as consenting to the sexual activity*”. The first Exception to Section 375 IPC states that “*a medical*

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora
Explanation 2.— Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: PROVIDED that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Exception 1.— A medical procedure or intervention shall not constitute rape. Exception 2.— Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

procedure or intervention shall not constitute rape". But even after the amendment no change has been made regarding the content of the exception of marital rape in IPC, which repeats the statement that sexual intercourse or sexual acts by a man with his own wife who is above 15 years of age is not rape.

4.5.7.2 Child sexual abuse and marital rape exception

The POCSO Act penalizes all the sexual activities of the person below the age of eighteen years irrespective of the gender or age of the victim or the accused. Further, one of the grounds of aggravated penetrative sexual assault is penetrative sexual assault by "a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child commits penetrative sexual assault on such child."⁸⁵ This is punishable with a fine and a minimum term of 10 years imprisonment which may extend to life imprisonment.⁸⁶ But the IPC provides for a marital rape exception which states that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.⁸⁷ The contradiction is that in one hand under the POCSO Act, a spouse of a person below the age of 18 years can be prosecuted irrespective of whether the marriage has been contracted voluntarily, a person having sexual contact with a person under 18 years can be punished on the other hand the marital rape exception still exist in our criminal law. Besides this it is important to note that a 'married woman' under the Code

⁸⁵ Supra n 8, s 9(n)

⁸⁶ Ibid s 10

⁸⁷ Supra n 7

who is above the age of 15 but below the age of 18 is also a child under the Act. Therefore, any form of sexual relations with such a ‘married woman’ would amount to an offence under the Act while the same Further, it is now mandatory for those who have information about the commission of a sexual offence to report it to the local police. The new amendment of the POCSO Act which was introduced by the Criminal Law Amendment Act, 2013 essentially implies that in case of conflict between the provisions of the POCSO Act and any other law, the former will override.⁸⁸ Thus, in all cases of child marriage where the bride or groom is below 18 years of age, a charge of aggravated penetrative sexual assault can lie against them under the POCSO Act. This will lead to an unintended situation of the restoration to child marriage in order to evade criminal prosecution. In *Independent thought v. Union of India*, the Supreme Court declared the marital rape against child wives are *arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just*” and is violative of *Art 14, 15, 21 of Constitution*.

4.6 Other Legislations

A few special enactments of relevance to the topic of child sexual abuse also have been enacted by the Parliament, such as “*The Immoral Traffic Prevention Act 1956 (ITPA)*, *the Information Technology Act 2000*, *the Juvenile*

⁸⁸ S 42A POCSO Act reads as: “*not in derogation of any other law, - The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of its inconsistency.*”

Justice (Care and Protection of Children) Act 2015, the Commissions of Protection of Child Rights Act 2005.”

4.6.1 The Immoral Traffic Prevention Act 1956 (ITPA)

The Immoral Traffic (Prevention) Act 1956 is the primary legislation that deals with “*the problem of human trafficking in India*”, supplemented by the Indian Penal Code 1860 (IPC). ITPA does not define child prostitution but prostitution as “*the sexual exploitation or abuse of persons for commercial purposes*” and criminalizes “*the act of selling, procuring and exploiting any person for prostitution*”. While the Act does not specifically define ‘trafficking’, it addresses many of the component aspects of one major type of trafficking by “*outlawing sexual exploitation and abuse of persons; running a brothel; living on the earnings of a prostitute; procuring, inducing or taking a person for the sake of prostitution, and; detaining a person for prostitution*”.⁸⁹ This act recognizes that children and even men can be sexually abused for commercial purposes and should be protected. Section 9 of this Act provides “*greater punishment to persons who cause, aid or abet the seduction of women or girls, over whom they have authority or who are in their care and custody, for prostitution*” The Act also confers wide powers on the relevant authorities in matters of “*rescue and rehabilitation of victims of trafficking and provides for stringent action against exploiters, including the eviction of brothels and increased punishment where offences are committed on children*”. This Act empowers the Central Government to appoint trafficking officers. These special

⁸⁹ Ss. 3, 4, 5, 6, and 8 Immoral Traffic (Prevention) Act 1956

police officers can search without warrant “any premises where this offence is suspected of being committed and they can rescue children or any person who is being forced into prostitution, or is carrying on or is being made to carry on prostitution”. Discretionary powers have been given to the magistrates “for interim placement of children and minors who are rescued”, in an institution recognized under the Children’s Act. Provisions for protective and corrective homes for the safe custody of children and special courts for their speedy trial are some of the important changes that are sought to be achieved by the new Act over its previous law.⁹⁰

One of the main drawbacks of the ITPA is that it has a tendency to criminalize victims of trafficking along with their exploiters, rather than making provision for their rehabilitation. In other words, the Act remains “restrictive and punitive instead of being progressive and reformatory”. It also remains unbalanced in the sense that while it has attempted to restrict supply of prostitution, it has failed to address the forces which create demand. Another problem is that it does not create a more general offence of trafficking outside the context of prostitution.

4.6.2 The Juvenile Justice (Care and Protection of Children) Act 2015

The juvenile justice (Care and Protection) Act, 2000 has been amended in 2006, in 2011 and also in 2015. 2015 amendment replaced the 2010 Act and provides strengthened provisions for both “children in need of care

⁹⁰ Saxena, Shobha (1995). *Crimes against Women and Protective Laws*. DEEP & DEEP PUBLICATIONS, New Delhi

protection and children in conflict with the law". Firstly the term "juvenile" is replaced to "child" or "child in conflict with law" across the Act. The child in need of care and protection under Section 2(14) of the Juvenile Justice (Care and Protection of Children) Act, 2015 includes children "*who has been is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts*"⁹¹ The new Act identifies a "*child in conflict with law to be a child who is found by the Juvenile Justice Board to have actually committed an offence*". The latest amendment in 2015 was the result of public demands for a more stringent punishment for the accused of who was a juvenile offender in Delhi Gang-rape case in 2012. In that case the juvenile who was the main accused, was given "*the maximum three year tenure imprisonment in a correctional home under the JJ Act*". Thus in 2015 Act under Section 15, special provisions have been made to tackle child offenders committing "*heinous offences in the age group of 16-18 years*". The Juvenile Justice Board is given the option to transfer cases of heinous offences by such children to a Children's Court after conducting a preliminary assessment. A revamped CWC is "*identified, empowered and given statutory functions for orders to be passed for children in need of care and protection beside rehabilitation and social integration*". Mandatory registration of child care institutions is provided with strict penalty for non-registration. Observation, shelter and special homes may be established by State Governments. Private unregistered child care homes "*abusing, exploiting and selling children will be in the net*".

⁹¹ The Juvenile Justice (Care and Protection Of Children Act) 2015, S 2(14)(viii)

Chapter II provides for “*Fundamental Principles for Care, Protection, Rehabilitation and Justice for Children*”. It incorporates internationally accepted “*principles of presumption of innocence, dignity and worth, participation, best interest, family responsibility, safety (no harm, no abuse, no neglect, no exploitation and no maltreatment), positive measures, non-stigmatizing semantics, non-waiver of rights, equality and non-discrimination, privacy and confidentiality, repatriation and restoration, fresh start, diversion and natural justice. Institutionalization as a measure of last resort is suggested if no other family based care option is possible or available*”. The Act prohibits “*the media from disclosing the identity of children or propagating any such information which would lead to the same*”. All reports relating to the child are also provided to be treated as confidential.

4.6.3 The Information Technology Act, 2000

In recent years child pornography has increased due to the easy access to internet, & easily available videos and pictures on the internet. Child pornography is the most heinous crime which occurs and has led to various other crimes such as “*sex tourism, sexual abuse of the child etc*”. Child pornography is a kind of child sexual abuse and crime in India. Information Technology Act, 2000 along with Indian Penal Code, 1860 provides protection from child pornography. The Information Technology Amendment Act 2008 under Section 67-B provides “*for punishment for publishing or transmitting of material depicting children in sexually explicit act in electronic form*”, then offender shall be punished with punishment in case of first offence: “*imprisonment upto 5 years*”

& fine amounting to 10 lakhs rupees and on subsequent offence -7 years of imprisonment & fine amounting to 10 lakhs rupees.”

4.6.4 The Goa Children’s Act, 2003

The Goa Children’s Act is a pioneer to the POCSO Act. Goa is the only state in India that enacted a legislation “*to protect, promote and preserve the best interests of children in Goa and to create a society that is child-friendly.*”⁹² The Act includes provisions relating to sexual offences committed against children, as also other rights of the child, such as, education, health and nutrition. In Goa, tourism-related CSA cases, and the number of paedophiles were growing. “*A growing number of paedophiles – seeking children as sexual partners – have discovered Goa to be a safe haven. They form part of a wider syndicate operating globally within a well-defined network.*”⁹³ Paedophiles can be defined as “*any adult who habitually seeks the company of a child / children for the gratification of his / her sexual needs*”.⁹⁴ Child rights organisations in Goa raised the campaign for a separate law dealing with sexual offences against children which resulted in passing of the Goa Children’s Act 2003. From August 2002, the then “*Secretary, Women and Child Development, Government of Goa*”, initiated a series of consultations in collaboration with NGOs. The Goa Children’s Act 2003 was amended in 2005, mainly to address difficulties that hampered the achievement of its objectives.

⁹² Preamble of the Goa Children’s Act 2003.

⁹³ Evil – Tourism related Paedophilia in Goa, Nishtha Desai, Vikas Adyayan Kendra (2001).

⁹⁴ Id

*“Sexual offences”*⁹⁵ under the Goa Children’s Act 2003 have been classified as *“grave sexual assault”*⁹⁶, *“sexual assault”*⁹⁷ and *“incest”*⁹⁸ and have similarity with the offences contained under the POCSO Act.⁹⁹ *“Grave sexual assault”* is a combination of the offences of *“penetrative sexual assault and pornography”* under the POCSO Act, whereas *“sexual assault”*, under the Goa Children’s Act 2003, is a combination of *“sexual assault and sexual harassment”*. *“Incest”* falls in the aggravated form of sexual offence. The Goa Act also lays down setting up a *“Children’s Court”*¹⁰⁰, and its procedures¹⁰¹. It maintains that *“cross-examining of child victims is avoided and the same, if necessary, is done through the judge,” “child’s testimony or statement should be recorded in the presence of a social worker/ counsellor as early as possible after the abusive incident,”* and *“adequate translations/ interpretations and translators/ interpreters who are sensitive to the children’s needs should be provided wherever needed”*.

⁹⁵ s.2 (y) of the Goa Children’s Act 2003

⁹⁶ Id s. 2 (y) (i)

⁹⁷ Id s. 2 (y) (ii)

⁹⁸ Id s. 2(y)(iii)

⁹⁹ For details see chapter 5

¹⁰⁰ Supra n.95 s. 27

¹⁰¹ Supra n. 95 s. 31

CHAPTER 5

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012: STATUTORY ANALYSIS

5.1 Introduction

The protection of children from sexual offences Act 2012 (hereinafter referred to as the Act) has been enacted “*to strengthen children and empowering the legal provisions for their protection from sexual abuse and exploitation*”¹. This legislation is in response to the rapid increase in the instances of serious sexual offences against children and low rates of conviction for the same. It provides for the provisions to safeguard children from grave offences of “*sexual assault, sexual harassment, human trafficking and pornography*”.² For the first time, a special law has been enacted to address the issue of sexual offences against children and clearly defines them. It includes within its limit the sexual abuse of both male and female children.³ Thus it makes the crimes “*gender neutral*” and has filled most of the lacunas in the current legal system. The Act penalizes, for the first time in India, a number of abusive sexual acts against children. The main aim of the Act is to put an end to the sexual crimes against children and to punish and create fear at the minds of the offenders and also to ensure the all kinds of protection of the children.

¹ The Protection of Children from Sexual Offences Act, 2012, Ministry of Women And Child Development Press Information bureau, Govt. of India (May 22, 2012), <http://pib.nic.in/newsite/erelease.aspx?relid=84409>.

² Id

³ Supra n 1, s. 2 (1) (d)

5.2 Genesis of the Act

One of the most destructive problems affecting children in India today is sexual abuse. Government study in 2007 study revealed that about 53% of the children interviewed reported they are experienced different forms of sexual abuse and exploitation including rape.⁴ It is an indisputable fact that the abusers were “*family members, neighbors, teachers and others known persons to the child and the mostly abused age group is of 5-12*”.⁵ A main finding of the study is that CSA is one of the slightest acknowledged abuse in India because most of the cases being unreported.⁶

Besides this, until the enactment of the Act the legislative framework dealing with CSA was inadequate to specifically address the issue. The legal provisions dealing with sexual offences against children were covered by various statutes including “*I.P.C, 1860*”⁷, “*the Indian Evidence Act, 1872*”⁸, the “*Code of Criminal Procedure*”, 1973⁹, the “*Indecent Representation of Women*

⁴ Kakkar, L., Varadan, S., & Kumar, P. *A Study on Child Abuse: India*. MINISTRY OF WOMEN AND CHILD DEVELOPMENT, Government ohild-Abuse-Report.pdf.

⁵ Child Abuse Destroying Illusions, 62 ECO. & POL. WKLY. 1400, 1400 (2007).

⁶ Supra n 4

⁷ I.P.C, ss 375, 376, 354, 509 and 377

⁸ Indian Evidence Act, 1872, s 114(A) provides that “*in cases of custodial rape, rape of a pregnant woman, and gang rape if the woman states before the court that she did not consent, the court shall presume that she did not consent.*”;

Indian Evidence Act, s 146, states that “*it is not permissible to put questions in cross-examination of the prosecutrix about her general moral character*”

⁹ CrPC. (Amendment) Act, 2005, No. 25, Acts of Parliament, 2005, s 164(A) “*for medical examination of victims of rape*”

s.53(A) “*for medical examination of accused of rape*” and s 176(1A)(a)(b) “*for investigation by judicial magistrates of custodial rape and deaths.*”; CrPC (Amendment) Act, 2008, No. 5, Acts of Parliament, 2009, s 357(A) “*providing for victim compensation scheme*”.

(Prohibition) Act”, 1986¹⁰ and the “Information Technology Act, 2000”¹¹. The IPC provisions had many loopholes that they are not defining CSA as specific offence not prescribes punishment for CSA and furthermore not differentiating the child victims from adults.¹²

Legal remedies were only existed under Sections ‘375, 354 and 377’ which includes only “*rape, sexual molestation and unnatural sex*”. These inadequate provisions of the IPC mainly related with offences against women and girl children and not focused on crimes against boys. Moreover, these IPC provisions were not successful in dealing with various kinds of sexual offences against children and the series of sexual acts according to the degree of “*coercion, injury, age and incapacitation of the child*”.¹³ It also didn’t consider the trust or relationship between the child and the abuser which is a crucial factor in determining the severity of such offences.

According to the 156th Report of the Law Commission of India,¹⁴ sexual offences against children under the age of twelve years¹⁵ may be committed in different forms such as “*sexual intercourse, carnal intercourse and sexual assault*”. The “*penile penetration into the vagina*” of the victim is

¹⁰ Indecent Representation of Women (Prohibition) Act, No. 60 of 1986, s 3 and s4 “*pertaining to the prohibition of advertisements, books or posts containing indecent representation of women*”.

¹¹ Information Technology Act, No. 21 of 2000, INDIA CODE (2000), s 67 “*it provides that publication and transmission of pornography through the internet is an offence*”.

¹² Supra n 1

¹³ Geeta Ramaseshan, *Law and the age of innocence*, THE HINDU (Jan 18, 2016, 3.40Am) <http://www.thehindu.com/opinion/op-ed/article3543940.ece>.

¹⁴ 156th Law Commission of India Report, Government of India, The Indian Penal Code (1971), (Oct 11, 2014, 2.30 pm) <http://lawcommissionofindia.nic.in/1-50/Report156.pdf>.

¹⁵ I.P.C., s 376(2)(f). “*treating the rape on a child below twelve years of age as an aggravated offence punishable with a minimum of 10 years of rigorous imprisonment*”.

coming under the purview of offence of rape under ss 375 and 376¹⁶. The acts of “*penal oral penetration*” and the “*penal anal penetration*” were covered by “*unnatural sex*” against the order of nature under s.377 IPC.¹⁷ The instances of “*finger or any other object penetration*” into the vagina or anus of the victim were considered as offences of “*outraging modesty of women*” under s 354.¹⁸ In *Sakshi v. Union of India*¹⁹, the SC of India had approved the arguments of petitioners regarding the lacunas in the existing provisions IPC in dealing the sexual offences against children. Later the alleged arguments were confirmed by 172nd Report of the Law Commission of India.²⁰ These inadequacies in the criminal law were also emphasized by the Law Commission in 2000 and recommended that the term “*rape*” should be replaced by “*sexual assault*” should comprise all forms of “*penetration*”, both “*human and object*”.²¹

The shortcomings in the legislative framework and the alarming results of 2007 study²² and other statistical data showed the urgent need for a special legislation to effectively prevent the problem. ²³ In 2009 the government passed a draft bill named the “*Protection of Children from Sexual Assault Bill, 2010*”. This Bill was unique as it stated that “*the onus of proving their innocence rested on the accused, unlike the existing legislation where the onus lay on the*

¹⁶ I.P.C., s 375 and s 376.

¹⁷ I.P.C., s 377 ‘unnatural offences’, i.e., “*carnal intercourse against the order of nature with any man, woman or animal*”. I.P.C., s 377 criminalizes ‘private, consensual same-sex conduct’ and sexual-offences against children.

¹⁸ See I.P.C., s 354

¹⁹ A.I.R.2004 S.C. 3566

²⁰ See 172nd Law Commission Of India Report, Supra n 14

²¹ Pallavi Gupta, *Child Marriages and the Law*, 47(43) ECO.& POL.WKLY, 49,51 (2012), http://www.epw.in/system/files/pdf/2012_47/43/Child_Marriages_and_the_Law.pdf.

²² supra n 4

²³ <http://southasia.oneworld.net/todaysheadlines/india-bill-to-curb-child-abuse-soon>.

prosecution's ability to prove guilt". However, after several debates in 2011, a specific bill for preventing sexual abuse against children was drafted comprehensively by the intervention of "*TULIR Centre for the Prevention and Healing of Child Sexual Abuse*" was finally passed by the Rajya Sabha in 2011.²⁴ The bill is enacted as specific legislation named "*Protection of Children from Sexual Offences Act 2012*".

5.3 Applicability and Jurisdiction of the Act

Be it enacted by Parliament in the Sixty-Third Year of the Republic of India. This act comprises of nine chapters and published in the Gazette of India Extraordinary Part II Section I dated 20th June, 2012. The applicability of the Act extends to "*the whole of India, except the State of Jammu and Kashmir*".²⁵

The Act necessitates the "*State Governments to depute the Sessions Court in each district as a Special Court to try offences under the Act*"²⁶. Such courts shall furnish the institutional system for enforcing the provisions of the Act. Otherwise if there is an already established "*children's court*" under the CPC Act²⁷ or "*Special Court*" for a similar purpose has been notified in a

²⁴ HavoviWadia, The Sounds of Silence: Child Sexual Abuse in India. Available at, <http://infochangeindia.org/children/analysis/the-sounds-of-silence-child-sexual-abuse-in-Inda>.

²⁵ Supra n 1

²⁶ Supra n 1, S. 28(1)

²⁷ Id; The Commissions For Protection Of Child Rights Act, 2005, No. 4 of 2006, s.25 reads as "*Children's Courts.- For the purpose of providing speedy trial of offences against children or of violation of child rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify at least a court in the State or specify, for each district, a Court of Session to be a Children's Court to try the said offences: Provided that nothing in this section shall apply if-*
(a) *a Court of Session is already specified as a special court; or*
(b) *a special court is already constituted, for such offences under any other law for the time being in force.*"

district, then these courts will try offences under this Act. These courts will have the power to take cognizance of any sexual offence against children, if receives any police report or complaint of such acts It shall also have the jurisdiction to try the offences under section 67(B) of IT Act²⁸ in so far as it relates to “*publication or transmission of sexually explicit material depicting children in any act, or conduct or manner or facilitates abuse of children online.*”²⁹

The Supreme Court has uttered apprehension on the instances of sexual abuse against of children and absence of prevention strategies by the

²⁸ S 67(B) of Information Technology Act 2000 reads as: “*Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form:*

Whoever,-

- (a) *publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or*
- (b) *creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or*
- (c) *cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or*
- (d) *facilitates abusing children online or*
- (e) *records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:*

Provided that the provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form-

- (i) *The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or*
- (ii) *which is kept or used for bonafide heritage or religious purposes*

Explanation: For the purposes of this section, "children" means a person who has not completed the age of 18 years.”

²⁹ Supra n 1, s 28(3)

government and issued direction to the Chief Secretaries to make efforts to put an end to the issue.³⁰ The Court observed:

*“it is the bounden duty of the States under Articles 21, 21A, 23, 24, 45 and 51A(k) to create and maintain a protective and healthy environment in which children who are the future of this country can bloom and subsequently become mature and responsible citizen of this country.”*³¹

The implementation of the Act become more delayed that most states have neither established the special courts nor appointed special public prosecutors. So the CSA cases still being tried by the normal criminal courts, and thus children’s right to child-friendly procedures has been denied repeatedly.³² Recently provisions of the Act have been invoked by the police in several districts whenever sexual offences against children have been reported. A few States have already notified certain courts as Special Courts, including Delhi, Kerala and Rajasthan. The reason for the delay is not only this but also the non-availability of sufficient number of judges to preside over these special courts and co-ordination of various departments which have their responsibilities assigned under the Act.³³

³⁰ In Re. Exploitation of children in the state of Tamil Nadu v. Union of India, Writ petition (CrI) No.102(2007) , *“During the hearing of this case on 16th December 2013 , a Bench of Justices S.S. Nijjar and Ibrahim Kalifulla noted that many States and Union Territories had not complied with the earlier directions of the Court regarding the implementation of protective provisions contained in the Act”*.

³¹ Ibid p 3

³² Experts share their views on the law against child sexual abuse. *“The Act cannot be implemented until the Special Courts are notified and a Special Public Prosecutor appointed,”* says Vidya Reddy, Director, Tulir-Centre for the Prevention and Healing of Child Sexual Abuse, Chennai. *“Cases can be filed under POCSO, but that is all. How can we move ahead with prosecution if the courts don’t exist,”* she asks. See <http://www.satyamevjayate.in/child-sexual-abuse/reviewing-pocso.aspx>.

³³ Ramyakannan *“Act to protect children from sexual offences hangs fire”*- The Hindu, April 1, 2013, *“Application of the Act itself is at a very nascent stage in the country,*

5.4 Analyzing the Provisions

The Act lays down the provisions with regard to various kinds of sexual offences against children and its punishments, compulsory reporting and punishment for “*non-reporting*” and “*false complaints*”, establishment of special courts, special procedures to be followed in recording of statement of victim, medical examination, investigation and trial. The Act also emphasizes the rights of children to free legal aid, government’s duty to frame guidelines in different stages of prosecution of CSA cases, role of the NCPCR and state commissions in monitoring the implementation.

5.4.1 Definition of child

Under the Act, the term “*child*” has been defined to mean “*any person below the age of eighteen years.*”³⁴ It does not classify the female child from male child and thus any child below eighteen years gets protection from all kinds of sexual offences. This gender neutrality and clear definition of child gives a positive status to the Act.

Before the enactment of the Act the concept of the child with respect to sexual offences was confusing in two aspects. First issue is the absence of uniformity in the matter of age limit of children in different legislations and the other is most of the legislations differentiates the female child from male

since it only came into existence on November 14, explains Anant Kumar Asthana, a Delhi-based lawyer working in the child rights segment.” <http://www.thehindu.com/news/national/tamil-nadu/act-to-protect-children-from-sexual-offences-hangs-fire/article4567428.ece>

³⁴ Supra n 3

child³⁵. The penal legislation of the country IPC fixes the criminal liability on the child between the age limit of seven and twelve years.³⁶ For the purpose of protection against “kidnapping, abduction and related offences”, the age limit has been fixed as 16 years in case of male child and 18 years in case of female child. However, IPC under s 375, exempts a person from the charge offence of rape if he has a “*forcible sexual intercourse with his wife*”, who is above 15 years of age. Under the Immoral Traffic (Prevention) Act, 1986, a child means “*a person who has not completed 16 years of age and a minor means a person who has completed 16 years of age but not completed 18 years*”. However a “*minor*” is “*a person under eighteen years of age in several other legislations*”.³⁷ Besides this there were no legal provisions in IPC which specifically deals with sexual abuse against male children. That is if a female child is subjected to non-penetrative sexual abuse, the abuser could be charged with “*assault with intent to outrage the modesty of a woman*.”³⁸ If a male child was abused, then the offender could be charged only with “*unnatural offences*”.³⁹ But in most of the times the authorities will not ready to cover the non penetrative sexual acts which were not always the case.⁴⁰ But the Act

³⁵ Supra chapter 1, Definition of Child, p 3

³⁶ Indian Penal Code, No. 45 of 1860 ss 82, 83

³⁷ The age of Majority Act, Juvenile Justice (Care and Protection of Children) Act, 2000, s 2(k), Protection of Women from Domestic Violence Act, 2005, s 2(b)

³⁸ Supra n 14, s 354

³⁹ Ibid s. 377, see also “*India: Court Strikes Down 'Sodomy' Law*,” Human Rights Watch news release, July 2, 2009, <http://www.hrw.org/news/2009/07/02/india-court-strikes-down-sodomy-law>.

⁴⁰ *Allan John Waters and Duncan Grant v. the State of Maharashtra and Maharukh Adenwalla, Bombay High Court.*

penalizes the non penetrative sexual acts against both boys and girls and provides equal punishment for the offender irrespective of sex of the victim.

Although the Act is gender-neutral overall with regards to victim, the legislators failed to incorporate this gender neutrality in certain extend with respect to offenders by using the pronoun 'he' in the description of offender in the definition of “*penetrative sexual assault*”⁴¹ and thus naturally excludes the women offenders.⁴² Besides this in chapter V of the Act, which contains the provisions of reporting, uses the pronoun ‘he’ throughout after the first section. Here again the provision has a male bias and caused to be interpreted to completely pardon women from the burden of reporting. There is a prejudice concept in the society that sexual abuse is perpetrated only by men and the penetrative sex applicable only to the use of the male organ. Women can also sexually abuse both male and female children for example, “*digital rape*” of children, or inserting any objects into the anus or vagina of children. It is true that most sex offenders are men, and most victims are female. However, the studies indicate that there is an increase in the number of male sexual abuse victims in India.⁴³

5.4.2 Classification of sexual offences

It is the first time in India the sexual offences were defined and classified under the Act as “*penetrative and aggravated penetrative sexual*

⁴¹ Supra n 3, chapter 2 sec A(3)

⁴² Jose Parapully, *Questions of Protection*’ (14 August 2015, 4.00am), http://www.telegraphindia.com/1120814/jsp/opinion/story_15851586.jsp#.UIazp2CpSnM.

⁴³ Supra n 4

assault, sexual and aggravated sexual assault, sexual harassment, using a child for pornographic purposes, storage of pornographic material involving child, abetment to an offence and attempt to commit an offence.”

The punishment provided by the Act for each offense is based on the severity of offense that some have ‘minimum and maximum term’ of imprisonment but some others have only a maximum period is specified under the Act. The punishment provided for ‘penetrative sexual assault’⁴⁴, is “*for a term which shall not be less than seven years but which may extend to imprisonment for life*”. And the punishment for “*sexual harassment*”⁴⁵, is imprisonment “*for a term which may extend to three years*”. That in such cases the special court has no discretion to reduce the sentence below the minimum term prescribed under the Act. For committing all of the sexual offences the offender has to pay the fine also.

In “*State of Himachal Pradesh v. Sanjay Kumar*”⁴⁶, decided by Justice A.K. Sikri and Justice Abhay Manohar Sapre of the SC of India, the accused committed the offense of repeated “*penetrative sexual assault*” upon a 9 year-old child who is his niece. The offences under sections 376(2) (f)⁴⁷ and 506⁴⁸ of IPC were charged against him. The trial court convicted him, but this order was set aside by the High Court on the basis that the prosecution had failed to prove the guilt of accused beyond reasonable doubt. The Supreme Court

⁴⁴ Supra n 1, S 4

⁴⁵ Supra n 1, s 12

⁴⁶ MANU/SC/1599/2016

⁴⁷ punishment for rape of a female below 12 of age

⁴⁸ punishment for criminal intimidation

restored the conviction of the accused by trial court which had awarded rigorous imprisonment for a period of twelve years and fine of Rs. 50,000, in default of payment of fine a further period of one year of imprisonment.

The Act also makes clear that if sexual offence is committed under POCSO as well as IPC, the quantum of punishment awarded should be greater in degree.⁴⁹ The Act also defines some other offences like ‘abetment’⁵⁰, ‘attempt to commit offence’⁵¹, “*failure in reporting offence*”⁵², “*false complaints*”⁵³, and “*disclosing the identity of victim*”⁵⁴ and stipulates punishments for the same.

5.4.3 Special procedures

The Act stipulates “*special procedures*” to be followed by the investigating agencies and courts during recording of statement.⁵⁵ It provides for establishment of Special Courts⁵⁶ and appointment of Special Public Prosecutors⁵⁷ for the trial of with offences stipulated under the Act. Children have a right legal representation by an advocate of his/her choice or free legal

⁴⁹ Supra n 1, s 42

⁵⁰ Supra n 1, ss 16& 17

⁵¹ Sec 18 states that “*punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both*”

⁵² Supran 1, s 21(1,2)

⁵³ Supran 1, s 22

⁵⁴ Supran 1, s 23(1, 2, 3, 4)

⁵⁵ The recording by the police should be “*as spoken by the child*” and should be in the presence of the child’s parents or a person in whom the child has trust or confidence, s 26 (1). “*If the child does not understand the language in which the FIR is recorded, it is incumbent upon the police to seek assistance of a translator or interpreter*” whose qualifications and experience is provided under the POCSO Rule. S 19 (4) of Act and Rule 3 of the POCSO Rules].

⁵⁶ Supra n 1, s 28 and 34

⁵⁷ Supra n 1, s 32

aid⁵⁸. The Act also provides rehabilitative measures, such as compensation for the child and involvement of the Child Welfare Committee in different stages of prosecution.

5.5 Some debating provisions

5.5.1 Raising of age of consent

Under the POCSO Act, the term “*child*” has been defined to mean “*any person below the age of eighteen years*”⁵⁹. The Act does not recognize sexual autonomy of children in any form. Children can also be held liable for committing sexual offences under the Act. As a result, sexual interactions or intimacies among or with children below the age of 18 years constitute an offence. It is an undeniable fact that it is a social reality that the existence of child marriage which is still prevailing in the country. UNICEF’s State of the World’s Children Report 2012 says that “*47 percent of Indian children aged below 18 are married*⁶⁰ and *26 percent of these married children do indulge in sexual activity*”.⁶¹ As stated above while the Prohibition of Child Marriage Act, 2006 forbids marriage below the age of 18 for girls and 21 for boys, it neither makes such marriage null nor void unless of course either of the parties seeks annulment.⁶² Such a provision in the Child Marriage Act brings it in direct Contradiction with the POCSO Act as it has created a situation wherein the

⁵⁸ Supra n 1, s 40

⁵⁹ Supra 1, Section 2(1)(d)

⁶⁰ The State of the World’s Children 2012, UNITED NATIONS CHILDREN’S FUND 121 (Feb. 2012), available at http://www.unicef.org/sowc/files/SOWC_2012- Main_Report_EN_21Dec2011.pdf.

⁶¹ Abantika Ghosh, NCPCR unhappy with revision in age of consent for sex, THE INDIAN EXPRESS, (Jul. 11, 2012), <http://www.indianexpress.com/news/ncpcr-unhappy-with-revision-in-age-of-consent-for-sex/972746/>.

⁶² Supra n 6

existence of child marriages is tolerated on one hand while any form of sexual relations which emanate from such relations has been made punishable. Hence, it indirectly allows consensual sexual acts and it validates the legitimacy of offspring from such a relationship. In 2012, Sandeep Paswan “stood trial for raping and kidnapping a minor girl, the same minor girl who was his lawfully wedded wife and with whom he had been cohabitating for over a year. But owing to the provisions of POCSO Act he was facing charges for raping and kidnapping his own wife”.⁶³

There have been a number of cases in which girls between the ages of 16-18 years have left their homes on their own and with a man of their choice. In such cases, it is the parents of the girl will usually file a case against the man alleging kidnapping from lawful guardianship, rape, and sexual assault. The question is whether there should criminal consequences follow in cases where girls elope with and/or marry a man they claim to love. In such a case the Delhi High Court⁶⁴ observed that it is “*distressing*” that the IPC “*acquiesces child marriage*” by stating that sexual intercourse by a man with his wife above the age of 15 and below the age of 16 years is not rape. The

⁶³ Smriti Singh, Raising age of consent for sex to 18 regressive, undemocratic: Court, THE TIMES OF INDIA, (Jun 1, 2012), <http://timesofindia.indiatimes.com/india/Raisingage-of-consent-for-sex-to-18-regressive-undemocratic-Court/articleshow/13694982.cms?intenttarget=no>.

⁶⁴ *Lajja Devi v. State* 2012 VIAD (Delhi) 465 With respect to girls above the age of 16 years, it held: “*If the girl is more than 16 years, and the girl makes a statement that she went with her consent and the statement and consent is without any force, coercion or undue influence, the statement could be accepted and Court will be within its power to quash the proceedings under Section 363 or 376 IPC. Here again no straight jacket formula can be applied. The Court has to be cautious, for the girl has right to get the marriage nullified under Section 3 of the PCM Act. Attending circumstances including the maturity and understanding of the girl, social background of girl, age of the girl and boy etc. have to be taken into consideration.*”

Indian Majority Act, Hindu Minority and Guardianship Act, 1956 and the Dowry Prohibition Act, 1961 also recognize child marriages and “*destroy the very purpose and object of the Prevention of Child Marriage Act to restrain and prevent the solemnization of Child Marriage.*”⁶⁵ The court then tried to distinguish the situation of girls below and above 16 years of age. In cases of marriage of a girl below the age of 16 years her consent would be immaterial. However, the court stated that “*...there can be special or exceptional circumstances which may require consideration, in cases where the girl even after attaining majority affirms and reiterates her consent.*” They also held that consummation with a wife below age of 15 years is an offence and in such cases whether she is married or applicable personal law provides otherwise, is irrelevant. As is evident from the above ruling, the distinction based on age was linked to the marital rape exception under the IPC. But after the enactment of POCSO Act where the Special Courts in emerging cases of this nature have taken different positions on this issue.⁶⁶ The reality is that these cases⁶⁷ have

⁶⁵ Child Marriage and the Protection of Children from Sexual Offences Act, 2012, <https://www.nls.ac.in/cc1/justicetochildren/poscoact.pdf> p 3, and 4:

⁶⁶ “1). A 15-year-old girl eloped with and subsequently married a 22-year-old man. Based on a complaint by the mother, the couple was traced and the man was booked for kidnapping and rape under the IPC and POCSO Act. Dharmesh Sharma, Additional Sessions Judge rejected the view that the POCSO Act criminalizes even consensual sexual relationships, acquitted the accused, and observed: “I am afraid if that interpretation is allowed, it would mean that the human body of every individual under 18 years is the property of the State and no individual below 18 years can be allowed to have pleasures associated with one’s body. In my opinion, it would neither serve the object of present enactment, nor the purpose of criminal law to hold the accused guilty on the ground that he had sexual intercourse with a girl below 18 years.”

2) “The mother of a 14-year-old girl alleged that her daughter has been repeatedly raped by their landlord and had become pregnant as a result of it. The accused was arrested. However, at the bail hearing the parties decided to compromise the matter as the accused agreed to marry the girl and offer financial support to her mother. He was granted interim bail and the couple married in the course of the trial. Thereafter, the prosecutrix

posed considerable difficulties before the courts. They have found it difficult to convict the accused when the prosecutrix did not support the case of the prosecution and claimed to have gone willingly with the man.⁶⁸

5.5.2 Mandatory Reporting

Chapter V sec 19(1) of POCSO Act imposes a duty upon every person including a child having knowledge of the commission of a sexual offence or the apprehension that a sexual offence is likely to be committed to report the same to the police or special juvenile police unit.⁶⁹ For the first time in India

and her mother turned hostile. They claimed that the prosecutrix was 18 years of age and was in love with the accused. She had indulged in sexual intercourse with him under the belief that he would marry her. When she became pregnant, he refused to marry her and she then filed a case against him. The accused claimed that he did not commit fraud by performing marriage with her on account of this case. On its part, the Court attempted to discern the consensual nature of the decision made by the girl and then finally acquitted the accused when the girl refused to support the prosecution's case."

3) "A Muslim man was arrested for kidnapping and raping a 17-year-old girl. At his bail hearing, he claimed that the couple loved each other and intended to marry. Kamini Lau, Additional Sessions Judge rejected his bail and observed "Merely because both the girl and the accused happen to be from the same religion i.e. Muhammadan-whose Personal Law provides for a different age of marriage than the one provided under the statutory law of the land-does not mean any special indulgence is required to be given to the accused as far as criminal law of this land is concerned." Further, she held "Muslim parents are as much entitled to protect their minor daughters from sexual abuse and exploitation as any other Indian irrespective of religious considerations. No separate parameters can be adopted for Muslim offenders only because the complainant happens to be from the same religion."

⁶⁷ Anon, "Consensual sex with minor not a crime, Delhi court says", Times of India, 26 August 2013, http://articles.timesofindia.indiatimes.com/2013-08-26/delhi/41454391_1_minor-girl-15-year-old-girl-18-years.

State v. Aas Mohammad, 78/3013, Sections 376 and 506 of IPC and Sections 4, 6, 10 of POCSO Act. Judgment dated 13.08.2013. Decided by Sh T.S. Kashyap, Additional Sessions Judge -01, Special Judge (NDPS), Shahdara District, Karkardooma Courts, Delhi . See also Anon, "Muslim man's age plea denied in rape case", Times of India, 25 September 2013, http://articles.timesofindia.indiatimes.com/2013-09-25/delhi/42392078_1_pocso-act-criminal-law-marriage

⁶⁸ Supra n 66

⁶⁹ Protection of Children from Sexual Offences Act 2012, Sec 19(1) reads as: "*Notwithstanding anything contained in the CrPC, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,-(a) the Special Juvenile Police Unit, or(b) the local police*".

sexual offences against children is defined and classified under the POCSO Act. The offences vary from “*penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual assault, and sexual harassment, the use of a child for pornographic purposes*”.⁷⁰ The Act also places an obligation upon personnel of hospitals, media, lodges, hotels, or photographic facilities. They should report if they come across any sexually exploitative material or object related to a child to the police or the Special Juvenile Police Unit.⁷¹ The mandatory reporting nature is expressly evident from sec 21 of POCSO Act as it provides punishment for non reporting of all the offences providing under the Act. Sec 21(1) provides for punishment record a for the failure to report or case but excludes a child⁷² from punishment for non reporting. The Act also requires a person in-charge of a company or institution to be punished for non reporting the commission of an offence that may have been committed by a subordinate under his/her control.⁷³

The objectives of mandatory reporting can be read from sec 21 are to identify child victims of sexual abuse and to prevent them from coming to further harm.⁷⁴ Model Guidelines under Section 39, POCSO Act describes the purpose of mandatory reporting and stated that “*without detection, reporting and intervention, these children may remain victims for the rest of their lives,*

⁷⁰ *Id* Chapter 2, Sexual offences against children

⁷¹ *Id* s20

⁷² *Id* s 21(3)

⁷³ *Id* s 21(2)

⁷⁴ *Reporting cases of child sexual abuse is essential*, TIMES OF INDIA <http://timesofindia.indiatimes.com/city/goa/Reporting-cases-of-child-abuse-is-essential/articleshow/34127636.cms>

*carrying the scars of the abuse throughout their lives and even, in some cases, repeating the pattern of abuse with their own children”.*⁷⁵The Act puts “*the responsibility to report not on the victim him/herself but on a surrounding adult who may be in a better position to help because of the nature of sexual abuse, the shame that the child victim feels and the possible involvement of a parent, family friend or other close person, makes it extremely difficult for children to come forward to report sexual abuse*”.⁷⁶

5.5.2.1 Practical dilemmas in implementation of mandatory reporting

The mandatory reporting obligation under POCSO Act is enacted in the best interest of child however it raises some problems in implementation specific to the Indian legal context. They are;

- ***When to report***

The POCSO Act neither provides for a time limit for reporting a CSA offence nor gives guidance on whether the reporter of the offence need to verify the facts before reporting. The question is whether a doctor or another professional under POCSO Act should report a previous sexual offence revealed by the victim after some years of occurrence. The Act does not provide any exceptions for failure to report. For instance, in a case of alleged commission of sexual assault by a priest on a minor girl, the co-accused, an assistant surgeon, was charged with the offence of failing to report under

⁷⁵ *Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act 2012*, September 2013, MINISTRY OF WOMEN AND CHILD DEVELOPMENT, <http://wcd.nic.in/act/POCSO%20-%20Model%20Guidelines.pdf>, at 73

⁷⁶ *id*

Sections 19 and 21(2) of the POCSO Act. The Kerala High Court observed “that the doctor, who was in a position to treat the minor girl and was aware of the commission of an offence, could not be excused for her failure to report, for the burden to report lies, as a matter of practice, more heavily on such professionals than on the general public.”⁷⁷

Another issue is whether a person who failed to report should be tried only after the instance of sexual offence has been proven. In *Kamal Prasad Patade v. State of Chhattisgarh*⁷⁸ the principal of a school in Chhattisgarh was informed of an incident of penetrative sexual assault (punishable under Sections 4 and 6 of the POCSO Act) allegedly committed by the peon against a Class III student, at 8:00 am. Before the principal could complete a local-level investigation into the complaint, an FIR was filed at 10:30 am, the very same day. The principal was arrested the next day for allegedly failing to report the incident as mandated by Section 19 of the POCSO Act. Chhattisgarh High Court held that in order to sustain a prosecution under Section 21(2), POCSO Act it must first be proved beyond reasonable doubt that the primary offence of sexual assault was committed, and thus a simultaneous prosecution of the person charged with committing the sexual offence and the person who failed to report would be a violation of the due process of law.⁷⁹ But in another case

⁷⁷ *Ajitha v. State of Kerala*, CrI. Rev. Pet. No. 818 of 2016 [Ker HC] decided on 09.08.2016

⁷⁸ Writ Petition (Cr.) No. 8 of 2016 decided on 12 May 2016 by the Chhattisgarh High Court.

⁷⁹ Id

In *Balasaheb @ Suryakant Yashwantrao Mane v. State of Maharashtra*,⁸⁰ a child residing in Ashram school had been raped by the cook. The applicant, who was the Director of the Trust running the school, had been informed about the incident by the victim as well as her relatives. The Bombay High Court held that “*the act of aggravated penetrative sexual assault by the cook and the failure to report to the police by the director of the trust despite knowledge were different offences committed in the course of the same transaction thus warranting joint charge and trial*”.⁸¹

- **Maintaining Confidentiality**

The POCSO Act provides for mandatory reporting of sexual offences irrespective of the consent of child and is not compatible with the ethical duty of doctors and health care providers to maintain confidentiality. They are ethically bound to maintain privacy and confidentiality of the patients who approach them.⁸² This is for ensuring proper communication and better treatment. But they should not reveal the identity and findings in medical attendance “*unless their revelation is required by the laws of the State*”⁸³. “*Thus the duty to maintain confidentiality is superseded by the mandatory reporting clause under POCSO Act. The IACP Code allows disclosure of*

⁸⁰ Criminal Revision Application No. 69 of 2017, decided on 22 March 2017 by High Court of Bombay

⁸¹ id

⁸² Obligation referred in documents like The Professional Conduct, Etiquette and Ethics for Registered Medical Practitioners, 2002 and The Indian Association of Clinical Psychologists (IACP), Code of Ethics for Clinical Psychologists, 2012-2013.

⁸³ The Professional Conduct, Etiquette and Ethics for Registered Medical Practitioners, 2002 clause 2.2

confidential information with appropriate consent of the individual client”.⁸⁴

The issue of consent also arises in the context of victims affected with sexually transmitted diseases or victims approaching the psychological counseling or treatment in result of sexual assault, the question is whether the doctor is mandate to report the crime to the investigating authorities.

Issue of confidentiality is crucial in cases of unwanted pregnancy. The Act mandates reporting but does not require the reporter to inform to the child or get consent of child or parent. If a girl victim of sexual abuse or parents approaches a medical facility for medical termination of pregnancy, it is the right of every girl to get pregnancy terminated, if it has occurred as a result of rape, with maintenance of confidentiality. This confidentiality will be losing if the same is intimated to police. Hence, again people may resort to criminal abortion, thus risking their lives. Sexual autonomy and the Right to privacy, *“protects every individual from governmental intrusion into matters so fundamentally affecting a person or the decision whether to bear or beget the child”*.⁸⁵ A pregnancy allegedly due to an act of rape may be terminated as per MTP Act, 1971 but in case of a minor girl the parental consent is essential for abortion. Here the adolescent girl is denied her reproductive autonomy also.

- ***Access to medical care***

Another issue is the mandatory reporting irrespective of the consent of victim child or parents may result in the discontinuance of further treatment.

⁸⁴ IACP, Code of Ethics for Clinical Psychologists, 2012-2013, para 4.5

⁸⁵ J. Rubinfeld, *“The Riddle of Rape by Deception and the Myth of sexual autonomy”* Yale Law Journal

The fear that the doctors will report the incident and compel them to engage with the criminal justice system, will deter them from going to a hospital and that could easily result in unsafe termination of pregnancies or adversely affect the child's right to health.⁸⁶

- *Consensual sexual intimacy*

Sexual contact between two adolescents or between an adolescent and an adult are considered illegal under the POCSO Act 2012, because no exception has been granted in the Act under which an act of sexual encounter with a person under 18 is an offence irrespective of consent or the gender or marriage or age of the victim/the accused. However, it is proposed that any consensual sexual act that may constitute penetrative sexual assault should not be an offence when it is between two consenting adolescents, otherwise both the adolescents will be charged under the POCSO Act, 2012. On the other hand, the latest amendment of the Indian Penal Code concerning rape laws in 2013 clearly reports that the age of consent for sex has been fixed to 18 year, hence, anyone who has consensual sex with a child below 18 years can be charged with rape, which may increase the number of rape cases. The doctors have to mandatorily report the instances of consented sexual activity as sexual offense if the victim approaches him for treatment or for pregnancy care or for termination of pregnancy. The mandatory reporting provision under POCSO Act “*adopted a protectionist approach and failed to recognize the autonomy*

⁸⁶ *An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children*, p 14, CENTRE FOR CHILD AND THE LAW, National Law School of India University, Bangalore, 15 June 2018

and evolving capacities of children as well as the need to ensure that children or adolescents engaging in consensual sexual exploration are not treated as children in conflict with law".⁸⁷ A possible solution to the problem would be for a competent authority to distinguish between acts of crime and consensual sex at an early stage. Thus, the incident ought to be reported, but decisions regarding registering an offence and investigating may be discretionary.⁸⁸

- *Impacts on rights of children*

UNCRC provides for right to “access information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health”.⁸⁹ To facilitate this right, States must provide adolescents with access to sexual and reproductive information, including on family planning and contraceptives, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted diseases (STDs). In addition, States parties should ensure that they have access to appropriate information, regardless of their marital status and whether their parents or guardians consent.⁹⁰ Criminalizing sex below 18 years will prevent the school counselors and doctors to provide safe sex advice or treat effects of

⁸⁷ Swagata Raha, *Love and Sex in the Time of POCSO Act, 2012*, <http://www.tarshi.net/blog/voices-love-and-sex-in-the-time-of-the-pocso-act-2012/>

⁸⁸ *Analysis of underreporting of cases of child sexual abuse in india*, Yash arya & ayushi chaturvedi, Feb 2017, p 10 *The world Journal on Juristic polity*, www.jurip.org

⁸⁹ Art 17 UNCRC

⁹⁰ CRC General Comment 4, Para 28

unsafe sexual practices.⁹¹ The mandatory reporting under the POCSO Act does not extend to addressing information and safe access to health services for children and families who do not wish to report to the police.

5.6 The Protection of Children from Sexual Offences (Amendment) Act, 2019

The protection of children from sexual offences amendment act 2019 has been made tremendous changes in the penal provisions in the Act. Sections four, five and six are amended to provide option of stringent punishment, including death penalty, for committing sexual assault and aggravated penetrative sexual assault crime on a child to protect the children from sexual abuse.⁹² Amendments are also made in Section 9 to protect children from sexual offences in times of natural calamities and in other situations where children are administered, in any way, any hormone or any chemical substance, to attain early sexual maturity for the purpose of penetrative sexual assault.⁹³ Section 14 and 15 of the POCSO Act are also amended to levy fine for not destroying, deleting or reporting the pornographic material involving a child with an intention to share or transmit it.

The punishment for “*aggravated penetrative sexual assault*” is increased to the minimum punishment from ten years to 20 years, and the maximum

⁹¹ Jyoti Belur, Brijesh Bahadur Singh, Child Sexual Abuse and the law in India, (Dec. 12, 2016, 10:55 AM), <https://crimesciencejournal.springeropen.com/articles/10.1186/s40163-015-0037-2>

⁹² *The amendment increases “the minimum punishment from seven years to ten years. It further adds that if a person commits penetrative sexual assault on a child below the age of 16 years, he will be punishable with imprisonment between 20 years to life, with a fine.”*

⁹³ *The amendment Act adds two more grounds to the definition of aggravated penetrative sexual assault. These include: “(i) assault resulting in death of child, and (ii) assault committed during a natural calamity, or in any similar situations of violence.”*

punishment to death penalty. The amendment act defines child pornography as “any visual depiction of sexually explicit conduct involving a child including photograph, video, digital or computer generated image indistinguishable from an actual child.”

The Act penalizes “storage of pornographic material” for commercial purposes with a punishment of up to “three years, or a fine, or both”. The amendment act stipulates that the “punishment can be imprisonment between three to five years, or a fine, or both”. Also added two other offences for storage of pornographic material involving children. These include: “(i) failing to destroy, or delete, or report pornographic material involving a child, and (ii) transmitting, displaying, distributing such material except for the purpose of reporting it.”

5.7 Conclusion

Most provisions of the POCSO Act, if implemented in its true spirit, should assure justice to the child. But there are a few provisions whose efficacy is debated, especially in the context of the principle of the best interest of the child. In one aspect the age of consent to sexual activity stipulated in the Act is in conformity with the subject of Child Protection, and the Convention on the Rights of the Child but in another aspect the sexual activity among children between 16 and 18 years is expected behaviour at that age and criminalisation might become a tool in the hands of those perpetuating patriarchy, casteism and religious bias. Recently Madras high court made significant observations acknowledging adolescent sexuality and the need to exclude it from the

purview of POCSO Act. Given that the age of consent is fixed at 18 years, sexual intimacies and interactions among or with children in the age group of 16-18 years has been criminalized. In India, even though child marriage is prohibited under secular law, it enjoys sanction under the Hindu Marriage Act and Muslim Personal Law thus complicating matters. If personal laws are allowed to override the POCSO Act, it will lead to the discriminatory application of the law. In this regard, the National Commission for Protection of Child Rights (NCPCR) Bill, 2010 is informative. It proposed that that any consensual sexual act that may constitute penetrative sexual assault should not be an offence when it is between two children who are both above 14 years of age and are either of the same age or the difference in age is not more than three years.⁹⁴ It is imperative that the Act be amended to address this inconsistency.

Another debating clause is with regard to mandatory reporting. Mandatory reporting has its pros and cons. It makes adults accountable for child welfare and ensures that the case gets reported. But then, due to fear of registration of FIR, the child or child's support structure may not seek help or

⁹⁴ Section 3 of the Protection of Children from Sexual Offences Bill, 2010 prepared by the National Commission for Protection of Child Rights deals with 'unlawful sexual act with the child' and states that "*any sexual act with the child under the age of sixteen years with or without the consent of the child is an offence except in the two circumstances mentioned. The situation mentioned here is the exception in Section 3(ii) reads as "Any consensual sexual act penalized by this chapter (except for sections 23, 25, 27 and 31) is not an offence when engaged in between two persons who are both over 14 years of age and are either of the same age or whose ages are 5 within 3 years of each other."* Situations mentioned under Sections 23 (Unlawfully stripping the child in public view), Section 25 (Child pornography), Section 27 (Blackmailing for a sexual act) and Section 31 (Stalking a child) are excluded from these exceptions and will continue to be offences irrespective of the age of the children involved in such act."

even medical treatment or mental health support. “Therefore, reporting cannot be made Obligatory as a blanket law without taking into account these specifications. The decision to report is contextual and moreover entirely based on the environment, both immediate and social, of the survivor. If the presence of a mandatory reporting clause prevents the victims from seeking help or makes it difficult for them to disclose to a trusted adult, then this form of reporting only becomes a problematic compromise”.⁹⁵ At a minimum, it is important that mandatory reporting not interfere with the access to health care services and information about sexuality and reproduction by children, particularly adolescents. Importantly, it should also not compromise the best interest or rights of child.⁹⁶

And another fact regarding the enhanced punishment by 2019 amendment Act. Even though such stringent punishments will make fear in the minds of offenders it will not prevent the sexual offences in all situations. There is an urgent public policy research issue that requires attention, is therapeutic approaches in engaging with the root causes of sexual violence such as “sex offender treatment programs” rather than stringent punitive measures.

⁹⁵ *Id*

⁹⁶ *An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children*, p 27, CENTRE FOR CHILD AND THE LAW, National Law School of India University, Bangalore, 15 June 2018

CHAPTER 6

PROSECUTING CHILD SEXUAL ABUSE IN INDIA

6.1 Introduction

Though India has a specific legislative frame work to curb the issue of child sexual abuse, it is not always free from criticisms and not enough effective to achieve its objective of prosecution of offenders. The sluggish attitude by different agencies concerned in addressing the child sexual abuse in fact resulted in the situation where children have become more vulnerable to sexual exploitation. In order to gain the effective implementation of these legislations there is a need for empowering of law enforcement agencies. The administration, police and judiciary should play a Important role in detection and investigation of sexual crimes against children and ensure that there is no under reporting. It is important to understand the three necessary components of prevention, protection and prosecution of the addressing activism of sexual crimes against children in which the prosecution includes several tasks like the identification of the offender, bringing them in front of law, the criminal proceedings in the court, imposing punishment on convicted offenders and also making the perpetrators compensate for the damages and ensuring that they do not cause any further harm. This chapter examines how Indian legal system punishes a sexual abuse offender by analysis of various procedures in prosecuting CSA cases and role of various stakeholders under POCSO Act.

The deficiencies of statutory offences under India Penal Code to deal with child sexual abuse have largely been fulfilled through the POCSO Act. But every legislation is definitely followed by a procedure for its effective enforcement. Without bonafide procedural measures substantive law would be ineffective and worthless. The POCSO act is not only a substantive law but also provides for child friendly procedures for reporting, recording of evidence, investigation and trial of offences etc. Besides POCSO act criminal proceedings in sexual abuse cases is also regulated by “*Criminal Procedure Code 1973 and The Evidence Act 1872*”. Along with these legislations the judicial responses and scrutiny via different decisions and directions have brought new dimensions in preventing and addressing the issue of sexual offences against children.

6.2 Reporting

The first step towards the commencement of criminal proceedings in the child sexual abuse cases is the reporting of the crime. Recently POCSO Act incorporated provisions for obligatory reporting¹ to designated authorities by anyone who has the knowledge of an offence may be committed. The failure to report the instances of child sexual abuse itself is as an offence under the Act.² The Act mandates “*the media, or hotel or lodge or hospital or club or studio or company to inform the police about coming across any material or object which*

¹ Protection of Children from Sexual Offences Act, 2012, Chapter 5. Sec 19(1) “*Any person (including a child) who has apprehension that an offence is likely to be committed, or has knowledge that an offence has been committed 10 shall provide such information to the Special Juvenile Police Unit or the local police*”.

² s. 21 of POCSO Act.

is sexually exploitative of the child".³ The identity of the sexual abused victim cannot be disclosed in any manner and violation of the same is also punishable.⁴ The Act has not specified the classification of offences as cognizable or non-cognizable but it can be determined by "*first schedule*"⁵ of the CrPC". Thus all offences described in the Act are cognizable, except "*the offence of failure to report or record a case*"⁶ and "*the offence of false complaint or false information*"⁷ which are non-cognizable and bailable offences. On receipt of Information of the offence either orally or "*through an application or in person by the victim or a person familiar with the facts of the case*", a complaint⁸ of the cognizable offence under Section 154 of CrPC⁹ can be made by special juvenile police unit¹⁰ or local police. "*If the victim is present at the time of lodging a complaint, then the FIR*"¹¹ can be filed immediately. However, if the complaint is made by a third party or telephonically or through an application, then the police firstly visit the place of occurrence and speak with the victim to ascertain the facts of case and

³ s. 20 POCSO Act.

⁴ s.23 POCSO Act.

⁵ "*Whenever the punishment is less than 3 years of imprisonment, the offence would be non-cognizable and bailable. Any higher term of imprisonment beginning from 3 years and above would make such offence cognizable and non-bailable*".

⁶ s. 21 POCSO Act.

⁷ s. 22POCSO Act

⁸ s. 2(d) of Cr P C 1973.

⁹ s. 154(1)Cr P C reads as "*Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.*"

¹⁰ In every police station in the country, for example, there is now supposed to be a special juvenile police officer, who should be trained to deal sensitively with crimes involving children.

¹¹ "*First Information Report (FIR) is a written document prepared by the police when they receive information about the commission of a cognizable offence though this term is not used in the Criminal Procedure Code*".

then record the FIR. If the complaint is lodged out of jurisdiction, then the FIR can be filed and then transferred to the relevant police station”.¹² The SC in *Harpal Singh v. HP*¹³ held that “delay in reporting of the case will not affect the case if reasonable explanation is given brought out during investigation”.

In spite of this mandatory provision¹⁴ in the POCSO Act for the reporting of instances of child sexual abuse, only a small proportion of child sexual abuse cases are ever reported to the police.¹⁵ The reasons are firstly the “tight-knit family structure and the entrenched tendency not to disclose family shame”. What is worse is that a feeling of shame and silence characterizes cases of sexual violence against children and this often comes in the way of bringing offenders to justice. Secondly “the most important reason is why children and their relatives choose not to come forward is a fear that they will not be treated sympathetically by our justice system”. Indeed, many victims and the adults supporting them endure terrible experiences that add to their trauma. These can include “intimidating interviews by police officers, degrading and painful medical examinations, and intimidation by perpetrators to drop charges. Court

¹² Trishla Jasani & Sneha Kupekar, Sheela Sail Ed, *Child Sexual Abuse - Role Police Procedures and Protocols in India*, Childline India, <http://childlineindia.org.in/Child-Sexual-Abuse-Police-Procedures-and-Protocols.htm>.

¹³ 1981(1) SCC 560).

¹⁴ Supra n 1

¹⁵ A nationwide study conducted by the Ministry of Women and Child Development, India, has revealed that “more than 70% of children who have faced child sexual abuse did not tell anyone of the abuse, and out of the total children abused, only between 3-5% reported the matter to the police”. Ministry of Women and Child Development, Government of India, 2007.<http://pib.nic.in/newsite/erelease.aspx?relid=26737>.

*cases too can be unpleasant experiences for the child since they can last for years and involve stressful cross-examinations”.*¹⁶.

6.3 Investigation

After a complaint is lodged the police start the investigation process by concurrent action to be taken at the time of registration of FIR like takes the victim to the hospital, visit the place of occurrence of offence and pursue the offender and also legal aid is also offered if necessary. The Act casts the police in the role of child protectors during the investigative process. Thus, the police personnel receiving a report of sexual abuse of a child are given the responsibility of making urgent arrangements for the care and protection of the “*child, such as obtaining emergency medical treatment for the child and placing the child in a shelter home, should the need arise*”.¹⁷ The police are also required to report the matter to special court and bring the matter to the attention of the Child Welfare Committee (CWC) within 24 hours of receiving the first report of the offense, so that CWC may then proceed where required to make further arrangements for the safety and security of the child. “*Parallel enquiry is conducted by the probation officer, who submits enquiry report to CWC which help the police to investigate the case*”.¹⁸

Children need legal protection right from the time of the incident, while filing the First Information Report, and during trial and post-trial. Various

¹⁶ Human rights Watch. Breaking the Silence-Child Sexual Abuse in India 2013, p 31, <https://www.hrw.org/report/2013/02/07/breaking-silence/child-sexual-abuse-india>

¹⁷ Model Guidelines under section 39 of *The Protection of Children from Sexual Offences Act*, 2012 September, MINISTRY OF WOMEN AND CHILD DEVELOPMENT.

¹⁸ Supra n 12.

professionals working together are important. “*Area-wide Joint Investigation Committees must be formed. The team can have a trained police officer, mental health expert, social worker, child rights lawyer, teacher, government official, and a sensitive medical doctor. Such teams must be recognized by law and immediately swing into action as soon as a child sexual abuse case comes to light. There must be a list of responsible persons, like teachers and doctors, who have a duty to report*”.¹⁹ The cases of CSA need the participation of child advocacy groups and psychologists to withstand the hardship of the legal process. There must be joint investigation and cooperation between law enforcement agencies and social services.

During this process the child victim is interviewed by a police officer²⁰ and record the statement of the victim.²¹ A lady officer or constable should present throughout all the process if a female victim is involved. Statement of the victim has to be recorded at residence of the victim or in any place of the choice of the victim in the presence of the parent or representative of the child and as far as possible that is to be recorded through audio-video. While recording the statement of the child, the police officer “*should not be in uniform and take all steps to protect the child from the public media*”. The recording of the statement should be as what is spoken by the child. The police officer or magistrate recording the statement of the child may take the assistance of a

¹⁹ Bajpai, Asha (2012) “*Protecting India’s Children: Vulnerabilities and Challenges,*” Macalester International: Vol. 29, Article 8. Available at: <http://digitalcommons.macalester.edu/macintl/vol29/iss1/8>

²⁰ A woman officer not below the rank of superintend of police in case of female child.

²¹ Supra n 1, s. 24

“translator or a interpreter” having adequate qualification and experience. If the child has mental or physical disability the assistance of the “special educator or an expert in the field having necessary qualification maybe taken”.²². A copy of the final report is also to be given to the child, parents or the representative of the child. The SC in a recent writ petition²³reluctant to take proper appropriate action against the officers of the Delhi and Haryana police in the mode of departmental proceedings for their failure to register the FIR by saying that “*the trial has already commenced and the charge sheet filed against all accused*”. But from the facts of the case it is clear that though the medical examination of the victim was done, but neither the copy of the report was furnished nor any FIR under Section 376 D of the Indian Penal Code or the provisions of the POCSO Act registered against the accused. That is in spite of the special child friendly procedures for reporting and investigation incorporated in the legislation the same has not always fulfilled by the investigating agencies. But in other hand in *Karnal Singh v. MP*²⁴, and in *Zahira Habibullah v. Gujarat*²⁵ the court held that defective or flawed investigation is not a ground to deny justice to the victim. “*It would not be right to acquit an accused person solely on account of defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.*” The police investigating the offence

²² s.157, Cr P C

²³ *Nishu v. Commissioner of Police, Delhi and Ors.* 2014 (3) ACR 2516 (SC). “*The petitioner is a minor who was kidnapped on 25.10.2013 by a group of nine persons who had kept her confined up to 8.11.2013. The accused persons, in different combinations, had repeatedly raped her and that one of the accused, named Pradeep is a constable in Haryana Police*”.

²⁴ 1995 5 SCC 518

²⁵ 2004 (4) SCC 158.

of sexual assault against “*minor child to conclude within three months from the date the registration of the FIR*”.²⁶

6.4 Medical examination of the victim

Under Indian criminal law, the prosecution can secure a conviction for rape based solely on the testimony of the victim, so corroboration by forensic evidence is not obligatory. Normally the victims to be examined by a doctor. The findings are cold medico-legal reports “*which can play an important part in whether or not the police and prosecutors believe a rape survivor’s account*”.²⁷ Presumption can be made as to the absence of consent in certain prosecutions for rape.²⁸ The POCSO Act makes provisions for “*the medical examination of the child in a manner designed to cause as little distress as possible. The examination is to be carried out in the presence of the parent or other person whom the child trusts, and in the case of a female child, by a female doctor*”.²⁹

India is party to several international treaties that obligate its government to ensure that all forensic procedures and criminal justice processes respect survivors’ physical and mental integrity and dignity. At the international level, the “*Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes, 2005*”³⁰ provides for good practices that can be adopted by States in

²⁶ s. 173(1A), Cr P C

²⁷ Human Rights Watch, India – *Dignity on Trial: India's Need for Sound Standards for Conducting and Interpreting Forensic Examinations of Rape Survivors*, p 2 September 2010, <http://www.hrw.org/reports/2010/09/06/dignity-trial-0>.

²⁸ Indian Evidence Act 1872, sec 114-A

²⁹ Supra n 1 sec 27

³⁰ *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, Guideline 1, paras 3(c) and 3(d) ECOSOC Resolution 2005/20. www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf

accordance with domestic law and judicial procedures and highlight the importance of guiding professionals³¹ to assist and support in dealing the child victims and witness of crime in a sensitive manner. The WHO Guidelines for medico-legal care for victims of sexual violence³² provides for “*the appropriate practices for the child sexual abuse*”³³ *victims medical care that is assessment and examination of child victims, collecting medical and forensic specimen, and also treatment and follow up care of the victims*”.³⁴ Victims of sexual assault require comprehensive, gender-sensitive health services in order to cope with the physical and mental health consequences of their experience and to aid their recovery from an extremely distressing and traumatic event. The types of services that are needed “*include pregnancy testing, pregnancy prevention (i.e. emergency contraception), abortion services (where legal), STI testing and/or prophylaxis, treatment of injuries and psychosocial counseling*”. In addition to providing immediate health care, the health sector can act as an important referral point for other services that the victim may later need, for example, social welfare and legal aid. Health workers are also well placed to collect document the evidence necessary for corroborating the circumstances of the crime and for identifying the Offender and the health consequences of the event). Such evidence is often crucial to the prosecution of CSA.

³¹ “*The term professionals includes judges, law enforcement officials, prosecutors, defence lawyers, support Persons and others in contact with child victims and witnesses of crime*”. guideline 9(b)

³² *Guidelines for medico-legal care for victims of sexual violence*, WHO ,2013 available at whqlibdoc.who.int/publications/2004/924154628X.pdf

³³ Id chapter 7, p 75

³⁴ Id p81 to 92

Guidelines issued by the World Health Organization (WHO) for examining survivors of sexual violence state that forensic examinations must be minimally invasive and that even a purely clinical procedure such as a bimanual examination³⁵ is rarely medically necessary after sexual assault. In the case of prepubescent girls and boys who are victims of sexual abuse, the WHO guidelines say that “*most examinations*” should be “*noninvasive and should not cause pain,*” and that “*speculums or anosscopes and digital or bimanual examinations do not need to be used in child sexual abuse examinations unless medically indicated.*” The guidelines further caution: “*consider a digital rectal examination only if medically indicated, as the invasive examination may mimic the abuse.*”³⁶

The victims of child sexual abuse have to undergo medical examination as part of the legal procedures for prosecuting these offenses. And the law also prescribes the treatment for the victim and rehabilitation to a healthy life on free of cost. The registered medical practitioner rendering medical care shall “(i) *collect evidence after a thorough medical examination, (ii) treat the physical and genital injuries, (iii) conduct age assessment of the victim (if required), (iv) offer prophylaxis for sexually transmitted diseases including HIV, (v) discuss emergency contraceptives with the pubertal child and her parent, (vi) do baseline evaluation for mental health issues, (vii) monthly follow up at least for six months to look for development of psychiatric disorders, (viii) do family*

³⁵ A clinical procedure that involves the insertion of two fingers to diagnose medical conditions of the uterus or urinary tract.

³⁶ Supra n 25 p 4

counseling and (ix) assist the court in interviewing the child and testifying in the court”.

Section 27 of POCSO Act mandates that *“if victim of a sexual offence is a female child, the medical examination has to be done by a registered lady medical practitioner”*. That should be done in the presence of the parent of the child or any other person in whom the child reposes trust or confidence. In addition, in case the parent of the child or other person cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in *“the presence of a woman nominated by the head of the medical institution”*. Criminal Law (Amendment) Act, 2013 has inserted an important section in Criminal Procedure Code, 1973. According to section 357C, *“all hospitals, public or private, whether run by the Central Government, the State Government, local bodies, or any other person, shall immediately provide the first aid or medical treatment, free of cost, to the victims of any offence covered under Sections 326A, 376, 376A, 376B, 376C, 376D, and 376E of the IPC, and shall immediately inform the police of such an incident”*. Section 166B of the IPC provides for *“whoever in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of Section 357C of CrPC, shall be punished with imprisonment for a term which may extend to one year or with fine or both”*.

CrPC Section 164A states that

“(1) when during investigation, medical examination of victim of rape/attempted rape is to be done, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman should be sent to a registered medical practitioner within 24 h from the time of receiving the information relating to the commission of such offence. (2) The registered medical practitioner, to whom such woman is sent, should examine her, without any delay and prepare a report of her examination comprising the preliminary details with meticulous mention of injuries over the body, general mental condition of the female with detailed description of all materials taken for investigation. (3) The report should precisely state all the reasons for each conclusion arrived at. (4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained. (5) The exact time of commencement and completion of the examination shall also be noted in the report. (6) The report should be forwarded without delay to the investigating officer, who shall forward it to the magistrate. (7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.”

The Medical Termination of Pregnancy (MTP) Act, 1971 Section 3 (2) (b) (i) states that *“a pregnancy may be terminated by a registered medical practitioner where the continuation of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical and mental health”*. Where any pregnancy is alleged to have been the result of a sexual assault, the

anguish as a result of such pregnancy shall be presumed to make serious injury to the mental health of a rape victim. No pregnancy can be terminated except with the consent of the pregnant woman. Age of consent is 18 years and for pregnant woman below 18 years of age or who is mentally ill, consent of her guardian is sufficient. The act does not mention of reporting to investigating authorities in cases of pregnancy because of alleged rape or determination of age of the pregnant woman if she does not appear to be of 18 years of age.

The Ministry of Health and Family Welfare, Government of India provided “*Guidelines and Protocols for Medico legal Care for Survivors/Victims of Sexual Violence in 2014*”³⁷ enhancing the appropriate guidelines for doctors and medical professionals to handle the victims of sexual crimes. These guidelines mandate compulsory reporting to police of any case of sexual assault even though the victim or parent is not consented with the same. When any case of consensual or nonconsensual sexual act is either brought to a doctor he/she has to examine it with the purpose to form an opinion as to (1) *whether a sexual act has been attempted or completed*, (2) *whether such a sexual act is recent and whether any harm has been caused to the survivor’s body*, (3) *what is the age of the adolescent girl who is probably a victim of sexual offence*, and (4) *whether there is any role of any intoxicated substance in the alleged act*. Apart from the same required for medico legal purposes, the said victim is entitled for treatment

³⁷ *Guidelines and protocols for medico-legal care for victims of sexual violence*, ministry of health and family welfare, 2014, available at http://www.mohfw.nic.in/sites/default/files/9535223249_1.pdf

that includes care for injuries, sexually transmitted diseases, HIV, testing for pregnancy, use of emergency contraception, psychological counseling, and follow up care.

6.4.1 Challenges and gaps

Child sexual abuse is a multidimensional problem having legal, social, medical and psychological implications.³⁸ There are some challenges and controversies in the existing legal frame work regarding the medical care of child sexual abuse victims.

6.4.1.1 Medical examination

Availability of trained medical professionals and doctors is a problem in this area of medical examination of the victim. All medical practitioners now need to be aware of detailed examination and reporting of victims of sexual assault. Preparing of detailed report on the examination of victim is now mandatory and the refusal to conduct examination is an offense. Not only the availability of trained doctors but also the availability of woman doctors in case of female child victim is also difficult to get practical especially in hospitals in remote areas. This may also cause to delay in medical examination.

6.4.1.2 Consent

The consent of victim or the consent of parent in case of child is mandatory for medical examination. If the victim is not ready to undergo medical examination but the family member or investigating officer is insisting for the medical examination, the POCSO Act is silent and does not give direct provision. However, it would be necessary to take informed consent from parent when the victim is a child (below 12 yr) and consent from both parent and the

³⁸ Behere PB, Sathyanarayana Rao TS, Mulmule AN. Sexual 9. "Abuse in women with special reference to children: barriers, boundaries and beyond". INDIAN J PSYCHIATRY 2013; 55 : 316-9.

victim, if the victim is an adolescent (age group from 12 -18 yr). But the consent issue is not arising in giving emergency medical care to the victim. The issue of consent raises in the context of victims affected with “*sexually transmitted diseases*” or victims approaching the psychological counseling or follow up treatment in result of sexual abuse, the question is whether the doctor is obligated by law to report the crime. The problem is the asking of reporting the crime may result in the victim will discontinue the further treatment.

6.4.1.3 Pregnancy cases

If a girl victim of sexual abuse or parents approach a medical facility for medical termination of pregnancy, it is the right of every girl to get pregnancy terminated, if it has occurred as a result of rape, with maintenance of confidentiality. This confidentiality will be lose if the same is intimated to police. Hence, again people may resort to criminal abortion, thus risking their lives. A pregnancy allegedly due to an act of rape may be terminated as per MTP Act, 1971; it is noteworthy to mention that henceforth it is the duty of every such medical practitioner to collect samples for DNA typing to help the investigating authorities. Failure to intimate all such cases is now punishable under law. Even failure to collect and preserve sample for “*DNA typing*” in pregnancy cases resulting from sexual assault can be punishable for loss of evidence of a crime.

6.4.1.4 Treatment cost

The law has stated legal obligation on the medical establishment to provide free medical care to the victims. If there are no proper facilities or costly procedure is required, the State should “*take responsibility of reimbursing the cost*”; otherwise hospital may provide substandard medical treatment procedure or may deprive the victim from comprehensive treatment. But the extend of the same is not prescribed by the law that whether the immediate medical care, medical examination and follow up care of victim altogether coming under this free of cost. Another question is if any such sexual exploitation results in

pregnancy, whether the pregnancy too will cover under the free treatment is not clear from the Act.

6.4.1.5 Consented sexual intimacy:

Sexual contact between two adolescents or between an adolescent and an adult are considered illegal under the POCSO Act 2012, because no exception has been granted in the Act. The Act of consented sexual intimacy with a person under 18 is an offence irrespective of consent or the gender or marriage or age of the victim or the accused. However, it is proposed that any consensual sexual act that may constitute "*penetrative sexual assault*" should not be an offence when it is between two consenting adolescents, otherwise both the adolescents will be charged under the POCSO Act, 2012. On the other hand, the latest amendment of the Indian Penal Code concerning rape laws in 2013 clearly provides that "*the age of consent for sex has been fixed to 18 yr*", hence, anyone who has consensual sex with a child below 18 yr can be charged with rape, which may cause to increase the number of rape cases. The doctors have to obligatorily report the instances of consented sexual activity as sexual crime against a child if the victim approaches him for treatment or for pregnancy care or for termination of pregnancy.

6.4.1.6 Role of mental health professional

*"The definitive signs of genital trauma are seldom seen in cases of child sexual abuse"*³⁹. Hence, the evaluation of child sexual abuse victim requires special skills and techniques in history taking, forensic interviewing and medical examination. *"The role of mental health professional is crucial in interviewing the child in the court of law. Child sexual abuse can result in both short-term and long-term harmful mental health impact. Mental health professionals need to be involved in follow up care of the victim with regard to emergence of*

³⁹ Adams JA, Harper K, Knudson S, Revilla J. Examination 11. *findings in legally confirmed child sexual abuse: it's normal to be normal. Pediatrics* 1994; 94 : 310-7.

psychiatric disorders, by providing individual counseling, family therapy and rehabilitation”⁴⁰

6.5 Medical examination of the accused

The Criminal Procedure Code seeks to provide “*for a detailed medical examination of a person accused of an offence of rape or an attempt to commit rape by the registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner by any other registered medical practitioner*”.⁴¹ Sec 53A (2) provides that

- (1) “*The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:-*
 - (i) *The name and address of the accused and of the person by whom he was brought,*
 - (ii) *The age of the accused,*
 - (iii) *Marks of injury, if any, on the person of the accused,*
 - (iv) *The description of material taken from the person of the accused for DNA profiling,*
 - (v) *Other material particulars in reasonable detail.*
- (2) *The report shall state precisely the reasons for each conclusion arrived at.*
- (3) *The exact time of commencement and completion of the examination shall also be noted in the report.*
- (4) *The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 of Cr P C as part of the documents referred to in clause (a) of sub-section (5) of that section”.*

⁴⁰ Sathyanarayana Rao TS, Nagpal M, Andrade C. Sexual 12. coercion: time to rise to the challenge. *Indian J Psychiatry* 2013; 55 : 211-3.

⁴¹ S. 53 A, Criminal Procedure Code (Amendment) Act of 2005

Thus such a report should form a part of the final report. Medical examination is an important piece of information which is required for collection of medical evidences, their documentation and interpretation in court. It becomes more imperative where there is no other corroborating witness to the incident. In most of the cases the delayed reporting caused for delay in searching out the accused and investigation. Thus often it is not possible to undertake the medical examination of the accused immediately after the offence committed. This delay is resulting in loss of important forensic evidence is one of the main reasons behind “*low conviction rates of accused*⁴²”. Examination of clothes is important “*when the accused has been brought for medical examination within 24 hours of the act or not washed his clothes.*”⁴³ There is a need for immediate reporting of these cases and immediate medical examination along with appropriate collection of forensic evidence.⁴⁴

Various problems arising from inadequacy of resource and lack of proper training which affect how investigations, prosecution and medical examinations are conducted in cases of CSA.⁴⁵ The samples for forensic

⁴² See, Rate of Conviction, Chapter 7

⁴³ KrishanVij. Textbook of Forensic Medicine and Toxicology Principle and Practice; 4th edition: Reed Elsevier India Pvt. Ltd, 2008, p 417

⁴⁴ Shrikant Sidram Shinge and Manish Baburao Shrigiriwar, “*Medico-legal Examination of Accused of Alleged Rape Cases A Prospective Study*”p 334, JOURNAL OF INDIAN ACAD FORENSIC MED. October-December 2013, Vol. 35, No. 4

⁴⁵ Maharashtra State Consultation. (2014). *Review of the Protection of Children from Sexual Offences 2012: Consultation between stakeholders.*
http://www.google.co.uk/url?sa=t&rct=j&q=&src=s&source=web&cd=1&ved=0CCMQFjAA&url=http%3A%2F%2Fwww.esocialsciences.org%2FDownload%2FDownload.aspx%3Ffname%3DA2015312618_19.pdf%26category%3DArticles%26aid%3D6550&ei=5xWEVe6ALeKP7AaKhLnIAw&usg=AFQjCNH8XPPnJRyQGARG8fiVw8dON23Qfg&bv m=bv.96042044,d.ZGU.

examination must be sent to the forensic laboratory immediately without any delay by the Police. In several cases, forensic evidence had become unfit for examination due to a delay by the Police. The protocols evolved by the “*Public Health Department*” must be strictly followed regarding the manner in which “*records of body fluids collected during the medical examination and sent for forensic examination*”.⁴⁶

6.6 The Court Proceedings

Victims of CSA and their families have to undergo alone process of criminal procedures that can last for many years. In CSA cases, where the burdens of giving evidence repeatedly over a large period make the victims and their parents trauma and which lead to withdrawal of complaints. This is most important because the criminal justice system do not recognize that the person before it, is a child or an adult. Establishment of Special “*children’s courts*,”⁴⁷ as provided by POCSO Act, should make a clear difference from the earlier position. The POCSO Act further makes provisions for “*avoiding re-victimization, child friendly atmosphere through all stages of the judicial process and gives paramount importance to the principle of best interest of the child*”. It incorporates “*child friendly procedure for reporting, recording of evidence, investigation and speedy trial of offences, trial in-camera and without revealing the identity of the child through designated Special Courts*”. It also provides for the Special Court to fix the amount of compensation to be paid to a victim of

⁴⁶ ibid p 5

⁴⁷ Supra n 1 chapter7, sec 27.

sexual offence so that the amount can then be used for the “*child’s medical treatment and rehabilitation*”.⁴⁸ Where trial procedures may be conducted in a more sensitive manner with “*the victim’s testimony given either ‘in camera’ (i.e. privately), via video-link, or behind curtains or screens, is intended not only to reduce trauma but also protect the identity of the child*”. The Special Court plays a crucial role in how the legal system and the evidence may be interpreted in the Court.

6.7 Prosecution

The public prosecutor who is in-charge of prosecuting the CSA case must have adequate knowledge on the procedures prescribed by POCSO Act. In a case where the allegation is of sexual abuse the accused will normally raise the following pleadings.

- i. *“Inordinate delay in lodging the FIR by the victim to the police and the delay in lodging the FIR by the police to the court.*
- ii. *Absence of proper medical evidence to connect the allegations of rape.*
- iii. *Admissibility of the evidence a child witness.*
- iv. *Non-Corroboration of the version of the prosecutrix by an independent witness.”*

Since the offence of a CSA is a serious offence, the Supreme Court has held that “*any delay in lodging the FIR by the victim or the parents of the victim to the police should not be blown out of proportion to doubt the veracity of the*

⁴⁸ POCSO Act – Providing Child-Friendly Judicial Process. 7. Press information Bureau, Government of India. Available from: <http://pib.nic.in/newsite/efeatures.aspx?relid=86150>,

victim in a rape case".⁴⁹ Medical evidence indicating the presence of semen of the accused on the body or cloth of the victim and some irregularity in genital area of victim, any bite marks on face on private parts of body are crucial evidence with regards to allegation of sexual offence. But the presents of these signs are not very much important in cases of married women or in case of children who is unable to resist. According to the amendment to 'section 154 of the Evidence Act' by deleting sub-section 4. "*Corroboration is not a rule of evidence but a rule of prudence. There is no legal inhibition for the court to convict the person accused of rape on the uncorroborated version of the prosecutrix if the same inspires the confidence of the court and appears to be absolutely trust worthy*".

With regard to the evidentiary value of a child witness, Sec.118 of the Evidence Act states that "*even a child is also competent to give evidence and the evidence of a child is admissible. The child of tender age can be allowed to testify if he or she has psychological capacity to understand questions and give rational answers thereto. Therefore, the evidence of a child witness is not required to be rejected per se. The only caution to the court is that such evidence of a child must be scrutinized with care and caution.*"⁵⁰ The evidence given by a dumb witness is also admissible under section 119 of the Evidence Act as such evidence will be treated to be oral evidence.

⁴⁹ See *State of Punjab v. Gurmit Singh's* case AIR 1996 SC P 3093.

⁵⁰ AIR 2008 SC P 1842, *Golla Elugu Govindu v. State of Andhra Pradesh*

Prosecutor is expected to assist the Court in framing proper questions to be put to the accused. Under section 313 (5) of Cr.P.C., *“it is the duty of the prosecutor to assist the court in putting all the incriminating aspects to the accused, lest it would be a ground for the accused in the appeal alleging that incriminating circumstances were not brought to his notice at the time of examination of the witness under section 313 of Cr.P.C.”* In most of the Cases there are several loop holes in investigation process conducted by the police. Just because of this lacuna in CSA cases lead to the ground for disregard the testimony of child victims. In Gurmit Singh’s case⁵¹ *“reported in, the victim had not said anything about the rape to her friends, but had narrated about the incident only to her mother that too after reaching home”*. The conduct of the victim was found to be natural and it was held that *“her evidence was not to be doubted on the ground that she did not complain either to her lady teachers or to her girlfriends”*. It is in this regard, section 6 of the Evidence Act ⁵² is to be considered in appropriate manner. Section 6 is an exception to the *“rule of admissibility of hearsay evidence”*. For bringing hearsay evidence within the ambit of Section 6 of the Evidence Act, *“it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication”*.

⁵¹ AIR 1996 SC 1393

⁵² Provision with regard to res-gestai

6.8 Trial

With Regard to victim or protection system, “*right to anonymity, in camera trial, provision for video conferencing, legal representation, compensation, right to speedy trial etc.*” are incorporated by virtue of several judicial decisions. Hence recording of evidence oral as well as documentary is the most pivotal role of the Special Court Judge according to POCSO Act. Section 118 of the Evidence Act provides that “*all persons shall be competent to testify unless the court considers that they are prevented from the questions put to them, or from giving rational answers of those questions, by tender years, extreme old age, disease, whether of body or mind*”. Section 135 of the Evidence Act deals with the order of production and examination of witnesses in Court of Law in a CSA cases.

The CSA victim has the right to take legal assistance of her choice and if the family members are the guardian of the child are unable to afford a lawyer, it is the duty of the court to provide such assistance. In Delhi Domestic Working Women’s Forum v. UOI⁵³, “*the requirement of legal representation and counseling has been extended to the victim right from the Police Station itself. Victim can have Private Lawyers who can assist the Public Prosecutor and even submit written arguments, nevertheless functioning under the public prosecutor*”.⁵⁴

⁵³ 1995 (1) SCC 14.)

⁵⁴ s. 301(2) CrPC.

A Special Court dealing with child who is sexually abused, will take cognizance of the offence as “*there is no procedure for committal to it for trial under section 209 of Cr.P.C. section 33 of the Act deals with the manner in which the evidence of the sexually abused child must be recorded*”. It is the duty of the Special Court to permit frequent breaks to the child during the trial and to create and a child-friendly atmosphere by allowing a family member or a guardian or a friend or relative in whom the child has trust or confidence, to be present in the court. It is expected of the Special Court to avoid aggressive questioning or character assassination of the child by the counsel for the accused. It must ensure that the dignity of the child is maintained at any cost. The identity of the child should not be disclosed at any time during the course of investigation or trial unless the Special Court may permit such disclosure of identity that too on reasons being recorded. It is mandatory for the Special court to “*record the entire evidence of child within a period of 30 days from the date of taking cognizance of the offence and the entire trial is to be concluded within a period of 1 year from the date of taking cognizance of offence*”⁵⁵. The special court should “*ensure that the child is not exposed in any way to the accused at the time of recording the evidence except ensuring that the accused is in a position to the hear the statement of the child and could communicate with the accused*”.⁵⁶The entire trial process under the Act will have to be done “*in-camera*”. “*The Special Court has the power to record the*

⁵⁵ POCSO Act S 35(1),(2)

⁵⁶ Id S. 36

*evidence of child in any place other than the court after forming a prior opinion to that effect” as per section 284 of Cr.P.C. The Special Court has the power “to take the assistance of a translator or an interpreter having such qualifications and experience and if the child has any mental or physical disability, the special court may take the assistance of the special educator or any person familiar with the manner of communication of the child”.*⁵⁷

6.9 Recording of evidence

In the case of *Rameshwar v. The State of Rajasthan*⁵⁸ “a Judge who recorded the statement of a girl of seven or eight years certified that she did not understand the sanctity of an oath and accordingly he did not administer one to her. He, however, did not certify that the child understood the duty of speaking the truth”. The question was whether this omission rendered her evidence inadmissible. it is held, that

1. “An omission to administer, an oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt within S.118, Evidence Act. The Oaths Act does not deal with competency and under S.13 of that Act omission to take oath does not affect the admissibility of the evidence. It therefore follows that the irregularity in question cannot affect the admissibility of the evidence of the girl.”⁵⁹
2. It is, however, desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness

⁵⁷ Id, s. 38

⁵⁸ AIR 1952 SUPREME COURT 54

⁵⁹ A.I.R.(33) 1946 P.C. 3, Rel. on.

may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether.”

As per first proviso to Sec. 376 CrPC mandates, “*the Session Court dealing with the case of rape punishable under Sec. 376 and 376 (A) to (D) of IPC must complete the proceedings within a period of two months from the date of commencement of examination of the witness.*” The SC in *Akil @ Javed v. State NCT Delhi*⁶⁰ held that “*trial in all criminal cases should be held on day-to-day basis and if there is any deviation from the mandatory provision to Sec. 309 of Cr.P.C., it would be a serious lapse and would be dealt on the administrative side by the High Court. Therefore, it is mandatory that the trial should be held on a day to day basis*”.

6.10 Child friendly procedures

Section 33 of POCSO Act mandates that “*the Special Court shall record the evidence in camera without giving room for continuous examination*”. Section 36 of the Act provides that “*the Court has to take steps to see that the child would not see the accused at the time of testifying*”. The Supreme Court in *Smt Sudesh Jakhu v. Narender Verma* held that *right to anonymity is a legal right*”. The provisions of *in camera trial* have been extended to all offences of sexual assault against children.⁶¹ In camera trial, u/s 327 Cr P C is essential in offence of rape and it should be “*invoked in all crimes of trafficking of children for commercial sexual exploitation*”. In *Sudesh Jakhu v. K.C. Jakhu*⁶² Justice

⁶⁰ *Akil @ Javed v. State NCT Delhi* (CrI. A. 1735) 09, 2012

⁶¹ *Sakshi v union of india*, 1996 6 SCC 591

⁶² 1998 CriLJ 2428

Jaspal Singh raised *“the necessity of free atmosphere and recess during court proceedings. The prime inquiry before a court should be to elicit the truth. It is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment”*. The court observed that

“the trial judge should record the victim’s statement in the same language as spoken by the child and shall handle the proceedings with considerable sensitivity and ensure that the trial is fairly conducted. He should take care that questions asked are not complex or confusing. Questions containing a negative or double negative should be better avoided. If the prosecution establishes to the satisfaction of the court that to obtain a full and candid account from the child witness the use of a screen would be necessary, the court may be inclined favorably to provide such a screen.”

The Court also directed that *“whenever a child or a victim of rape is required to give testimony, sufficient brakes should be given as and when required”*. Right of accused to cross examine the victim, though a legal right, it is restricted, in CSA Case, the defense counsel cannot put questions on the child victim directly, but has to give the questions to the special court and the court will, in turn, ask question to the child victim.

In Praful Desai judgment video conference is allowed in the trial stage and that ensures not only anonymity but also protection to the victims of sexual abuse.

In *State of Himachal Pradesh v. Mohan Misra*⁶³ the Supreme Court held that “merely because the victim girl is not examined, this can never be a ground to acquit an accused if there is evidence otherwise available proving the criminal act of the accused. That is the Prosecutrix need not be examined, and the character and antecedents of the victim has no bearing or relevance...and can never serve either as mitigating or extenuating circumstance. No stigma should be implied against the victim/witness. After all it is the accused and not the victim of sex crime who is on trial in the court”.⁶⁴

The testimony of victim itself is reliable that the evidence of a victim of CSA is entitled to much value, if there is any absence of corroborating evidence.⁶⁵ It was held that *the statement of the rape victim who was between 15-17 years, inspired confidence for acceptance and, therefore corroboration of evidence was not needed and there is no legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction*”. And court also said that “in cases involving sexual assault minor contradictions or insignificant discrepancies in the statement of the witnesses should not affect the case”. In *Andhra Pradesh v. Gangula Satyamurthy*,⁶⁶ it was held that “the court must appreciate the evidence in totality of the background of the entire case and not in isolation”. “The Evidence has to be weighed and not counted”⁶⁷ and there is “no rule of practice that there must in every case be corroboration before a conviction can be allowed to take

⁶³ 1995 CrLJ 3845

⁶⁴ *Haryana v. Prem Chand and others*, 1990 (1) SCC 249, *Maharashtra v. Madhukar Narayan Marvikar*, AIR 1991 SC 207, *State of Punjab v. Gurmit Singh*, AIR 1996 SC 1393).

⁶⁵ *Punjab v. Gurmeet Singh*.

⁶⁶ JT 1996 (10) SC 550).

⁶⁷ *Himachal Pradesh v. Raghubir Singh*

place”.⁶⁸The rule of prudence that “*the evidence of a victim of sexual assault must be corroborated in material particulars has no application*”.⁶⁹ Though the doctor couldn’t report any visible injuries, the court held that, *there was no reason to suspect the testimony of the victim and upheld the conviction of the accused*. In *Rampal v. State of Haryana*⁷⁰ “*the court convicted the accused based on the sole testimony of the prosecutrix*”.

Courts need to take appropriate role in delivering justice to victim. “*The Courts have to take a participative role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. S.311 of CrPC and S.165 of Evidence act. Act confer wide and vast powers on presiding officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process*”⁷¹

6.11 Examination of the accused

Section 313 of Cr.P.C. provides for examination of the accused and provides an opportunity for the accused to explain the incriminating circumstances put to him to commit the offence. The Court can also take the assistance of the SPP and the defense lawyer while preparing the questions to be put to the accused⁷². The Court should make “*all effort to bring out the incriminating aspects in the prosecution case to put to the accused and seek his explanation. It is true that the accused can keep silent when he is examined,*

⁶⁸ *Rameshwar v. Rajasthan*, AIR 1952 SC 54).

⁶⁹ *Maharashtra v. CPK Jain*, AIR 1990 SC 658).

⁷⁰ 1994 Supp(3) SCC 656

⁷¹ Supra n 21

⁷² CrPC, s. 313

*but if the accused make statement supporting prosecution case in his examination, such statement can be used against him”.*⁷³

6.12 Compensation for the victim

Compensation is a legal right available to victim under section 357A CrPC.⁷⁴ All state governments in consultation with the central government have to prepare a scheme for victim compensation. On recommendation by the court for compensation, the DLSA or SLSA must decide on the quantum of compensation awarding to victim. In *Bodhi Sattwa Gautam v Subra Chakroborty*⁷⁵ it was held that “*compensation can be awarded to the victim from the convicted person even if there was no fine as part of the sentence and even without conviction or during pendency of trial*”.⁷⁶ The Special Court has got power to direct the accused who is convicted of having committed offence/s under this Act to pay compensation in regard to injuries caused to the child victim or for immediate rehabilitation also⁷⁷. Therefore, in appropriate cases, the Special Court can award higher compensation than amount provided under state govt. scheme⁷⁸ the one found in the scheme formulated by the State Governments and even provides the Special court to award interim compensation to meet the urgent needs of the child victim for relief or rehabilitation at any stage after the registration of FIR.

⁷³ *Ramnaresh v. State of Chhattisgarh*) AIR 2012 SC 135

⁷⁴ Inserted by amendment of CrPC in 2008

⁷⁵ 1996 1 SCC 490).

⁷⁶ *Supra* n 31

⁷⁷ POCSO Act s. 38(3)

⁷⁸ CrPC 357A, POCSO rule 7(1)

6.13 Punishment⁷⁹

Sec. 42 of POCSO Act provides that “*where an act or omission constitutes an offence punishable under this Act and also under any other law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under such law or this Act as provides for punishment which is greater in degree*”.

6.14 Role of Governmental organizations in combating CSA

6.14.1 Commissions for Protection of Child Rights

“*The National Commission for Protection of Child Rights (NCPCR)*” is a statutory body under Ministry of Women and child Development which constituted⁸⁰ in 2007 under the Commissions for Protection of Child Rights (NCPCR) Act 2005 “*to protect, promote and defend child rights in the country*”.⁸¹ The Act also provides for “*constitution of state commissions⁸² for protection of child rights in each state and union territory and functions and powers of national commission⁸³ and also establishment of children’s court⁸⁴ in each district for speedy trial of offences against children*”. The supreme functions of the Commission is “*to review legal safeguards provided for protection of child rights and prepare and present annual and periodic reports on the working of these safeguards and recommends measures for effective*

⁷⁹ See chapter 5 for details of punishment

⁸⁰ Commissions for Protection of Child Rights (NCPCR) Act 2005, Act No 4 of 2006, sec 3(1)

⁸¹ Available at <http://ncpcr.gov.in>

⁸² s. 17(1) supra n 7

⁸³ s. 13(1) supra n 7

⁸⁴ s. 25 supra n 7

*implementation, spread child literacy, enquire into violation of child rights and recommend initiation of proceeding where necessary, look into the matters relating to distressed, marginalized and disadvantaged children without family, children of prisoners, inspect juvenile home and recommend appropriate measures”*⁸⁵. The Commission undertakes “*periodic review of existing laws, policies and programmes on child rights in reference to the treaties and other international instruments and makes recommendations for their effective implementation in the best interest of children*”. It is a mandatory duty of the National Commission for the Protection of Child Rights (NCPCR) and State Commissions for the Protection of Child Rights (SCPCR) to monitor the implementation of the Protection of Children from Sexual Offences Act, 2012.

6.14.2 National Institute of Public Cooperation and Child Development (NIPCCD)

*“The National Institute of Public Cooperation and Child Development (NIPCCD)”*⁸⁶ is a premier organization which acts as an autonomous body under the Ministry of Women and Child Development Department, Government of India “*to promote voluntary action, research, training and documentation on women and child development in the year 1966 under the Society Registration Act of 1860*”. The institution was established at New Delhi with its four Regional Centres at Guwahati, Bangalore, Lucknow and Indore. The prime areas of the Institute relates “*to child care interventions relates to maternal and child health*

⁸⁵ id

⁸⁶ Available at <http://www.nipccd.nic.in>

and nutrition, early childhood care and education, childhood disabilities, positive mental health in children and child care support services". The Institute functions as an apex institution for training functionaries of the "*Integrated Child Development Services (ICDS) programme.*"⁸⁷ And also under the Integrated Child Protection Scheme (ICPS)⁸⁸ "*it is designated as the nodal institution for imparting training on child rights issues and prevention of trafficking of women children for SAARC countries*".

6.14.3 The Central Adoption Resource Authority (CARA)

The Central Adoption Resource Authority (CARA) is an autonomous body under Ministry of Women and Child Development, Government of India. CARA which primarily deals "*with adoption of orphan, abandoned and surrendered children through recognized agencies. It functions as the nodal body for adoption of Indian children and is mandated to monitor and regulate in-country and inter-country adoptions*". As per the provisions of Hague Convention on Inter-country Adoptions, 1993(ratified by Government of India

⁸⁷ The Integrated Child Development Services (ICDS) scheme is the "*largest program for promotion of maternal and child health and nutrition in India under the ministry of women and child development. The scheme was launched in 1975 in pursuance of the National Policy for Children. The scheme has expanded in the last twenty-seven years from 33 projects to 5171 blocks. It is a multi-sectoral program and involves several government departments. The international agencies like UNICEF, USAID, DFID and CARE India serve are acting as development partners and providing technical and other supports for the effective operation of the programme. The prime objective of the programme is to lay foundation for proper psychological, physical and social development of the child, improve health and nutritional status of children below six years of age, reduce infant mortality, morbidity, malnutrition and school dropouts, achieve effective policy implementation to promote child development and enhance capability of the mother to look after health and nutrition, education and other needs of her child*".

⁸⁸ Infra n 15

in 2003), CARA “is designated as the Central Authority to deal with in-country and inter-country adoption of children”.

6.14.4 The Integrated programme for Street Children

The Integrated programme for Street Children by the Ministry of Social Justice and Empowerment seeks to “prevent indigence of children without homes and family ties and are vulnerable to abuse and exploitation such as children of sex workers and children of pavement dwellers . The programme rehabilitates these children by providing food, clothing, shelter, non formal education, recreation, counseling, guidance, and referral services and makes easy retreat from the street life. The other components of scheme includes enrolment in school, vocational training, occupational placement, mobilizing preventive health services and reducing the incidence of drug and substance abuse, HIV/ AIDS etc”.⁸⁹

6.14.5 CHILDLINE India foundation

CHILDLINE India foundation ⁹⁰ is a monitoring agency for the CHILDLINE 1098 service which is “a toll free telephone helpline and is working in 74 urban and semi urban cities in the country. Anyone can call for assistance for the interest of children. It also launched the Child Sexual Abuse Awareness Program in January 2011 with a view to make child sexual abuse awareness in the children between an age group of 7 to 12 and in their families and has been

⁸⁹ www.childlineindia.org.in › ... › Child Targeted Schemes & Programmes

⁹⁰ <http://www.childlineindia.org.in/cif.htm>

evolved by a four pronged approach of engaging the Community, Parents, Children and putting Support Structures in place”.

6.14.6 The Shishu Greh Scheme

The Shishu Greh Scheme is being implemented by the Ministry of Women and Child Welfare for “*ensuring care and protection of abandoned, orphaned, and destitute infants or children up to 6 years within the country and to promote adoption for rehabilitate them. Now these all are coming under the integrated child protection scheme. In addition to all these child protection schemes and programmes three pilot projects were implemented to i) combat trafficking women and children for commercial sexual exploitation under the sanction of tradition ii) combat trafficking of women and children for commercial, sexual exploitation in source areas and iii) combat trafficking of women and children for commercial sexual exploitation in destination areas.*”⁹¹

6.14.7 Child welfare committee (CWC)

The child victims of sexual abuse and exploitation are described as the “*children in need of care and protection*” under Juvenile Justice (Care and Protection of Children) Act 2015.⁹²The Act requires “*state governments for the establishment of a child welfare committee (CWC) or two in a district*”⁹³ and the *procedure in relation to the committee*”.⁹⁴ The Committee shall have the

⁹¹ Available at <http://www.childlineindia.org.in/Initiatives-to-combat-trafficking-of-Women-and-Children.htm>

⁹² THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015, Act NO. 2 OF 2016 sec 1 subsection 14, (viii) reads as “*who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts.*”

⁹³ Supra n 22, s. 27

⁹⁴ Supra n 2, s. 28

“authority to dispose of cases for the care, protection, treatment, development and rehabilitation of children in need of care and protection, and power to deal exclusively with all proceedings under this Act relating to children in need of care and protection.⁹⁵as per the provisions of the Act”⁹⁶ a child can be brought before the committee (or a member of the committee if necessary) “by a police officer, any public servant, CHILDLINE personnel, any social worker or public spirited citizen, or by the child himself/herself”. The CWC usually sends the child to a children's home while the inquiry into the case is conducted for the protection of the child. Children's homes are “government funded institutions that provide temporary shelter, food and clothing to children in need of care and protection. Children in the homes are meant to receive basic education and life skills lessons”. The CWC meets and interviews the child to learn his/her background information and also understand the problem the child is facing. The probation officer in charge of the case must also submit regular reports of the child. The purpose of the CWC is “to determine the best interest of the child and find the child a safe home and environment either with his/her original parents or adoptive parents, foster care or in an institution. A final order must be given within four months of the admission of the child before the CWC”. In the case of individual child sexual abuse, reporting the abuse can be difficult, since it is often a family member or a known adult that is the abuser. The CWC will instruct the local police station to file a report against the abuser(s) under the relevant IPC

⁹⁵ Supra n 2, s. 29

⁹⁶ Supra n 2, chapter 6 , s. 31 to 38, PROCEDURE IN RELATION TO CHILDREN IN NEED OF CARE AND PROTECTION

clause. Children who have been sexually abused require special attention and tact on the part of the CWC. The case needs to be handled very sensitively and should allow for the child to express their emotions and concerns. The child's statement should be recorded in much detail so that the report can be used in a court of law. The child needs counseling and guidance from a clinical psychologist or social worker. The CWC must issue a memo for the medical examination of the child. Medical reports are vital to the prosecution and conviction of the abuser. In the case of pregnancy as an outcome of the sexual abuse, the CWC can issue request a medical termination of pregnancy with the consent of the parents. If the pregnancy is too advanced, the girl can be taken to girl's home for counseling and care until delivery. Once born, DNA testing of the baby can be used in evidence of the crime.⁹⁷ The Child Welfare Committee, have powers to provide for basic needs of such child, protect its human rights, and order temporary financial assistance to cover its basic and immediate needs.⁹⁸

The POCSO Act, also provides the role of Child Welfare Committee. It is required *"to produce the child by the police before the Child Welfare Committee within 24 hours of recording information"*,⁹⁹ and also the committee provided to perform judicial functions. The main role of the CWC under the POSCO Act is *"to provide assistance to children who are alleged to be victims*

⁹⁷ Dr Nilima Mehta *Child protection and juvenile justice system: For children in need of care and protection*", 2008, Available at www.childlineindia.org.in/pdf/cp-jj-cncp.pdf

⁹⁸ *Supra* n 2 , s.37.

⁹⁹ s.19 (6) of the Protection of Children from Sexual Offences Act, 2012 Act and rule 4 (3) of the Protection of Children from Sexual Offences Rules, 2012

of sexual assault and, where applicable, their families, in obtaining care and protection. This role has been given to the CWCs in recognition of the fact that in cases of sexual assault it is important to look beyond the investigation and trial of the alleged perpetrator to providing assistance to the children in such cases who are in need of care and protection". Rule 4 (5)¹⁰⁰ lay down "considerations to be taken into account by the Child Welfare Committee conducting the inquiry on the matter of sexual abuse".

6.15 Role of Non Governmental organizations

The legal frame work in India envisages large role of NGOs in combating and addressing the issue of child sexual abuse. They are playing vital role in the successful implementation of policy and programs run by the Government to combat sexual abuse of children into all aspects of addressing the issue. They have taken the lead and supported initiatives, and basically the static demands of the NGOs have encouraged and drawn state and public awareness to the issue of child sexual abuse and exploitation. Recently the government seeks assistance and cooperation of these organizations in the work process and as collaborators and they work on developments of standards prescribed for the protection of child rights by the national and international instruments, monitors resource allocation, child development projects, undertake evaluation and also develop participatory community level structures. Many NGOs are involved in

¹⁰⁰ Protection of Children from Sexual Offences Rules, 2012

liberating children from the clutches of the vulnerability of sexual abuse and exploitation.¹⁰¹

6.15.1 Scope of NGOs in combating sexual abuse of children

The scope of NGOs in combating child sexual abuse is credible to serve and save children and protection of child rights. They are the activities related *“with prevention of sexual abuse of children, co ordination with government and other agencies, conducting research, role in health and medical issues, and in providing support before repatriation of the victims”*.

6.15.1.1 Prevention

Actually NGOs are the pioneers in bringing this hidden crime of child sexual abuse into the public domain by their continuous efforts. NGOs are taking part with an eminent job of spreading awareness, employment and literacy in the society as in our country poverty is an undeniable reason for the commercial sexual exploitation of children. Within the limited resource and funding the task of welfare of the children and other vulnerable groups are undertaken by NGOs. They have established programs and projects to provide awareness about the child sexual abuse through various awareness programmes in schools and villages and help preventing children from being deceived and trafficked and to make awareness in children that they can differentiate unsafe touch from a safe one. Thus NGOs are the only actor at grass root level working for prevention. Coordination, cooperation, and support from government agencies

¹⁰¹ Role of Non-Government Organizations in Confronting Trafficking In India, Apeksha Kumari, American International Journal of Research in Humanities, Arts and Social Sciences, page 200, Available at <http://www.iasir.net>

of all levels are essentially needed in the process of combating child sexual abuse and exploitation.

6.15.1.2 Conducting research

Over the past decade in national, international level more organizations have conducted many studies and researches¹⁰² and help government to improve data systems and hence can fill the data gaps and enhance coverage and quality of analysis and strengthen evidences on child related issues. This is an important

¹⁰² In the 1990s, some of the significant small-scale qualitative studies, which were carried out in various parts of India, revealed the extent and contours of child sexual abuse. Some of these studies were undertaken by the NGOs: “*Samvada, Bangalore; Sakshi, Delhi; RAHI, Delhi; and by the Tata Institute of Social Sciences, Mumbai.*”

- *In 1993-94, the Bangalore-based NGO Samvada undertook one of the first specific studies on Child Sexual Abuse*
- *through a series of workshops for 348 girls aged between 15 and 21 years, who were from 11 schools and colleges in Karnataka. The study reported that 47 per cent of the girls had been molested or had experienced sexual overtures, and 15 per cent had been subjected to serious sexual abuse, including rape. One out of three children was under 10 years old when the abuse started. (www.boloji.com; Enfold www.enfoldindia.org)*
- *In 1997, the Sakshi Violation Intervention Centre, a Delhi-based group, undertook a study of 350 schoolgirls. Of these 63 per cent had been sexually abused by someone in the family; 25 per cent had been raped, made to masturbate the perpetrator or perform oral sex. Over 30 per cent of the girls had been sexually abused by their fathers, grandfathers or male friends of the family.*
- *In 1998, the Delhi-based NGO Recovering and Healing from Incest (RAHI) carried out a study in selected States on ‘Women’s Experience of Incest and Childhood Sexual Abuse’. The study had found that 76 per cent of middle and upper class women in Chennai, Mumbai, Kolkata and Goa had been sexually abused as children, and 71 per cent of them had been abused by relatives or someone they knew and trusted. The study revealed that some women only realized that they had been abused when they were responding to the questionnaire (RAHI 1998 cited by WCD 2007b).*
- *In 1999, the Tata Institute of Social Sciences, Mumbai, interviewed 150 girls and found that 58 of them, more than one in three had been raped before the age of 10 (Krishnakumar 2003).*

A couple of other studies also threw light on Child Sexual Abuse (CSA) and its prevalence and incidence. One such study has been in 2006 by the Chennai-based NGO Tulir – Centre for Prevention and Healing of Child Sexual Abuse, with the support of the international organisation Save the Children undertook a study of CSA in Chennai. It included 2211 class XI students, girls and boys, who had different socio-economic backgrounds and attended mainstream schools. The results of the study show that out of a total of 2211 child participants, 939 had faced at least one form of sexual abuse at some point in time. The study results show that 39 per cent of the girls faced sexual abuse, compared to 48 per cent of the boys; taken together this is 42 per cent of the children”.

role of NGOs in providing awareness and enlightens the society in this grave issue of sexual abuse of children and moreover to find out the hidden aspects of organized crime activity. As conducting research on various needs and issues can supply intervention programs and policy development with significant information and understanding regarding this offence. Ongoing research and completely well informed intervention programs and implementations are needed for measuring the magnitude of the problem and then only adequate prevention and protection strategies can be adopted.

6.15.1.3 *Role in health issues of victims*

Many NGOs have programs on health issues of the child victims of sexual exploitation especially day care facilities for “*HIV infected children*”. And NGOs provide “*AIDS prevention education*” and to promote community-based care in case of child prostituted and children of prostitutes. NGO volunteers are mostly well trained and equipped with materials and information on HIV prevention and AIDS care to distribute to their different target populations. They focus on child protection and child participation, children in difficult circumstances, education, HIV/AIDS awareness, health, early childhood care and development. etc. PLAN India is a child-centered development organization that aims to promote child rights and improve the quality of life of vulnerable children. Plan works in 13 States in India and has directly impacted lives of over a million children and their families since 1979. Development interventions focus on child protection and child participation, children in difficult

circumstances, education, HIV/AIDS awareness, health, early childhood care and development. etc.

6.15.1.4 Rehabilitation and Repatriation and of victims

The relevance of these organizations in rescue operations as witnesses, advisors, and partners and as human rights ombudsman cannot be substituted with any other measures. NGOS can help in identifying victims, vulnerable persons, carrying out risk assessment, and also in the post rescue activities. These includes counseling and interviewing of the victim ,helping the police to act on with respect to the best interest of the child and acts as translators for the child victims of interstate trafficking etc. They can also take main role in protecting and supporting the child victims in cases of trafficking for sexual abuse and exploitation.¹⁰³ In case of repatriation of trafficked children for sexual exploitation the law enforcement agencies should ensure that NGO members are co-opted in the joint team for rescue and rehabilitation. It would be appropriate to associate local NGOs working at the place of rescue. NGOs that have Shelter Homes should definitely be involved.¹⁰⁴

6.15.1.5 Under Immoral Traffic Prevention Act (ITPA) 1956

Immoral Traffic Prevention Act 1956 provides for “*large role of NGOs and social workers*”. This gender neutral Act passed for “*prevention of trafficking of human beings included trafficking of children for commercial*

¹⁰³ S K Roy, Child trafficking in India: realities and realization, 1 IUAES2013, PANEL MMM 02.

¹⁰⁴ Protocol on Inter State Rescue and Post Rescue Activities Relating to Persons Trafficked for Commercial Sexual Exploitation, Government of India 2007, page 13.

sexual exploitation and recognizes it as an offense punishable". While dealing with cases of sexual exploitation with trafficking of children "*the courts should have almost care to ensure that the exploiters as relatives are not obtaining the possession and custody of trafficked child victim*". In this regard the court should take necessary assistance from the NGO. The court hearing cases under ITP Act should ensure that "*the victim is supported by a socially committed advocate of her own choice or an NGO working on trafficking issues for guard the victim from re trafficking*".¹⁰⁵ The fee for lawyers representing the trafficked victim and expenses incurred by NGO s working in this matter are to be meet by the free legal aid service authorities at centre and states so that all who assisting in the implementation of the act should be adequately compensated.¹⁰⁶

- **Advisory body**

The Act prescribes "*the establishment of an advisory body of leading social workers and co opted NGO members and also its powers for the effective discharge of the duties and functions of special police officer under ITPA*".¹⁰⁷

On questions of general importance regarding the working of Act the advisory body can take steps for the protection of best interest of the victim that can advise and facilitates the police to carry out rescue and ensure the protection of rights of rescued persons. The body can take necessary steps for the prevention of trafficking and also in rehabilitation and empowerment of the victims. Selected

¹⁰⁵ *Delhi domestic working women's forum v. Union of India*, 1995 1 SCC 14.

¹⁰⁶ *Trafficking and the Law*, second edn, HUMAN RIGHTS LAW NETWORK, New Delhi November 2002, page 92

¹⁰⁷ s. 13(3)(b) Immoral Traffic Prevention Act

NGOs can be included in advisory body and thus those can be actively engage in prevention of child sexual abuse and aftermath protection of human rights of the child.

- ***During search***

NGOs are considered to be the appropriate agencies in helping the police officer during the search done for victims of trafficking. The Act ensures the legal right of NGOs in take parts of rescue process by providing a provision that the need of maintaining a list of women activists and NGOS and can be called upon such necessary situations.

- ***In rescuing of children***

As per section 16 of the Act NGOs can move the magistrate to seeking orders for rescue a person. Thus the magistrate can issue orders to the police officer to rescue the trafficked victims upon the information provided by the NGO. The magistrate can also issue orders for closure of brothel based upon the information delivered by NGOs.¹⁰⁸ The act mandates “*the presence of woman police officer or a female member of NGO during interview with female rescued children*”.¹⁰⁹ Home verification of rescued children is a procedure established by the Act before the rehabilitation and is done by the probation officer. But it can also be done by a NGO if a magistrate empowered to do so or the probation officer entrust the NGO the responsibility. If the task is entrusted with NGO the

¹⁰⁸ s. 18(1)

¹⁰⁹ s. 16(6)(A) of ITPA

law enforcement agencies have to make network with appropriate NGO and thus speedy and easy verification can be expected.

- **Rehabilitation**

NGOs can assist the magistrate on rehabilitation process that the magistrate may summon a panel of five persons, in which three of them shall be women. The panel assists the magistrate in taking decision in home verification and rehabilitation of rescued persons.¹¹⁰ This gives a legal right to NGOs in taking part of justice delivery system and an opportunity to ensure the process is the best interest of children.

6.15.1.6 Under Protection of Children from Sexual Offences Act (POCSO) 2012

The POCSO Act also provides provisions for role of NGOs in addressing the problem of child sexual abuse. The Act specifically addresses the issue of child sexual abuse and provides protection of children under age of eighteen from all forms sexual abuse and exploitation. NGOs working on child centered activities have a “*duty to report*”¹¹¹ the offence to the authority if it is committed within the sphere of that organization. And NGOs can act as “*a translator or interpreter*” of the child¹¹² on recording of the reporting of the offence. As per sec 19(5) “*special juvenile police unit or local police had a duty to admit the child victim who in need of care and protection to shelter homes or hospital*

¹¹⁰ s. 17(5) of ITPA

¹¹¹ Protection of Children from Sexual Offences Act (POCSO) 2012, s. 19

¹¹² Supra n 43, s. 19(4)

within twenty four hours of reporting".¹¹³ In this regard shelter homes provided by NGOs are mainly dependable. The Act insists "*the magistrate or police officer shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence*".¹¹⁴ In these stage members of NGOs plays active role in many cases especially children in need of care and protection. During recording of evidence, member of a NGO can present in the court if the special court permits to do so as the part of creating a child friendly atmosphere in the court and also can act as an expert or interpreter for the child during trial.¹¹⁵ The Act also empowers state government to prepare guidelines for use of NGOs with the pre-trial and trial stage to assist the child.¹¹⁶

¹¹³ S. 19(5) reads as "*Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and **protection**, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and **protection** (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed*"

¹¹⁴ Supra n 43 s. 26

¹¹⁵ Supra n 43, s.38(1) & (2)

¹¹⁶ s. 39 states that "*Subject to such rules as may be made in this behalf, the State Government shall prepare guidelines for use of non-governmental organizations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child.*"

CHAPTER 7

CHILD SEXUAL ABUSE: AN EMPIRICAL STUDY ON ANALYSIS OF JUDGEMENTS OF POCSO COURT IN ERNAKULAM DISTRICT, KERALA

7.1 Introduction

The enactment of Protection of children from Sexual Offences Act is a welcome development by which a wide range of sexual crimes including child rape, harassment and exploitation for pornography have been criminalized. The problem of child sexual abuse demand justice to children as victims of crime. Before the implementation of *Protection of Children from Sexual Offences Act* the sexual offenses against children are also tried by the ordinary criminal courts and the trial proceedings are not different in cases of children from the adult ones and there was also an uncertainty of convictions in child sexual abuse cases due to flaws in legal process. In the preamble itself the Act clarifies its objective of protecting children from all forms of sexual offences and the establishment of special courts for the trial of these offences. Sec 28 of the Act mandates that “*state governments should in consultation with chief justice of high court designate a session’s court of be a special court to try offences under the POCSO Act*”. The aim is to facilitate speedy trials and child friendly procedures in child sexual abuse cases and to ensure the justice to the child victims.

The child victims of sexual offence have to interact with several functionaries and service mechanism in his /her journey for justice from

reporting of the crime to prosecution of the offender. The different procedures are discussed in chapter VII. The Act ensures child friendly justice in each of the machinery that encounters the child to avoid the re victimization of the victim. In this chapter the researcher aims to do an empirical study to examine the child friendliness and efficacy of special courts in achieving speedy justice and better results. The study focuses on analyzing the judgments delivered by the special court designated under POCSO Act in Ernakulam district of Kerala in child sexual abuse cases and to examine how far these courts are really responsive to child victims of sexual crimes and to fulfill the very purpose of implementation of Act.

7.1.1 Context of the study

The POCSO Act envisages powers and child friendly procedures to be adopted by the special courts in recording of evidence, age determination, mandates in camera trial and speedy trial. The Act vests the responsibility on the special judge to maintain a child friendly atmosphere by allowing a family member or a person in whom child trust or confidence to be present in the court and has mandated all the questions to the victim should be asked through the judge. There is also provision for presumption of offense and culpable mental state. These all are contrary to the conventional criminal procedures and law. The Act also ensures assistance of a special educator or an expert in recording the statement¹ and also in recording evidence of the child victims. It is the duty

¹ “*providing information about the offence to police by the statement*” under Section 161 and “*recording of statement of the victim by magistrate*” under Section 164 of Code of Criminal Procedure, 1973 (CrPC)

of each special judge to put questions on the victim in an age appropriate manner. The term ‘child friendly’ is also defined by *the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act)*.² Under the JJ Act the Juvenile Justice Boards (JJBs) have the responsibility of ensuring the procedures are ‘child friendly’ and also should create a ‘child friendly atmosphere’ for the child victims that the venue will be different from ordinary courts.³

At the international level, the *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes, 2005*⁴ provides for good practices that can be adopted by States in accordance with domestic law and judicial procedures and highlight the importance of guiding professionals⁵ to assist and support in dealing the child victims and witness of crime in a sensitive manner. “Child-sensitive” has been defined to mean “an approach that balances the child’s right to protection and that takes into account the child’s individual needs and views.”⁶ Another international document which defines the term child friendly justice is *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 2010*⁷ and the guideline envisage the

² Section 2(15) of the JJ Act, 2015 defines the term as “any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child”.

³ Sec 7(1) of JJ act

⁴ Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Guideline 1, paras 3(c) and 3(d) ECOSOC Resolution 2005/20. www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf

⁵ The term “professionals” includes judges, law enforcement officials, prosecutors, defence lawyers, support Persons and others in contact with child victims and witnesses of crime. guideline 9(b)

⁶ Ibid 9(d)

⁷ Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) – edited version 31 May 2011, http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20_4_.pdf

ingredience in all stages of legal proceedings. The definition⁸ of the term includes the justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.

7.1.2 Objectives of the study

- To examine whether the special courts are procedurally compliant with the POCSO Act in trial of the cases of child sexual abuse.
- To understand the interpretation of provisions, application of presumption, appreciation of testimony of the child, conviction rate, disposal rate, factors affecting conviction and acquittal, compensation orders, response to romantic relationships, use of medical evidence, and investigation lapses.
- To identify the gaps and challenges in the functioning of special courts.
- To identify the positive effects of POCSO Act and the good practices that adopted by special courts during the trial.
- To mention suggestions for the reform of mechanism on based on the above.

7.1.3 Framework of analysis

The judgments were analyzed to gather information on the following

- Rate of convictions and acquittals and the reasons,
- Appreciation of testimony of child victims,
- Rate of accused persons who are known/unknown to the victim and how the relationship with the victim and accused affects the testimony of the victim,

⁸ Child friendly justice is defined as “*justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level, and giving due consideration to the child's level of maturity and understanding and the circumstances of the case.*”

- Rate of cases in which the accused and the victim were married and in romantic relationships, testimony in such cases, and the outcome,
- Age profile of the victim and accused and the nature of their testimony,
- Sentencing pattern and charges,
- disposal rate and time taken to dispose the case,
- Committal of the cases,
- Application of presumption,
- compensation- interim and final awarded by special court,
- Treatment of romantic cases by special court,
- Treatment of hostile witness,
- Treatment of medical evidence,
- Age determination,
- Investigation lapses highlighted by special courts.

7.2 Findings based on analysis of Judgments

A total of 185 cases of special court under POCSO Act, Ernakulam from February 2013 to October 2017 were analyzed in which the proceedings of 7 cases were quashed by producing High Court order by the accused and 4 cases were transferred to JFCM court and 12 cases were transferred to LP cases as the accused was absconding and in 3 cases the charge abated by the death of accused. The reason for transferring cases to JFCM Court is that the sexual offences are not charged and the special court applied the rule in *Thressiamma Varkey v. State of Kerala*⁹. The judgments of 8 cases were not available in the website.

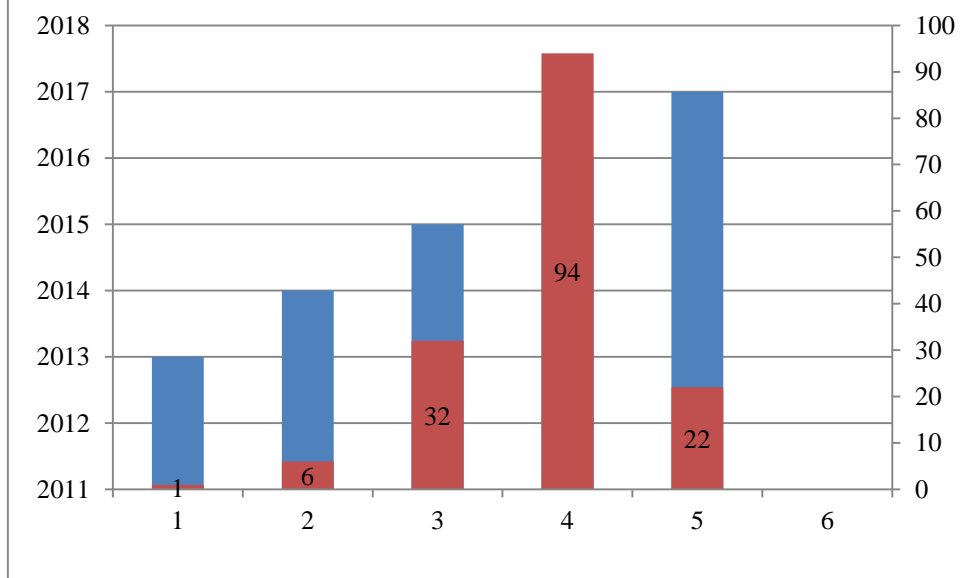
⁹ 2017 (3) KHC 656, The Hon' High Court of Kerala issued following directions for compliance by the subordinate courts:

“a) All cases pending before the Children’s Court, where the proceedings are not concluded shall be transferred to the Magistrate Court concerned as provided under Section 228 (1)(a) Cr.P.C. for trial and disposal in accordance with law, unless at least one of the offences for which the accused is being tried is punishable with imprisonment of more than seven years. b) In cases where the proceedings are

Table 7.1: Total number of disposed cases for the period of study

Analyzed cases	151
Transferred to JFCM	4
Transferred to LP Cases	12
Abated by death of accused	3
Judgments not available in the website	8
Proceedings quashed by High Court	7
Total	185

Chart 7.1 - Year-wise Total number of Judgements Analysed



concluded under the Old Act, the same cannot be re-opened for the purpose of complying with the new procedure.

- c) *No case against the children or violation of child rights shall be committed to the Sessions Court for being tried before the Children’s Court unless at least one of the offences for which the accused is being tried is punishable with imprisonment of more than seven years.*
- d) *If none of the offences for which the accused is being tried is punishable with imprisonment of more than seven years, then, even if the case has been already numbered as C.P., the trial can be conducted by the Magistrate Court concerned by changing the nomenclature as C.C. or S.T. as the case may be, as the change in nomenclature does not affect the substantive right of the parties.”*

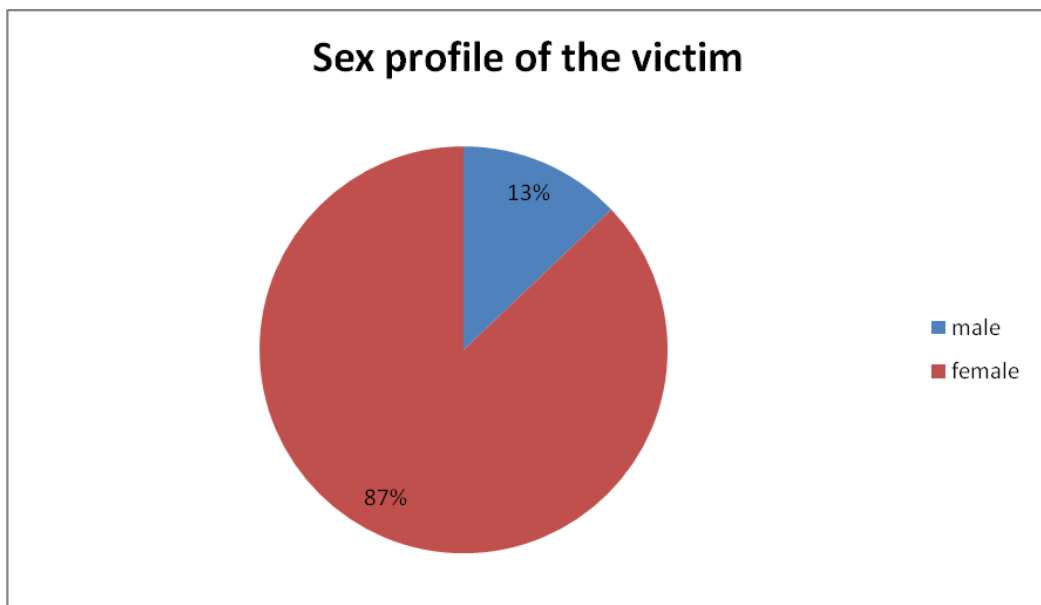
The findings from the in-depth analysis of 151 judgments are summarized under the following.

7.2.1 Profile of the Victim

7.2.1.1 Sex profile

Total number of victims from 150 cases is 155 children in which 135 victims (87%) were females, while 20 victims (13 %) were male. In one case the victims are 165 students of a class and the sex of those students not specifically mentioned in that case¹⁰. This data is not consistent with the findings of the *Study on Child Abuse* by the Ministry of Women and Child Development, Government of India, as per which 55.04% boys and 44.96% girls in Kerala had reported having faced one or more forms of sexual abuse.¹¹

Chart 7.2. Sex profile of the Victim

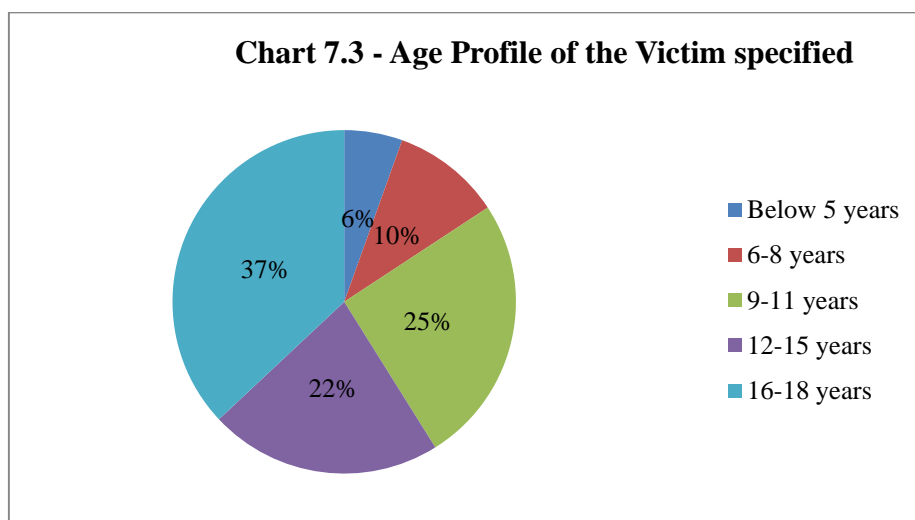


¹⁰ *State of Kerala v. Baburaj*, Sessions Case No. 538/2016, decided on 28.09.2017

¹¹ Ministry of Women and Child Development, *Study on Child Abuse: India 2007*, p.75, available at <http://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf>,

7.2.1.2 Age profile

Of the 151 cases the age of the victims specified in 141(93%) cases where in 10 cases (7%) the age is not specified in the judgment. All those cases which age not specified are acquitted cases in which the victim uncontested thus the court given up all other evidence and disposed. Of the 146 victims from 141 cases whose age was specified, 8 victims (6%) below 5 years, 15 (10%) were between 6 and 8 years, 37 (25%) were between 9 and 11 years, 32 (22%) were between 12 and 15 years, and 54 (37%) were between 16 and 18 years. In one case the age of the victim child was determined as below 12 by medical examination of the victim¹². In this case the accused sexually assaulted a 12 year boy who is a native of Rajasthan came Kerala for sale of balloons, ribbons etc. along with his mother. The victim was not school going and there was no documentary evidence to prove the age. So an OP ticket written the age of victim as between 12 to 13 is accepted by the court as evidence that the same was executed by the dentist on the instruction of police to determine the age of victim.



¹² *State of Kerala v. Chandran K K*, Sessions Case No. 209/2016 decided on 31.05.2017

Cases in which age of the victim contested

The age of the victim contested in two aspects one is not below the age of 18 and thus not included in the definition of child and the other aspect is child victim not below the age of 12.

The first and foremost important factor of the POCSO is that the victim should be below 18 years. So in almost one in every 10 cases the age contested as not proved below 18 to attract the offences under POCSO Act. Data from the study reveals that age of 12 victims (22%) contested in the age group of 16-18 and age of 4 victims (12.5 %) contested in age group of 12-15. In *State of Kerala v. Rafeek*¹³ age of the victim not proved below 18 years which is the first and foremost ingredient to attract POCSO Act. In this case the special court rejected a petition of prosecution at the end of the trial to receive a document and summon the witness to prove the age of victim by saying that *“It is not at all fair, on the part of the prosecution to produce the material documents when the matter was taken for judgment. Once, the accused has disclosed the defense case, then normally, it is not at all just to permit the prosecution to produce any documents.”* Thus prosecution failed to prove the age of victim and the accused acquitted.

The second aspect of not below the age of 12 years is important to prove the aggravated factor in sexual assault and penetrative sexual assault cases, but it is evident from the data that in six cases only the age is contested as not below

¹³ Sessions Case No. 74/2015 decided on 21.07.2017

12 years. In *state of Kerala v. Gopalakrishnan Nair*¹⁴ the victim deposed that she is aged 10 years and studying in 5th standard. The court opined that from this testimony of victim one can safely conclude that the age of victim is below 18 years but in order to prove the aggravated factor of below 12 years under sec 9(m) of POCSO Act the prosecution has to produce documentary evidence.

7.2.1.3 Pregnant victim

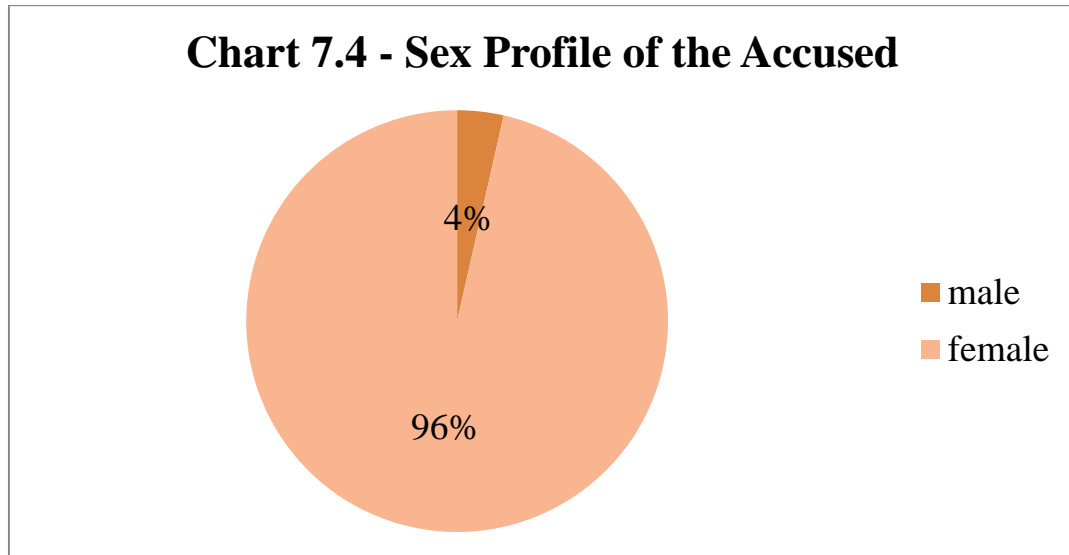
In 6 cases, the victim was pregnant when the FIR was registered. The victim testified against the accused in two cases only and turned hostile in 4 cases. In testified cases the victims supported in chief examination but turned hostile in cross examination. Charges of aggravated penetrative sexual assault were filed in five cases, while in one case the charges failed to reflect the aggravated nature of the offence. In all the six cases there was romantic relationship or promise to marry the victim and in two cases it was specified in the judgment that the accused and victim got married subsequently. In all these six cases, the accused acquitted as the victim did not support the prosecution case even though there was pregnancy as a result of alleged sexual abuse. In *State of Kerala v. Sudheesh*¹⁵ the accused committed penetrative sexual assault repeatedly on a girl child of 17 years and impregnated her by pretending love. But the victim and mother of the victim turned hostile and denied that the sexual abuse had taken place and thus the accused acquitted.

¹⁴ Sessions Case No. 761/2016 decided on 08.08.2017

¹⁵ Sessions Case No. 54/2017 decided on 30.06.2017

7.2.2 Sex profile of the Accused

There were a total of 169 accused persons out of 151 cases analyzed, of which 163 were male and six were female.



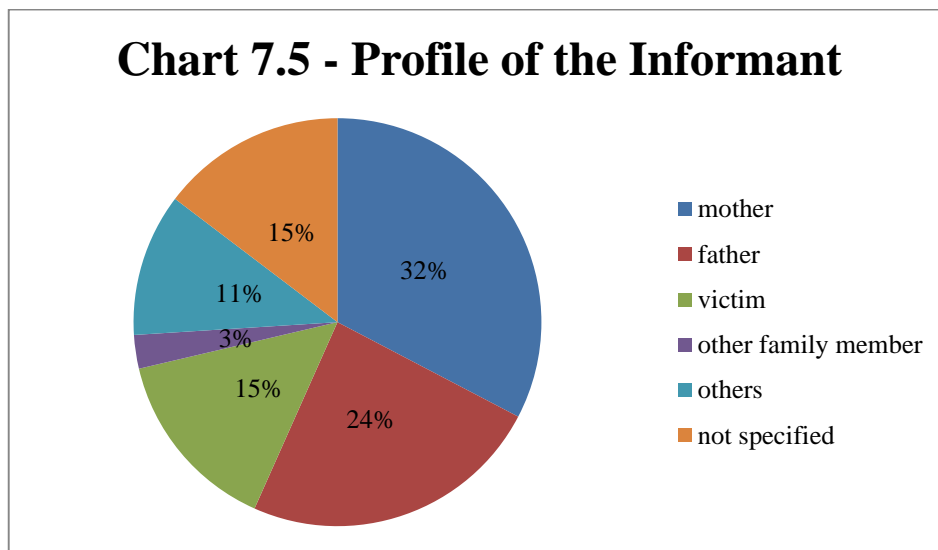
All the perpetrators of sexual offense are males and the charges against the five females were that of abetment of a sexual offence and in those cases the females are co accused and one female accused is charged with failure in reporting the crime under POCSO Act. For example in *State v. Jimmy and Siji*¹⁶ the second accused was the biological mother of victim who intentionally aided and assisted the first accused her boy friend to commit the offences of sexual assault and physical assault on her own children. The prosecution case was that when the victim a girl child of 12 years, was watching TV, the first accused with sexual intent, laid her on a cot, placed your leg on her body and also caught her right breast. When this incident was told to the 2nd accused, mother of her she had threatened the girl. Then, on another day a boy child of 9 years, son of 2nd

¹⁶ Sessions Case No. 599/2013 decided on 09.06.2017

accused, happened to see, both accused were in a compromising position, from the bedroom and when it was objected by the child, the 1st accused, with the intention of causing hurt, hit his head on the wall and caused simple hurt. Here the female offender charged with abetment to the offences under sections 354, 323, 506(i) of IPC and S. 23 of JJ Act.

In *State v. Fr. Edwin Pigarez and others*¹⁷ the fourth accused was a female medical practitioner who willfully abstained from reporting the crime though she had knowledge about the offense and charged under sec 19(1) of POCSO Act.

7.2.3 Profile of Informants



The informants of the offence in most cases are mothers (49), fathers (36), and victims (22). Other family members who came as informants are grandmothers (three cases), and step mother in one case. Others included the Child line activists(2), counselors of schools(2) and child care institutions(4),

¹⁷ Sessions Case No. 203/2016 decided on 08.12.2016

principal and teachers of school (4), doctors (2), and other known persons including employer and security staff (one case each). In one case police happened to register the offense in pursuance of another offense and in one case the informant is a stranger. FIR is lodged by who is not specified in 22 judgments.

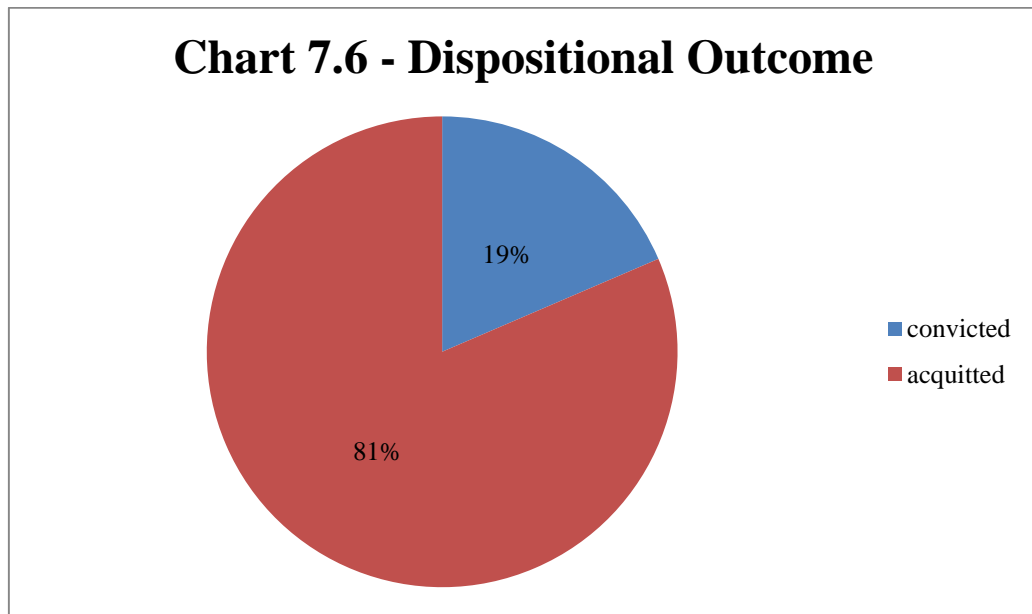
While the POCSO Act mandates anyone having information about the commission of a sexual offence or an apprehension that it is about to be committed to report, the judgment analysis revealed that cases were mostly reported by parents and victim. Other authorities under POCSO Act who is bound to mandatory reporting is very few in number compared to parents of victim as informants in the judgments studied. In *State of Kerala v. Edwin Pigarez and others*¹⁸, a lady doctor charged with violation of sec 19(1) of POCSO Act as she was failed to report the offence of sexual assault committed by a priest of church.

7.2.4 Rate and nature of conviction

Conviction awarded in 28 cases while 123 cases resulted in acquittal. This pegs the overall rate of conviction during the period of the study at 18.5%. Of these 28 cases, in 17 cases the accused was convicted both under the POCSO Act and IPC whereas in 4 cases the conviction was only under the POCSO Act and in 5 cases conviction was only under IPC and in two cases the conviction was under IPC, POCSO and also JJ Act. In all these convicted cases the accused persons pleaded not guilty and the case was contested and judges found the

¹⁸ Id

testimony of the victim/prosecutrix or eye-witnesses consistent and reliable.



7.2.4.1 Conviction both under POCSO Act and IPC

The accused convicted both under IPC and POCSO Act in 17 cases. In *state of Kerala v. Velayudhan*¹⁹ the court relied upon the consistent testimony of the victim, who was aged 10 years was corroborated by other material witnesses’ evidence even though the victim was not medically examined. The allegation was that the accused a security staff of the flat where the victim came for tuition had caught the hand and breast of child by saying that he can make it big. The accused was convicted under S. 354 of IPC and S. 9(m) r/w. 10 of POCSO Act.

In *state of Kerala v. Prakasan*²⁰ that allegation was that accused had placed a girl child of 4 years in his lap and inserted his finger into his vagina and also inserted his penis into her mouth. The court relied upon the testimony of the

¹⁹ Sessions Case No. 109/2016 decided on 27.07.2017

²⁰ Sessions Case No. 560/2015 decided on 10.03.2017

victim and other material witnesses and convicted the accused under section 375(a) IPC and S.3 (a) r/w.5 (m) & S. 6 and S.9 (m).

7.2.4.2 Conviction under POCSO only

In four cases the conviction was solely based on POCSO Act and in three of which were only charged with offences under POCSO Act and not under any other Act²¹. But in *State of Kerala v. Sathyan*²² the accused charged with offences under sec 3 and 7 of POCSO Act and also with sec 377 IPC. The allegation was that the accused committed sexual assault on a 15 year old boy child by caught the penis and caused the child to catch the penis of accused and also manipulated the body of the child to cause penetration in between thighs thus committed carnal intercourse against order of nature. The prosecution failed to prove the offences charged but the court convicted the accused under sec 7 of POCSO Act only that it has been proved the accused undressed himself and lay over the child and the court applied presumption of sexual intention under sec 30 of POCSO Act.

7.2.4.3 Conviction under POCSO Act, IPC and JJ Act

In two cases the accused convicted under POCSO Act, IPC and also JJ Act. In *state of Kerala v. Abdul Rahim*²³ the testimony of the victim of 8 years, was corroborated by other witnesses in which she has a consistent case that the accused, her teacher of 'madrasa' had committed repeated rape by finger

²¹ *State of Kerala v. Jolly Xavier*, Sessions Case No. 430/2015 decided on 27-05-2017, *State of Kerala v. Chandran K K*, Sessions Case No. 209/2016 decided on 31.05.2017, *State of Kerala v. Maju@ Manu*, Sessions Case No. 871/2016 decided on 25-05-2017

²² Sessions Case No. 452/2015 decided on 31-10-2017

²³ Sessions Case No. 106/2016 decided on 20-02-2017

penetration and sexual assault by causing the child to catch his penis. The medical report stated "*redness around the perineum, condition of hymen old tear and vagina admits tip of finger*" supported the prosecution case. The accused was convicted for the offences under Section 3(b), 5(f)(n) of POCSO Act, Section 375, IPC and also sec 23 of JJ Act.

And in *State of Kerala v. Augustine*²⁴ a 11 year old female child sexually abused repeatedly by her own grandfather who have control and charge over the child and threatened that she will be killed if it was revealed to anybody. The court relied on the testimony of victim with the corroborating testimony of other witnesses even though medical report stated 'no abnormalities' and convicted the accused for the offences under sec 9(l) (m) (n) POCSO Act, s.506 (1) of IPC, and s.23 of JJ Act.

7.2.4.4 Acquittal under POCSO Act, but conviction under IPC

In five cases, the accused was acquitted under the POCSO Act, but convicted under the IPC. The two principal reasons for this were the failure of the prosecution to prove the ingredients of the offence under POCSO Act and to establish that the victim was a minor. In *State of Kerala v. Vijesh*²⁵ the accused came in a motorcycle, made comments and caught the hand and stomach of a 17 year old girl and tried to take her in the bike on the way of her school and also stared and threatened her and the offences charged was under section 11(i) r/w 12, 11 (iv) r/w 12, S.7 r/w. 8 of POCSO Act S. 354, 354A (I)

²⁴ Sessions Case No. 265/2016 decided on 10.05.2017

²⁵ Sessions Case No. 793/2015, Decided on 16.08.2017

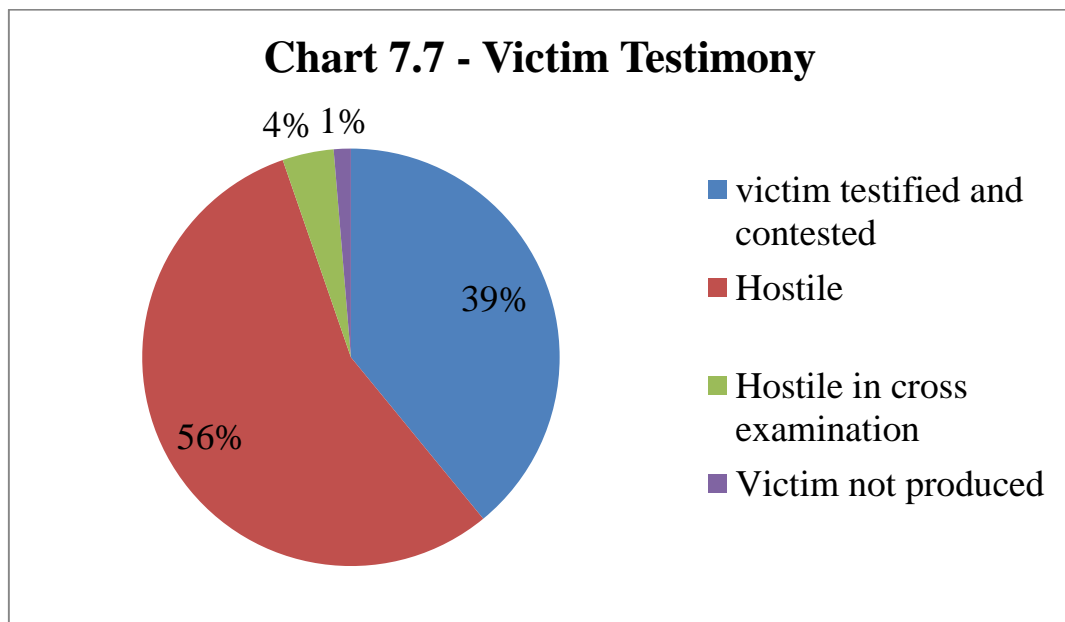
(i) of IPC. The court convicted the accused only under sec354 IPC for outraging modesty and observed that

“In order to attract the POCSO Act, the first and foremost ingredient to be proved by the prosecution is that, at the time of the incident, the victim was a ‘child’ that is aged below 18 years. Here in this case the prosecution did not adduce any evidence to prove the age of the victim.”

And thus acquitted for the offences charged under POCSO Act.

7.2.5 Nature of victims’ testimony

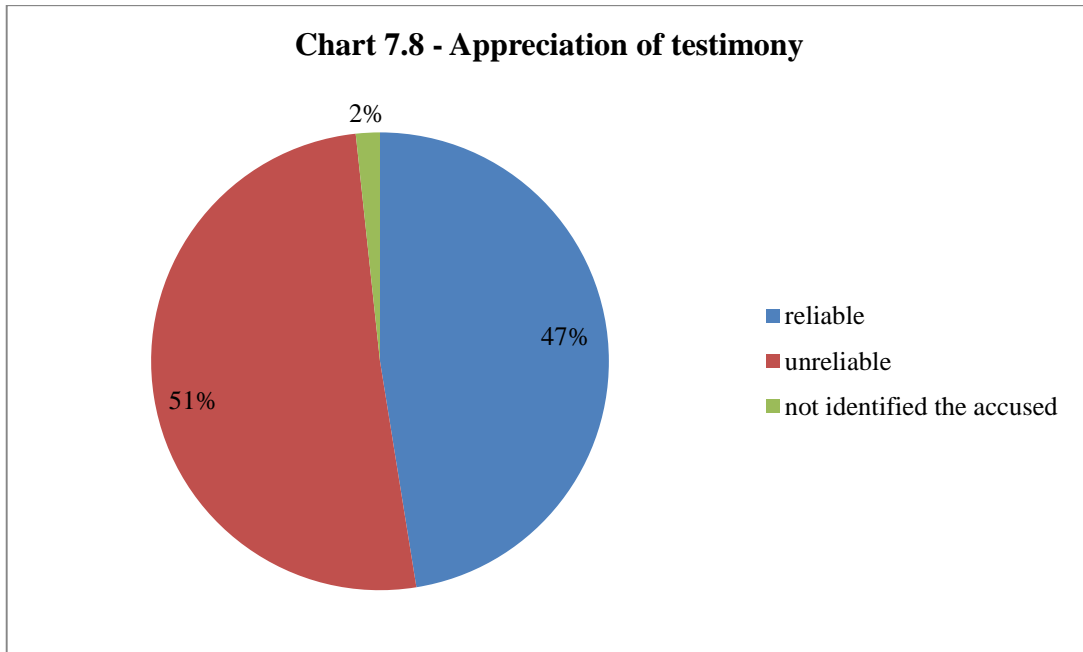
Of the 151 cases, the victims of 84 cases (56%) turned hostile and in 59 cases (39%) the victim testified and contested against the accused. In 6 cases (4%) the victim testified against the accused and supported the prosecution case in chief examination but turned hostile in cross examination. In two cases, the child victims neither produced before the court nor testified and the material witness examined before the court while they turned hostile thus resulted in acquittal in both cases.



➤ The testimony of victims of 30 cases was considered unreliable by the

Special Court, which constitutes 51% of the victims, testified against the accused.

- In one case the victim couldn't identify the accused due to disability that of mental retardation of the child and ended in acquittal. In *State v. Gopu*²⁶



7.2.6 Factors led to Conviction

The main factors that lead to conviction are the Special Court found the testimony of the child to be cogent, consistent, and reliable and also corroborated by the testimony of other material witnesses or medical evidence or with both.

7.2.6.1 Relied upon sole testimony of child victim

In *State of Kerala v. Gopalakrishnan Nair*²⁷ the accused convicted on the basis of consistent testimony of the victim even though the medical report with the words “not found abnormalities”. In this case the accused is a neighbor and friend of victim’s father herein, with sexual intent, embraced, pressed the

²⁶ Sessions Case No. 398/2016, decided on 20.09.2017

²⁷ Sessions Case No. 761/2016 decided on 08.08.2017

breast, kissed on the lips and also pressed on the vagina over the dress of a girl of aged 10 years and therefore committed aggravated sexual assault. Eventhough the prosecution failed to prove the aggravated factor of age below 12 years and also there are some minor discrepancies, the court relied upon the testimony of the victim. The Court considered victim's testimony and the circumstantial evidence, and applied the presumption under Section 29 of POCSO Act thus convicted the accused for the offence of sexual assault.

7.2.6.2 Cogent testimony of the victim corroborated with other witnesses evidence

In majority of the convicted cases the consistent testimony of the victim corroborated with other evidences is the reason for conviction. In *State of Kerala v. Niju*²⁸ the accused, a neighbor of the victim girl of aged 8 years came to her house for repairing motor and herein, with sexual intent, had kissed on the lips of the child. It is also alleged that, accused caught her vagina, over her dress and also caused her to catch his penis. Thereby the accused had committed offences of outraging modesty under IPC and also sexual harassment under POCSO Act. The court convicted the accused on the basis of testimony of the victim corroborated with testimonies of other two material witnesses even though there are some minor contradictions and discrepancies.

In *State of Kerala v. Baby*²⁹ the accused herein, with sexual intent, had caught the breast and vagina of a girl child of 11 years from her house on several

²⁸ Sessions Case No. 156/2016, decided on 30.06.2016

²⁹ Sessions Case No. 192/2016, decided on 28.04.2017

days repeatedly thus committed aggravated sexual assault on a child below 12 years. Here court considered the cogent testimony of the victim along with corroborating testimony of her mother and convicted the accused.

7.2.6.3 Victim testimony corroborated with medical evidence

In nine cases the conviction was based on the corroboration of medical evidence with the testimony of the victim. In *State V. Thomas*³⁰ the accused an auto driver who used to take children to school had raped a four year old girl child by finger penetration inside his auto. From the back seat of the auto he had inserted his finger in to the vagina of the girl by inserting hand through her skirt. In this case the victim testimony fully corroborated by medical evidence. The medical evidence state that “noticed injury on the vulva and labia minora.” The defense counsel raised the plea of impossibility of committing such an offence in a public place and two defense witnesses are examined and also there is a major discrepancy in the testimony of the material witness regarding the date of offence, the court relied on the consistent testimony of the victim child corroborated by medical evidence and convicted the accused.

In *state of Kerala v. Maju @ Manu*³¹ the accused herein, a priest of a temple with the intention of having illicit sexual intercourse, had acquaintance victim girl of 16 years, by contacting through the mobile phone. Due to the instigation and promise given by the accused that he will marry her, he had taken her to Bangalore and committed repeated sexual intercourse with her. Thereby

³⁰ Sessions Case No. 111/2016, decided on 17.06.2017

³¹ Sessions Case No. 871/2016, decided on 25.05.2017

the accused charged with offences of rape under IPC and aggravated penetrative sexual assault under POCSO Act. In this case the victim testified against the accused and her testimony against the accused was consistent. Medical report was also corroborating the victim testimony that the doctor deposed that “there was evidence of sexual intercourse and she had noticed, tear of hymen”. Eventhough the aggravated factor of repeated sexual offence is not proved, the cogent testimony of the victim and material witnesses and also the medical report lead to conviction of the accused for rape and penetrative sexual assault.

7.2.7 Factors led to acquittal

The most important reason for acquittal of the accused is that of victim turned hostile in 84 cases. The other reasons for acquittals were because the victim did not support the prosecution case in cross examination, victim testimony found unreliable and also prosecution failed to establish the ingredients of offence or to prove the age of victim less than 18 years. Some grounds are explained below.

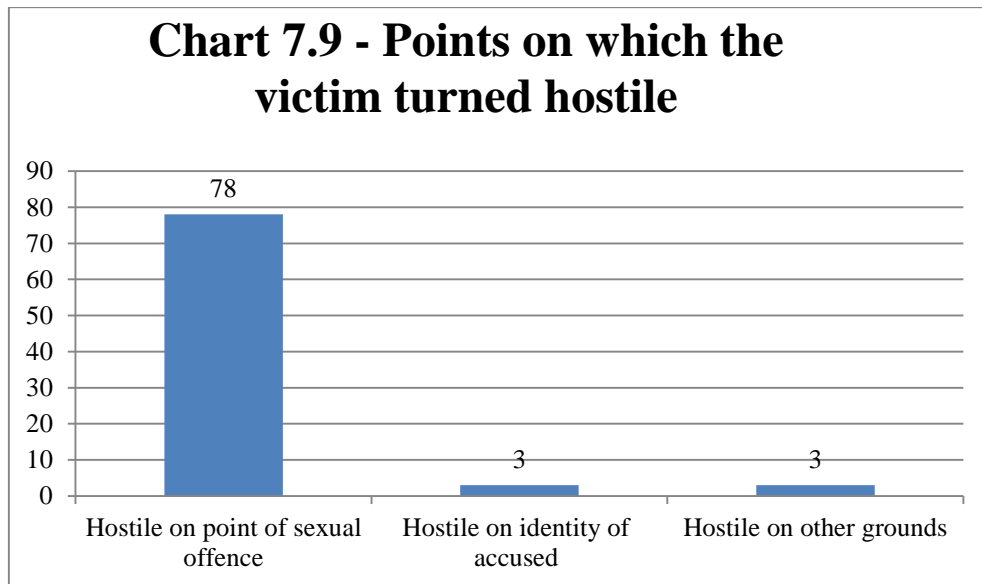
7.2.7.1 Victim turned hostile

The victim turned hostile in 84 cases staggering 56% of the total cases analyzed. The accused was acquitted in all cases in which the victim turned hostile and the reasoning in most of these judgments contain similar lines that

“the victim and parent of the victim turned hostile and as the victim does not support the prosecution case and the court given up all other evidences thus the accused acquitted”.

Almost in 78 cases the victim turned hostile and denied the sexual

offence had taken place. Only in three cases the victim turned hostile on point of identity of the accused. In other three cases victim turned hostile on some other grounds.



Hostile on occurrence of sexual offence

Total in 78 cases the victim turned hostile on the point of occurrence of sexual offence. In all these cases victim did not support the prosecution case and deposed that never such an offence had taken place. For instance in *State of Kerala v. Alan*³² accused with the intention of having illicit sexual intercourse with a girl child of 16 years, had acquaintance with her by pretending love and also by giving the promise of marriage. Then on several days he came to the residence of her had repeated sexual intercourse with her by inserting his penis and finger into her vagina. But the victim and complainant did not support the prosecution case. The court stated that “*she did not support the prosecution. She has categorically deposed that, accused never had sexual intercourse with her*

³² Sessions Case No. 929/2016, decided on 19.06.2017

either by inserting penis or by finger. So, by considering her evidence, all other witnesses were rightly given up by the learned prosecutor. So, there is no evidence to show that the accused had committed the above offences”.

In *State of Kerala v. Manaf*³³ the accused with sexual intent had placed two female children of 10 and 8 years on his lap and caught their vagina and also showed some obscene pictures to them in his mobile phone and thus committed aggravated sexual assault and sexual harassment under POCSO Act. But the victims turned hostile and deposed that the accused only embraced them with affection and never touched their private parts with bad intention nor showed any obscene pictures in mobile phone. Thus by considering victims evidence accused acquitted.

Hostile on identity of accused

In *State of Kerala v. Shemeer*³⁴ a girl child of 9 years came to shop for purchasing biscuits, the accused with sexual intent, caught and fondled on her genitalia and thereby committed the offence of sexual assault punishable u/s 7 r/w 8 of POCSO Act. In this case the victim deposed that the sexual offence had taken place but she didn't identify the accused and said that she is not sure as to whether it was the accused as he does not remember the face of the accused herein who assaulted her. The court said that “she never identified the accused herein as the person who assaulted her. There is no occurrence witness. There is no other evidence regarding the identity of the accused”

³³ Sessions Case No. 455/2016, decided on 08.08.2017

³⁴ Sessions Case No. 750/2016, decided on 17..08.2017

In *State of Kerala v. Chacko@ kunjappan*³⁵ the prosecution case was that, the accused A1, a member of Hindu Pulaya community and A2, a member Christian community, with the intention of having illicit sexual intercourse with two minor girls of age 9 years and 6 years respectively, members of Hindu Ulladan community, a Scheduled Tribe, on several days taken them to their houses by offering sweets removed their dress, touched their vagina with their penis, embraced and kissed them with the knowledge that, the children are the members of a Scheduled Tribe community. The first accused was absconding and the prosecution given up evidence of one of the victim and the other victim turned hostile on identity of the second accused. Even though the victim deposed that the second accused sexually assaulted her on the repeated question of prosecutor, in cross examination she turned hostile on identity of accused and categorically deposed that the accused herein is not the Maniyan who assaulted her. Medical evidence was also not supporting the prosecution and the evidences of material witnesses are not admissible as there are material discrepancies and contradictions.

Hostile on other grounds

The victim turned hostile on some other reasons such as on the point of age and false and fabricated case by the parents of the girl against the boy who were in romantic relationship.

³⁵ Sessions Case No. 441/2014, Decided on 12.01.2017

For example in *State of Kerala v. Naveen O.V*³⁶ the victim turned hostile by admitting love and consensual sex with the accused and she deposed that accused never raped her. The only question was regarding the age of the victim that consensual sex with a minor will also amounts to sexual assault under the POCSO Act. Instances of alleged sexual assault were occurred several days of 2014 and 2015. The court splitted the case in to two separate cases and in one case³⁷ and opined that

“the incidents alleged were, of the year 2015. In 2015, the victim had already attained the age of 18 years. There is no allegation of absence of consent. Simply because, there was promise of marriage, it cannot be said that, there was no free consent of the victim. So, I have no hesitation to hold that, for the incidents in 2015, that is when the victim had attained the age of 18 years, there is no rape. Therefore, I hold that, there is no sufficient ground to proceed against the accused in SC.748/2016.”

In the other case the only question was regarding the age of the victim that the consensual sex with a minor will also amounts to sexual assault under the POCSO Act. But the victim deposed that she had attained age of 18 and she happened to give FI statement as insisted by her parents. Considering the evidence of victim the court given up all other evidence and thus the accused acquitted.

In *State of Kerala v. Akhil Sudhan*³⁸ the allegation was that the accused herein, with the intention of having illicit sexual intercourse a girl child of 14

³⁶ Sessions Case No. 747/2016, SC 107/2016 decided on 17-10-2017

³⁷ Sessions Case No. 748/2016, decided on 10-07-2017

³⁸ Sessions Case No. 539/2015, decided on 30.08.2017

years, had acquaintance with her and by pretending love, taken her from her house at 12.00 midnight, and brought to his house in a motorcycle and from that house, and sexually assaulted her. But in court the victim had deposed that, she had a quarrel with her parents and she could not stay there. Hence, she contacted the accused, her lover and requested him to take her to somewhere else. When he refused, she threatened that, she will commit suicide. So, because of that threat, being a true lover, the accused was constrained to take her from her house. He had taken her to his house and immediately informed her parents. The mother of the victim also deposed that the accused himself informed the matter to them via telephone. By acquitting the accused the court observed that

“So being a true lover, the accused was constrained to take her out of her house. But, he had taken her into his house, where his parents and sisters were also living. So, we cannot see any bad intention on the part of the accused. If the intention of the accused was to have sexual contact, he could have taken her to somewhere else. Moreover, immediately in the morning they had informed the parents of the PW.1. Therefore, I hold that, prosecution has failed to prove that the accused had kidnapped and sexually assaulted PW 1, a girl child of 14 years, as alleged.”

7.2.7.2 Hostile in cross examination

In six cases the victim’s testimony supported the prosecution case but turned hostile in cross examination. For instance in *State of Kerala v. Shaji*³⁹ the accused with the intention and preparation of committing sexual assault, had

³⁹ Sessions Case No. 481/2016, decided on 30.05.2017

trespassed to the house of a girl child aged only 10 years, and from the bedroom, forcefully laid her on a cot, lifted her skirt and touched her thighs with sexual intent. The victim though supported the prosecution in chief examination, but turned hostile in cross examination. In cross examination, she has deposed that, she do not know as to who sexually assaulted her. She happened to give statement before the police, Magistrate and before court, as said by her family members. In court question, she has categorically deposed that, accused herein, never trespassed to her house and sexually assaulted her, in any manner. Mother of the victim and a neighbor also declared hostile in this case and thus accused acquitted.

In *State of Kerala v. Brite*⁴⁰ a girl child of 14 years was sleeping inside her house at around 2 am , the accused herein, step father of the girl with sexual intent, caught the right breast of her and committed offence of sexual assault. Here the prosecution has examined only PW1 to 3, the victim, her mother and the Investigating Officer. Though the victim has supported the prosecution in chief examination, but denied the entire incident in cross examination and mother of the victim also turned hostile. The court held that

“Since the victim has denied the entire incident in cross examination, she cannot be relied. I am of the opinion that, there is no evidence to show that, the accused has committed the above offences”.

7.2.7.3 Testimony of victim is not reliable

Of the 59 cases in which the victim testified against the accused the

⁴⁰ Sessions Case No. 264/2016, decided on 08-02-2017

testimony of victims of 30 cases found unreliable and accused were acquitted.

In *State of Kerala v. Dhaneesh*⁴¹ the prosecution case was that the accused, brother of victim's father has resided with the victim and her mother on promise of take care of them after her father's death. While residing together on several days, the accused, with sexual intent had exhibited obscene videos and pictures to the girl victim of 9 years, in his mobile phone. The accused had inserted his penis into her mouth, repeatedly, and also threatened that she will be killed, if it was revealed to anybody. It is also alleged that, accused had repeated sexual intercourse with her, during the same period. The accused was acquitted as the testimony of the victim was found unreliable due to discrepancy in the testimony of the victim and her mother regarding the time and nature of the incidents of sexual assault. There were material contradictions with evidence given by victim and her mother and the statements under 161 and 164 CrPC. The Court referred to various discrepancies in the testimonies of the child and her mother and find merit on the points raised by defense counsel that the accused left the company of victim's mother and because of that grudge, by the instigation of mother, the child had given such a statement. The court also observed that "*here PW1 and PW2 have deposed that, for about 3 months prior to Ext.P2, accused left the company of PW.1. So, we cannot rule out, the possibility of implicating the accused, falsely.*"

In *State of Kerala v. Baby and Bindhu*⁴² a girl child of 11 years was

⁴¹ Sessions Case No. 519/2015, decided on 11.05.2017

⁴² Sessions Case No. 463/2014, decided on 26.08.2017

residing along with her sisters in the house of second accused and family after the death of her mother. , During that period the first accused Baby from the room of that house and in a ‘paramba’ near culvert over the neighborhood canal, had sexually assaulted the girl repeatedly. The 2nd accused had intentionally aided and assisted the 1st accused. The court found merit on the argument of the learned defence counsel that the victim testimony is full of contradictions, omissions and improvisations. She is not having a consistent case regarding the place, time and even regarding the manner of assault. Apart from her oral evidence, there is no corroborative evidence. Medical evidence also does not support. The evidences adduced by defence were also supporting the arguments that it is a false and fabricated case and thus the accused acquitted.

In *State of Kerala v. Muhammed Khan @ Noufal Ikka*⁴³ the accused with sexual intent caused to catch the penis of a boy child of 12 years, an inmate of a child care home from the bath room of the same building. It is also alleged that, prior to this incident on three occasions, the accused did the same act with the boy. The accused was a former inmate of the same institution. In this case the accused acquitted as the testimony of the victim unreliable due to material contradictions with his own statements and testimony of material witness regarding the time, date and number of instances of sexual assault. It is also to be noted that there was an unexplained delay of 2 and half months to reporting. The court observed that

“Of course, in a case of this nature, the delay may not be always fatal. But,

⁴³ Sessions Case No. 112/2016, decided on 14.02.2017

when this delay is considered along with the above contradiction in the evidence of material witnesses, I am of the opinion that, it is fatal..... I hold that, the prosecution has failed to prove that, the accused had caused PW1, to catch his penis repeatedly, as alleged”.

7.2.7.4 Prosecution failed to establish ingredients of offence.

In *State of Kerala v. Noorudhin*⁴⁴ the accused with the intention and preparation of sexually assaulting mentally retarded girl child of 12 years, had trespassed to the house where she lives with her grandmother and from the hall room, caught the mouth of the girl, lifted her skirt, removed the panties, inserted the penis into the vagina and also caught her breast. The victim produced before the magistrate and she kept silent because of fear .As the victim is a mentally retarded girl there was material contradictions in her testimony but unfortunately the prosecution failed to prove her disability in the court. And also two material witnesses were not produced or examined in the court. Eventhough the medical report states some evidences of assault that “*hymen old tear at 1'O clock position. Itching vulva with fungal infection*” the prosecution failed to prove the ingredients of sexual offences committed by the accused and he acquitted.

In *State of Kerala v. Sulthan Ansari @ Sulthan*⁴⁵ the accused herein, with the intention of having carnal intercourse against the order of nature, had kidnapped a boy child of 6 years, from the lawful guardianship of his mother by giving some toys, without the consent of her when they were attending a

⁴⁴ Sessions Case No. 856/2015, decided on 31.05.2017

⁴⁵ Sessions Case No. 866/2016, decided on 12.04.2017

marriage function. Accused had taken the child to the nearby bushy area, laid him on the ground and removed his shorts. The victim and his mother had a consistent testimony regarding the kidnapping but that was not sufficient to prove the accused had attempted to have carnal intercourse against order of nature. Thus the accused acquitted for offense of sexual assault under POCSO act and for carnal intercourse under IPC, and convicted only for a lesser offence under IPC. The court observed that “:the prosecution has failed to prove, that the accused herein had attempted to have carnal intercourse against the order of nature, and with sexual intent, had touched the body of the victim and committed sexual assault.” Accused convicted only for kidnapping the child.

7.2.7.5 Failure in proving age of victim under 18 years

In *State of Kerala v. Nikhil*⁴⁶ the accused with the intention of having illicit sexual intercourse with a girl of 15 years had proposed and fell in love. Then, on a day in 2012, when she was aged 16 years had taken her into his house, in a scooter and from the bed room, had sexual intercourse with her by giving the promise of marriage. Then on several days, from the house of the accused and the house of the victim he had repeated sexual intercourse with her, till March 2015. Thereby the accused had committed the above offences. As the marriage was orally fixed by the parents of victim and accused the victim consented for the sexual relationship, but subsequently the accused and his parents withdrawn from the decision to marry the victim. The victim deposed that first incident was in the year of 2012 when she was aged 16 years. The court

⁴⁶ Sessions Case No. 99/2016, decided on 13.09.2017

opined that the law as it stood in 2012, which is before the enactment of Criminal Law Amendment Act 2013, is that, sexual intercourse with a woman aged 16 years and above, with her consent is not rape. The accused cannot be held liable under sec 376 (2) (n) of IPC. For the incidents in the year of 2014 the testimony of victim was vague regarding the date of incidents of sexual contacts and the age of the victim is not proved less than 18 years. Victim or mother neither deposed the date of birth nor produced conclusive documentary proof for proving the age of victim. The court reluctant to apply the sections 5(1) and 6 under POCSO Act and held that

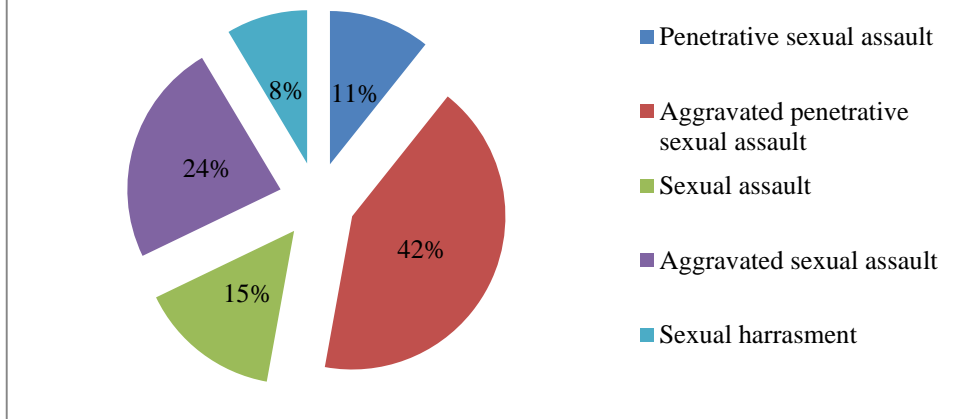
“so, simply by relying on a certificate issued by head mistress of the school we cannot come to the conclusion that at the time of the alleged incidents PW 1 was aged below 18 years, especially when the accused is disputing the age of the victim. Moreover, PW 1 has deposed before the court that, she had failed in two classes.”

For the incidents of 2015 it is proved from the testimony of victim itself that she was attained age of 18 years. Thus the accused acquitted in this case as the age of victim is not proved less than 18 years.

7.2.8 Analysis of charges framed

Of the 151 cases, in 11 cases the offences charged only under IPC and the POCSO Act not applied as the offences were committed before the enactment of POCSO Act. Charges under the POCSO Act were as follows: penetrative sexual assault in 15 cases (11%) aggravated penetrative sexual assault in 59 cases (42%), sexual assault in 21 cases (15 %), aggravated sexual assault in 33 cases (24 %), and sexual harassment in 12 cases (8 %). As is evident, majority of the charges were under aggravated penetrative sexual assault under the POCSO Act.

Chart 7.10- Charges under POCSO Act



Charges were also framed under Sections 14 (Punishment for using child for pornographic purposes) in two cases, 17(punishment for abetment) in three cases, 18(Attempt), and 21(Failure in reporting the offence)⁴⁷ of the POCSO Act. In 52 cases, multiple charges under POCSO Act have been filed.

In ten cases charges were framed only under POCSO Act and in 130 cases charges were framed under POCSO and IPC. Charges framed under IPC are as follows;

- Rape under Section 376 IPC in 68 cases;
- Inducing or compelling the woman for marriage under Section 366 IPC in 16 cases;
- Sexual harassment by outraging modesty of woman under section 354 IPC in 41 cases;
- Kidnapping from the lawful guardianship under Section 361 IPC in 16 cases;
- Unnatural offences under sec 377 in 11 cases.

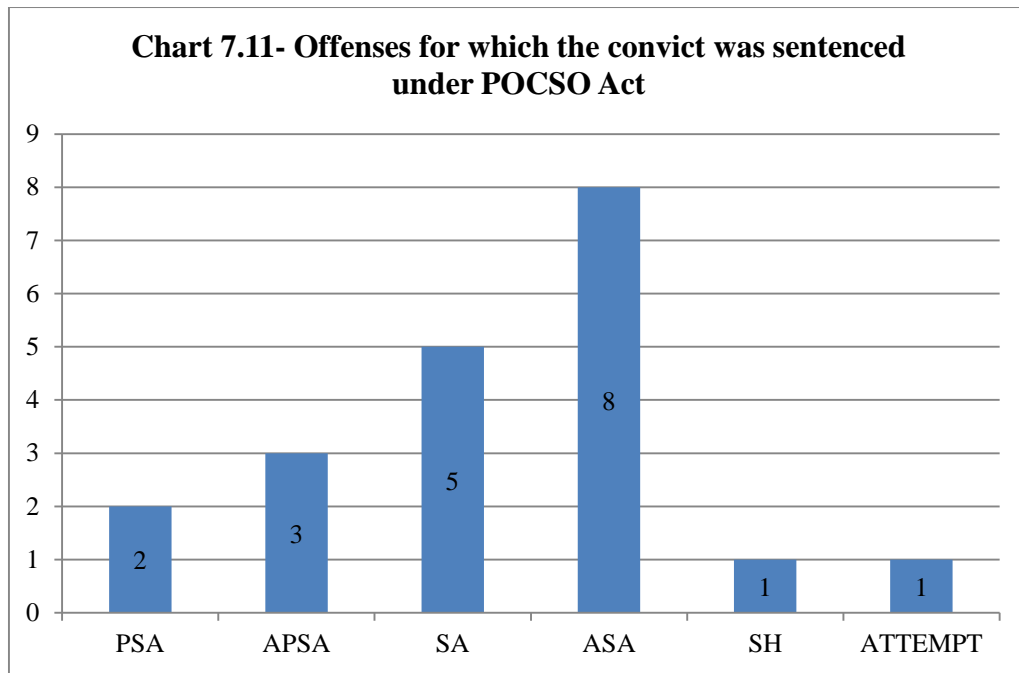
⁴⁷ *State of Kerala v. Edwin Pigarez and others*, supra n

Charges were also framed under sec 447(criminal trespass), sec 506 (criminal intimidation), sec 293 (sale etc. of obscene objects to young person), sec 313 (causing miscarriage of a pregnant woman) and sec 373 (buying minor for prostitution). Additional charges were also framed under the Information Technology Act (in 2 cases), SC/ST Prevention of Atrocities Act (in 4 cases) and Juvenile Justice (Care and Protection of Children) Act (in 8 cases).

7.2.9 Sentencing Pattern

Of the 23 cases that resulted in conviction under the POCSO Act, the accused was sentenced under the POCSO Act in 20 cases, released on probation in three cases. In five cases accused sentenced under IPC only and the offences charged were rape, outraging modesty of woman and also compelling women for marriage. In two cases sentences were passed under JJ Act in addition to sentence under POCSO and IPC. Sentences were passed under two cases of penetrative sexual assault, three cases of aggravated penetrative sexual assault, five cases of sexual assault, eight cases of aggravated sexual assault, one case of sexual harassment, and one case of attempt to commit aggravated penetrative sexual assault. The highest sentence is recorded in aggravated sexual assault followed by sexual assault, aggravated penetrative sexual assault and penetrative sexual assault.

Offense wise breakdown of sentencing orders under POCSO Act are shows in the graph below:



PSA- Penetrative sexual assault; APSA- Aggravated penetrative sexual assault; SA- Sexual assault; ASA- Aggravated sexual assault; SH- Sexual harassment; Attempt- Attempt to APSA.

7.2.9.1 Quantum of sentence

The POCSO Act prescribes for quantum of minimum sentences on all the sexual offences defined by the Act. If a statute has prescribed a minimum sentence, generally courts do not have the power to pass as sentence less than the minimum. The Supreme Court of India held in *State of J&K v. Vinay Nanda*⁴⁸, that

“where the mandate of law is clear and unambiguous, the court has no option but to pass the sentence upon conviction as provided under the statute.....The mitigating circumstances in a case, if established, would authorize the court to pass such sentence o imprisonment or fine which may be deemed to be reasonable but not less than the minimum prescribed under an enactment.”

⁴⁸ AIR 2001 Sessions Case No. 611

The mitigating factors that influenced the quantum of punishment to be minimized were first offense, age of the convict, sole breadwinner of the family, and the socio-economic background of the convict.

- The minimum mandatory sentence was imposed in 15 offences charged under the POCSO Act and eight charges under IPC in the convicted cases. The court struck a balance between the mitigating and aggravating factors while awarding the minimum sentence. For example in *State of Kerala v. Augustine*⁴⁹ the minimum prescribed sentence under sec 6 of the POCSO Act for aggravated penetrative sexual assault was imposed by balancing the facts that the accused had abused his own grandchild, breached the trust of his relations, and his elder age as well as the fact that he was the sole breadwinner of the family. In *State of Kerala v. Maju@ Manu*⁵⁰ the special court while imposing minimum sentence considered the balancing facts that the accused is a priest of the temple and the victim was in love with accused and the victim had the knowledge that the accused is a married man. The court said that

“the offences proved are grave. The accused, a 38 years old man, a priest of the temple and having wife and two children, had kidnapped a girl child of 16 years, and had sexual intercourse with her. He had not only destroyed his family, but also destroyed the future of a young girl and it is true that they were in love”.

⁴⁹ Sessions Case No. 871/2016, decided on 25.05.201

⁵⁰ Sessions Case No. 871/2016, Decided on 22-05-2017

In *State of Kerala v. Thomas*⁵¹ the accused, an auto driver used to take the victim girl of 4 years to and from the school and to the Day Care, as instructed by her mother and he committed aggravated penetrative sexual assault on the girl. The court held that

“It is very unfortunate that, small children are being subjected to sexual assault, especially by school van drivers, auto drivers and other such persons, who were entrusted the children by the parents, on a bonafide belief that they will take the children safely to school. So, it is to be viewed very seriously. But, at the same time, here the accused had prayed for leniency and submitted that, he is having wife and small children including DWI, and he is the only breadwinner of the family. There is no allegation of any previous conviction or involvement in any other crime”.

Thus in this case the court imposed minimum mandatory punishment prescribed by the Law.

- The maximum prescribed sentence was awarded in four cases under POCSO Act which comprised of one aggravated penetrative sexual assault and one sexual assault and two aggravated sexual assault and also three cases under IPC for rape on minor. Aggravating factors which influenced the quantum of sentence were the relationship between the convicted person and the victim, age and profile of the victim and also profile of the offender. The maximum prescribed sentence was awarded in four cases under POCSO Act which comprised one case of aggravated penetrative sexual assault, two cases of aggravated sexual assault and one case of sexual assault. Under IPC, maximum sentence was awarded in three cases

⁵¹ Sessions Case No. 430/2016, Decided on

of rape in which charges were also framed for aggravated penetrative sexual assault under POCSO Act but sentenced under IPC by applying sec 42 of POCSO Act⁵². For instance, in *State v. Prakashan*⁵³ where the offence of aggravated sexual assault and rape was committed by a 51 year old man, a girl child of 4 years. Court considered the age and profile of victim and opined that it is pertinent to note that accused did the act by knowing the fact that, father of the victim is no more and the convict deserves higher sentence and imposed life imprisonment.

In *State of Kerala v. Rockey and Others*⁵⁴ a minor girl of 9 years was sexually exploited by three accused persons and the biological mother of the girl had intentionally aided and assisted them to sexually assault the child. In this case the court quoted the ruling of Supreme Court in *Alister Anthony Pereira v. State of Maharashtra*⁵⁵ and awarded maximum sentence to all the convicts.

In *State of Kerala v., Edwin Pigarus and others*⁵⁶ the accused was the priest of the church had committed aggravated penetrative sexual assault repeatedly on a girl child of 14 years more than over three months. The special

⁵² Sec 42 of the POCSO Act provides for 'Alternative punishment' which reads as *Where an act or omission constitute an offence punishable under this Act and also under any other law for the time being in force, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under such law or this Act as provides for punishment which is greater in degree.*

⁵³ Sessions Case No. 560/2015, Decided on 10-03-2017

⁵⁴ Sessions Case No. 135/2014, decided on 21-10-2017

⁵⁵ 2012 (1) KLT SN 33 (Case No. 38) Sessions Case No., *The Apex court has held that, "the social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment".*

⁵⁶ Sessions Case No. 203/2016 decided on 08.12.2016

court awarded double life imprisonment on the convict for various offenses under IPC and POCSO.

7.2.9.2 Alternate punishments applied

Special court applied sec 42⁵⁷ of POCSO Act for alternate punishment in eight cases for awarding greater punishment prescribed by law for same offences under different statutes. For instance in *State V. Arjun*⁵⁸ the accused had trespassed to the house of the victim girl of 16 years and from the bed room, with sexual intent, demanded a kiss from the victim when she refused, accused pushed her down to the cot, caught on her breast. The accused charged with offences of sexual assault under sec 7 of POCSO Act and Ss 451 and 354(A)(1)(i) under IPC for the offences of trespass and outraging modesty. In this case the accused convicted and the court imposed sentence under sec7 read with 8 of POCSO Act and sec 451 IPC. No separate sentence awarded under sec354 as the court applied sec 42 of POCSO Act.

7.2.9.3 Probation Applied

Of the 28 convicted cases probation was awarded in only three cases that were of aggravated sexual assault, sexual harassment and failure of reporting⁵⁹ each under POCSO Act. In all the cases other than these three of the convicted cases the court rejected the plea of leniency and not applied probation and awarded sentence prescribed by law to the convicts. For example in *State V.*

⁵⁷ Sessions Case No. 534 of 2016

⁵⁸ Sessions Case No. 534/2016, Decided on 18-09-2017

⁵⁹ *State of Kerala v., Edwin Pigarus and others.*

*Haridas*⁶⁰ the accused, a priest (poojari) of a temple, on the pretext of prayer and by taking advantage of the belief and trust of parents of boy, had taken a boy child of 14 years to Chottanikkara. It is pertinent to note that, he had made them believe that, the child alone needs to come Chottanikkara for prayer, as he was the most effected person. He has intentionally avoided the presence of other family members. The court pointed out that here in this case the accused had the intention to sexually assault the boy from the very beginning itself. And the court observed that

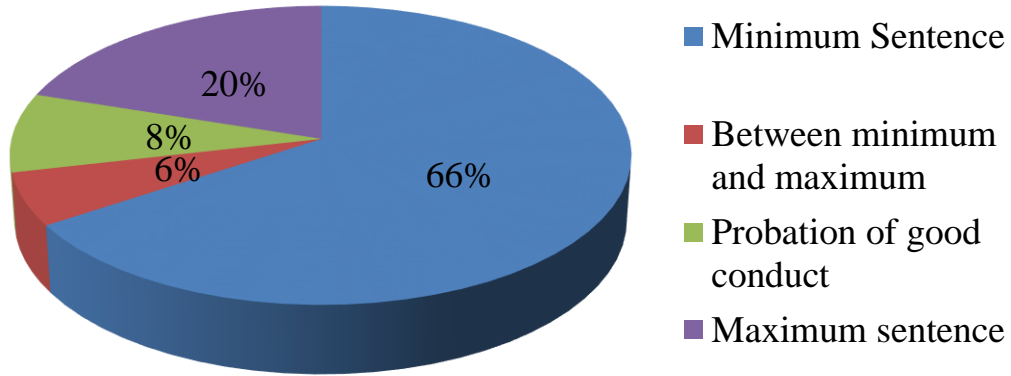
“Nowadays persons like the accused herein (priests) are committing these type of offences against the children and it has become a menace. It has to be curbed at any cost. So by considering all the above aspects, including the ‘modus of operandi’, I am of the opinion that accused deserves the maximum punishment prescribed by the law. He does not deserve any leniency.”

Probation is neither expressly excluded nor prescribed in the sentencing section in the POCSO Act. But the court has exercised discretion and given probation for those offences for which the Court had the view that there are chances of reform and in one case the court considered the mental illness of the accused⁶¹. The award of probation in sexual harassment cases cannot be said to be against the spirit of the POCSO Act as it does not prescribe for a minimum sentence in this category, though a maximum of three years imprisonment is prescribed.

⁶⁰ Sessions Case No. 345/2016, Decided on

⁶¹ *State of Kerala v. Aneesh Antony*, Sessions Case No. 346/2016, Decided on 30-06-2017

Chart 7.12 - Sentencing Pattern



- In all the cases where sentencing is awarded under the POCSO Act, fine was also imposed on the convict. In all the cases where there are more than one sentencing term passed either under different sections of POCSO or when sentenced both under the POCSO Act and the IPC, then concurrent sentences were awarded by the court. And set off also allowed by the court.
- In some cases, the court convicted and sentenced the accused under provisions different from that which they had been charged under. For instance, in *State of Kerala v. Maju @Manu*⁶² the accused was convicted for penetrative sexual assault on a girl aged 16 years. Even though the accused was charged with having committed aggravated penetrative sexual assault by repeatedly, he was convicted under sec 3(a) read with 4 of

⁶² Sessions Case No. 871 of 2016.

POCSO Act and sentenced to seven years imprisonment, though it was noted the aggravating factor that the offense committed more than one time. In *State of Kerala v. Gopalakrishnan Nair*⁶³, the initial charge was under Section 9(m), POCSO Act because the accused had allegedly with sexual intent, embraced, pressed the breast, kissed on the lips and also pressed on the vagina over the dress of a 10-year-old female child. The accused was convicted under sec 7 even though the child was below 12 years and then sentenced u/s.8 to three years rigorous imprisonment and fine.

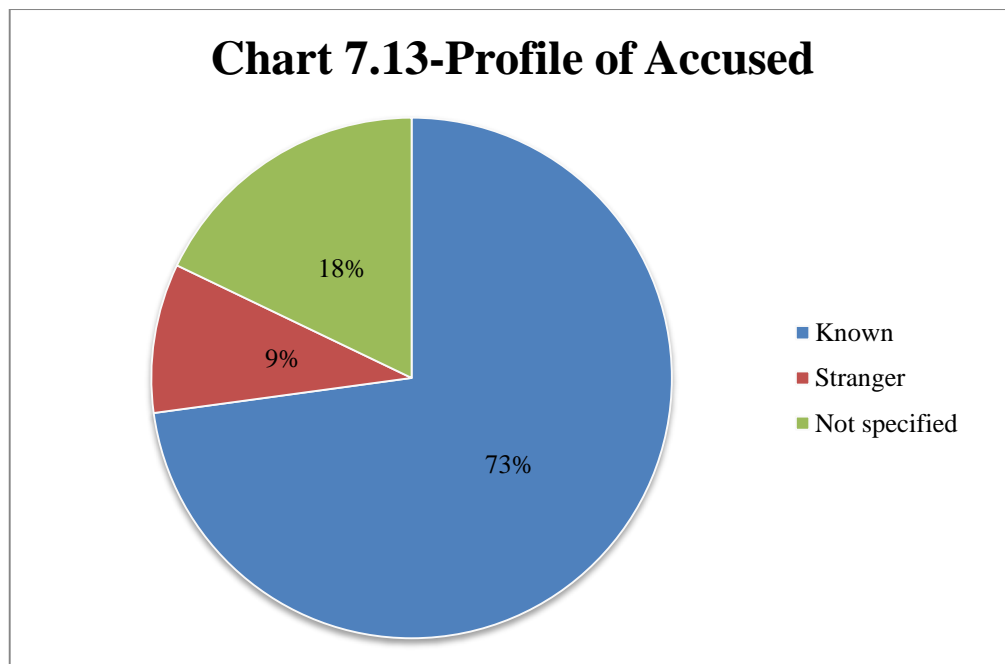
Table - 7.2. : Types of sentences passed by court for different offences

Type of sentence	PS A	APSA	SA	ASA	SH	Rape of minor	Others	Total
Probation				1	1		1	3
Minimum sentence	2	1	4	6	1	5	4	23
Maximum sentence		1	1	2		3		7
Between maximum and minimum		1				1		2

7.2.10 Profile of the accused and its implication on testimony of the victim and outcome of the case

In 73 % of the cases, the accused was known to the victim. In 9 % of the cases the accused was a stranger and in 18 % of the cases the relationship of the accused with the victim was not specified in the judgment.

⁶³ Sessions Case No. 761/2016, Decided on 08-08-2017



7.2.11 Application of Presumption under POCSO Act

Of the 28 convicted cases, the special court applied presumption prescribed under POCSO Act in twenty cases and the accused convicted. In five cases conviction was solely under IPC and presumption was not applied. In two cases though the conviction was under POCSO Act the court neither referred nor applied the presumption clause⁶⁴. In one case⁶⁵ the presumption is not applied as the evidence of victim with regard to aggravated penetrative sexual assault was not sufficient to get the benefit of *presumption* to the victim. In this case the accused committed aggravated penetrative sexual assault repeatedly on his grandchild of 10 years. The allegation was that he had with sexual intent, embraced, pressed the breast, kissed on the lips and also pressed on the vagina over the dress of the girl child. Charges were framed under various sections of

⁶⁴ *State of Kerala v. Anoop*, Sessions Case No. 414/2016, decided on 10.07.2017 & *State of Kera v. Sulthan Ansari @ Sulthan*, Sessions Case No. 866/2016, decided on 12-04-2017

⁶⁵ *State of Kerala v. Augustine*, Sessions Case No. 265/2016

POCSO Act and the court observed that there is a statutory presumption regarding the offences u/s.3, 5, 7 &9 of the Act. The court has to presume that the accused has committed the offence, unless the contrary is proved. Here the court applied the presumption on all the offences by saying that the accused failed to rebut the presumption except regarding sec 5, the allegation of licking the vagina, there was only a statement by the victim. So, regarding that aspect, the court opined that the evidence of victim is not sufficient to get the benefit of presumption. However the accused convicted for other offences.

In majority of the acquitted cases the presumption under POCSO Act is not applied but in 25 cases the presumption is rebutted by defense evidence or by effective cross examination of the victim and the accused acquitted.

7.2.11.1 Presumption applied and convicted

The presumption was expressly mentioned and recorded conviction in 20 cases. In *State V. Sumesh P M*⁶⁶ with the intention of sexually assaulting a girl child of 10 years had trespassed to her rented house. The allegation was that the accused had caught and pressed the breast and buttock of the child by inserting his hand through her jeans. In this case even though the defense adduced one witness the court observed that the evidence of DW1 is not sufficient and there is no circumstance in this case, which could rebut the presumptions provided under sec 29 and 30 of POCSO Act. Thus the accused convicted

⁶⁶ Sessions Case No. 397/2015 Decided on 30-05-2017

In *State V. Gopalakrishnan Nair*⁶⁷ the allegation was that the accused with sexual intent, embraced, pressed the breast, kissed on the lips and also pressed on the vagina over the dress of a girl child of 10 years. The argument of accused, ‘a 63 year old man, had only fondled a girl of 10 years, without any sexual intent, he had only shown the affection towards the girl’ is not accepted by the court applied the mandatory presumption under sec 30 of POCSO Act. The court also observed that the accused failed to rebut the presumption by adducing defense evidence or by effective cross examination of the victim. Thus he has been presumed to be done the act with sexual intent and convicted.

7.2.11.2 Cases resulted in conviction but no application of presumption

In some cases the court doesn’t applied the presumption clause but the accused convicted. For instance In *State of Kerala v. Anoop*⁶⁸ the accused neighbor of the victim girl of four and half years had taken her to his bedroom disrobed her, made himself nude, fondled the hands, legs and the vagina of her. It was also alleged that the accused had inserted his penis into the mouth of girl and also prior to this incident on several days inserted his penis into her vagina. In this case there were some contradictions in the testimonies of witnesses and the victim testimony was not clear regarding the details of offence that she had only deposed that the accused removed her dress and did something wrong. Though repeated questions were put to her, regarding the alleged act of the accused, she repeatedly deposed that, she does not remember. But the medical

⁶⁷ Sessions Case No. 761/2016, Decided on 08-08-2017

⁶⁸ Sessions Case No. 414/2016, decided on 10.07.2017

report shows that “*genitalia show congestion of labia minora and hymen. Hymen shows minor injuries, recent in appearance. Vagina admits one finger.*”

7.3 Issues and challenges

1. Gaps in age-determination
2. Issues related to appreciation of testimony of victims
3. Compensation and Monetary Reliefs

The Special Court neither compute compensation nor granted interim compensation in any cases analyzed. Compensations are largely being disbursed under the Victim Compensation Scheme. The Court’s discretion under the Section 33(8) POCSO Act has not been adequately understood or explored. While POCSO Act is applicable to all children, sexual offences identified for compensation under the Victim Compensation Scheme is gender specific. Compensation for male children is currently possible only if Court exercises its discretion under the Act and awards compensation.

4. Investigation Lapses
5. Filing of incorrect charges reflect poor understanding of POCSO Act
6. Hostile victims
7. Challenges posed by romantic relationships
8. Application of probation in cases of penetrative and aggravated penetrative sexual assault
9. Needs of child victims and victims with disabilities not addressed
10. Gaps in understanding of the POCSO Act
11. Problems with medical reports and their appreciation by the Special Court.

CHAPTER 8

BARRIERS IN IMPLEMENTATION OF POCSO ACT

8.1 Introduction

The POCSO Act ensures the need to construct a responsive legal system to protect the children from all kinds of sexual abuse and exploitation, but the implementation of the Act has been inconsistent with its objective to prevent the problem of CSA. The low conviction rate¹ in the sexual abuse cases has continued to be treated as a failure of the justice system by the civil society. The journey of a sexually abused child survivor through the criminal justice system includes various barriers to reach justice. The implementation of POCSO Act in the best interest of the victimised child is still remains as a dream because of the uncoordinated network of various stakeholders who have to bear responsibility towards the victims under the Act. In this chapter an attempt is made to find out the major barriers to the implementation of POCSO Act and to examine the major difficulties faced by various stakeholders to fulfil their duties under the Act.

8.2 Non disclosure or delayed disclosure of sexual abuse

Sexual abuse can have significant negative effects on child's physical and mental health and also possibilities leading to suicidal tendencies.² The empirical study on analysis of judgements revealed that in most of the cases the

¹ For details see chapter 7, Rate of conviction revealed in the empirical study.

² For details see chapter 2, Effects of child sexual abuse, p. 61.

abuser is a person in the close circle of the child.³ When the abuser benefits of vulnerabilities of the victim child, such as poverty or any kind of disability there is a chance of double victimisation. The sexual abuse victims are frequently re-victimised during their journey through criminal justice system especially children from economically or socially vulnerable groups have greater difficulties in facing the legal system. The fear of blaming by the society, the concept of family shame, lack of faith in institutions and concern about prolonged legal process are caused to non disclosure or delayed disclosure of the sexual abuse incidents by the victims and their family. According to Pipe M. E. & Goodman, G.S, the non disclosure of sexual assault by child victims is based on three reasons. They are;

“Firstly, the children/adolescents often fear that they will be held responsible for the abuse or they will be blamed as they invited the abuse in some manner and so this one of the biggest deterrents for children/adolescents not to report abuse. Secondly, many children/adolescents blame themselves and thus experience embarrassment and shame and this also plays in role in delaying children’s disclosure of abuse to a trusted adult. Thirdly, “grooming” is another important reason for delayed disclosure”⁴

The nondisclosure of the sexual abuse incidents often becomes the crucial difficulty in implementing the laws because the first step towards accessing justice is disclosure of the abusive incident. Even though the law suggests mandatory reporting⁵ the cases where the abuser is a close family

³ For details see chapter 7, Profile of accused.

⁴ Pipe M.E. & Goodman, G.S. *Elements of secrecy: Implications for children’s testimony*, BEHAVIOURAL SCIENCES & THE LAW, 9(1), pp.33–41 (1991).

⁵ Sec 19 , POCSO Act

member (incest cases) the lack of active support from the mother of victim can be evidenced.⁶ In such cases the mothers convinces the girls to drop out from the legal proceedings for the ‘larger good of the family’. Thus the mandatory reporting clause in the Act does not necessarily help in such cases as even the victims do not want their father or brother or grandfather to go to jail. Instead what they need is a guarantee that this abuse will not happen again or they simply want the abuser to leave from the home.⁷

The RAHI Study identified the reasons for nondisclosure of sexual abuse as “*I want to forget it happened*’ (23%); *‘What will people think of me’* (14%); *‘I feel it was my fault’* (11%); *‘I don’t trust anyone’* (11%); *‘It is not that important’* (9%); *‘I feel guilty as it gave me pleasure’* (7%); *‘I would not have been believed’* (7%); *‘I was a willing participant so it wasn’t an issue’* (3%); *‘I was threatened’* (3%); *‘I was bribed’* (1%); *‘for other reasons’* (35%).”⁸ CWC members and support persons interviewed also disclosed that the victims of multiple sexual abuses never disclosed it to the police or wanted any legal action against the abuser at any point of the repeated abuses. The common reasons for non- disclosure or delayed disclosure for many years in all these cases are that the apprehension of not being believed, social shame, protecting family from shame, confusion about the incident and self-blaming tendencies. In some cases delayed disclosure is often taken by courts and law enforcement agencies as a

⁶ *Children’s access to justice and restorative care*, Fact sheet 3, HAQ CENTRE FOR CHILD RIGHTS AND HUMAN DIGNITY FOUNDATION, (13 Nov. 2017, 3p.m.) haqcrc.org/our-work/protection/access-justice-restorative-care.

⁷ id

⁸ RAHI FOUNDATION, *Voices from the Silent Zone*, Section 4: Disclosure, 1998; pg. 23

reason to doubt the reliability of the child's report.⁹ The abuser may also use physical coercion by actually hurting the child, or by threatening the child, or another loved family member (example, the child's mother or sibling) with physical harm, if the child does not keep quiet about the abuse.¹⁰ Children who are very young or who have intellectual disabilities do not have the necessary communication skills to talk about the abuse, and this may be another reason for delayed disclosure or discovery. Naming, shaming and blaming the victim is a common enough practice in India and although under POCSO, 2012 it is expressly forbidden, it does happen.¹¹

As per Section 35(1), POCSO Act, evidence must be recorded within 30 days of the Special Court taking cognizance of the offence. Although a delay for any reason ought to be recorded by the Special Court, the empirical analysis of judgements is noted that reasons for delay were not provided in any judgment except in nominal ones, where also, the reasons were mostly mechanical in nature. This is an extremely important provision, as the longer the trial takes, the more vulnerable the child/family is to the influence of the other family members or society who may want to hush up the abuse and therefore the child and family may become hostile over time. Secondly, the longer the time between the actual events and giving of evidence, the more difficult it is for children to retain in

⁹ *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues*, p 118 (10Aug. 2017, 9.a.m.).

<https://www.nls.ac.in/ccl/publications/POCSOIMPLEMENT2018.pdf>

¹⁰ S. Oz, *The 'wall of fear': The bridge between the traumatic event and trauma resolution therapy for childhood sexual abuse survivors*, JOURNAL OF CHILD SEXUAL ABUSE, 14(3), pp.23-47 (2005).

¹¹ *Supra* n 9, p 119

their memory, exact details of the events. If the child is below 8-10 years of age, reporting temporal information is difficult (for example, the date or time of the event). Children also have difficulty in reporting events methodically and completely, and may inadvertently miss out details during one of the many times that they have to give an account of their ordeal to the police, Magistrate, medical practitioner, and the Special Court.

8.3 Lack of support system

India does not provide any government support services where children can report sexual or other forms of violence against them and seek support to make decisions about whether to file criminal complaints, and cope with its consequences. As discussed in the previous section children afraid to report rape because they fear they will not be believed, not just by the police but also by their family members.. Especially in cases of where the abuser is often a family member, it is extremely difficult for children to report the abuse in the absence of strong support.¹² Lack of support systems within the criminal justice system under the POCSO Act 2012, results in victims turning hostile and subsequently, a low conviction rate in POCSO cases. The POCSO Act and Rules have elaborated the manner in which each stakeholders, such as the police, doctors, Special Public Prosecutors, Child Welfare Committees (CWC) and Special Courts, are required to carry out their duties. The POCSO Rules have also

¹² HUMAN RIGHTS WATCH, *Breaking the Silence: Child Sexual Abuse in India*, (Feb. 2013, 15 No. 2017 11 a.m.)
<https://www.hrw.org/report/2013/02/07/breaking-silence/child-sexual-abuse-india>

provided for the child and family to have access to a Support Person under Rule 4(7-10). The Support Person, who is appointed by the CWC, becomes an important link between authorities and the victim and his/her family, while assisting them as they journey through the justice system, from the time of registering a complaint, till the closure of trial and ultimate rehabilitation and social re-integration of the child. As per this CWCs have been entrusted with the responsibility of appointing support persons with the consent of the child and the child's parents or the person whom the child trust.¹³ Respondents from the child protection system in Ernakulam district shared that no panel of support persons is available and although a list had been prepared by the DCPU, it has not been updated. The respondents also shared that a panel of support persons comprising representatives from NGOs are appointed in most cases. These Support Persons are asked by the CWC to prepare the Social Investigation Report, counsels the child victim, take them to court, facilitate the medical exam, and assist in repatriation processes. However, the police are not informed when a Support Person is assigned in the case. A Support Person interviewed, shared that she informs the police and the Special Court when she is appointed. Apart from supporting the child, assistance is given by the CWC to the family to avail government schemes and to ensure schooling of siblings of the child victim. Support is also extended to children living in child care institutions who do not have parents or guardians. According to a Support Person, their presence “*gives them [child victims] comfort and confidence. They know that there is a person*

¹³ POCSO RULES 4(7)

supporting them in the court.” And in most of the times the Child line representatives make up for the lack of formally appointed Support Persons. The families who participated in the Enfold Study on implementation of the POCSO Act¹⁴ stated that the criminal justice system is not as child-friendly as it is intended to be. When the families of child victims under the POCSO Act were asked to list out the challenges they faced entering the criminal justice system, the primary challenge that was reported was that they have low confidence in the existing systems, including the legal system.¹⁵ In addition, re-victimization of the child who has faced abuse because of delays, adjournments and repeated visits to the court was also reported as a major challenge.¹⁶ It was also observed in the Enfold Study that lack of convergence of all stakeholders was an issue that needed to be addressed, to make the implementation effective on the ground.¹⁷ Stakeholders who are part of the process have often shown an insensitive attitude, resulting in mismanagement of cases, long hours of wait at police stations, hospitals and courts, multiple or repeated interviews of victims and trivializing the abuse as just another offence.¹⁸ The Maharashtra Report, for instance, stated that *“Unless stakeholders in the criminal justice system and the child protection system can understand and address grooming, the social*

¹⁴ Enfold Report, p.39.

¹⁵ id

¹⁶ id

¹⁷ Id p 86

¹⁸ Id p 79

*consequences, and pressures in cases of sexual offences, and institutionalise a robust support system, the rate of victims turning hostile cannot be reduced”.*¹⁹

Unless a robust support system is institutionalized, children will continue to feel re-victimized by the criminal justice process. Complexities such as grooming, external pressure to compromise, and the inability to bear the financial, social and emotional burden of a criminal trial can only be addressed with the necessary support of qualified, experienced professionals. Until such support is provided, child victims will continue to turn hostile. The community programs must have “*appropriately trained professional staff the criminal justice system must respond in a flexible manner to the ‘special needs of children as victims and witnesses’ and the justice system must utilize support systems that offer ‘maximum comfort and support for the child.’*”²⁰

8.4 Challenges in investigation process

Despite important changes in the law aimed at improving police accountability, a combination of police apathy, victim-blaming, and deliberate misuse of police powers hampers investigations of rape and other acts of sexual violence.²¹ Victims from economically and socially marginalized communities are even more vulnerable to such police apathy or abuse. Where victims report that the police themselves are perpetrators, the backlash and impunity are

¹⁹ Maharashtra Report, p.105.

²⁰ Lucy Berliner and Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Assault*, Volume 40, No.2, JOURNAL OF SOCIAL ISSUES, p.125 (1984)

²¹ Abhishek Bhalla and G. Vishnu, *The rapes will go on*, TEHELKA MAGAZINE, April 14, 2012, (20 Feb., 2017, 8. a.m.) <http://www.tehelka.com /2012/04/the-rapes-will-go-on/?singlepage=1>.

heightened, with harassment and intimidation extending to human rights defenders and journalists.²² HRW studies found numerous examples in the various states that despite clear legal obligations, the police were apathetic or put pressure on the victim's family to settle the case, especially where the alleged perpetrator was from a powerful community. And the police were often either unaware or simply ignored procedures, especially under POCSO Act and Rules meant to protect best interest of children.²³ Police rarely informed the victims and their families about provisions related to compensation and free legal aid, and often failed to inform child welfare committees. One reason is that government circulars and guidelines do not reach police in villages and smaller towns.²⁴

Several instances of failure of mandatory duties on the part of police can be seen. Public prosecutor interviewed said that the Investigating officer must

²² A lack of police accountability is a larger systemic problem in India. In 2006, the Supreme Court ordered state governments “to set up independent police complaints authorities”. To date, however, most states have failed to comply with the court’s directives to ensure operational complaints authorities at both state and district levels, and the composition of the authorities that exist are rarely in compliance with the court’s directive. See Suparna Jain and Aparajita Gupta, “Building smart police in India: Background into the needed police force reforms,” Niti Aayog, 2016, (17 Nov. 2017, 2p.m.) http://www.niti.gov.in/writereaddata/files/document_publication/Strengthening-Police-Force.pdf. The report found that “Uttar Pradesh refused to constitute these authorities, Rajasthan was yet to constitute them, Madhya Pradesh had constituted them at district level but not at state level, and the composition of these boards in Haryana failed to comply with the court’s directive”. See also “India: High Cost for Reporting in Chhattisgarh,” Human Rights Watch news release, (April 18, 2016, 5 p.m.), <https://www.hrw.org/news/2016/04/18/india-high-cost-reporting-chhattisgarh>; Human Rights Watch, Bound by Brotherhood: *India’s Failure to End Killings in Police Custody*, (Dec. 19, 2016 6 p.m.), <https://www.hrw.org/report/2016/12/19/bound-brotherhood/Indias-failure-end-killings-police-custody>.

²³ *Everyone Blames Me’: Barriers to Justice and Support Services for sexual assault survivors in India*. HUMAN RIGHTS WATCH, p 25, <https://www.hrw.org/.../everyone-blames-me/barriers-justice-and-support-services-sex...>

²⁴ Id

regularly consult the Public prosecutor during the investigation, especially prior to filing the charge sheet to ensure that all legal points are well covered. However, this is seldom done and most officers bring the final charge sheet directly to court on the date of filing, without consulting the PP in advance. Hence, the PP is not able to provide valuable legal inputs in order to present a strong case without any loopholes. The frequent excuse made by police officers for non-appearance in court or failure to comply with court orders is that they are busy with other burdens. This needs to be rectified immediately and cases of sexual offences must be treated as a priority by the police machinery. The judicial officer opined that recording of several additional statements of the victim by police must be avoided as the defense lawyers can exploit this situation to their advantage. Instead, a memorandum of the statement can be prepared and after the entire statement is recorded, it should be finalised and then signed. And it is not required to record a panchnama of the clothes of the child and send them for forensic examination when the incident has occurred several weeks/months prior to the filing of the FIR as vital evidence would already be lost. Such unnecessary procedures should be avoided as they only serve to delay the investigation and the trial and adds to the workload of the police and the court. The medical officers complained about the delay of police in sending samples for forensic examination to the forensic laboratory. In several cases, forensic samples had become unfit for examination due to a delay by the Police. Eventhough there is a mandatory requirement for the police to inform the CWC about every FIR recorded under the Act it is not always being done. Only cases

where the child is produced before the CWC are coming to the notice of the CWC. In the absence of documentary evidence to prove the age of victim, the age verification test must be done but very often the Police produce children before the CWC without age proof and medical examination.

However the interviews with police officers bring out some difficulties faced by investigating authorities in POCSO Cases. Though the Act prescribes many child friendly measures, some of these are not accepted by the victim or her family. For instance, due to the dishonour attached to sexual violence in our society, parents prefer to record the statement at the police station rather than at their residence. Even if a lady police officer is in civilian clothes, the police vehicle is easily identifiable, even if it is parked at a distance, and this raises the curiosity among the neighbours. Family of the victim like to avoid such situations to protect the confidentiality of the child. Similarly, children are not comfortable when their statements are video recorded. Children become inhibited and tongue-tied when they face the camera and are not able to speak in a natural and free flowing manner. This hinders the process of recording their statement. If the victim is a very young child, the statement is recorded over several days as the investigating officer has to wait till the child feels comfortable to confide and talk freely about the incident.

Another difficulty is with regard to lack of infrastructure required to follow all the provisions stipulated under the Act that the police do not have sufficient number of lady officers particularly in rural areas, they do not have sufficient number of vehicles to take the victim and accused separately for the

mandatory medical examination. As the distances in rural areas are huge, it takes an entire day to take the child and the accused for medical examination to the district hospital and bring them back which further delays investigations. Police do not have the required training or assistance of experts to deal with victims who suffer from disabilities. Pressure exerted by social workers also adversely impacts the investigation.

8.5 Disclosure of identity of child victims

Maintaining confidentiality is an essential means to protect the right to privacy of the child, as well as it encourages the physical and psychological recovery of the child and ensures that the social reintegration of the child is not hindered by his or her past. The POCSO Act makes it mandatory upon persons and authorities like police Officer²⁵, Special Court²⁶ and any media²⁷ to ensure protection of privacy and confidentiality of a child victim of sexual offence, and to ensure non-disclosure of the child's identity. The identity of the victim includes "the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed"²⁸ Non-disclosure of identity of the child by media covers the name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of the identity of the child.²⁹ The printing or publishing

²⁵ S. 24(5), POCSO Act, 2012.

²⁶ Section 33 (7) of POCSO Act, requires "*the Special Court to protect the identity of the child during the investigation and trial. For reasons recorded in writing, the Special Court can permit disclosure, if it is in the interest of the child*".

²⁷ Supra n. 25, s.23 (2)

²⁸ Explanation to 33(7)

²⁹ Supra n. 27

of any matter relating to a sexual offence committed against a woman is also prohibited under Section 327 (3) of CrPC, unless it is permitted by the Court. The Special Courts may permit disclosure of identity of the child, only if it feels that such disclosure is in the interest of the child, and the reasons for this must be recorded in writing.³⁰ In *Gaya Prasad Pal v. State*³¹ the Court expressed their anguish at the disclosure of the identity of the victim prosecutrix and said that “*if reference is required in this context, the particulars of the prosecutrix noted at the stage of recording of the evidence only need to be seen. The objective behind the statutory command for in-camera proceedings in such cases being the rule in terms of Section 327 Cr.P.C is to protect the victim female from secondary victimization.*”³² Thus disclosing the identity of victim child in any way caused to secondary victimization and may lead to dropping off the victim from midway of trial by turning hostile.

In spite of these statutory prohibitions, in most of the sexual abuse cases the identity of victim has been disclosed directly or indirectly by various authorities³³ including media. The interview with police officers found that there is a pressure from the media to provide daily information regarding the progress in investigations in some high profile cases, which hinders investigation. Excessive media exposure results in providing vital clues regarding the victim and her family through which the reporters can identify the victim and the

³⁰ Supra n 26

³¹ MANU/DE/3290/2016

³² Id

³³ Indirect disclosure of victim’s identity by special court judgements examined in empirical study, see chapter 7

victims are in constant fear of this exposure. The media project report of CSA by 'Arpan' found that the focus of media is primarily on contact abuse, while only very few cases of non-contact abuse are reported through Medias.³⁴ There is always an element of sensationalism while reporting the cases of sexual abuse of children. They also lack consistency and most often, they do not provide accurate information or data about the prevailing situation. Many times, the engagement with issue is of a brief nature. Instead of disclosing identity of victim, the media must have a longer engagement with cases which they report and follow them up until the final outcome to provide an accurate picture. There is also a need for greater coverage of cases in non-metro cities. The reports also need to maintain confidentiality and maintain the right balance between unambiguous reporting and over exposure.³⁵

8.6 Lack of victim protection scheme

The lack of a witness protection law or a nationwide scheme contributes to the likelihood that alleged perpetrators will locate and threaten sexual violence survivors or their family members. The threat of grooming by the abuser especially when the abuser released on bail is an important reason for turning hostile by the victim. In certain situations such intimidation at times forces the victims to run away from their homes. The lack of witness protection deters victims from cooperating with investigations and testifying truthfully in court,

³⁴ *Between the lines- an analysis of media reportage on child sexual abuse*, ARPAN MEDIA REPORT 15012018.cdr, (15 Sep. 2016, 4 p.m.) www.arpan.org.in/wp-content/uploads/2018/07/MEDIA-REPORT.pdf

³⁵ Id

and makes it more likely they will turn “hostile” and retract their earlier statements, contributing to unwarranted acquittals. The Supreme Court has repeatedly observed that “*India needs a witness protection scheme*”.³⁶ More than a decade ago, the Law Commission of India issued detailed recommendations for “*administrative or legislative action*” for witness protection.³⁷ Yet, India has not enacted a law or developed a nationwide scheme governing and witness protection. The capital, Delhi, however, introduced a Witness Protection Scheme in 2015.³⁸ A key barrier to an effective witness protection scheme in India is the lack of independence and accountability of the police, who have an important role to play in any such scheme.³⁹

8.7 Difficulties in medical care and examination

Under Indian criminal law, the prosecution can secure a conviction for rape based solely on the testimony of the rape survivor where it is “*cogent and consistent*” in material particulars⁴⁰. Forensic corroboration is considered legally relevant but not necessary. In practice, however, judges and police give significant weight to forensic evidence, therefore necessitating the need for

³⁶ *NHRC v. State of Gujarat*, 2003 (9) SCALE 329; *PUCL v. Union of India*, 2003(10) SCALE 967; *Zahira v. State of Gujarat*, 2004(4) SCC 158; *Sakshi v. Union of India*, 2004 (6) SCALE 15.

³⁷ LAW COMMISSION OF INDIA, “*198th report on Witness Identity Protection and Witness Protection Programmes*,” August 2006, (August 19, 2017, 11 a.m.) <http://lawcommissionofindia.nic.in/reports/rep198.pdf>

³⁸ *Delhi Witness Protection Scheme*, 2015, http://dlsa.org/wp_content/uploads/2015/12/Delhi-Witness-Protection-Scheme-2015.pdf.

³⁹ Existing law gives criminal justice officials some room to maneuver protection for survivors and witnesses, including by imposing bail conditions on the accused; enhancing bail conditions where needed; applying to have the accused’s bail canceled; or filing fresh criminal complaints against the accused and his associates when they threaten the victim.

⁴⁰ *State of Punjab v. Gurmeet Singh*, 1996 Cri LJ 1728 and *State of Maharashtra v. Chandraprakash Kewalchand Jain*, 1990 Cri LJ 889.

standardizing medico-legal evidence collection and awareness around its limitations. Medical examinations not only serve a therapeutic purpose but can also help gather forensic evidence. The children who are victims of sexual abuse also need further medical care. In 2014, the central government's Ministry of Health and Family Welfare issued guidelines and protocols to handle sexual violence cases.⁴¹ But HRW study stated that "*the guidelines were not properly implemented in the country*".⁴² Interview with a judicial officer states that most doctors are not aware of the new definitions of sexual offences under POCSO and continue to use archaic terms in their reports which causes confusion. This must be avoided as it benefits the accused. Very often the doctor who signs the medical examination report does not come to court for the deposition and a doctor who was not involved in the examination is sent to court, which weakens the prosecution case. Judges and Public Prosecutors were concerned that a delay in the submission of the forensic medical report, delays the entire trial. It generally takes around 4 -6 months for the forensic reports to be submitted to court. Another major concern for Judges was that victims were not being examined by lady doctors, even though this is mandated by law because lack of necessary number of lady medical officers. But doctors from the districts emphasised that "*even though the law mandates that a lady doctor shall conduct*

⁴¹ *Guidelines and Protocols, Medico-legal care for survivors/victims of sexual violence*, MINISTRY OF HEALTH AND FAMILY WELFARE, Government of India, March 19, 2014, <http://mohfw.nic.in/sites/default/files/953522324.pdf> (accessed February 15, 2017).

⁴² *Everyone Blames Me': Barriers to Justice and Support Services for sexual assault survivors in India*. HUMAN RIGHTS WATCH, p 50, <https://www.hrw.org/.../everyone-blames-me/barriers-justice-and-support-services-sex...>

the medical examination, no provision had been made to increase the number of lady doctors in their hospitals". They also lack facilities such as counselling and tests such as colostomy. Lack of basic infrastructure such as dedicated space, adequate furniture and equipment is another difficulty in child friendly medical examination and follow up care.

Most doctors do not come prepared to court for their deposition. They do not even read the medical examination report prior to their deposition, thereby contradicting their own findings, as a wrong answer could adversely affect the case of the prosecution. At the time of conducting the medical examination, police officers are often made to go from one department to another, along with the victim, without any guidance from doctors or hospital authorities. This causes hardships to the victim and delays the medical examination resulting in loss of vital evidence. It also violates the mandate of Confidentiality. In most hospitals, the victim and Police are made to wait for a long time, generally 2-3 hours, before the medical examination commences. No special arrangements are made to treat victims of sexual violence on an urgent basis. Doctors are frequently transferred which causes problems at the time of service of summons. It becomes difficult to trace the appropriate doctor and serve the summons. Often doctors who examine the victim do not come to court for their deposition, despite being served the summons several times. This always delays the trial. Often, samples of medical evidence, clothes of the victim, etc. are not sealed correctly; panchnamas are not drawn up. There was no private and separate space designated for the examination of victims of sexual violence. The child is usually

examined in the labour ward, in casualty, or sometimes even in the same room as the accused.

The health care system is overburdened and this causes delay in submitting forensic / medical reports, which is a concern for the investigating agency. The medical officers also responded that the Police and the Courts require a “conclusive” report. However, a doctor cannot determine rape or contact abuse. They can only determine sexual intercourse / penetration and even this may not be possible without the Doppler test. Finally all the doctors interviewed were concerned about the contradiction between the provisions of mandatory reporting under POCSO and patient-doctor confidentiality. They believe that mandatory reporting will discourage patients from approaching the health system and availing treatment after sexual violence as they may not wish to approach the Police. The contradiction between mandatory reporting clause and MTP Act were also highlighted by the medical officers.⁴³

8.8 Lack of information and legal assistance

Legal assistance is important to help victims navigate the legal system and protect their rights. Such assistance is especially important because public prosecutors are often overburdened and come unprepared to court.⁴⁴ In cases CSA, the law provides for a support person to provide assistance to the child

⁴³ Issues on mandatory reporting clause under POCSO Act has been discussed in chapter 5.

⁴⁴ See, for example, “Towards victim-friendly responses and procedures for prosecuting rape: A study of pre-trial and trial stages of rape prosecutions in Delhi (Jan 2014-March 2015),” PARTNERS FOR LAW IN DEVELOPMENT, May 1, 2017, <http://pldindia.org/wp-content/uploads/2017/06/A-STUDY-OF-PRE-TRIAL-AND-TRIAL-STAGES-OF-RAPE-PROSECUTIONS-INDELHI-2017.pdf> (accessed June 26, 2017).

throughout the process of investigation and trial⁴⁵ Implementation is often lacking in this regard, as Human Rights Watch found in the cases documented in its 2013 report on child sexual abuse.⁴⁶ Section 40 of the POCSO Act make scope for free legal assistance or having a legal counsel of their choice if the guardian or the family of the child is unable to afford a legal counsel. There is a need to enable private lawyers to assist the prosecution and address the Special Court. Currently, the private lawyers, regardless of their expertise in the POCSO Act, cannot represent the victims at their own accord. The child and her or his family can take assistance of a lawyer of their choice because due to the plethora of cases, the same Public Prosecutor is not able to pay adequate attention to all the cases thereby failing to put the facts together in a proper manner. Services of a free legal aid lawyer from panel of lawyers appointed by the legal services authority should be readily available. The District Legal Services Authority is required to provide them with a lawyer in case they are unable to afford one. However, there is no information regarding a legal aid lawyer or a private lawyer having provided assistance to victims in the districts. The member of DLSAs has confirmed that no legal aid lawyer has been appointed to assist the child or the family of the child. While there is reference to a legal aid lawyer being provided to the accused, judgements do not indicate courts having facilitated such services either.⁴⁷ Hence, it can be assumed that no additional legal representation was

⁴⁵ POCSO Rules, 2012, rule 4(7).

⁴⁶ HUMAN RIGHTS WATCH, *Breaking the Silence*, 2013

⁴⁷ Judgement analysis of POCSO courts never gave an indication of presence of such a legal aid counsel.

provided for child victims. As per Section 301 of Cr.P.C., private lawyers are allowed to do submissions only under the directions of the PP, after the PP has already submitted. The private persons are not able to make appropriate interventions in the matter. This should change and the private lawyers should be given more movement in these cases.

Another major problem is that sexual violence survivors are unable to access up-to date information about their case, according to a 2016 report by the Delhi State Legal Services Authority in collaboration with the police. Courts' websites should furnish details of specialised services available under the POCSO Act – District Child Protection Units; translators and interpreters for different languages and dialects; sign language interpreters; special educators; counsellors; social workers; supports persons, including governmental agencies and NGOs. This will enable access to such services by the Special Courts, investigating agencies and children / families. Particulars of DCPUs, translators and interpreters for different languages and dialects; sign language interpreters; special educators; counsellors; social workers; support persons, including governmental agencies / NGOs, should be available on the courts' websites. Such data should be prepared in consultation with DCPUs. There is a need to include further details of a case on the court's websites in a systematic manner – date of FIR, date of arrest, date of cognizance, date of grant of bail, daily orders, date of granting of interim compensation, name of defense lawyer, Special Public Prosecutor, and the child's lawyer.

8.9 Victim compensation

As per Rules 7(1) & (2), POCSO Rules, compensation may be paid by the Court on its own or based on an application made on behalf of the child. Since, in most cases, there is no private legal representation for the child and children are unaware of the provision, it falls upon the Public Prosecutor to make the application. A prosecutor interviewed disagreed with this suggestion and stated that the CWC and the Collector should handle compensation. Police do not appear to fulfil their responsibility, laid down under Rule 4(12) of the POCSO Rules, to provide information regarding victim compensation schemes. A respondent working with the Special Court stated that due to lack of awareness, victims do not get compensation. As most of the families have no information of compensation, the Judge and the staff of the Court provide the information when the victim comes to Court.⁴⁸

8.10 Challenges in activities of CWC

Interview with CWC members revealed certain difficulties faced by them in fulfilling their duties under the law. CWC is recognised as a Magistrate of first class as a bench. However, other stakeholders do not award them this statute which serves to reduce their authority. The CWCs highlighted the challenge of addressing sexual offences that take place in the private spheres (homes and in families) and public spheres (schools, residential care institutions). Though the Act provides for five CWC members on the Bench, in

⁴⁸ Linkage between compensation and conviction in POCSO Cases and role of special court judges in providing interim and final compensation are discussed in chapter 7.

most districts the numbers of members vary. The mandated number of members has not yet been appointed to the Committees. This hampers their work. The sittings of the CWC were also not sufficient in some districts. This needs to be looked into urgently. There is a complete lack of basic infrastructure, insufficient number of Probation Officers and care givers. And the respondents also submitted that adequate training must be provided to all CWC members before they are assigned their tasks. It is imperative that they are made aware of the Act as they have a crucial role in the implementation of the Act.

The CWC members interviewed were also concerned that the Police were not informing them after an FIR under POCSO is registered, hence a suitable reporting mechanism should be evolved. In cases where the accused is a family member, the safety of the child becomes critical and the Police must produce the child before CWC. The Rules of the POCSO Act clearly provide the three circumstances under which the Police shall produce the child before the CWC. However, this was not being followed.

But the police officer interviewed informed that documentation of the CWC is not maintained properly. This causes problems when the Court orders for the records of the CWC. The police officers also complained that the victim child and the police officer are made to wait for a long time before the CWC attends to them which delays the legal process and causes the child further anxiety and trauma.

8.11 Lack of convergence between various stakeholders

There is lack of convergence of stakeholders in order to offer more holistic assistance to children, which would include health care, legal aid and comprehensive rehabilitation and reintegration services. Various stakeholders interviewed disclosed the striking factor that the lack of convergence of various authorities under the Act, where the police works at their tangent and the judiciary works in their own direction. Researchers and the research work are not acknowledged by judiciary and hence they have no official role in the process. Moreover, there is no coordination between Special Courts and Child Welfare Committees or the support persons. For example Rule 4 (9) of the POCSO Rules require the police to inform the Special Courts in writing about the assigning of a support person within 24 hours of such assignment, but this seldom happens.

The convergence of various laws in force like the JJ Act, POCSO Act and IPC etc. to better deal with the situation and properly train the stakeholders to deal with the cases of CSA where there is a clear lack of knowledge of the child laws among the lawyers and police of remote areas. Another important question should be raised in discussing the barriers in implementation of POCSO Act that the question of accountability of responsible stakeholders in the situation where the cases are not concluded within a time frame of three months.⁴⁹ Convergences of laws dealing with the same issues and better coordination

⁴⁹ A public interest litigation had been filed by Bachpan Bachao Andolan on the same question which is still pending in the Supreme Court.

between various stakeholders are very important in rendering justice to the victims and also being fair to the accused. Hence convergence is required between the system under the various laws and the criminal justice system.

8.12 Conclusion

While the reporting of this offence still remains rooted in silence due to the different reasons discussed above, it is also true that over the years, more and more children and their families are coming forward to disclose. However, because of the lack of proper and responsive reaction from the legal system, the victim and his/her family feel disturbed and frustrated and many of them even drop off in the mid-way. So it is important to encourage reporting for the system to respond. A better understanding of the overlapping vulnerabilities that put children in danger is needed as well as broader awareness of child protection laws and more stringent implementation of Child Protection policy in schools. The lack of awareness coupled with institutional apathy is a deadly combination. Functionaries of the criminal justice system must take care to prevent secondary victimization post-disclosure, especially by diligently adhering to the legal provisions and processes that are intended to enable a child-friendly trial. Awareness in POCSO Act, sensitization of *Sakshi guidelines*, protection of the child from the perpetrator, the creation of a child-friendly environment, the presence of psychologists during the pre-trial and trial, frequent breaks during the trial are yet to be enacted for the better protection of child victims of sexual offences.

CHAPTER 9

CONCLUSION

9.1 Introduction

Child Sexual Abuse has captured the world attention very recently. India too has witnessed a rampant increase in sexual crimes against children. National level study of Government of India in 13 states across the country suggests that child sexual abuse has reached epidemic proportions in India with *one in two children* surveyed reporting abuse. This revealed high prevalence of the problem of CSA. Besides this, after the national qualitative study by Human Rights Watch in 2013 specifically on CSA, there was an increased reporting of instances of CSA in Indian private schools by international medias which has an impact on the public discourse on sexual abuse of children.¹ The journey of strengthening its legal and policy framework to address the problem of CSA, children's access to justice, care and protection continues to undergo various challenges. Measures taken by the government ranging from enactment of the Protection of

¹ This made the issue into sharp focus at least in the minds of middle and upper middle class parents. For example see the sources: End the rape epidemic (online petition to Prime Minister Manmohan Singh by concerned parents and citizens) http://www.avaaz.org/en/delhi_rape/?bqCxjeb&v=24601, Ensure Parents are part of the implementation panel to monitor progress.(Petition to Minister of Education, Karnataka to ensure that police guidelines on protecting children are implemented by schools) <https://www.change.org/p/mr-kimmane-ratnakar-ensure-parents-are-part-of-the-implementation-panel-to-monitor-progress> utm_source=action_alert&utm_medium=email&utm_campaign=175704&alert_id=oticon YAvLh_f7FHH%2BVeps%2BKIFT2r8PDnDcqiWRIHpARs%2Fk46FQ S79Wb6NgYsULp7PaKeELKO4DX Two minors raped IT city observes bandh <http://ibnlive.in.com/news/two-minors-raped-it-city-bangalore-observes-bandh/489341-62.htm>

Children from Sexual Offences (POCSO) Act in 2012 and the amendment to the criminal law in 2013 expanding the definition of 'rape', to improving law enforcement, courts and justice delivery process, including training and capacity building of judges, police and other professionals required to implement such laws. While the POCSO Act and the subsequent amendment to criminal law provide for child-sensitive and victim sensitive legislation and procedures, much remains to be achieved in terms of implementation. It was in this context, a study on legal perspectives of CSA has conducted by analysing the effectiveness of Indian laws to strengthen the measures for protection of children against sexual abuse and exploitation. A detailed analysis of the legislative frame work in India against CSA and various procedures in child sexual abuse cases and implementation of POCSO Act also has done by using primary and secondary data. An empirical study was also conducted to understand the working of POCSO courts and to examine how the legal system respond to dealing with reported sexual abuse cases against children. Unstructured interviews with various stakeholders were also carried out for understanding practical difficulties in implementation of POCSO Act. The findings of the study are summarized in this chapter.

9.2 Findings

9.2.1 Understanding the problem of child sexual Abuse

- CSA was a under carpeted problem until the 19th century and Indian society has tried very hard to sweep the issue. It starts with the family hushing up instances of sexual abuse of children within the family, resulting in under

reporting of the issue and a gross underestimation of the gravity of the problem. The nature of CSA is shrouded in secrecy and children are discouraged to speak openly in Indian society about the instances of sexual abuse.

- There is not a uniform definition of the term child sexual abuse in the country and various definitions examined under the study differ on determining whether a particular behaviour is sexually abusive or not. Thus there is a gap in definitional discussions on the point of development of children and sexuality and also an uncertainty regarding the normal sexual activities in children and adolescents. For example different observations about the question whether non contractual activities included in definition of CSA.
- Various kinds of child sexual abuse encompass commercial and non commercial forms of child sexual abuse. The practice of physically or psychologically coercing children to participate in activities, commonly with a parent or caregiver for the purpose of sexual gratification (inter and intra familial sexual abuse of children), and the forms of commercial sexual exploitation of children, including pornography and prostitution and sexually abusive cultural practices including early and forced marriages, female genital mutilation, and virginity exams are coming under the purview of the term CSA.
- Child sexual abuse usually occurs where there is a combination of risk factors like parental inadequacy, unavailability, conflict, harsh punishment,

and emotional deprivation. It is perpetrated against children and young people of all ages and in families from all backgrounds, religions and economic situations. Sexual urges and willingness to act on these, power and control issues, Traumatic childhood experiences leads to sexual abuse of children. Parental impairments, particularly maternal illness, alcoholism, extended parental absences, serious marital conflicts, parental substance abuse, social isolation and punitive parenting have all been associated with increased risk. And unsupervised use of technology and internet and explicit media exposure includes videos, music, television, innuendos, and pictures also are the causes of CSA.

- The effects of the sexual abuse of children are wide ranging. The impacts of child sexual abuse on the perspective of human rights all forms of sexual abuse violate the rights of children to liberty and security, privacy and integrity, health and, in some cases, even the right to life. The children suffering from sexual abuse develop a range of maladaptive anti social and self destructive behaviors and thoughts by trying to cope with the abuse. CSA leads to several lifelong effects and causes to deprive the child from having real and healthy social relationships and causes various physical and mental traumas in children and to many health issues and also vulnerable to sexually transmitted diseases, including HIV/AIDS and in cases of adolescent child also to early and unwanted pregnancies.

9.2.2 Prevalence of CSA

- According to WHO, one in every four girls and one in every seven boys in the world are sexually abused and at any given time, one of ten Indian children is the victim of sexual abuse. All the analysed studies reveal that CSA is globally extensive problem and even the least prevalence of CSA includes a large number of victims.
- The first official study by government of India revealed that sexual abuse was reported by 53.22% children. Among them 52.94% were boys and 47.06% girls 21.90% of child respondents faced severe forms of sexual abuse, 5.69% had been sexually assaulted and 50.76% reported other forms of sexual abuse.
- A study by a NGO named Samvada conducted among 348 girls from 11 schools and colleges in Bangalore reported that 47% of the participants had been sexually abused and 15% among them were under 10 years of age. In a survey conducted by NGO called Sakshi in 1997 among 350 school going girls in New Delhi found that 63% had experienced child sexual abuse by the family members and 25% of the girls had experiences of either being raped, making the perpetrator to masturbate, or engaging in oral sex. In a study by RAHI about 600 English-speaking middle and upper class women had been interviewed out of which 76% revealed that they had been abused in their childhood or adolescence. The tulir study among 2211 school children in Chennai stated that 42% of children had experienced at least one form of sexual abuse, of which 48% were boys and 39% were girls.

- According to the NCRB total crimes against children increased more than five times and sexual crimes against children increased over four times within 10 years (from 2005 to 2015).
- The highest number of cases recorded under the POCSO Act in 2016 was of penetrative sexual assault (55%), followed by sexual assault (34%) and other offenses including abatement and attempt to commit offences (8%). But the cases relating to child pornography made up for a trivial value of 47 cases only. The offence of 'sexual harassment' accounted for 3% of all cases under the POCSO Act.
- Kerala holds third position in the states of highest rate of sexual offences against children in the country. According to NCRB data on the rate of sexual offences against children, the national crime rate of sexual abuse of children in 2016 was 8.1%, Kerala however, recorded a rate of 19.8%. In 2016 the total number of sexual offence cases against children in Kerala is 1848 (including POCSO and IPC) is the 64.1% of total crimes against children in Kerala (2879). Other states which possess highest rate are Sikkim 45.3% followed by Mizoram 45%).
- According to SCRB data compiled by Police department of Kerala there has been 600% increase in total crimes against children and a 500% increase in child rape in the state over last 10 years. The increase in the rate is scandalous that the total number of child rape cases in 2008 was 215 and in 2018, it is about 1204. In 2016, 33.25% of all crimes against children in Kerala were under the category of child rape (958 out of 2881).

9.2.3 Legal framework in India

- Until the enactment of POCSO Act in 2012 the provisions and procedures pertaining to the sexual abuse of children were scattered across various statutes namely the Indian Penal Code, 1860, the Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973, the Indecent Representation of Women (Prevention) Act, 1986 and the Information Technology Act, 2000. The IPC applied to cases of sexual offences against children came under the category of outraging modesty of a woman, rape of a woman and unnatural sexual offences. And the punishment provided for these offences are inadequate and was not sufficient to eradicate the sexual offences against children.
- Legal remedies were only available under Sections 375, 354 and 377 which covered rape, sexual molestation and unnatural sex. These limited provisions of the IPC largely focused on offences committed against the female child, with little emphasis being given to the sexual offences against a male child thereby resulting in a very parochial approach. Additionally, the IPC also failed to take into account the various forms of sexual violence committed on children and the range of sexual contexts according to the extent of coercion, injury, age and incapacitation of the child.
- The inadequacy of existing laws in dealing child sexual abuse and the data on prevalence of CSA caused to make efforts by the Indian government to bring a new law in the nature of Goa Childrens Act 2003 and enacted the POCSO Act in 2012.

- As a result of call for amendment of rape laws in India followed by the notorious *Delhi rape case*, Justice Verma Committee was appointed by the government. Subsequently the Criminal Law amendment 2013 came into force for amending various criminal laws including IPC, CrPC, Indian Evidence Act and also POCSO Act on laws related to sexual offences and some positive changes were brought about into IPC that offences like sexual harassment, voyeurism and stalking were introduced for the first time. As the definition of the term “woman” in the IPC includes girl children. However, this amending statute did not address the issue of sexual abuse of male children in the IPC.

9.2.4 The Protection of children from Sexual offences Act 2012

- The enactment of Protection of Children from Sexual Offences Act in 2012 is extremely important milestone in the history of protection of child rights. In this Act, various sexual offences against children, which did not exist in Indian criminal law, were defined and criminalized for the first time. The Act defines Children as persons below the age of 18 years and it recognises that the victims and the perpetrators of the offence can be male, female or third gender It raises the age of sexual consent from 16 years to 18 years, by making all sexual activity with a minor a statutory sexual offence. The Act broadens the understanding of rape (penetrative sexual assault) from penile vaginal penetration to penetration by specific body parts or of objects into specified parts of the child’s body, or making the child to so penetrate. It also penalises the person who may not engage in the

penetration but may cause the penetration of a child by another person or cause the child to penetrate another. The Act also recognises that sexual abuse may involve or may not involve bodily contact; it categorises these offence as 'sexual assault' and 'sexual harassment'.

- Under the Act, penetrative sexual assault and sexual assault becomes aggravated when it is committed by specified persons such as a police officer, member of the armed forces or security forces; public servant; management or staff of place of custody or care and protection, hospital, educational or religious institution, upon a child therein etc.; or in a specified manner using deadly weapons, fire, heated or corrosive substance; or committed by one or more persons etc.; or in specified situations such as offence committed more than once or repeatedly; or on a child with physical or mental disability or resulting in physical or mental disability; or on a child below 12 years of age, etc. and more severe punishment is provided for the same.
- The Act lays down special procedures to be followed by the investigating agency when recording the child's statement and by the Special Court during the child's deposition. Reporting to the police about commission of a sexual offence is mandatory under the Act for everyone, and the legislation includes a penal provision for non-reporting. The Act contains provisions to ensure that the identity of a child against whom a sexual offence is committed is not disclosed by media. It provides for designation of Special Courts and appointment of Special Public Prosecutors to deal

with offences listed under the Act. Children are to be provided other special support in the form of translators, interpreters, special educators, experts, support persons and NGOs during the pre-trial stage and trial stage. Children are entitled to legal representation by a lawyer of their choice or free legal aid. The Act also contains rehabilitative measures, such as compensation for the child and involvement of the Child Welfare Committee.

- Most provisions of the POCSO Act, if implemented in its true spirit, should assure justice to the child. But there are a few provisions whose efficacy is debated, especially in the context of the principle of the best interest of the child. For example the Act has increased the age of consent to sexual activity from 16 years to 18 years. Therefore, sexual activity described under the POCSO Act committed with a child above 16 years is an offence, even if such activity is consensual. In one aspect the age of consent to sexual activity stipulated in the Act is in conformity with the subject of Child Protection, and the Convention on the Rights of the Child but in another aspect the sexual activity among children between 16 and 18 years is expected behaviour at that age and criminalisation might become a tool in the hands of those perpetuating patriarchy, casteism and religious bias. Recently Madras high court made significant observations acknowledging adolescent sexuality and the need to exclude it from the purview of POCSO Act. Another debating clause is with regard to mandatory reporting. Mandatory reporting has its pros and cons. It makes adults accountable for

child welfare and ensures that the case gets reported. But then, due to fear of registration of FIR, the child or child's support structure may not seek help or even medical treatment or mental health support.

- The protection of children from sexual offences amendment act 2019 has been made tremendous changes in the penal provisions in the Act. Sections four, five and six are amended to provide option of stringent punishment, including death penalty, for committing sexual assault and aggravated penetrative sexual assault crime on a child to protect the children from sexual abuse. Amendments are also made in Section 9 to protect children from sexual offences in times of natural calamities and in other situations where children are administered, in any way, any hormone or any chemical substance, to attain early sexual maturity for the purpose of penetrative sexual assault. Section 14 and 15 of the POCSO Act are also amended to levy fine for not destroying, deleting or reporting the pornographic material involving a child with an intention to share or transmit it. Even though such stringent punishments will make fear in the minds of offenders it will not prevent the sexual offences in all situations. There is an urgent public policy research issue that requires attention, is therapeutic approaches in engaging with the root causes of sexual violence such as 'sex offender treatment programs' rather than stringent punitive measures.
- Prosecution includes several tasks like the identification of the offender, bringing them in front of law, the criminal proceedings in the court, imposing punishment on convicted offenders and also making the

perpetrators compensate for the damages and ensuring that they do not cause any further harm.

9.2.5 Findings based on empirical study

- The sex profile of victims reveals that the total number of victims from 151 cases is 155 children in which 135 victims (87%) were females, while 20 victims (13 %) were male.
- Of the 151 cases the age of the victims specified in 141(93%) cases and in 10 cases (7%) the age is not specified in the judgment. Of the 146 victims from 141 cases whose age was specified, 8 victims (6%) below 5 years, 15 (10%) were between 6 and 8 years, 37 (25%) were between 9 and 11 years, 32 (22%) were between 12 and 15 years, and 54 (37%) were between 16 and 18 years.
- In 6 cases, the victim was pregnant when the FIR was registered. The victim testified against the accused in two cases only and turned hostile in 4 cases. In testified cases the victims supported in chief examination but turned hostile in cross examination.
- There were a total of 169 accused persons out of 151 cases analyzed, of which 163 were male and six were females All the perpetrators of sexual offense are males and the charges against the five females were that of abetment of a sexual offence and in those cases the females are co accused and one female accused is charged with failure in reporting the crime under POCSO Act.

- The informants of the offence in most cases are mothers (49), fathers (36), and victims (22). Other family members who came as informants are grandmothers (three cases), and step mother in one case. Others included the Child line activists(2), counselors of schools(2) and child care institutions(4), principal and teachers of school (4), doctors (2), and other known persons including employer and security staff (one case each).
- Conviction awarded in 28 cases while 123 cases resulted in acquittal. This pegs the overall rate of conviction during the period of the study at 18.5%.
- Of the 151 cases, the victims of 84 cases (56%) turned hostile and in 59 cases (39%) the victim testified and contested against the accused. In 6 cases (4%) the victim testified against the accused and supported the prosecution case in chief examination but turned hostile in cross examination. In two cases, the child victims neither produced before the court nor testified and the material witness examined before the court while they turned hostile thus resulted in acquittal in both cases.
- The most important reason for acquittal of the accused is that of victim turned hostile in 84 cases. The other reasons for acquittals were because the victim did not support the prosecution case in cross examination, victim testimony found unreliable and also prosecution failed to establish the ingredients of offence or to prove the age of victim less than 18 years.
- Almost in 78 cases the victim turned hostile and denied the sexual offence had taken place. Only in three cases the victim turned hostile on point of

identity of the accused. In other three cases victim turned hostile on some other grounds.

- Of the 151 cases, in 11 cases the offences charged only under IPC and the POCSO Act not applied as the offences were committed before the enactment of POCSO Act. Charges under the POCSO Act were as follows: penetrative sexual assault in 15 cases (11%) aggravated penetrative sexual assault in 59 cases (42%), sexual assault in 21 cases (15 %), aggravated sexual assault in 33 cases (24 %), and sexual harassment in 12 cases (8 %). As is evident, majority of the charges were under aggravated penetrative sexual assault under the POCSO Act.
- Of the 23 cases that resulted in conviction under the POCSO Act, the accused was sentenced under the POCSO Act in 20 cases, released on probation in three cases. In five cases accused sentenced under IPC only and the offences charged were rape, outraging modesty of woman and also compelling women for marriage. In two cases sentences were passed under JJ Act in addition to sentences under POCSO Act and IPC.
- The highest sentence is recorded in aggravated sexual assault followed by sexual assault, aggravated penetrative sexual assault and penetrative sexual assault under POCSO Act.
- The minimum mandatory sentence was imposed in 15 offences charged under the POCSO Act and eight charges under IPC in the convicted cases. The maximum prescribed sentence was awarded in four cases under POCSO Act which comprised of one aggravated penetrative sexual assault

and one sexual assault and two aggravated sexual assault and also three cases under IPC for rape on minor. Special court applied sec 42 of POCSO Act for alternate punishment in eight cases for awarding greater punishment prescribed by law for same offences under different statutes.

- Of the 28 convicted cases probation was awarded in only three cases that were of aggravated sexual assault, sexual harassment and failure of reporting each under POCSO Act.
- In all the cases where sentencing is awarded under the POCSO Act, fine was also imposed on the convict. In all the cases where there are more than one sentencing term passed either under different sections of POCSO or when sentenced both under the POCSO Act and the IPC, then concurrent sentences were awarded by the court. And set off also allowed by the court.
- In 73 % of the cases, the accused was known to the victim. In 9 % of the cases the accused was a stranger and in 18 % of the cases the relationship of the accused with the victim was not specified in the judgment.
- Of the 28 convicted cases, the special court applied presumption prescribed under POCSO Act in twenty cases and the accused convicted. In five cases conviction was solely under IPC and presumption was not applied. In two cases though the conviction was under POCSO Act the court neither referred nor applied the presumption clause. In one case the presumption is not applied as the evidence of victim with regard to aggravated penetrative sexual assault was not sufficient to get the benefit of presumption to the victim.

- Gaps and Challenges identified by the empirical study
- Gaps in age-determination of child victims in absence of documentary evidence. The special court did not apply the JJ Model Rules, 2007 with respect to the determination of the age of the victim before the JJ Act, 2015 came into force and not exercised its power under Section 34(2) to order an ossification test, or apply Section 94, JJ Act, 2015 or Rule 12(3), JJ Model Rules, 2007.
- The testimonies of victims are rejected by the Courts based on far reaching presumptions, or erroneous interpretations of the law. Such disregard of established evidence standards and the deployment of personal bias can be detrimental to the premise of the Act, and demoralise victims who sum up enormous courage to testify in court. There are judgments in which Special Court has called into question the discrepancies in the statements of victim and deemed her testimony unreliable based on it.
- The award of compensation by Special Courts is an exception as elaborated in Section 2.6 and Special Courts has not gone beyond Section 357, Cr.P.C. Neither Section 33(8), POCSO Act nor Section 357A, Cr.P.C was considered by the Special Court in awarding interim or final compensation.
- Investigation gaps by the police such as failure in collecting documents that establish age or initiate ossification, failure to seize relevant property or prepare proper panchnama, discrepancies in accuracy of records including FIR, failure to record the statement of independent witnesses, Lapses with respect to collection of samples and medical reports, Breach of prescribed

procedures, and other failures in investigation process including delay in filing FIR and medical examination are identified from judgement analysis.

- Filing of incorrect charges including inconsistent application of aggravated factors in POCSO Act and failure to include all applicable provisions reflect poor understanding of POCSO Act by the police.
- Victims turned hostile while testifying before the Special Court and the reasons are romantic relationship with accused and the process for recording the testimony began well over a year after the incident took place or was reported as it is probable that the accused may have applied pressure, threats, or influenced the victim and her family to retract their statement in court, or they may have compromised the matter by offering to marry the victim. Another reason for hostile victims is that the cases in which the victim testified against the accused in chief but turning hostile in cross examination in cases where the accused is a close family member.
- The POCSO Act rigidly fixes the age of consent at 18 years and does not recognize adolescent sexual expressions or autonomy. As a result, romantic cases present unique challenges before the police, prosecution, and Special Courts. The veracity of romantic cases is frequently called into question because it is projected that the case may have been registered by parents who disapproved of the match for various reasons, such as caste or religion, and the victim may have been pressured into testifying against her lover. Victims and their families invariably turn hostile in such cases because of

marriage between the victim and the accused or compromise and leave the Special Courts with no option but to acquit the accused.

- Some procedural gaps identified are even though the POCSO Act requires Special Courts to take direct cognizance in most of the cases committal proceedings took place, and questions to victims are posed by the defence lawyer and the PP directly to the child in most cases. There is no reference to interim compensation in any of the case. Evidence is rarely recorded within 30 days and the disposal time of one year was met in only 39% of the cases.
- Needs of child victims and victims with disabilities not addressed properly. The Special Court complexes in are not disabled-friendly. Further, little has been done to identify interpreters, translators, special educators and experts who could aid the Special Court and other authorities in communicating with children.
- Problems with medical reports and their appreciation by the Special Court is identified because the varying quality of medical examinations conducted by government hospitals. Ambiguity in description by medical officers is often caused to rejection of appreciation of testimony of victim with medical reports by the special courts.

9.2.6 Barriers in Implementation of POCSO Act

- Unstructured interviews with various stakeholders revealed various barriers and practical difficulties in implementation of POCSO Act. Non disclosure or delayed disclosure of sexual abuse, Lack of support system,

disclosure of identity of child victims, Lack of victim protection scheme, Lack of information and legal assistance, Lack of convergence between various stakeholders and various challenges in investigation process, medical care and activities of CWC are some of the difficulties identified by the study for proper implementation of the Act.

- A combination of police apathy, victim-blaming, and deliberate misuse of police powers, failure of mandatory duties on police and pressure exerted on victim family for out of court settlements hamper investigations of rape and other acts of sexual violence. Investigating officers are also facing some difficulties in implementing child friendly procedures in the Act for example recording of victim statement from the residence of victim , video recording, lack of adequate infra structure and lady officers etc.
- Lack of uniformity and standardization in medico legal evidence collection, medical reports, lack awareness on POCSO Provisions and rules, lack of infra structure and lady medical officers in government hospitals are the major barriers in medical examination process. Absence of appearance of medical officer who signs the medical examination report in court of law for deposition actually benefits the accused. The concerns over the contradiction between the provisions of mandatory reporting under POCSO with MTP Act and patient-doctor confidentiality is worth important. Medical officers believe that mandatory reporting will discourage patients from approaching the health system and availing treatment after sexual violence as they may not wish to approach the Police.

- Even though the CWC recognized as a Magistrate of first class as a bench, other stakeholders do not award them this statute which serves to reduce their authority. Lack of uniformity in infrastructure, number of members, periodic sittings and insufficient member of probation officers and care givers are important factors hampers the efficient activities of CWC. Besides this lack of convergence between CWC and investigating agencies and lack of proper documentation by CWC is also caused to fail the proper implementation of the Act.

9.3 Suggestions

Following are the main suggestions to for the effectiveness of legislative framework against CSA and effective implementation of POCSO Act to prevent sexual offences against children. Most of these suggestions are the outcomes of the empirical study and interactions with the various stakeholders and office bearers of governmental and non governmental agencies and child protection services. Suggestions related to policy changes and Legislative actions are gathered based on the analysis of various studies and committee reports related to this topic.

9.3.1 General Suggestions

- 1) **Ensure Preventive measures:** The law deals only with the post commission stage of offences and punishments. So the preventive measures also should be enacted for example it may be suggested that the Act must contain provisions for creation of institutions associated with children including schools to provide sexuality education which is appropriate for

their age. Parent Education Programmes should be launched to enable parents and other family members to talk to children about sex and sexuality at home, and to focus more on sensitizing boys to respect girls.

- 2) **Awareness to children:** Awareness to children about their body and sexuality should begin within the home. Try to teach children about the healthy relationships and safe and unsafe touches instead of teaching them good/bad touch.
- 3) **Facilitating the establishment of community level support groups:** Facilitating the establishment of community level support groups to create awareness about child sexual abuse, the legal framework, and support services available to all children, particularly children out of school, children with disabilities, children living on the street, and children living in residential institutions.
- 4) **Review of law within reasonable period:** The government should review the existing legislations within reasonable time for example government should urgently facilitate a debate on effectiveness of mandatory reporting under POCSO Act.
- 5) **Training:** Appropriate, Regular and periodic training should be provided for various stakeholders and support persons under POCSO Act.
- 6) **Feedback:** Seeking feedback from various stakeholders on a regular basis on the challenges they face in dealing CSA cases under the POCSO Act, measures they have taken to make the procedures child friendly, and to solicit suggestions for improvement.

- 7) **Restructure Research & and Development activities and innovation in Prevention strategies of CSA:** An elaborate research activity in this field is necessary to maintain proper data on prevalence and nature of this problem. Research activities in our country are often starved of resources such that they are neither able to diversify their research portfolio nor undertake research with a long term perspective. So there is an urgent need to explore the ways to revamp and restructure the present Research and Development system.
- 8) **Collaborate with mass media** to work out and promote awareness about the existing laws and to challenge attitudes and harmful gender stereotypes that maintain the tolerance and condoning of violence against children in all its forms; and to also use the media to promote positive attitudes towards children.

9.3.2 Suggestions regarding amendments to legal provisions

1. Make adequate amendment in age of consent for sexual activity in case of adolescent sexual relations. The POCSO Act should treat this age group as a separate category in matters of defining and punishing sexual offences. The age gap between the two children in such cases will be in a stipulated range.
2. More adequate provisions should be provided for the sexual offences against differently abled children.

3. Distinguish more vulnerable child groups (eg street children) from normal family children and ensure provisions for adequate protection against sexual offences
4. Amendments in IPC to ensure gender neutrality for the protection of male child victims.
5. Non consensual non penetrative sexual acts should be clearly defined to distinguish it from behavioral patterns of Indian society to express their love and affections towards children.

9.3.3 Suggestion regarding Implementation level of POCSO Act

- 1) Establishment of dedicated POCSO Courts in each district to exclusively deal with cases under the POCSO Act because the pendency of POCSO Cases is very high.
- 2) Ensure child friendly infrastructure in each POCSO courts including waiting rooms, disabled friendly infrastructure etc.
- 3) Creation of a cadre of trained para-legal volunteers to support child victims during the entire course of the investigation and trial that the CWCs could draw from for the appointment of Support Persons.
- 4) POCSO Courts should not avoid exercising the discretionary power under s 33(8) POCSO Act on award of interim and final compensation to victims and also power to age determination under sec. 34(2).
- 5) State Government should ensure a list of qualified translators, interpreters, special educators and experts who assist in the recording of testimony of the child could be made available to all Special Courts.

- 6) Appoint Special Public Prosecutors (SPP) as mandated under Section 32 (1), POCSO Act.
- 7) The state and its machinery should be pro-active in creating an environment to assure the child victim of sexual abuse relief and rehabilitation by providing timely compensation and follow up medical care on free of cost.

9.4 Scope of further study

The researcher feels that there are some sample opportunities in doing research in the following areas:

- 1) Detailed empirical studies on challenges faced in the investigation and prosecution of cases under the POCSO Act;
- 2) Study on the implications of assignment of Support Persons in POCSO cases;
- 3) Evidence-based therapeutic programs for persons at risk of sexually abusing children
- 4) Empirical study on Children in conflict with law in child sexual abuse cases.
- 5) Journey through the criminal justice system in child victims' perspective.

9.5 Conclusion

The POCSO Act is much appreciated in expanding the scope of offences to be included under child sexual abuse to more comprehensively address the issue. It also encourages a child friendly environment during the investigation and trial of such offences, which immensely helps the victim. However, what is lacking is the methodical operationalisation and implementation of the legislation to meet its objectives. As we cross the seventh year of the Act, we hope that these gaps will be addressed and abridged. Of greater worry are certain

provisions in the POCSO Act, which do not adhere to the legislation's goal and require re-appraisal. It is important that debates among stakeholders are facilitated to draw out more such issues, as also to strengthen the legislation. Successful prosecution is not the only test to measure whether a child has attained justice. The concept of justice extends to providing a child-friendly process through the special procedures, infrastructure and human resources envisioned under the POCSO Act. The rehabilitative component is also an essential part of justice delivery, and is not limited only to victim compensation, but rests on effective coordination with the juvenile justice system. Justice is not one fold; the interest of a specific child requires to be identified, and her/ his needs to be fulfilled. The solution may not always lie within the criminal justice system; other ways also require to be explored. What valuing is being done towards preventing the entry of children into the criminal justice system. Under the Constitution, it is the state's duty to take steps to prevent violence against children, including sexual violence. "Preventing violence in one generation reduces the likelihood in the next."² To be effective, preventive programmes should be integrated into the mainstream of community life. These should be initiated through professionals working in child-related fields, and should be implemented with community participation. This will also ensure a strong community support structure, more so for children at risk of sexual abuse and exploitation.

² General Comment No 13 (2011), titled, the right of the child to freedom from all forms of violence, issued by the Committee on the Rights of the Child.

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APPENDIX - 1

List of Analysed Cases (Ernakulam POCSO Court)

Sessions Case No. 599/2013	–	State of Kerala v. Jimmy @ Ors
Sessions Case No. 441/2014	–	State of Kerala v. Chacko@ Kunjappan
Sessions Case No. 524/2014	–	State of Kerala v. Shabeer & Ors
Sessions Case No. 681 of 2014	–	State of Kerala v. Vincy & Ors
Sessions Case No. 463/2014	–	State of Kerala v. Baby & Ors
Sessions Case No. 813/2015	–	State of Kerala v. Sunny
Sessions Case No. 855/2015	–	State of Kerala v. Baby
Sessions Case No. 859/2015	–	State of Kerala v. Shakkir & Ors
Sessions Case No. 878/2015	–	State of Kerala v. Manikandan & Ors
Sessions Case No.596/2015	–	State of Kerala v. Tom Jose
Sessions Case No. 22/2015	–	State of Kerala v. Jigesh
Sessions Case No. 256 of 2015	–	State of Kerala v. Benny
Sessions Case No. 395 of 2015	–	State of Kerala v. Saravanan
Sessions Case No. 397 of 2015	–	State of Kerala v. Sumesh P M
Sessions Case No. 430 of 2015	–	State of Kerala v. Jolly Xavier
Sessions Case No. 446 of 2015	–	State of Kerala v. Jayan
Sessions Case No. 452 of 2015	–	State of Kerala v. Sathyan
Sessions Case No. 463 of 2015	–	State of Kerala v. Vijayan
Sessions Case No. 499/2015	–	State of Kerala v. Shibu@ Ayyappan
Sessions Case No. 505 of 2015	–	State of Kerala v. Muhammed
Sessions Case No. 519/2015	–	State of Kerala v. Dhaneesh
Sessions Case No. 532/2015	–	State of Kerala v. Sareesh

Sessions Case No. 537/2015	–	State of Kerala v. Babu
Sessions Case No. 538 of 2015	–	State of Kerala v. Baburaj
Sessions Case No. 539/2015	–	State of Kerala v. Akhil Sudan
Sessions Case No. 560 of 2015	–	State of Kerala v. Prakashan
Sessions Case No. 561/2015	–	State of Kerala v. Arumughan
Sessions Case No. 587/2015	–	State of Kerala v. Bindu hari & Ors
Sessions Case No. 608/2015	–	State of Kerala v. Rajeev
Sessions Case No. 688/2015	–	State of Kerala v. Varghese
Sessions case No. 74of 2015	–	State of kerala v. Rafeek
Sessions Case No. 759 of 2015	–	State of Kerala v. Shiju
Sessions Case No. 793 of 2015	–	State of Kerala v. Vijesh
Sessions Case No. 796/2015	–	State of Kerala v. Jinse
Sessions Case No. 799/2016	–	State of Kerala v. Nikhil
Sessions Case No. 105/2016	–	State of Kerala v. Mani
Sessions Case No. 106 of 2016	–	State of Kerala v. Abdul Rahim
Sessions Case No. 109 of 2016	–	State of Kerala v. Velayudhan
Sessions Case No. 111 of 2016	–	State of Kerala v. Thomas
Sessions Case No. 112/2016	–	State of Kerala v. Muhammed Khan
Sessions Case No. 117/2016	–	State of Kerala v. Krishnan Kutty
Sessions Case No. 149/2016	–	State of Kerala v. sunil Kumar
Sessions Case No. 153/2016	–	State of Kerala v. Udayan @ Kunjumon
Sessions Case No. 155/2016	–	State of Kerala v. Akhil @ Appu & Ors
Sessions Case No. 156 of 2016	–	State of Kerala v. Niju
Sessions Case No. 192 of 2016	–	State of Kerala v. Baby
Sessions Case No. 194 of 2016	–	State of Kerala v. Saneesh Joy
Sessions Case No. 195 of 2016	–	State of Kerala v. Sajeev & Ors
Sessions Case No. 197/2016	–	State of Kerala v. Lakshmanan

Sessions Case No. 198/2016	–	State of Kerala v. Ibrahim
Sessions Case No. 199/2016	–	State of Kerala v. Nikhil
Sessions Case No. 203 of 2016	–	State of Kerala v. Fr. Edwin Pigarez &Ors
Sessions Case No. 208/2016	–	State of Kerala v. Babu
Sessions Case No. 209 of 2016	–	State of Kerala v.Chandran K k
Sessions Case No. 248/2016	–	State of Kerala v. Vyshakh C V
Sessions Case No. 250/2016	–	State of Kerala v. Sajeevan
Sessions Case No. 253/2016	–	State of Kerala v. Aliyar
Sessions Case No. 264 of 2016	–	State of Kerala v. Brite
Sessions Case No. 265 of 2016	–	State of Kerala v.Augustine
Sessions Case No. 343/2016	–	State of Kerala v. Suhail
Sessions Case No. 345 of 2016	–	State of Kerala v. Haridas
Sessions Case No. 346 of 2016	–	State of Kerala v. Aneesh Antony
Sessions Case No. 394/2016	–	State of Kerala v. Abhilash& Ors
Sessions Case No. 396/2016	–	State of Kerala v.Midhun
Sessions Case No. 398 of 2016	–	State of Kerala v. Gopu
Sessions Case No. 400 of 2016	–	State of Kerala v. Gopu
Sessions Case No. 401 of 2016	–	State of Kerala v. Gopu
Sessions Case No. 414 of 2016	–	State of Kerala v. Anoop
Sessions Case No. 418/2016	–	State of Kerala v. Stintaj
Sessions Case No. 419/2016	–	State of Kerala v. Arun
Sessions Case No. 426/2016	–	State of Kerala v. Jithin
Sessions Case No. 429/2016	–	State of Kerala v. Sanoj
Sessions Case No. 452 of 2016	–	State of Kerala v. Shaji
Sessions Case No. 453/2016	–	State of Kerala v. P P Hassan
Sessions Case No. 455/2016	–	State of Kerala v. Manaf
Sessions Case No. 456/2016	–	State of Kerala v. Shibu
Sessions Case No. 461/2016	–	State of Kerala v. Ambadikannan
Sessions Case No. 463/2016	–	State of Kerala v. Muhammed Fasil & Ors

Sessions Case No. 466/2016	–	State of Kerala v. Jinshad &Ors
Sessions Case No. 47 of 2016	–	State of Kerala v. Mohammed Hashir
Sessions Case No. 472/2016	–	State of Kerala v. Muhammed Faizal
Sessions Case No. 480/2016	–	State of Kerala v. Sumesh @ Kannan
Sessions Case No. 481/2016	–	State of Kerala v. Shaji
Sessions Case No. 527/2016	–	State of Kerala v. Jefrin
Sessions Case No. 534 of 2016	–	State of Kerala v. Arjun
Sessions Case No. 605/2016	–	State of Kerala v. Tinu Binoj
Sessions Case No. 614/2016	–	State of Kerala v. Baby @ Rajan
Sessions Case No. 619/2016	–	State of Kerala v. Manikuttan
Sessions Case No. 621/2016	–	State of Kerala v. Manikuttan
Sessions Case No. 622/2016	–	State of Kerala v. Rasheed
Sessions Case No. 628/2016	–	State of Kerala v. Jacob@ Joy
Sessions Case No. 637/2016	–	State of Kerala v. Sibin
Sessions Case No. 697/2016	–	State of Kerala v. Anwur Hussain &Ors
Sessions Case No. 698/2016	–	State of Kerala v. Maneesh
Sessions Case No. 747/2016	–	State of Kerala v. Naveen O V
Sessions Case No. 748/2016	–	State of Kerala v. Naveen O V
Sessions Case No. 749/2016	–	State of Kerala v. Basheer
Sessions Case No. 750/2016	–	State of Kerala v. Shameer
Sessions Case No. 751/2016	–	State of Kerala v. Subair
Sessions Case No. 752/2016	–	State of Kerala v. Antony P J
Sessions Case No. 758/2016	–	State of Kerala v. Francis
Sessions Case No. 760/2016	–	State of Kerala v. Johnson
Sessions Case No. 761 of 2016	–	State of Kerala v. Gopalakrishnan Nair
Sessions Case No. 762/2016	–	State of Kerala v. Prince

Sessions Case No. 794/2016	–	State of Kerala v. Udayan T A
Sessions Case No. 795/2016	–	State of Kerala v. Rephel@ Charley
Sessions Case No.417/2016	–	State of Kerala v. Mathai
Sessions Case No. 800/2016	–	State of Kerala v. Henry Rocha
Sessions Case No. 801/2016	–	State of Kerala v. Biju
Sessions Case No. 805/2016	–	State of Kerala v. Dilshan
Sessions Case No. 807/2016	–	State of Kerala v. Sura
Sessions Case No. 836/2016	–	State of Kerala v. Jaimon
Sessions Case No. 847 of 2016	–	State of Kerala v. Antony C R
Sessions Case No. 85/2016	–	State of Kerala v. Basil
Sessions Case No. 851/2016	–	State of Kerala v. Rajeeesh
Sessions Case No. 871 of 2016	–	State of Kerala v. Maju @ Manu
Sessions Case No. 896 of 2016	–	State of Kerala v. Aneesh @ Anas
Sessions Case No. 898/2016	–	State of Kerala v. Stophin
Sessions Case No. 926/2016	–	State of Kerala v. Elson
Sessions Case No. 928/2016	–	State of Kerala v. K K Vijayan
Sessions Case No. 929/2016	–	State of Kerala v. Alan
Sessions Case No. 942/2016	–	State of Kerala v. Babu C D
Sessions Case No. 956/2016	–	State of Kerala v. Dhaneesh
Sessions Case No. 957/2016	–	State of Kerala v. Anuraj
Sessions Case No. 969/2016	–	State of Kerala v. Akhil@ Ajith Unnikrishnan
Sessions Case No.107/2016	–	State of Kerala v. Naveen O V
Sessions Case No.870/2016	–	State of Kerala v. John Christo
Sessions Case No.952/2016	–	State of Kerala v. Mirza
Sessions Case No. 158/2017	–	State of Kerala v. Raj Kumaran
Sessions Case No. 127/2017	–	State of Kerala v. Suresh
Sessions Case No. 08/2017	–	State of Kerala v. Hashim
Sessions Case No. 213/2017	–	State of Kerala v. Gopakumar
Sessions Case No.512/2017	–	State of Kerala v. Balakrishnan
Sessions Case No. 432/2017	–	State of Kerala v. Vinodkumar K N

Sessions Case No. 793/2017	–	State of Kerala v. Renju
Sessions Case No. 81/2017	–	State of Kerala v. Ibrahim P M
Sessions Case No. 83/2017	–	State of Kerala v. Muhammed Ashiq
Sessions Case No.110/2017	–	State of Kerala v. Govindankutty
Sessions Case No.113/2017	–	State of Kerala v. Ananthavishnu
Sessions Case No.114//2017	–	State of Kerala v. Sajeer
Sessions Case No.266/2017	–	State of Kerala v. Amal
Sessions Case No.270/2017	–	State of Kerala v. Jithu Thankachan
Sessions Case No.271/2017	–	State of Kerala v. Mukesh Thampi
Sessions Case No.275/2017	–	State of Kerala v. Kuriakose
Sessions Case No.276/2017	–	State of Kerala v. Prakashan
Sessions Case No. 3/2017	–	State of Kerala v. Mridul @ Kittu
Sessions Case No. 327/2017	–	State of Kerala v. Shijas
Sessions Case No. 386/2017	–	State of Kerala v. Paul Marian Prakash
Sessions Case No. 54/2017	–	State of Kerala v. sudheesh
Sessions Case No. 6/2017	–	State of Kerala v. Akhil
Sessions Case No. 53/2017	–	State of Kerala v. Saju



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RESEARCH ARTICLE

CHILD SEXUAL ABUSE AND MEDICAL CARE IN INDIA - A LEGAL REVIEW.

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Abstract

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Introduction:-

Child sexual abuse is a serious problem in India as across all the countries in the world. According to the nationwide study conducted by Government of India 2007 revealed that more than 53% children report facing one or more forms of sexual abuse in India (Kakkar.L et al 2007). It is a grave violation of many of the human rights of the children. Sexual abuse is also a grave public health problem with both short- and long-term effects on victim's physical, mental, and sexual and reproductive health. If the victim of the sexual abuse is a child, it becomes more vulnerable. Right to health and medical care is one of the most important rights included in the very definition of child abuse. According to the World Health Organization "child abuse or maltreatment constitutes all forms of physical and or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child's health, survival, development or dignity, in the context of a relationship of responsibility, trust or power"(WHO 1999). The ingredient of 'child health' is more relevant in the context of child sexual abuse. The WHO also defines child sexual abuse as "the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, 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 activity, the exploitative use of a child in prostitution or other unlawful sexual practices, and the exploitative use of children in pornographic performances and material"(WHO 1999).

Right to health and effects of sexual abuse

The right to health is an important ingredient of basic human rights and an essential part of dignified life of a human being. Internationally the term health is defined as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" (Constn WHO 1946). The concept of right to health is first recognized by the Universal Declaration of Human Rights 1948 and lays down that "Everyone has the right to standard of living adequate for the health and well-being of himself and of his family, including food, clothing, and housing and medical care and necessary social services"(UN 1948). The Declaration does not define the components of a right to health; however, they both include and transcend medical care. The right to health was also recognized as a human right in the International Covenant on Economic, Social and Cultural Rights, 1966(UN 1966).

The impacts of sexual abuse on children are wide ranging. When we trace deep into the impacts of child sexual abuse in the perspective of human rights, all forms of sexual abuse violate the rights of children to liberty and security, privacy and integrity, health and, in some cases, even the right to life. On a close scrutiny of the effects of

the sexual abuse it is shocking that children suffering from sexual abuse develop a range of maladaptive anti social and self destructive behaviors and thoughts by trying to cope with the abuse. The secrecy shrouded around the problem prevents the child from actual disclosing the issue which always leads to several lifelong effects and causes to deprive the child from having real and healthy social relationships and causes various physical and mental traumas in children and it always adversely affects the health of the children. In the instances of child sexual abuse children are always prone to many health issues and also vulnerable to sexually transmitted diseases, including HIV/AIDS and in cases of adolescent child also to early and unwanted pregnancies. So children's right to health is therefore dependent on medical care that respects confidentiality and privacy and includes appropriate mental, sexual and reproductive health services and information.

Medical care of sexually abused children and Law

At the international level, the *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes, 2005*(ECOSOC 2005) provides for good practices that can be adopted by States in accordance with domestic law and judicial procedures and highlight the importance of guiding professionals to assist and support in dealing the child victims and witness of crime in a sensitive manner. The WHO Guidelines for medico-legal care for victims of sexual violence provides for the appropriate practices for the child sexual abuse victims medical care that is assessment and examination of child victims, collecting medical and forensic specimen, and also treatment and follow up care of the victims (WHO 2013). Victims of sexual assault require comprehensive, gender-sensitive health services in order to cope with the physical and mental health consequences of their experience and to aid their recovery from an extremely distressing and traumatic event. The types of services that are needed include pregnancy testing, pregnancy prevention (i.e. emergency contraception), abortion services (where legal), STI testing and/or prophylaxis, treatment of injuries and psychosocial counselling. In addition to ensuring urgent health care, the medical sector has to perform as an important referral source for other services that the victim may later go through, for example, legal assistance and social benefits. Health workers are also well placed to collect and document the evidence necessary for corroborating the circumstances of the assault and for identifying the perpetrator and the health consequences of the event). Such evidence is often crucial to the prosecution of cases of sexual violence.

Indian legal scenario

In India, the Protection of Children from Sexual Offences Act (hereinafter referred to as POCSO Act), 2012 has provided some special progressive procedures to be followed by the medical practitioners in dealing with child sexual abuse cases. The victims of child sexual abuse have to undergone medical examination as part of the legal procedures for prosecuting these offenses. And the law also prescribes the treatment for the victim and rehabilitation to a healthy life on free of cost. The registered medical practitioner providing medical care shall also do some more duties as (i) collect evidence on abuse after a careful medical examination, (ii) give treatment for the physical and genital wounds and injuries, (iii) assess the age of the victim (if required), (iv) suggest prophylaxis for sexually transmitted diseases including HIV, (v) talk about emergency contraceptives with the adolescent child and her parent, (vi) do fundamental evaluation for mental health impacts of abuse, (vii) monthly follow up at least for six months to look for development of psychiatric disorders, (viii) do family counseling and (ix) assist the court in interviewing the child and take evidence in the court.

Section 27 of POCSO Act mandates that if victim of a sexual offence is a female child, the medical examination has to be done by a registered lady medical practitioner. That should be done in the presence of the parent of the child or any other person in whom the child reposes trust or confidence. In addition, in case the parent of the child or other person cannot be present, for any reason, during the medical examination of the child, that should be carried out in the presence of a woman insisted by the head of the medical institute. Criminal Law (Amendment) Act, 2013 has inserted an important section in Criminal Procedure Code, 1973. According to new section 357C, all hospitals, public or private, whether run by the Central Government, the State Government, local bodies, or any other person, shall immediately provide the first aid or medical treatment, free of cost, to the victims of any offence covered under Sections 326A, 376, 376A, 376B, 376C, 376D, and 376E of the IPC, and shall immediately inform the police of such an incident. Section 166B of the IPC provides for whoever in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of Section 357C of CrPC, shall be punished with imprisonment for a term which may extend to one year or with fine or both.

CrPC Section 164A states that (1) when during investigation, medical examination of victim of rape/attempted rape is to be conducted; such examination shall be carried out by a registered medical practitioner of a government hospital or a hospital run by local government bodies. And if there is any absence of such a practitioner, by any

other registered medical practitioner, with the consent of such woman or of a person capable of giving such consent on behalf of the victim child and such woman should be sent to a registered medical practitioner within 24 hours from the time of receiving the information regarding the commission of the crime. (2) The registered medical practitioner, to whom such woman is sent, should examine her, without any delay and prepare a report of her examination comprising the preliminary details with meticulous mention of injuries over the body, general mental condition of the female with detailed description of all materials taken for investigation. (3) The report should specifically speak all the reasons for each conclusion arrived at. (4) The report shall specially record that the consent of the woman or of the person competent to give such consent on behalf of victim for such examination had been obtained. (5) The accurate time of beginning and end of the examination shall also be stated in the report. (6) The report should be forwarded without any delay to the investigating officer, who shall forward it to the magistrate. (7) nothing in this section shall be interpreted as legally valid any examination without the consent of the woman or of any person competent to give such consent on her behalf.

The Medical Termination of Pregnancy (MTP) Act, 1971 Section 3 (2) (b) (i) states that a pregnancy may be terminated by a registered medical practitioner where the continuance of the pregnancy has a risk to the life of the pregnant woman or will cause serious harm to her physical and mental health. Where any pregnancy is alleged to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the woman. No pregnancy can be terminated except with the consent of the pregnant woman. Age of consent is 18 years and for pregnant woman below 18 years of age or who is mentally ill, consent of her guardian is sufficient. The act does not mention of reporting to investigating authorities in cases of pregnancy because of alleged rape or determination of age of the pregnant woman if she does not appear to be of 18 years of age.

The Ministry of Health and Family Welfare, Government of India provided Guidelines and Protocols for Medico legal Care for Survivors/Victims of Sexual Violence in 2014 enhancing the appropriate guidelines for doctors and medical professionals to handle the victims of sexual crimes (MHFW 2014). These guidelines mandate compulsory reporting to police of any case of sexual assault even though the victim or parent is not consented with the same. When any case of consensual or non-consensual sexual act is either brought to a doctor he/she has to examine it with the purpose to form an opinion as to (1) whether a sexual act has been attempted or completed, (2) whether such a sexual act is recent and whether any harm has been caused to the survivor's body, (3) what is the age of the adolescent girl who is probably a victim of sexual offence, and (4) whether there is any role of any intoxicated substance in the alleged act. Apart from the same required for medico legal purposes, the said victim is entitled for treatment that includes care for injuries, sexually transmitted diseases, HIV, testing for pregnancy, use of emergency contraception, psychological counselling, and followup care.

Challenges and gaps

Child sexual abuse is a multidimensional problem having legal, social, medical and psychological implications (Behere PB et al 2013). There are some challenges and controversies in the existing legal frame work regarding the medical care of child sexual abuse victims.

Medical examination

Availability of trained medical professionals and doctors is a problem in this area of medical examination of the victim. All medical practitioners now need to be aware of detailed examination and reporting of victims of sexual assault. Preparing of detailed report on the examination of victim is now mandatory and the refusal to conduct examination is an offense. Not only the availability of trained doctors but also the availability of woman doctors in case of female child victim is also difficult to get practical especially in hospitals in remote areas. This may also caused to delay in medical examination.

Consent

The consent of victim or the consent of parent in case of child is mandatory for medical examination. if the victim child refuses to undergo medical examination but the family member or investigating officer is consented for the medical examination, the POCSO Act is not explicitly give any instruction. However, it would be careful to take informed consent from parent when the victim is a child (below 12 yr) and consent from both parent and the victim, if the survivor is an adolescent (age group from 12 -18 yr).The consent issue is not arising in providing emergency medical care to the victim. The issue of consent raises in the context of victims affected with sexually transmitted diseases or victims approaching the psychological counseling or treatment in result of sexual assault, the question is

whether the doctor is mandated to report the crime. The problem is the asking of reporting the crime may result in the victim will discontinue the further treatment.

Pregnancy cases

If a girl victim of sexual abuse or her parents approach a medical facility for medical termination of pregnancy, it is the right of every girl to get pregnancy terminated, if it has occurred as a result of rape, with maintenance of confidentiality. This confidentiality will be beaten if the same is intimated to police. Hence, again people may resort to criminal abortion, thus risking their lives. A pregnancy allegedly due to an act of rape may be terminated as per MTP Act, 1971; it is noteworthy to mention that henceforth it is the duty of every such medical practitioner to collect samples for DNA typing to help the investigating authorities. Failure to intimate all such cases is now made punishable. Even failure to collect and preserve sample for DNA typing in cases of pregnancy resulting from rape can be punishable for loss of evidence of a crime.

Treatment cost

The law has stated legal obligation on the medical fraternity and establishment to provide free medical care to the survivors. If there are no appropriate facilities available or any high cost treatment procedure is required, the State should give reimbursement of such cost; otherwise hospital may provide insufficient medical treatment procedure or may deny the victim from complete care and treatment. . But the extent of the same is not prescribed by the law that whether the immediate medical care, medical examination and follow up care of victim altogether coming under this free of cost. Another question is if any such sexual assault results in pregnancy of the child, whether the pregnancy and delivery expenses too will cover under the free treatment is not clear from the Act.

Consented sexual intimacy:

Sexual activities between two children below 18 years or between a child and an adult are regarded as (even in case of adolescents) not legal and considered as an offense under the POCSO Act 2012, irrespective of consent or the gender or marriage or age of the victim or the accused person. However, it is proposed that any consensual sexual activity should not be an offense when it is between two consenting adolescents, otherwise both the adolescents will be charged with sexual offenses under the POCSO Act, 2012. On the other hand, the latest amendment of the Indian Penal Code concerning rape laws in 2013 clearly reports that the age of consent for sex has been fixed to 18 yr, hence, anyone who has consensual sex with a child below 18 year can be charged with rape, which may increase the number of rape cases. The doctors have to mandatorily report the instances of consented sexual activity as sexual offense if the victim approaches him or her for pregnancy treatment or for termination of pregnancy.

Role of mental health professional

The definitive signs of genital trauma are seldom seen in cases of child sexual abuse (Adams JA et al 1994). So, the medical examination and medical care of child sexual abuse victim requires special skills and techniques in history taking, interviewing forensic data collection and also in physical examination. The role of mental health professional is vital in interviewing the child in the court of law. Child sexual abuse has both short-term and long-term harmful mental health effect. Mental health professionals required to be engaged in follow up care of the victim with regard to emergence of any psychiatric disorders, by giving individual counselling, family therapy and rehabilitation (Sathyanarayana Rao TS. et al 2013).

Conclusion:-

Thus we can see that Indian legal framework provides for specific progressive provisions in various Acts and in the special law for the protection of child from sexual abuse to deal with the medical care of the victims of child sexual abuse. The rise in the reported cases sexual violence against children and women and the gaps in responding to the needs of survivors of sexual violence at various levels, we also have standardized protocols (MHFW 2014) for care, treatment and rehabilitative services for survivors of sexual violence. But there are certain complexities in dealing with the medical care of the victims of child sexual abuse. In order to tackle this main strategy recommended is to provide immediate training and awareness for the various stakeholders including doctors. A multi-dimensional, multi-agency team and multi-tier approach including access to psychological support is to be made available to deliver holistic comprehensive care under one roof for victims of child sexual abuse (Harbishettar v et al 2014).

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CHILD MARRIAGE AND CHILD SEXUAL ABUSE IN THE TIME OF POCSO ACT – AN ANALYSIS

HINDT. RASHEED

Abstract

The Protection of Children From Sexual Offences Act, (POCSO Act) 2012 is a significant legislation which enacted in response to the rapid increase in the instances of grave sexual offences against children and low rates of conviction for the same. The purpose of the Act is to put an end to the sexual offences against children and punish and create fear at the hearts of the offenders and also to ensure the physical and mental development of the children. Significantly departing from suggestions made by the National Commission for the Protection of Child Rights and other socio-legal luminaries, the Act lifted the qualification age of a child from the extant below 16 years to now below 18 years. This step made some inconsistencies in the existing scenario of Indian society. Thus this paper shall examine the implications of the POCSO Act on child marriages in general and ‘love’ marriages in particular. It is a reality that one-third of rape cases in India are filed by parents against boys when their daughter exercises her sexual choice and elopes with him. In this perspective, the issue of “Age of Consent”, (i.e. the age at which the law should allow children to engage in sexual acts) in the Act assumes a great importance. According to the legislation all individuals under the age of 18 are ‘children’ and

engaging in sexual activity with such individuals is a punishable offence. Hence the paper also analyses the approach of law towards the consensual sex between the adolescents and what role and up to what extent, does ‘age of consent’ issue play, while dealing with laws relating to sexual offences. The author tries to underline the problematic aspects of uniform age of consent.

Child marriage and child sexual abuse in the time of POCSO Act - An analysis

Introduction

Child marriage is defined as a marriage to which either of the contracting parties is a child. ‘Included under the umbrella term “child marriage,” are a number of different practices in which at least one of the parties is under the age of 18. It refers to marriages that are physically forced, or arranged with or without consent between parties of like age or where one party is considerably older than the child bride.’² It is a socially established practice that has been carried on for centuries and of course with the support of religion and family. It is important that according to the report of UNICEF it is found as a universal phenomenon. But it is common in Sub Saharan Africa and South Asia. In south Asia it is widely

The Prohibition of Child Marriage Act 2006 s 2(b)

www.humanrightsadvocates.org/wp.../05/DahlstromReportFinal.doc p 12

prevalent in Bangladesh, Afghanistan, Nepal, Pakistan and India.³ According to UNICEF child marriage is a main form of child sexual abuse and perhaps the most prevalent form of sexual abuse and exploitation of girl children.⁴ In child marriages the girl child is subjected to more abuses than the boy child. Because child marriage ultimately determines the girl child's eventual sexual partner, it also determines her sexual relations. For this reason, child wives are at a greater risk of both physical and sexual abuse.

Child marriages are widely prevalent in India despite the promulgation of various laws. In India the Child Marriage Restraint Act 1929 was taken the role of restraint than prohibition. It was only in 2006 a new legislation The Prohibition of Child Marriage Act, 2006 was introduced. It seeks to prohibit the solemnization of marriages of girl below the age of 18 years and boys below the age of 21 years.⁵ The Act prescribes penalties for the solemnization, promotion, and allowing of child marriages. A male above 18 years of age can be punished under the Act for contracting a marriage with a girl less than 18 years.⁶ But the Act is silent on sexual relations in a child marriage. It extends legitimacy to children born of child marriages thus indirectly acknowledging sexual intercourse within a child marriage.

Under the Indian Penal Code, 1860 (IPC), sexual intercourse by a man with his wife above 15 years of age, is an exception to rape.⁷ The Criminal Law Amendment Act, 2013 raised the age of consent to 18 years but did not disturb this exception. As a result, sexual intercourse with a wife above 15 years of age and below 18 years of age will not amount to rape under the IPC.

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act), was enacted to protect children from offences of sexual assault, sexual harassment and pornography and to provide a child-friendly system for the trial of these offences. The Act provides for seven specific sexual offences against children and stipulates child-friendly legal procedures that must be adhered to during investigation and trial. Under the POCSO Act, the term "child" has been defined to mean "any person below the age of eighteen years"⁸. The Act does not recognize sexual autonomy of children in any form. Children can also be held liable for committing sexual offences under the Act. As a result, sexual interactions or intimacies among or with children below the age of 18 years constitute an offence.

Child sexual abuse and marital rape exception

The POCSO Act penalizes all the sexual activities of the person below the age of eighteen

UNICEF, The State of the World's Children, (2007) <http://www.unicef.org/sowc07/report/report.php>.

http://www.unicef.org/chinese/protection/files/Child_Marriage.pdf

Supra n 1 s2 (a)

Supra n 1 s3(1)

⁷ Exception 2, Section 375, Indian Penal Code, 1860

Section 2(1)(d), Protection of Children from Sexual Offences Act, 2012.

years irrespective of the gender or age of the victim or the accused. Further, one of the grounds of aggravated penetrative sexual assault is penetrative sexual assault by “a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child commits penetrative sexual assault on such child.”⁹ This is punishable with a fine and a minimum term of 10 years imprisonment which may extend to life imprisonment.¹⁰ But the IPC provides for a marital rape exception which states that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.¹¹ The contradiction is that in one hand under the POCSO Act, a spouse of a person below the age of 18 years can be prosecuted irrespective of whether the marriage has been contracted voluntarily, a person having sexual contact with a person under 18 years can be punished on the other hand the marital rape exception still exist in our criminal law. Besides this it is important to note that a ‘married woman’ under the Code who is above the age of 15 but below the age of 18 is also a child under the Act. Therefore, any form of sexual relations with such a ‘married woman’ would amount to an offence under the Act while the same Further, it is now

mandatory for those who have information about the commission of a sexual offence to report it to the local police. The new amendment of the POCSO Act which was introduced by the Criminal Law Amendment Act, 2013 essentially implies that in case of conflict between the provisions of the POCSO Act and any other law, the former will override.¹² Thus, in all cases of child marriage where the bride or groom is below 18 years of age, a charge of aggravated penetrative sexual assault can lie against them under the POCSO Act. This will lead to an unintended situation of the restoration to child marriage in order to evade criminal prosecution.

Child marriage and Love

It is an undeniable fact that it is a social reality that the existence of child marriage which is still rampant in India. UNICEF’s State of the World’s Children Report 2012 says that 47 percent of Indian children aged below 18 are married¹³ and 26 percent of these married children do indulge in sexual activity.¹⁴ As stated above while the Prohibition of Child Marriage Act, 2006 forbids marriage below the age of 18 for girls and 21 for boys, it neither makes such marriage null nor void unless of course either of the parties seeks annulment.¹⁵ Such a provision in the Child Marriage Act brings it in direct conflict

Supra n 8, s 9(n)

¹⁰ *Ibid* s 10

¹¹ *Supra* n 7

¹² S 42A POCSO Act reads as: not in derogation of any other law, - The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of its inconsistency.

¹³ The State of the World’s Children 2012, UNITED NATIONS CHILDREN’S FUND 121 (2012), http://www.unicef.org/sowc/files/SOWC_2012-Main_Report_EN_21Dec2011.pdf.

¹⁴ Abantika Ghosh, NCPCR unhappy with revision in age of consent for sex, THE INDIAN EXPRESS, (Jul. 11, 2012), <http://www.indianexpress.com/news/ncpcr-unhappy-with-revision-in-age-of-consent-for-sex/972746>.

¹⁵ *Supra* n 6

with the POCSO Act as it has created a situation wherein the existence of child marriages is tolerated on one hand while any form of sexual relations which emanate from such relationships has been made punishable. Hence, it indirectly allows consensual sexual acts and it validates the legitimacy of offspring from such a relationship. In 2012, Sandeep Paswan stood trial for raping and kidnapping a minor girl, the same minor girl who was his lawfully wedded wife and with whom he had been cohabitating for over a year. But owing to the provisions of POCSO Act he was facing charges for raping and kidnapping his own wife.¹⁶ Smriti Singh,

Raising age of consent for sex to 18 regressive, undemocratic: Court,

There have been a number of cases in which girls between the ages of 16-18 years have left their homes on their own and with a man of their choice. In such cases, it is the parents of the girl who will usually file a case against the man alleging kidnapping from lawful guardianship, rape, and sexual assault. The question is whether there should be criminal consequences in cases where girls elope with and/or marry a man they claim to love. In such a case the Delhi High Court¹⁷

observed that it is “distressing” that the IPC “acquiesces child marriage” by stating that sexual intercourse by a man with his wife above the age of 15 and below the age of 16 years is not rape. The Indian Majority Act, Hindu Minority and Guardianship Act, 1956 and the Dowry Prohibition Act, 1961 also recognize child marriages and “destroy the very purpose and object of the Prevention of Child Marriage Act to restrain and prevent the solemnization of Child Marriage.” The court then tried to distinguish the situation of girls below and above 16 years of age. In cases of marriage of a girl below the age of 16 years, her consent would be immaterial. However, the court stated that “...there can be special or exceptional circumstances which may require consideration, in cases where the girl even after attaining majority affirms and reiterates her consent.” They also held that consummation with a wife below age of 15 years is an offence and in such cases whether she is married or applicable personal law provides otherwise, is irrelevant. As is evident from the above ruling, the distinction based on age was linked to the marital rape exception under the IPC. But after the enactment of POCSO Act where the Special Courts in emerging cases of this nature have taken different positions on this issue.¹⁸ The reality is that these

¹⁷ Lajja Devi v. State 2012 VIAD (Delhi) 465 With respect to girls above the age of 16 years, it held: “If the girl is more than 16 years, and the girl makes a statement that she went with her consent and the statement and consent is without any force, coercion or undue influence, the statement could be accepted and Court will be within its power to quash the proceedings under Section 363 or 376 IPC. Here again no straight jacket formula can be applied. The Court has to be cautious, for the girl has right to get the marriage nullified under Section 3 of the PCM Act. Attending circumstances including the maturity and understanding of the girl, social background of girl, age of the girl and boy etc. have to be taken into consideration.”

¹⁸ Child Marriage and the Protection of Children from Sexual Offences Act, 2012 <https://www.nls.ac.in/ccl/justicetochildren/poscoact.pdf> p 3, and 4: 1). A 15-year-old girl eloped with and subsequently married a 22-year-old man. Based on a complaint by the mother, the couple was traced and the man was booked for kidnapping and rape under the IPC and POCSO Act. Dharmesh Sharma, Additional Sessions Judge rejected the view that the POCSO Act criminalizes even consensual sexual relationships, acquitted the accused, and

cases¹⁹ have posed considerable difficulties before the courts. They have found it difficult to convict the accused when the prosecutrix did not support the case of the prosecution and claimed to have gone willingly with the man.²⁰

Conclusion

With rapidly changing contemporary attitudes in urban India, social sensibilities have seen a paradigm shift in adolescent sexual curiosities leading to increased experimentation with one's sexuality.²¹ A detailed report by the Indian Institute

observed: "I am afraid if that interpretation is allowed, it would mean that the human body of every individual under 18 years is the property of the State and no individual below 18 years can be allowed to have pleasures associated with one's body. In my opinion, it would neither serve the object of present enactment, nor the purpose of criminal law to hold the accused guilty on the ground that he had sexual intercourse with a girl below 18 years." 2) The mother of a 14-year-old girl alleged that her daughter has been repeatedly raped by their landlord and had become pregnant as a result of it. The accused was arrested. However, at the bail hearing the parties decided to compromise the matter as the accused agreed to marry the girl and offer financial support to her mother. He was granted interim bail and the couple married in the course of the trial. Thereafter, the prosecutrix and her mother turned hostile. They claimed that the prosecutrix was 18 years of age and was in love with the accused. She had indulged in sexual intercourse with him under the belief that he would marry her. When she became pregnant, he refused to marry her and she then filed a case against him. The accused claimed that he did not commit fraud by performing marriage with her on account of this case. On its part, the Court attempted to discern the consensual nature of the decision made by the girl and then finally acquitted the accused when the girl refused to support the prosecution's case. 3) A Muslim man was arrested for kidnapping and raping a 17-year-old girl. At his bail hearing, he claimed that the couple loved each other and intended to marry. Kamini Lau, Additional Sessions Judge rejected his bail and observed "Merely because both the girl and the accused happen to be from the same religion i.e. Muhammadan-whose Personal Law provides for a different age of marriage than the one provided under the statutory law of the land-does not mean any special indulgence is required to be given to the accused as far as criminal law of this land is concerned." Further, she held "Muslim parents are as much entitled to protect their minor daughters from sexual abuse and exploitation as any other Indian irrespective of religious considerations. No separate parameters can be adopted for Muslim offenders only because the complainant happens to be from the same religion.

¹⁹ Anon, "Consensual sex with minor not a crime, Delhi court says", Times of India, 26 August 2013, http://articles.timesofindia.indiatimes.com/2013-08-26/delhi/41454391_1_minor-girl-15-year-old-girl-18-years. State v. Aas Mohammad, 78/3013, Sections 376 and 506 of IPC and Sections 4, 6, 10 of POCSO Act. Judgment dated 13.08.2013. Decided by Sh T.S. Kashyap, Additional Sessions Judge -01, Special Judge (NDPS), Shahdara District, Karkardooma Courts, Delhi. See also Anon, "Muslim man's age plea denied in rape case", Times of India, 25 September 2013, http://articles.timesofindia.indiatimes.com/2013-09-25/delhi/42392078_1_pocso-act-criminal-law-marriage

²⁰ Supra n 18

²¹ Chitwan Deep Singh, Prasanthpranjali & Sahilarora, *The Protection of Children From the Sexual Offences Act, 2012: A critique of the decision to raise the age of consent for sexual relations*, JOURNAL OF INDIAN LAW AND SOCIETY 282 (2013).

of Population Studies states that among those people who reported to be in pre-marital romantic partnerships, 42 per cent of men and 26 per cent of women admitted to engaging in sex with their partners with a sizeable number being under the age of 18.²² Therefore, criminalizing sex between adolescents in a society where it is quite prevalent would lead to making thousands of men susceptible to rape cases whenever the issue of lack of consent comes up. More importantly, this underlines the problematic aspects of uniform age of consent. Given that the age of consent is fixed at 18 years, sexual intimacies and interactions among or with children in the age group of 16-18 years has been criminalized. In India, even though child marriage is prohibited under secular law, it enjoys sanction under the Hindu Marriage Act and Muslim Personal Law thus complicating matters. If personal laws are allowed to override the POCSO Act, it will lead to the discriminatory application of the law. In this regard, the National Commission for Protection of Child Rights (NCPCR) Bill, 2010 is informative. It proposed that any consensual sexual act that may constitute penetrative sexual assault should not be an offence when it is between two children who are both above 14 years of age and are either of the same age or the difference in age is not more than three years.²³ It is imperative that the

Act be amended to address this inconsistency. The strict enforcement of punitive measures adopted recently is an attempt to force people to change their sexual and reproductive behavior. How far the law can penalize such a natural urge in the absence of proper sex education the imparting of which is an implicit right of the people under Article 21A of the constitution. Also the youth of the nation have the right to access information and education about sexual rights, sexual orientation, sexuality, social relationships and gender identity available to them under International Conference on Population and Development programme of action (1994).

It is also submitted that it is not possible to eradicate a social evil with the stringent punishments provided by law. We need to work towards creating more secure and child friendly societies where children can be raised with love care and affection so that elopement is not the only choice for them to express their freedom and autonomy. It is the duty of state authorities, its machinery, NGOs and women groups to create public awareness on various aspects of life in case of marriage at a tender age and in adolescents and young adults about the serious psychological and physical health issues that such a relation entails.

²² Two Hundred Fortieth Report on The Protection Of Children From Sexual Offences Bill, 2011, DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, Cl. 6.8 (Dec 21, 2011), <http://nlrd.org/wpcontent/uploads/2012/01/240-TH-REPORT-ON-PROTECTION-OFCHILDREN-FROM-SEXUAL-OFFENCES.pdf>.

²³ Section 3 of the Protection of Children from Sexual Offences Bill, 2010 prepared by the National Commission for Protection of Child Rights deals with 'unlawful sexual act with the child' and states that any sexual act with the child under the age of sixteen years with or without the consent of the child is an offence except in the two circumstances mentioned. The situation mentioned here is the exception in Section 3(ii) reads as "Any consensual sexual act penalized by this chapter (except for sections 23, 25, 27 and 31) is not an offence when engaged in between two persons who are both over 14 years of age and are either of the same age or whose ages are 5 within 3 years of each other." Situations mentioned under Sections 23 (Unlawfully stripping the child in public view), Section 25 (Child pornography), Section 27 (Blackmailing for a sexual act) and Section 31 (Stalking a child) are excluded from these exceptions and will continue to be offences irrespective of the age of the children involved in such act.