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PROTECTION OF CHILDREN FROM SEXUAL ABUSE
UNDER THE PROTECTION OF CHILDREN FROM
SEXUAL OFFENCES ACT, 2012 AND JUVENILE JUSTICE
(CARE AND PROTECTION OF CHILDREN) ACT, 2015

AUTHORED BY - KARTIK JAIN, A3221519332
AMITY LAW SCHOOL, NOIDA BATCH 2019 – 2024

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I, KARTIK JAIN student of BALLB (H), hereby declare that the dissertation titled.

" Protection of children from sexual abuse under the Protection of Children from Sexual Offences Act, 2012 and Juvenile Justice (Care and Protection of Children) Act, 2015" which is submitted by me to Amity Law School, NOIDA in partial fulfillment of the requirement for the award of the degree of B.B.A.LL.B (H) by the Amity University, NOIDA, is my original work and has not been submitted elsewhere for award of any degree/certificate. It is further declared that all the sources of information used in the dissertation have been duly acknowledged. I understand that the dissertation may be electronically checked for plagiarism by the use of anti-plagiarism software to assess the originality of the submitted work.

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KARTIK JAIN

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LIST OF ABBREVIATIONS

AIDS	Acquired immunodeficiency syndrome
AIR	All India Reporter
APSAC	American Professional Society Abuse Children
CARA	Central Adoption Resource Authority
CWC	Child Welfare Committee
DCPU	District Child Protection Unit
DLSA	Delhi Legal Services Authority
ECOSOC	Economic and Social Council
FIR	First Information Report
HIV	Human immunodeficiency virus
HC	High Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPC	Indian Penal Code
JJA	Juvenile Justice Act
MLC	Medico Legal case
MoWCD	Ministry of Women and Child Development
NCPCR	National Commission for Protection of Child Rights

NCRB	National Crime Records Bureau
NCT	National Capital Territory
NGO	Non Governmental Organisation
PIL	Public Interest Litigation
POCSO	Protection of Children from sexual offences
RTE	Right to Education
SC	Supreme Court
SCPCR	State Commission for Protection of Child Rights
SJPU	Special Juvenile Police Unit
UN	United Nation
UNCRC	United Nation Convention on Rights of child
UNESCO	United Nation Educational, Scientific and Cultural Organisation
UNGA	United Nation General Assembly
UNICEF	United Nation Children's Fund
UOI	Union of India
WHO	World Health Organisation

CHAPTER- 1

1.1 INTRODUCTION

Children have been spared from the indignities, cruelties, and horrors that humans so frequently inflict on one another throughout history. Children have been abandoned, malnourished, beaten, enslaved, sexually molested, and executed at various periods and in various countries. Child abuse, for example, has become a severe social problem in many nations, despite the fact that it occurs infrequently or not at all in many others. Despite the fact that child abuse appears to rise in settings of fast socio-cultural change, urban migration, family dysfunction, and the like, no clear set of prognostic indicators has been established.

Indeed, it appears that characteristics that predict child abuse in one community are unlikely to predict child abuse in another. Only active public and professional concerns allowed a more accurate image of all types of child abuse and neglect to emerge, including physical, sexual, emotional, and failure to thrive due to maternal deprivation.¹ The current thesis is an attempt to analyse the juvenile justice system as well as a study of child abuse in many forms and how it has been dealt in various existing law and government policies.

This research aims to solve one of the most pressing issues confronting our country today.

Sexual abuse of children has been since the dawn of time, yet its nature and characteristics have evolved with each passing day. The preliminary study's findings and material revealed that the Prohibition of Child Sexual Offenses Act, 2012, had a severe flaw. It has also been discovered that there is a need to reconcile the various laws and give the POCSO precedence over other existing regulations.

"How we treat our children from the moment of birth reflects how we as a society consider ourselves," Stevanne Auerbach correctly observed. The physical and intellectual development of children has a greater impact on the quality of a nation and its survival.

Children's welfare and protection are a top priority because they are the nation's assets. They hold the nation's potential and establish the boundaries for its future development. Child

¹ Jill E. Korbin, "Child Abuse and Neglect: Cross-cultural Perspective", University of California Press, 1983



development is measured by variables such as child survival, child education, and child protective services.

"Starve a child of nourishment, affection, freedom, and knowledge, and you generate an adult who is stunted as an individual and holds back rather than accelerates progress toward development," John Grun noted. The pain of the vast majority of children in India today is reflected in John Grun's remarks. They are deprived of even the most basic necessities.²

The World Health Organization (WHO) defines Child Sexual Abuse (CSA) as *"the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws or social taboos of society..."*³.

Children under the age of 18 make up 37% of India's population, with a considerable proportion of them suffering from severe deprivations such as a lack of access to basic education, nutrition, and health care. Furthermore, children are vulnerable to a variety of adverse childhood experiences (ACEs), such as abuse, neglect, and maltreatment, with child safety issues often ignored.

Death, acute malnutrition, extreme violence, conflict driving displacement, children being out of school, child labour, children having children, and child marriages are the eight life events associated with childhood. To sense it, the award offered by our society for the innocence of the child victim of sexual assault, which is tremendous trauma on her person, is social death, which is more terrible than death itself.⁴

There is no specific definition for a child victim in our country. Section 2(wa) of the 1973 Code of Criminal Procedure defines the term "victim" (amended act 2008). The term "victim" refers to a person who has experienced a loss or injury as a result of the conduct or omission

² Navreet, 2003

³ World Health Organisation, 1999 Report of the consultation on child abuse prevention Geneva (Switzerland)



for which the accused person has been prosecuted, and it also refers to the victim's guardian or legal heir.⁵

There can be no definitive meaning of the word "child victim" because there are so many different definitions of what a child is. It considers the nature and age of legislation adopted for a specific purpose in the same way.

The Ministry of Women and Child Development (MoWCD) performed a large-scale nationwide survey in 2007 to analyse the extent and nature of child abuse in India, and the results were frightening. That more than half (53%) of the 12,447 children interviewed had experienced sexual abuse, which was defined as "sexual assault, making the child fondle private parts, making the child exhibit private body parts, and being photographed in the nude," and that more than 20% had experienced severe sexual abuse..⁶

In 2019, 46.6 percent of the 1.48 lakh crimes against children reported were related to kidnapping and abduction, 31.9 percent to the POCSO Act, 3.3 percent to rape, and 2.9 percent to assault against women with the purpose to offend her modesty.

Meanwhile, POCSO incidents accounted for 31.9 percent of overall crimes against minors in 2019, up from 28 percent in 2018 and 25 percent in 2017. The offender was known to the victim in 94.2 percent of the 26,192 cases registered under Sections 4 and 6 of the POCSO Act (amended in 2019) to provide for a minimum 20-year sentence for penetrative sexual assault of a victim under the age of 16 or for aggravated sexual assault on a minor), and was one of the victim's family members in 2,153 cases.⁷

A path from a "No" legislation to a "Special law" demonstrates the critical necessity for a special system, particularly to handle the rising number of sexual offences against children. The Protection of Children from Sexual Offences Act of 2012 (POCSO) has been in effect for

⁵ Inserted by Code of Criminal Procedure (Amendment) Act, 2008

⁶ Vikas Choudhary, "Child sexual abuse in India: A systematic review", NCBI, Oct 9, 2018

⁷ Bharti Jain, "Centre claims better enforcement as Pocso cases rise 19% in 2019", Times of India, Oct 2, 2020



about a decade. However, we continue to struggle to ensure its correct and effective execution in order to provide justice to child sexual assault victims.⁸

Even for an adult, there is a widespread belief that going through a trial is invariably a horrific event. When it comes to children who have previously been traumatised and are now facing a trial, the prosecution has a strong case. Our criminal justice system's lengthy procedures traumatise them, further favouring the prosecuting perpetrator.

While the state is prosecuting the culprit, the child victim goes through three stages: pre-trial, judicial trial, and post-trial.

The process of detection before to a judicial trial is known as pre-trial. The judicial examination and determination of facts and legal issues emerging between parties to a civil or criminal case is referred to as a judicial trial. Following the conclusion of a judicial trial and the announcement of a judgement, post-trial implies keeping track of the case's progress.⁹

All individuals shall be competent to give testimony unless the court considers that they are prevented from comprehending the question put to them or from giving rational answers to those questions by reason of their tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind, according to Section 118 of the Indian Evidence Act, 1872.¹⁰

The National Commission for the Protection of Child Rights (NCPCR) is a statutory body established in 2007 under the Commissions for the Protection of Child Rights (CPCR) Act, 2005, by an act of Parliament. The NCPCR is an organisation dedicated to ensuring that all laws, programmes, policies, and administrative systems in India are centred on children's rights.

⁸ Satyarthi, "STATUS OF POCSO CASES IN INDIA", March 2021

⁹ R.Malathi M.L., "DECODING THE CONCURRENCY OF LAWS RELATED TO CHILD VICTIMS IN

¹⁰ Ibid.



It works to guarantee that all laws and policies in the country are in line with the Indian Constitution's emphasis on children's rights, as well as the United Nations Convention on the Rights of the Child. Any person between the ages of 0 and 18 is considered a child. The Commission recognises that children's rights are universal and unalienable.

It focuses on children who are part of society's most vulnerable groups.

The Commission considers all of a child's rights to be equally vital, and hence does not rank them in order of significance.

In addition, the Commission is charged with obligations under two other acts:

The Protection of Children from Sexual Offenses (POCSO) Act which was passed in 2012, The Right to Education Act which was passed in 2009.

The NCPCR is required by the RTE Act to:

Examine and evaluate the safeguards in this Act for the protection of children's rights, and make recommendations for their effective implementation.

Investigate complaints against children's educational rights, including free and compulsory schooling.

The mandate of the Commission is to ensure that all laws, policies, programmes, and administrative mechanisms are consistent with the Child Rights perspective as embodied in the Indian Constitution and the UN Convention on the Rights of the Child. A child is defined as a person between the ages of 0 and 18.¹¹

Child Welfare Committees (CWCs) are to be formed by the State Government for each district, according to Section 27(1) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act), to exercise the powers and discharge the duties conferred on such Committees in relation to children in need of care and protection under the JJ Act, 2015.¹²

¹¹ Dr. Prateep Roy, “Situation of Children and Child Rights in India”, Butterflies, 2015

¹² “National Commission for Protection of Child Rights (NCPCR)” October 10, 2020 by Insights Editor



1.2 STATEMENT OF PROBLEM

With the repeated string of sexual abuse or rape of children being reported across the nation and a public outcry raging on the streets the victimized and abused child suffers in silence. Traumatized and horrified family members of unfortunate victims find themselves helpless and confused, unable to cope up with the heinous crime. Even though on 22 May 2012, the Parliament passed the Protection of Children against Sexual Offences Act, 2012 (POCSO) to protect children from offences of sexual assault, sexual harassment and pornography. It remains an unimplemented law, unknown to most and beyond knowledge or information of those who need to apply it. Sadly, the result is that POCSO, an Act, which is a necessity in India where, as per census 2011 more than 440 million children counted below 18 years of age constituting 37% of the total population of the country have been abused. Rhetoric demands stiff penalties, expeditious new laws and fast track courts little realizing that POCSO, as a wholesome law already says it all. The research problem is based on certain drawbacks in the POCSO law around the following issues which will be specifically focused which undermines the effectiveness of existing legislation.

1. Consent of victim for medical examination: If the child/adolescent refuses to undergo medical examination but the family member or investigating officer is insisting for the medical examination, the POCSO Act is silent and does not give clear direction. In such instances, it is critical to clarify the issue of consent.
2. Inconsistency in rules of medical examination: The POCSO Act, Section 27(2) mandates that in case of a female child/adolescent victim, the medical examination should be done by a female doctor. The law, on the other hand, requires that the available medical officer give emergency medical care. The Criminal Law Amendment Act, Section 166A of the Indian Penal Code, on the other hand, requires the on-duty Government medical official to examine the rape victim without fail. When a female doctor is unavailable, this legal challenge arises.

3. **Treatment cost:** The law has imposed a legal obligation on the medical community and institution to offer survivors with free medical care. If suitable facilities are not available or a costly procedure is required, the state should reimburse the costs; otherwise, the hospital may provide inadequate medical treatment or deny the survivor thorough treatment.
4. **Consented sexual intimacy:** Because no exception has been granted in the Act, sexual contact between two adolescents or an adolescent and an adult is considered illegal under the POCSO Act 2012, an act of sexual encounter with a person under the age of 18 is an offence regardless of consent, gender, marriage, or age of the victim/accused.
5. **Special Courts:** Most states have not yet notified special courts or appointed special public prosecutors, thus denying children their right to a child-friendly system and structure.
6. **Training:** Training all the stakeholders is one of the important variables in providing comprehensive care and justice.
7. **Role of mental health professional:** In cases of child sexual abuse, the definite symptoms of genital injuries are rarely visible. In a court of law, the role of a mental health professional is critical in interviewing the child. Child sexual abuse can have both short- and long-term negative mental health consequences.
8. **Reporting:** It is common knowledge that most incidences of child sexual abuse go unreported. Survivors and family members are humiliated and ashamed of the conduct, which has left them with remorse, rage, resentment, and emotional stress. Fear of re-victimization as a result of medical examinations, the criminal court system, and uninformed society members keeps them silent and subjected to long periods of torture. All medical practitioners who work with children are required by law to disclose any reasonable suspicion of child sexual abuse to the authorities. As a

result, specialists must keep a close eye on sexual abuse and properly investigate and examine the child.¹³

1.3 OBJECTIVES OF THE RESEARCH

The objective of this research is to develop an understanding to assess the magnitude and forms of child abuse in India and to present the overview of the Juvenile Justice System (JJS) in India as it exists today with all inadequacies:

1. Monitor implementation of juvenile justice through research and documentation.
2. Childhood sexual abuse and review the impact it can have, explore the long-term effects and symptoms associated with childhood sexual abuse, and counseling implications.
3. To find and study the recommended strategies and program interventions for preventing and addressing issues of child abuse. To address some preliminary concerns about the substantive and procedural components of the law addressing child sexual abuse and India's overarching child protection framework.
4. Whether the existing provisions are sufficient for proper need, care and education to the juvenile/child in the homes.
5. To study the effectiveness of the POCSO Act, 2012 in the investigation procedure which is of utmost important and widespread social problem.

1.4 HYPOTHESIS

When we analyse we find that there are enforcement and implementation problems under the Juvenile Justice Act 2015 and the POCSO Act 2012. The provisions of these two acts form a lethal combination, and provide a constricted background to provide protection and sound development of child. In view of the existing condition and dire need of change for strict implementation to provide teeth to the existing laws, this hypothesis rest on presumption that if the situation remains unchanged the repercussion of this shall expunged the objective of the Juvenile justice system.

¹³ Laura K. Murray, “Child Sexual Abuse”, NCBI, April 29, 2015



1.5 RESEARCH QUESTIONS

The researcher will also be mapping the issues on the following research questions:

1. Why society is now more concerned about sexual abuse?
2. What are the main sources of evidence?
3. What are the effects of Child sexual abuse on victim ?
4. What can be done to make children safer?
5. What are the laws related with Child sexual abuse in India and in other countries ?
6. How effective is the POCSO Act 2012 and Juvenile Justice (Care and Protection Act) Act 2015 and its implementation ?

Thus, the purpose of this study is to delve into the aspects of child sexual abuse across India and reasons behind it despite the existence of various legislations that is prohibitive in nature towards the specific issue of child sexual abuse.

1.6 RESEARCH METHODOLOGY

The proposed study would be based mainly on the method of doctrinal research, in addition descriptive methods shall also be applied in accordance with the need of prospective study. Where the things are of introductory in nature, the method to be applied will be analytical. It includes the various provisions dealing with child abuse in different statutes and are vital for this research.

Some primary source of data could also be used in accordance with the requirements of study. The information shall be gathered using secondary source of data. It will include governmental and semi-governmental publications, personal records, mass media reports and law journals, public and personal documents, internet magazines and other similar good sources of data. The proposed study will definitely enrich the existing knowledge about the legal aspects of 'Juvenile Justice'.

1.7 SURVEY OF LITERATURE

In order to comprehend and study the issue at hand as well as to meet the aforementioned objectives, the researcher referred to research in the relevant field of study. Some of the most notable are listed below:

1. Ministry of Women and Child development Government of India, “Study on Child Abuse: India 2007”

This report by the Ministry provides the statistical data on number of cases of sexual abuse cases in the country on the basis of gender. The statistics have been collected by the an NGO.

2. Vikas Choudhary research paper titled: Child sexual abuse in India: A systematic review provides the insight into the data and causes and types of child sexual abuse.

It provides the causes and types and various other factors in detail of such abuse. It basically focuses on the factors which are more relevant in India with respect to its cultural, historical, societal background.

3. R.Malathi M.L, “DECODING THE CONCURRENCY OF LAWS RELATED TO CHILD VICTIMS IN INDIAN CONTEXT - A PERSPECTIVE”, Tamil Nadu State Judicial Academy

This article explores the statistical outlook on Child Sexual Abuse in India and various factors that are responsible for their abuse and the major issues that deal with it. It also mentions about the situation of trials with respect to children and ways to make such procedures child friendly.

4. Report of the consultation on child abuse prevention, Geneva(Switzerland): World Health Organisation, 1999.

In the report the World Health Organisation defines Child Sexual Abuse. It mentions and includes various factors and consequences of such abuse, ways to curb these and

provides for various ways in which a child should be dealt with in cases of abuse.

5. Karen L. Kinnear, Childhood Sexual Abuse 21(A reference handbook second edition)



This handbook specially focused on various indicators of child sexual abuse and how the parent or guardian should respond and react and make a comfortable environment for the child. It includes the behavioural indicators, sexual indicators and physical indicators of such abuse.

6. Dr. Prateep Roy, *Situation of Children & Child Rights in India: A Desk Review 7* (Butterflies, New Delhi, 2015)

This study talks about the various laws and legislations on child sexual abuse in India and other international legislations. It draws a comparison of Indian laws and international legislations and statutes and how India complied with its international responsibilities.

7. Kalantry, Sita, “Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR” , Cornell University 15-16.

This report specifies the provisions of ICESCR that expressly focuses on child rights and UNESCO’s involvement in formulation ICESCR and adding express provisions with respect to rights of children.

8. MINISTRY OF WOMEN AND CHILD DEVELOPMENT, “ Guidelines for the Use of Professionals and Experts under the POCSO Act, 2012” (2013)

The ministry issued certain guidelines for professionals and experts under the POCSO Act. It imparts that if an NGO has information of sexual abuse of child then it is binded by mandatory reporting.

CHAPTER 2

CONCEPTUALISATION OF CHILD SEXUAL OFFENCE IN INDIA AND ITS TYPES

‘All kids need is a little help, a little hope and somebody who believes in them.’-

Earvin ‘Magic’ Johnson¹⁴

For decades, child sexual exploitation has been a part of history, but it has not always been an accepted topic of public discussion. For several years, it was taboo in society to share any troubling personal information about one's family life, and public awareness of sexual harassment was low. Most people assumed that child sexual exploitation only occurred among the poor and ethnic minorities.

The first large-scale government-sponsored research study to determine the magnitude and type of child abuse in India was commissioned in response to growing concerns about female infanticide, child rapes, and institutional abuse of children. A startling revelation from a government-commissioned study is that more than 53% of Indian children are sexually abused or assaulted. The majority of these incidents involved somebody the child knew or who was in a place of confidence and accountability. Unsurprisingly, most children did not report the violence to anyone. Furthermore, the rates and extent of Child sexual abuse in the country vary by region and rural-urban area.

Sexually abused children are deeply let down by the criminal justice system's systematic inability to address their complaints, as well as the social stigma associated with such violence. Just 3% of Child sexual abuse violations were reported to the authorities. Given the shame and associated socio-cultural stigma, it's unsurprising that Child sexual abuse is severely underreported, particularly if the violence occurs within the family. This pattern is

¹⁴ He is an American retired professional basketball player. Since his retirement, Johnson has been an advocate for HIV/AIDS prevention and safe sex, as well as an entrepreneur, philanthropist, broadcaster and motivational speaker.



not unique to India, but is seen in collectivist societies across Asia, where an individual's experience is overlooked in order to shield the family from the stigma of sexual violence.

Child Sexual Abuse was not widely known or discussed until the late twentieth century. People began to publicly discuss child sexual exploitation and to take concrete steps to stop it. In the early 1970s, when feminists led an anti-rape movement and used child sexual exploitation as an example of a repressive patriarchal culture, Child sexual abuse became widely known.

During the 1970s and 1980s, public figures and other non-feminists entered the battle against Child sexual abuse. Politicians took matters into their own hands in an attempt to establish government policy to safeguard children. Politicians were motivated to act in part by a desire to obtain positive public support, but political and public interest in the topic of Child sexual abuse waned over time.

The World Health Organization (WHO) defines Child sexual abuse as:

The involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violate the laws or social taboos of society. Child sexual abuse is evidenced by this activity between a child and an adult or another child who by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person. This may include but is not limited to: the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of child in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performances and materials.¹⁵

The American Professional Society on the Abuse of Children (APSAC) defines child sexual abuse in its Handbook on Child Maltreatment (2nd Edition, 2002):

"Child sexual abuse involves any sexual activity with a child where consent is not or cannot be given. This includes sexual contact that is accomplished by force or threat of force,

¹⁵ Report of the consultation on child abuse prevention (WHO/HSC/PVI/99.1), Geneva(Switzerland):
World Health Organisation, 1999.



regardless of the age of the participants, and all sexual contact between an adult and a child, regardless of whether there is deception or the child understands the sexual nature of the activity. Sexual contact between an older and a younger child also can be abusive if there is a significant disparity in age, development, or size, rendering the younger child incapable of giving informed consent.”

2.1 REASONS BEHIND PREVALENCE OF CHILD SEXUAL ABUSE

Child abuse and victimisation, like any other form of social damage, have a number of causes. It should be remembered that the economic, social, and cultural circumstances, as well as the laws that regulate the society, all play a role in child abuse. Child abuse is frequently caused by poverty, illiteracy, and parents' lack of knowledge in underdeveloped or developing countries, for example.

The societal dogmas responsible for child sexual abuse are briefly explained below:

2.1.1 Taboo around discussing sex and sexuality

In India, there's hesitance and social shying from talking about things related to sex and sexuality, especially with children. Adults find it troublesome and humiliating to have conversation about the subject with children since regularly they themselves have not gotten and have no thought how to have 'the talk'.

Ignorance and misconceptions about sexuality pervade in the absence of teaching and proper information, leaving children, especially adolescents, uninformed and vulnerable.

The taboos create an atmosphere of stigma and secrecy around any subject involving sexuality, including child sexual abuse, which is frequently unreported due to the taboos.

2.1.2 Tolerance of Gender-Based Violence

In India, there has always been a degree of denial about gender-based violence against women

and children, as well as a level of acceptance and tolerance at times. We believe that if women and children cross the “line of morality” established by our patriarchal society, such things will happen to them.



2.1.3 A Culture that accepts and values adults over children

Children are treated as people who are not yet fully developed. Their principles and voices are often absent from public debates on topics that directly affect them.

Without even the slightest critical involvement, they are taught to 'respect' the utter authority of adults. Their viewpoint may be considered "disrespectful."

As a result, a child who has been sexually abused is always unaware that an adult might do such a thing to him or her. If a child is sexually abused, many parents and community members believe it is the child's fault.

2.2 FORMS OF CHILD SEXUAL ABUSE

2.2.1 Physical abuse

Bodily assault is the act of inflicting physical injury on a child. This includes things like burning, striking, hitting, shaking, kicking, beating, or otherwise injuring a child. It's possible that the parent or caregiver didn't mean to hurt the child. It could, however, be the result of age-inappropriate physical punishment or harsh discipline.

2.2.2 Sexual Abuse

When a child is subjected to unwanted sexual conduct, this is known as sexual abuse. Sexual exploitation includes fondling a kid's genitals, forcing a kid to fondle an adult's genitals, intercourse, incest, rape, sodomy, exhibitionism, and sexual abuse.

These acts must be carried out by a person who is accountable for the child's treatment (for example, a babysitter, a parent, or a day care provider).

These offences are considered sexual harassment if they are done by a stranger, and they must be investigated by the police and criminal courts.

2.2.3 Emotional abuse

Psychological maltreatment, emotional violence, and verbal abuse are all terms used to describe it. It includes parental or caregiver behaviours or inactions that have caused or may cause severe behavioural, cognitive, emotional, or mental trauma.



Parents/caregivers may use harsh and/or unusual punishments, such as locking a child in a closet or dark room for extended periods of time, or threatening or terrorising them. Less serious but equally destructive actions include belittling or rejecting care, using bad terms to describe the child, and a practise of blaming or making the child a victim.

2.2.4 Neglect

When a parent fails to address a child's basic needs, this is known as neglect. Physical, educational, and emotional neglect are all examples of neglect. Physical neglect might include not providing enough food or clothing, as well as not providing appropriate medical treatment, supervision, or weather protection (heat or cold). It's possible that you'll be abandoned.

2.2.5 Educational Neglect

Failure to provide adequate schooling or unique educational requirements causes excessive absenteeism. Psychological neglect encompasses a lack of parental attention and affection, as well as substance abuse, which includes encouraging the child to use drugs and alcohol.

2.2.6 Behaviours

Child sexual abuse includes both touching and non-touching behaviours. Here are some examples of touching behaviour:

- Touching a child's genitals (penis, testicles, vulva, breasts, or anus) for sexual enjoyment or other reasons;
- Forcing a child to touch another person's genitals or playing pornographic (pants-down) games with them.

Non-touching behaviour can be demonstrated in the following ways:

- exposing a child to pornography - exposing a child to another person's genitals
- Inviting children to participate in sexual activities with one another - Using the internet to entice a youngster for sexual purposes, etc.

The purpose of presenting such behaviours is to highlight that violence is not limited to physical contact.

2.3 INDICATORS OF CHILDHOOD SEXUAL ABUSE

It's likely that children who have been sexually assaulted will remain silent about it. Rather, you may see signs such as physical changes in your child's behaviour or emotions. Children are affected by sexual violence in a variety of ways. The age of the child, the frequency and severity of the abuse, what happens during the abuse, and who is abusing them are all factors that influence how they respond.

Some children will have very modest symptoms, while others will exhibit none at all.

2.3.1 *Physical indicators*

A medical professional is generally the one who determines physical indicators. Medical practitioners have gained more experience in recognising the indicators of child sexual abuse in recent years. Pregnancy and venereal disease are the most frequent physical signs of sexual abuse when they are present.

Semen in a child's vagina, a torn hymen, vaginal damage, an injury to the penis or scrotum, labial adhesions, vulvovaginitis, persistent urinary tract infections, and anal bruises are all signs.¹⁶ Other signs include vaginal swelling or redness, pain while going to the bathroom, trouble walking or sitting, and bruising on soft body regions such as the buttocks or thighs.

2.3.2 *Sexual indicators*

Sexual-psychosocial indicators include children's utterances about sexual features that a child of that age would not likely be aware of, sexually suggestive drawings or comments, sexual harassment while interacting with other children, hints of sex with adults, and, in some cases, masturbation. When children get older, they may experiment with masturbation, but if they

¹⁶ Karen L. Kinnear, *Childhood Sexual Abuse 21*(A reference handbook second edition)



do it frequently during the day, are unable to stop, or insert different items into their vagina or anus, these could be signs of sexual abuse.¹⁷

2.3.3 Behavioural indicators

Some of the behavioural indicators of sexual assault include sleep difficulties, bedwetting, regressive behaviour, dread of specific people, anxiety of being left alone, cruelty to animals, food problems, melancholy, or social isolation. Because these symptoms could potentially be indicative of other family problems, doctors should be cautious when diagnosing sexual assault only on the basis of nonphysical clues.¹⁸

2.4 CONSEQUENCES OF CHILD SEXUAL ABUSE

Child sexual abuse is a major public health issue with far-reaching consequences. Child sexual abuse has the following outcomes or ramifications:

2.4.1 Psychological Effects

Emotional and mental health issues are frequently the first symptom and result of child sexual abuse. Post-traumatic stress disorder, despair, hopelessness, anxiety and panic disorder, guilt and wrath, and substance misuse problems that begin in childhood or adolescence are all examples.

2.4.2 Physical Effects

Adults who have been sexually abused as children are more likely to have physical health problems. This is thought to be due to the substance misuse, mental health concerns, and other effects that child sexual assault survivors endure.

¹⁷ Ibid.

¹⁸ Ibid.



Adult victims of child sexual abuse utilise health care more frequently and have significantly more health concerns than individuals without a history of child sexual abuse.

Adult survivors of child sexual abuse are more likely to develop a variety of non-life threatening and potentially psychosomatic disorders. Fibromyalgia, severe premenstrual syndrome, chronic headaches, irritable bowel syndrome, and a variety of reproductive and sexual health concerns, such as heavy bleeding, amenorrhea, pain during intercourse, and others, are among them.¹⁹

Survivors of child sexual exploitation face not only more minor health issues, but also a larger likelihood of more serious problems. Women with a history of child sexual abuse are more likely to develop obesity and eating disorders.

Adults who were sexually abused as children are 30% more likely than their nonabused colleagues to have a serious medical condition like diabetes, cancer, or heart disease, stroke, or hypertension.

2.4.3 Behavioural Effects

Adult survivors of child sexual abuse are more prone to become involved in criminal activity as both a perpetrator and a victim. This is most likely due to a higher chance of substance misuse issues as well as other lifestyle concerns.²⁰

Adult survivors are more than twice as likely as non-abused peers to be arrested for a property offence (9.3 percent versus 4.4 percent). As adults, child sexual abuse victims were nearly twice as likely as the general population to be arrested for a violent crime (20.4 percent versus 10.7 percent).

Physical hostility, non-compliance, oppositionality, and over-sexualized behaviour are all common behavioural disorders in sexually abused children and adolescents.

¹⁹ Walker, E. A., Keegan, , *et al.*, Psychosocial factors in fibromyalgia compared with rheumatoid arthritis:

²⁰ Darkness to light, Report on Child sexual abuse statistics (12/04/2015)



2.4.4 Interpersonal Effects

Survivors of child sexual abuse have lower social skills, communication issues, a lack of trust, and uneasy relationships.

Children's sexual exploitation has long-term societal consequences. When the financial cost is multiplied by the prevalence of child sexual exploitation.

2.5 MAGNITUDE OF PROBLEM IN INDIA

Child sexual abuse has long been a concealed problem in India, with public debate and the criminal justice system mostly ignoring it. India is the world's second most populous country, with 17 percent of the world's people living there, according to the latest census. Nearly one-fifth of the world's children sleep in India, which accounts for 42 percent (more than one-third) of the country's total population, with nearly half of those children in need of care and protection.²¹

Recovery and Healing from Incest, an Indian non-governmental organisation (NGO), completed the first study on child sexual abuse in India in 1998. The majority of the participants (76%) said they had been mistreated as a child or adolescent.²²

A survey of 2,211 school-aged children in Chennai was done in 2005 by Save the Children and Tulir—Center for Healing and Prevention of Child Sexual Abuse, an Indian NGO. More than one-tenth (15%) of the participants claimed that they had experienced severe types of sexual abuse, while over 48 percent and 39 percent of the boys and girls, respectively, reported being sexually assaulted.²³

In 2007, the Ministry of Women and Child Development in India performed a research that covered 13 states. According to the study, roughly 21% of the individuals had been subjected

²¹ Varthika Gupta, "CHILD SEXUAL ABUSE IN INDIA" LAWUNISON, Aug 7, 2020

²² Ayushi Dixit, “Child Sexual Abuse”, India Think

²³ Ministry of Women and Child development Government of India, “Study on Child Abuse: India 2007”



to severe types of sexual abuse. 57.3 percent of the participants who reported being molested were boys, 42.7 percent were girls, and roughly 40 percent were 5–12 years old. Other forms of sexual assault were experienced by about half of the subjects.²⁴

According to data from the National Crime Record Bureau, 109 children were sexually molested every day in India in 2018, a 22 percent increase from the previous year.²⁵

According to newly revealed NCRB data, 32,608 incidents were reported under the Protection of Children from Sexual Offences Act in 2017, while 39,827 cases were reported in 2018. (POCSO).²⁶

The POCSO Act of 2012 is a comprehensive statute that protects children from sexual assault, sexual harassment, and pornographic offences. It necessitates the establishment of special courts, special prosecutors, and support individuals for child victims in situations involving child sexual abuse.

According to the report, there were 21,605 child rapes in 2018, with 21,401 rapes of girls and 204 rapes of boys.²⁷

In India, a large portion of the kid population is vulnerable from birth until they are physically, emotionally, and psychologically capable of self-sufficiency. As a result, children require a holistic approach in order to become active participants in their personal growth as well as the nation's development.²⁸

²⁴ Ibid.

²⁵ Editorial, “109 children sexually abused every day in India in 2018: NCRB” Times Of India, January 16,2020

²⁶ Ibid.

²⁷ Ibid.

²⁸ Dr. Prateep Roy, *Situation of Children & Child Rights in India: A Desk Review 7* (Butterflies, New Delhi, 2015)

In India, the number of children in need of treatment and protection is vast and expanding. Because of uncontrollable homes, extreme poverty, and illiteracy, children receive relatively little treatment during their formative years. Free programmes, on the other hand, are underutilised. The urban poor, the massive migrant population, and rural areas are all particularly affected.

In large cities, street children (abandoned and sometimes homeless) and child labourers working in low-wage jobs are serious issues. Children in tough conditions, such as those who have been affected by disasters, those who live in war zones, refugees, and those who have HIV/AIDS, require extra care and recuperation.



CHAPTER- 3

INTERNATIONAL LEGAL FRAME WORK AND STANDARDS FOR THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES

Once the substantial rights of children and the protection of such rights were recognized by human societies, state parties decided to pass differential laws in their domestic jurisdiction and at the international level. International instruments are undoubtedly among the most important resources of human rights that recognize essential rights and freedoms.

Based on their scope and the protection they provide to people, international instruments can be classified as general and special instruments. General instruments, like the Universal Declaration of Human Rights (1948), do not address the rights of special groups and generally cover the rights of all humans regardless of gender, religion, nationality, etc. In contrast, special instruments cover special groups including women, refugees, children, etc. Each of these instruments is particularly significant at the international level and each addresses certain general or special principles and rights of human beings.

3.1 GENERAL INTERNATIONAL INSTRUMENTS

3.1.1 *Universal Declaration of Human Rights*

On December 10, 1948, the Universal Declaration of Human Rights was signed, marking a turning point in human history. At the time, the world was still recovering from the devastation caused by the Second World War, as well as the Nazi regime's massacres and other crimes.²⁹

²⁹ Background information: Universal Declaration of Human Rights.p.1.



The nations would not accept war crimes based on fictitious justifications, nor could they overlook the fact that millions of civilians had died as a result of the on-the-ground conflicts. In an unprecedented agreement, state parties from all over the world declared that human rights could no longer be grossly violated, keeping the entire world responsible for any kind of such oppression.³⁰

Representatives from 48 countries gathered at the United Nations headquarters in Paris to discuss the foundational rights of human beings; a discussion that resulted in the final version of the Declaration being prepared on December 10, 1948, which contained these basic rights and held the world responsible for providing these rights to all human beings. The Declaration's 30 articles³¹ reflect the signing nations' agreement on the importance of following essential rules in various aspects of human life, such as substantial rights (e.g., life, personal security, and liberty); civil rights and freedoms (e.g., freedom of opinion and expression); and rights to equality (e.g., the right to be free from discrimination).

Children were viewed as vulnerable beings in the Declaration, who required particular protection, greater education, and a life that was guided by the child's best interests.³²

It should be noted, however, that the Declaration is not a legally enforceable instrument in and of itself, and that the state signatories cannot be held accountable for failing to comply with the Declaration's responsibilities.³³ However, because the Declaration is recognised as one of the most basic and essential international treaties and conventions on human rights recognition, States Parties can use it to create domestic laws to defend human rights.

³⁰ Ibid.

³¹ Background information: Universal Declaration of Human Rights. op. cit. p.2.

³² Holzscheiter, Anna, "Children's Rights in International Politics", (Palgrave Macmillan), pp.128-9, (2010).

³³ Background information: Universal Declaration of Human Rights. op. cit. p.3.



3.1.2 *International Covenant on Civil and Political Rights*

Many state organizations and countries believed that the Declaration needed to be turned into a legally binding instrument in the shape of one or more treaties by 1948, when it was enacted. As a result, the United Nations General Assembly adopted the International Covenant on Civil and Political Rights (hereinafter as 'ICCPR') on December 16, 1966, which became enforceable on March 23, 1976, to safeguard such rights.³⁴

Regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, the Covenant requires State Parties to respect the equal rights of men and women to enjoy all civil and political rights contained in the Covenant within their territory and subject to their jurisdiction.³⁵ It emphasises the family's position as "as the natural and fundamental group unit of society,"³⁶ which is "entitled to protection by society and the state."³⁷ The ICCPR defines a kid as a "minor" who is entitled to certain rights independent of his family, society, or the state's "race, colour, sex, language, religion, national or social origin, property, or birth."

The ICCPR also underlines a child's right to identification, which includes the right to "birth registration, to a name and to acquire a nationality".³⁸ The ICCPR, on the other hand, does not explicitly provide for children's participation rights, such as the right to be included in decisions that directly affect them.

³⁴ International Covenant on Civil and Political Rights, Health and Human Rights.

³⁵ Article 3, ICCPR

³⁶ Children's Rights in International Politics, Article 23(1) and Article 10(1), ICCPR. p.128. (2010).

³⁷ Article 23(1), ICCPR

³⁸ Article 23(2), (3), ICCPR



The Human Rights Committee is in charge of overseeing the proper implementation of the ICCPR by reviewing reports submitted by States Parties - which are required to include in their reports the measures they have taken to implement the ICCPR as well as any difficulties they have encountered in doing so - and issuing concluding remarks that detail the strengths and weaknesses of the ICCPR.³⁹

The Committee also identifies difficulties related to the right to health, whether directly or indirectly, and makes recommendations on how the State party should resolve the ICCPR's implementation deficiencies.

For example, in its general comments, the Committee may highlight the need to eliminate gender-based inequality in access to the rights set forth in the ICCPR, require State parties to explain their strategies for ensuring equality of both genders in terms of equal rights to education, food, and healthcare services, or emphasise the need to eliminate practises that discriminate against women through enacting legislation and taking other required steps. On April 10, 1979, India ratified the Convention.

3.1.3 The International Covenant on Economic, Social and Cultural Rights

Around 20 years after the adoption of the Declaration, discussions led to the United Nations General Assembly passing the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) on December 16, 1966, and their implementation on January 3, 1976.⁴⁰

The Covenant requires the parties to enforce its provisions across their respective territories, to fulfil their Covenant requirements through global cooperation, and to submit reports to aid in the monitoring of the Covenant's enforcement.

In terms of human rights, everyone should have access to the resources necessary for their own survival.⁴¹ According to Article 12, ICESCR, “the right of everyone to the enjoyment of

³⁹ Article 28, ICCPR

⁴⁰ International Covenant on Economic, Social and Cultural Rights.

⁴¹ Vite, Sylvain, “The Interrelation of the Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and Property”,638.



the highest attainable standard of physical and mental health” should be protected. The article recommends to the States parties several steps: reduction in the number of stillbirths and infant mortality; provision of required resources for healthy development of children as well as public access to healthcare services; enhancement of environmental health and improvement in industrial hygiene; prevention and treatment of diseases.⁴²

Furthermore, the Committee highlights the right to health as an important right that should be accompanied by access to safe drinking water, food, and housing, hazard-free occupational and environmental conditions, health education and related information, such as information about sexual and reproductive health, safe occupation, and reasonable working hours, particularly for perinatal women, and specific safeguards for children against economic and social exploitation, as well as threats to their emotional well-being.⁴³

The provisions of Articles 13 and 14 of the Covenant provide special protection for the right to education. Furthermore, Article 18 requires United Nations Educational, Scientific, and Cultural Organization (UNESCO) to invite its representatives to attend committee meetings, create recommendations on closing observations, prepare reports highlighting accomplishments in implementing the Covenant's duties, and contribute to the committee's work.⁴⁴ UNESCO's involvement in formulating and codifying the ICESCR's right to education has resulted in the proper protection of all ESCRs, at least in theory. India has not signed the ICESCR Optional Protocol and has also not ratified ICESCR but has signed it.

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⁴² International Covenant on Economic, Social and Cultural Rights.

⁴³ Articles 6,7,10, ICESCR

⁴⁴ Kalantry, Sita, “Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR” , Cornell University 15-16.



3.2 SPECIAL INTERNATIONAL INSTRUMENT

3.2.1 *The Declaration on the Rights of the Child (1924)*

The League of Nations passed another declaration, the Declaration on the Rights of the Child, in 1924, 24 years before the adoption of the Universal Declaration of Human Rights. It was the first international declaration on human rights⁴⁵ and the first of its kind to protect the rights of children exclusively.⁴⁶

The Geneva Declaration, often known as the Children's Charter, mandates members to satisfy the economic, social, and psychological requirements of children. The Declaration emphasises the importance of children's welfare as vulnerable beings by demanding adults to follow certain moral principles in their care of children, but it does not establish any specific legal rights for children.⁴⁷

The Declaration contained only five principles concerning children's rights, indicating the Declaration's focus on the needs of children in underprivileged communities, orphaned and abandoned children in need of shelter (Article 4), and children experiencing exceptional circumstances such as war or other national emergencies (Article 3).⁴⁸ Another significant highlight note is that these five standards make no reference to guardians or the family as people committed by these provisions. Thus, the Declaration was not a push to join prevailing standards on child assurance into a lawful structure that ought to be trailed by State parties.

⁴⁵ League of Nations (1924) 'Declaration on the Rights of the Child', 26 September 1924.

⁴⁶ Holzscheiter. Anna, "Children's Rights in International Politics. The Transformative Power of Discourse. Great Britain" CPI Antony Rowe, Chippenham and Eastbourne. p.123. (2010).

⁴⁷ Ibid.

⁴⁸ Ibid.



3.2.2 *The Declaration on the Rights of the Child (1959)*

The subsequent worldwide instrument to address explicitly the privileges of children, similar to the 1924 Declaration, was worried about child exploitation, this time because of exploitations of children in equipped contentions in the period following WW II.⁴⁹

The United Nations International Children's Emergency Fund (UNICEF) was made in 1946 dependent on the arrangements of a goal of the United Nations General Assembly.⁵⁰

The first target sought after by UNICEF was to help children deceived directly or indirectly by WWII, however later it turned into an element to manage the most under-developed nations of the world. A number of associations were engaged with drafting another Declaration on the Rights of the Child in 1950. The principal form drafted by Economic and Social Council (ECOSOC) was then suspended on the grounds that more works were required on the two worldwide basic liberties covenants. Finally, in 1957, a distinct undertaking was dined by the Commission on Human Rights to draft a Declaration as the main global instrument dedicated to children's rights.

A conjecture expressing that "children could and ought to depend upon the selective insurance of grown-ups to guarantee the activity of their rights" has been supported by the 1959 Declaration and a few different instruments endorsed during the 1960s and the decade that followed. The tendency dependent on a dream that views children as articles in global law is clear in these writings, especially in Principle 8 of the Declaration, which specifies "the child shall in all circumstances be among the first to receive protection and relief".⁵¹

The degree covered by the 1959 Declaration has an all-encompassing extension contrasted with the comparative recently received instruments. Notwithstanding the accentuation made by the Declaration as to handicapped children or other children that need specific consideration, it essentially covers a more extensive degree contrasted with its 1924 partner as the previous is generally worried about normal youth circumstances.

⁴⁹ UNGA (1959) 'Resolution 1386 (XIV)', 125, 20 November 1959

⁵⁰ Holzscheiter, Anna, "Children's Rights in International Politics" 125, (2010).

⁵¹ Ibid.



The Declaration made two unmistakable references to the wellbeing of the kid when it alludes to enactment on issues related with adolescence and furthermore when it makes references to rules that can be utilized as a reason for the children's " education and guidance" (Principle 7). In expansion, the Declaration not just accommodates some broad commitments to determine major problems focusing on children yet it additionally sets various standards dependent on which children can be furnished with a more joyful encounter of their childhood. In any case, the Declaration doesn't make any reference to parent-kids relations and how this relationship is influenced by parental power.

3.2.3 The United Nations Convention on the Rights of the Child (1989)

No treaty on basic freedoms is all the more internationally notable that the CRC as a critical instrument received by 192 States parties.⁵²

It is by and large accepted by States parties that children are more defenseless against misuse, exploitation and the infringement of their privileges contrasted with adults. In expansion, children, as members with restricted intellectual, enthusiastic, social turn of events, and admittance to political force, need uncommon types of help to help them manage their situation.⁵³

All children, paying little mind to their degree of capacities, family conditions, race, identity, and ethnicity are secured by the arrangements of the CRC and its four crucial standards (i.e., the wellbeing of the kid rather than those of guardians, appreciating the privilege of the kid in a separation free way, approaching fundamental rights which incorporate right to life, endurance, improvement, regarding the privilege to investment and approaching continuing or hearings love them), which in a vital way to deal with the privilege of the children joins common, political, monetary, social, and social rights.

The previous 20 years anyway experienced maltreatment, disregard, misuse, and oppression against children in spite of the section of the CRC, because of a few reasons including the

⁵² Todres, Jonathan. Wojcik, Mark E and Revaz, Cris R., "The U.N. Convention on the Rights of the Child" Inc, Ardsley Park. p.9. (2006)



way that the CRC may not supersede domestic laws since it doesn't comprise a resolution whose execution can be checked by any worldwide component other than a prerequisite for States gatherings to occasionally give the United Nations Committee on the Rights of the Child with reports in regards to the degree to which their enactment and strategy meet the assurances illustrated in the CRC, however there is no significant approval for this cycle and consequently the CRC has become a just symbolic instrument.

Despite the fact that many States Parties have ratified the CRC, evaluation of its implementation has been delegated to bodies that are also responsible for providing education, health, and social services. ⁵⁴If appropriate means for increasing awareness are not in place, incorporating the CRC principles into domestic legislation is pointless.

Although all CRC members are obligated to incorporate the CRC's principles into their legislative Acts and policies, no specific method for doing so has been established.

3.2.4 The Optional Protocols to the UN Convention on the Rights of the Child on Sex Trafficking

Sexual exploitation, forced labour, armed conflicts, marriage, and organ trafficking are all reasons why child trafficking is a multibillion-dollar industry around the world. UNICEF estimates that two million children are trafficked into prostitution or other criminal activities each year around the world.⁵⁵

To give children more prominent assurance, to fight against the most noticeably worst types of denials of basic liberties against children, and to all the more viably manage sex dealing, child prostitution, child porn, and child exploitation by some precluded practices, the United Nations, on May 25, 2000, received two Optional Protocols to the United Nations

⁵⁴ Lundy, Laura. Kilkelly, Ursula. Byrne, Bronagh and Kang, Jason, "The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries" 102.

⁵⁵ Revaz, Cris R., “The Optional Protocols to the UN Convention on the Rights of the Child on Sex Trafficking and Child Soldiers” 13.



Convention on the CRC: the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

Sale of children is restricted by this Protocol, which calls for forestalling certain Acts through legitimate enactment and guidelines. The Optional Protocols are likewise an endeavor to present more grounded insurance of children in armed conflict.⁵⁶ Regarding prevention of child trafficking India ratified the Protocol on 16th August 2005.

3.2.5 The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (Child Soldiers Protocol) specifies that Children younger than eighteen may not be utilized in armed conflicts, and the individuals who are sixteen or seventeen can be selected on deliberate premise, since children, especially those with helpless families, a long way from home, living in war-influenced regions, or without admittance to schooling, are viewed by this Protocol as youthfulness and exceptionally weak creatures to brutality which open them to genuine injury and passing, just as infection, actual attack, and assault.⁵⁷

Children should not be utilized as cutting edge troopers or for self destruction missions and barbarities against their own family and neighbours or get medications to build their

fortitude and dull their affectability to torment. Loss rates and cases of perpetual incapacity visual impairment, and mental problems brought about by terrible occasions are frequently

⁵⁶ Both Optional Protocols expressly permit signatories to the CRC to sign and ratify the Protocols even if they have not ratified the underlying Convention. As a result, the United States - which has signed but not ratified the CRC - is eligible to sign, ratify, and implement the two Optional Protocols independent of the CRC. The Optional Protocols are important tools for promoting children's rights both domestically and internationally.

Ibid. p.13.

⁵⁷ The Coalition to Stop the Use of Child Soldiers reports that approximately 300,000 children in over 40 countries worldwide are engaged in military conflict, while another 500,000 are recruited into paramilitary organizations, guerilla groups, and civil militias in more than 85 countries.



higher among kids, contrasted with grown-ups, since they come up short on the necessary experience and preparing.

3.3 CONCLUSION

The idea of child abuse comprises quite possibly the most perceived subjects of human civilisation. This idea can't just be seen inside the civilisation of all societies of the world including Asia, Africa, America and Latin American nations, yet additionally inside the civilisation of Europe which was obviously one of the first landmasses on the planet to help the production of independent rights for children. However, this way was obstructed by numerous realities acclimated and rehearsed inside various States gatherings and nations like religion, culture, economy, and social wonders. They couldn't see or even picture the idea of a different lawful character of the child. One can even add that the entire political hardware States parties had truly entered and surprisingly forestalled the improvement of the idea of the privileges of the child.

The end of World War II brought into reality the making of the United Nations Organization where the protection of child and their assurance from different angles requested the social affair of agents from a significant number of countries. These developments opened various windows into the object of assurance of the protection of child and figured various global settlements, which might be named general and extraordinary worldwide law-production deals overseeing and securing various privileges of children. The center elements of these global arrangements might be summed up as

- a) to restrict the force of States parties in regards to the infringement of the rights of child,
- b) to build the structure of public, local and worldwide obligation of States parties concerning the insurance of various rights of children,
- c) to make a worldwide norm for the security of the individual honesty of child between States gatherings of the United Nations Organization, and
- d) to ensure suitable execution of the arrangements of domestic law at a public and local level.

The Convention on the Rights of the Child is one of the most well-established international treaties safeguarding children's rights (CRC). The Convention is the cornerstone of children's human rights law. The Convention's main goal is to safeguard all children around the world and to give States Parties recognized international legal responsibilities. The Convention's goal should be viewed as a transformative revolution for the protection of the child's autonomy and freedoms. The Convention encourages States Parties to improve family situations and places a strong emphasis on non-discrimination and race equality.

The ideas of identity just as ethnicity are additionally profoundly esteemed by the Convention. Accordingly, the motivation behind Convention is to unequivocally ensure the essential and fundamental components of the rights of the children. In the ambit of this key international law-making convention, there are four basic principles that should be presented:

- 1) the wellbeing of the children rather than those of guardians,
- 2) appreciating the rights of the child with a non-discriminatory strategy,
- 3) approaching fundamental rights which incorporate right to life, lastly
- 4) endurance, improvement just as regarding the option to take part in the procedures or hearings which may decidedly influence their rights in some other domestic strategies.

The motivation behind these four center standards is to guarantee the fundamental necessities of common, political, monetary, social, and social rights and the other way around.

CHAPTER 4

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT (POCSO ACT) 2012

4.1 INTRODUCTION

With the world's second-largest child population, India has a complicated structure of rights and safeguards in place for children that are spread throughout a wide range of legislative enactments, from the Constitution to the Indian Penal Code and other statutory requirements. The Indian Constitution makes an exception to the general concept of equality by allowing the government to create particular provisions for children.⁵⁸ A recent amendment to the Constitution extends the fundamental right to free and compulsory education to children aged six to fourteen.⁵⁹ A number of sections in the Fundamental Rights Chapter have been dedicated to avoiding child trafficking⁶⁰ and their employment in dangerous industries.⁶¹

The constitutional foundation for the protection of children is not, however, restricted to negative provisions that may only be enforced against the state. India is a signatory to the United Nations Convention on the Rights of the Child, 1989, in addition to the national framework. Surprisingly, other Indian legislative enactments have not supported this strong international and constitutional obligation for preserving children's rights. The Indian Penal Code, the country's most important penal statute, is notable for its aversion to child sexual abuse.

Due to the Code's refusal to recognise child sexual abuse as a distinct criminal offence, prosecutors and courts are frequently compelled to depend on other broad provisions that are often inadequate to deal with several incidents of abuse. Only girl-children who have been subjected to peno-vaginal penetration fall within the definition of rape as established by the

⁵⁸ Article 15(3) of the Indian Constitution

⁵⁹ Article 21-A inserted via Constitution (Eighty-Sixth Amendment) Act 2002

⁶⁰ Article 23 of the Indian Constitution

⁶¹ Article 24 of the Indian Constitution



law. The clause does not penalise other types of sexual abuse, such as exhibitionism, touching, penile-anal penetration, penile-oral penetration, or object-vaginal penetration.⁶² Other sorts of penetration are covered under a provision outraging women's modesty, which has its own baggage.

Such evident flaws in India's criminal legislation have sparked uproar among child rights campaigners, who believe that a special law aimed solely at combating child sexual abuse is urgently needed. The Ministry of Women and Child Development advocated the implementation of the Protection of Children from Sexual Offences Act, 2012 in order to comprehensively manage the horrendous crimes of sexual abuse and sexual exploitation of children through less unclear and more strict legislative requirements.

There were only two chargeable sexual offences in the IPC prior to the passage of the POSCO, 2012 Act — rape, which is peno-vaginal penetration, and outraging a woman's modesty, such as touching or taking obscene images. The legislation also made no distinction between an adult and a child.

POCSO, on the other hand, covers all forms of sexual offences against children, as well as the consequences that go along with them.

The Act is a good piece of legislation because it makes nearly every known kind of sexual abuse against children a legal offence, providing minimal opportunity for reinterpretation. Furthermore, by establishing a child-friendly court process, the Act promotes children who have been sexually abused to bring their perpetrators to justice, seek recompense for their injuries, and seek help in surviving their suffering. It makes the state's many agencies, such as the police, the judiciary, and the child protection system, stakeholders in ensuring justice.

⁶² Section 375 of IPC after Criminal Amendment Act 2013



4.1.1 *Pre POCSO, 2012*

Sakshi v Union Of India ⁶³

This was a case brought by an NGO named 'Sakshi', which was concerned about the rise in sexual abuse against women and children, as well as the enforcement of IPC sections 377, 375/376, and 354. The petitioners addressed the issue of limiting rape cases to only penile-vaginal penetration, which has since been changed by the 2013 Criminal Law Amendment as it was found to be in violation of Article of the Constitution. According to statistics data, children are frequently abused in ways other than penile/vaginal penetration. Penile/anal penetration, penile/oral penetration, finger/vaginal penetration, and object/vaginal penetration are all common methods. Furthermore, bringing these instances under Section 377 would be extremely unjust. The petitioners emphasised Article 15 (3) of the Constitution, which provides for specific provisions for women and children, implying that these provisions must be sufficient.

The Supreme Court dismissed the public interest lawsuit after rejecting the plea. It did, however, give helpful guidelines for rape and sexual abuse cases involving children. The Sakshi guidelines are as follows:

1. A screen or an arrangement where victim or witnesses do not see the body or face of the accused.
2. Questions put in cross examination on behalf of accused, if they relate directly to the incident, must be given in writing to the Presiding Officer of the court who may put them to the victim/witnessed in a language that is clear and not embarrassing.
3. Victims of child abuse or rape should be allowed sufficient breaks as and when required during the testimony.

Bachpan Bachao Andolan v Union Of India ⁶⁴

Following egregious abuses of children's rights, a PIL was filed before the Supreme Court. The petition was filed with the express purpose of discouraging child trafficking in India.

⁶³ AIR 2004 SC 3566

⁶⁴ AIR 2011 SC 3361



Sexual abuse of children is highly common in these areas, which is a violation of the Juvenile Justice Act as well as other international treaties and covenants.

State vs Pankaj Chaudhary ⁶⁵

The accused had inserted his fingers inside the vagina and anus of a five-year-old girl. He was accused of 'outraging the modesty of a woman' as there was no concept of penetration with fingers in Indian law. The defence had won in this case.

4.1.2 After POCSO:

POCSO was enacted in 2012 to make it simpler for victims of sexual abuse to obtain justice. The Act mandates the employment of more compassionate approaches to dealing with victims and prohibits judicial victimisation of children. As a result of this greater awareness, the number of such cases reported has doubled.

Nishu v Commissioner of Police, Delhi ⁶⁶

Petitioner was a little girl who was abducted and raped repetitively by a group of nine people. One of the nine individuals was a Haryana Police constable. Under Section 376D of the IPC and corresponding sections of the POSCO Act, the prosecution failed to provide any medical reports or a copy of the FIR. In this case, the Court decided that exercising its Article 32 authority would be improper because the case had already been probed by the Haryana Police.

4.2 FEATURES OF THE ACT

The Act takes a forward-thinking attitude. It is a law that does not discriminate based on gender. It defines a child as anyone under the age of 18 and protects all minors from sexual abuse. It imposes harsh penalties for a variety of sexual offences.

⁶⁵ MANU/DE/3194/2011

⁶⁶ 2014(3)ACR2516(SC)



It includes a list of all known sorts of sexual offences against minors.⁶⁷

POCSO's passage was undeniably a huge step forward in protecting children's rights and ensuring that they have a stable childhood. The goal and object of the law is to protect minors from sexual abuse.

The statute does not mention the term rape to describe sexual offences, nor does it limit sex to only penetration. Instead, the legislation expands the definition of penetrative sexual assault to encompass oral sex, as well as the insertion of any instrument into the anus, mouth, or vagina, as well as penile sex. Because acts like digital penetration were not deemed an offence under the IPC prior to the POCSO Act, many defendants in similar cases were let off lightly or charged under less serious parts of the IPC, such as outraging a woman's modesty. With the addition of penetrative assault to the POCSO, 2012, the layer of protection for children in India has been enhanced, and convictions for numerous types of penetrations are now allowed.⁶⁸

Furthermore, The POCSO Act of 2012 makes it a crime to commit a variety of sexual assaults that do not involve penetration. Furthermore, the offences of aggravated penetrative and non-penetrative sexual assault have been made much more serious, with harsher punishments, particularly when committed by a specific group of perpetrators, such as family members, known persons, and individuals on public duty and government officials.

Rape, gang rape, grievous bodily harm, threats with firearms or corrosive substances, assault of a child under the age of 12 or one who is physically or mentally disabled, impregnating a minor, or assaulting a pregnant child knowingly, or infecting the child with HIV are some of the offences covered by it. As a result, the definition of assault under the POCSO Act is broad and covers a wide range of probable scenarios. The need for these measures is to ensure that numerous offences against children are covered by it, as children are often among India's most vulnerable citizens.⁶⁹

⁶⁷ Dr. Ashutosh Bairagi, "Protection of children from sexual Offences: Decoding the Law" 63 International Journal of Scientific Research (2017)



In many ways, the POCSO Act, 2012 is a breath of fresh air because it not only has provisions for after a crime has been committed, but it also includes repeated or constant stalking, watching, or contacting a child either directly, through electronic media, or through other means, thus including incidents of child harassment via sexting or cyberspace, under its definition of sexual harassment.⁷⁰

One of the cornerstones of the POCSO Act is that the perpetrator must be punished even if there is only an intent to commit an abuse offence and the offender is unsuccessful for whatever reason.⁷¹ Under the POCSO statute, the mere attempt to commit an offence is punishable by half of the prescribed punishment for the conduct of the offence. It also includes provisions for penalty for aiding and abetting the commission of the crime, which is the same as for the commission of the crime. This includes the trafficking of minors for the purpose of prostitution.

The POCSO Act also includes robust safeguards to prevent abuse of the system, including penalties for filing false complaints or providing fake information with the goal to harm someone's reputation.

4.2.1 Special Courts:

The presentation of Special Court (Section 35) for violations against children as given under the Act assumes a significant part in how the law and the proof might be managed and deciphered. The POCSO Act considers Special Courts where preliminary procedures might be directed in a more delicate way with the minor who has been the person in question.⁷²

It considers the declaration to be made either covertly by video-interface, behind screens, or in front of a camera, which is intended not only to prevent a recurrence of the harm but also to protect the child's character. In place of international recommendations, it incorporates

⁷⁰ Ibid.

⁷¹ Section 16, POCSO

⁷² Belur, J., Singh, B.B. “Child sexual abuse and the law in India: a commentary”. *Crime Sci* 4, 26 (2015).



new child-friendly methods for reporting, recording evidence, investigation, and trial of offences.

The media is prohibited from exposing the identities of minors who have been sexually molested without the authorization of the Special Court under the POCSO Act of 2012. Breaching this provision carries a penalty of 6 months to 1 year in prison.

The POSCO Act stipulates that the child's evidence must be documented within 30 days after the crime's occurrence in order to enable a timely trial. In addition, if at all possible, the Special Court must complete the trial within a year.

4.2.2 CWC and Role of Doctors:

Further provisions include the child's relief and rehabilitation as soon as a complaint is filed with the Special Juvenile Police Unit (SJPU) or local police. Within 24 hours of the crime that was committed, these police units must make immediate steps to give the child safety and take him or her to a hospital or shelter facility. The SJPU or the police are required to notify the Child Welfare Committee within 24 hours of receiving the information so that required efforts can be made for the child's long-term rehabilitation.

In terms of the POCSO Act 2012, doctors have a double duty to perform. They have the ability to determine whether a child has been or is being abused (for example, if they come across a youngster with an STD); they are also frequently the initial point of contact in determining whether a child has been sexually abused.

4.2.3 Acquiring Information:

In cases of claimed child sexual abuse, there are two separate parts to acquiring information from the child (or accompanying adults: (a) the medical history and (b) the interview. The interview portion of the evaluation extends beyond the medical history in that it aims to gather information directly linked to the alleged sexual abuse, such as details of the assault, and containing the date, time, and location, as well as the frequency, description of the apparel worn, and so on.

Interviewing children is a specialist skill that should be performed by a trained expert if at all possible.

In order to comply with the POCSO Act, 2012 interviews may be undertaken by a



number of experts, including policemen or investigating organisations. These are forensic interviews, not therapeutic ones, with the goal of obtaining a testimony from the child in an appropriate behaviour, impartial, and truth-seeking way that will aid honest and fair outcome in the criminal justice and child welfare systems. An investigation or forensic inquiry can provide information that can help with treatment decisions, but it is not part of the treatment process.

4.2.4 Role of NGO's:

The POCSO Act of 2012 and the POCSO Rules of 2012 include provisions for NGOs to act as assistance for children, as well as other measures.

Making a report to the police under Section 19(1) of the POCSO Act, 2012 - this section allows anybody, even members of non-governmental organisations, to file a report. Many non-governmental organisations (NGOs) work closely with vulnerable children and are capable of detecting child abuse. A youngster may feel more comfortable reporting abuse to an NGO worker than to a member of his or her own family in many circumstances.⁷³

Under section 21(1) of the POCSO Act, 2012, an NGO that has information of a child's sexual abuse is also obliged by the concept of mandatory reporting.⁷⁴ The CWC may designate an NGO worker as a contact person to assist the child during the pre-trial and trial process (sub-rule 7 of rule 4 of POCSO Rules, 2012). In addition, the child's parents, guardian, or any person in whom the youngster has faith and confidence can approach an NGO for support (proviso to sub-rule 7 of rule 4 of POCSO Rules, 2012).

When an NGO is appointed as the support person, its employees have the right to be notified of events, such as the arrest of the accused, motions filed, and other court procedures, under

⁷³ Section 19, POCSO Act,2012

⁷⁴ MINISTRY OF WOMEN AND CHILD DEVELOPMENT, “ Guidelines for the Use of Professionals and Experts under the POCSO Act, 2012” (2013)

sub-rule 11 of Rule 4 of the POCSO Rules, 2012. This information is then passed on to the child and his or her family by the NGO support person.

Under Rule 7 of the POCSO Rules, 2012, the NGO aiding a child can file an application for interim and ultimate compensation with the Special Court as well as the Legal Services Authority.

It has been observed that victims of child sex abuse, as well as their families, prefer to approach and seek guidance from a non-governmental organisation (NGO) before reporting the incident to the authorities. In such cases, the NGO serves as the child's initial point of contact, offering counselling, legal guidance, and support in filing a report.

The Union Cabinet strengthened the POSCO Act in 2019 by proposing an amendment that states that for the protection of children from sexual offences in natural disasters where children are injected with any chemical substance to achieve sexual maturity for the purpose of sexual assault, any chemical substance must be injected. The main point of the introduction is that the death sentence should be applied to a child rapist who has committed aggravated sexual assault of a penetrative character.

With some amendments made in the year 2019 by introduction of The Protection of Children From Sexual Offences (Amendment) Act, 2019. This amended act provides for harsher punishments for the offences covered under the 2012 Act. With the inclusion of the death sentence to the Act's provisions, it strengthens the legal measures relating to sexual offences against children. It also aims to safeguard children from crimes other than sexual assault, such as sexual harassment and pornography involving children. The amended act creates new offences, such as defining "child pornography" and expanding the definition of "aggravated sexual assault".⁷⁵

⁷⁵ Diva Rai, “Analysis of the POCSO Amendment Bill, 2019” (2020)



4.3 PUNISHMENTS UNDER THE ACT

The punishments under the principal Act after passing of the Amendments stands as follows:

4.3.1 *Penetrative sexual assault*⁷⁶

Penile-vaginal, penile-oral, penile-urethral, or penile-anal penetration, as well as object penetration, are all possibilities. Section 4 of the statute stipulates a minimum sentence of seven years, with the possibility of life imprisonment and a fine.

After the amendment, the Act increases the punishment to ten years. It also adds that if a person commits penetrative sexual assault on a child below the age of 16 years, he shall be punishable with imprisonment of twenty years which can go upto life imprisonment with fine.⁷⁷

4.3.2 *Aggravated penetrative sexual assault committed by a person of trust or authority*⁷⁸

Section 6 of the statute specifies a penalty of at least ten years in jail, with extent of life imprisonment and a fine.

The Act has increased the punishment to a minimum of ten years which may extend to death penalty for accused.

4.3.3 *Non-penetrative sexual assault committed with a sexual intent*

Non penetrative sexual assault includes touching the vagina, penis, anus or breast of the child or asking the child to touch the vagina, penis, anus or breast of the perpetrator or any other person or any other act done with sexual intention. In such cases, Section 10 provides for punishment for not less than 3 years which may extend to 5 years and a fine.

⁷⁶ “ANALYSIS OF INDIAN LEGAL POSITION ON CHILD SEXUAL ABUSE”, K & A LLP

⁷⁷ THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (AMENDMENT) ACT, 2019

⁷⁸ Ibid.



4.3.4 Aggravated non-penetrative sexual assault done by a person of trust and authority

Section 10 lays down the punishment which should not be less than 5 years and it may also extend to 7 years, and a fine (Section 10).

4.3.5 Sexual harassment

Sexual harassment is caused by indecent and sexually explicit remarks, emails or telephone calls; taunting, jeering, or posing a request for sexual favour.

The punishment is 3 years and a fine (Section 12).

4.3.6 Using a minor for pornographic purposes

It includes producing or distributing any pornographic content via print or electronically. The punishment is 5 years and a fine and in case of second conviction, the punishment would be 7 years and a fine (Section 14 (1)).

4.3.7 Storage of pornographic material involving child

It includes storage of pornographic material for commercial purposes with imprisonment of upto three years or fine or both.

The Act has increased the punishment to a imprisonment between three to five years or fine or both. In addition, the Act adds two other offences for storage of pornographic material involving children.

These include: (i) failing to destroy, or delete, or report pornographic material involving a child, and (ii) transmitting, displaying, distributing such material except for the purpose of reporting it.⁷⁹

⁷⁹ Editorial, “What is POCSO (Amendment) Bill 2019?” India Today September 4, 2019



4.3.8 *Attempt of offence*

Section 18 of the act provides for 1 year punishment and fine.

4.3.9 *Abetment*²⁴

The definition of abetment is same as defined under Section 107 and 108 of the IPC. The punishment is same as that of the offence which is provided under Section 17 of the act.

4.3.10 *Failure to report an offence*²⁵

The punishment is six months and a fine provided under Section 21 of the act.

4.4 PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (POCSO) RULES, 2020

Following the amendments to the POSCO Act in August of 2019, the Supreme Court ordered the Centre to implement the compensation system established by the National Legal Services Authority in September 2019. According to a report released in November by Supreme Court registrar Surinder S Rathi on POCSO cases, barely 1% of child sexual assault survivors receive compensation, and 96% do not receive support from those who are supposed to help them during the legal process.⁸⁰

The central government's Ministry of Women and Child Development notified the Protection of Children from Sexual Offences Rules, 2020 on March 9, 2020, superseding the previous 2012 Rules.⁸¹

Rule 3 of the POCSO Rules 2020, provides for awareness generation and capacity building. It includes preparing age-appropriate educational material, requires police verification of employees in schools and child care centres, procedures for reporting sexually abusive material (pornography), and the provision of proper child rights education at an ideal age.

⁸⁰ Amrita Madhukalya, “ New rules under amended POCSO Act: Survivors may get quick compensation”
Hindustan Times, Feb 22, 2020

⁸¹ Editorial, “Compensation To Be Paid Within 30 Days: New POCSO Rules Comes Into Force” Livelaw, 12
March 2020



Furthermore, state governments have been requested to offer information regarding child helpline services via the toll-free number 1098.⁸² State governments have been asked to create a child protection policy based on the premise of not tolerating any form of violence against children, which must be followed by all institutions, organisations, and other entities that interact with children.

According to the Rule 4, anyone who obtains pornographic material involving a child, or information about such pornographic material being stored, distributed, or displayed, should report the contents to the special juvenile police unit (SJPU), a police official, or a cyber-crime portal, as appropriate (cybercrime.gov.in). Following receipt of such a report, the SJPU or police take corrective measures in accordance with government directives given from time to time.

According to Rule 5, Interpreters, translators, special educators, experts, and support persons: Each district's District Child Protection Unit (DCPU) should keep a register of names, addresses, and other contact information for interpreters, translators, experts, special educators, and support persons, which will be accessible to the SJPU, local police, magistrate, or Special Court (SC) as needed.

According to Rule 6, if an SJPU / police officer receives information about an offence and is satisfied with the child against whom the offence was committed, the child must receive emergency medical care and protection and be transported to the nearest hospital or medical care facility centre within 24 hours of receiving such information.

According to Rule 7, the CWC (Child Welfare Committee) and the DLSA (District Legal Services Authority) are tasked with checking any amount of penalties issued by the Special Court under the Act that must be paid to the child victim.

Rule 9 provides for compensation to victims. It includes a provision for compensation to the victim child, under which the State Government must pay the compensation to the victim within 30 days of receiving the Special Court's ruling.⁸³

⁸² Editorial, "POCSO RULES, 2020" Empower IAS, 16 March, 2020



According to Rule 12 which provides for monitoring of implementation act the Act, the National Commission for the Protection of Children's Rights (NCPCR) or the State Commission for the Protection of Children's Rights (SCPCR) should oversee the designation of Special Courts by state governments, as well as the appointment of Special Public Prosecutors by state governments, as well as the rule's other requirements.⁸⁴

4.5 CONCLUSION:

The failure to establish Speed Trial Courts to deal with Child Sexual Abuse in all of the country's districts is a key problem for the proper implementation of the POCSO Act. The POCSO Statute requires the establishment of these special courts, and because this condition has not yet been met, there is a significant delay in the disposition and pendency of cases filed under the act.

Despite their best efforts, police officers in POCSO cases confront numerous obstacles in conducting a thorough investigation. The registration of the FIR is the first step. The police must ensure that the filing of the FIR and the investigation of the Medico-Legal Case are completed as quickly as possible (MLC).⁸⁵

Institutions such as the National and State Commissions for the Protection of Child Rights are expected to monitor and review the Act's implementation on a regular basis, as well as raise public knowledge about the Act's provisions, under Section 43-44 and Rule 6 of the POCSO Act. The operation of such departments, as well as their monitoring and assessment mechanisms, have not, however, been made public. To this end, it is critical to examine the methods established by such groups and assess their effectiveness in producing meaningful results.⁸⁶

⁸⁴ "Centre notifies new POCSO rules making law for sexual offences against children more stringent", Economic Times, March 13, 2020

⁸⁵ Mayank Tiwari, “Critical Analysis of India’s Protection of Children from Sexual Offenses Act 2012”, Jurist, May 8, 2020

⁸⁶ Ibid.



The Union defended the punishment of granting death sentence by citing Supreme Court rulings in *Macchi Singh and others v State of Punjab*⁸⁷ and *Devender Pal Singh Bhullar v State, N.C.T. of Delhi and Anr*,⁸⁸ in which the court decided that the death penalty may only be granted in the "rarest of the rare" circumstances.⁸⁹

Thus, the intention of the Act is to serve as a deterrence; yet, it can be argued that introducing the death penalty in situations of child sexual abuse could backfire and even have catastrophic consequences. Family members are frequently the perpetrators of abuse, and having such a penalty on the books may deter the crime from being reported. Furthermore, because the maximum punishment for murder is also the death penalty, it may endanger the minor's life.⁹⁰

The current laws criminalising sexual offences against children was long overdue. People should feel a sense of contention and credibility in the entire process from initiation to adjudication if the adjudication process is made more transparent and the involvement of police in such offences is made much more rapid.⁹¹ This act's deterrent effect is sufficient, but in order to conquer and remove this issue at the grassroots level, the masses' collective consciousness must be clean and include feelings of love and compassion.⁹²

There has been a rise in the number of incidents reported in recent years, and this is due to the increased awareness that has been achieved through various awareness campaigns in collaboration with NGOs and Friends of the Police. To improve the rate of conviction, both the investigation and the court trial must be improved so that the survivor is not pressured to become hostile.⁹³

⁸⁷ 1983 AIR 957

⁸⁸ AIR 2002 SC 1661

⁸⁹ Anubhav Kumar, "Apoin to ponder over in the POCSO Bill" *The Hindu*, Aug 12, 2019

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Ibid.

⁹³ *Supra* note 68



CHAPTER 5

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2012

5.1 INTRODUCTION

The Juvenile Justice (Care and Protection of Children) Act, which replaced the Juvenile Delinquency Law and the Juvenile Justice Act (Care and Protection of Children Act)2000, was introduced and enacted in Parliament in 2015. One of the most important elements of the new Act was that juvenile in conflict with the law between the ages of 16 and 18 might be tried as adults in cases where the offences were to be decided.

A Juvenile Justice Board was to examine the nature of the offence and whether the juvenile should be tried as a minor or a kid. After the 2012 Delhi gangrape, in which one of the defendants was just under of 18 years old and thus tried as a juvenile, this provision gained traction.

The Juvenile Justice Act, which looks after the restoration of young criminals under the age of eighteen years through its system of care on two classified groups of children – Children In Conflict with Law and Children In Need of Care and Protection – includes documents that are used in court to determine the minor's age.⁹⁴

The second main item dealt with adoption, replacing the Hindu Adoptions and Maintenance Act (1956) and the Muslim Guardians of the Ward Act (1890) with a more universally acceptable adoption legislation. However, the Act did not replace these laws. The Act expedited adoption procedures for orphaned, abandoned, and surrendered children, and it gave the existing Central Adoption Resource Authority (CARA) legislative standing to help it fulfil its mission more effectively.⁹⁵

⁹⁴ Srishti Verma, "POCSO Act, 2012 & Juvenile Justice Act, 2015 - A Legislative Shield for Protection of Children Against Sexual Offences", Probono May 1, 2020

⁹⁵ Esha Roy, "What do the amendments to the Juvenile Justice Act mean?" Indian Express, February 21, 2021



In *Dr. Subramanian Swamy and others vs. Raju and others*,⁹⁶ the Supreme Court refused to read down the provisions of the Juvenile Justice Act, 2000, in order to account for a juvenile offender's mental and intellectual competence and refused to interfere with the age of a juvenile accused in cases where juveniles were found guilty of heinous crimes. The Court found that the Act's provisions are in accordance with constitutional directions and international conventions. The Court also stated that the designation of juveniles as a distinct class met the requirements of Article 14 of the Indian Constitution, and that it should focus on the legality of the legislation rather than the clarity of the law.⁹⁷

The term "juvenile in conflict with the law" has been replaced with "child in conflict with the law," and the phrase "juvenile in conflict with the law" has been replaced with "child in conflict with the law." While the Juvenile Justice Act of 2000 defines juveniles in conflict with the law as the "accused," the Juvenile Justice Act of 2015 defines a "child in conflict with the law" as a child who has been found by the Juvenile Justice Board to have actually done an offence.

5.2 CATEGORISATION OF CHILDREN PROTECTED UNDER JUVENILE JUSTICE ACT

Children in conflict with the law

The Act changed the definition of a "minor" in conflict with the law to a "child" in violation of the law small/serious/ obnoxious were categorised. After a preliminary examination by the juvenile justice commission, children between the ages of 16 and 18 can be tried as adults in the case of heinous crimes.

A child who is in conflict with the law will be transferred to an observation house for the duration of the investigation. The child will be segregated based on his or her age, gender,

⁹⁶ JT 2014 (4) SC 328



physical and mental state, and the nature of the offence. If the Juvenile Justice Commission finds a child guilty of a crime, he or she will be placed in a special home.

Before bringing the matter to the juvenile court, the Juvenile Justice Council will perform a preliminary assessment within three months. When the child is designated an adult by the juvenile court, the final order must include an individual plan for the child's rehabilitation, as well as a follow-up by the probation officer, the District Child Protection Unit, or a worker. The juvenile court makes certain that the child is kept secure until he or she reaches the age of twenty-one.⁹⁸

Children in need of care and protection

A child in need of care and protection must be brought to the Child Protection Committee within 24 hours. A child who has been parted from his guardian is required to make a declaration under the law. Non-reporting is considered a criminal offence. The child in need of care and protection is directed by the child protection committee under the supervision of a social worker to the appropriate child protection institution.

The social worker or child protection officer must perform the investigation within 15 days. At the very least, 20 days a month. The district magistrate meets with the child protection committees and conducts a quarterly review of the committee's operation.

For care, treatment, instruction, preparing, improvement and restoration, a child in need of and protection will be set in a children's home. Safe houses open for children who need local area support in the present moment to shield them from misuse or get them far from street life under the law.⁹⁹

⁹⁸ Anjali Dhingra, "All about Juvenile Justice Act", iPleaders, June 24, 2019

⁹⁹ Ibid.



5.3 FEATURES OF THE ACT

The Juvenile Justice Act forbids the media from disclosing a child's identify or disseminating any information that could lead to it. All reports relating to the child are also submitted with the understanding that they will be handled as confidential. The Juvenile Justice Act makes it illegal to treat a child cruelly, and it also makes it illegal to engage a child for begging.

The Act establishes a comprehensive system for dealing with children who are in conflict with the law as well as those who require care and protection. Unregistered private child care homes that abuse, exploit, and sell children will be caught up in the net. The issue of intercountry adoption, as well as Central Adoption Resource Authority's role, has been simplified and expanded.¹⁰⁰

The process for a "preliminary assessment" of a juvenile over the age of 16 in situations of heinous crimes is outlined in Section 15 of the Juvenile Justice Act. There are three factors to consider when performing a preliminary evaluation to determine whether the child be tried as an adult or as a juvenile.

This includes his mental and physical competence to conduct the crime, as well as his ability to comprehend the crime's implications and the conditions in which he allegedly committed it.

Before reaching a decision, a juvenile court considers the social investigation report of a probation officer and the mental health report of a government hospital, as well as the opinions of experienced psychologists, psycho-social workers, and other specialists.

If a juvenile court determines that the child can be tried as an adult, the case is transferred to a special children's court, which reviews the judgement and determines whether it was correct. Juveniles can now be condemned to prison, even life imprisonment, under the new law. It does, however, prohibit the imposition of the death sentence and the imposition of life imprisonment without the possibility of release.¹⁰¹

¹⁰⁰ *Supra* note 97

¹⁰¹ Utkarsh Anand, "Decoding the proposed changes in the POCSO Act", Hindustan Times, March 23, 2021

5.3.1 Section 3

Section 3 of the Act provides for general principles to be followed in administration of Act. Some of these principles are:¹⁰²

1. *Principle of the Best Interest of the Child*

The phrase "best interest of the child" refers to the motivation behind any decision made in the child's best interest, which is to ensure that his fundamental rights and needs are met, as well as his character, social well-being, and physical, enthusiastic, and academic development.

2. *The Principle of Presumption of Innocence*

It will be considered throughout the justice and protection process, from the initial contact to the final decision, including aftercare. Any unlawful behaviour by a child that is done for the sake of endurance, or as a result of environmental or situational considerations, or as a result of adult or peer group control.

3. *Principle of Right to maintain privacy and Confidentiality*

Each child has the right to protection and privacy by any means and at any time during the legal process. No juvenile report will be distributed that could lead to their recognition, unless in cases where the revealing of their distinctive evidence identification will result in their protection.

4. *Principle of equality and non-discrimination*

There shall be no discrimination against a child on any basis, including sex, caste, race, place of birth, or disability, and every child shall have equal access, opportunity, and treatment.

Every reasonable step should be done to protect the child from all forms of discrimination or punishment based on the child's parents, legal guardians, or family members' position, actions, expressed opinions, or convictions.

¹⁰² Section 3, Juvenile Justice Act



5. *Principle of Participation*

The child should be given the opportunity to participate, and the child who is capable of forming his or her own opinions has the right to freely express those opinions in all matters affecting the child's growth and development. The child's opinions should be given due weight in accordance with the child's age and maturity.

6. *Principle of institutionalization*

It is a measure of last option; in some cases, the family is unable to care for the child's well-being, and when the child has no family to care for and no one to look after the child, the government must make alternative arrangements.

7. *Principle of Diversion*

8. *Principles of Natural Justice*

Every child, regardless of race, ethnicity, colour, gender, language, religion, political or other beliefs, national, ethnic, or socioeconomic origin, property, disability, or birth or other status, should be treated fairly and equitably. Special assistance and protection may be required in some circumstances to guarantee that children's rights are respected equally.

9. *Principle of Family Responsibility*

Guardians or parents of a minor must be involved in laying the framework for the investigation and trial, as well as be present when it takes place. They should be informed by police, investigators, or courts that a standard request will be made and that they are welcome to participate.

10. *Principle of Dignity and worth*

With the child's sense of pride and value, the child's treatment will be predictable. Every single person is born free and equal in terms of dignity and rights. They have reason and conscience, and they should act in a spirit of friendship toward one another (Article I of UN Declaration Human Rights). Because of their innate dignity and humanity, all children shall be treated with respect.

11. Principle of Safety

Without resorting to restrictive measures and processes in the name of care and protection, the state holds a larger duty for ensuring the safety of every child in its care and protection.

12. Principle of Positive Measures

The principle's core subject is to promote the well-being of juveniles. Positive measures will be used to correct and change the juveniles' personalities and behaviours.

13. Principle of non-stigmatizing Semantics

The idea of non-stigmatizing semantics advises that terminology often used in criminal procedures, decisions, and activities that may stigmatise juveniles be avoided. The guideline states that adversarial or accusatory language such as capture, remand, blame, charge sheet, preliminary, indictment, warrant, summons, conviction, and detention should be avoided.

14. Principle of non-waiver of Rights

The Indian Constitution expressly prohibits the waiver of rights. In India, the equivalent is exemplified by the juvenile justice system. Any juvenile, competent authority, or stakeholder engaged in the juvenile justice system should not postpone the legal rights guaranteed by the Juvenile Justice Act under any circumstances. Furthermore, the failure to exercise fundamental rights does not imply a waiver of the equivalent.

15. Principle of Repatriation and Restoration

A child must not be separated from his or her parents against their will, according to the law. However, if the Board or the Court determines that the separation is necessary for the child's best interests in accordance with the law and procedures, such a determination may be necessary in a specific case, such as one involving parental abuse or neglect, or one in which the parents are living separately and a decision about the child's residence must be made.

16. Principle of Fresh Start

The fresh start principle encourages juveniles in conflict with the law to start over. This guideline also states that all previous records of the juvenile must be destroyed within a certain time frame. They will be required to delete all of their previous records.¹⁰³

5.4 AMENDMENTS MADE TO THE ACT

The Act currently divides offences into three categories: petty, serious, and heinous.

The Supreme Court ruled in January 2020 that offences with a possible punishment of more than seven years in prison but no minimum term of less than seven years should be classified as "serious" rather than "heinous."¹⁰⁴

Smriti Irani, Minister of Women and Child Development, said the Juvenile Justice (Care and Protection of Children) Act, 2021, resolves various concerns raised by the National Commission for Protection of Child Rights (NCPCR) during its review of a previous version of the Bill passed in 2015.¹⁰⁵

According to the amendments, crimes committed by children that carry a minimum term of less than seven years will be classified as "serious" rather than "heinous" offences. As a result, these children will be handled as juveniles and will not be subjected to the adult criminal justice system.

Children accused of crimes with a maximum penalty of more than seven years but no minimum sentence will no longer be tried in adult courts, and district magistrates and additional district magistrates will be able to issue adoption orders from now on.¹⁰⁶

¹⁰³ *Supra* note 98

¹⁰⁴ Sravasti Dasgupta, "Cabinet approves amendments to Juvenile Justice Act, empowers DMs to issue adoption

¹⁰⁵ Editorial, “Lok Sabha passes amendment to Juvenile Justice Act”, The Hindu, March 25,2021

¹⁰⁶ *Supra* note 103



5.5 RELATIONSHIP BETWEEN POCSO & JUVENILE JUSTICE ACT

While IPC is a general law, Juvenile Justice Act and POCSO Act are special laws.

The Protection of Children from Sexual Offences Act was passed in 2012 after it was determined that current portions of the Indian Penal Code 1860 and the Criminal Procedure Code 1908 were insufficient to address the growing number of child sexual abuse cases.

POCSO and Juvenile Justice Care and Protection of Children Act, 2015 are the two main legislations on child protection available, among others. These laws differ in certain ways, but in terms of the overall goal of protecting children who have been victims, they are complementary.

While POCSO establishes broad obligations for the protection of children under the age of eighteen, it also addresses one of the major concerns of children being subjected to sexual harassment for pornographic purposes by defining various degrees of sexual assault on children and prescribing appropriate punishments. When dealing with situations involving minors, establishing the minor's age is a critical step in moving the case forward.

POCSO, on the other hand, does not have a provision that deals with such an issue; on the other hand, the Juvenile Justice Act, which looks after the restoration of young criminals under the age of eighteen years through its system of care on two classified groups of children – Children In Conflict with Law and Children In Need of Care and Protection – provides for documents that are considered to be important and for determining the age of minor in the court.¹⁰⁷

Why are there female-centric compensation guidelines but no male-specific ones if POCSO is gender-neutral? POCSO has a number of challenges that require legislative response.

These are the ones. Absence of the concept of consent between a minor and a sexual partner over the age of 18, and silence on the scope of POCSO's applicability where two children are participating in sexual activity. When two children engage in any type of sexual behaviour, they are both subject to the Juvenile Justice Act and must be treated as Children in Need of

¹⁰⁷ *Supra* note 94

Care and Protection . However, when dealing with occurrences like these, there is a substantial departure from theory, since the female minor is normally treated as Children in Need of Care and Protection while the male minor is classified as Child in Conflict with Law, raising a deeper question that whether the society is ready to come out of the old societal practices and rethink our ways to be in harmony with justice. ¹⁰⁸

The Juvenile Justice Board, established under the Juvenile Justice Act, hears exclusively cases involving children. Special Public Prosecutors are also assigned to delicate cases so that the judicial system does not add to the trauma of juvenile victims. Furthermore, the government recently announced the Protection of Child against Sexual Offences Rules 2020, which will oversee the implementation of the revisions made to the 2012 Act.

By applying the relevant authorities mentioned in the Juvenile Justice Act, these recent improvements bridge the gap and strengthen the interplay between the Juvenile Justice Act and the Protection of Child against Sexual Offences. The Special Juvenile Police Unit (Section 107 of the JJ) has authority over child pornography offences under Protection of Child against Sexual Offences Rules 2020. Mandatory police verification of personnel at schools and organisations that work with children, as well as the drafting of a "Zero Tolerance Policy" by institutions and agencies for violence against children, are other essential changes. ¹⁰⁹

While these 2019 modifications aim to strengthen current regulations, they may have the opposite effect. Child rights activists have argued that including the death penalty and

¹⁰⁸ Ibid.

¹⁰⁹ “Centre notifies new POCSO rules making law for sexual offences against children more stringent”, Economic Times, March 13, 2020

extending the time in prison for criminals could lead to fewer cases being reported and potentially the murder of child victims.¹¹⁰

As of now, there are no serious reports or figures to back this up, but it is expected that this conjecture will eventually become reality.

5.6 PROVISIONS AND SAFEGUARDS FOR CHILDREN UNDER THE CONSTITUTION OF INDIA

The constitutional provisions have influenced advancements in the field of juvenile justice since the country's independence. Part 3 and 4 of the Constitution, which deal with fundamental rights and state policy directive principles, respectively, include specific unique provisions for children.

Article 15(3): Allows the state to make special provisions for women and children.

Article 23: Human trafficking and forced labour are prohibited.

Article 24: Children under the age of 14 are prohibited to work in factories, mines, or other hazardous occupations.

Article 39 (e): Directs the state to protect children of a vulnerable age from being forced into jobs that are unsuitable for their age and strength.

Article 39(f): Directs the state to provide conditions for children's healthy growth and to safeguard children and youth from exploitation and moral and material abandonment.

Article 45: Requires the state to give all children up to the age of 14 with free and compulsory education.

¹¹⁰ Sana Ali, 'Death Penalty in POCSO Imperils Child Victims of Sexual Offences' India Spend, 14 October 2019



Article 47: It states that it is the state's responsibility to improve nutrition and living standards. In 2002, the 86th Constitutional Amendment was approved, making the right to education a fundamental right. ¹¹¹

5.7 CONCLUSION

The Justice Verma Committee Report in one of its conclusion on child sexual abuse holds “*there is an urgent need to audit the performance of all institutions of governance and law and order. It is indeed necessary that we must now have external social audit for the sake of transparency. We also wish to make it clear that every case of a missing child must be registered as FIR*”. The Committee also recommends creating "an oversight mechanism" through the High Court, special training needs programmes, sensitising officials about child sexual abuse, and stringent enforcement of necessities of various child statutes. ¹¹²

The Juvenile Justice Act should be aggressively implemented. It is futile and harmful to act without hands willing to carry it through. As a result, the government must ensure that the act is appropriately carried out by the authorities. Every crime in India should not have a common juvenile age. To categorise and separate the Juvenile Justice System, a system similar to that used in the United States, the United Kingdom, and France might be created.

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¹¹¹ Rohit Pradhan, “CRITICAL ANALYSIS: JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT 2015”, Lexforti, September 14, 2020

¹¹² *Supra* note 97

¹¹³ *Supra* note 110



CHAPTER- 6

JUDICIAL TREND AND RECENT DEVELOPMENT

6.1 INTRODUCTION

The function of the Indian judiciary and the scope of judicial interpretation have grown dramatically in recent years, owing in part to the massive increase in statutory intervention in the modern era. The twin guarantees of equality before the law and equal protection under the law are recognized as two of the most essential pillars of universal human rights, when the freedom to claim and develop these rights is guaranteed.

The common man's determination to maintain the Rule of Law and construct a just society included respect for the courts. The law's more important goal was the establishment of a moral society. The unbiasedness, autonomy, and reliability of the personnel in the judiciary are the basic underpinnings of this high regard.

In the sphere of human rights, judicial activism encompasses a wide spectrum of administrative vacuums. The Supreme Court and the High Courts have played a significant role in ensuring the general public's fundamental rights. After all, the judges were members of the general public, and they couldn't be completely immune to the overwhelming patterns of social musings winning.

As a result, an examination of court decisions was done in order to demonstrate how concerned judges are with societal prejudices and how, despite these prejudices, they gave rulings that moved the law toward juvenile justice.

The Supreme Court of India has repeatedly expanded the scope of Article 21 of the Indian Constitution, ruling that significant presence was not a privilege to exist, but rather a privilege to live with dignity.

The Indian Constitution requires all instrumentalities, including the court, to convert the status

quo into a new human order in which everyone has equal status and opportunity. As a result, the judiciary has both socioeconomic and creative functions. In the same spirit, India's court has played an important role in promoting child welfare. In this attitude, the Supreme



Court has emphasised the importance of the nation taking care of the child, who is the nation's future hope.¹¹⁴

6.2 JUDICIAL TRENDS IN PROTECTING THE CHILD'S INTEREST DURING THE TRIAL

State of Punjab vs Gurmit Singh¹¹⁵

The following are the numerous guidelines that SC observed in this case:

Courts should consider the case's overall probabilities rather than being misled by slight inconsistencies or tiny differences in the prosecutrix's statement, which are not fatal, to throw out an otherwise credible prosecution case.

Rape cases should be tried in camera as a general rule, with open trials as an exception.

The victim's confidentiality must be preserved as much as feasible throughout the investigation.

If at all possible, female judges should try a case of sexual assault on a woman to make it easier on the victims and to strengthen the system's quality of evidence and proper trial.

In this case, the Court also hoped and commented that the Parliament will pay close regard to the petitioner's claims and pass appropriate legislation with the urgency that it deserves.

Sakshi Vs Union Of India¹¹⁶

Re-enquiry or trial of offences under S. 354, IPC (outraging the modesty of a woman by use of assault or criminal force) or S. 377 (unnatural offences) S. 327 (2) (regarding constraining the sufferer or any person interested in such sufferer to do anything which is illegal or which may facilitate the commissioning of the offence) should also be undertaken in the case of child sexual abuse and/or rape, according to the SC.

The Court also established mechanisms to protect the interests of children who are victims of such crimes:

¹¹⁴ Kamajeet Singh & Devinder Singh, "A Peep into Judicial Response to Child Welfare Jurisprudence in



The victim or witnesses may be shielded from seeing the accused's body or face by a screen or other means.

1. Questions addressed in cross-examination on behalf of the accused relevant to the occurrence of crime should be submitted in writing to the Presiding Officer of the Court, who may ask the victim or witnesses the questions in a straightforward and non-embarrassing manner.
2. Adequate intervals should be provided to victims of child abuse or rape as needed.

Hiranath Misra vs Rajendra Medical College¹¹⁷

The fact that the material witnesses were not given the opportunity to be cross-examined did not invalidate the ruling. It was a situation in which a group of male students broke into a girls' dormitory late at night and misbehaved with the girls. The committee appointed to investigate the matter recorded the statements of the girls in camera and used them against the appellants (on the issue of miscreants' identity) without allowing them to cross-examine the girls on the grounds that doing so would reveal the girls' identities and subject them to further humiliation, as well as because the inquiry was conducted by responsible persons in committee.

6.3 TOWARDS A VICTIM-CENTRIC APPROACH IN THE JUDICIAL PROCESS

Under the maxim, "not only must justice be done, but it must also be seen to be done," judicial procedures are usually held in open courtrooms to maintain transparency. The contemporary tendency of in-camera trials has evolved in opposition to this maxim in order to ensure anonymity and reduce victim trauma and stigma. It also protects you from the media's voyeuristic intrusion.

¹¹⁷ AIR 1973 SC 1260



A judge has a responsibility to strike a careful balance between an accused's right to a fair trial and a victim's right to protection against a breach of her dignity. Because closed-door sessions are not open to public inspection, the presiding judge has an additional responsibility to ensure this. Within this limit, one of Mumbai's pioneering victim support programme provides a ringside view of rape proceedings. Sharing these findings with a larger audience becomes a critical civic responsibility in the hopes of bringing some fresh air into these closed settings.

The constitutionality of the Juvenile Justice and Children's Acts was upheld in the case of Subramanian Swamy vs Raju¹¹⁸. The twin grounds of challenge were that

- (i) The Juvenile Justice Act results in under classification because all juveniles under the age of 18 years are grouped into one class, regardless of their level of mental maturity or the gravity of the crime, and
- (ii) It replaces the criminal justice system in the country, resulting in deregulatory effects. If the legislature has decided that the age of 18 is the dividing line between juveniles and adults, and this decision is constitutionally legitimate, the court's investigation must conclude.

It is not possible to understand the Juvenile Justice Act in any other way if its provisions clearly express the legislative aim in light of the country's international commitments and are in accordance with constitutional obligations. Juvenile Justice Act is completely consistent with Art. 14 - The same penal law, the Penal Code, applies to all juveniles; the only difference is that the Juvenile Justice Act introduces a different scheme for trial and punishment in place of the regular provisions under the Code of Criminal Procedure for trial of offenders and punishments under the Penal Code, 1860. As a result, the Juvenile Justice Act does not need to be read down as it is not unconstitutional.

In India, the differences between the juvenile justice system and the adult criminal justice system are listed. Procedures and approaches should be presented in light of the goals that need to be met. The same penal legislation, the Penal Code, applies to all juveniles; the only

¹¹⁸ (2014) 8 SCC 390

difference is that the Juvenile Justice Act introduces a new framework for trial and punishment. The court went on to say that the focus of criminal trials is to record a finding on the accused's guilt or innocence, whereas the primary goal of sentencing is to punish a guilty offender.

Juvenile inquiry focuses on determining the juvenile's guilt or innocence, as well as investigating the underlying societal or familial causes of the claimed offence, while juvenile sentence focuses on reforming and rehabilitating the errant juvenile.

6.3.1 Issue of victim's past

State of Punjab vs. Gurmit Singh ¹¹⁹

The Supreme Court slammed the acquittal of people accused of gang-raping a 16-year-old girl in this case. The young village girl had been described by the trial court as a person of questionable character who had made up a rape claim to justify spending the night away from home. It had refused to take her word for it. The Supreme Court stated that the trial court's evaluation of the evidence was "not just unreasonable, but perverse."

"The victim's testimony is vital in such cases, and unless there are compelling reasons to seek corroboration of her statement, the courts should have no difficulty acting solely on the testimony of a victim of sexual assault to convict an accused where her testimony inspires confidence and is found to be reliable," it held. In such instances, seeking corroboration of her assertion before relying on it is, in most situations, adding insult to injury.

6.3.2 Child friendly procedures

Sudesh Jhaku vs K.C.J ¹²⁰

A horrifying case of a father, a high-ranking administrator in the Ministry of Home Affairs, involving his six-year-old daughter in a series of sexualized games and orgies with himself and other adults compelled the court system to consider a number of issues related to sexual

abuse and assault. There was a need to clarify and expand on the definitions of the phrases

¹¹⁹ 1996 AIR 1393

¹²⁰ 1998 CriLJ 2428



'rape,' 'penetration,' and to give sexual offenders in a 'position of trust and authority' a harsher sentence. The court also discussed what safeguards should be taken when a child is summoned to testify in court.

Several child friendly methods are mentioned in the order, such as asking basic questions (avoiding double negatives) when questioning the child and providing the youngster breaks. It also emphasizes how the existence of a screen can both maintain the child's anonymity and make her/him feel uncomfortable when deposing. It also mentions the presence of "support personnel" or "neutral adults" who can hold the child's hand and provide assistance during the trial.

6.4 LANDMARK CASES ON CHILD SEXUAL ABUSE

Ghanashyam Misra vs The State¹²¹

In 1956, the Orissa High Court extended the punishment of Ghanashyam Misra, a schoolteacher who raped a 10-year-old girl in the school grounds, acknowledging that the offence was perpetrated by a person in a position of trust or responsibility for the child.

The judgement reads – “The circumstances are all of an aggravating nature. The victim is a young girl of ten years, and the culprit an adult of 39 years... He took advantage of his position by inducing her to come inside the school room and committed such an atrocious act, the consequence of which might as well be the complete ruin of the future life of the girl.”

The court not only increased the sentence to seven years, but also ordered the defendant to compensate the father and child.

¹²¹ AIR 1957 Ori 78



Gurcharan Singh vs State of Haryana ¹²²

The accused forcibly took a girl under the age of 16 to his fields outside of the village, where he raped her. Because the victim was under the age of 16, the court decided that the absence of marks of assault on her was irrelevant. More crucially, it was decided that the victim could not be regarded an accomplice in the crime.

Tuka Ram vs State Of Maharashtra ¹²³

Popularly known as the Mathura rape case, it was a custodial rape that occurred in India on March 26, 1972, when Mathura, a minor girl, was raped by two police officers connected to a police station when she went with others for the recording of a statement.

The accused was acquitted by the session court and it was held that the victim willingly handed her body to a police constable. Only previous injuries were discovered on the hymen, according to the medical report, and no semen stains were discovered. As a result, the prosecution had failed to establish its case.

The accused was found guilty by the High Court, which decided that simply passive surrender of the body and its acquiescence to the desires of others produced by threats or terror cannot be equated with desire or will. Mathura, on the other hand, was alone at the station late at night. The accused must have taken the initiative for sexual desire, and the victim must not have been a voluntary participant in the act. Her subsequent behaviour in making statements to her relatives and the general public demonstrated that she had been subjected to coercive sexual intercourse.

After the accused was acquitted by the Supreme Court, there was a public outrage and protests, which eventually led to the Criminal Law (Second Amendment) Act 1983, which amended Indian rape law.

¹²² 1972 AIR 2661

¹²³ 1979 AIR 185



The Supreme Court resolved a decades-long conflict between Exception 2 to Section 375 of the Indian Penal Code and other child protection provisions.

Justice Lokur said, “A child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an unmarried child or a divorced child or a separated or widowed child. At this stage we are reminded of Shakespeare’s eternal view that a rose by any other name would smell as sweet — so also with the status of a child, despite any prefix.”

The POCSO Act, which defines "penetrative sexual assault" and covers a girl or a boy minor under the age of 18, has been mentioned in the verdict. Similarly, all minors under the age of 18 are included in the scope of JJ Act. The Supreme Court has read down Exception 2 to Section 375 of the Indian Penal Code, holding that sexual intercourse between a man and his own wife who is under the age of 18 is statutory rape.

6.5 RECENT JUDICIAL PRONOUNCEMENTS

To combat rising crimes against children, the Union government should lower the age for individuals to be tried as adults under the Protection of Children from Sexual Offences (POCSO) Act from 18 to 16.

The committee noted that POCSO instances increased by about 45 percent in two years, from 32,608 in 2017 to 47,325 in 2019, and issued critical suggestions to combat cybercrime, improve the conditions of sex workers, and boost police responsibility in cases of crimes against women. According to the people mentioned above, the strict law was frequently misutilised to criminalise consensual partnerships.

Only if someone between the ages of 16 and 18 is charged with serious crimes such as murder or rape can they be tried as an adult under POCSO or the Indian Penal Code. A juvenile justice board is normally in charge of making the decision. If they are prosecuted as

¹²⁴ MANU/SC/1298/2017

minors, they are sent to a reform home rather than a jail, and a rehabilitation plan is drawn up. Cybercrime against women and children increased from 4,330 in 2017 to 8,684 in 2019, according to the panel, and it crossed geographical lines. As a result, the panel advised that law enforcement agencies across the country work together to combat such crimes.

The panel also discussed how criminals may access the dark web, evade cybersecurity barriers, and remain anonymous by using Virtual Private Networks (VPNs), which allow users to hide their location. It was suggested that the Union government identify and block such VPNs on a permanent basis.

The committee received multiple submissions concerning women complainants having difficulty filing police complaints, and it recommended that police officers and law enforcement professionals who refused to submit such cases or registered fraudulent cases face severe consequences.¹²⁵

We woke to a surprising judgement by the Bombay High Court on National Girl Child Day, January 21. Justice Pushpa V. Ganediwala of the Nagpur bench of the High Court, acquitting the accused of sexual assault under the POCSO Act, said there was no direct physical contact, i.e. skin to skin with sexual intent, without penetration by the man, who pressed her breast and attempted to remove her salwar under the pretext of giving the child fruit in his house.

In the absence of any specific detail as to whether the top was removed or whether the accused inserted his hand inside the top and pressed her breast, the Bombay High Court held that the act of pressing a child's breast would not fall under the definition of "sexual assault" as provided by the Protection of Children from Sexual Offences (POCSO) Act, 2012.

The Bombay High Court appears to have overlooked the fact that the POCSO Act was established to address situations of sexual assault against minors. Its POCSO understanding of "sexual assault" replaces the legal view with the court's personal view.¹²⁶

¹²⁵ Deeksha Bhardwaj, "Try 16+ as adults in POCSO cases: Panel", Hindustan Times, March 11, 2021

¹²⁶ Neymat Chadha, "The Question of Childhood, Intent and Sexual Abuse", Live Wire, Jan 26, 2021

Siddu vs State of Karnataka ¹²⁷

In this particular case, the court interpreted Section 34 of the POCSO Act.

The main purpose of assessing the accused's age under Section 34 of the POCSO Act 2012, according to the Hon'ble Karnataka High Court, is to determine which Court is appropriate to trial and punish the accused. If the accused is found to be under the age of 18 and a juvenile, the learned Sessions Judge's jurisdiction to conduct a trial is revoked, and the Juvenile Justice Board is the sole competent authority to try and dispose of the matter, as provided by the said special law.

As a result, it is incumbent on the learned Sessions Judge, who is competent, to issue an order under Section 34 of the POCSO Act, 2012 determining whether the accused is a juvenile or has reached the age of majority in order to bring him before the Sessions Court for trial. Even if there is a question about the age of the accused and the Court needs more evidence to resolve the issue, it can consider that evidence and decide the age of the Juvenile based on that evidence, and only then may the Court proceed to the merits of the case.

H Moogaveera vs State of Kerala

The statement of the victim child recorded under Section 164 (Recording of confessions and statements) of Code of Criminal Procedure cannot be regarded evidence recorded under Section 35 (period for recording of child's evidence and disposal of case) of the POCSO Act. Because the statement of 164 was made before the trial began, it cannot be considered evidence under sub-section (1) of section 35 of the POCSO Act.¹²⁸

Arjun Kishanrao Malge v. State of Maharashtra

The court issued a series of orders and instructions for investigators, prosecutors, and even special courts dealing with the Protection of Children from Sexual Offenses (POCSO) Act to obey.

¹²⁷ 2016 SCC OnLineKar 708

¹²⁸ Rintu Mariam Biju, “Statement of victim child recorded under Section 164 of CrPC not evidence under Section 35 of POCSO Act: Karnataka High Court”, Bar and Bench, May 12, 2021



The Hon'ble Court, while reiterating that the POCSO Act and Rules are special legislation enacted by Parliament with the purpose of providing a statutory shield to protect children from sexual assault, sexual harassment, and pornography, and providing for the establishment of Special Courts to try such cases.

The court also opined that the POCSO Act, when read in conjunction with Rules 4(13) and 4(15) of the POCSO Rules, recognizes a statutory right to assistance and representation by legal counsel for the child's family or guardian, as well as a right to be present and participate in proceedings in accordance with the said provision.

When the prosecution files an application in court on behalf of the prosecution, the public prosecutor's office is responsible for notifying the child's family of the hearing date.

When the accused files an application in court on behalf of the child, the accused is responsible for notifying the child's family of the hearing date.

If the victim's family, guardian, or legal counsel could not be notified of the court's proceedings, it is the responsibility of the Special Juvenile Police Unit (SJPU) to provide written reasons to the court.¹²⁹

The Supreme Court ruled in Eera v State of NCT of Delhi¹³⁰ that under the Protection of Children from Sexual Offences Act, an adult with the mental age of a child cannot be recognized as a victim.

In this case, the victim/survivor, who was 38 years old, had the mental age of a 6-8-year-old child, and it was argued that the person accused of physically assaulting her should also be charged under the POCSO Act, not only to recognize the seriousness of the offence, but also to ensure that she could benefit from the provisions of child-friendly procedural safeguards and seek justice and compensation under the POCSO Act.

The Supreme Court dismissed the appeal on the grounds that the Act's language was unambiguous, and the Court could not expand its scope unreasonably, as that would amount to judicial legislation.

¹²⁹ POSH at Work, April 10, 2021



The goal of POCSO, according to SC, is to treat minors as a distinct group and to treat them differently so that no crime (sexual assault, sexual harassment, or abuse) is committed against them. This law differentiates between children and adults. As a result, convicting an accused for an IPC offence when the victim is a minor is illegal.

In Anuj Kumar vs. State of UP, the Allahabad High Court has ruled that using a candidate's criminal prosecution as a juvenile to create an opinion on his competence for appointment is arbitrary, unlawful, and unconstitutional under Article 14 of the Indian Constitution.

Furthermore, the Court has held that an employer cannot ask a candidate to disclose details of criminal prosecutions they have faced as a juvenile, and that the requirement to disclose details of criminal prosecutions they have faced as a juvenile is a violation of the child's right to privacy and reputation guaranteed under Article 21.

The Court further said that-

“The conviction by a Juvenile Justice Board under the Juvenile Justice Act, 2000 of a juvenile is not a disqualification for employment. As a sequitor prosecution faced as a juvenile is not a relevant fact for forming an opinion about the criminal antecedents and suitability of the candidate for appointment. Such prosecution cannot be made a basis for denial of appointment. Non-disclosure of irrelevant facts is not "deliberate" or wilful concealment of material facts. Hence non-disclosure of such criminal cases cannot invalidate the appointment of the said person.”¹³¹

¹³¹ Nupur Thapliyal, “Conviction of Juvenile by JJ Board is not a disqualification for employment, requirement of its disclosure violates his privacy, Art 21”, Live Law, May 14, 2021

CHAPTER

7

CONCLUSION AND SUGGESTIONS

A child should be completely prepared to live an independent life in society and should be raised in the character of the United Nations Charter's ideals, including peace, dignity, tolerance, freedom, equality, and solidarity. A child should grow up in a family environment, in an atmosphere of love and happiness, for the complete and harmonious growth of his or her individuality.

She or he has a valuable right to safety. Many societal circumstances traumatize the child victim, but it is the judiciary's role to ensure that a peaceful and healthy environment is restored. The courts have a critical role in protecting and healing the rights of child victims. "They need mending to be a peaceful process for them, not a harsh one." This is our contribution to the future of the innocent children as responsible citizens of this society.

Juvenile delinquency and criminality are on the rise, and it's a significant problem that needs to be addressed right away. Despite the fact that the government has passed legislation to address the problem, it has proven ineffectual in terms of either changing juveniles or discouraging them from committing crimes.

The amended POCSO Act designates children aged 16 to 18 as a category that can be tried as adults if they are accused of committing a severe crime punishable by a minimum of seven years in prison. However, the Act does not mandate that all children in this age group be prosecuted as adults.

7.1 VICTIM COMPENSATION SCHEME

Only those who have not received aid under any other programme for the same crime are eligible for compensation under this programme. Other benefits, such as free medical care or other interim recompense (including monetary compensation), may be available to victims. The victims / dependents / Station House Officer (SHO) of the area can file a compensation application with the State Legal Services Authority, together with a copy of the FIR and other court-related papers.

Gravity of the offence, degree of harm, medical expenses, loss of educational opportunity / employment, victim-offender relationship, consequent pregnancy, STDs contracted, disability incurred, financial circumstances, and other factors are all taken into account when determining compensation.

The court will consider monetary expenses phased by the victim, such as money spent on counsellor or psychological therapy, medical treatment, loss of earnings, litigation costs, property damage or loss, loss due to attachment or collection of property for evidentiary purposes, funeral expenses, and interest on the total sum incurred, when determining the quantum of compensation.

In *Sunil Kumar v. State of NCT of Delhi*, the Court ordered the State to compensate the victim in accordance with the Delhi Victim Compensation Scheme, 2015, within two months of the date of the judgement.¹³²

7.2 STATE OF COURTS

People are gaining confidence in the appellate judiciary. This, combined with the lower rate of case disposition in subordinate courts compared to appellate courts, leads us to question the lower judiciary's efficiency.

Aside from statistics on the number of cases, appeals, and decisions, the issue also involves the manner in which justice is delivered.

¹³² 2021 SCC OnLine Del 2391

Despite the fact that we now have a specific statutory framework, the subordinate courts frequently fail to provide justice. The matter is heard by the Special Court, which was formed under POCSO Section 28(1). This clause allows a Sessions Court to be designated as a Special Court to hear POCSO cases. Section 32 of the Act calls for the appointment of a special public prosecutor to handle solely POCSO cases.

Though these courts are similar to Sessions Courts in some ways, they have been given the jurisdiction to take cognizance of such cases upon the filing of police reports and have magistrate-like powers. This unique system was created to facilitate swift justice.

India undertook the commitment to protect children when it ratified the United Nations Convention on the Rights of the Child, which was accomplished when POCSO was passed in 2012. Articles 15 and 39 of the constitution allow and promote the creation of special legislation in the children's interest.

If a prima facie case is established, the Special Court is obligated to consider it. It is well established law that evidence sufficiency is an issue for trial; it cannot arise at the stage of cognition. In a number of occasions, lower courts have dismissed cases on the basis of thin and horrible reasoning.

This injustice in the courts, which had been going on since 1972, came to light on September 16, 1979. This was the day four scholars submitted an open letter to the then- Chief Justice of India, detailing the abuse of an adivasi girl in Mathura [the court made no effort to conceal her identity] by the trial court and later the Supreme Court. The trial judge refused to trust the victim's story, accusing her instead of creating facts in order to defend her "honour."

It said she was "habitual to sex," an argument used to exonerate the accused while accusing the victim.

Rameeza Bee's case is even less well-known. Four police officers raped her after two of them forced her into a police station late at night.

Despite the fact that the committee led by a high court judge found no basis to label her a prostitute, the sessions judge did so, even going so far as to claim that the sub-inspector could not have permitted three of his juniors to "share the body of that woman."

There is a long number of such cases. According to the Supreme Court report¹³³ for 2019, trial courts resolved on only 4% of the cases that were filed between January and June 2019. Only half of the cases have resulted in charges being filed. According to a Hindustan Times survey¹³⁴, 357 out of 663 cases resulted in acquittal because the victim retracted her testimony owing to family or police pressure.

A lower court is an important stage in the legal process. It starts the legal process by laying the groundwork for the case to be built on. At this point of the trial, the most qualified and experienced lawyers and judges are required. However, it looks that the entire system is inverted.

However, we will never be able to build a solid structure to accomplish justice until the foundation is strong enough.

7.3 AGE OF CONSENT

There is no clear legal framework in place for young people's consent to sex. It can be deduced from criminal statutes that make sex with people under the age of 18 illegal. The level of maturity, whether mental or biological, is always growing as the sociocultural environment changes.

¹³³ Krishnadas Rajagopal, "SC orders setting up of special courts in districts with over 100 pending POCSO cases", The Hindu, July 25, 2019

¹³⁴ Avantika Mehta, "Family, police pressure: Why most rape victims turn hostile during trial", Hindustan Times, Apr 28, 2016

There is a clear distinction between right and wrong for a boy or girl at the age of 16, and the person has acquired a sense of higher self by the age of 16. Male and female consent should be equal, and the minimal age should match the child's increasing capacity, age, and maturity. Regardless of sexual orientation, gender, or race, the age of consent to sex must be enforced similarly to all people.

Teenagers between the ages of 16 and 18 are sexually active. It is critical to lower the age of consent and establish a 3 to 5 year age gap between the consenting young pair. This will confirm that the girl has not been exploited by someone significantly older. A legislation change like this could safeguard a young 16-year-old girl from sexual exploitation and harassment.

7.4 CONSENT FOR MEDICAL EXAM

After discussing the process of the medical examination, clinicians must obtain the child's written agreement, which must be full, informed, and voluntary. Second, they should provide ample time to comprehend the material and address any doubts they may have. Finally, the child and/or his or her parent/guardian should agree to the examination voluntarily and without feeling compelled to do so.

If the child is under the age of 12 or is unable to give consent, consent should be obtained from the child's parents/guardians or any other person in whom the child has faith and confidence.

7.5 SUGGESTIONS

7.5.1 Educating the general public, particularly legislators, of the gravity of child sexual abuse

The widespread transmission of factual information to the public, particularly policymakers, will help to shatter the silence and taboo surrounding child sexual abuse, as well as promote the design of effective remedies.

7.5.2 Evaluation of existing prevention programs for child sexual abuse

Currently, child abuse prevention programmes generally focus on teaching preschool and elementary school children how to recognise signs of abuse and how to protect themselves. Children who have been the victims of past or ongoing sexual abuse may benefit from programmes that encourage them to report such instances to their parents or other responsible adults.

Child sexual abuse prevention programmes must be enhanced, with programme strategies more specifically aimed at preventing child sexual abuse.

7.5.3 Changing the focus of child sexual abuse prevention from children to adults Many experts worry that even if children retain the knowledge gained from child sexual abuse prevention programmes, they would be unable to resist abusive behaviour directed at them by older and stronger perpetrators. Adults have an affirmative responsibility to protect children from sexual abuse.

As a result, while existing child sexual abuse prevention programmes must be strengthened, efforts must be made to develop programmes that shift child sexual abuse prevention responsibilities from children to adults and public institutions.

One way is to employ widespread and intensive public education, such as media campaigns, to raise adult awareness and knowledge of child sexual abuse, as well as to teach adults how to safeguard children.

7.5.4 Providing mental health treatment to all children who have been sexually abused

Sexually abused children may suffer severe and long-term psychological repercussions. Mental health therapies, when provided in a timely manner, can help alleviate some of these effects. Mental health therapies for persons who engage in abusive conduct can assist them in addressing stressors that frequently lead to sexual abuse, so assisting in the prevention of such abuse.

7.5.5 Restatement of legal terms

Amend and harmonise legislation to bring them in accordance with international norms and definitions, such as child definitions, child trafficking, sexual abuse, child sexual exploitation, child pornography/child abusive pictures, and child sexual exploitation in prostitution.

7.5.6 Report and investigate crimes against children

Establish extensive legal procedures for reporting, investigating, and prosecuting child sexual abuse and exploitation offences. Create and support systems for reporting exploitation and abuse. They should be made aware of them and educated to use them properly by service providers and others who have regular contact with children.

Without fear of consequences, the general public should be allowed to report suspected or confirmed cases of child abuse and exploitation. Follow-up (including, if appropriate, investigations) should be prompt and effective, while also being sensitive to the interests and rights of people affected.

According to an examination of the various case laws, the conviction rate under POCSO is extremely low, which casts an unfavourable light on the way the criminal justice system is conducted and raises public concern that minor victims of rape and sexual offences are not receiving justice.

In fact, in the vast majority of acquittals, it was discovered that the prosecutrix (alleged victim) - referred to in court as the "stellar witness" - had become hostile. Simply put, the alleged victim's evidence was determined to be in conflict with the prosecution's legal position.

It is important to note that every level of the legal process was designed to be child-friendly, but this has not always been the case. While most courts offer a "vulnerable witness deposition room" where victims can speak with judges or prosecutors, the process is long and tiresome.

As a result, severe steps must be implemented to prevent and regulate child sexual abuse. Apart from statutory measures and law, parents can prevent their children from being harmed by recognising warning signs in them. It is imperative that the entire human race join together to remove the problem of child sexual abuse.

“It [trial as an adult] is not a default option; it is a conscious, calibrated one,” the Bombay High Court said in a recent case. And for that, all of the legal requirements must be met.

“Essentially, the trial in the ordinary court is offence-oriented; in the juvenile court, it is offender-oriented,” according to one of the court's significant observations.

In other words, social safety and the child's future are regulated in the children's court. Prison is the standard option for an adult offender; for a child, it is the last resort.”

Adolescents, while lacking in real-world experience, are acutely aware of their actions. Psychological variables have a significant influence in the development of an adolescent's mind, and the court should constantly consider this. As a result, the Madras High Court correctly stated in this instance that “punishing a teenage boy who gets into a relationship with a young girl by treating him as an offender was never the goal of the POCSO Act.”

Under the POCSO Act, 2012, a group named the "Sensitive Issues Committee" shall be formed to investigate the psychological causes of criminal behaviour, similar to the case of *Vijayalakshmi v. State Rep. by the Inspector of Police*.¹³⁵ The committee would then write an unbiased report, which would include a knowledge of both parties as well as their current mindsets, and submit it to the court if needed.

¹³⁵ 2021 SCC OnLine Mad 317

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