INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed



www.ijlra.com

ISSN: 2582-6433

DISCLAIMER

No part of this publication may be reproduced, stored, transmitted, or distributed in any form or by any means, whether electronic, mechanical, photocopying, recording, or otherwise, without prior written permission of the Managing Editor of the *International Journal for Legal Research & Analysis (IJLRA)*.

The views, opinions, interpretations, and conclusions expressed in the articles published in this journal are solely those of the respective authors. They do not necessarily reflect the views of the Editorial Board, Editors, Reviewers, Advisors, or the Publisher of IJLRA.

Although every reasonable effort has been made to ensure the accuracy, authenticity, and proper citation of the content published in this journal, neither the Editorial Board nor IJLRA shall be held liable or responsible, in any manner whatsoever, for any loss, damage, or consequence arising from the use, reliance upon, or interpretation of the information contained in this publication.

The content published herein is intended solely for academic and informational purposes and shall not be construed as legal advice or professional opinion.

Copyright © International Journal for Legal Research & Analysis. All rights reserved.

ISSN: 2582-6433

ABOUT US

The *International Journal for Legal Research & Analysis (IJLRA)* (ISSN: 2582-6433) is a peer-reviewed, academic, online journal published on a monthly basis. The journal aims to provide a comprehensive and interactive platform for the publication of original and high-quality legal research.

IJLRA publishes Short Articles, Long Articles, Research Papers, Case Comments, Book Reviews, Essays, and interdisciplinary studies in the field of law and allied disciplines. The journal seeks to promote critical analysis and informed discourse on contemporary legal, social, and policy issues.

The primary objective of IJLRA is to enhance academic engagement and scholarly dialogue among law students, researchers, academicians, legal professionals, and members of the Bar and Bench. The journal endeavours to establish itself as a credible and widely cited academic publication through the publication of original, well-researched, and analytically sound contributions.

IJLRA welcomes submissions from all branches of law, provided the work is original, unpublished, and submitted in accordance with the prescribed submission guidelines. All manuscripts are subject to a rigorous peer-review process to ensure academic quality, originality, and relevance.

Through its publications, the *International Journal for Legal Research & Analysis* aspires to contribute meaningfully to legal scholarship and the development of law as an instrument of justice and social progress.

ISSN: 2582-6433

PUBLICATION ETHICS, COPYRIGHT & AUTHOR RESPONSIBILITY STATEMENT

The *International Journal for Legal Research and Analysis (IJLRA)* is committed to upholding the highest standards of publication ethics and academic integrity. All manuscripts submitted to the journal must be original, unpublished, and free from plagiarism, data fabrication, falsification, or any form of unethical research or publication practice. Authors are solely responsible for the accuracy, originality, legality, and ethical compliance of their work and must ensure that all sources are properly cited and that necessary permissions for any third-party copyrighted material have been duly obtained prior to submission. Copyright in all published articles vests with IJLRA, unless otherwise expressly stated, and authors grant the journal the irrevocable right to publish, reproduce, distribute, and archive their work in print and electronic formats. The views and opinions expressed in the articles are those of the authors alone and do not reflect the views of the Editors, Editorial Board, Reviewers, or Publisher. IJLRA shall not be liable for any loss, damage, claim, or legal consequence arising from the use, reliance upon, or interpretation of the content published. By submitting a manuscript, the author(s) agree to fully indemnify and hold harmless the journal, its Editor-in-Chief, Editors, Editorial Board, Reviewers, Advisors, Publisher, and Management against any claims, liabilities, or legal proceedings arising out of plagiarism, copyright infringement, defamation, breach of confidentiality, or violation of third-party rights. The journal reserves the absolute right to reject, withdraw, retract, or remove any manuscript or published article in case of ethical or legal violations, without incurring any liability.

ISSN: 2582-6433

CHILDREN BORN THROUGH RAPE: ADDRESSING THE MISSING LINK IN RECOGNISING THE FORGOTTEN VICTIMS IN CRIMINAL JUSTICE SYSTEM

AUTHORED BY - NARAYANEE AKSHAYAVARSHINI N P[1]

Abstract

Indian criminal law treats rape as a wrong done to a woman, and its machinery of trial, compensation and rehabilitation is built around her. The child born of the offence appears nowhere in that design. This paper asks whether such a child can be recognised as an independent victim under the Bharatiya Nagarik Suraksha Sanhita, 2023; whether the Constitution and existing statutes protect the child's dignity, identity and privacy; and whether the compensation and family-law regime meets the child's financial and psychological needs. Through a doctrinal reading of Indian statutes and case law, and a comparison with international human rights instruments, the practice of the International Criminal Court and the laws of the United States, South Africa and England and Wales, it argues that the gap is one of legislative omission and not constitutional impossibility. The paper closes with amendments and judicial directions that would give these children a defined legal status, a paternity-neutral route to documents and benefits, and a compensation entitlement that does not depend on the mother's claim.

Keywords: children born of rape, victim, Bharatiya Nagarik Suraksha Sanhita, compensation, paternity, dignity, India.

[1]CLA2512, 2nd year LLM(Hons), Department of Criminal Law and Criminal Justice Administration, School of Excellence in Law, The Tamil Nadu Dr. Ambedkar Law University

ISSN: 2582-6433

CHAPTER-I

INTRODUCTION

1.1 Introduction

A rape trial in India is conducted as a contest between a woman and the man accused of violating her. The offence is defined by reference to her body and her consent, the case rises or falls on her testimony, and compensation, where it comes at all, is measured against what she has lost.[2] When the offence leaves her pregnant and she carries the pregnancy to term, a third person enters the story, and the criminal law has almost nothing to say about that person. The child is not a complainant or a witness. For most legal purposes the child is not a victim either, and appears, if at all, as a fact the court may weigh when it computes the mother's loss.

This paper takes the view that the omission is a substantive gap and not a drafting accident that good sense in individual cases will cure. A child conceived through rape starts life with disadvantages that trace directly to the offence. The biological father is a criminal, or an unidentified man, or a relative. The mother may herself be a minor. Her family may turn away from both of them. Birth registers and school forms ask for a father's name. Succession law, in its older vocabulary, calls the child illegitimate.[3] None of these burdens was chosen by the child.

The scale of the problem cannot be stated with any confidence. The National Crime Records Bureau registered 31,516 cases of rape in 2022.[4] Its published tables do not show how many of those cases involved a pregnancy, how many pregnancies were carried to term, or what became of the children. There is no official figure for children born of rape in India. That silence is itself a measure of how little attention the question has attracted. Two clarifications are needed at the outset. Nothing in this paper is meant to qualify a survivor's right to decide whether to continue a pregnancy. The Medical Termination of Pregnancy Act, 1971 presumes grave injury to the mental health of a woman whose pregnancy is alleged to have been caused by rape,[5] and the Supreme Court has held that reproductive choice is part of personal liberty.[6] The study concerns the child who is born, whether because the survivor chose to continue the pregnancy or because termination was unavailable, delayed or unknown to her. Second, the phrase "child born of rape" is used here as a descriptive legal category, and with some reluctance. The

[2]Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, §§ 63–64 (India) [hereinafter BNS].
[3]Hindu Succession Act, 1956, No. 30 of 1956, § 3(1)(j) (India) (providing that illegitimate children are deemed related to their mother and to one another) [hereinafter HSA].
[4]Nat'l Crime Recs. Bureau, Ministry of Home Affs., Crime in India 2022 (2023) (India).
[5]Medical Termination of Pregnancy Act, 1971, No. 34 of 1971, § 3(2) (India), as amended by Medical Termination of Pregnancy (Amendment) Act, 2021, No. 8 of 2021.
[6]Suchita Srivastava v. Chandigarh Admin., (2009) 9 S.C.C. 1 (India).

ISSN: 2582-6433

purpose is to secure entitlements for a person without attaching a label that follows him or her around.

1.2 Need of the Study

The law of rape has been rewritten more than once in the last decade. Consent, evidence, sentencing and the survivor's treatment in court have all been reworked by Parliament and the Supreme Court, and the Justice Verma Committee's report of 2013 remains the fullest statement of what a survivor-centred system requires.[7] Almost all of that attention has gone to the woman. The child who may be born of the offence has stayed outside the reform conversation, and the reasons are not obscure. The prosecutor acts for the State and the survivor's counsel acts for the survivor. Child welfare bodies hear of a rape case only if the child is separately brought to them. Nobody is under a duty to ask what the child needs, so in the ordinary course nobody does.

The need is sharper now that Parliament has replaced the criminal codes. The Bharatiya Nyaya Sanhita, the Bharatiya Nagarik Suraksha Sanhita and the Bharatiya Sakshya Adhiniyam came into force on 1 July 2024. They renumbered and in places reworded the earlier provisions, but the definition of "victim" was carried over from the Code of Criminal Procedure, 1973 without change in substance.[8] Whether a child born of rape falls within that definition is therefore an open question under the new code, and trial courts will be answering it, one way or the other, without guidance.

Rescue by individual judges is no substitute for a rule. When a court does order support for a child of this kind, the outcome depends on the diligence of one lawyer and the sympathy of one bench. A child's access to maintenance, a school seat or a birth certificate ought not to depend on either.

1.3 Significance of the Study

The study has value in three respects. For victimology, it tests the boundary of the category. Nils Christie's account of the "ideal victim" explains why the person who fits the stereotype is recognised more readily than the one who does not.[9] A child born of rape fits no stereotype at all, being neither the person attacked nor a bystander, and so shows how far the legal category has been drawn around the original act and not around the harm that followed. For doctrine,

[7]Justice J.S. Verma Comm., Report of the Committee on Amendments to Criminal Law (2013) (India).
[8]Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, § 2(1)(y) (India) [hereinafter BNSS]; cf. Code of Criminal Procedure, 1973, No. 2 of 1974, § 2(wa) (India) (repealed 2024).
[9]Nils Christie, The Ideal Victim, in FROM CRIME POLICY TO VICTIM POLICY 17 (Ezzat A. Fattah ed., 1986).

ISSN: 2582-6433

the study asks how far Article 21 and the harm-based wording of section 2(1)(y) of the BNSS can be stretched without legislation, and where legislation becomes unavoidable. For practice, it offers legal services authorities, Child Welfare Committees and Special Courts some steps they could take now, and offers Parliament a drafting agenda.

There is also a comparative reason. The International Criminal Court has begun to recognise children born of wartime rape as victims in reparations proceedings.[10] India is not a party to the Rome Statute, but a domestic system that cannot do what an international tribunal has done for children born of mass atrocity should at least look hard at why.

1.4 Review of Literature

The literature that bears on this study sits in several fields which seldom speak to each other. It is taken here in turn, noting for each the main finding and the difficulty it leaves.

Research on children born of wartime rape is the most developed. Carpenter's work showed that human rights and humanitarian discourse on mass rape had concentrated on women and perpetrators and left the resulting children almost unseen, even as the children faced rejection and a lack of documents.[11] Denov and Lakor's study in northern Uganda found that stigma and exclusion persisted into the post-conflict period.[12] The difficulty is that this work is concerned with armed conflict and transitional justice. Rape in a functioning legal system produces the same harms for the child but calls for different legal tools.

Indian scholarship on rape law is substantial but centred on the survivor and the trial. Baxi's study of rape trials shows how the courtroom produces further injury for the complainant and how ideas of honour and shame shape outcomes,[13] and Satish's work examines judicial discretion in sentencing.[14] Neither addresses a child born of the offence. That is no criticism, since each author set a different question, but it leaves the child absent from the main body of Indian writing on the subject.

Official reports form a third strand. The Law Commission, the Malimath Committee and the Verma Committee agree that victims have long been neglected in Indian criminal procedure

[10]Prosecutor v. Ntaganda, ICC-01/04-02/06-2659, Reparations Order (Mar. 8, 2021).
[11]R. Charli Carpenter, Surfacing Children: Limitations of Genocidal Rape Discourse, 22 HUM. RTS. Q. 428 (2000); BORN OF WAR: PROTECTING CHILDREN OF SEXUAL VIOLENCE SURVIVORS IN CONFLICT ZONES (R. Charli Carpenter ed., 2007).
[12]Myriam Denov & Atim Angela Lakor, When War Is Better than Peace: The Post-Conflict Realities of Children Born of Wartime Rape in Northern Uganda, 65 CHILD ABUSE & NEGLECT 255 (2017).
[13]PRATIKSHA BAXI, PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA (2014).
[14]MRINAL SATISH, DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA (2016).

ISSN: 2582-6433

and that compensation has been irregular and under-implemented.[15] These reports are directed principally at the survivor, and derivative claimants such as children receive little separate attention in them.

Family-law decisions form a fourth strand. The Supreme Court has repeatedly softened the consequences of illegitimacy for children whose parents' union was void or informal. Revanasiddappa v. Mallikarjun gave children of void marriages a share in their parents' property,[16] and Tulsa v. Durghatiya declined to visit the parents' status on the child of a long relationship.[17] The reasoning, that a child should not pay for circumstances the child did not create, applies to the child born of rape with greater force. Yet these decisions concern unions that were at least consensual, and the courts have not been invited to extend them.

Finally, American scholarship has examined the position of women who become mothers through rape and the custody claims their assailants may bring. Prewitt's account documents how thin the protection was in many States.[18] The focus is on the mother and on custody, and the child's own standing as a victim is not developed.

1.5 Research Gap

The gap is therefore clear. Each field supplies a part of the argument, but none of the sources consulted for this paper puts the parts together for the Indian child. Criminal law has the vocabulary of victimhood and no child. Family law has the child and no vocabulary of victimhood. International practice offers recognition, and Indian law has no provision ready to receive it. The recurring challenges across the literature are the absence of data, the reluctance of survivors to be identified, and the habit of treating the child as part of the mother's case. The finding this study carries forward is that stigma and legal invisibility reinforce each other.

1.6 Research Problem

Indian criminal law defines a victim by reference to loss or injury caused by the act for which the accused is charged, and builds its rights of participation and compensation on that definition. Children born of rape are not mentioned in the definition, in the provisions on rape, in the Protection of Children from Sexual Offences Act, 2012, or in the compensation schemes.

[15]Law Comm'n of India, Report No. 154, The Code of Criminal Procedure, 1973 (1996) (India); Comm. on Reforms of Crim. Just. Sys., Ministry of Home Affs., Report, vol. 1 (2003) (India); see also Verma Comm., supra note 6.
[16]Revanasiddappa v. Mallikarjun, (2011) 11 S.C.C. 1 (India).
[17]Tulsa v. Durghatiya, (2008) 4 S.C.C. 520 (India).
[18]Shauna R. Prewitt, Giving Birth to a "Rapist's Child": A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape, 98 GEO. L.J. 827 (2010).

ISSN: 2582-6433

Their claims to dignity, identity, maintenance, inheritance and education must therefore be pursued through general constitutional, family-law and child-protection provisions that were not written with them in mind. Those claims depend on the mother's circumstances, on proof of paternity that she may not wish to attempt, and on official discretion. The research problem is the absence of a legal link between the criminal law that creates the child's predicament and the civil and welfare law that might relieve it.

1.7 Research Questions

1. Whether children born as a result of rape can be legally recognised as independent victims of the sexual offence under the Indian criminal justice framework.
2. Whether the existing constitutional and statutory framework adequately protects the dignity, identity, privacy and other legal rights of children born as a result of rape, particularly in relation to their biological parentage.
3. Whether the existing Indian criminal justice and victim-compensation framework adequately addresses the financial, psychological and social consequences suffered by such children, including their rights to maintenance, inheritance, education and rehabilitation.
4. What legislative and judicial reforms are necessary to establish a comprehensive, child-centred and victim-oriented framework for recognising and protecting children born as a result of rape.

1.8 Hypothesis

The paper proceeds on the hypothesis that the Indian criminal justice framework, as drafted and applied, recognises the survivor alone as the victim of rape; that it therefore fails to treat children born of the offence as independent victims; and that this omission leaves their dignity, identity, privacy and economic rights dependent on the survivor's own claim and on discretionary welfare provisions. The null hypothesis is that the existing framework already recognises and adequately protects these children. The paper also proposes that statutory amendment, together with a purposive reading of existing provisions by the courts, can correct the position.

1.9 Aim and Objectives

The aim of the study is to examine whether Indian law recognises and protects children born

ISSN: 2582-6433

of rape and to propose a framework that would do so. The objectives are:

(i) to analyse the statutory definition of "victim" and test whether it can include a child born of rape;

(ii) to assess how far the Constitution and existing statutes protect such a child's dignity, identity and privacy, including in relation to biological parentage;

(iii) to evaluate the compensation, maintenance, succession, education and rehabilitation provisions as they apply to such a child;

(iv) to study the international and comparative approaches to recognising and protecting these children;

(v) to examine how Indian courts have treated the child and the questions that surround the child; and

(vi) to propose legislative, administrative and judicial reforms.

1.10 Research Methodology

The study is doctrinal. Primary sources are the Constitution, the BNS, BNSS and Bharatiya Sakshya Adhiniyam, the POCSO Act, the Juvenile Justice Act, the Medical Termination of Pregnancy Act and the relevant family and succession statutes, together with decisions of the Supreme Court. Secondary sources are Law Commission and committee reports, books and journal articles. International instruments and the practice of the International Criminal Court are read alongside the domestic material. The comparative chapter is selective and not exhaustive.

The United States, South Africa and England and Wales were chosen because each answers one of the questions the paper asks. No field research was undertaken. Where official data does not exist, the absence is treated as a finding and not as a defect in the method. Citations follow the Bluebook, 21st edition.[19]

1.11 Scope

The study is confined to children born as a result of offences under sections 63 to 70 of the BNS, including rape by a relative, and to the corresponding offences under the POCSO Act. A child conceived through non-consensual intercourse within marriage is, in law, not a child born of rape where the wife is eighteen or older, because of the exception to section 63,[20] and falls outside the study, although the argument made here has obvious relevance to such a child.

[19] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020).
[20] BNS, supra note 1, § 63, exception 2.

ISSN: 2582-6433

Family and succession law is examined mainly through the codified Hindu statutes, which are the most developed, and the position under other personal laws is noted only where relevant.

1.12 Limitations

The limitations are those of the subject. The data are absent, so claims about the scale of the problem are necessarily cautious. The new criminal codes have been in force for a short time, and reported decisions applying them are few. The analysis rests on reported judgments and does not capture what happens in trial courts and Child Welfare Committees, where the question is most likely to arise. Finally, the comparative survey covers four systems and cannot claim to be a survey of the world.

1.13 Chapterisation

Chapter I sets out the problem, questions, hypothesis and method. Chapter II describes the international and national legal framework as it bears on the child. Chapter III compares the approaches of the International Criminal Court, the United States, South Africa and England and Wales. Chapter IV examines the role of the Indian judiciary. Chapter V maps the gaps identified against the four research questions and outlines the shape of a child-centred framework. Chapter VI states the findings, the conclusion and the suggestions.

IJLRA

ISSN: 2582-6433

CHAPTER II

INTERNATIONAL AND NATIONAL FRAMEWORK

2.1 The International Framework

No international instrument speaks directly of children born of rape in peacetime. What exists is a set of general guarantees which, read together, leave little doubt about what a State owes such a child.

The Universal Declaration of Human Rights says that all children, whether born in or out of wedlock, are to enjoy the same social protection.[21] The International Covenant on Civil and Political Rights gives every child the measures of protection that his or her status as a minor requires, without discrimination on grounds that include birth.[22] The Convention on the Rights of the Child, which India ratified in 1992, is more detailed. Article 2 prohibits discrimination on the basis of the child's "birth or other status." Article 3 makes the child's best interests a primary consideration in all actions concerning children. Articles 7 and 8 protect the right to a name, to preserve one's identity and, so far as possible, to know and be cared for by one's parents. Article 16 protects privacy, article 19 requires protection from violence and abuse, articles 27 and 28 deal with an adequate standard of living and education, and article 39 obliges States to promote the recovery and social reintegration of child victims.[23]

Article 7 exposes the central tension of the subject. The child's interest in knowing his or her origins can sit uneasily with the mother's interest in leaving the assault behind her. The words "as far as possible" leave room to strike the balance by reference to the child's best interests, which the Committee on the Rights of the Child describes as at once a substantive right, an interpretative principle and a rule of procedure.[24]

Two soft-law instruments bear directly on the question of status. The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power says that "victim" includes, where appropriate, the immediate family or dependents of the direct victim.[25]

The 2005 Basic Principles on the Right to a Remedy and Reparation use similar language.[26] A

[21]G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25(2) (Dec. 10, 1948).
[22]International Covenant on Civil and Political Rights art. 24(1), Dec. 16, 1966, 999 U.N.T.S. 171.
[23]Convention on the Rights of the Child arts. 2, 3, 7, 8, 16, 19, 27, 28, 39, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].
[24]U.N. Comm. on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1), U.N. Doc. CRC/C/GC/14 (May 29, 2013).
[25]G.A. Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985).
[26]G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005).

ISSN: 2582-6433

child born of rape is a dependant of the direct victim in the plainest sense, and is also harmed by the offence on his or her own account. International law, in other words, already has the vocabulary this paper proposes to use. In the context of armed conflict the Security Council has gone further. Resolution 2467 acknowledged children born of sexual violence as a group whose stigma, lack of legal identity and need for reparation require attention.[27]

India is bound by the Convention and the Covenant in international law, but treaties do not become enforceable in domestic courts without legislation. The Supreme Court has nonetheless read international norms into the fundamental rights where domestic law is silent and there is no inconsistency, most prominently in Vishaka v. State of Rajasthan.[28] That interpretive route is the most readily available one for the child, and later chapters return to it.

2.2 The Constitutional Framework

The Constitution says nothing about children born of rape, but several of its provisions meet at the point where such a child stands. Article 21 is the principal one. The right to life has been read to include the right to live with human dignity and all that goes with it.[29] Since Puttaswamy, it has also included privacy, covering informational privacy and decisional autonomy.[30] A birth record that makes a mother name her assailant, or a school form that obliges a child to explain the absence of a father, touches both.

The equality provisions help less than one might expect. Article 15(1) prohibits discrimination on grounds of religion, race, caste, sex or place of birth. It does not mention the circumstances of birth, so the claim of a child stigmatised as illegitimate must rest on Article 14, and on the argument that a classification penalising a child for the manner of his or her conception bears no rational relation to any legitimate object. Article 15(3) permits special provision for children, and Article 39(f) directs the State to secure for children opportunities and facilities to develop in conditions of freedom and dignity.

The Directive Principles are not enforceable by themselves, but the Court has used them to give content to Article 21, as it did in deriving a right to education from Article 21 read with Articles 41 and 45.[31] Article 21A now makes education a fundamental right for children between six and fourteen.[32]

[27]S.C. Res. 2467 (Apr. 23, 2019).
[28]Vishaka v. State of Rajasthan, (1997) 6 S.C.C. 241 (India).
[29]Francis Coralie Mullin v. Adm'r, Union Territory of Delhi, (1981) 1 S.C.C. 608 (India).
[30]K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1 (India).
[31]Unni Krishnan v. State of Andhra Pradesh, (1993) 1 S.C.C. 645 (India).
[32]India Const. art. 21A (inserted by the Constitution (Eighty-sixth Amendment) Act, 2002).

ISSN: 2582-6433

Where the State fails in its duties, the Court has been willing to award compensation as a public-law remedy for infringement of fundamental rights.[33] This is a potentially significant opening for a child. The harm of rape is inflicted by a private person, so any State liability would have to rest on a failure to protect, to investigate or to rehabilitate. That argument can be made. On the decisions discussed in this paper, it has not yet been made on behalf of a child.

2.3 The Statutory Framework

2.3.1 Criminal law and procedure

The BNS defines rape in section 63 and prescribes punishment in section 64, with enhanced provisions for particular victims and circumstances in the sections that follow.[34] None of these provisions treats a resulting pregnancy or birth as an aggravating circumstance or as a distinct head of harm. Disclosure of the identity of a person against whom rape is alleged is punishable under section 72, and printing or publishing court proceedings without permission under section 73.[35] Both provisions protect the survivor. Neither mentions anyone born of the offence.

The BNSS defines a victim as a person who has suffered any loss or injury caused by reason of the act or omission for which the accused has been charged, and adds that the expression includes the victim's guardian or legal heir.[36] Much turns on that definition. A victim may appeal against an acquittal, a conviction for a lesser offence or inadequate compensation,[37] may receive compensation from the offender under section 395, and may claim from the State under the scheme required by section 396.[38]

Section 396 is worded more widely than the definition, for it speaks of "the victim or his dependants" who have suffered loss or injury as a result of the crime and require rehabilitation.[39] The wording matters because a child is a dependent of the mother in the ordinary sense. But a dependent claims through the victim, and a claim that exists only through the victim fails when the victim cannot or will not make it.

2.3.2 The POCSO Act

Where the survivor is below eighteen, the Protection of Children from Sexual Offences Act,

[33]Rudul Sah v. State of Bihar, (1983) 4 S.C.C. 141 (India); Nilabati Behera v. State of Orissa, (1993) 2 S.C.C. 746 (India).
[34]BNS, supra note 1, §§ 63–70.
[35]Id. §§ 72–73.
[36]BNSS, supra note 7, § 2(1)(y).
[37]Id. § 413.
[38]Id. §§ 395–396.
[39]Id. § 396(1).

ISSN: 2582-6433

2012 applies alongside the BNS. It requires the Special Court to ensure that the child's identity is not disclosed at any time during investigation or trial, and it empowers the Court to direct payment of compensation "to the child" for physical or mental trauma and for immediate rehabilitation.[40] The rules framed under the Act list the factors for fixing compensation, and one of them is whether the child became pregnant as a result of the offence.[41] The scheme therefore notices the pregnancy and does not notice the person born of it. In the Act, "the child" is the one assaulted.

2.3.3 Child protection law

The Juvenile Justice (Care and Protection of Children) Act, 2015 is the one statute through which a child born of rape can enter the system without first being identified as such. It treats as a "child in need of care and protection" a child who is without parental care, or whose parent or guardian is found unfit or incapacitated to look after the child, among others.[42] A Child Welfare Committee may order restoration, foster care, sponsorship or adoption,[43] and section 74 bars disclosure of the identity of a child who is the subject of its inquiry.[44] These are real protections. They are available, though, only if the child reaches the Committee as a child without family support, and nothing in the Act connects the child's predicament to the offence that caused it. The Act offers care. It offers no compensatory remedy that responds to the offence.

2.3.4 Maintenance, succession and guardianship

Support from a parent is governed by the general law. Section 144 of the BNSS allows a magistrate to order a person with sufficient means to maintain his "legitimate or illegitimate minor child" who is unable to maintain itself,[45] and the Hindu Adoptions and Maintenance Act, 1956 similarly obliges a Hindu to maintain his or her legitimate or illegitimate children.[46] Each remedy requires the court to be satisfied that the respondent is the father. A conviction for rape does not of itself declare the paternity of any child, and a mother who has no wish to confront her assailant again may be unwilling to ask for a DNA test and a maintenance order against him.

Inheritance is harder. Under the Hindu Succession Act, "related" means related by legitimate

[40]Protection of Children from Sexual Offences Act, 2012, No. 32 of 2012, § 33(7)–(8) (India) [hereinafter POCSO Act].
[41]Protection of Children from Sexual Offences Rules, 2020, r. 9 (India).
[42]Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2 of 2016, § 2(14) (India) [hereinafter JJ Act].
[43]Id. §§ 37, 44–45, 56.
[44]Id. § 74(1).
[45]BNSS, supra note 7, § 144(1)(b).
[46]Hindu Adoptions and Maintenance Act, 1956, No. 78 of 1956, § 20 (India).

ISSN: 2582-6433

kinship, and illegitimate children are deemed related only to their mother and to one another.[47] Such a child inherits from the mother but not, as of right, from the father. Section 16 of the Hindu Marriage Act, 1955 rescues children of void and voidable marriages, and the Supreme Court has read it generously,[48] but a child of rape was not born of any marriage, void or otherwise, and sits outside it.

Guardianship raises a different problem. Under the Hindu Minority and Guardianship Act, 1956, the natural guardian of an illegitimate minor is the mother and, after her, the father.[49] Nothing in the Act disqualifies a father whose paternity arises from rape. Nor does the Hindu Succession Act, which disqualifies a murderer from inheriting from his victim,[50] disqualify a rapist from inheriting from the child he fathered. Where the mother is married to another man, section 116 of the Bharatiya Sakshya Adhiniyam adds a further complication by presuming that a child born during the marriage is the husband's unless non-access is shown.[51]

2.3.5 Education and documentation

Section 3 of Right of Children to Free and Compulsory Education Act, 2009 gives every child between six and fourteen a right to free elementary education, section 12(1)(c) requires private unaided schools to reserve a quarter of their seats for children belonging to disadvantaged groups. The definition of that expression in section 2(d) includes any group the appropriate Government may notify as disadvantaged on social, cultural, economic, geographical, linguistic, gender or other grounds.[52] A State could notify children born of sexual violence tomorrow. The author is not aware of any State that has done so.

Documentation is a quieter obstacle. Birth registration under the Registration of Births and Deaths Act, 1969 is the gateway to most other documents, and the prescribed forms ask for the names of both parents.[53] A mother who does not wish to name her assailant is placed in a difficult position, and the child inherits the consequences in school admissions and later in identity records.

2.4 The Framework from the Child's Side

Seen from the child's side, the framework has three features. First, it is derivative. Every provision that touches the child does so through the mother, as her dependant or as an incident

[47]HSA, supra note 2, § 3(1)(j).
[48]Hindu Marriage Act, 1955, No. 25 of 1955, § 16 (India); Revanasiddappa, supra note 15.
[49]Hindu Minority and Guardianship Act, 1956, No. 32 of 1956, § 6(b) (India).
[50]HSA, supra note 2, § 25.
[51]Bharatiya Sakshya Adhiniyam, 2023, No. 47 of 2023, § 116 (India).
[52]Right of Children to Free and Compulsory Education Act, 2009, No. 35 of 2009, §§ 2(d), 3, 12(1)(c) (India).
[53]Registration of Births and Deaths Act, 1969, No. 18 of 1969 (India).

ISSN: 2582-6433

of her loss, or through a generic category (illegitimate child, child in need of care and protection, disadvantaged group) that makes no reference to the offence. Second, it is conditional on proof or on discretion. Paternity must be proved before maintenance can be ordered, the Committee must be approached before care can be arranged, and the State must choose to notify before a school seat can be claimed. Third, it is silent on the offender's continuing claims, whether to guardianship, to the child's property or to any role in the child's life. These three features, and not any single missing section, explain why the child has no secure legal position.

CHAPTER III
COMPARATIVE STUDY

A comparison with other systems serves a limited purpose here. No jurisdiction has solved the problem completely, and the point is not to import a model whole. The systems below were chosen because each answers one of the questions this paper asks:
whether the child can be a victim (the International Criminal Court), how the offender's legal claims over the child can be cut off (the United States), whether a constitutional duty to the child can be enforced within the criminal process (South Africa), and how a family court weighs a child's welfare against a parent's claim when parentage arises from an offence (England and Wales).

3.1 The International Criminal Court

The Rome Statute empowers the Court to order reparations against a convicted person and establishes a Trust Fund for the benefit of victims.[54] Rule 85 of the Rules of Procedure and Evidence defines victims as natural persons who have suffered harm as a result of the commission of any crime within the Court's jurisdiction.[55] The definition rests on harm and not on the person against whom the crime was directed. In Ntaganda, the Trial Chamber applied it to children born of rape and sexual slavery committed by the accused's forces. It recognised them as victims entitled to reparations and attributed their suffering, including stigma, rejection by the community and difficulties with identity, to the crimes themselves.[56] The Court took a similar approach in Ongwen, where the reparations order extended to children born of sexual

[54]Rome Statute of the International Criminal Court arts. 75, 79, July 17, 1998, 2187 U.N.T.S. 3.
[55]Int'l Crim. Ct., Rules of Procedure and Evidence, r. 85(a), ICC-ASP/1/3 (Sept. 9, 2002); LUKE MOFFETT, JUSTICE FOR VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT (2014).
[56]Ntaganda, supra note 9.

ISSN: 2582-6433

and gender-based crimes.[57]

Two features deserve notice. The first is textual. The Rome Statute test, harm "as a result of" a crime, is not far from the BNSS test of loss or injury "caused by reason of" the act charged. The difference between the two systems lies in how the words have been read and not in how they were drafted. The second is institutional. The Court's orders operate alongside a Trust Fund, so a child's entitlement does not depend on the convicted person's ability to pay. India is not a party to the Rome Statute and the orders are not authority here, but they show that a harm-based reading of the victim concept can accommodate such a child without disturbing the rest of the system.

3.2 The United States

In the United States the debate has concerned the offender's parental rights more than the child's status. A woman who bore a child conceived by rape could, in many States, face a custody or visitation claim from her assailant, and the law was slow to prevent it.

Prewitt's account of the position in 2010 recorded how uneven the protections were from State to State.[58] Congress responded in 2015 with the Rape Survivor Child Custody Act, which gives grant funding to States that allow a mother to seek termination of her rapist's parental rights, on clear and convincing evidence, in respect of a child conceived through rape.[59] A number of States now have statutes of this kind, and they differ on whether a criminal conviction is required.

The American model is instructive for what it does not do. It protects the mother's interest and, through her, the child's freedom from an unwanted relationship with the offender. It does not make the child a victim, and it leaves the child's financial claims against the offender, such as support and inheritance, to be handled separately, where they may be extinguished along with the parental rights depending on the statute. For India, the useful lesson is that severing the offender's legal claims is a matter for statute and can be done with evidential safeguards short of conviction. The less useful part is the possible loss of the child's financial claims, which a child-centred model should try to avoid.

3.3 South Africa

The South African Constitution gives every child the right to have his or her best interests treated as of paramount importance in every matter concerning the child,[60] and the Children's

[57]Prosecutor v. Ongwen, ICC-02/04-01/15-2074, Reparations Order (Feb. 28, 2024).
[58]Prewitt, supra note 17.
[59]Rape Survivor Child Custody Act of 2015, 34 U.S.C. § 21301.
[60]S. Afr. Const., 1996, § 28(2).

ISSN: 2582-6433

Act applies the same standard to all matters concerning the care, protection and well-being of a child.[61] In S v M, the Constitutional Court held that a sentencing court must give independent consideration to the interests of the children of an offender, even though those children were not parties and had committed no offence.[62] The case concerned an offender's own children, but the principle is a general one. It treats the child as a rights-holder affected by the criminal process and obliges the court to make inquiries it would otherwise not make. A child born of rape is affected by the criminal process in a more basic way still. The South African approach shows how a best-interests clause, when enforced, can supply the entry point that Indian criminal procedure lacks.

3.4 England and Wales

In England and Wales the Children Act 1989 treats the child's welfare as the court's paramount consideration in any question about the child's upbringing.[63] An unmarried mother has parental responsibility from birth, while an unmarried father acquires it only by registration, agreement or court order.[64] A convicted rapist who seeks an order must therefore persuade the court that it serves the child's welfare, and the circumstances of conception weigh heavily in that assessment. The English position is attractive for its flexibility and shows how a family court can protect a child from the offender without a special statute. Its limitation is that it responds only when a dispute reaches a court. By itself it does not secure the child's financial support or documents.

3.5 Lessons for India

Three lessons follow. A harm-based definition of victim can include the child without strain, as the Court's practice shows, and the Indian text is capable of the same reading. The offender's claims over the child are a proper subject for statute, as the American experience shows, and the statute should preserve what the child gains from the connection, such as maintenance and inheritance, while removing what the mother and child stand to lose. And the best-interests principle needs an enforcement point inside the criminal process, which the South African courts have supplied at sentencing. India has the constitutional materials for each of these. It lacks the connecting provisions.

[61]Children's Act 38 of 2005 §§ 7, 9 (S. Afr.).
[62]S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) (S. Afr.).
[63]Children Act 1989, c. 41, § 1(1) (UK).
[64]Id. §§ 2(2), 4.

ISSN: 2582-6433

CHAPTER IV

ROLE OF THE JUDICIARY

4.1 Victims, Compensation and the Constitution

The Supreme Court has done more than Parliament to give victims of rape an enforceable position. In Delhi Domestic Working Women's Forum v. Union of India, the Court called for a Criminal Injuries Compensation Board and indicated that compensation should be awarded whether or not the offender is convicted.[65] In Bodhisattwa Gautam v. Subhra Chakraborty, it held that rape violates the fundamental right under Article 21 and ordered interim monthly payments to the survivor.[66]

In Chairman, Railway Board v. Chandrima Das, it held that Article 21 protects non-citizens as well and ordered the State to pay compensation for a rape committed by its employees.[67] In Ankush Shivaji Gaikwad v. State of Maharashtra, it pressed trial courts to consider compensation under the old section 357 in every criminal case.[68]

The same period saw a widening of the victim's procedural place. Mallikarjun Kodagali v. State of Karnataka affirmed and explained the victim's statutory right of appeal, and Jagjeet Singh v. Ashish Mishra held that a victim must be heard on a bail application and has participatory rights from investigation to the end of the trial.[69] Nipun Saxena v. Union of India strengthened the protection of identity for victims of sexual offences and approved the National Legal Services Authority's model compensation scheme for State use.[70] In Laxmi v. Union of India, the Court showed that a bench can fix a minimum compensation by direction in a public interest petition where the legislature has not provided one.[71]

What these decisions share is a purposive reading of victim-protective provisions. They also share another feature: in each, the victim was the person attacked. None of the decisions considered here dealt with a child born of the offence, and none addressed how the definition of "victim" applies to such a child. The extension has not been refused. It has not been asked for.

[65]Delhi Domestic Working Women's Forum v. Union of India, (1995) 1 S.C.C. 14 (India).
[66]Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 S.C.C. 490 (India).
[67]Chairman, Rly. Bd. v. Chandrima Das, (2000) 2 S.C.C. 465 (India).
[68]Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 S.C.C. 770 (India).
[69]Mallikarjun Kodagali v. State of Karnataka, (2019) 2 S.C.C. 752 (India); Jagjeet Singh v. Ashish Mishra, (2022) 9 S.C.C. 321 (India).
[70]Nipun Saxena v. Union of India, (2019) 2 S.C.C. 703 (India).
[71]Laxmi v. Union of India, (2014) 4 S.C.C. 427 (India).

ISSN: 2582-6433

4.2 The Child as an Item of Loss

The one point at which the Court has noticed the child born of rape is the direction in Delhi Domestic Working Women's Forum that the Board should take into account, among other things, loss of earnings due to pregnancy and the expenses of childbirth where these result from the rape.[72] The child enters the Court's reasoning as an expense. That is an understandable way to think in a judgment concerned with the survivor, and it was correct as far as it went. But it sets a pattern. The child's birth is the mother's cost, and the child's own long-term needs for education, care and a secure identity find no place in the calculation.

Suchita Srivastava v. Chandigarh Administration treated a woman's right to make reproductive choices as part of personal liberty, and refused to allow a pregnancy to be terminated against the wishes of a rape survivor with an intellectual disability.[73] Two points follow for this study. The case confirms that the decision to continue or end a pregnancy belongs to the survivor, which is the premise on which this paper proceeds. It also shows that where a survivor continues a pregnancy, a child will be born, and the law has to say what becomes of that child. The judgment is concerned with the choice and not with what follows from it.

4.3 Legitimacy, Parentage and the Child's Interest

Outside the criminal context the Court has been more willing to look at the child. In Revanasiddappa it held that children of void or voidable marriages are entitled to a share in their parents' property,[74] and in Tulsa it declined to visit the consequences of the parents' status on the child of a long-standing relationship.[75] The common theme is that the child should not bear the cost of circumstances the child did not create. That theme applies with at least equal force to a child conceived by rape. But the decisions concern unions that were consensual, and the Court has not been asked whether the same logic extends to a non-consensual conception, in which the biological father has no claim to be treated as a parent at all.

Questions of identity and parentage have been handled with some care. The Court has said that a child's paternity should not lightly be put in question, because of what a finding of illegitimacy does to the child, and has accordingly warned against routine directions for blood or DNA tests.[76] Later decisions have allowed such tests where the facts require.[77] Between

[72]Delhi Domestic Working Women's Forum, supra note 64.
[73]Suchita Srivastava, supra note 5.
[74]Revanasiddappa, supra note 15.
[75]Tulsa, supra note 16.
[76]Goutam Kundu v. State of W.B., (1993) 3 S.C.C. 418 (India); Bhabani Prasad Jena v. Convenor Sec'y, Orissa State Comm'n for Women, (2010) 8 S.C.C. 633 (India).
[77]Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 S.C.C. 576 (India); Dipanwita Roy v. Ronobroto

ISSN: 2582-6433

them the cases state a workable test: the interest in establishing the truth is balanced against the child's privacy and status. That test needs adaptation in a rape case, where paternity is sought neither by a father nor by a husband but by the prosecution or the court, and where identification of the father is a consequence of the offence and not of any relationship. The cases have not considered how the child's interests are to be represented when that happens.

ABC v. State (NCT of Delhi) is the closest the Court has come to the problem. It held that an unwed mother is entitled to be appointed guardian of her child without having to notify or name the father, and treated the child's welfare and the mother's circumstances, and not the father's rights, as the matters that should drive the inquiry.[78] The reasoning protects the mother's privacy and, with it, the child's settled life. It is a useful precedent for the paternity-neutral approach discussed in Chapter V. But it addresses guardianship alone, and it assumes an ordinary unmarried relationship and not an offence.

4.4 Assessment of the Judicial Approach

Three features of the case law call for comment. The first is that the courts have proceeded by analogy, finding the child through the mother and the family. The second is that the child is nearly always absent. In criminal proceedings the State is represented and so is the survivor, but nobody speaks for a child born of the offence. The Court in Laxmi and Nipun Saxena could issue general directions because petitioners asked it to, and no petitioner has yet asked on behalf of such a child.

The third feature is a danger. Where a court treats the existence of the child as a reason for settling a case on terms favourable to the accused, whether by compromise or by a proposal of marriage between survivor and accused, the child is turned from a claimant into a bargaining chip. The Supreme Court has rejected compromises in rape cases as contrary to the public interest and an affront to the survivor's dignity,[79] and the principle should apply with equal force where a child exists.

The judiciary alone cannot supply what is missing. Courts can read "victim" purposively, award compensation in individual cases and issue directions in public interest litigation. They cannot create a standing entitlement, a funding source or a procedure for registering a child without a father's name. These need legislation or, at the least, an executive scheme, and the next chapter considers what they might look like.

Roy, (2015) 1 S.C.C. 365 (India).
[78]ABC v. State (NCT of Delhi), (2015) 10 S.C.C. 1 (India).
[79]State of M.P. v. Madanlal, (2015) 7 S.C.C. 681 (India).

ISSN: 2582-6433

CHAPTER V

MAPPING THE GAPS: TOWARDS A CHILD-CENTRED FRAMEWORK

5.1 Purpose of this Chapter

The earlier chapters have gathered the materials. This chapter sets them against the four research questions and outlines the shape of a framework that would answer them. It does not repeat the findings, which are stated in Chapter VI. It sorts the gaps in a way that shows which are matters of interpretation, which need legislation and which need administrative arrangements.

5.2 The Gaps at a Glance

Table 1: Gaps in the present framework

Issue (research question)	Position at present	Gap and likely remedy
Victim status (RQ 1)	BNSS s. 2(1)(y) turns on loss or injury caused by the act charged. The child is not mentioned and no decision addresses the point.	Interpretive route is available but untested. An explicit statutory inclusion is preferable.
Dignity, identity and privacy (RQ 2)	Article 21 protects dignity and privacy. BNS ss. 72–73 protect the survivor's identity only. Birth and school records ask for parentage details.	No protection of the child's identity and no paternity-neutral registration. The offender keeps guardianship claims. Needs statute and administrative reform.
Compensation and rehabilitation (RQ 3)	The birth is an item in the mother's loss. BNSS s. 396 reaches "dependants". POCSO compensation goes to the child assaulted.	No independent entitlement. The claim fails if the mother does not make it. No rehabilitation head. Needs scheme amendment.
Maintenance (RQ 3)	BNSS s. 144 and HAMA s. 20 apply if paternity is proved.	Conviction does not establish paternity. The mother may not wish to litigate. No State-funded first line of support.

ISSN: 2582-6433

Issue (research question)	Position at present	Gap and likely remedy
Inheritance (RQ 3)	HSA s. 3(1)(j) confines the child to the mother's side. HMA s. 16 does not reach the child.	The child cannot claim from the father as of right, and the offender may inherit from the child. Needs amendment.
Education (RQ 3)	Article 21A and RTE Act s. 3. Section 12(1)(c) depends on State notification of disadvantaged groups.	No notification for such children and little support beyond elementary schooling. Executive reform.

5.3 Four Organising Ideas

Independent but not exclusive. The child should be recognised as an independent victim, in the sense that the child's claims do not depend on the mother's, but not an exclusive one, so that the mother's claim and the child's claim proceed side by side. Independent status matters in the cases that test the system: where the mother has died, where she is herself a minor and cannot act, where she is estranged from the child, or where she declines for reasons of her own to pursue a claim. In each, a dependent's claim would fail while an independent claim would not.

Rights without relationship. The framework should give the child the benefits of parentage without the relationship. Maintenance, inheritance and a claim on the offender's estate are financial matters. Custody, guardianship, access and a say in the child's upbringing are matters of relationship. Statute can separate the two. The offender can be made liable for support and the child entitled to inherit, while the offender is denied guardianship, visitation and succession to the child. The law should not say that a man who fathered a child by rape owes nothing, and it should not say that he is entitled to something.

Documents without disclosure. The child should be able to live without a name in the "father" field. A birth certificate, school form or identity document that offers a neutral option removes an everyday source of exposure at little cost, and fits with ABC.[80] The child's interest in knowing his or her origins, protected by Article 7 of the Convention, should be met separately, through a confidential record the child can access on reaching majority, and not through

[80]ABC, supra note 77.

ISSN: 2582-6433

information printed on documents shown in public.

Support first, recovery second. Many prosecutions fail and many offenders cannot be traced or cannot pay. A child's access to support should not wait on the outcome. The State, having provided it, should be entitled to recover from the offender on conviction. This is the logic of section 396 of the BNSS, which makes compensation available even where the offender is not traced or the case ends in acquittal, applied to the child.

5.4 Competing Interests and Safeguards

A framework of this kind raises real objections, and each deserves an answer. The first is that independent victim status may stigmatise the child. The status exists to open entitlements and not to be displayed. It should be accompanied by strict confidentiality, by extension of the protection in section 72 of the BNS to the child, and by a prohibition on recording the circumstances of conception in any document shown to third parties.

The second objection is that recognition might pressure a survivor to continue a pregnancy she would otherwise end. It must not do so. Nothing proposed here touches the Medical Termination of Pregnancy Act or the survivor's right to decide, and any statutory text should say so expressly. The third concerns the accused. State support need not wait for a conviction, but a finding of paternity against the accused, and its consequences for the accused's property and parental claims, should follow only a conviction or a separate judicial finding on evidence, so that the presumption of innocence is not displaced. Finally, the survivor's involvement matters. No proceeding that names the child or seeks a paternity test should begin without the survivor's informed participation, except where the child's welfare, assessed by a court or a Child Welfare Committee, requires otherwise.

CHAPTER VI

FINDINGS, CONCLUSION AND SUGGESTIONS

6.1 Findings

Research question 1. No provision of the BNS, the BNSS or the POCSO Act names a child born of rape as a victim, and none of the Supreme Court decisions examined here has considered the point. The text of section 2(1)(y) of the BNSS, which depends on loss or injury caused by reason of the act charged, is capable of covering such a child, because the stigma, the loss of identity and the economic disadvantage that the child suffers are consequences of the offence. The reading is arguable and consistent with the purposive approach in Mallikarjun

ISSN: 2582-6433

Kodagali and Jagjeet Singh,[81] but it is untested, and a trial court is as likely to reject it as to accept it. At present the child is not an independent victim in law.

Research question 2. Article 21 supplies the right in principle. The statutes, however, protect the survivor's identity and not the child's. Birth registration and school documentation can expose the child's origin. Paternity law leaves the offender with possible claims to guardianship and to the child's estate. ABC is the only authority that points towards a paternity-neutral approach, and it was not decided on facts involving an offence. The protection of dignity, identity and privacy is inadequate.

Research question 3. The financial, psychological and social consequences are met, if at all, through general provisions: the reference to dependants in section 396 of the BNSS, compensation under the POCSO Act, maintenance under section 144 of the BNSS and the Hindu Adoptions and Maintenance Act, and the right to education. None of these depends on, or responds to, the offence. None provides psychological rehabilitation for the child as such. Inheritance from the father is largely unavailable. The framework is inadequate in each of the areas the question names.

Research question 4. The comparison shows that each missing element has a working precedent elsewhere: a harm-based victim concept in the practice of the International Criminal Court, severance of the offender's claims in the United States, an enforceable best-interests duty in the criminal process in South Africa, and welfare-based discretion in England and Wales. The Indian courts have the interpretive tools but have not been asked to use them.

6.2 Suggestions

Legislative

1. Amend section 2(1)(y) of the BNSS by adding an Explanation that a child born as a result of an offence under sections 63 to 70 of the BNS, or of a penetrative sexual assault under the POCSO Act, is a victim for all purposes of the Sanhita.
2. Amend sections 395 and 396 of the BNSS so that the court, on conviction, and the Legal Services Authority, where there is none, must consider the child's compensation, maintenance and educational needs; so that State schemes carry a specific head for the child; and so that compensation is available irrespective of the outcome of the trial and recoverable from the offender on conviction.
3. Provided that where a court learns during trial that a child has been born as a result of

[81]Mallikarjun Kodagali and Jagjeet Singh, supra note 68.

ISSN: 2582-6433

the alleged offence, it shall refer the child to the Child Welfare Committee and the District Legal Services Authority, with the survivor's informed participation.

4. Amend the Hindu Minority and Guardianship Act and the Hindu Succession Act, and enact corresponding provisions for other personal laws or a general statute, so that a person convicted of fathering a child by rape, or found by a court on evidence to have done so, is disqualified from guardianship, custody, access and succession to the child, while the child remains entitled to maintenance from him and to inherit from him.
5. Amend the birth registration rules to allow "unknown" or "withheld" in the father's field without inquiry, and provide for a confidential record of origin accessible to the child on reaching majority.
6. Extend the protection of section 72 of the BNS and section 33(7) of the POCSO Act to the child, and prohibit the recording of the circumstances of conception in school and official records.
7. Direct the National Crime Records Bureau to publish anonymised data on pregnancies and births resulting from reported rape.

Administrative

8. States should notify children born of sexual violence as a disadvantaged group under section 2(d) of the Right of Children to Free and Compulsory Education Act, 2009, and make them eligible for sponsorship and after-care under existing child-protection schemes.
9. The National Legal Services Authority and State authorities should amend the 2018 compensation scheme to add an entitlement for the child that does not depend on the survivor's claim.
10. Magistrates, prosecutors, Child Welfare Committees and legal services authorities should be trained and given a protocol that treats the survivor as the decision-maker on all matters involving the child, and that keeps the child's circumstances confidential.

Judicial

11. Courts should read section 2(1)(y) of the BNSS purposively, as the Supreme Court has read victim-protective provisions in other cases, and should hold that a child born of rape has suffered loss or injury caused by reason of the offence.
12. In a public interest petition, the Supreme Court or a High Court should issue directions of the kind given in Laxmi,[82] requiring the Union and the States to frame an interim

[82]Laxmi, supra note 70.

ISSN: 2582-6433

scheme for such children, and may usefully invite the Law Commission to examine the statutory reforms proposed above.

13. Where paternity is to be tested in a case involving rape, courts should ensure that the child's interests are separately represented, whether through the Child Welfare Committee or an amicus, and that the survivor has been heard.
14. Courts should not treat the existence of a child as a ground for compromise or for any proposal that the survivor marry the accused, consistently with Madanlal.[83]

Each of these steps should be taken with the survivor and not around her.

6.3 Conclusion

The hypothesis stated in Chapter I is borne out. The Indian criminal justice system treats the survivor as the only victim of rape, and treats the child as a consequence of the offence and not a person harmed by it. The Constitution does not require that result. It follows from the way the victim has been defined and from the absence of provisions linking the criminal law to family, child-protection and welfare law. The change needed is not dramatic. A definition has to be amended, a compensation head added, a few provisions of personal law disapplied to the offender, and some administrative arrangements made. What the change demands, above all, is that someone be made responsible for noticing the child.

Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, §§ 63-64 (India) [hereinafter BNS].

Hindu Succession Act, 1956, No. 30 of 1956, § 3(1)() (India) (providing that illegitimate children are deemed related to their mother and to one another) [hereinafter HSA]

Nat'1 Crime Recs. Bureau, Ministry of Home Affs., Crime in India 2022 (2023) (India).

Medical Termination of Pregnancy Act, 1971, No. 34 of 1971, § 3(2) (India), as amended by Medical Termination of Pregnancy (Amendment) Act, 2021, No. 8 of 2021.

Suchita Srivastava v. Chandigarh Admin., (2009) 9 S.C.C. 1 (India).

Justice J.S. Verma Comm., Report of the Committee on Amendments to Criminal Law (2013) (India).

Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, § 2(1)(y) (India) [hereinafter BNSS]; cf. Code of

Criminal Procedure, 1973, No. 2 of 1974, § 2(wa) (India) (repealed 2024).

Nils Christie, The Ideal Victim, in From CRIMe PolIcY to VictIm PolIcy 17 (Ezzat A. Fattah ed., 1986).

[83]Madanlal, supra note 78.

ISSN: 2582-6433

prosecutor v. Ntaganda, ICC-01/04-02/06-2659, Reparations Order (Mar. 8, 2021).

Carpenter ed., 2007).

Borm or Martine Rape in Aerter Va 65 Cirls Must & Nece 35 201-Conflict Realities of Children

PRATIKSHA BAXI, PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA (2014).

MRINAL SATISH, DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA (2016).

Law Comm'n of India, Report No. 154, The Code of Criminal Procedure, 1973 (1996) (India); Comm. on Reforms of Crim. Just. Sys., Ministry of Home Affs., Report, vol. 1 (2003) (India); see also Verma Comm., supra note 6.

Revanasiddappa v. Mallikarjun, (2011) |1 S.C.C. 1 (India). 1'Tulsa v. Durghatiya, (2008) 4 S.C.C. 520 (India).

Shauna R. Prewitt, Giving Birth to a "Rapist's Child": A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape, 98 Geo. L.J. 827 (2010).

G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25(2) (Dec. 10, 1948).

International Covenant on Civil and Political Rights art. 24(1), Dec. 16, 1966, 999 U.N.T.S. 171.

Convention on the Rights of the Child arts. 2, 3, 7, 8, 16, 19, 27, 28, 39, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

G.A. Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985).

S.C. Res. 2467 (Apr. 23, 2019).

Vishaka v. State of Rajasthan, (1997) 6 S.C.C. 241 (India).

Francis Coralie Mullin v. Adm'r, Union Territory of Delhi, (1981) 1 S.C.C. 608 (India).

K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1 (India).

Chairman, Rly. Bd. v. Chandrima Das, (2000) 2 S.C.C. 465 (India).

Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 S.C.C. 770 (India).

Mallikarjun Kodagali v. State of Karnataka, (2019) 2 S.C.C. 752 (India); Jagjeet Singh v. Ashish Mishra, (2022) 9 S.C.C. 321 (India).

Nipun Saxena v. Union of India, (2019) 2 S.C.C. 703 (India).

Laxmi v. Union of India, (2014) 4 S.C.C. 427 (India).

Delhi Domestic Working Women's Forum, supra note 64.

83 Madanlal, supra note 78.