

A CRITICAL ASSESSMENT OF THE WORKING OF CHILD SEXUAL

ABUSE LAWS IN INDIA

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PREFACE

The lawmakers have for long ignored the glaring loopholes in the prevailing laws concerning sexual offences directed against children. Thus, the enactment of the Protection of Children from Sexual Offences Act, 2012 is an obvious step forward but it has its shortcomings too. Child Sexual abuse is maybe one of the most exceedingly bad risks that India confronts today. Dissimilar to different manifestations of sexual misuse, we can't enjoy faulting the victimized person or other outer strengths (like the impact of Western society). Child sexual misuse tosses a mirror to the general public and demonstrates a face of humankind we are hesitant to see. The main way we can battle what we see in this mirror is by first looking the issue straight in its eyes as opposed to brushing it far from anyone's regular field of vision.

Save the Children Norway and CWIN Nepal, in a 2003 Report stated:

“Child survivors of sexual abuse should not only be treated as victims. They should be empowered and encouraged to live a dignified life”.

This research work is an endeavour to contribute a little more towards the concern.

DECLARATION

I, AARZOO AGARWAL, do hereby declare that the dissertation titled “A CRITICAL ASSESSMENT OF THE WORKING OF CHILD SEXUAL ABUSE LAWS IN INDIA” submitted by me for the award of the degree of MASTER OF LAWS of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.



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- 1872 - Indian Evidence Act
- 1948- Universal Declaration of Human Rights
- 1949- The Constitution of India
- 1956- The Immoral Traffic (Prevention) Act
- 1971- The Medical Termination of Pregnancy
- 1973- The Code of Criminal Procedure
- 1986- Child and Adolescent Labour (Prohibition and Regulation) Act
- 2000- The Information Technology Act
- 2005- Commission on Protection of Child Rights Act
- 2006- Prohibition of Child Marriage Act
- 2009- The Right of Children to Free and Compulsory Education Act
- 2013- The Protection of Children from Sexual Offences Act
- 2013- The Criminal Law (Amendment) Act
- 2015- The Juvenile Justice (Care and Protection) Act
- 2016- Right of Persons with Disabilities Act
- 2018- The Criminal Law (Amendment) Act

INTERNATIONAL INSTRUMENTS

- 1953- European Convention on Human Rights
- 1959- Declaration of the Rights of the Child
- 1989- Convention on the Rights of the Child

TABLE OF ABBREVIATIONS

1.	ACP	Assistant Commissioner of Police
2.	ADM	Additional District Magistrate
3.	ASHA	Accredited Social Health Activist
4.	CALPRA	Child and Adolescent Labour (Prohibition and Regulation) Act
5.	CARA	Central Adoption Resource Agency
6.	CCI	Child Care Institutions
7.	CCPWC	Cyber Crime Prevention against Women and Children
8.	CCL	Child in Conflict with Law
9.	CIF	ChildLine India Foundation
10.	CJM	Chief Judicial Magistrate
11.	CMPO	Child Marriage Prohibition Officer
12.	CNCP	Child in Need of Care and Protection
13.	CPCR	Commission for Protection of Child Rights
14.	CRC	Convention on the Rights of the Child
15.	CrPC	Criminal Procedure Code
16.	CSA	Child Sexual Abuse
17.	CPCR	Commission for Protection of Child Rights
18.	CWC	Child Welfare Committee
19.	DCPC	District Child Protection Committee

20.	DCPO	District Child Protection Officer
21.	DCPU	District Child Protection Unit
22.	DGP	Director General of Police
23.	DM	District Magistrate
24.	ECHR	European Convention on Human Rights
25.	FIR	First Information Report
26.	ICCPR	International Covenant on Civil and Political Rights
27.	ICPS	Integrated Child Protection Scheme
28.	IPC	Indian Penal Code
29.	ITPA	Immoral Traffic (Prevention) Act
30.	JJ Act	Juvenile Justice Act
31.	MTPA	Medical Termination of Pregnancy Act
32.	MWCD	Ministry of Women and Child Development
33.	NALSA	National Legal Service Authority
34.	NCPCR	National Commission for Protection of Child Rights
35.	NCRB	National Crime Records Bureau
36.	NGO	Non Government Organisation
37.	NHRC	National Human Rights Commission
38.	PCMA	Prohibition of Child Marriage Act
39.	PIL	Public Interest Litigation
40.	POCSO	Protection of Children against Sexual Offences
41.	PRI	Panchayati Raj Institutions

42.	SC	Supreme Court
43.	SCPCR	State Commission for Protection of Child Rights
44.	TIP	Test Identification Parade
45.	UDHR	Universal Declaration For Human Rights
46.	UNCRC	United Nations Convention on the Rights of the Child
47.	UNICEF	United Nations Children's Fund
48.	UN	United Nations
49.	v.	Versus
50.	VLPCP	Village Level Child Protection Committee
51.	WHO	World Health Organisation

CHAPTER 1

INTRODUCTION

1.1 Background

“Children are the great promise of tomorrow, the dawn of humanity and buds of social development”¹. Children are “supremely important national assets”² and are “the greatest gift of humanity”³. The truth remains, however, that even today, children are part of the marginalized minority community in terms of human rights and social justice. The main explanation for this shortcoming is that children are still not a complete political force in the true sense of the term. In fact, they are usually physically, psychologically and economically defenceless. And when it comes to abuse of children, protecting them, safeguarding their rights and ensuring a conducive environment for their growth and development holds paramount importance given their vulnerable position in the society.

The criminal laws of India provide numerous stringent measures towards curbing and punishing abominable sexual crimes, but the segment of child centric legislation was quite neglected of the exclusive attention it deserved until late. The recent years have seen an inexplicable rise of cases of child sexual abuse. Heinous as it sounds, the ramification of such acts are equally grave not only on the child but also on the entire social structure. In the wake of many recent incidents, the previously frail framework of child sexual abuse related laws has witnessed much development in the form of strengthened substantive and procedural legislation. But a look into the recent statistics of child abuse reporting and redressal raises questions on the adequacy and more importantly, the efficacy of the laws currently in place.

According to the NCRB data, “32,608 cases were reported in 2017 while 39,827 cases were reported in 2018” under the Protection of Children from Sexual Offences Act (POCSO). The reported number is quite less as compared to what studies suggest but even lower is the number of cases timely disposed off. Law Commission⁴ reports have also expressed opinions for revamp in the existing bodies but not much work has

¹ UNICEF, HIDDEN IN PLAIN SIGHT: A STATISTICAL ANALYSIS OF VIOLENCE AGAINST CHILDREN 77 (2014).

² Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244,249.

³ Bandhua Mukti Morcha v. Union of India, (1997) 10 SCC 551, 553.

⁴ K. K. Geetha, Revisiting Rape Laws - Need of the Hour, 3 NIRMA U. L.J. 75 (2013).

been substantiated in that sector as well. As many as 109 children were sexually abused every day in India in 2018, which showed a 22 per cent jump in such cases from the previous year.

International instruments such as the Convention on the Rights of the Child (CRC)⁵, The International Covenant on Civil and Political Rights (ICCPR)⁶ and various other international as well as national forums from time and again have been laying down guidelines for the effective protection of children emphasising on sexual offences which have deep rooted mental, physical and psychological repercussions not just on the child being exploited but also his family leading to moral degradation of the entire societal structure when justice isn't timely and rightly delivered if at all delivered.

The extent of child abuse and neglect can be expressed in terms of frequency and occurrence rates. It is difficult to determine the point when exploitation and neglect usually occurs. The incidence rates that measure the prevalence of new cases are extremely contentious. A prime issue relating to assessing the problem of child sexual abuse is that it is extremely difficult to get responses from children on such a sensitive subject because of their inability to fully understand the different dimensions of their right violation and to talk about them. Acute data on abused children is therefore very difficult to obtain. Furthermore, the concept of abuse and violation of children's rights is not yet clear across countries. This varies from state to state, from region to region. In spite of this, the estimated number of abused and neglected children is alarming and unless the governments act in unison and respond to the situation by way of both prevention and treatment, it will be great injustice to children and they will be denied their basic rights. Indeed, determining the true extent of child maltreatment issue is more an expectation than a realistic goal. Accurate data is difficult to obtain due to a number of factors; the main among them is reluctance that surrounds reporting.⁷

For the purpose of this dissertation, the legal and policy framework and the enforcement machinery in place along with the follow up mechanism to address the different kinds of sexual abuse against children has been analysed while discussing

⁵ Convention on the Rights of the Child, 20 November 1989, Art. 37, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (1989), entered into force September 2, 1990.

⁶ <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (Jan. 18, 2020, 4:32 PM).

⁷ Violence in the Family: Child Abuse, Encyclopedia of Crime and Justice, Vol. IV (1990).

the lacunae where the state efforts fall short. The research also aims to comprehensively suggest alternative and reinforced measures to cater to this issue by throwing light on the different perspectives that lead up to such offences and how strengthening the procedural mechanism along with combined legislative action can help create positive outcomes towards this societal menace. There exist important reasons which led the researcher to choose the issue of child sexual abuse, *viz.*

- The researcher during her work at the trial courts has closely experienced the working of POCSO and allied laws which led to the identification of the plausible root causes that forms the groundwork of this research.
- The rising recent statistics and reports of child sexual abuse in spite of various newly enacted laws and procedures raise serious questions about the effectiveness of such enactments. Hence, an analytical study would help in an in-depth understanding of the matter.
- Much work is being substantiated in the sector of protecting children from sexual abuse. Thus, a close scrutiny through focussing on the various duty holders involved in delivering justice enables the researcher to present the study through the lens of those actually involved on ground.
- The arena of pre, during and post trial rehabilitation lie much ignored and need to be equally catered to curb the issue.

1.2 Review of Literature

Kumar⁸ has provided officials and everyone else working in the realm of care and protection of children with comprehensive and detailed knowledge about their responsibilities as enshrined under the various legislations concerning children. It takes a note of the fact that there lies immense ignorance and laxity among the duty holders regarding their modes of functioning and the use of the power and functions entrusted to them. A holistic picture is presented of the ecosystem of child protection as well as the fragmented network where lack of collaboration and symphony among the various departments causes shortfalls in the redressal of the victim issues. The book draws insights on the procedure of restoration of the child victim after doing an in depth study and detailed measures and follow up provisions encompassing medical, physiological and psychological support.

⁸SURENDRA KUMAR, ROLE OF DUTY BEARERS IN CHILD PROTECTION 74-95 (1st ed. 2019).

Khan⁹ explains exhaustively the normative framework of child abuse laws both at the International level as well at the domestic policy formulation and showcases the laws in mechanism to address child sexual abuse issue as it stands now. Inputs regarding the international instruments for protection of children before and after 1989, the Vienna guidelines and the optional protocol to the CRC which has been recently added, have immensely helped the researcher to formulate a groundwork on which the existing policies could be scrutinized and new changes be suggested. However, the book fails to bring fore the actual on ground reality confining itself mostly to the theoretical legal provisions.

Malik¹⁰ has taken note of the views and rulings by various courts and studied them in contrast with the traditional law on the subject of sexual offences against children. He has done an extensive study on the Criminal Amendment Act 2013 as this act has transmitted the effect of the POCSO Act to the general criminal jurisprudence. He has also adopted a novelty in approach by scrutinizing the various provisions in details in context with the international developments around the globe. The book also throws lights on the grey areas of the child legislation in India and has helped the researcher to understand the problems still subsisting in the present day framework.

Walby¹¹ discusses on the reforms needed in the healthcare system and the efforts that need to be put in by the State authorities so that through victim rehabilitation the fight against child abuse is strengthened. She has emphasised that the provision of immediate assistance to victim-survivors of abuse is the central contribution of the health sector to the mitigation of the harms of abuse and to abuse prevention. The health consequences of such acts involve both physical and mental trauma, and require a range of interventions, flexible in response to victim-survivor choices. Although her work focuses on such cases in fragile crisis zones but it has helped the researcher enormously to suggest such measures in the context of the child in the domestic sphere.

⁹ NUZHAT PARVEEN KHAN, CHILD RIGHTS AND THE LAW 37-117, 326-438 (2nd ed. 2016).

¹⁰ PRATAP S. MALIK, A COMPLETE GUIDE TO PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT (POCSO)(1st ed. 2016).

¹¹ SYLVIA WALBY, VICTIM SERVICES AND HEALTHCARE SYSTEMS, STOPPING RAPE: TOWARDS A COMPREHENSIVE POLICY 59-110 (1st ed. Bristol University Press, 2015) www.jstor.org/stable/j.ctv4g1rd0.8. (Feb. 21, 2020, 9:49 PM).

Murray, Nguyen and Cohen¹² explain that before delving into what are the implications of any legal crime it is pertinent to understand what constitutes that crime along with its phenomenology. Through various analyses and surveys the article brings to fore the causes and factors leading to aggravated sexual offense against children while also emphasizing on the factors affecting the disclosure raids. Numerous assistance are involved after such sexual abuse has been experienced by a child and the efficiency during their intervention and interdependent nature of multiple services having a multi-disciplinary approach combined with therapeutic strategies for the sexually abuse children and their families is the need of the hour. Cultural considerations act as huge barriers and focus is made on the current trends of the shift from laboratory to real life settings with wider scale dissemination and implementation.

Singh and Nair¹³ have through various empirical data collected from databases such as PubMed, Google scholar, newspaper reports, and government websites explored the global scenario of the problem of child sexual assault. The article compares the position with India and further explains the multi centric and an integrated approach for the control and prevention mechanisms. It presents a holistic view of the trends in the increase of child sexual abuse crimes and portrays through data the vulnerability of different age groups becoming victim to abuse.

1.3 Statement of Problem

Legislative action is one of the most effective means to deal with any wrong perpetuated against any segment of the society. The lack of coherence among the legislations and procedural guidelines often brings the entire purpose of the law and progress in addressing the issue to a standstill. The current legislative framework has been recently improved to more effectively address the concern, yet the society is grappled in a complex socio-legal maze when it comes to addressing child sexual abuse.

¹² Laura K. Murray et al., Child Sexual Abuse, CHILD ADOLESC PSYCHIATR CLIN N AM., Apr 2014, 321–337.

¹³ Sreekumaran N. Nair et al., An Epidemiological Overview of Child Sexual Abuse, J FAMILY MED PRIM CARE (Jan 24, 2020, 11:42 AM) /0 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4311357/>.

Children constituting the formative stage of the components of a State deserve more attention and proactive protective action. The review of the existing literature shows that steps are indeed being taken at the domestic and international levels to strengthen sexual abuse laws pertaining to children. But these steps have not been able to encompass the all-round rendering of justice- procedural and restorative as is revealed by the lacunae in the working of the judicial as well as the involved administrative and executive system.

1.4 Aims and Objectives

The aim of this dissertation is to analyse factors contributing to the surmounting issue of child sexual abuse of children in India where a significant percentage of its population lies in the tender age group and also the flaws in the legislative and enforcement machinery that are the major hindrances towards tackling the menace.

In order to achieve the aim of this dissertation, the researcher has endeavoured to set forth the following objectives:

- To determine the underlying cause of the steadily rising number of child sexual abuse.
- To study the available national and international instruments working on the segment of protection of children from sexual abuses.
- To determine the loopholes that hinder speedy disposal of child sexual abuse cases along with the factors contributing to the low seeking of redressal from the authorities deputed for the purpose.
- To understand the shortfalls of the enforcement, the redressal machinery and the hurdles encountered by the victims in the procedural and institutional facilities provided to them by the State.
- To conduct a study on the working of stakeholders who are involved in rendering justice to victims of child sexual abuse.
- To suggest legislative and administrative reforms in order to remedy the current lack in effectiveness of laws relating to child sexual abuse.

1.5 Research Hypothesis

For the purpose of this dissertation, the researcher hypothesises that:

- The laws formulated for catering to protection of children against sexual abuse are inadequate to deal with the surmounting crisis.
- There is not enough infrastructure, support and safeguard for the victims of child sexual abuse and their families and guardians.
- There is lack of awareness and coherence amongst the duty holders entrusted with the task of ensuring compliance with the existing legislation.
- There is immense delay in completing the entire trial and redress process which impedes with filing of cases or staying put throughout the entire judicial process.
- The domestic laws and policies of India are not at par with the developments around the world to stringently deal with cases of child sexual abuse.

1.6 Research Questions

For the purpose of ascertaining the scope of her study, the researcher has formulated the following research questions:

- What are the legislations provided by the state to protect children from sexual abuse?
- What are the major causes and factors accounting for and leading to child sexual abuse crimes in India?
- Whether the existing mechanisms in place adequately addressing the issue at the international and the domestic level?
- What shortcomings in the judicial process and the current legislative framework are hindering the progressive action being taken in the recent years in the child sexual crime-centric domain?
- Whether the current manner of handling and disposal of child sexual abuse cases adequately serve the ultimate purpose behind the enactment of the law?

1.7 Research Methodology

In writing this dissertation, the researcher has adopted doctrinal method of research to make a study of the existing rights and laws that protect children against sexual abuse; the various factors that exert influence on the procedure enlisted under law regarding offences of child sexual abuse; and to assess the development and progress vis-a-vis international and domestic standards.

The researcher has extensively relied on the empirical data collected from secondary sources to gauge the on ground working of the organs involved in exercising influence and implementing the existing laws and also to understand the challenges faced by the duty holders in effective discharge of their duties. A qualitative approach has been adopted while conducting the empirical research concerning the subjective assessment of opinions, attitudes and behaviour of the respondents as well as for the collection of some data that throw light on the mindset and awareness among the general population towards child sexual abuse. The primary tool used is survey method where the 'child-centric approach' is the central theme.

1.8 Scope and Limitations

This dissertation essentially extends to studying the prevalence of child sexual abuse ranging from the use of abusive language, subjecting the child to mental strains to the committing of the most violent and heinous crimes like rape and murder. There have been numerous reforms in the domestic laws, therefore this research also comprises a study on the current trend of handling of such cases pre-trial, during the ongoing trial and post-trial and the enforcement machinery employed to look over the purpose. The research also lays emphasis on a 'victim-centric' approach.

A major limitation of this research lies in the fact that the researcher had to face impediments and constraints due to paucity of time, finances and more importantly due to the prevailing situation of closure of all departments and offices in the wake of COVID-19. The researcher was also unable to reach out to the respondents in the course of the research to pursue her originally intended empirical study.

1.9 Sources of Data

The researcher has utilised both primary and secondary sources in writing this dissertation.

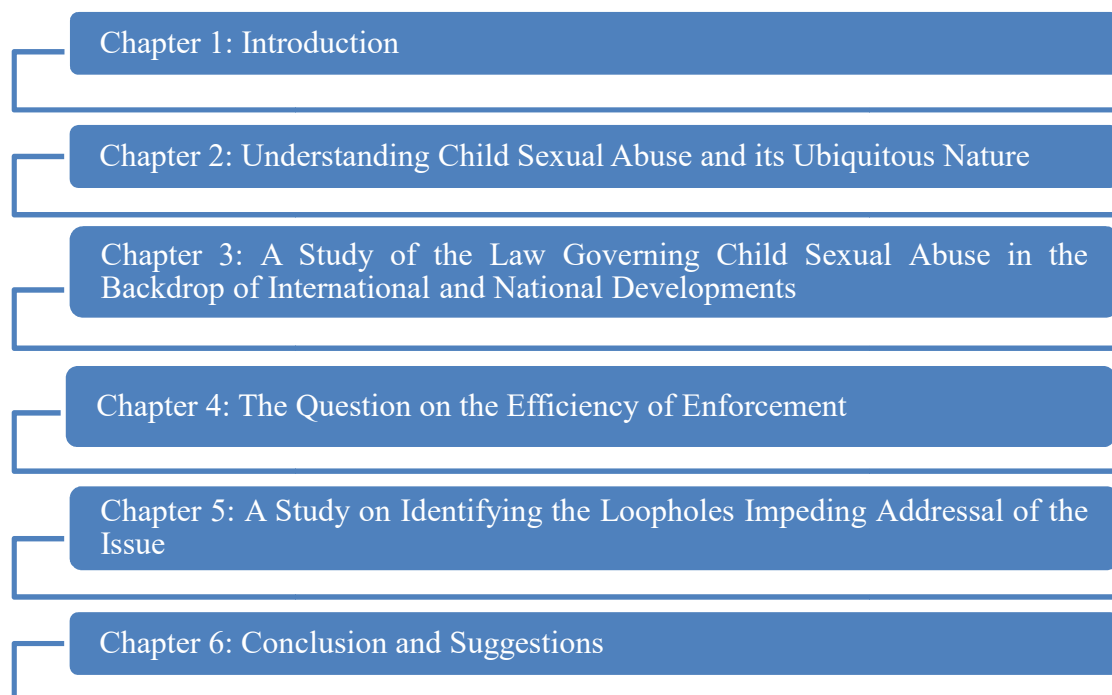
The primary sources include international instruments; national legislation; and case laws in addition to the data collected in pursuance of the empirical study intended to be undertaken.

The secondary sources comprise of a number of books, articles published in journals, magazines and newspapers, reports and internet sources.

1.10 Mode of Citation

A uniform system of citation has been adopted throughout the dissertation. The Bluebook uniform system of Citation (20th edition) has been adopted.

1.11 Chapterization



Chapter 1: Introduction
Chapter 2: Understanding Child Sexual Abuse and its Ubiquitous Nature
Chapter 3: A Study of the Law Governing Child Sexual Abuse in the Backdrop of International and National Developments
Chapter 4: The Question on the Efficiency of Enforcement
Chapter 5: A Study on Identifying the Loopholes Impeding Addressal of the Issue
Chapter 6: Conclusion and Suggestions

Chapter 1: Introduction

This chapter provides an introduction to the dissertation and contains the research methodology in addition to providing an apt background to the entire dissertation.

Chapter 2: Understanding Child Sexual Abuse and its Ubiquitous Nature

This chapter provides an overview of what constitutes child sexual abuse, its pervasive nature in all institutions of the society and the needs of those victimised by such actions.

Chapter 3: A Study of the Law Governing Child Sexual Abuse in the Backdrop of International and National Developments

This chapter traces the developments nationally and internationally on laws dealing with child sexual abuse throughout the course of history. The chapter also includes a comparative study with an analytical eye on the rights recognised and issues addressed in the current domestic framework vis-a-vis the reformative rules formulated and actions suggested by global forums and the extent of compliances that India has been able to achieve.

Chapter 4: The Question on the Efficiency of Enforcement

This chapter discusses in detail the bodies and institutions entrusted with the task to comprehensively enforce the mandates of child sexual abuse laws. This chapter comprises of an analysis of the different dutyholders including police, child welfare officers, judicial officers and others working in the realm of disposing child sexual abuse crimes in a properly laid and effective manner. It also studies the areas where the current institutions fall short to attain their objective.

Chapter 5: A study on Identifying the Loopholes Impeding Addressal of the Issue

This chapter tries to point out and study what are the major issues encountered by child victims of abuse which fail the attempts by current legislations and institutions to effectively curb sexual abuse of children.

Chapter 6: Conclusion and Suggestions

This chapter concludes the dissertation wherein the testing of the hypotheses has been done and an effort to offer suggestions has been made by the researcher.

CHAPTER 2

UNDERSTANDING CHILD SEXUAL ABUSE AND ITS UBIQUITOUS NATURE

“We owe our children, the most vulnerable citizens in our society, a life free of violence and fear”

- Nelson Mandela.

2.1. Who is a child- The age factor?

A child can be referred to as a young person especially between infancy and puberty. An unborn foetus is also considered as a child in some aspects of law. Among the most contentious issues while speaking about child rights is the subject of age. The Convention on the Rights of the Child considers every person below the age of 18 as a child but also gives in to a gasping loophole where national laws are allowed to prevail by stipulating a younger age of majority.¹⁴ As per Juvenile Justice (Care & Protection of Children) Act, 2015 “A child is any person who has not completed eighteen years of age”. Prohibition of Child Marriage Act, 2006 defines “A child is a person, if a male, has not completed 21 years of age and if female, has not completed eighteen years of age”. The Immoral Traffic (Prevention) Act, 1956 states, “A child is a person who has not completed 16 years of age” and defines the term ‘minor’ as “a person who has completed the age of 16 years but has not completed age of 18 years”. The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 uses two terms “A child is any person who has not completed 14 years of age and an adolescent is a person who has completed 14 years of age but is below 18 years of age”.

A major contradiction arises in this context where the regional laws of a few states and also some personal laws prescribe a lower age, often the age of puberty as the age of majority when the person no longer remains a child as per the eyes of the law and the community at large. Many national laws designate a much lower legal age for marriage and for consent to sexual relationships.

¹⁴ Convention on the Rights of the Child, 20 November 1989, Art. 1, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (1989), entered into force September 2, 1990.

Throughout Africa and Asia where although 18 is the common legal marriageable age, the legal age for consent for entering into sexual relations is as young as 12 years. Central and South America allow marriage among females at the age of 16 years or below. All this poses a huge obstacle to prevent sexual abuse against these young children since in many countries as the legal protection for the children depends on the country's legal age of consent. This conflict makes us ponder if practices which are considered exploitative universally maybe considered normative and reconcile with the most of specific cultures. The best interests of the child as stated down in various documents and discussions can lead to different interpretations often depending on what the accepted values in a particular culture are.

In Iran, the girl child is said to attain majority at the age of nine while the stipulated age is fifteen years for boys. This raises a serious concern with respect to the biological fitness of the child to enter into sexual activities and also the grave physical and psychological effect on a young person especially when it comes to being a victim of sexual offences. The redressal mechanism even if present may prove helpless to rightly render justice to such a child.

2.1.1 Mental Age

People whose mental stage still falls in the child bar are regarded disabled women and men and not children. The current law on statutory interpretation goes against using a rights based framework to improve the situation of mentally disabled victims who are disbarred from availing themselves of the more victim friendly procedures assessable under POCSO.¹⁵ Disabled, especially mentally disabled children are being abused about 4 times, more than the other children.

The statutory age has been linked to the capacity to consent; the mentally disabled are also incapable of consenting when it comes to any binding contract. However, the reasoning that has been give in by the Apex Court has been that this yardstick cannot be used for the mentally retarded as the extent can range from mild to severe impairment¹⁶.

¹⁵ See LiveLaw News Network, Rape Accused Dead; But SC Keeps Case Alive To Decide Victim's Interests [Read Order], LIVELAW (Jan. 21, 2017), <http://www.livelaw.in/rape-accused-dead-skeeps-case-alive-decide-victims-interests/> (Last visited Mar. 17, 2020)

¹⁶ Eera v. State (NCT of Delhi), (2017) 15 SCC 133 (2017) 3 MLJ (Cri) 452.

Speaking of sexual exploitation the topic of consent is irrelevant as such form of exploitation is a suppression of choice it is an eradication of the free will of the person and also a decimation of self-determination.¹⁷

2.2 What Constitutes Child Sexual Abuse?

Child sexual abuse is not just limited to physical acts of sexual activity but may also extend to emotional and mental forms of abuse that have underlying sexual predicaments. Unfortunately, as abuse is not confined to any watertight definition, it is often the non-understanding of inflictment of abuse and what constitutes it which leads to its overlooking and hence non-reporting. Children in such cases are left to suffer the mental and psychological impact of such activities which deeply scars their development and their further future prospects. The kin of children play a major role in ignoring and 'burying' the 'not-so-grave' acts of the abusers owing to their false sense of social stigma and tendency to avoid disputable issues.

Child sexual abuse is demonstrated by this occurrence between a child and an adult or another child who, by age or growth, has a relationship of obligation, trust or power intended to fulfil or meet the needs of the other individual. These can include, but is not limited to, an invitation or coercion of a child to engage in any illicit sexual activity; the abuse of a child in prostitution or other illegal sexual practices and exploitation of minors in pornographic production and content.

Child sexual abuse (CSA) constitutes all forms in which an adult can use a child for sexual purposes in bodily contact and penetration and also includes non-bodily forms of sexual gratification. Child rape is the penetrative form of such assault. The element of sexual intent is of cardinal importance in all cases but where sexual abuse enters the limits of bodily penetration, the act in itself becomes so offending that no sexual intent is required. Such an act *per se* is culpable¹⁸.

¹⁷ Arushi Garg, *Navigating through Age and Agency in Eera v. State*, 14 SOCIO-LEGAL REV. 79 (2018).

¹⁸ DR. PRATAP S. MALIK, A COMPLETE GUIDE TO PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT (1st ed. 2016).

The World Health Organisation has defined child sexual abuse as

“The involvement of a child in sexual activity, which he or she does not fully understand, cannot give informed consent to, or for which the child is not prepared and cannot give consent, or which violates the laws or social taboos of society. It includes a variety of sexual activities such as fondling, inviting a child to touch or touch sexually, intercourse, exhibitionism, involving a child in prostitution or pornography, or online child luring by cyber-predators.”¹⁹

‘The National Society for the Prevention of Cruelty to Children (NSPCC)²⁰ UK defines Sexual abuse as –

“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.”

The Child Abuse Prevention and Treatment Act (CAPTA) of United States of America²¹ defines sexual abuse as

‘The employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or The rape, and in cases of caretaker or interfamilial relationships, statutory rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children’.²²

The researcher conducted a survey amongst a mixed batch of randomly selected people comprising 41 females and 28 males with 81% of the age group falling in the

¹⁹ <https://www.childlineindia.org/a/issues/sexual-abuse>(Jun. 23, 2020).

²⁰ <https://www.nspcc.org.uk> (accessed on Apr. 2, 2020).

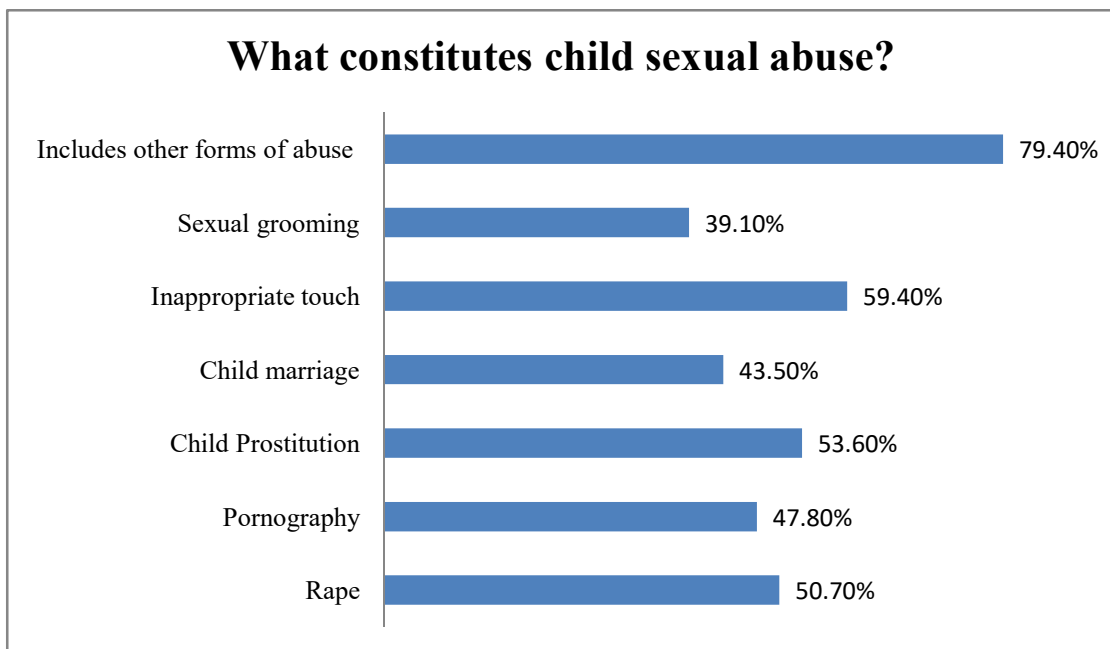
²¹ <https://www.childwelfare.gov> (accessed on Jun. 23, 2020).

²² 42 U.S.C.A. § 5106g (4) (2010).

range of 18 to 30 years, 14% being above 30 years of age and 5% below the age of 18 years.

The respondents were asked if they agreed that child sexual abuse is an increasing concern in the present day society. 72.1% strongly agreed with the statement. Only 4 out of the 69 respondents pressed a strong disagreement. The survey indicates the fact that society acknowledges the prevalence of increasing instances of sexual abuse in present-day society.

In the same survey another question was asked as to what the respondents believed constituted child sexual abuse. The results of the survey are given below:



It was surprising that although CSA manifests itself in numerous ways, most of the respondents were not aware about sexual grooming and the fact that child marriage also constitutes as a form of child marriage. Most of the respondents viewed CSA as an independent term separate from acts such as rape and child pornography. The exact ambit of the term was vague for nearly all of the respondents barring a few.

2.2 Dilemma of Child Rights and the Socio-Legal Reality Pertaining To Sexual Offences against Children in India

The 2011 census data showed a staggering 472 million population of children below the age of 18 years²³. The rights as envisaged in the Indian Constitution guaranteeing the right to life²⁴, freedom from exploitation²⁵, right to safety²⁶, education and the directive principles²⁷ promoting progressive development becomes ever the more pertinent for this huge section of the population owing to its vulnerability, necessity of future foundation building and lack of voice amongst the grown masses. It's the duty of the State to make sure that opportunities to develop in an environment of dignity and freedom is provided to the child. Childhood should be protected against exploitation. As per government estimates, more than 40 percent of India's children are vulnerable to threats of trafficking, homelessness, forced labour, prostitution, drug abuse, and crime, and are in dire need of protection. More than half of the country's women who are married were wed before attaining 18 years which is the legal age. Currently, only around 60 percent of births in India are registered and added to that is the issue of poverty. All these factors contribute to increased vulnerability and the susceptibility of being overseen by the eyes of the governing law.

CSA is not an uncommon phenomenon against girls by male strangers in rural, inner-city neighbourhoods, but it is much too common to cause harm to millions of children, boys and girls alike, in large and small communities, and across a variety of cultures and socio-economic backgrounds.²⁸. The girls however are much more vulnerable than boys in cases of child rapes. In instances when the recipient is a child, He / she may not be aware of their own victimization or that abuse has been perpetrated against them. This range of reach reflects the understanding that forcing some kind of sexual intent on a person against his or her will is an inherently violent act, regardless of the use of physical force or the subsequent contact or injury. These definitions also raise the important consideration of consent, and identify categories of

²³ "Office of the Registrar General & Census Commissioner, India". <http://www.censusindia.gov.in>. (Last Visited 28 Feb, 2020).

²⁴ INDIA CONST. art. 21.

²⁵ *Id* art. 19.

²⁶ KUMAR, *Supra* note 8.

²⁷ *Supra* note 24, art. 31-51.

²⁸ Cromer LD & Goldsmith RE, *Child Sexual Abuse Myths: Attitudes, Beliefs, And Individual Differences*, 19 JCHILD SEX ABUSE 618-47(2010).

people who are unable to consent or resist because of lack of knowledge, age, disability, state of consciousness or intoxication, or fear of harm to self or others²⁹.

Rape nevertheless is more gruesome than any other form of sexual abuse as its ill impact on the mental as well as the physical state of the child leaves lasting impact with hindrance to proper education and support and in many cases leads to unwanted pregnancies, sexually transmitted diseases³⁰, situations of abortions, aggravated medical risks destroying the childhood of both the child-mother and the child and impacting their health heavily apart from the mental trauma. The possibility of such a child-victim fitting back into the societal maze is also highly affected.

Studies reveal that when it comes to child sexual abuse, such cases are better addressed when victims are from a upper social strata as they are better equipped to drain resources in the cumbersome trial process. Also child abuse is generally perceived to result only when some form of physical sexual abuse takes place when other forms are equally damaging to the child. Attention has been focused on individual cases rather than on the environment in which violence is possible; legislation and institutions are better tailored to dealing with a case rather than preventing it.

2.4 Root of the Problem

Child sexual abuse is not a phenomenon which is limited to only underdeveloped or developing countries. However, the presence of socio-economic and cultural issues embedded deep within the society contributes majorly to magnifying the problem manifold.

Girls are more subjected to sexual abuse than boys and gender discrimination and inequality plays a major role in giving birth to new crimes affecting girls often at a very young age. The practice of early marriage is also deeply rooted in sex-discrimination providing another avenue for sexual exploitation.³¹ In lesser developed

²⁹Laura K. Murray et al., *Child Sexual Abuse*, CHILD ADOLESC PSYCHIATR CLIN NAM., Apr 2014, 321–337.

³⁰Dhawan J et al., *Sexually Transmitted Diseases in Children In India*, 76 INDIAN J DERMATOL VENEREOL LEPROL 489-93 (2010).

³¹ Anti-Slavery International, "Early Marriage," paper presented at the United Nations World Conference on Population and Development, Cairo, Sept. 5-13, 1994.

areas such as the sub Saharan Africa and South Asia³² the rates of teenage marriage are quite high. For example, the average age for marriage of girls in Bangladesh continue to be 15.³³ Women who marry at a young age may become subjects of abuse due to the tendency towards higher rates of separation and dissolution of marriage.

An outgrowth of political and economic change leads to labour migration and therefore trafficking networks increases even the more. Fuelled by poverty, against a backdrop of economic disparity and the often wilful disregard of government agencies, these channels continue to thrive. When young girls from impoverished families are taken to distant lands for domestic service under vulnerable conditions of slavery, with little or no pay, very often, physical and sexual abuse result.

Increasing access to unregulated technological devices and the free accessibility to high speed Internet has increased the concerns because of a new form of sexual abuse on the virtual platform through pornography, harassment and negative influence on young minds to knowingly or unknowingly catch them in the net of abuse of various forms.

2.5 Understanding the Victims and the Places of Exploitation

Child sexual exploitation victims come from all the religious, cultural and economic classes. Children with few friends and little contact with siblings, who are isolated from others, are at greater risk. Various forms of criminals perpetrate such crimes, including men and women, outsiders, trustworthy friends or families and communities of all sexual orientations, socioeconomic classes and cultural backgrounds³⁴. The most vulnerable are children who are abandoned or who live on the streets (generally street children) with / without adult carers. Kids find it hard to break the silence, especially in cases of incest, enforced confidentiality and a child's fear of losing the family's privacy and protection are powerful barriers to disclosure. Culture, gender and class, too, can affect willingness.

³²S. Singh and R. Samara, *Early Marriage Among Women in Developing Countries*, INTERNATIONAL FAMILY PLANNING PERSPECTIVES 22, 148-157 & 175, 1996.

³³S. N. Mitra et al., *Bangladesh Demographic and Health Survey, 1993-1994*, National Institute of Population and Training and Mitra and Associates, Dhaka, Bangladesh, and Macro Inc., International, Calverton, Md., USA, 1994.

³⁴MALIK, *supra* note 10.

In a survey of boys studying in high school in Ethiopia, the lifetime burden of sexual harassment was 68.2% and that of rape was 4.3%. How much has the crime of abusing children sexually affected the male gender is still an ignored and understudied segment. Inadequate responses in cases of abuse becomes a critical downfall hindering the recovery of the child as the fear and guilt may prove detrimental to his/her growth. If the perpetrator is not identified and prosecuted, the abuse might well be repeated threatening the safety of other children. The child may be threatened repeatedly. Instead of compassion, victims may be re-traumatized by how they are treated once they make their abuse known.

2.5.1 Vulnerability from the Familiar- Incest

It is now widely accepted as also is shown by reports³⁵ that a majority of child abuse cases occur within the family and known community. Distinctive features can include heightened guilt and/or unwillingness to report abuse, and increased likelihood of retraction. These cases of incest are often subdued for the sake of protecting the reputation of the family and the child by the members. In fact, Therapists agree children often misread abuse as evidence of special treatment and thus do not blame the perpetrator, particularly if the abuser is a parent or someone close to the child. Even the supporters of such child victims have to face ostracism and the wrath of the other members in many of the cases and have no easily accessible program to assist them in such situations. There is a fear of retaliation and a tendency to privately settle the matter in most cases.

An NGO named RAHI (Recovery and Healing from Incest)³⁶ conducted India's first study on child sexual abuse. It surveyed about 600 people from middle and upper class society. The offender was a family member in 40 per cent cases, usually an uncle or a relative. A very troubling finding is that this study reported that 72 percent of the victims said they had been raped and did not disclose the matter to anyone. Only 3 per cent of the victims' families complained to the police about them or made the abuse known to the public. A detailed study into incest also reveals that social

³⁵ Malloy LC, Lyon TD, Quas JA, *Filial dependency and recantation of child sexual abuse allegations*. J AM ACAD CHILD ADOLESC PSYCHIATRY. 46(2) 162-70.

³⁶RAHI Foundation, <https://www.rahifoundation.org/> (Jan. 10, 2020, 11:12 AM).

factors like illegitimacy of children, bias against female child and having step children show higher incidences of such cases.

In the survey conducted by the researcher, the respondents were asked if they were aware that a majority of sexual abuse of children occurs within families and known communities. 94.1% of the respondents answered in the affirmative. This in itself is an acknowledgement of the fact that people are aware of the existing imbalance and diseased notions of the concept of a family as the largest number of perpetrators are amongst people who are generally deemed the safest.

2.5.2 Institutional Abuse

The media has played a vigilant role in time to time reporting of cases of sexual abuse of both boys and girls in protective homes, welfare institutions and schools. Such kinds of abuse within the child care institutions often do not come to light as these incarcerated children do not have much contact with the outside world. Such form of exploitation in welfare institutes morbidly expresses a disgusting reality of abuse by those who are entrusted with the responsibility of protection. The abusers are often the institution staff, officers or people from the outside world who collude with the staff luring them with monetary gains and other benefits; sometimes also due to pressure or fear of sanctions.

Orphanages, shelter homes, foster care homes, refugee camps, juvenile and observation homes and educational institutes are places where abuse occurs at the institutional level. Children end up in these institutions in two conditions. The first situation is when law places them in the shelter of institutions when they do not have people i.e. parents or relatives to support them outside or when they have suffered some sort of abuse or misfortune that necessitates the need of placing them separately. Street children, runaways and those rescued from trafficking for sex work or labour are routinely placed in institutions which are run by government, private organisations or religious charities. The second situation is of juveniles who are in conflict with law. It is only the first category which is considered as a victim whereas, there is an urgent need to understand the vulnerable position of children in conflict with law as well to ensure that their future is not jeopardized by actions or events where they may have to suffer more wrong than what they might have committed.

At the institutional level, child safety programs are still relatively rare and are centred mainly in major cities making them unsupportive to the majority of the kids. Schools, children welfare/shelter homes, rehabilitation centres, juvenile delinquency centres which are supposed to be the safe haven of the children have shown a high incident rate of sexual abuse of children. Children are also subjected to rapes in the hands of their employers and in the workspace as child labour is a disguised and mostly unorganised industry. No employment benefits and protective measures can be availed by the helpless trafficked or economically deprived children.

Going by statistics, cases of sexual harassment reportedly increased by 30% in shelter homes against women and children from 544 cases reported in 2017 to 707 in 2018.³⁷ As per the estimates of a study, 20 million Indian children end up in institutional residential care. These include orphans, those who cannot be supported by the parents, juveniles in conflict with the law as well as the street children who have been rescued from trafficking for labor or sex work. The Muzzafarpur Shelter home case³⁸ was a glaring example of exploitation of young girls. Justice Verma Committee had recommended reforms to improve the plight of children in residential care institutions. Present system of registering and monitoring these institutions has failed to show good results. Most of these incidences go unreported and any leakage is quickly covered up to ensure that the funding of the institution is not hindered.

Numerous organizations are still not registered under the Juvenile Justice Act. The system of monitoring and surveillance by child welfare committees is flawed. According to the Juvenile Justice Act, all existing child care facilities had to be registered with the authorities within six months, with child protection commissions mandated to inspect them. But in practice the legislation does not provide provisions for non-compliant child care facilities. The Arya Orphanage case³⁹ was an example where lack of defined monitoring mechanisms made it difficult to detect the incidents of rape and abuse of the children living therein. Weak monitoring thus leaves scope for considerable confusion and possible manipulation. In the Anchorage Shelter

³⁷ National Crime Records Bureau, Crime in India: 2016 Statistics (2017), <http://ncrb.gov.in/StatPublications/CI/CI12016/cii2016.html> (Feb. 17, 2020).

³⁸ THE HINDU, <https://www.thehindu.com/news/national/court-to-pronounce-quantum-of-sentence-in-muzaffarpur-shelter-home-case-on-feb-4/article30675053.ece> (Feb. 12, 2020, 4:12 PM).

³⁹ Vijay Bhushan & Ors v. Arya Anthalaya, CS(OS) No. 1728/2011.

Home case⁴⁰ where foreign nationals were involved in sexual abuse of boys, securing justice was proved to be even more cumbersome and complicated. The fact that the behavioural reactions of children cannot be equated with grown up adults was initially rejected making it difficult to render timely justice to the victims.

The transfer system⁴¹ brought about by the Juvenile Justice Act of 2015 provides for conducting a preliminary assessment of every child aged 16 years and above who has allegedly committed heinous offences to assess the child's physical and mental capacity to commit the offence on the basis of which the children's court subsequently orders whether the trial of the child should be carried out as an adult. This system was meant to balance the legitimate interest of the child while taking care of the need to deter brutal crimes against women. As the entire focus of the law has been on considering children in conflict with law as the culprit in cases of heinous crimes, this study argues on the importance of bringing forth the facts that support the need to look at aspects where the probability of these children in conflict with law being abused at these institutions all the more sexually is also quite high.

As per data from the NCRB, the propensity of juvenile crime for every 1 lakh children is only 8 with majority of cases being reported of theft, trespass etc. with sexual offences constituting less than 6 percent of all cases reported. The fact that even a miniscule percentage of sexual assault by under age men cannot be taken lightly added to the issue of under-reporting has led to this strengthening of the law. But speaking from the perspective of a reformative approach, this system of punishment and rehabilitation of young boys if shaped after adult punitive institutions is more likely to end up strengthening the traditional rooted notions of masculinity rather than shaping them. In a study by ECHO centre for juvenile justice it was found that the observation homes meant for rehabilitation purposes often resembled jails where children were beaten and scolded. Justice Verma Committee noted that these homes had a hostile atmosphere where children were vulnerable to sexual abuse.

Two senior inmates sexually assaulted two minor inmates on 28 September 2012 in a government run shelter home for boys in Jalpaiguri District, West Bengal. Victims had injuries and were admitted to Jalpaiguri District Hospital. The shelter home

⁴⁰Childline India Foundation & Anr v. Alan John Waters & Ors, Cr. Appeal 1208-1210 (2008).

⁴¹ Megha Mehta, *Children No More? A Feminist Critique of the Juvenile Justice Transfer System in India*, 12 NUJS L. REV. 43 (2019).

houses both orphans and juveniles.⁴² Contrary to popular belief, boys too are frequent subjects of sexual malpractices.

2.5.3 Child Prostitution

Child prostitution happens for a number of reasons such as trafficking, selling them off by the parents due to economic constraints and kidnapping. The number of such cases normally are unaccounted and not reported making it very difficult to understand the plight of those suffering. Often a considerable fee is paid in payment for the loss of virginity at a very early age.⁴³

Reports⁴⁴ released in late 1996 by UNICEF and the International Labor Organization (ILO) draw attention to child prostitution as "one of the most intolerable forms of child labor." Business sexual abuse incorporates prostitution, 'sex tourism' and obscenity.

Although the recent judicial decisions have stated sex with married minor girls as rape by their spouses irrespective of their consent but the number of such cases coming forward is negligible.

2.5.4 Child Marriage

Marriage is a revered institution and abuse is the antithesis of all that is good about relationships. In the colonial era, family law was seen to be wholly based on the religious laws of each community and therefore the state chose to maintain a neutral stance towards the religious and personal affairs of the citizens. Thus where the personal law allows a lower age for marriage there comes in a heavy contradiction between such rules where the government has no right to interfere on one hand and laws formulated at the national level to address societal evils and curb abominable crimes on the other hand. Mention can be made of the controversy that arose in the

⁴² *Teens sexually assaulted by homosexuals at West Bengal govt shelter*: THE INDIAN EXPRESS (Sept. 28, 2018) <http://www.indianexpress.com/news/teens-sexually-assaulted-by-homosexuals-at-westbengal-govtshelter/1009330>.

⁴³ W. Boonchalaksi and P. Guest, *Prostitution in Thailand*, The Institute for Population and Social Research, Mahidol University, Salaya, Thailand, 1994.

⁴⁴ UNICEF, "UNICEF Report Demands End to Most Intolerable Forms of Child Labour, Such as Prostitution, Bonded Labour," press release, New York, Dec. 9, 1996; and International Labour Organization (ILO), "ILO Calls for Immediate Action Against Intolerable Forms of Child Labour," press release, Geneva, Nov. 12, 1996.

1891 debates regarding the age at which a Hindu wife (usually a child) could be said to have given her consent to sexual activity within marriage. Where a young girl was raped at the age of 10 or 11 years by her husband aged 35 years which consequently led to her bleeding to death, the existing provisions of rape under the IPC could not be attracted since the statutory age of consent was only ten years back then.⁴⁵

Post this horrific incident an impetus was given by social reformers to raise the minimum age of marriage. The efforts to abolish the institution of child marriage has eventually transformed into efforts to raise the minimum age of consent for sex within marriage. Child marriage and its consummation is illegal under the POCSO Act. In India, although child marriage is prohibited by secular law, under some Personal Law it enjoys sanction, thus complicating matters.

As the present study is only limited to children which are defined as those below the age of 18 in the Indian context, it is pertinent to note that frequent instances of sexual abuse including rape are hidden under the garb of a legitimate relationship since even today marital rape is not considered as a crime. The Prohibition of Child Marriage Act also registered as many as 501 incidences, a 26 per cent jump from 2017, when 395 cases were reported under the Act.

There is always a possibility that when children are sold to perform hazardous forms of work, or married against their will at very young ages by family members for economic or socio-religious reasons, they may view the act as a societal and familial. Separating the two types of abuse in different categories not only perpetuates the reasoning that interfamilial abuse and neglect is completely sequestered from societal causes, but also that societal abuse and neglect occurs in isolation from a normative understanding of child, parent and state relations.⁴⁶

2.5.5 Online Abuse

Online sexual exploitation most commonly includes grooming, live streaming, consuming child sexual abuse material, and coercing and blackmailing children for sexual purposes. As technology advances, new forms of this crime emerge. Never

⁴⁵ Geraldine H. Forbes, *Women and Modernity: The Issue of Child Marriage in India*, 2 WOMEN'S STUDIES INTERNATIONAL QUARTERLY 410 (1979).

⁴⁶ *Id.*

before has it been easier for perpetrators to make contact with children, share images of abuse, hide their identity and profits – and inspire each other to commit further crimes.

Like other forms of sexual abuse, online abuse can scar victims emotionally and physically for a lifetime. But unlike other forms of abuse, the child can potentially be re-victimized millions of times – every time an image is watched, sent or received.

Identifying and investigating offenders is difficult, as they often adapt technology, such as darknet portals or other anonymous channels, to enable their offending and avoid detection. Online sexual exploitation often occurs across multiple jurisdictions, with victims and offenders often in different countries. Some countries are yet to update legislation that criminalizes the viewing or possession of child sexual abuse material online. Online child sexual abuse has many forms. They include-

- Accessing, possessing, producing and/or distributing images and/or videos of child sexual abuse. This crime is often referred to as “child pornography”. There are billions of examples of this kind of material on the Internet today.
- Grooming of children for sexual purposes, developing a relationship with a child to enable their sexual abuse and/or exploitation, either online or offline. The proliferation of social media, messaging and live-streaming apps in recent years have seen a dramatic increase in reports of this crime.
- Live-streaming sexual abuse of children using online video applications to view, and sometimes interact with the sexual abuse of children live. Some countries, such as the Philippines have become hubs for this kind of abuse in recent years, where poverty is causing some parents to abuse their own children for profit.
- Sextortion i.e. coercing and blackmailing children for sexual purposes Producing and/or utilizing sexual images and/or videos depicting a child, for the purposes of sexual, financial or other personal gains. Offenders can be

adults or peers of the victims – and sometimes the child sexual abuse material is self-produced through manipulation of the victim.

Indian law does not specifically deal with abuse over internet. Few provisions of the IT Act, POCSO Act and IPC criminalise and penalise pornography and its forms; but the area has grown so wide as of late, that a law specifically dealing with online abuse needs to be ushered.

CHAPTER 3

A STUDY OF THE LAW GOVERNING CHILD SEXUAL ABUSE IN THE BACKDROP OF INTERNATIONAL AND NATIONAL DEVELOPMENTS

3.1 Addressing child sexual assault globally

International law recognizes all individuals including children as subjects to International human rights law. To take the process further the granting of specific substantial rights and endowing the necessary procedural capacity to exercise and claim these rights are steps which are still in the process. The first human right instrument specific to the rights of the child was the Declaration of the Rights of Child, 1924. However it is interesting to note that before 1989, there existed very few instruments that acknowledged the incidences of sexual abuse of children. The European Convention on Human Rights (ECHR) made reference to the special protection of children “against physical and moral hazard⁴⁷”. Principle 9 of the United Nations Declaration on the Rights of the Child, 1959 states that the child should be protected against “all forms of exploitation”. ICCPR stresses that children deserve special measures of protection against “social exploitation⁴⁸”. None of these made any direct reference to the term rape or sexual assault against children. This is a reflection of the fact that although the world wars, regional wars and unrest witnessed huge number of such cases, but they were brushed under the carpet thus undermining the significance of protecting children rights as human rights.

The field of children rights showed significant positive development with the adoption of the Convention on the Rights of the Child (CRC) in 1989.

The CRC legally binds all parties which are signatories to it. It is based on four main principles of non discrimination; working towards the best interest of the child; providing the child with the right to life to survive and to develop; and also the right to be heard. The CRC clearly recognises 4 broad categories of rights to children:

⁴⁷ KHAN, *supra* note 9.

⁴⁸ MALIK, *supra* note 10.

- survival rights which include the right to life if an access two basic necessities searches adequate requirements of food shelter medical facilities and a basic standard of living
- developmental rights
- the third category speaks of protection rights to children from abuses that the child maybe subjected due to two procedures of the criminal justice system refugee children children and employment and those who have undergone abuse or exploitation
- participation rights.

The convention provided children with basic human rights- civil, economic, social, cultural and political with the civil rights granting protection from torture and maltreatment while the social rights clearly mentioning “protection from sexual exploitation as a basic human right”. It called for the state parties to take all appropriate legislative, administrative, educational and social measures to protect children from “all forms of physical or mental violence, injury or abuse, maltreatment or exploitation, neglect or negligent treatment including sexual abuse” while in the care of parents, legal guardian or any other person who has been entrusted with the care of the child. It stated measures to include effective procedures for establishment of social programs providing necessary support for the child as well as for identification reporting, investigation, treatment and follow up of instances of child maltreatment.

The CRC has been a huge development to protecting children against sexual abuse but it is also argued that ratification of CRC instead of helping the children may serve as a facade for governments violating children rights. On the positive side most of the signatories of the CRC have incorporated the convention provisions into their domestic laws and nearly 1/3 have incorporated these provisions into the national constitution. As of now, India has not signed the third optional protocol on the Rights of the Child on a Communications Procedure.

The next substantial action was the “Vienna guidelines” and the “*United Nations Guidelines on Justice in matters involving Child Victims and Witnesses*”⁴⁹ that call for providing equal access to justice and fair care, restitution, compensation and social services to child victims and witnesses. It notes that law enforcement professionals including police, lawyers and the judiciary will be given special training in dealing with cases involving child victims and that specialized units should be set up. Assistance should be provided to children such as advocacy, economic assistance and counselling and health services. Also rehabilitation should be family and community based rather than institutionalized. It is unfortunate that misuse of reservations, lack of sanctions and other relaxing provisions and loopholes in International law allow countries to violate the norms and go scot-free. This weakens the results that could otherwise be achieved.

With the advent of the virtual world and the influence of social media has helped in increasing multifold awareness by documenting instances of young girls and women who are coerced or sold into sexual slavery and prostitution become victims of child pornography or trafficking across international borders is bonded sexual labor, paedophilia affecting both boys and girls is a deviant practice. Young children due to a number of reasons trade sexual favors in exchange of financial support often to meet the expectations to produce income for their families. Another huge concern for the international community is the exploitation of adolescents and even younger girls given away in marriage not just by the weaker and underprivileged sections of the society but also those bound by meaningless notions of customs and social image.

The 1st World Congress was the result of a proposal initiated by ECPAT and grew from a collaboration between itself, the UNICEF, various individual non-governmental organizations extending support to the CRC. It was a humongous effort with 119 countries participating where international action was sought to be mobilized by highlighting the global nature of the issue of sexual exploitation of all people below the age of 18 years. Resultantly, the Agent for Action was unanimously adopted where commercial sexual exploitation of children was reiterated to be a "massive violation" of their human rights, and sustained initiatives in the fields of mitigation, social mobilization, education, criminalization and law enforcement and

⁴⁹United Nations Guidelines on *Justice in matters involving Child Victims and Witnesses*, (Jun. 24, 2020).<https://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>.

the allocation of adequate support and resources to achieve these goals were deemed urgent needs for their eradication. Investing in girls and women is not only about social justice but it is also about sound economics. The agenda focuses on the best interest of the child stipulating their active representation and emphasising on protection and recovery procedures which are sensitive to the specific needs of each victim. It stressed on the necessity for local, national, regional and international cooperation and coordination.

It aimed towards developing new strategies and compliance with the provisions of international human rights instruments. It emphasized on educational efforts such as working on improving access to schools, bolstering family ties and deterring communities from continuing discriminatory practices that leave girls and sometimes even boys in a vulnerable position. This congregation first signaled the outrage over the sexual exploitation of children.⁵⁰ However, being a nonbinding agreement it does more to provide moral suasion rather than meting out legal sanctions. Two more World Congresses have taken place since then to draw International attention over emerging problems of child sexual abuse.

3.2. Indian Legal and Policy Framework

In spite of the best of intentions where the drafting is tardy and implementation is piecemeal, the legislation is bound to fail in achieving its purpose.

3.2.1 Indian Penal Code and Criminal Procedure Code

Till 2012, the law recognised sexual offences against children only under three sections of the Indian Penal Code (IPC). They were general sections which were also made applicable to women which included girls under the age of 18 and the existence of sexual offences against boys was not recognised at all. Complaint could be registered for rape⁵¹, outraging a woman's modesty⁵² and for an "unnatural act" defined as "carnal intercourse against the order of nature with any man, woman or

⁵⁰ Karen Mahler, *Global Concern for Children's Rights: The World Congress Against Sexual Exploitation*, INTERNATIONAL FAMILY PLANNING PERSPECTIVES, 79-84, 23 No. 2 (Jun., 1997) <http://www.jstor.com/stable/2950828>.

⁵¹ Indian Penal Code, 1860, No. 45, Acts of Parliament, §376.

⁵² Indian Penal Code, 1860, No. 45, Acts of Parliament, §354.

animal”⁵³ which included anal sex, homosexuality and bestiality as criminal sexual acts.

The IPC failed to effectively provide protection to children as it neither protected male victims nor recognized any other form of sexual acts other than the traditional penile-vaginal intercourse. But the extremely limited scope of the applicability of these sections to children can be clearly understood since they were not at all specifically aimed at children related crimes and other forms of non-penetrative actions such as harassment, assaults and sexual exploitation in different forms were not explicitly recognised. So even if reported, these complaints were simply not recorded.

It is interesting to note that even the recent changes in the IPC and the CrPC use the term ‘women’ even for girls under the age of 16 and 12. The use of this term signifies lesser inclination towards a child friendly approach for women and girl children cannot be put in the ambit of the same umbrella.

The CrPC is majorly inclined towards providing standard procedures for women as to their arrest, strict regard to decency, recording of information by women police officer; in case of an offence of rape the recording to be conducted at the residence of the victim or at her choice of place. However, only one particular provision protects the male child below 15 years of age who is exempted from attending at any place other than the place of residence for recording of statement.

3.2.2 Protection of Children from Sexual Offences Act, 2012

The enactment of POCSO Act was a revolutionary step to provide a robust legal framework for a variety of offenses against every child. Being gender neutral for both the child and the accused, the act provides mechanisms for child friendly reporting, the recording of evidences, expeditious investigation and trial through the setting up of special courts containing provisions to safeguard a child’s interests at every stage of the judicial process. Until the new legislation, various types of abuse had to be tried under a patchwork of different laws frequently tailored for specific reasons, and hurdles to prosecution were created by their unclear applicability to particular cases of

⁵³ Indian Penal Code, 1860, No. 45, Acts of Parliament, §377.

child abuse. This was not clear, for example, whether any law protected non-penetrative sexual offenses committed against boys.

The new legislation also sets out procedures for police and courts to deal sensitively with victims. There were also inconsistencies about the age at which a person may have sex and marry legally. Specific definitions of child sexual abuse are among the strengths of the statute, including a description of aggravated assault, applied in cases where the perpetrator is in a position of authority over the child (for example, a policeman or the manager of a residential care facility). The act set out rules to be followed by police when questioning victims so that they are handled sensibly. The statute bans a child's aggressive questioning at trial, provides provisions to protect his or her privacy, and requires the judge to conclude his or her work within one year, and to dispose of a trial within two months.

The POCSO Act provides a robust legal framework to safeguard the interest of the child from offences of sexual assault, both penetrative and non penetrative, sexual harassment and pornography by including different mechanism for the recording of evidence; providing child-friendly reporting; speedy trial through designated special courts. It has been lauded for being a gender neutral act for both the child victim and also for the accused. The act also criminalises watching or collecting pornographic content where children are involved. Abetment of such abuse has also been made a criminal offence.

The POCSO Act, 2012 widens the ambit of the definition of the child by including every person below the age of 18 years as a child⁵⁴. This definition is however, limited by the fact that the law takes into its ambit only the physical age and not the mental age of many who may not stand at par with an adult is not taken into consideration. As per POCSO, “penetrative sexual assault on a child below 12 years constitutes as aggravated penetrative sexual assault- a crime punishable with a fine and a minimum term of rigorous imprisonment for 10 years, which can be extended to life imprisonment”. However, before the passing of the POCSO 2012, prosecution of child sexual abuse cases were covered by the few provisions⁵⁵ under the Indian Penal Code which did not exclusively or effectively provide protection to children against

⁵⁴ KHAN, *supra* note 9.

⁵⁵ Indian Penal Code, 1860, No. 45, Acts of Parliament, §§375, 354, 377.

sexual offences. Only after mass protests on various outwardly heinous offenses in the wake of Kathua rape case⁵⁶ and the Unnao rape case, the Indian Penal Code and the POCSO Act were suitably amended bringing forth an exclusive legislation to cater to sexual exploitation of children. The Criminal Law (Amendment) Act, 2018 introduction of several new provisions on sexual offences against children below 16 years and 12 years under the Indian Penal Act makes it another avenue for justice. Death penalty has been included for rape of children below 12 years of age.⁵⁷ This immediate and strong response emerges from the need for harsh punishment, which can serve as a deterrent to such a heinous crime. Unfortunately other than the increased minimum punishment, no other special concession has been stated given the increased trauma for the girl. Since even the minimum punishment can be reduced by the judges, much needs to be done in this area. Also the insertion of death penalty is being questioned as there might possibly be a tendency of the culprit to harm the child even further to the extent of killing him/her.

The IPC provides punishment to any public servant who foregoes his duty to record any information given to him under section 154 of the CrPC relating to cognizable offences dealing with all forms of sexual assault and abuse. This provision would also be applicable if a police officer calls a POCSO victim to the police station for recording of statement. Similarly if the officer intentionally does anything to affect the investigation or neglects or fails to follow procedures relating to search, seizure, witness examination, etc or fails to register a case, penalty and punishment under Section 166 A of the IPC will be attracted.

Indian lawmakers have in the recent past taken vigilant action towards addressing some of the loopholes existing in the mostly outdated rape laws of India. Rape in the Indian legal Language has been defined in Section 375 of the IPC⁵⁸. Rather than using the traditional term, a new terminology has substituted the term “rape” in the POCSO Act with the intent to bring a psychological revamp in the way such offences are looked at from the purview of the child, his/her kin and the society at large. Three categories of main offences have been covered under the act namely penetrative sexual assault, sexual assault and sexual harassment wherein the first category of

⁵⁶ Mohd. Akhtar v. The State Of Jammu And Kashmir, WP (CrI.) 85/2018.

⁵⁷ Indian Penal Code, 1860, No. 45, Acts of Parliament, §376 (2) (f).

⁵⁸ *Id.*

penetrative sexual assault covers the provisions of rape. Penetrative sexual assault⁵⁹ and aggravated penetrative sexual assault⁶⁰ are the advanced forms of sexual abuse of a child. Although not mutually related, the case studies of numerous reports⁶¹ show how the courage mustered from sinister incidents of abuse add up to lead to more heinous crimes such as penetrative and non-penetrative sexual assault.

Issues:

The Medical Termination of Pregnancy Act of 1971 allows liberty to women to seek an abortion without their identity being reported. This allows them the option to go for a medical abortion in case pregnancy occurs after a forced intercourse, thus protecting their right whether to keep the child or otherwise. Especially in the case of minor girls continuing the pregnancy often proves detrimental to the health of the child hampering her future prospects educationally, socially and psychologically. This would in turn gravely affect the life of the child and her family at large. POCSO also clashes with the Medical Termination of Pregnancy Act of 1971 as if any girl seeks abortion being under the age of 18 years, the service provider is compelled to register a sexual assault complaint with the police. Not surprisingly, the service providers hesitate to provide abortion services to minor girls even when the pregnant girl child is accompanied by a reliable adult and supported by a medical prescription.

Ultimately, the legislation says nothing about providing victims with more sensitive medical tests or the need to provide them care, recovery and rehabilitation. Future statutory changes must resolve these major concerns. Nonetheless, if the new legislation leads to further convictions, further victims will be encouraged to report their abuse and potential attackers will be deterred from abusing children. It's important that police officers, government officials, and courts around the country recognize and obey the law. This will be overseen by the national and state commissions for the protection of children's rights, and so it is important that adequate resources and manpower be provided to them. The Government must also establish appropriate training programs along with the NGOs and working groups.

⁵⁹ The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012.

⁶⁰ *Id.*

⁶¹ MALIK, *supra* note 10.

Section 40 of the Act allows victims to access legal aid. However, that is subject to Code of Criminal Procedure. In other words, the lawyer representing a child can only assist the Public Prosecutor, and file written final arguments if the judge permits. Thus, the interest of the victim often go unrepresented.

The law presumes all sexual act with children under the age of 18 is sexual offence. Therefore, two adolescent who engage in consensual sexual act will also be punished under this law. This is especially a concern where adolescent is in relationship with someone from different caste, or religion.⁶²

The laws have been formulated in such a way that for the State, gender acts as a means of social stratification. The POCSO and the IPC criminalises consensual sex between children. The criminal law amendment act has increased the age of consent to 18. There exists a hegemonic masculinity as it is only the underage men who can be prosecuted for rape under the Indian Penal Code and POCSO whereas under age women are denied the sexual autonomy assuming they lack consent based on the age. The female may also be in a socio- economic position of dominance but a strong assumption of the male always being the aggressor is what widely prevails. This male female dichotomy results in the labeling of minor males as ‘juvenile sex offenders’ while the underage women who engages in consensual sex becomes a ‘victim’ albeit she may be equally responsible for the decision to enter into to a sexual relationship.

3.2.3 The Juvenile Justice (Care and Protection of Children) Act

The Juvenile Justice Care and Protection of Children Act⁶³ obliges every police station to have specially trained child welfare officers and special juvenile police units to be present in every district and city. These units are meant to be supported by social workers funded by the integrated child protection scheme. Many child rights experts and lawyers are often brought in to train these units but just like any other government program their effectiveness varies from state to state. The child welfare committee is heavily dependent on the police force. Human Rights Watch in a report stated that officers admitted the fact that they were not equipped to deal properly with cases of

⁶² Megha Mehta, *Children No More? A Feminist Critique of the Juvenile Justice Transfer System in India*, 12 NUJS L. REV. 43 (2019).

⁶³ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2015.

sexual violence and so therefore often tried to avoid them.⁶⁴ The presence of a stronger media and civil society in big urban places unlike remote areas also affects the effectiveness of police operations. Many incidences and cases have reported how the lax attitude of the police officers while dealing with the victims of such offences, by intimidating the parents to rather avoid than face the situation in the name of social prestige, or by the use of undue influence in matters of getting a proper medical legal examination conducted, interrogation techniques which are more aggressive than consoling. This makes the victim and the person assisting him, lose faith in the system.

A sexually abused child is considered as "child in need of care and protection" under Juvenile Justice (Care and Protection of Children) Act, 2015. Police officer should therefore inform the Child Welfare Committee about every case under the Act within 24 hours. CWC can appoint a support person for the child who will be responsible for psycho-social well-being of the child. This support person will also liaise with the police, and keep the child and child's family informed about progress in the case.

3.2.4 Integrated Child Protection Scheme

The Integrated Child Protection Scheme (ICPS) aims to holistically provide a child protection mechanism covering the preventive and rehabilitation aspects for children who are in need of care and protection and for those children who are in conflict with the law. District child protection committee are formed under the ICPS program which is responsible for implementing and monitoring all the child protection laws. The DM has the responsibility to monitor the functioning of the child protection committee at the village level and the block level which are notified by the state government under ICPS.

The ICPS was established in 2009 as a central government funded scheme designed to create a safe environment for children in challenging situations, as well as other disadvantaged children through Government-Civil Society Partnership. The number of such committees has increased, but there are still serious gaps. Poorly trained and

⁶⁴ HUMAN RIGHTS WATCH, BREAKING THE SILENCE: CHILD SEXUAL ABUSE IN INDIA 4 (2013).

under resourced child welfare commissions are unable to screen orphanages and other residential care facilities adequately.

3.2.4 National Commission for the Protection of Child Rights

The National Commission for the Protection of Child Rights (NCPCR) was established in 2007 after the Nithari incident. The NCPCR is a statutory body under the administrative control of the Ministry for Protection of Women and Child Development established under the CPCRA Act of 2005.

The only purpose is to make sure that all policies, laws and administrative mechanism are in sync with the child rights perspective envisioned by the Indian Constitution and the UNCRC. It has the authority to enquire into complaints and take notice of non-implementation of laws *suo moto*. It acts as the ombudsman to make sure the legal system is in consonance with international instruments, despite being short staffed, has also been charged with monitoring the implementation of the POCSO Act, as well as India's ambitious Right to Education Act of 2009. Short staffed, resource stripped and inadequately qualified-these commissions and bodies are not able to deliver their utmost to working towards redressing the child abuse issue. The CPCRA Act had also directed to establish State Commissions for Protection of Child Rights in each state having the same functions but working at state level.

3.2.6 Other Initiatives by the Government

The National Human Rights Commission has the responsibility to protect and promote human rights as guaranteed by the constitution and stated in International Covenants and enforceable by Indian courts. State Human Rights Commissions too have similar responsibilities and both of them can enquire into human rights violations covered by the state and the concurrent list. India has also implemented the National Policy for Children.

Law Commission⁶⁵ reports have expressed opinions for revamp in the existing bodies but not much work has been substantiated in that sector as well.

The coming up of a 24/7 toll free number embodying the concept of a free child helpline is a commendable action. Since its inception, CHILDLINE India has become

⁶⁵ K. K. Geetha, *Revisiting Rape Laws - Need of the Hour*, 3 NIRMALIA U. L.J.75 (2013).

one of the most effective actions taken up by the Ministry of Women and Child Development. Similar helplines exist around the world by different names such as the NSPCC Child Protection Helpline, Childline and Bullying Helpline in the UK, Child Help and National Child Abuse hotline in USA, Kids Helpline in Australia, ChildLine in Japan, CWIN in Nepal etc. Child Helpline International is a global network of such helplines which was an outcome of the international consultation on child protection held in India in 2001 which has taken up the idea to form a global network aiming at not just establishing a mutual support network of existing helplines, but also facilitating the establishment of new help lines in interested countries. It is working towards partnering with telecom sector to channel technological innovations and develop an international database on the issues affecting children in need of care and protection. It is also working on partnering with the inter-connected sectors comprising government, corporate sector and media to cater to the issue at greater depths.

Witness Protection Scheme, 2018

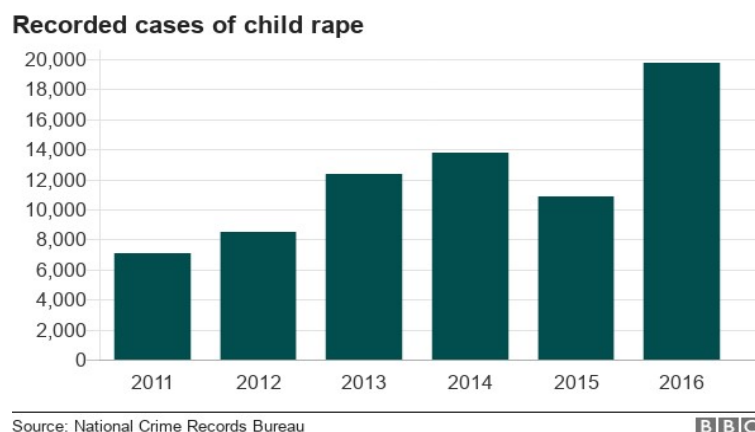
Previously there existed no law for victim protection in India. In order to protect witnesses of offences punishable with death or imprisonment for life or imprisonment upto 7 years and above and also to those offences which are punishable under section 354, 354A, 354B, 354C, 354D and 509 of the IPC, the Witness Protection Scheme was approved by the Supreme Court in Mahendra Chawla and others vs Union of India and Others.⁶⁶

The onus to apply has been put on the witness to seek a witness protection order. On the basis of the threat analysis report sought from the head of the police in the district, a witness protection order is passed by the competent authority. These measures ensure that witnesses do not come face to face with the accused during the trial or investigation; that mails and telephone calls are monitored; regular patrolling may be done around the witness house; his identity may be concealed; there may be need for measures of installation of security devices in and around the witness home and escort services for the purpose of attending hearing to and from the court may also be

⁶⁶ Writ Petition criminal 156 of 2016.

provided. The police has the duty to inform witness about the existence of the scheme with all expenses to be incurred from the state witness protection fund.

Inspite of various provisions introduced in order to prevent the menace of child abuse, the statistics of child rape in India tells some different story:



The above mentioned data⁶⁷ clearly shows that such existing and new laws are failing the prima facie purpose due to their inadequacy or inefficacy to curb this problem. In order to deal with this issue, India needs to adopt new approaches which have proved sound and successful in various other countries. What is needed is the better implementation of existing legal mechanisms, and to ensure that justice is dispensed quickly.

The major problem that attributes to the slow and ineffective redressal of crimes in India is the huge pendency and inordinate delay in the disposal of criminal cases. The reason is the lacunae in the enforcement machinery combined with the frailty of the legal structure that inspite of ample laws is unable to exercise effective control in the follow up mechanism.

3.3 Analysing the ‘Concluding Observations’ of the CRC

The CRC put forward its third and fourth concluding observations on the 13th of June 2014. The committee welcomed the adoption of the POCSO Act and National Policy for Children and also appreciated the ratification of the optional protocols to the CRC on the involvement of children in armed conflict and on the sale of children, child pornography and child prostitution among others.

⁶⁷Soutik Biswas & Biswas Soutik, *The horror story inside an Indian children’s home*, BBC NEWS, <https://www.bbc.com/news/world-asia-india-45124802> (Feb. 26, 2020).

Areas of concern:

The report further highlighted the main areas of concern noting that India had failed to address the recommendations which were given in the concluding observations in the second periodic report, especially those which were related to non-discrimination, sexual exploitation, education, child labour and administration of juvenile justice. It pointed out the presence of different level of authorities and incompetency within the state parties federal structure which has resulted in a differentiated application of child rights legislation and the presence of fragmentation and inconsistencies in the implementation of child rights across India. The development of the National Policy for Children has to be prioritised which is yet to be implemented. The allocation of sufficient financial, human and technical resources for effective operation with the involvement of children, youth, parents, NGOs and other relevant interested bodies is the need of the hour.

The up gradation of the Department of Women and Child Development into a full-fledged ministry is a progressive move; however the ministry should also have sufficient authority to co-ordinate all the activities which are related to implement the mandates of the Convention at the Inter-Ministerial levels and also the state levels.

On planning and budgeting:

India has taken efforts to improve planning and budgetary processes and has also increased its budget allocation for schemes and programmes but the huge mismanagement exacerbated by high levels of corruption and lack of effective monitoring and evaluation systems is a big hindrance coupled with the fact that budgetary allocation alone do not sufficiently consider child protection needs. A four pronged strategy has been suggested which includes

- Substantially increasing their allocations in all social sectors.
- Establish a budgeting process which include specific indicators and tracking system.
- Mechanism to be established to monitor and evaluate the efficacy ,adequacy and equitability of resource distribution and
- Finally, all necessary measures need to be taken to combat and prevent corruption.

On inadequate research:

There is a scarcity of available data on children between 15 and 18 years and the types of data collected are also limited. Data collection system should be improved in a way to cover all areas of the Convention and should also be disaggregated by the age, sex, geographical location, ethnic, socio-economic and national background to deeply analyse on-ground situations especially to determine the level of vulnerability.

The National Commission for the Protection of Child Rights had been established in 2007 along with the establishment of commissions at the state level which is mandated to receive complaints from children on the violation of their rights. Concern was expressed at the lack of a definite procedure for the selection of members of the commission completely in line with the Paris principles. Other problems include inadequate budgetary allocation the lack of autonomy to comply with their mandate as independent bodies. Moreover state commissions for child rights protection do not yet exist in all the states. There is an immediate need for India to strengthen its technical cooperation with the office of the UN high commissioner for human rights and UNICEF.

On training and sensitization:

Dissemination and awareness raising by including all forms of communication such as media and also targeted interventions to increase awareness among those who are most socially economically disadvantaged. Child friendly versions of the conventions should be made available in the local languages.

Training programs for all professionals in particular law enforcement officials prosecutors judicial officers teachers health workers social workers personal working in alternative care and rehabilitation through undertaking campaigns conducting capacity building workshops and incorporating child rights in the school curriculum.

Other areas to be looked into:

Communities and civil actors which includes all NGOs and child organisations to be included in the planning, implementation, monitoring and evaluation of all state supported policies. NGOs should be effectively monitored for the quality and the coverage of services provided by them.

In compliance with the general principles given in Articles 2, 3, 6 and 12 of the convention, India should work more towards following the comprehensive approach to reduce discrimination against women and children, the best interest of the child should be taken as a primary consideration such that all procedures and criteria are developed accordingly and disseminated to courts of law, administrative and legislative bodies, public and private institutions and also to the public at large.

Children are generally not perceived to be right holders by the society and their participation in the public sphere to have their voices heard is hugely insufficient. This is very relevant when it comes to sexual abuse of children as there's different voices may be the reason which allows the perpetrators to go scot free and allows room for many more to garner the courage to even think about committing se chats.

Serious concern was raised at four important points: the non criminalisation of sexual abuse committed to married girls over the age of 15 which was inconsistent with the POCSO Act. Secondly, data indicating that one-third of the rape victims in India is a child in that 50% of the abuses are cases of incest or by people in a position of trust and responsibility. Thirdly, most of the cases of child sexual abuse are not reported owing to the fear of social stigma and also due to the lack of information available on the rate of prosecutions. Finally, the committee pointed out the inadequacy of child sensitive treatment and professional examination services for victims of child sexual abuse. The conflict between personal laws on one hand and the prohibition of Child Marriage Act of 2006 on the other is another major concern. Enforcement officers often have very little awareness about PCMA.

India has worked on one of the recommendation by criminalising all forms of sexual abuse of girls under the age of 18 which includes marital rape.

Childline India Foundation in collaboration with the state is running a 24 hours helpline for children but it is yet not accessible to all children at a national level.

India has adopted The National Early Childhood Care and Education Policy of 2013. The program would enable parents to take better care of young children but the program lacks a national strategy or agendas which have been implemented to support parents and the families to fulfil all the obligations regarding child rearing.

Support Services:

India needs to establish adequate support services for parents and adopt and implement awareness raising and training programs on parenting skills. With a view to reduce the institutionalisation of children, the state needs to support and facilitate family based care for children whenever possible and also establish a system of kinship care and foster care for the children in alternative care. Independent and periodic review of the placement of children in these institutions and foster care has to be ensured along with providing accessible channels for the reporting, monitoring and remanding the maltreatment and abuse of children. These alternate care centres should also be equipped with adequate human, technical and financial resources so that social reintegration of the resident children can be facilitated and also the quality of rehabilitation can be ensured.

On Education and Information:

Sexual education is not just important for the grown-ups but it's even the more important for adolescents. Thus, the strategy on adolescent reproductive and sexual health should be effectively implemented and sexual and reproductive health education should be mandatory made a part of the school curriculum. It should be ensured that effective access to confidential sexual and reproductive health information is provided to adolescent girls and boys and also services such as access to modern contraception and legal abortions. Awareness needs to be raised to foster responsible parenthood and sexual behaviour giving particular attention to boys and men.

India had adopted a comprehensive scheme towards preventing trafficking and rescuing, rehabilitating, reintegration and repatriation of the victims of trafficking for commercial sexual exploitation in 2007. However, India is a source, destination and transit of the trafficking of children for labour, sex tourism and child pornography even today. High levels of internal trafficking of children raises concerns as trafficking for the purpose of begging, marriages and illegal adoption occur at a very high rate.

CHAPTER 4

THE QUESTION ON THE EFFICIENCY OF ENFORCEMENT

This is a justice system, don't just reduce it into a system.

According to the report by the NCRB, child rape is the 2nd most prevalent crimes against children after kidnapping and abduction. This data is a serious concern notwithstanding the fact that most cases go unreported or unsupported and that the 'lesser' forms of abuse other than pornography, attempt to commit sexual assault, do not even make it to the list. The Supreme Court while hearing a *suo motu* public interest litigation (PIL) petition which was launched by the Supreme Court itself after startling statistics it collected in a report titled "Alarming Rise in The Number of Reported Child Rape Incidents" showed that as many as 24,212 child rape cases had been registered between January and June in the year of 2019. Out of the 796 child rape cases registered in the six months between January and June 2019 in Delhi alone, only two were disposed off. The court report revealed that out of the 24,212 FIRs filed across India from January 1 to June 30, 2019, 11,981 were still being probed by the police. Charge sheets had been filed in 12,231 cases, though trials had commenced only in 6,449 cases. The trial courts had till now decided 911 cases which was about 4% of the total cases registered.⁶⁸

The court while trying to identify the handicaps facing law enforcement and trial proceedings, also expressed its dissatisfaction with regard to the inexplicable delay in giving justice to children subjected to sexual abuse and exploitation despite the enactment of the POCSO Act. The recent past has seen a rise in the number of child sexual abuse cases reported and it is a welcome step but the number is still abysmally low compared with the actual situation. One important reason for the hesitation is the fear of being caught in police jargons and unsympathetic treatment, pressuring police interviews, humiliating and traumatic medical check-ups and threats and pressure by offenders to drop charges. Yet after the case is registered, it can also be traumatic experience for the child in court. Cases can last for years and involve stressful examination. This can dissuade victims from coming forward and allow abusers to go unpunished for their misdeeds.

⁶⁸Crime in Shelter Homes, THE HINDU, <https://www.thehindu.com/news/national/sc-startled-by-delay-in-child-rape-cases/article28448240.ece> (Dec. 26, 2019)

This part of the study primarily tries to analyse the impediments posed by the State enforcement machinery. The following categories of dutyholders and their functions have been analysed:

4.1 The Working of Courts⁶⁹

The Academia has been highly criticized for not being sufficiently critical of the judicial decision-making adopted at the trial court level as most of the attention is devoted to the study of the judges of constitutional courts.⁷⁰ In the context of Indian trial courts there is a lack of documentation on the incidence of trial procedure an activity which does not allow stories of injustice to surface although researchers in West have showed through their studies that to what extent children as victims are revictimized⁷¹ in the course of the judicial process.

CASE STUDY: Oberoi conducted the first ever study on the working of Special Courts analysing 14 POCSO cases and the manner in which they were dealt with by the judges. In one of the cases,⁷² the FIR which was filed to the police stated that the accused followed the minor girl on her way to school and they were consequently charged under section 11 of the POCSO Act. The judge acquitted the accused persons when the informants i.e. the minor girl and her father turned hostile during the trial examination and their eyewitness friends could not be traced when the matter was listed for trial. The judgment bypassed every reason for the filing of the FIR and no procedure was adopted to find out why the informant and her friends turned hostile during the recording of statements. The Bombay High Court had previously decided on a similar matter where the bench directed all parties to be present in the court, called for recording the reasons for falling back on the filed complaint and asking the complainant repeatedly on different occasions during the judicial process if there existed some force or coercion.⁷³ The background of the accused was also traced to

⁶⁹ Geeta Oberoi, *Disappointing Performance of Special Courts Conducting Trials of Sexual Offences Committed against Children in India*, 11 NJAL.J.61 (2017).

⁷⁰ RICHARD POSNER, *HOW JUDGES THINK*, 204-229 (Harvard University Press, 2010).

⁷¹ Berliner and Stevens, *Advocating for sexually abused children in the criminal/justice system*, SEXUAL ABUSE OF CHILDREN: SELECTED READINGS (Washington, D.C.: U.S. Department of Health and Human Services, 1980). Libai, *The protection of the child victim of a sexual offense in the criminal justice system*, 15 Wayne L. Rev. 977-1032 (1969). Weiss and Berg, *Child victims of sex assaults: Impact of court procedures*, 21 J. THE AM. ACADEMY OF CHILD PSYCHIATRY 513-518 (1982).

⁷² State of Maharashtra v. Shahbaz Ganj Pathan and Ajjju Shabbir Shaikh, New Session Case No. 10/1/2014.

⁷³ Poonam and Ors v. State of Maharashtra, 2015 All MR (Cri) 2722.

understand if they had any sort of criminal history. None of such steps were taken in the above mentioned case to ascertain the true facts.

Judges also need to exert utmost caution in recording the statements as well as while pronouncing the judgment towards the exact facts that need to be reproduced; for words are the means in trying to depict the actual situation put down on paper. In *State of Maharashtra v. Sambhaji Praihad Kute*⁷⁴, the judge reproduced the prosecution version of facts to show that two minor girls who are going to school requested an unknown motorcyclist to drop them at the school whereas the girls had reported that the motorcyclist enticed them for a ride to school and molested them. This is a grave distortion of facts not expected of learned men of honour.

In the court room when an efficient and indisciplined practices are carried out, the trial process slows down and it has grave effects on the victims.⁷⁵

The real practice in the courts is still to casually adjourn hearings for frivolous reasons which are nowhere similar to what the legislators allowed or envisioned. Unlike regular criminal matters, cases related to atrocious offence of sexual abuse of children deserve special attention and much more efficient and regulated procedures. The defence councils are frequently absent in person or seek adjournments as they are unprepared. Statements that they have had other hearings to attend are also stated without invoking any penalty or affecting the case of the accused. Judges get to hear piecemeal evidence when the these trials are broken into multiple hearings; therefore taking weeks or even months to dispose and having prolonged gaps in between.

In a case where the Supreme Court has heavily criticised passive ways of judges administering trials, the shocking way in which the trial was managed by the judge can be understood by the fact that where a girl in her teens was gang-raped by her teachers it took five different dates for the trial court judge to record her testimony.

In another case, the proceedings were delayed between the victim girl's examination-in-chief and cross-examination which allowed ample time to the accused to persuade the victim to change the story.

⁷⁴ New Session Case No. 151/2014.

⁷⁵ *Why Rape Victims Lose: The culture of endless delays by trial courts leads to injustice for victims*, ECONOMIC AND POLITICAL WEEKLY, 49, No. 52 (Dec. 27, 2014) <http://www.jstor.com/stable/24481195>.

When trial court judges have to handle other criminal cases as well it naturally creates bottlenecks to dispose of the POCSO cases on time. With the enactment of the new act, more power and more awareness instilled in the children and the parents along with the proactive role played by various organisations, the number of reported cases has considerably increased. What is unfortunate is that with the rise in the reported cases delays in disposing them will become worse due to limited infrastructure and procedural lapses.

The legal tools to work on compliances and controlling how trials progress rest with the judges and not with the advocates. Although judges are burdened with the pendency of cases, the duty to proactively work on complying with section 309 is not relinquished. Plea to adjourn hearings without merit should be refused especially when witnesses are present in the courthouse and advocates should be clearly informed and strictly notified that requests to adjourn due to careless and frivolous reasons such as being busy or unprepared would be denied straightforward. Sanctions can be imposed on the advocates when unwarranted requests are made. Where adjournments become unavoidable, judges should minimize the time gap between subsequent hearing dates striving to resume the hearing on the next working day.⁷⁶

Lack of awareness among those prosecuting and hearing these cases of the manner in which children are commercially sexually exploited, and how the laws can be applied to better protect these children. For ex, judges have power under the Criminal Procedural Code to advise the police to conduct additional or new investigations if necessary, but this rarely occurs, even when a case merits additional investigation. Another obstacle to effectively trying cases involving sexual crimes against children is the pressure on judges and the resources available to them.

When a trial is in progress, the judges may be hearing other trials that are unrelated to sexual exploitation of children. As a result, judges must hear cases involving sexual children in the same forum in which they hear other criminal matters, and this is not conducive to protect the need of children who are the victim of sexual crimes.

⁷⁶ HAQ Centre for Child Rights, Implementation of the POCSO Act: Goals, Gaps and Challenges, 75, 102, available at <http://haqrc.org/wp-content/uploads/2018/02/implementation-of-the-pocsoact-delhi-mumbai-study-final.pdf> (Mar. 19, 2020).

Finally, lower court judges are not encouraged to be innovative in their use of laws or legal procedure to protect children.

4.2 Role of Police

Crime against children has phenomenally increased in the recent past. These crimes bring a lifelong adverse impact on the children. The police generally are the first responder and law enforcement agency entrusted with the task to protect children along with preventing and investigating crimes committed against them. When a child friendly attitude is exhibited by the police, this positive experience of children can reduce trauma, increase the child's trust in the justice system and better cooperation can be expected from them during investigation.

Every woman and child can avail free legal aid as per the Legal Services Authority Act of 1987 under Sec. 12. There are various other compensation funds including provision for interim compensation under the CrPC, POCSO Act, Victim Compensation Scheme of States, Supreme Court judgements etc. The necessary assistance to access this free legal aid and compensation should be extended by police officers and the DLSA needs to be informed through PLVs about individual cases requiring such assistance. At the district level the District Child Protection Unit (DCPU) can be contacted.

The Superintendent of Police and other senior police officers have a number of roles with respect to child protection. They are supposed to sensitize police personnel especially at the field level, foster partnerships between various entities working in close coordination with various stakeholders, promoting child friendly policing, supervision of investigation and raising the issue of child protection in various forums.

If the cognizable offence was not committed under the jurisdiction of the said Police Station, the police shall register a zero FIR and send it to the Police Station having jurisdiction over the matters of the place where the offence was committed. The Police Station with appropriate jurisdiction commences the investigation. If it so happens the police station refuses to lodge an FIR or to record any information, a copy of such information shall be sent to the Superintendent of the Police or the Assistant Commissioner of Police in writing, along with the statement that the

approached Police Station refused to lodge the FIR or record the information in question. A copy of the writing must also be sent to the Commissioner of Police, the Deputy Commissioner of Police and the Senior Police Inspector.

Special Juvenile Police Unit (SJPU)

The State government should set up SJPU in every district and city to organize child-related police functions. The SJPU should be led by an officer not below or above the rank of DSP and should have two social workers as members with experience of child welfare work. One woman has to be a social worker. SJPU deals with all child related matters.

The Central Government shall constitute a Special Juvenile Police Unit at each railway station for the Railway Protection Force or Government Railway Police as required and where a Special Juvenile Police Unit cannot be established, at least one RPF or Government Railway Police Officer shall be designated as Child Welfare Police Officer.⁷⁷

4.3 Prosecutors

The office of the prosecutor and the department of the police are separate to ensure that the prosecution department remains independent from the police, but this has proved problematic for trials. Prosecutors carry a very heavy load. Prosecutors are normally present in the courts for as long as the judges sit. They have very minimal assistance both in term of legal research and administration support. Considering that they have no contact with victim or access to other firsthand sources of information, they are primarily dependent on police information. It is only in cases where a victim engages a private lawyer that a prosecutor meets with the victim and is able to understand the case from the victim's perspective.

Moreover, because prosecutors must rely heavily on the police for instructions and information about the fact of a case, if the police fail to provide the sufficient information, the prosecutor's ability to try the cases is hampered. For example, when alleged offenders are arrested, they immediately apply on bail, and the bail application is served on the relevant police station at the time of application is made. Discussions

⁷⁷ The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2015.

with lawyers and prosecutors revealed that the police officers in charge of an investigation, who must instruct the prosecutor, rarely, if ever, meets with the prosecutor in advance of the hearing to plan a strategy for opposing the time of the hearing, which does not give the prosecutor sufficient time to prepare a strong opposition. Therefore, in most cases, the alleged abused obtain bail.

4.4 Role of Executive Organs

The district magistrate has a very important role towards capacity building and sensitization. Appropriate training to various functionaries of the district administration, especially those who are directly connected with child protection should be regularly imparted. They are endowed with the duty to ensure that various departments work together to maintain synergy, avoid duplication of efforts and even blame games. Formal platforms such as the District Task Force for Child Labour and the District Child Protection Committee under ICPS can be fully exploited to achieve this purpose. To ameliorate the threat to children, promoting partnerships and forging alliances with NGOs, Panchayati Raj institutions, civil society organisations, media and advocacy groups and training and research institutions would help in mobilization of resources and tapping the vast network of cutting edge level functionaries such as anganwadi workers, ASHA workers and teachers who can play a very efficient role in disseminating information and monitoring implementation.

The child welfare committee and any person connected with the child can file a petition before the DM who is the grievance redressal authority. It is the DM who sees the quarterly report on the nature of disposal of cases and their pendency submitted by the CWC. The power to order necessary remedial measures is in the hands of the DM who can further request the state government to consider additional committees. The JJ Act states that if CWC fails to address the pendency of cases even after three months of receiving directions it shall be terminated and a new CWC shall be constituted.⁷⁸ Unfortunately, on ground this section has not taken form as per the statute.

The district child protection committee is co-chaired by the DM along with the chairperson being Zila Parishad. It represents various line departments such as police,

⁷⁸ *Id.*

education, social welfare and child development etc. Also entrusted with the responsibility to monitor the Village Level Child Protection Committee and the Block Level Child Protection Committee notified under the ICPS by the state government the district magistrate holds a very powerful position. It is his duty to take steps so that child and adolescent labour rehabilitation fund is constituted. When it comes to child marriage, the DM is held to be the Child Marriage Prohibition Officer vested with all powers conferred on a child marriage probation officer under section 13(4) of the PCMA act. The District Magistrate also holds important responsibilities under The Immoral Traffic Prevention Act of 1956 such as appointment of a special police officer, notification of public places, passing an order to keep a person in a protective home etc. Whereas the structure has been designed quite comprehensively, the executive organ being heavily dependent on political mandates and release of funds and also lack of impetus has yet to go a long way to work effectively at the core of the issue.

CHAPTER 5

A STUDY ON IDENTIFYING THE LOOPHOLES IMPEDING ADDRESSAL OF THE ISSUE

The victim faces an arduous journey battling societal as well as legal hindrances right from the reporting of the case to the disposal. The repercussions post trial and a 'restorative' and 'reformative' approach is a neglected arena. The reason is the lacunae in the enforcement machinery combined with the frailty of the legal structure that in spite of ample laws is unable to exercise effective control in the follow up mechanism. This issue can be understood by identifying the challenges faced by victims during the three crucial stages:

Before the filing of a complaint, issues which include but are not limited to the following important factors arise:

- The online portal even if exists is not within easy access of every child
- There is already a huge pendency of cases which is intimidating and deters being caught in the legal maze
- Sufficient infrastructure both at the institutional level and policy level does not exist
- There is still a stigma attached to coming forward and fighting for the issue especially if the abuse does not 'seem' very serious
- The level of awareness is still very low both in the justice providers as well as the justice seekers with respect to the existence of remedies
- Sufferors especially children lack dedicated support services
- There is a lack of vigilance and trust in the legal and enforcement structure
- The present system of fines and punishments is flawed with loopholes which does not allowed the victims and their supporters to have very high hopes which may instill confidence to go ahead with adopting a the legal route for getting justice.

If the victim crosses the first hurdle and garners enough courage to file the complaint the system is marked with procedural loopholes which allow the abusers to have an easy hand.

- There is prejudice at the institutional level.

- Child sexual abuse cases still face inordinate delay in their entire disposal process.
- Bail provisions are not always stringently dealt with by judicial officers.
- There is inefficiency on the part of the prosecution and medical evidence in spite of procedural guidelines is still relied on excessively.

After the judicial procedure ends, the post-decision period raises the most serious concerns which are the most overlooked aspects of the entire process.

- There exist rehabilitation issues not just for the child but also the perpetrator for ensuring his/her reformation.
- Restoring the position of the child in the narrow mind-set community is a challenge.
- The career of the child and his or her educational aspects are not given due attention.
- There is no present system of mandatory family counselling.
- The perpetrator may come in contact with the growing child and have mental and psychological adverse impact.
- If sexual abuse goes to the extent of rape, the issue of abortion or dealing with the child of the child rape victim becomes a much bigger concern.
- There does not exist much study on the social patterns perpetrating the crime and a compulsive study on the social background of the offender also is crucial.

This researcher has tried to focus on two core areas which if rightly worked upon can immensely influence all the allied reasons that inhibits the proper redressal of child abuse issues, namely- The manner of court proceedings and the rehabilitation of the victim.

5.1. Manner of Court Proceedings

Victims of child sexual abuse and their families face the possibility of a prosecution that can drag on for years. Across India, court trials are usually a lengthy and arduous process. In cases of child sexual assault, where the stress of regularly and over long periods of time testifying is on already traumatized children as well as parents, the complainants end up feeling humiliated by the procedure. This is most important

because sometimes the system, such as the police and judges, does not understand that the person before it is a child and not an adult, and needs special care, and that the evidence of the child requires different compilation and evaluation.

5.1.1. Nature of Court- Special Courts

The act provides for establishment of a special court for the purpose of speedy trial which has the power to try any offence with which the accused may have been charged under the CrPC, 1973. Even cases registered under the Information Technology act of 2000⁷⁹ can be tried in such special courts. Also the government is empowered to appoint special public prosecutors for these special courts. Unfortunately, even more than 7 years after the passing of the act, it is mostly the overburdened session court which carries out the functions as designated special courts. Most of the state allocations for such infrastructure lie unutilized. There is also no separate cadre of lawyers to be appointed as the special public prosecutor. The already present officers are given this responsibility with leads to additional delay. Also it is seen that there is a lack of coherence between the appointed lawyer and the public prosecutor appointed in the court.⁸⁰

5.1.2 Court room environment

The POCSO Rules provide guidelines on special children's rooms, separate space for children waiting or providing their statement or interview; separate exits, wherever possible; video conferencing facilities wherever feasible; entertainment facilities.⁸¹ The Legal Services Authority may provide a support person or para-legal volunteer to advise and accompany the child in advance to record the statement, familiarize the child with the atmosphere of the court and the trial, and where the child is found to have been distressed by the experience of coming to the courtroom, Orders for video conferencing can be issued on behalf of the child by the Judge, on an application submitted by the help person or para-legal volunteer or by the Legal Services Authority.⁸² It also calls for providing for necessary expenses, ensuring friendly environment, No statement of the child to be disregarded as proof purely on the grounds of the child's age, photographs or comments admissible in the child's

⁷⁹ The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000, § 67B.

⁸⁰ Walby, *supra* note 11.

⁸¹ Protection of Children from Sexual Offences Rules, 2012 (Rule 54(12)).

⁸² Protection of Children from Sexual Offences Rules, 2012 (Rule 54(14)).

interview not to be harmful to the child's emotional or physical well-being, different modes of contact and evidence collection to be followed in the case of small children or otherwise disabled children, Ensuring that the child comes up close and personal with the perpetrator at no point during the trial. Following the litigation process, the child or parent should be told of the court decision and should be made aware of his / her legal rights.⁸³ But the environment of the court room is still intimidating and unfamiliar for the child required to testify as a witness.⁸⁴

5.1.3 Significance attached to medical evidence

Once information is received regarding commission of an offence, elaborate principles have been laid down in the POCSO Act which governs medical examination of the child to be sent to a registered medical practitioner within 24 hours. Emergency medical care has to be provided to such a child victim. Indian criminal law allows the prosecution to secure a conviction based only on the testimony of the child and it is not mandatory to corroborate it by forensic evidence. As per the routine practice the victims are examined by a doctor and medical legal reports are prepared. These reports play an important part and are a deciding factor whether the prosecutors and the police believe the survivors statement. This entire process can be extremely intimidating for many victims and their families. Often, doctors examining the victims are insensitive in their approach and many do not even have the skills to perform such an important role. Resultantly, many victims decide not to pursue the case. Child sexual abuse need not always involve violence or penetration. In such situations convicting a person on the sole basis of an oral testimony requires a very experience evaluation and the doctors and personnel involved often fail to consider that their role also includes treating and counselling the child. In case of medical evaluation where there is no informed consent it constitutes assault and is in itself an inhuman and degrading treatment.

The courts also sometimes show aggressive attitude being rigidly provisional as in Mohd. Habib Vs State⁸⁵, A rapist was acquitted because of the lack of marks of injury on his penis. The Delhi High Court presumed it to be an indication of no resistance. The victim was merely seven years old and the fact that she had a ruptured hymen and

⁸³Protection of Children from Sexual Offences Rules, 2012 (Rule 54(21)).

⁸⁴ State v Sujeet Kumar, CrI. A. 1190/2014 in the High Court of Delhi.

⁸⁵ 1989 Cr.LJ 137 Delhi.

there were bite marks on her body were blatantly ignored and not even considered by the court. The judgement could not even be swayed by the accounts of the eyewitnesses. Such was the inhuman approach that necessitated a child friendly law but unfortunately a lot more reforms need to come about.

Limits for submission of evidence

The POCSO Act prescribes no time limit for the completion of investigation however the Criminal Law Amendment Act, 2018 states that rape offences against the child has to be completed within 2 months from the date when the information was recorded by the officer in charge of the police station. However this time bound investigation also depends on the support from the forensic science laboratory reports by the medical authorities.⁸⁶

5.1.4 Time Bound Adjudication as an Issue

Out of the many school of thoughts, the rationalists and empiricists have dominated the entire period of length of the history of philosophy. Rationalist like Hegel propounded that the universe could be understood and expressed through rational ideas. While John Locke and fellow associates believe that the world was to be explored only true sense perceptions which constituted the experiences of man. The unification of both these schools could not be achieved in spite of the efforts of thinkers like Immanuel Kant. Thus, the idea that a court case can be concluded within a given time frame seems to have originated from a rational thinking presuming human conduct to be fairly reasonable and that by defining time limits for each stage of the trial the total expected time to be consumed in a court would become calculable. But going by the other view, it has to be understood that that the working of the trial court also largely depends upon the conduct and responses of indirect parties such witnesses, experts, forensic scientists, process- servers apart from the response of the judges and the parties to the suit.⁸⁷ All trial courts are specific in their working, and POCSO court being a court of first instance has to discharge all legal functions including legal supervision of investigation before the charge sheet, hearing and disposing all misc. applications that can be filed under any provision of CrPC, etc. The effective hearing time of the number of witnesses appearing in response to

⁸⁶ KHAN, *supra* note 9.

⁸⁷ *Id.*

the summons is also highly unpredictable. The expeditious approach of the judges too is constrained somehow by the total pendency, overburden of work and lack of tech-savvy environment.

The existing culture of recurrent adjournments and delays contradicts the vision of the entire Criminal Procedural law of India. CrPC mandates the judges to conduct day-to-day trials and that the witnesses should testify while they are present in the court. The POCSO law mandates taking testimony from child victims within 30 days from the date of taking cognizance of a case. The longer time that goes for the victims to testify the higher is the probability of their being pressurized to change their version of the story therefore compromising the case. It is vital to follow these provisions to ensure truthful victim testimony and make rightful convictions.

5.1.5 Entirely technical process

There is no pre-trial orientation of the victims in a proper regulated manner inspite of the POCSO guidelines due to lack of trained manpower, attached empathy, lack of coordination, resources etc. They walk blindfolded as it was, through the legal labyrinth without understanding the reasons of any of the steps taken or their position. This compromises both 'access to justice' and active participation.

5.1.6 False Imputation/ Retracted Statements

The investigating officer obtains the statement of the child and files a charge sheet but sometimes, it so happens that the victims on coming to the court change their statement and also go to the extent of denying any crime being committed against them. In most cases, this failure is due to false allegations but sometimes it may also be because of the vulnerable socio-economic conditions of the victims that may compel or threaten them to do so. Its important for the court to create such a child friendly environment and support system and instil enough confidence into the system so as to decrease the happening of such instances.

5.2 Victim Rehabilitation

To rehabilitate means to restore to a former capacity or to reinstate to restore or bring to a condition of health or useful and constructive activity⁸⁸. While dealing with victim rehabilitation the following issues still persist post- decision-

5.2.1 Absence of Support Services

One significant lacunae is the lack of support resources that help the victim to seek judicial redress and also allow for restorative justice outside the court process. Uninformed participation contributes to further abuse. The obvious consequences of uninformed involvement are: random payments by victims to different staff to obtain basic knowledge about the legal procedure, lack of informed consent for medical testing, and most significantly, failure to apply for compensation provided under the law to victims.

The presence of a support system for the child suffering from abuse is crucial. Before determining whether or what kind of state support the child would require, it becomes pertinent to first find out whether the child lives alone, with the family, in a government institution, with relatives, in a shelter home or at any other place. While understanding the nature of abuse and the extent and type of remedy and redressal that the child needs, the life situation of the child needs to be closely understood. The abused child may be a street child, a flesh trade victim, a child in conflict with law, a child having a family crisis, differently abled, a child in an institution, a child affected by conflicts or disasters, a child addict, emotionally disturbed or mentally ill or even a political refugee. The remedy needs to be curated as per the needs of the child.

5.2.2 Monetary Compensation- an Inadequate Solution

The POCSO Rules in addition to section 357 and 357A of the Code of Criminal Procedure provide for interim compensation to be granted to the child victims from the state authorities. This compensation has to be released within 30 days from the date of receiving the special court's order. Unfortunately owing to the social economic realities, this amount of compensation is consumed towards livelihood of the family rather than rehabilitation of the victims. The present mode of working of

⁸⁸ Workshop on Childhood, Vulnerability and Resilience: December 11-12, 2015 (2015).

law provides only a temporary solution to this problem. After the justice process is completed the child has to return to the same set of circumstances and therefore faces the risk of again being a victim of the same kind of offence.

5.2.3 Re-location Issues

Victims often face relocation due to social stigma, as well as due to family internal pressures. In these cases, it is important to provide individual and family counselling, safe shelter assurance and other support services available to help the survivor heal. These are not available at the moment however.

5.2.4 Victim-Centric Approach

There is a need to introduce ‘well defined legislation’ for the rehabilitation of child rape victims to overcome the trauma of such grim incidents. The concept of ‘Victim Centred’ Approach is very famous in United Kingdom⁸⁹. This method is commonly used against the problem of human trafficking which helps the victims as well as their families to meet the reintegration needs. As the quandary of human trafficking is very large in number in India, so the ‘Victim Centred’ Approach is one of the most essential approach which may result in beneficial outcome for prevalent cases in India. ‘Restorative Justice’ is practiced in the Russian and the Australian Courts⁹⁰, it is the criminal justice framework focussing on the redemption of criminals through reconciliation with victims and the broader community. Different high court judges in India have now recognized the value of restorative justice, which is non-stigmatic, economically viable and socially feasible as a fair and just mechanism which is to be introduced in India to rehabilitate minors, as the fortune of any country is based on their young minds.

5.2.5 Disabled Child Victim⁹¹

When the institutions fail to provide for the needs of disabled children when they suffer from sexual abuse it renders the entire legal system discriminatory. Therefore, it becomes a matter of safeguarding their rights rather than providing a mere

⁸⁹baltimore-victim-center-approach.pdf, <https://victimsofcrime.org/docs/dna-protocol/baltimore-victim-center-approach.pdf?sfvrsn=0> (Jan. 7, 2020).

⁹⁰Restorative Justice, , https://www.researchgate.net/publication/320863236_Restorative_Justice (Jan. 8, 2020).

⁹¹ Arushi Garg, *Navigating through Age and Agency in Eera v. State*, 14 SOCIO-LEGAL REV. 79 (2018).

concession to this vulnerable population. People whose mental stage still falls in the child bar are regarded disabled women and men and not children. The current law on statutory interpretation goes against using a rights based framework to improve the situation of mentally disabled victims who are disbarred from availing themselves of the more victim friendly procedures assessable under POCSO.⁹²

The statutory age has been linked to the capacity to consent; the mentally disabled are also incapable of consenting when it comes to any binding contract. However, the reasoning that has been give in by the Apex Court has been that this yardstick cannot be used for the mentally retarded as the extent can range from mild to severe impairment⁹³. A procedure to determine the age of a child has been provided under the JJ Act 2015 but in the trial courts the victim's age frequently becomes a fact in issue in numerous POCSO cases and the evidence relied on to prove the age includes just the birth records, matriculation/school certificate and radiological test.⁹⁴ This is a big loophole and holds tangential relevance as a similar process as the JJ Act has not been provided under POCSO and many judges refrain from taking the pain of expanding the ambit of their judicial interpretation.

Children under POCSO Act are devoid of certain additional rights which are available for mentally disabled adult sexual assault victims. If a child victim is also mentally disabled, provision should be provided of videography of the complaint⁹⁵, the victim identification of the accused should be supervised by a judge or a magistrate to make sure that the methods used are such that the victim is comfortable with⁹⁶ as well as videography of the same should be carried out⁹⁷. The victim pre-recorded statement to the judicial officer should be allowed to be produced in lieu of the examination in chief.⁹⁸

⁹² See LiveLaw News Network, Rape Accused Dead; But SC Keeps Case Alive To Decide Victim's Interests [Read Order], LIVELAW (Jan. 21, 2017), <http://www.livelaw.in/rape-accused-dead-skeeps-case-alive-decide-victims-interests/>.

⁹³ *Eera v. State (NCT of Delhi)*, (2017) 15 SCC 133 : (2017) 3 MLJ (Cri) 452.

⁹⁴ Swagata Raha et. al., Centre for the Child, National Law School of India University, Bangalore, Study on the working of Special Courts under the POCSO Act, 2012 in Maharashtra (2017), 40-43.

⁹⁵ Code of Criminal Procedure, 1974, No. 02, Acts of Parliament, § 154(1).

⁹⁶ *Id.* § 54A.

⁹⁷ *Id.*

⁹⁸ *Id.* § 164(5).

5.2.6 Safe Shelter for the Victim

Huge number of cases of incest are proof that home is not always safe for the child. And for those who lack a proper home, child welfare committee being badly trained and poorly funded are not able to adequately supervise the residential care facilities, orphanages and shelter homes set up and provided for by the state or private and charitable entities. Removing from one place of abuse and shifting to another where they may be similar chances of suffering repeated abuse is not the solution. The need is to reinforce the entire structure setup in a manner that during and post trial the child is finally able to find a surrounding that is stringently monitored, reliable and safe.

5.2.7 Career and Community Concerns

The educational prospect of a child subjected to sexual abuse is highly affected and the guilt or uneasiness to fit back in the stigmatised community and school environment adds further to his concerns. NGOs, child right organisations like Save the Child, UNICEF have been working vigilantly in this area but there is a need for inherent recognition of the fact that the child is a 'victim' and needs support. This needs wider dissemination of awareness to the general public and also counselling to the family and the community.

5.3. Awareness and Sensitization

The researcher in her survey where more than 70% of the respondents held a graduation degree, put forward a question asking the respondents about their familiarity with any law that existed in India to address child abuse and protect child rights. Surprisingly only 35.3% answered in the positive. Assuming that the survey projected information that the respondents have provided is accurate, a staggering 52.9% indicated towards a very minimal level of knowledge while 11.8% still had no idea of the existence of any such legal provisions in place. This data reflects that where in this era of extremely easy access to informative content across all channels, if such is the level of awareness among the literate community it is not difficult to assess how limited the reach of information is to the underprivileged sections of the society who are devoid of such access. No amount of laws and remedies can come to help if the people are not aware of their existence and how to apply them to their aid.

The researcher in her survey asked if the respondents had ever attended any sensitization session/seminar/ program on child sexual abuse or child rights. Only 30.4% of the respondents agreed to have attended any such program with a majority of 65.2% denying having ever attended any such awareness session. In fact 4.3% admitted that they had never heard that any such program even existed.

CHAPTER 6

CONCLUSION AND SUGGESTIONS

“This report⁹⁹ sheds light on the lives in a world that is often hidden and neglected, a world of vulnerability and exclusion. And it calls for us to speak up for the rights of children and to act on behalf of those who need our protection”.

-U.N. Secretary Kofi Annan

Recent rulings have shed a positive light on the way the changing outlook among the masses and proactive action of the judicial minds have led to some notable rulings where courts have been awarding death sentences for the rape and murder of minor girls taking into extra consideration where minority is coupled with intellectual challenge and physical disability¹⁰⁰ along with the admission of the fact that public abhorrence of such crimes needs reflection through imposition of appropriate sentence by Court¹⁰¹. Also convictions on the basis of sole statement of victim found reliable and sufficient¹⁰² help in reinforced confidence to proceed with a complaint without the fear of legal jargons and complications.

The WHO World Violence Report addresses how children's security mechanisms and legal institutions need to respond, with main recommendations highlighting the need for better evaluation and tracking, better response processes, policy implementation, better data, reporting of effective responses, and enhanced professional training and education. However, it is a sad truth that the legal system still in many aspects produces the child as an adult, subjects the child to adult normativity while pretending to recognize the child status of the child, and in effect robs the child of childhood and scars the child forever.¹⁰³

Law and policy to protect children's well being is not a terrain where competing rights should be fought over. Instead the state and its institutions, and the family should view this terrain as an area of shared responsibility. This is where the vulnerability approach comes in. Vulnerability theory recognizes human vulnerability as a

⁹⁹ United Nations General Secretary Kofi Annan, EXCLUDED AND INVISIBLE - Report of State of World Children – 2006, UNICEF. , <http://www.unicef.org/sowc06/english> (Last visited March 28, 2020).

¹⁰⁰ Gurvail Singh v. State of Punjab, (2013) 2 SCC 713.

¹⁰¹ Shyam Narain v. State of NCT of Delhi, 2013 (3) SCC 1.

¹⁰² Radhakrishna Nagesh v. State of Andhra Pradesh, 2012 (6) RAJ 582.

¹⁰³ Pratiksha Baxi, “Public Secrets Of Law: Rape Trials In India”, 119, 57 JILI (2015).

universal characteristic that defines our humanity, in opposition to current notions of the liberal fully functioning and autonomous individual. It is this shared vulnerability that allows us to be positioned within a relationship of responsibility towards each other. Doing so allows law and policy to transcend issues of competing rights and competing identities. It also helps shape the responsiveness of the state and its institutions in enabling families and children to build resilience and mitigate their individual vulnerabilities.¹⁰⁴

One-third of the girls and one-sixth of the boys experience some form of sexual abuse while they are minors and most of these cases go unreported. Where participants in a survey responded by 69 people were asked what in their opinion was the biggest reason for underreporting of these cases the following facts came to light,

36.2% of the respondents attributed fear of the society the biggest reason for under reporting of child sexual abuse cases. It was followed by 18.8% of the people who felt it due to lack of awareness of rights. The third biggest factor which the respondents felt was fear and lack of liability and trust in children. Other reasons stated by the respondents included poor enforcement attitude of police and other agencies, delayed justice system, lack of faith in parents or elders, weak mindset of parents, lack of support from family and parents and easy manipulation of children.

When asked to evaluate the efforts taken by the state to address the crime of child sexual abuse on the basis of their effectiveness, 47.8% expressed that they found the state efforts moderately effective while more than 46% heavily criticized and questioned the efficacy of whatever steps have been taken on the part of the state.

The respondents were asked to put forward their suggestions on the issue. Some of the strong points that the researcher agrees with are:

- Law is sufficient but problem is with the execution, implication and enforcement of the provided laws.

¹⁰⁴ 3 See Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1, 3 (2008). See also Martha A. Fineman, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 273, 269 (2010); MARTHA ALBERTSON FINEMAN AND ANNA GREAR (EDS.), *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* (2013); Martha A. Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self Sufficiency*, 8 *AM. U. J. GENDER SOC. POL'Y & L.* 13, 18-19 (1999). 24 See *id.* See also *VULNERABILITY AND THE HUMAN CONDITION: AN INTERDISCIPLINARY INITIATIVE*, <http://web.gs.emory.edu/vulnerability/about/index.html> (last visited June 24, 2015).

- Better environment for child victims, they should not be made to live the incident again and again by telling the same story to different people.
- A comprehensive change in the mindset of people through education and proper propaganda.
- Child abuse cases should have simplified and child sensitive procedures, and the families should not be victimised in the society, hence confidentiality should be maintained.
- Provision of sex Education at Schools and other educational institutes. Teaching the underage ones about inappropriate touch and what's wrong and right in touch. Awareness of child abuse laws on all platforms and also on parents teacher meet.
- Not making child abuse a taboo, and not normalising the feelings of desperation of a child. Sometimes it may take years for a child to accept the fact. Schools play a major role. While Sex Education is still a taboo, child sexual abuse education hardly exists. Schools must intervene, and sensitise parents as well as children about the issue. There is an absolute need to focus on these social evils which have faced the wrath of our ignorance since ages. More academic research in the field, is another way to address this issue.
- Increase awareness through various media platforms and also via social networking platforms. Provide a safe, reliable communication gateway where an affected child can reach out, discreetly if needed, and ask for help. Childline is a positive step that has to be widened and strengthened.
- Increase sensitization session about sexual abuse, so that children come out and speak up what they've really experienced. Sexual abuse immensely affects their mental as well as physical health. It's important that more and more sessions are organised, When children get aware and educated, laws also get properly implemented.

Further suggestions that the researcher would like to put forward are:

- The delivery of justice has to be expeditious through increased investment in human resources especially for training and counselling, use of technology for effective monitoring and increased budgetary allocations for coming up with suitable courtroom settings as laid down in the POCSO guidelines.
- In order to make the entire process more survivor centric, support services such as the integrated child protection scheme needs to be strengthened.
- Special psychological social counselling to the survivors of sexual abuse and the families need to be made compulsory through legislative measures.
- The National Family Health Survey (NFHS-4) establishes a direct casual link between education levels and delayed age of marriage. Thus, focus on improving education for children especially those belonging to the underprivileged section of the society would help in overall improvement in the segment of child protection and development.
- The Supreme Court directive of setting up exclusive children courts in every district has to be diligently executed and where the trial is not time bound stringent measures on the officials would help in speeding up the excruciating process.
- Apart from just a special juvenile police officer, a dedicated police cadre needs to be set up for investigation of cases dealing with crime against children.
- A policy needs to be formulated that covers relocation and rehabilitation guidelines for the child and in certain cases covering the family as well ensuring full physical and psychological recovery coupled with social integration.
- Setting up of an exclusive panel of doctors and psychologists in all government and private hospitals with basic training provided to every medical personal from time to time to deal with cases of child sexual abuse as per WHO Guidelines. Such cases should be dealt with sensitively minimizing examinations which are invasive in nature and ensuring access to continued reproductive as well as sexual and mental health services.
- The pendency and the performance of the courts should be digitally tracked and timely disposal of cases should be appropriately rewarded.

- A registry can also be maintained containing a list of all repeat sex offenders and the timely track can be kept of their progress.¹⁰⁵ Also increasing awareness through educative sessions and mass campaigns that focus on this matter need to be conducted on a mass scale.
- The National Commission for Protection of Child Rights¹⁰⁶ should have an independent capacity for carrying out investigations and also adequate resources to keep a check on the effectiveness of the POCSO Act.
- Redundant SCPCRs needs to be reinvigorated and in places where they haven't yet been set up, the state can be made liable by cutting down on its funding to create a pressure for productive working.
- The registration of children residential care facilities should be made mandatory and this should be subject to the regular and periodic inspections and if found wanting in specified standards, penalties should be imposed.
- Since it is less probable for a child to falsely implicate a person, a survivor centric approach post and during trial by effective monitoring and interviewing of the child should be done.
- Disciplinary consequences should be meted out to police officials found mishandling such cases.
- There is a dire need to make system-level changes by shifting non-POCSO cases to other courts and therefore making child exclusive courts where witnesses are examined on a day-to-day basis and the docket is effectively organized to ensure that the legal time requirements for the child victims are met to testify and complete trials. Since such a change cannot be brought about on a massive scale encompassing all the districts in one go, the courts can adopt the approach followed by various government programs such as smart city concept whereby one exclusive court can serve as a model for the other courts in a region and slowly but surely the model can be copied and implemented after studying the improvement and changes necessitated by such practical implementation.
- In *Sampurna Behera v. Union of India*¹⁰⁷ the Supreme Court emphasized on the need to set up meaningful special juvenile police units and noting the lax

¹⁰⁵ *Id.*

¹⁰⁶ Oberoi, *supra* note 18.

¹⁰⁷ civil writ petition, 473/2005.

attitude of the administration, directed the appointment of child welfare police officers at the earliest according to the JJ act. For the purpose of clearly identifying the duties and responsibilities of such units and officers, either the National Police Academy or the Bureau of Police Research and Development and NGOs may be asked for guidance whenever necessary.

- The advisory issued by the MHA on crime against children should be enforced by strict compliance regulations. All existing legislations relating to child abuse should be vigorously enforced. The law enforcement machinery has to be sensitized by way of well structured training programs, taking inputs on juvenile justice and human rights which should be included in the syllabus of various training programs as a priority subject. Thorough investigation of cases of crime against children should be done and charge sheets should be filed within three months against the accused from the date of occurrence without compromising on investigation. Inability to do so should attract stringent actions. To deal sensitively with the trauma that follows the crime, empanelled professional counsellors can be professionally recruited on a national/State basis to provide counselling to the victim and his or her family. Proper implementation of the rules under JJ act and also the POCSO rules needs to be brought to the fore not as mere advisories or guidelines but as compulsive measures since a delicate issue such as children's protection cannot be taken lightly.
- Collaboration of the local police with ChildLine-1098 service must be taken on a pilot basis.

More the light is thrown on this issue, the brighter the future of mankind shall be. The child being subjected to crime and not being redressed adequately is more likely to be filled up with remorse and a broken life and broken legal framework enforcement can never bring on a bright and humanly mankind having faith in the legal machinery.

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