

The Centre for Child and the Law of the National Law School of India University (CCL-NLSIU) is a specialized research centre working in the area of child rights, since 1996. The main thrust of the work is on Juvenile Justice and Child Protection, Universalisation of Quality Equitable School Education, Child Labour, Protection of Children from Sexual Offences, Justice to Children through Independent Human Rights Institutions, Right to Food and Child Marriage. The mission of CCL NLSIU is to institutionalize a culture of respect for child rights in India.

The Juvenile Justice Programme at CCL-NLSIU engages in multi-disciplinary direct field action with children and families in the juvenile justice system, as well as multi-disciplinary research, teaching, training, and advocacy in order to positively impact policy, law and professional practice on issues concerning children and their families. The team working on the Protection of Child from Sexual Offences Act, 2012 (POCSO Act) has authored Frequently Asked Questions on the Protection of Children from Sexual Offences Act, 2012 and the Criminal Law (Amendment) Act, 2013 (2nd ed, reprint December 2016). The team also authored Law on Child Sexual Abuse in India – Ready Reckoner for Police, Medical Personnel, Magistrates, Judges and Child Welfare Committees (November 2015).

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IMPLEMENTATION OF THE POCSO ACT, 2012 BY SPECIAL COURTS: CHALLENGES AND ISSUES

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Based on CCL-NLSIU's Studies on the
Working of Special Courts in Five States



Centre for Child and the Law
National Law School of India University

February 2018

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Working of Special Courts in Five States**



**Centre for Child and the Law (CCL)
National Law School of India University (NLSIU)**

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Message from the Vice - Chancellor

Child sexual abuse is one of the most pressing concerns of the day. The rising number of cases of children who are reported to have suffered some form of sexual abuse is indicative of the failure of the state and society to provide children with an environment conducive to growth, in accordance with the United Nations Convention on the Rights of the Child. However, it is also an opportunity to take cognizance of the problem and strive towards getting justice for victims, and aim to prevent future instances of child sexual abuse. The rising public consciousness and media attention, along with the pro-active measures taken by the judiciary in the last few years is proof that the right of children to live with dignity is finally getting the attention it requires.

This publication is an attempt to address some of the common hurdles faced in the functioning of Special Courts established under the POCSO Act, 2012. It provides empirical data from the five state studies conducted by the Centre for Child and the Law, National Law School of India University, Bangalore, along with the experiences of practitioners from across the country, providing a unique blend of academic and practical perspectives. The problems uncovered in the chapters, the questions raised, and the recommendations made can serve as the foundation for reform.

I congratulate the team at CCL-NLSIU, as well as all the authors who have contributed to the publication, for their commendable effort. It is hoped that the publication can serve as a resource for the functionaries of the child protection

system and the criminal justice system to nuance their understanding of the POCSO Act, 2012, and to appropriately address the issues faced in the functioning of Special Courts established under the POCSO Act, 2012. This, in the long run, can lead to a better implementation of the POCSO Act, increased access to justice for victims, and one step forward in the larger process of healing for survivors of child sexual abuse.



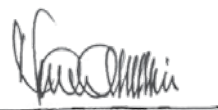
Prof. (Dr.) R Venkata Rao
Vice Chancellor
National Law School of India University

Message from the Registrar

Child sexual abuse has been shrouded in a culture of silence, leaving behind shattered lives, and a widespread loss of faith in the legal system. The enactment of the POCSO Act, 2012, and the establishment of Special Courts under the Act, was a step forward in bringing out and addressing instances of child sexual abuse through a legal system dedicated to meeting the needs of children. Nearly five years on it is time to take stock of whether the criminal justice system has succeeded in giving children access to justice.

The studies of the Centre for Child and the Law, National Law School of India University, on the functioning of Special Courts under the POCSO Act in five states, provided an essential insight into the way the guarantees of the law were becoming meaningless on the ground. This publication has drawn from those studies and sought to provide a more holistic picture of the issues, drawing from a wide range of experiences and perspectives.

It gives me great pleasure to see the efforts of the team at the Centre for Child and the Law fructifying into this compilation of comprehensive, thoroughly-researched and richly empirical chapters, which focus on the many different aspects of the functioning of Special Courts under the POCSO Act. I am confident that the publication will serve as an important tool for all the stakeholders involved in protecting children from child sexual abuse.



O.V. Nandimath, Ph.D

Registrar & Professor of Law
National Law School of India University

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This Report on the “Implementation of the POCSO Act 2012 by Special Courts: Challenges and Issues” has been the product of the work of many individuals - members of the Centre for Child and the Law, National Law School of India University (CCL-NLSIU), law students, and experts from outside. We would like to thank each one of them for the many ways in which they have contributed to this report. Without their work this report would never have been possible.

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The guest authors who have contributed to this report are Dr. Jagadeesh N, Professor and Head, Department of Forensic Medicine, Vydehi Institute of Medical Sciences, Bangalore; Dr. Preeti Jacob, Associate Professor, Department of Child and Adolescent Psychiatry and Dr. Kavita Jangam, Assistant Professor, Department of Psychiatric Social Work, both from the National Institute of Mental Health and Neurosciences (NIMHANS), Bangalore; Advocate Michelle Mendonca; Ms. Urmila Pullat, Lawyer and researcher with the Asian Human Rights Commission (Hong Kong) and Founder, Website project 'How Revealing', Ms. Sonia Pereira, LLM, Georgetown University, and Ms. Kushi Kushalappa and Ms. Suja.S from Enfold Trust, Bangalore.

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List of Abbreviations

ABA	Absciscic Acid test strip
ACP	Assistant Commissioner of Police
AS	Assam
CCL-NLSIU	Centre for Child and the Law at National Law School of India University, Bangalore
CCRUs	Collaborative Child Response Units
CLAA	Criminal Law (Amendment), Act 2013
Cr. P.C	Code of Criminal Procedure, 1973
CRC	Committee on the Rights of the Child
CSA	Child Sexual Abuse
CSJ	Counsel for Secure Justice
CWC	Child Welfare Committee
DCPO	District Child Protection Officer
DCPU	District Child Protection Unit
DL	Delhi
DSLSA	Delhi State Legal Services Authority
DNA	Deoxyribo Nucleic Acid
DWCD	Department of Women and Child Development
EDTA	Ethylene Diamine Tetra Acetic acid
FIR	First Information Report
FSL	Forensic Science Laboratory
FTA	Flinders Technology Associates card for fast detection of DNA
HCC-JJ	High Court Committee on Juvenile Justice
HIV	Human Immunodeficiency Virus
IEA	Indian Evidence Act, 1872
IHRL	International Human Rights Law
IO	Investigating Officer
IPC	Indian Penal Code
IT Act	Information Technology Act, 2000
ITPA	Immoral Traffic (Prevention) Act, 1956

JJ Act	Juvenile Justice (Care and Protection of Children) Act, 2015
JJB	Juvenile Justice Board
MDT	Multi-Disciplinary Team
MHP	Mental Health Professional
MTP	Medical termination of pregnancy
NCRB	National Crime Record Bureau
NFHS	National Family Health Survey
NGO	Non- Government Organization
NLSIU	National Law School of India University
OSC	One Stop Centres
PCMA	Prohibition of Child Marriage Act, 2006
POCSO Act	Protection of Children from Sexual Offences Act, 2012
PP	Public Prosecutors
PSA	Prostate Specific Antigen
PTSD	Post Traumatic Stress Disorder
SC	Scheduled Caste
SHO	Station House Officer
SJPU	Special Juvenile Police Unit
SLSA	State Legal Services Authority
SOP	Standard of Procedures
SPP	Special Public Prosecutors
STs	Scheduled Tribes
STI	Sexually Transmitted Infection
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNICEF	United Nations Children's Emergency Fund
UNODC	United Nations Office on Drugs and Crime
UTs	Union Territories
UV	Ultra Violet rays
VCS	Victim Compensation Scheme
WHO	World Health Organisation

Introduction

It is almost six years since the law relating to the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) was enacted. The enacting of a special law to address the growing concern of civil society in India with regard to the sexual assault on children was welcomed by most people in the country, as till then, we had little or no specific legal provision to prosecute those who committed sexual offences against children. The POCSO Act, 2012 brought visibility to these heinous crimes against children, and made it possible for the victims or their parents or guardians, or indeed, anyone who had knowledge of a sexual offence having been committed against a child, to file complaints against the offenders. Even though the reporting of these crimes might still be far below the actual numbers, the fact is that this law has taken the country by a storm. However, the Act has not served to deter sexual offences against children, as evident from the fact that there has been no reduction in the number of such crimes. This has resulted in some sections of our society asking for the death penalty as punishment for those who commit serious sexual offences against children. Others have been asking the question why this law has failed to check the crimes against children. It was with the objective of trying to understand this that the Centre for Child and the Law (CCL), National Law School of India University, Bangalore undertook a study of the Special Courts under the POCSO Act to be able to understand how they functioned, what were the problems they confronted, etc.

The five states in which the study was carried out are Delhi, Assam, Maharashtra, Karnataka and Andhra Pradesh (in the order in which the studies were conducted). The reports of the same are available on the CCL-NLSIU website, and have been used by judicial academies and other training institutions as resource material to train the functionaries of the child protection system. Though the focus of these reports was only on the Special Courts, the analysis has also

covered various other aspects of a POCSO trial, such as the police, the prosecution, support services, and so on. The objective of this publication, was to provide a larger, more holistic, picture of some of the issues covered by the state studies, taking the studies as a starting point and enhancing their insights through the experiences of practitioners, and the insights gained from other research projects. The publication has been composed by the researchers from the Centre for Child and the Law, as well as practitioners and others working with children, well versed with the POCSO Act. It is hoped that the recommendations emerging from these studies can set in motion a process of long-term, meaningful change for children who have been victims of, and who continue to be vulnerable to sexual abuse.

The authors of some of these chapters have generally first presented the international and national legal regimes, followed by the findings with regard to the particular aspect of the POCSO Act that has emerged from the studies. In some cases, they have critiqued the way the Act has been implemented, and in every case, have made concrete recommendations for amendment or a future course of action to strengthen the Act and make its implementation child-friendly.

The Report is structured in the following manner:

The first two chapters “Structural Compliance of Special Courts with the POCSO Act, 2012” and “Procedural Compliance of Special Courts with the POCSO Act, 2012” have been written by Sonia Pereira & Swagata Raha. These two chapters address the manner in which the non-implementation of the structural and procedural mandates of the POCSO Act has caused victims to be intimidated and revictimised by the criminal justice system, and potentially caused gross miscarriages of justice. The third chapter, “Factors Affecting Acquittals in Special Courts”, is by Michelle Mendonca. This chapter elucidates some of the factors that have led to the low level of convictions under the POCSO Act and offers recommendations for strengthening prosecution and investigation.

The fourth chapter addresses the questions relating to “Charges and Sentencing Patterns under the POCSO Act, 2012” while the ninth chapter “Love”, Consent and the POCSO Act examines the questions relating to “consensual” sexual relations between children and adults, and some of the challenges that emerge due to the extra-legal considerations that arise in these cases. Both these chapters are authored by Shraddha Chaudhary. The fifth and sixth chapters deal

with “Compensation under the POCSO Act, 2012” and “Challenges related to Age-Determination of Victims under the POCSO Act, 2012” and were authored by Swagata Raha.

The seventh chapter, “Appreciation of Medical Evidence by Special Courts in POCSO cases” is by Dr. Jagadeesh N. The eighth chapter, “Appreciating Children’s Testimonies” by Dr. Preeti Jacob and Dr. Kavita Jangam discuss the issues that arise from the fact that children are the main witnesses in cases under the POCSO Act. The importance of understanding the mental and emotional make up of children, the way they conceptualise and articulate their experiences, and the need for the capacity building of the judicial officers, police personnel, lawyers and public prosecutors to appreciate this, is brought out in this chapter.

“Children with Disabilities under the POCSO Act, 2012”, the tenth chapter by Anuroopa Giliyal addresses the problems that are faced by children with disabilities and the fact that the POCSO barely mentions this category of children, leave alone making provisions for meeting their specific needs with reference to their presence in the courts and in appreciating evidence provided by them.

The eleventh chapter by Urmila Pullat on “Child Sexual Abuse and the Culture of Shame and Silence” directly deals with the problem of low reporting or the lack of reporting and how this is rooted in the culture of silence that surrounds sexual abuse in general. This in turn arises out of concerns for the prestige and reputation of the family, the marriageability of the girl child, and a general lack of trust in the criminal justice machinery. The last chapter “Support Gaps and Linkage between the Criminal Justice and Child Protection Systems” has been written by Kushi Kushalappa and Suja Sukumaran. Both of them work with Enfold, an organization that has been specifically addressing the problem of child sexual abuse in various ways. This chapter lucidly brings out the difficulties in having the child as a witness when there has been little or no provision of support services to the child, and the problems that arise from this with reference to convictions under the Act.

We hope that the report will lead to the stakeholders reflecting upon the findings and suggestions, and brainstorming ways to address them so that the legal system can be strengthened. It is high time that justice to children who have experienced child sexual abuse, and the larger aim to preventing the future abuse of children, is taken seriously. Only when the children of our country, some of

the most vulnerable citizens, have an environment in which they can grow up without losing their innocence, and living in fear, can we claim that we are a civilized society. It is incumbent upon us all, not merely the state and civil society organisations, but every adult citizen of India, to work towards creating that kind of a society.

Prof. (Dr.) V.S. Elizabeth
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Structural Compliance of Special Courts with the POCSO Act, 2012

SONIA PEREIRA* AND SWAGATA RAHA**

The POCSO Act prescribes very limited structural requirements for Special Courts. These prerequisites include the designation of Special Courts, appointment of Special Public Prosecutors (SPP), and the use of certain tools to prevent contact between the child victim and the accused at the time of evidence. The POCSO Act also vests the Special Courts with the responsibility of ensuring that the atmosphere is child-friendly, but does not elaborate on structural modifications required for the same.

This Chapter examines the provisions related to the physical infrastructure of Special Courts, guided by domestic law and international standards. The key trends from the studies conducted by CCL-NLSIU in some Special Courts under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) in Delhi, Assam, Maharashtra, Andhra Pradesh and Karnataka are analyzed to ascertain whether these requirements are being adequately complied with.

* LLM, Georgetown University. Worked with Amnesty International in London on human rights issues in South Asia. She also contributed to CCL-NLSIU's Study on the Working of Special Courts in Maharashtra.

** MSt International Human Rights Law, Oxford University, B.A.LLB (Hons), W.B. National University of Juridical Sciences Kolkata. Currently working as Senior Research Associate (Consultant) with the Centre for Child and the Law, NLSIU Bangalore. She led the Studies on the Working of the Special Courts in Delhi, Assam, and Maharashtra and has conducted capacity building programmes for Judges of Special Courts in different States.

The authors are grateful to Pratiksha Basarkar, a IV B.A.LLB (Hons.) student from the National Law School of India University, Bangalore for providing research assistance on the comparison of the POCSO Act, 2012 with international standards. The article has greatly benefited from the feedback by the team at CCL comprising Shraddha Chaudhary, Anuroopa Giliyal, Arlene Manoharan and Monisha Murali.

I. Structural Compliance with the POCSO Act

1.1. Establishment of Special Courts

According to Section 28(1), POCSO Act, State Governments should, in consultation with the Chief Justice of the High Court, designate a Sessions Court to be a Special Court to try offences under the POCSO Act, to facilitate speedy trial. The Standing Committee Report on the POCSO Bill had observed that the establishment of multiple courts or legal infrastructures would not be useful and recommended that “wherever the legal framework has been created under the Commissions for Protection of Child Rights Act, 2005 the same should be used.”¹ Accordingly, if a Sessions Court has been notified as a Children’s Court under the Commissions for Protection of Child Rights Act, 2005, or if any other Special Court has been designated for similar purposes under any other law, it will be regarded as a Special Court under the POCSO Act.²

This provision is based on the recognition that children, due to their distinct status, require special care and attention. Moreover, a sexual offence of any kind not only harms the child physically but also causes long term damage to the mental state of the child.³ The POCSO cases require an understanding of the complexities of abuse, the child should feel supported, testimony and evidence should be sensitively appreciated, and the privacy of the child should be protected. The purpose of this provision is to ensure that POCSO matters are dealt with only in Special Courts “designated for similar purposes” as laid down in the Act, and to ensure speedy trial. The legislative intention is that Judges and SPPs be well versed with matters concerning offences against children or sexual offences.

However, the POCSO Act does not expressly require Special Courts to exclusively deal with offences under the POCSO Act or offences against children. This results in delays in hearings, the judge and SPP being overworked and the child potentially being exposed to other accused persons, police, and lawyers

- 1 Department-Related Parliamentary Standing Committee on Human Resource Development, *Two Hundred Fortieth Report On The Protection Of Children From Sexual Offences Bill, 2011*, (Standing Committee Report on POCSO Bill) para 5.10. <http://www.prsindia.org/uploads/media/Protection%20of%20children/SCR%20Protection%20of%20Children%20from%20Sexual%20Offences%20Bill%202011.pdf>.
- 2 POCSO Act, Section 28(1) proviso.
- 3 Standing Committee Report on POCSO Bill, para 1.14.

while waiting for the trial.⁴ Moreover, structural modifications needed to prevent exposure between the child and the accused, including the provision of screens and partitions,⁵ separate entrances and waiting rooms, and an overall child-friendly atmosphere⁶ is difficult to maintain. The court hall cannot be designed primarily for children, as these are not the only cases being dealt with by the Special Court. The Judge and the SPP are also compelled to constantly switch their mind-set from POCSO matters to other matters.⁷

1.2. Appointment of Special Public Prosecutors (SPP)

According to Section 32(1), the State Government should appoint a SPP “for conducting cases *only* under the provisions of [POCSO] Act.” Advocates with a minimum of seven years’ practice are eligible to be appointed as an SPP. The language of the provision suggests that the SPPs must exclusively handle POCSO cases. The purpose of this provision is to ensure that SPPs are trained in the provisions of the POCSO Act, as well as in the distinct procedural requirements, and they form a pool of dedicated prosecutors to achieve the goals of speedy trials and child-friendliness. However, due to the increased workloads, PP’s rarely handle only POCSO matters, and POCSO cases may be delayed because of this.⁸ CCL-NLSIU’s Studies revealed that existing PPs or Additional PPs were specified as PPs in Andhra Pradesh, Assam, Delhi, and Maharashtra.⁹ In two districts in Karnataka, retired PPs were appointed to try POCSO cases.¹⁰ PPs rarely spend enough time with the child before the hearing and often meet the child only on the

4 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra* (2017), p. 15, <https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf> (Maharashtra Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (2016), p.34, <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf> (Delhi Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Assam* (2017), p.25, <https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourtassamPOSCOAct2012.pdf> (Assam Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Karnataka* (2017), p.16, <https://www.nls.ac.in/ccl/jjdocuments/posco2012karnataka.pdf> (Karnataka Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh* (2017), p.12, <https://www.nls.ac.in/ccl/POSCOAP2017study.pdf> (Andhra Pradesh Report).

5 POCSO Act, Section 36(2).

6 POCSO Act, Section 33(4).

7 Delhi Report, p.116; Maharashtra Report, p.14.

8 Maharashtra Report, p.15; Delhi Report, p.34; Assam Report, p.25; Karnataka Report, p.16; Andhra Pradesh Report, p.13.

9 Andhra Pradesh Report, p.13; Assam Report, p.24; Delhi Report, p.30; Maharashtra Report, p.15.

10 Karnataka Report, p.14.

day of the hearing. This denies them the opportunity to form a relationship of trust with the child and effectively orient the child with the court hall and the judicial process or ascertain the child's vocabulary, developmental needs, or disability. The PP's often lack training on how to question and communicate with the child.

1.3. Design of the courtroom

According to Section 33(4), POCSO Act, the "child-friendly atmosphere" of the courtroom should be created "by allowing a family member, a guardian, a friend or relative, in whom the child has trust or confidence, to be present in the court."¹¹ This provision bears no reference to the physical dimension of the courtroom or the behaviour required to ensure that the child's interaction with the criminal justice system is child-friendly. It does not elaborate on structural modifications required to establish such a child-friendly court. Court halls, especially criminal courts, are not child-friendly in their appearance. They require both structural alterations, as well as attitude adjustments and changes in the manner of engaging with the child victim on the part of the people within the criminal justice system.

1.4. Tools and facilities to record testimony and prevent exposure

Section 36(1), POCSO Act, requires the Special Court to ensure that the child is not exposed to the accused at the time of recording evidence, and for this purpose it can record the evidence using video conferencing, single visibility mirrors, curtains, or any other device.

Exposure to the accused can destroy the confidence of the child and can trigger the memory of the traumatic assault.¹² The exposure could also provide the accused with an opportunity to intimidate the victim. The POCSO Act, however, does not address exposure to the accused before the trial and outside the courtroom. CCL-NLSIU's Studies revealed that most courts do not have separate waiting rooms or entrances for victims. This results in the child often having to enter via the same entrance and wait in the same room as the accused and their lawyers. Some Special Courts ensure that the child is made to wait in the Judge's chambers or if a support person is available, in the canteen,¹³ but this is not a regular practice.

11 POCSO Act, Section 33(4).

12 Leah Nelson, *Testifying in Court Can Amplify Trauma For Victims of Childhood Sexual Abuse*, 18th Annual Convention of the Association for Psychological Science (August 1, 2006), <https://www.psychologicalscience.org/observer/testifying-in-court-can-amplify-trauma-for-victims-of-childhood-sexual-abuse>.

13 Delhi Report, p.44.

Special Courts employ various mechanisms to prevent exposure to the accused, including using separate halls or partitions. However, many courts do not mandatorily apply this provision and sometimes the child is exposed to the accused present at the time of recording the testimony.¹⁴

1. 5. Key findings of the CCL-NLSIU Studies

Though the Act does not contain any explicit requisites in order to ensure a “child-friendly atmosphere”, many factors could be considered to ascertain the structural friendliness such as whether exposure of the child to the accused is prevented outside the courtroom, whether there are easily accessible toilets and drinking water facilities, whether there are designated waiting rooms or spaces, whether the court hall and all its facilities are accessible to children with disabilities. Though the Act does not mandate it, it is important to bear in mind the possibility of exposure of the child to the accused before entering the courtroom. In this regard, it should be considered whether there are separate entrances for the child, whether there is a separate waiting room for the child, etc.

The findings of CCL-NLSIU’s Studies in Andhra Pradesh, Assam, Delhi, Karnataka, and Maharashtra indicate that none of the Special Courts currently established exclusively try POCSO cases, even though they have been designated as Special Courts under POCSO Act. Similarly, the findings also reveal that SPPs are not exclusively working on POCSO cases. The heavy and diverse workload on PPs prevents them from having the time to build rapport with the child and gain their trust, ascertain their vocabulary, as well as to be sensitive when communicating with children. Apart from two Special Courts in Delhi that were studied in 2015, none of the other Special Courts studied in the other States had separate entrances or waiting rooms for the children, thus rendering it extremely likely for the child to come in contact with the accused and his lawyers before the trial. The toilets are not always accessible to the children, and almost none of the toilets are accessible to persons with disabilities, hence making their access to justice far more arduous. Although tools are available in almost all the Special Courts to prevent exposure to the accused, Special Courts vary in their use of these tools, and audio- visual facilities and separate rooms for children are rarely available.

14 Maharashtra Report, p.16; Delhi Report, p.33; Assam Report, p.25; Karnataka Report, p.15; Andhra Pradesh Report, p.14.

Some Special Courts across the country do have specialised infrastructure, enforcing structural requirements to ensure the implementation of the POCSO Act. In 2013, Karkadooma inaugurated its first child witness court room, which includes a separate entrance and lift, a one-way mirror so that the child cannot see the accused, a lowered dais for the child to be seated near the Judge, and a child play area, including a pantry.¹⁵

Goa has had a Special Children's Court since 2004, and it was designated as a 'Special Court' under POCSO in 2013. This Special Court deals only with matters pertaining to children and includes special facilities for the child to be seated next to the Judge. There is also in place a Victims Assistance Unit and a 'going to court programme' whereby law students from V.M. Salgaocar College of Law accompany children to court and assist them and their families with the process.¹⁶ Such a practice could be useful, especially in the absence of support persons, in orienting and assisting the child and the family with the judicial process.

In 2016, Hyderabad established a child-friendly court with separate waiting rooms and video conferencing facilities. The Judge does not sit on a dais, and officials are to be in plain clothes in this court hall.¹⁷ In 2017, Bengaluru established its first child-friendly court, which includes two halls separated by a one-way glass, which insulates the victim from seeing the accused. A separate lift, waiting room, video conferencing facilities have been provided.¹⁸

Apart from the newly designed Special Courts, majority of the Special Courts do not have physical infrastructure that is child-friendly and accessible to all children.

15 Bindu Shajan Perapaddan, *First child-friendly courtroom ready*, THE HINDU, 15 September 2012, <http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/first-childfriendly-courtroom-ready/article3899562.ece>

16 Jayant Sriram, *The teddy bear courts: Goa's pioneering children's courtroom*, THE HINDU, 29 July 2017, www.thehindu.com/society/the-teddy-bear-courts/article19377222.ece

17 Anon, *City gets child-friendly court*, THE HINDU, 25 August 2016, <http://www.thehindu.com/news/cities/Hyderabad/City-gets-child-friendly-court/article14588742.ece>

18 Anon, *Karnataka gets its first child-friendly court*, TIMES OF INDIA, 6 August 2017, <https://timesofindia.indiatimes.com/city/bengaluru/karnataka-gets-its-first-child-friendly-court/articleshow/59936904.cms>

II. Compatibility of POCSO Act with International Human Rights Law (IHRL) Standards relevant to Courtroom Structure

The UNCRC in its Preamble reiterates that children, due to their physical and mental immaturity, need special safeguards and care, including appropriate legal protection. The POCSO Act was enacted to give effect to India's obligations under the UNCRC and designed taking into account the heightened vulnerability of children due to their specific developmental needs, so as to ensure that their best interests are protected.¹⁹

Article 3 of the Convention elucidates that in all actions undertaken by courts of law regarding children, the primary consideration should be the best interests of the child. The child should be given all necessary care and protection for their well-being, and all institutions, services and facilities responsible for the care and protection of children should conform with the standards established with regards to safety, health, staff and supervision in particular. The Committee on the Rights of the Child (CRC) stated that Article 3 requires active measures to be undertaken by the Government, parliament and the judiciary, always applying the principle of the best interests of the child to consider how children's rights will be affected by their decision, directly and indirectly.²⁰

Article 19(1), UNCRC directs State Parties to take all appropriate measures to protect children from violence, including sexual abuse. In General Comment No. 13 (2011) on *The right of the child to freedom from all forms of violence*, the CRC²¹ observed that protective measures would entail "specialized courts and criminal procedures" for child victims of violence when appropriate and with the "possibility of providing accommodations in the judicial process to ensure equal and fair participation of children with disabilities." It also elaborates that child victims should be treated in a child-friendly and sensitive manner, taking into account their needs and personal situation, and respecting their integrity.²² Article 34, UNCRC obligates State Parties to ensure that children are protected from all forms of sexual exploitation and sexual abuse, including the inducement and

19 Preamble of the POCSO Act.

20 Committee on the Rights of the Child, General Comment 5 on *General Measures of implementation of the Convention on the Rights of the Child*, 2003, para 12, <http://www.refworld.org/docid/4538834f11.html>

21 Committee on the Rights of the Child, General Comment 13 *The right of the child to freedom from all forms of violence*, 2011, CRC/C/GC/13, para 56, http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf

22 *Id*, para 54(b).

coercion of a child to engage in unlawful sexual activity and the exploitative use of children in prostitution, unlawful sexual activities and pornographic performances and materials. Article 36 also prohibits all forms of exploitation prejudicial to any aspect of the child's welfare.

The Preamble of the POCSO Act signifies implementation of the obligation under the UNCRC to undertake all national, bilateral and multilateral measures to prevent such abuse and exploitation, acknowledging that sexual exploitation and sexual abuse are heinous crimes that need to be effectively addressed. Although it provides for Special Courts, the specialization is lost as they are dealing with all types of matters and not just POCSO Act. The POCSO Act is also silent on physical accessibility of the courtroom to children with disabilities, but this obligation is reflected in Section 12(1) of the Rights of Persons with Disabilities Act, 2016 which recognizes the right of persons with disabilities to access any court. The POCSO Act reinforces the principle of best interests of the child in its preamble, and stipulates the welfare of the child to be the prime consideration, including providing for the engagement of support persons,²³ legal aid²⁴ and the assistance of interpreters, special educators and experts²⁵ to provide additional support and assistance to children.

The Guidelines on justice in matters involving child victims and witnesses of crime, 2005²⁶ (2005 Guidelines) adopted by the Economic and Social Council recognizes the right of children to be treated in a caring and sensitive manner. It requires the implementation of measures to ensure interviews are child-sensitive,²⁷ measures to avoid unnecessary contact between the child and the alleged perpetrator,²⁸ and the use of aids such as interpreters and special assistance to facilitate the testimony of the child and to reduce the potential for intimidation of the child.²⁹ It emphasizes that child-sensitive procedures could include interview rooms designed for children, having closed sessions, measures to conceal the features and physical description of the child, and maintenance of confidentiality

23 POCSO Rules, Rule 4 (7).

24 POCSO Act, Section 40.

25 POCSO Act, Section 38.

26 Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, ECOSOC Resolution 2005/20, <http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf> (2005 Guidelines).

27 Article 13, 2005 Guidelines.

28 Article 34(a), 2005 Guidelines.

29 Article 31(c), 2005 Guidelines.

of the identity of the child including by assigning pseudonyms, recesses during a child's testimony, and hearings scheduled at times of the day appropriate to the age and maturity of the child.³⁰ The POCSO Act also provides for prevention of exposure of the child to the accused by using different tools including screens and partitions,³¹ as well as for questions to be directed through the judge to ensure that they are age appropriate and in a language that the child understands, and are not hostile and embarrassing to the child.³² It does not, however, mandate separate interview rooms.

The 2005 Guidelines also include the need for certain structural modifications, to ensure that the courts are child-friendly courts. For example, the need to prevent exposure to the accused should extend to before the trial, and hence separate entrances and waiting rooms are necessary under the 2005 Guidelines.³³ Moreover, the use of audio-visual facilities ensures that there is no exposure between the accused and the child.³⁴ Facilities such as easy access to toilets are necessary³⁵ for the comfort of the child, as well as elevated seats³⁶ and in order to ensure that there is no discrimination, these toilets should also be disabled friendly. However, the POCSO Act does not elaborate on structural necessities, apart from calling for a child-friendly atmosphere, and audio-visual facilities to prevent exposure to the accused.³⁷ The POCSO Act should be amended to include these structural necessities as are established in the guidelines. In the meantime, Special Court Judges should adopt the measures outlined so far to make their courtrooms more child-friendly.

III. Conclusion

The Special Courts require significant structural modifications to be child-friendly, and an amendment may be considered to the POCSO Act to ensure that Special Courts only take up POCSO matters and offences against children after an assessment of the likely impact on disposal. State Governments need to earnestly

30 Article 30(d), 2005 Guidelines.

31 Section 36, POCSO Act.

32 Section 33 (2), POCSO Act.

33 Article 31(b), 2005 Guidelines.

34 Article 31(a), 2005 Guidelines.

35 UNODC, Justice in matters involving child victim and witnesses of Crime, Model Law and Commentary, 2009, Article 24.

36 *Id.*, Article 26.

37 POCSO Act, Sections 33(4) and 36(1).

implement the letter and spirit of Section 32(1), POCSO Act to ensure that SPPs exclusively deal with POCSO cases.

Acknowledging the traumatic experience of child victims and children in conflict with the law in court, in *Sampurna Behura v. Union of India*,³⁸ the Supreme Court urged the Chief Justices of High Courts “to seriously consider establishing child-friendly courts and vulnerable witness courts in each district.” A long-term measure for consideration of the State Governments and High Courts is the location of Special Courts away from the criminal court complex, and its design to ensure that there are separate entrances, separate waiting rooms and proper provisions so that the child is not exposed to the accused, police personnel, advocates, and general public even when the child is waiting for the deposition. Facilities such as toilets and drinking water and other facilities to make the child feel comfortable should be made available and signs indicating where they are located should be placed outside all Special Courts. All these facilities, moreover, should be accessible to people with disabilities in accordance with the Rights of Persons with Disabilities Act, 2016. CCL-NLSIU’s recommendation that funds under the National Mission for Justice Delivery and Legal Reforms be utilized for ensuring that the ambience of the court complex is child-friendly requires consideration.

While the modified structures introduced in capital cities or select districts within States are laudable, efforts need to be made by majority of the Special Courts to overcome structural limitations. For instance, the POCSO Act enables the testimonies of children “at a place other than the court,” if the Special Court is of the opinion that the child cannot be examined in the courtroom.³⁹ This could include chambers of the judge or any other room within or even outside the court premises where the child may feel comfortable. Special Courts should also designate waiting rooms and waiting spaces for children and their families to prevent exposure to the accused, police personnel, advocates, and others. Practices followed by some Special Courts such as seating the child next to them and not in the witness box, not sitting on the dais, recording the testimony in chambers, allowing the child to wait in the judge’s chambers before evidence is recorded, may be considered for replication. Importantly, the absence of appropriate physical infrastructure and funds for structural modifications should not limit or prevent Special Courts from taking these measures to minimize the trauma children face when testifying in court. It will reinforce the child’s faith in the state, and send the message that the criminal justice system is committed to their best interests and protection.

38 Writ Petition (Civil) No. 473 of 2005 decided by the Supreme Court on 09.02.18.

39 POCSO Act, Section 37 proviso.

Procedural Compliance of Special Courts with the POCSO Act, 2012

SONIA PEREIRA* AND SWAGATA RAHA**

I. Introduction

The POCSO Act has been envisioned as “a self-contained comprehensive legislation” to protect children from a range of sexual offences and “safeguarding the interest and well-being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.”¹ It considers the specific needs of children, to afford children the additional protection they are entitled to because of their vulnerability and their physical and mental immaturity, and for the speedy disposal of such cases.

The POCSO Act prescribes several procedural safeguards while dealing with cases under the Act. Compliance with these procedural protections ensures that

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1 Statement of Objects and Reasons, POCSO Act, 2012.

due process is followed, children feel supported and secure throughout the entire judicial process and are not subjected to secondary victimization. This Chapter delves into the procedural requirements under the POCSO Act, and international standards set out in the UN Convention on the Rights of the Child, 1989 (UNCRC) and other international guidelines. Key findings and common trends from studies conducted by CCL-NLSIU in Assam, Maharashtra, Delhi, Karnataka and Andhra Pradesh are highlighted to observe the extent to which these safeguards are being complied with.

II. Overview of Procedural Provisions relevant to Special Courts and their Comparison with International Standards

2.1. Child-friendly procedures

Section 33(2), POCSO Act prohibits the Special Public Prosecutor (SPP) and the defence lawyer from putting questions to the child directly. All questions during the examination-in-chief and cross-examination must be routed through the Special Court. The purpose of such a provision is to guarantee that the child does not feel intimidated and threatened by the SPP and defence lawyers and that the questions asked to the child are filtered to ensure that only age appropriate and comprehensible questions are permitted. The POCSO Act has given statutory recognition to the Supreme Court's direction in *Sakshi v. Union of India*,² that during a trial of child sex abuse or rape, the questions asked during cross-examination should be given in writing to the Presiding Officer of the Court so that they can be addressed to the victim or witnesses in a language which is clear, and is not embarrassing.

As per Section 33(3), POCSO Act, frequent breaks should be allowed to the child during trial, if necessary. Special Courts should also ensure that children are not called repeatedly to testify in the court under Section 33(5). The Model Guidelines on the POCSO Act elaborate that the "start of children's testimony should not be delayed by other matters on the court list. It is best to... bear in mind his concentration span, the length of any recording, the best time to view it and the need for breaks."³ The objective is to avoid unnecessarily troubling the child to

2 2004 Supp (2) SCR 723.

3 Ministry of Women and Child Development, Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012, September 2013, 1.2 (v), p. 67, , <http://wcd.nic.in/policies/model-guidelines-under-protection-children-sexual-offences-pocso-act2012>.

repeatedly appear in court. The purpose of breaks is to ensure that the child does not feel overwhelmed by the proceedings in the court, and is allowed to testify at his or her own pace and comfort.

Section 36(1), POCSO Act, requires the Special Court to ensure that the child is not exposed to the accused while testifying. Section 36(2) suggests that the evidence could be recorded through video conferencing, single visibility mirrors, curtains or any other device. The purpose of this section is to protect the child from being intimidated during testimony and to ensure that the child is not traumatised by having to revisit the memory of the incident in the presence of the alleged perpetrator.

Section 37, POCSO Act requires the Special Court to conduct the trial *in camera* and in the presence of the parents of the child or any other person in whom the child has trust or confidence. The child can also be examined in a place other than the courtroom, if the Special Court is of the opinion that it is required to do so.⁴ This provision protects the privacy of the child, as well as aims to establish a child-friendly courtroom atmosphere. The absence of the public and the media during the testimony is meant to protect the child from embarrassment and fear when testifying to intimate details.

Several provisions of the POCSO Act are in line with the Guidelines on Justice in matters involving Child Victims and Witnesses of Crime, 2005 (2005 Guidelines), which recommend that measures should be put in place to ensure protection of children from being exposed to the alleged perpetrator, and ensure that they are questioned in a child sensitive manner, with judicial supervision and reduced intimidation such as by using testimonial aids.⁵ Safeguards should be put in place, including police protection and avoidance of direct contact between children and the alleged perpetrators.⁶ Unnecessary exposure to the public should be avoided, including through measures such as excluding the media and public from the courtroom during the child's testimony.⁷ The POCSO Act does not require the use of testimonial aids or police protection, and apart from providing for *in camera* trials and prohibition on exposure during investigation and evidence, does not contain express provisions regarding exposure to the accused before trial.

4 POCSO Act, 2012, Section 37 proviso.

5 Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, ECOSOC Resolution 2005/20, Article 31, <http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf> (2005 Guidelines).

6 Article 34, 2005 Guidelines.

7 Article 28, 2005 Guidelines.

2.2. Creation of a child-friendly atmosphere

Section 33(4), POCSO Act requires the Special Court to create a child-friendly atmosphere by allowing a family member, guardian, friend, or a relative, in whom the child has trust or confidence, to be present in the court. The Model Guidelines provide that the child should be given an opportunity to visit the court to familiarize himself with it before the trial. This will enable the child to experience the atmosphere in Court so that the child is not intimidated at the trial.⁸

Recommendations from Stakeholders for Child-friendly Special Courts

During CCL-NLSIU's Studies on the Working of Special Courts in Andhra Pradesh, Assam, Delhi, Karnataka, and Maharashtra, respondents from the judiciary, lawyers, prosecutors, child protection systems, NGOs, and children were asked their views on child-friendly Special Courts. Recommendations that emerged are as follows:

- **Separate Complex:** Special Courts should be located in a separate complex and not within the regular criminal courts complex. This is to ensure that children do not feel intimidated when confronted with the regular criminal court complex where accused are produced in chains and handcuffs.
- **Separate Entrance:** There should be a separate entrance and a separate waiting room to guarantee that the child is not exposed to the accused and his defence lawyers before the trial, hence reducing the chances for the child to feel threatened.
- **Accessible Structures:** The court complexes should be accessible to child victims and all other people with disabilities so that they are not disadvantaged because of their disability. The court complexes should have easily accessible toilets, including toilets for child victims and other people with disabilities.
- **Seating arrangements:** The judge should not sit on a raised dais. This is so that the judge appears friendly and approachable to the child. The arrangement should be informal and should not resemble a court hall. This is so that children do not feel like they are being put on trial, but understands that they are there to give testimony in a supported environment.

8 *Supra*, n.3.

- **Orientation to the child:** The child should be oriented to the court hall and the judge before the trial, and the procedure should be explained to the child. This will to some extent allay the child's fears and help prepare the child for the trial.
- **Privacy:** Minimal staff should be allowed in the courtroom, so that the privacy of the child is protected and the child does not feel overwhelmed.
- **Dedicated Special Public Prosecutor (SPP):** There should be a dedicated SPP for every Special Court. This will ensure that the SPP is sensitized and well versed in POCSO matters.
- **Exposure should be prevented:** The Court hall should be designed in such a way that the child cannot see the accused while testifying, whether through the use of a separate room, a screen or partitions. This way the child will not be intimidated by the presence of the accused.
- **Recording of testimony:** The testimony should be recorded quickly and in minimal number of hearings as needed. The case should also be disposed of speedily so that the child is not made to endure the trauma of the judicial process, and can continue the process of recovery.
- **Support Persons:** Support Persons should be made available so that the child is guided through the maze of the legal system and is assisted in the pre-trial processes and trial process.
- **Involvement of experts:** Child psychologists, special educators, interpreters and other experts should be involved as per the needs of the child, particularly in complex cases involving younger children and children with disabilities.
- **Communicating with children:** SPP's should receive training in how to best communicate with the child, and on ways to boost the child's trust and confidence. The child should be questioned in a manner and language that the child understands. Questions should not be aggressive but should be facilitative to the child's testimony. It is important that the child feels that the child's testimony is important and valued.

2.3. Facilitating the right to be heard

Section 38, POCSO Act, requires the Special Court to take the assistance of a qualified translator, interpreter, special educator, or a person familiar with the manner of communication of a child if it is necessary. The District Child Protection Unit (DCPU), a body created under the Integrated Child Protection System and now provided for under the Juvenile Justice (Care and Protection of Children) Act, 2015,⁹ has been vested with the responsibility of preparing a list of such experts and ensure it is available to the Special Courts.¹⁰

The Model Guidelines provide a comprehensive list of best practices when using interpreters¹¹ The assistance of such persons ensures that the testimony of the child is strengthened and not diminished by the developmental needs of the child and ensures that all children remain on par in terms of their access to justice.

Section 40, POCSO Act, recognizes the right of the family or guardian of the child to take assistance of a legal counsel of their choice in proceedings under the POCSO Act. The District or State Legal Services Authority is required to provide them with a lawyer in case they are unable to afford one. This provision is an extension of the right to legal aid as guaranteed under Article 39-A of the Indian Constitution¹² and reinforced in the Legal Services Authorities Act, 1987. The objective of this provision is to ensure that a child is not disadvantaged due to their economic background in attaining justice.

Moreover, in case of a child having a mental or physical disability, the assistance of a special educator, or an expert, or a person familiar with the child's communication manner can be sought by the police officer or Magistrate who is recording the child's statement.¹³ The report must be in a manner that the child can understand, and translators should be engaged to simplify the communication process, if needed.¹⁴ Rule 4(12) of the POCSO Rules provides a non-exhaustive list

9 JJ Act, 2015, Section 106.

10 POCSO Rules, 2012, Rule 3(1).

11 *Supra* n.3, pp. 19-20.

12 Article 39 A of the Constitution states: "The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

13 POCSO Act, Section 26(3).

14 Section 39, POCSO Act permits the state government to make guidelines on the assistance of experts to children in the pre-trial and trial stage.

of information to be provided to the child, including the status of investigation and the sentence imposed on the offender.

Article 12(1) of the UNCRC recognises a child's right to participate and express views when the child is capable of forming views, in accordance with the age and maturity of the child. This also includes the right of the child to be heard in judicial proceedings, directly or through a representative. In the context of judicial proceedings, the Committee on the Rights of the Child (CRC) in General Comment No. 12 *The right of the child to be heard* (2009) elaborated that:

A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.¹⁵

According to the 2005 Guidelines, if the child is a capable witness, the credibility of the testimony should not be diminished by the age of the child alone.¹⁶ Professionals should ensure that children express themselves regarding their involvement in the justice process by ensuring consultation of children.¹⁷ Children and if required, family members, should receive assistance from appropriately trained professionals to enable the child to participate in the justice process.¹⁸ They should receive support from child victim or witness specialists from the initial report till necessary.¹⁹ Professionals should develop methods to aid children in improving their understanding and communication at the pre-trial and trial stage, including measures such as specialists to address special needs, support persons to accompany children during testimony, and appointing guardians where necessary to protect the child's legal interests.²⁰

While there are no specific provisions related to appointment of guardians to protect the child victim's legal interest under the POCSO Act and Rules, they are

15 The Committee on the Rights of the Child in its General Comment No. 12 (2009) *The right of the child to be heard*, para 34, <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

16 Article 18, 2005 Guidelines.

17 Article 21, 2005 Guidelines.

18 Article 22, 2005 Guidelines.

19 Article 24, 2005 Guidelines.

20 Article 25, 2005 Guidelines.

entitled to legal aid and the assistance of experts, special educators, and support persons in the course of the trial.

2.4. Protection of Privacy

Section 33(7), POCSO Act requires the Special Court to protect the identity of the child during the investigation and trial. For reasons recorded in writing, the Special Court can permit disclosure if it is in the interest of the child. An explanation to Section 33(7) states that the identity of the child includes information about the child's family, school, relative, neighbourhood or any information through which the identity of the child may be revealed. The purpose of this provision is to ensure that the privacy of the child is always protected, in order to afford a fair opportunity to the child to move on with their lives once the trial is over.

Interestingly, Clause 23 of the draft POCSO Bill, provided for the disclosure of the identity of the child in the media, with the consent of the child or the parent or guardian. The Standing Committee objected to this clause stating that seeking the consent of the child could cause further trauma to the child, and could also be problematic when the parent or the guardian is the accused. Accordingly, the provision was amended to remove the reference to parental consent.²¹

Article 17 of the International Covenant on Civil and Political Rights, 1966 and Article 16 of the UNCRC protect the privacy of individuals and children, respectively and grants them legal protection from attacks on their honour and reputation. According to the 2005 Guidelines, there should be minimum interference in the child's private life.²² Children's privacy must be protected, including information of their involvement in the justice process, through confidentiality and restricted information disclosure.²³

The right to privacy of the child is emphasized in the Preamble of the POCSO Act and Section 23, POCSO Act which prohibits any reports or comments from being made in media which can lower the child's reputation or infringe his or her privacy. Furthermore, under Section 33(6), POCSO Act, character assassination

21 Department-Related Parliamentary Standing Committee on Human Resource Development, *Two Hundred Fortieth Report On The Protection Of Children From Sexual Offences Bill, 2011*, (Standing Committee Report on POCSO Bill) para 12.2 , <http://www.prsindia.org/uploads/media/Protection%20of%20children/SCR%20Protection%20of%20Children%20from%20Sexual%20Offences%20Bill%202011.pdf>

22 Article 12, 2005 Guidelines.

23 Article 27, 2005 Guidelines.

and aggressive questioning is prohibited. However, there is no clear provision on suppression of the name of the accused, as often it can reveal the identity of the victim especially when they are related.

2.5. Speedy trial

Section 33(1) of the POCSO Act expressly empowers the Special Court to take cognizance of an offence based on a complaint or upon a police report, without the accused being committed to it for trial. In *Kum. Shraddha Meghshyam Velhal v. State of Maharashtra*,²⁴ the Bombay High Court held that the Judicial Magistrate do not have the jurisdiction to deal with remand of the accused under the POCSO Act. The High Court observed that it is crucial for all police officers to produce the accused before the Children's Court and not the Magistrates Court, as the special procedures come into play from the process of filing of the private complaint or police report. This provision confers a special status on the Special Court to deal with all cases under the Act from the initial stage of the complaint being registered and the accused being produced for remand.

As per Section 35(1), POCSO Act, evidence should be recorded within 30 days of the Special Court taking cognizance of the offence, and reasons for delay (if any) should be recorded. Section 35(2) states the trial should be completed within one year of the court taking cognizance of the offence. The purpose of this provision is to ensure that trials are not drawn out, and that the child is not forced to relive the abuse for a long period of time. Similar emphasis is in Guideline 30 (c) of the 2005 Guidelines which states that professionals should ensure that trials take place as soon as practical, unless delays are in the child's best interest. The CRC has also stressed that the "celerity principle" should be applied in cases involving child victims of violence with due regard to the rule of law.²⁵

2.6. Support to the victim

In keeping with the 2005 Guidelines²⁶ which provide for support persons to be appointed to accompany the child during testimony and to provide effective assistance to the child to testify and to improve the child's communication

24 Criminal Application 354 of 2013 decided by the Bombay High Court on 03.07.14.

25 Committee on the Rights of the Child, General Comment 13 *The right of the child to freedom from all forms of violence*, 2011, para 54(d), http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf

26 Article 22-25, 2005 Guidelines.

and understanding at the pre-trial and trial stages, the POCSO Rules provide for a Support Person.

According to Rule 4(7) POCSO Rules, 2012, the CWC may provide a support person to provide assistance to the child throughout the process of investigation and trial. The Model Guidelines on POCSO call for these support persons to provide information, emotional and psychological support and practical assistance which are often crucial to the recovery of the child.²⁷ The DCPU and the CWC should maintain a list of persons/ NGOs who may be appointed as support persons.²⁸

III. Gaps in Implementation

3.1. Direct cognizance by the Special Court is not fully implemented

The committal rates differed from state to state, in breach of Section 33 (1) of POCSO providing for direct cognizance to be taken by the Special Court. In Delhi, 14.39% cases were committed to the Special Court by the Magistrates Court,²⁹ 54.65% cases in Assam,³⁰ 7.44% cases in Maharashtra³¹, and 11.7% cases in Andhra Pradesh.³² In Karnataka, judgment analysis revealed that soon after the POCSO Act was notified, there was some confusion in the Court regarding the production of accused. However, the accused is now produced directly before the Special Court for remand. Committal proceedings were initiated in 18 cases decided between September 2013 and September 2014. From September 2014 onwards, the Special Court started taking direct cognizance.³³ The analysis revealed that the rate of committal declined in all States with each passing year.

²⁷ *Supra* n.3, p.50.

²⁸ *Supra* n.3, p.51.

²⁹ CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (2016), p. 35, <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf> (Delhi Report).

³⁰ CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Assam* (2017), p.26, <https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourtassamPOSCOAct2012.pdf> (Assam Report).

³¹ CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra* (2017), p.17, <https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf> (Maharashtra Report).

³² CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh* (2017), p.16, <https://www.nls.ac.in/ccl/POSCOAP2017study.pdf> (Andhra Pradesh Report).

³³ CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Karnataka* (2017), p. 21, <https://www.nls.ac.in/ccl/jjdocuments/posco2012karnataka.pdf> (Karnataka Report).

3.2. Practice of direct questioning continues

Except for the Saket and Karkardooma courts in Delhi, interviews with respondents in other Special courts in Delhi,³⁴ Assam,³⁵ Maharashtra,³⁶ Karnataka,³⁷ and Andhra Pradesh³⁸ revealed that questions are almost always posed by the defence lawyers and the prosecutors to the child directly, in contravention of Section 33(2) of POCSO Act. The judge intervenes only when the child does not understand the question, or when the question is posed in a particularly aggressive or hostile manner.

This is worrying as this provision forms a large component in the establishment of a child-friendly environment in the courtroom. The essence of this provision was to prevent intimidation of the child, and ensure that questions are age appropriate and suitable to the developmental needs of the child, and in a language that the child understands. While some courts exhibit sensitivity when the child is very young, older children are assumed to be capable to withstand cross-examination by a defence lawyer. For instance, in one of the cases analysed,³⁹ the victim, a 17-year-old-girl who alleged that she had been raped on repeated occasions by her father, was repeatedly questioned about her “friendships” with boys and towards the end of her cross-examination admitted that she had filed a false case against her father. The Special Court proposed perjury proceedings against her, under a misconception of the law. It is very likely that the lengthy and aggressive questioning during the cross-examination could have intimidated the child into stating that she had filed a false case.

3.3. Minimizing Appearance and Frequent Breaks

In Maharashtra,⁴⁰ Assam,⁴¹ and Andhra Pradesh,⁴² the provision requiring Special Courts to allow frequent breaks and minimize appearances of the child is mostly complied with, with the Special Court attempting to record the evidence

34 Delhi Report, p.36.

35 Assam Report, pp.26-27.

36 Maharashtra Report, pp.17-19.

37 Karnataka Report, p.21.

38 Andhra Pradesh Report, p.18.

39 Spl. C. No. 146/2014 decided on 22/12/2016 (Thane) in Maharashtra Report, p.19.

40 Maharashtra Report, pp.22-23.

41 Assam Report, pp.29-30.

42 Andhra Pradesh Report, pp.19-20.

in one hearing. Where cross-examination is deferred at the request of the defence, heavy costs were usually imposed on the defence by one Special Court in Thane.⁴³ However, in Delhi, it appeared that the testimony was scheduled as per the convenience of the court, and not the child.⁴⁴ In courts in Bangalore, Belagavi and Ramanagara in Karnataka, this provision was found to have been neglected and children were often summoned multiple times to the court as adjournments were readily granted at the request of the defence.⁴⁵

3.4. Child-friendly atmosphere lacking in many courts

In Delhi, most respondents were of the opinion that there was not much difference between the trial conducted by the Special Court and that by a regular criminal court.⁴⁶ An interview with a respondent in Assam from the judiciary in Dibrugarh suggested that the Special Court exercises discretion by permitting the parent to be present only if the victim appears nervous.⁴⁷ A parent, relative and support persons are sometimes present in the courtrooms in Maharashtra.⁴⁸ In Bangalore, it is largely Support Persons working with children who encourage children to ask for breaks and the situation in cases in which the child does not have such support structure is not clear.⁴⁹ Some efforts are made to create a child-friendly atmosphere in Special Courts in Andhra Pradesh, with the Judge offering the child water and interacting with the child to relax him or her.⁵⁰

3.5. Identity of the child is poorly protected

In most Special Courts in Delhi,⁵¹ Maharashtra⁵², Assam,⁵³ Andhra Pradesh⁵⁴ and Karnataka,⁵⁵ no meaningful efforts were discernible to ensure that the identity

43 Maharashtra Report, p.22.

44 Delhi Report, p.41.

45 Karnataka Report, p.22.

46 Delhi Report, pp.33, 36-40.

47 Assam Report, p.27.

48 Maharashtra Report, p.19.

49 Karnataka Report, p.22.

50 Andhra Pradesh Report, p.18.

51 Delhi Report, p.41.

52 Maharashtra Report, p.23.

53 Assam Report, p.30.

54 Andhra Pradesh Report, pp. 20-21.

55 Karnataka Report, p.23.

of the child is protected. In these complexes, regular visitors know the POCSO court hall. In Assam, the identity of the victim was disclosed by either naming her or her family members in 77.32% cases.⁵⁶ In Maharashtra, the identity of the victim was revealed in 86.31% of the judgments studied.⁵⁷ In Andhra Pradesh, the identity of the victim was compromised in 96.85% of the cases studied.⁵⁸ The extent to which the identity of victims is disclosed, despite the law prohibiting it, is disappointing.

3.6. Recording of evidence and disposal of cases delayed

According to Crime in India, 2016, a staggering 89% of trials under the POCSO Act were pending.⁵⁹ Maharashtra accounted for nearly half of the 27500 cases pending in POCSO courts across the country, followed by Kerala, Rajasthan and Madhya Pradesh.⁶⁰ Judgment analysis indicated that though Special Courts were established for the speedy disposal of cases, a significant proportion of cases take longer than a year to complete and there are often delays in recording evidence. The delay is largely due to the time taken to complete investigations, obtain forensic reports, and file charge-sheet. Reasons for delay in recording the evidence of the child were, however, not mentioned in most judgments. In Delhi, 69% of the cases were disposed within a year,⁶¹ in Maharashtra 37% cases,⁶² and in Assam 29.06% cases.⁶³ In Karnataka, in only in 10 cases studied, the judgment was passed within a period of one year from the date of FIR. Majority of cases in the three districts studied in Karnataka i.e., 72.5% were disposed of after completion of one year but within two years.⁶⁴

Interestingly though, the acquittal rate as well as the rate of victims turning hostile was highest in matters disposed within one year in Maharashtra,⁶⁵ while in

56 Assam Report, p.30.

57 Maharashtra Report, p.23.

58 Andhra Pradesh Report, p.20.

59 National Crime Records Bureau, *Crime in India, 2016*, Table 4A.5 Court Disposal of Crime Against Children Cases (Crime Head-wise), p.2.

60 Pradeep Tharkur, *47 % of all POCSO cases are pending in Maharashtra*, TIMES OF INDIA, 2 Aug 2017, <https://timesofindia.indiatimes.com/india/47-of-all-pocso-cases-are-pending-in-maharashtra/articleshow/59873178.cms>

61 Delhi Report, p.44.

62 Maharashtra Report, p.28.

63 Assam Report, p.36.

64 Karnataka Report, p.29.

65 Maharashtra Report, p.29.

Assam, the rate of children turning hostile rose with the increasing gap between the lodging of the FIR and the recording of the evidence.⁶⁶ In Delhi, the conviction rate was better in cases disposed between one and two years as compared to those disposed within a year.⁶⁷ CCL-NLSIU's Maharashtra Report notes:

While matters should certainly be completed as early as possible, the overemphasis on speedy trials should not take away from the need for sensitive and developmentally appropriate appreciation of children's testimonies and a robust victim and witness protection program that is available from the time the FIR is lodged.

3.7. Exposure to the accused not adequately prevented

Avoiding exposure to the accused is a crucial component in protecting the best interests of the child, as this ensures that the child is not traumatised by facing the accused, as well as it ensures that the opportunity for the accused and his lawyers to intimidate the child is minimised. In most of the Special Courts visited by CCL-NLSIU, apart from those in Karkadooma and Saket in Delhi, Prakasham and Guntur in Andhra Pradesh, and Belagavi in Karnataka, there are no separate entrances into the court. Hence, the child and their family are exposed to the accused and the defence lawyers while waiting for the matter to be heard. Different courts have tried to limit this exposure. Where Support Persons are appointed in some courts in Delhi, they took the child to the canteen and brought her in just before the case was called out. Some judges permitted the child to wait in the chamber.⁶⁸

Special Courts have adopted varying practices in order to ensure that the child cannot see the accused while testifying. Interviews with respondents in Pune revealed that a plywood partition is placed between the victim and the accused in the courtroom.⁶⁹ In Assam, the Special Courts in Kamrup (Metro) and Dibrugarh record the child's statement in the judge's chamber. Screens were used in Dibrugarh in Assam and Prakasham and Guntur in Andhra Pradesh to prevent exposure of the accused to the child during recording the statement.⁷⁰ However, certain Special Courts in Karnataka do not use tools to prevent exposure to the accused. This mandatory provision is not sufficiently adhered to.⁷¹

66 Assam Report, p.35.

67 Delhi Report, p.43.

68 Delhi Report, p.44.

69 Maharashtra Report, p.30.

70 Assam Report, p.37; Andhra Pradesh Report, p.26.

71 Karnataka Report, p.74.

3.8. Evidence strictly recorded *in-camera*

CCL-NLSIU's Studies revealed that the evidence of the child is strictly recorded *in-camera* in all five States.⁷² The courtrooms are cleared when the victim or material witnesses like family members and eye-witnesses testify in POCSO cases. This is a step towards ensuring that the child does not feel exposed, embarrassed and re-traumatised while testifying, and that their privacy is protected. However, the entire trial is not conducted *in-camera* by most Special Courts and witnesses like the Investigating Officer and doctors are usually examined in open court.

3.9. Assistance of interpreters, experts, and special educators rarely taken

Interviews with stakeholders in Delhi⁷³, Assam⁷⁴ and Maharashtra⁷⁵ revealed that a list of qualified experts is not available with most Special Courts. Judgment analysis in these States also did not reveal the use of special educators and interpreters. An attempt was underway at preparing such a list of experts in Bengaluru by the DCPO's office.⁷⁶ In Andhra Pradesh, the Special Courts engaged special educators, translators and experts, usually brought in by the police.⁷⁷

Although it is mandatory under the proviso to Section 119, Indian Evidence Act, 1872 for a court to seek the assistance of an interpreter or special educator to record the statement of witnesses who cannot communicate verbally and to videograph the statement, reference to them was extremely sparse in cases involving children with intellectual disabilities or very young children in Maharashtra⁷⁸ and Andhra Pradesh⁷⁹ and not found in any cases in Assam.⁸⁰ In one case in Delhi, the accused stood behind the victim and translated her testimony because the Special Court had failed to arrange for a translator⁸¹ thus belying the spirit of the POCSO Act.

72 Delhi Report, p.45; Assam Report, p.38; Maharashtra Report, p.31; Karnataka Report, p.33; Andhra Pradesh Report, p.26.

73 Delhi Report, p.45.

74 Assam Report, p.38.

75 Maharashtra Report, pp.31-34.

76 Karnataka Report, p.34.

77 Andhra Pradesh Report, p.27.

78 Maharashtra Report, p.31.

79 Andhra Pradesh Report, p.27.

80 Assam Report, pp.38-39.

81 Delhi Report, p.45.

3.10. Assistance of private legal practitioners seldom taken

Taking the assistance of legal aid lawyers or private lawyers is not the usual practice in the five States studied by CCL-NLSIU. Few private lawyers attached to NGOs in Delhi, Mumbai, and Bengaluru offered legal assistance to children in POCSO cases and shared the hostilities they face from the SPPs and Special Courts.⁸² Two Additional Public Prosecutors interviewed in Delhi shared that they preferred not to rely on private lawyers and chose to work independently on their matters,⁸³ while PPs in Maharashtra perceived private lawyers as a “hindrance”.⁸⁴ No Legal Aid Lawyers had been assigned to support the prosecution in POCSO cases in the five States as the general belief was that no such assistance was required. Encouragingly, some private lawyers were allowed by Special Courts in Delhi to conduct the examination-in-chief and by prosecutors to assist them with written submissions.⁸⁵

3.11. Absence of a robust support system

Support persons play a very crucial role in ensuring that the child’s best interests are being considered throughout the entire judicial process. The CCL-NLSIU studies revealed that there is a severe shortage of available Support Persons and that States have not prioritized the setting up of support systems. For instance, no panel of Support Persons is available to children in Pune in Maharashtra, or Guwahati and Dibrugarh in Assam. In Thane district, Support Persons are routinely appointed from the panel of representatives from NGOs based in Mumbai. These Support Persons are asked by the CWC to prepare the Social Investigation Report, counsel the child victim, take them to court, facilitate the medical exam, and to assist in repatriation processes.⁸⁶ In Assam, support systems are mostly limited to helping families lodge the FIR.⁸⁷ Support Persons from NGOs were appointed only in Bengaluru in Karnataka and in Delhi, and are able to cater to only a fraction of the cases. In Bengaluru and Belagavi, Childline representatives make up for the lack of formally appointed Support Persons.⁸⁸

82 Delhi Report, p.46; Maharashtra Report, p.34.

83 Delhi Report, p.47.

84 Maharashtra Report, p.34.

85 Delhi Report, p.46.

86 Maharashtra Report, p.35.

87 Assam Report, pp. 39-40.

88 Karnataka Report, pp.35-37.

Similarly, in the districts studied in Andhra Pradesh, Support Persons have not been appointed, but Social Work graduates, the District Child Protection Unit and Childline staff provide support informally.⁸⁹ In Delhi, Support Persons are appointed by the Delhi Commission for Women, Delhi Legal Services Authority, and the CWCs during trial, but there is significant overlap and confusion about their roles.⁹⁰ Child victims interviewed in Delhi were highly appreciative of the services provided to them by a Support Person, saying they derived strength from the presence of the support person in the courtroom and that helped them testify confidently.⁹¹ Unfortunately, except Delhi,⁹² none of the other States had a Witness Protection Scheme in place and very little appears to have been done to prevent children and families from turning hostile.

IV. Conclusion

The CCL-NLSIU Studies demonstrate that procedural compliance in all five States needs to be strengthened and the duty to ensure compliance is not just on the Special Court, but also the SPPs, District Child Protection Units, and Child Welfare Committees. It is crucial that the child-friendly provisions are adhered to by Special Courts and SPPs as the objective of the legislation is to safeguard “the interest and well-being of the child at every stage of the judicial process.”⁹³ If the child is comfortable and confident in the court, this increases the chances of a credible and strong testimony and in turn encourages convictions. It is essential that Special Courts prioritise the creation of a child-friendly atmosphere and ensure that the child is supported by a parent, relative or support person in the courtroom.

Defence lawyers also need to be sensitive to the spirit of the POCSO Act and comply with the provision requiring them to communicate the questions to be put to the child to the Special Court and not question children directly. They should be mindful of the prohibition on aggressive questioning or character assassination under Section 33(6), POCSO Act. The Bar Council of India should consider drafting rules specifically on the conduct of lawyers in cases of sexual offences.

89 Andhra Pradesh Report, pp.28-29.

90 Delhi Report, p.46.

91 Delhi Report, p.49.

92 Delhi Witness Protection Scheme, 2015, <http://dlsa.org/wp-content/uploads/2015/12/Delhi-Witness-Protection-Scheme-2015.pdf>

93 Statement of Objects and Reasons, POCSO Act, 2012.

Maintaining confidentiality is an essential means to protect the right to privacy of the child, as well as it encourages the physical and psychological recovery of the child and ensures that the social reintegration of the child is not hindered by his or her past. It is important that Special Courts zealously protect the identity of the child by suppressing the names of the child, parents, relatives, school, and neighbourhood and substitute it with pseudonyms before the judgment is pronounced. Care also needs to be taken to also ensure that the identity of the accused is suppressed in cases in which the accused is related to the child.

Creating a database of interpreters, translators, experts and special educators is necessary in order to assist the court in recording and assimilating the testimony of the child, giving due consideration to the developmental needs of the child, and ensuring the child's right to be heard. To ensure that the matter is not adjourned for want of an expert, the SPP can assess the needs of the child in advance or the needs may be communicated to the SPP and Special Court by a Support Person.

In the absence of dedicated prosecutors exclusively trying POCSO cases, Legal Aid Lawyers and private lawyers can offer much needed assistance to strengthen the prosecution. It is important to spread awareness amongst Special Courts and prosecutors about the recognition of the victim's right to legal assistance under the POCSO Act and to urge them to allow legal counsels on behalf of the victim to assist the prosecution.

The UN Model Law on Justice in Matters involving Child Victims and Witnesses of Crime⁹⁴ defined "secondary victimization" to mean "victimization that occurs not as a direct result of a criminal act but through the response of institutions and individuals to the victim." Several of the provisions of the POCSO Act to be adhered to by the Special Court are aimed at avoiding secondary victimization. However, in the absence of a person within the system charged with the responsibility of ensuring that the child is not victimized, the effective implementation of these provisions depends on the sensitivity of the individual judges. Article 15 of the Model Law provides for a trained person with professional skills to support child victims and communicate with and assist children of different ages and backgrounds from the start of the investigation and during the entire justice process to "prevent the risk of duress, revictimization and secondary victimization." The Support Person envisaged under the POCSO Rules can play

94 UNODC & UNICEF, Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary, 2009, <http://www.refworld.org/docid/4a096ce42.html>

an important role in preventing secondary victimization and ensuring that the child is supported throughout the journey in the criminal justice system. State Governments also need to proactively develop a Victim Protection System to offer support and protection to victims and their families from threats and coercion by or on behalf of the accused.

Factors Affecting Acquittals in Special Courts

ADVOCATE MICHELLE MENDONCA*

“Law should not sit limply while those who defy it go free and those who seek its protection lose hope.”¹

I. Introduction

The long-awaited Protection of Children Against Sexual Offences Act, 2012 (hereinafter, POCSO Act) envisaged a separate framework to deal with sexual offences against children and to minimize the secondary victimization inherent in criminal justice systems.

The Centre for Child and Law at the National Law School Bangalore (hereinafter, CCL-NLSIU) has conducted empirical studies to evaluate the effectiveness of the Special POCSO Courts in five States: Andhra Pradesh, Assam, Delhi, Karnataka and Maharashtra.

Though the rate of reporting has increased from the 2007 baseline of 3%,² the CCL-NLSIU studies reveal a high acquittal rate indicating that the POCSO Act is ineffective in justice-delivery.

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1 *Jennison v. Baker*, (1972) 1 All ER 997

2 *Study on Child Abuse: India, 2007*, Ministry of Women and Child Development, <https://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf> (Note that the methodology of this study attracted criticism).

This article draws from the CCL-NLSIU studies in an attempt to 1) analyze the common issues leading to acquittals in cases of child sexual assault; and 2) provide recommendations to translate the Legislature's good intentions into concrete action.

But first this article will touch upon the impact of Indian cultural values on the effective implementation of the POCSO Act.

II. The Impact of Culture on the Implementation of POCSO Act

Lack of resources and infrastructure reduce the effectiveness of our entire legal system but cultural lag could be among the factors contributing to the high acquittal rate in POCSO cases. India expanded the criminalization of sexual acts with children only in 2012, but the POCSO Act is still far ahead of Indian culture which silences and stigmatizes persons subjected to sexual assault. It may be perceived as being counter-cultural to report these offences and suspicion attaches to this transgression of the norm of silence.

Some beliefs about these offences fly in the face of anecdotal and other evidence. For instance, although a 2017 Thomson Reuters poll found that Delhi is the world's most dangerous megacity in terms of sexual violence,³ the CCL-NLSIU Delhi Report reveals widespread police and judicial skepticism that instead attributes POCSO complaints to a desire to gain leverage in disputes or to receive compensation.⁴

2.1. Culture Creates a Stereotype of Victims' Response to Sexual Assault

Children, whose response to sexual assault does not match cultural expectations, are likely to be disbelieved and their offenders acquitted. In *State v. Vijay Sukhdeo Sonune*,⁵ a Special Court in Mumbai acquitted the offender reasoning that the child had not raised an alarm to alert the neighbours. In reaching this conclusion, the Special Court disregarded the child's testimony that the defendant had gagged her. An Assam Special Court acquitted a defendant on similar grounds.⁶

3 Thomson Reuters Foundation, "Most Dangerous Megacities for Women", <http://poll2017.trust.org/city/?id=delhi>.

4 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (2016), p. 115, <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf> (Delhi Report).

5 Special Case No. 24 of 2015, decided on 10.9.2016 (Mumbai) in CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra* (2017), p.83, <https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf> (Maharashtra Report).

6 *State v. Krishna Sahu*, G.R. Case No. 870 of 2014 decided on 27.07.2016 in CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Assam* (2017), p.20, <https://www>.

Even when children are not gagged, they may exhibit a “flight” or a “freeze” response. But the cultural imperative, that chastity must be valued over one’s life, has conditioned Special Courts to expect a universal “fight” response leading to acquittals based on a false conflation of lack of resistance with consent.

Cultural bias sometimes extends to children’s families as well. In 2017, in a pre-POCSO case,⁷ a Bangalore Sessions Court referenced the conduct of the child’s mother while acquitting her husband of abusing their child. The judge seemed to place the mother on trial while accepting, at face value, the unproven defense that the accusation was triggered by an impending divorce even though the defendant did not “probabilize” his defense⁸ either by taking the stand or producing any evidence. Irrespective of the merits of the case, the acquittal seems to have stemmed from the Court’s belief that the mother’s lifestyle choices rendered her testimony unreliable. There is a common cultural belief that only “loose” women are raped⁹ but this acquittal seems to suggest that the children of “loose” women are also fair game and their offenders entitled to impunity.

2.2 Cultural Patriarchal Values Reward Offenders for Marrying their Victims

Culture dictates that restoration of the child’s “defiled virtue” must accommodate marriage to her rapist.¹⁰ Though the Supreme Court has rejected marriage as a mitigating circumstance,¹¹ the CCL-NLSIU studies reveal that several Special Courts offer near-impunity in such cases by acquitting or reducing sentences based on unsound legal theories that replace the “age of consent” with the “age of discretion”.¹²

nls.ac.in/ccl/jjdocuments/studyspecialscourtassamPOCSOAct2012.pdf (Assam Report).

7 State of Karnataka v. Pascal Mazurier, Special C. C. No.178/2013 decided on 19.04.17.

8 See Ram Singh v. State of Himachal Pradesh, Criminal Appeal No. 115 of 2014 where the Himachal Pradesh High Court stated a defendant must probabilize his defense.

9 See Human Rights Watch “*Everyone Blames Me*”: Barriers to Justice and Support Services For Sexual Assault Survivors in India (2017) , <https://www.hrw.org/report/2017/11/08/everyone-blames-me/barriers-justice-and-support-services-sexual-assault-survivors> (HRW 2017)

10 See the Supreme Court’s characterization of child rape in Parhlad v. State of Haryana, Criminal Appeal No. 983 of 2015 and M. Mendonca (2016), *Protection of Children Against Sexual Offences Act, 2012: A Welcome First Step*, Journal of the Delhi Judicial Academy, Volume 9, pp. 270-292.

11 State v. Madanlal, MANU/SC/0689/2015.

12 Assam Report, pp.66-67.

The POCSO Act leaves no room for ambiguity about consent. Judges must enforce the law and not substitute their judgment for that of the Legislature.

Basing acquittals on an infallible view of culture¹³ instead of prescribed law results in asymmetric application of POCSO, unjust acquittals and violates the guarantee of equal protection for children.

III. Acquittals due to Police and Prosecutorial Failure

The CCL-NLSIU studies highlight several lapses in investigation related to evidence collection and documentation that lead to acquittals.

Lapses in investigation are not the fault of police alone. Having assisted the police in many investigations, this author is aware of the resource crunch and demotivating environment that stifles good intentions. The police are often called upon to make bricks without straw. They receive neither the training nor the resources to gather forensic evidence. A distrustful or indifferent public rarely offers corroborative support. Witnesses turn hostile.

Acquittals are the result of widespread systemic failure. At the same time, the police, with the support of prosecutors, can reduce the acquittal rate by implementing the recommendations in this section.

3.1 The Police Should File Proof of Age

The CCL-NLSIU studies attribute an inordinately large number of acquittals to a failure of the police and prosecution to file proof of age even though the entire prosecution case hinges on this evidence. In Maharashtra, these lapses were common in “romantic cases” which suggest that the police are less motivated to seek the “best evidence” in cases that they do not believe merit rigorous investigation.¹⁴

Prosecutors should insist that police file proof of age within the statutory timelines under Section 167 of the Code of Criminal Procedure, 1973 (Cr.P.C).

13 See Jack Donnelly, *The Relative Universality of Human Rights*, Human Rights Quarterly, Vol. 29, No. 2 (May, 2007), pp. 281-306.

14 Maharashtra Report, p.96.

3.2 The Prosecution Should File Appropriate Charges

The CCL-NLSIU studies indicate a failure on the part of police to file appropriate charges - especially charges of aggravated offences.¹⁵ Prosecutors also do not seem to add, alter or amend these charges.¹⁶ This indifference defeats the purpose of appointing Special Public Prosecutors who are expected to bring expertise to these cases.

Prosecuting cases without basic evidence or on erroneous charges not only wastes India's scarce judicial resources on trials that have no hope of success but more importantly, denies victims their right to justice and widens the impunity gap.

3.3 Recommendations to Improve the Conviction Rate

The State Should Encourage Linkages Between Prosecutors and Legal-Aid Lawyers

The State should strongly encourage prosecutors and legal aid lawyers to join forces to secure the victim's right to justice.¹⁷ Because the State invests resources in both these agencies, it has a duty to ensure their optimal utilization. Accountability for the outcomes of their services might motivate prosecutors and legal-aid lawyers to deliver high-quality legal support.

The State should require legal-aid lawyers to provide records not only of hearings attended but also details of services rendered like filing applications to oppose adjournments, providing research support to prosecutors etc.

The State Should Create Acquittal Review Mechanisms

The CCL-NLSIU studies show that, in stray cases, Delhi Special Courts ensured accountability for police in case of acquittals due to lapses and perjury.¹⁸ In a similar effort to deter poor performance, the Calcutta High Court ordered a departmental inquiry against the police and that no Sessions case should ever be assigned to the prosecutor.¹⁹ These are exemplary rulings but acquittals need an institutional rather than an individual response.

15 Maharashtra Report, p 61; Assam Report, pp.85-86.

16 Cr.P.C, Section 216.

17 POCSO Act, Section 40.

18 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (2016), pp.88-92, <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOCSOAct2012.pdf> (Delhi Report)

19 *Uttara Das v. State of West Bengal*, C.R.A. No. 290 of 2016 decided by the Calcutta High Court on 16.11.16.

States should implement the remedy proposed by the Supreme Court in *State of Gujarat v. Kishanbai*.²⁰ This case of child rape and murder was acquitted due to police and prosecutorial failure. Equating acquittals with injustice (either an innocent person has had to undergo an agonizing trial or a guilty person is allowed to walk free), the Supreme Court called for a two-pronged approach to address investigative and prosecutorial failure: first, to build the capacity of police and prosecutors through training and then, to hold them accountable for their lapses which lead to acquittals.

States should offer quality training to police officers and Special Prosecutors, and simultaneously set up Acquittal Review Mechanisms to deal with those who seem unable to benefit from training.

When children brave cultural ostracism to file complaints, in accordance with the Supreme Court's above ruling, States should ensure that the offender is held accountable and if not, the acquittal is reviewed to prevent recurrence of avoidable errors. Because India does not have the resources of more developed countries, we have a greater obligation to put limited resources to effective use.

IV. Acquittals due to Judicial Error

Though lapses in investigation and prosecution, and hostile witnesses account for a lion's share of acquittals, Special Courts also share some of the responsibility. Many Special Courts ensure compassionate interactions with children. As a former trial court lawyer as well as a guest faculty in the Maharashtra, West Bengal, Delhi and Sikkim Judicial Academies, the author has seen and heard of exemplary judicial practices.²¹

In one case in Maharashtra, a 4-year old child testified about the abuse but froze when she had to confront the defendant during identification. Her visible fear and emotional distress rendered her speechless. Recording her emotional reaction as identification, the Special Court reasoned that it was more compelling than any words she might have spoken.

In a West Bengal case, a 12-year old child grew silent when asked to describe sexual acts. The judge handed her a sheet of paper where she could write down

20 (2014) 5 SCC 108.

21 The following case studies were provided to the author by judges during workshops at Judicial Academies.

the words she was ashamed to speak. With the concurrence of the prosecutor and the defense counsel, the judge exhibited that sheet of paper - and a critical piece of evidence was brought on record.

A Delhi Special Court allowed a child to draw her experience of the abuse and exhibited the drawings. In *Hunny v. State*,²² the Delhi High Court upheld the conviction based on the evidence of a 5-year old child who used her doll as a testimonial aid.

Most Special Courts ensure that children feel validated when they testify. And yet, the conviction rate for these crimes remains low. While it is important that children should be compassionately treated in court, this matters little if they are not believed and their offenders are acquitted for unjustified reasons.

4.1 Gaps Due to Judicial Error

This section will address three kinds of gaps that lead to acquittals: 1) lack of an understanding of the dynamics of sexual abuse; 2) failure to follow mandated procedure; and 3) lack of precedent-based appreciation of evidence. It also includes recommendations to address each gap.

4.1.1. Lack of Understanding of the Dynamics of Child Sex Abuse

Lack of understanding of the dynamics of grooming²³ or Child Sexual Abuse Accommodation Syndrome²⁴ leads Special Courts to acquit due to an appearance of consent even when it is obtained by manipulation. Because most defendants base their case on consent, as CCL-NLSIU's Karnataka Report showed, the failure of Special Courts to assess consent is a troubling trend.

CCL-NLSIU's Assam Report highlighted this danger in *State v. Thumyhanghrim Hmar*²⁵ where the Special Court acquitted a man who engaged in a sexual

22 Criminal Appeal 841 of 2016 decided by the Delhi High Court on 06.06.17.

23 Grooming is premeditated behavior aimed at manipulating children into complying with the abuse, See Pryor, D.W., *Unspeakable Acts: Why Men Sexually Abuse Children* (1996), New York University Press.

24 Child Sexual Abuse Accommodation Syndrome is where the offender takes advantage of: 1) the secrecy that surrounds the abuse; 2) the helplessness of the child who tends to defer to adults and will obey demands for secrecy; 3) accommodation because the child feels trapped by a situation he believes he is responsible for; 4) delayed disclosure; and 5) retraction when child may withdraw allegations that are not believed. See Summit, R.C., *The Child Sexual Abuse Accommodation Syndrome*, *Child Abuse & Neglect* (1983) Chap 7, 177- 193.

25 Spl POCSO 4 of 2015 decided on 04.07.2015, in Assam Report, pp.65-66.

relationship with his brother's daughter. According to the child's testimony, following the death of her father in childhood, her uncle supported her family. He also slept with her in the same bed. She fell in love with him, became pregnant and wanted to marry him. The Special Court acquitted the defendant based on the child's "love affairs" with him and her mother's statement that she was 18 at the time of the offence. This case indicated classic signs of grooming by the defendant who abused his authority over the child and the mother, sexualized the relationship and finally escaped impunity because he had obtained her "consent" by these dubious means.

Power dynamics in relationships can mask manipulation. Special Courts need to pierce superficial consent as the Tripura High Court did when it believed the victim's testimony that the sexual relationship was non-consensual even though she had exchanged love letters with the defendant - her father was dependent on the defendant's family for employment.²⁶

To address this gap, all Special Judges should be provided with preparatory training or at least with quality reading material on the complexity of POCSO cases as well on judicial precedents. Ideally, this training should be provided before the Judge takes charge of the Special Court.

4.1.2 Failure to Follow Mandated Procedure

By creating a distinct legal architecture for crimes of child sexual assault, the POCSO Act is intended to be a separate Code in itself. While judges are rigid in applying procedure that protects the rights of the defendants (as they should be), the CCL-NLSIU studies show a lesser degree of rigour in enforcing provisions designed to protect the rights of child victims. Child victims, therefore, continue to undergo secondary victimization and make errors which weaken the prosecution's case.

This section will focus on two areas where Special Courts are failing to enforce mandatory procedure: failure to examine children and failure to ensure time-bound trials.

26 Sri Shib Sankar v. State of Tripura, CrI.A (J) 4 of 2015 decided by the Tripura High Court on 10.03.17.

*Special Courts are Failing to Enforce the Provision that Judges Must Question Children*²⁷

The CCL-NLSIU studies confirm that children find cross-examination most traumatic and yet none of the studies reveal findings that Special Courts do enforce the law to reduce this major source of secondary victimization. Defence lawyers continue to cross-examine children directly.

A “battle”²⁸ of wits between accomplished defense lawyers and traumatized, frightened children almost predetermines the outcome. Children may testify in fear unaware that the judge will intervene if boundaries are crossed. Their errors, which could have been prevented had the judge questioned them directly, accrue to the advantage of the defendant.

The CCL-NLSIU studies reveal varied reasons for this gap: questions cannot be framed in advance as they flow from the response of the children; the impact of artful cross-examination is lost when the judge poses questions; Special Courts lack time as they are designated rather than dedicated Courts; and defence lawyers resist judicial attempts to enforce the provision. One judge in Maharashtra stated that defense lawyers ask the question loudly which the judge must then pose to the child, defeating the purpose of the provision and according to another judge in Maharashtra this provision violates the defendant’s right to a fair trial.²⁹

While some of these reasons are valid, none of them justify judicial nullification of the law. Courts are either handing over their authority to the defense counsel or are exercising judicial discretion, where none exists. In both these scenarios, judges are making the law rather than enforcing it, thereby reducing the rule of law to “rule by judge” and weakening judicial institutions. This also violates the child’s right to a fair and child-friendly trial.

Instead of nullifying the few legal protections for children forced into an adult criminal justice system, Special Courts must fulfill the POCSO Act’s mandate, and provide children with a level playing field thereby enabling them to fearlessly assist the truth-finding function of the trial.

27 POCSO Act, Section 33(2).

28 State of Maharashtra v. R. S. Karanjule, Confirmation Case No. 03 of 2013 decided on 11.03.16.

29 Maharashtra Report, p.18.

States can consider investing in institutional mechanisms to enforce this provision. The Delhi High Court's drive to reserve *Vulnerable Witness Rooms* ensure that children are spared the intimidating atmosphere of a courtroom but instead testify via CCTV. Questions are posed to them by the DLSA support persons. This innovative mechanism fulfils the letter as well as the spirit of the law. But even Courts that lack these institutional mechanisms are bound by the law to pose questions to children.

Special Courts are Failing to Enforce the Law on Time-bound Trials

Curbing delays is not solely the responsibility of the judiciary. Because India lacks rational forward planning tools like Judicial Impact Statements,³⁰ the POCSO Act did not enhance the judiciary's resources to match its increased burden. Special Courts find it practically impossible to enforce the law on time-bound trials as they are designated rather than dedicated to POCSO trials.

The CCL-NLSIU studies indicate that frequent adjournment of children's testimony impacts the outcome. The CCL-NLSIU Karnataka Report found that, rather than completing the child's testimony in one hearing, the cross-examination is often adjourned.³¹ Children sometimes turn hostile in this interval. Families are also likely to withdraw from cases that are prolonged. Therefore, adjournments of the child's testimony negatively impact the likelihood of a conviction.

Special Courts are also unable to fulfill the legislative mandate on time-bound trials though in Delhi and Maharashtra, this delay did not seem to impact the likelihood of a conviction - in fact, a trial that results in a conviction may necessarily be lengthier.

However, reporting of child sexual offences will only increase and Special Courts must be efficient as well as effective. Despite their heavy caseload, they are not completely powerless to ensure time-bound trials. This section contains recommendations for a focused effort towards speedy justice.

30 Salem Advocates Bar Association (II) v. Union of India, (2005) 6 SCC 344 cited in M. Mendonca *A Data-Driven and Systemic Approach to Judicial Reforms*, LAW, JUDICIARY AND GOVERNANCE pp.194-205 at 202 (Universal Law Publishing, New Delhi 2017).

31 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Karnataka* (2017), pp.29-30, <https://www.nls.ac.in/ccl/jjdocuments/posco2012karnataka.pdf> (Karnataka Report).

Special Courts Should Deny Attempts to Prolong the Trial If They Violate the Rights of the Child Victim

Special Courts should follow the lead of the High Courts in balancing the fair trial rights of the defendant with the child's right to a time-bound trial.

Dismissing the defendant's plea to re-examine the child, the Uttarakhand High Court held that the POCSO Act provisions for speedy trial supercede the defendant's right to re-examine the child.³² The Madras High Court also dismissed a similar plea reasoning that the defendant should make himself available for the child's testimony.³³

Special Courts Should Set Case-Specific Time-Tables

Case-specific time-tables, which have been recommended by the Supreme Court³⁴ for civil cases, are a structured way of providing outcome-date certainty to all parties including the child. They are particularly well-suited to Special Courts where a single judge has ownership of the docket and a long-term perspective.³⁵ Each Special Court should, in consultation with the prosecutor and defense counsel, set a case-specific time-table that will bind all parties.

In addition, Special Courts should be committed to penalizing attempts to prolong the trial beyond the time-table: studies show that far from being an "external phenomenon", delay is the result of the behavior of the judges, lawyers and court staff and can only be reduced by judicial commitment by imposing costs on lawyers who cause it.³⁶ By aligning lawyers' incentives with systemic goals, Special Courts can promote speedy justice for children.³⁷

Special Courts Should Report Causes of Delay

Special Courts and prosecutors should also report reasons for delay. This approach is said to have worked in Bangladesh which not only created special courts but also requires judges, police and prosecutors to account for delays.³⁸

32 Pankaj Kumar v. State of Uttarakhand, MANU/UC/0741/2015.

33 S. Sankara Varman v. State, MANU/TN/1433/2016.

34 Ramrameshwari Devi v. Nirmala Devi, (2011) 8 SCC 249 directing that case time limits should not be exceeded and interlocutory applications should be heard between fixed dates of hearing

35 M. Mendonca (2017). *A Data-Driven and Systemic Approach to Judicial Reforms*, Law, Judiciary and Governance, pp.194-205 (Universal Law Publishing: New Delhi)

36 *Id.*

37 *Id.*

38 *Report of the ADB Symposium on the Need for Judicial Reforms* (2005), cited in n.36 at 199.

Special Courts Should Raise the Costs of Delay

Special Judges should raise the costs of delay whether caused by the prosecution or by the defense.

Delays impose negative externalities on the entire system. Currently, parties seek and receive adjournments “at the drop of a hat”.³⁹ Harshly criticizing judicial laxity in permitting delay,⁴⁰ the Supreme Court has held that judges should control the pace of the trial irrespective of the “pleasure or leisure” of advocates.⁴¹

Calling on courts to abandon “misplaced sympathy,” the Supreme Court imposed costs of Rs.50000 on a recalcitrant litigant who consistently employed dilatory tactics.⁴² A party seeking delay wastes not only a witness’ time but also the time of the judge, the other advocate, the litigants, the court staff etc.⁴³ Fines imposed by Special Courts should reflect *all* these costs. Prohibitively high fines would internalize the true costs of delay to parties rather than imposing it on the justice system collectively and defeating child-friendly provisions.⁴⁴

The Higher Judiciary Should Build a Supportive Culture for Judges Who Curb Delays

Legal culture in India is not supportive of judges who take strict action against delay.⁴⁵ Often judges who refuse adjournments must face striking lawyers, complaints and applications for transfer of cases.

The higher judiciary should create a legal culture that incentivizes and protects judges committed to reducing delay.

Parliament Should Reduce the Burden on Special Courts

The CCL-NLSIU studies demonstrate how criminalization of sexual experimentation has burdened Special Courts - a burden that is not justified by trial outcomes as these “romantic” cases account for most of the hostile witnesses and acquittals.

39 Shiv Cotex v. Tirgun Auto Plast (P) Ltd., (2011) 9 SCC 678.

40 Akil v. State, 2013 CrLJ 57.

41 Vinod Kumar v. State of Punjab, Criminal Appeal No. 554 of 2012 decided by the Supreme Court on 24.01.2015.

42 Gayathri v. Girish, C.C. No. 14061 of 2016 decided by the Supreme Court on 27.07.2016.

43 *Supra* n.36 at 201.

44 *Id.*

45 *Id* at 200.

Criminalizing all instances of sexual intercourse with children disrupts the lives of adolescent girls, penalizes adolescent boys and provides an inhuman way for parents to control the agency of their children. At the same time, children are particularly susceptible to abuse and grooming, and a child's "consent" should not be accepted at face value.

The Bombay High Court provided a glimmer of a solution by cautioning judges to grant bail in cases where 1) the defendant is between 19-22 years; 2) the victim is between 15-18 years; 3) there is some indication of a marriage; 4) the victim's 164 statement supports the defendant's contention; and 5) consent can be "safely inferred".⁴⁶

Drawing from the Bombay High Court's ruling, the POCSO Act should be amended to include a "peer-group exception" where sex between persons who fall within a certain age range (perhaps three years) is not criminalized unless consent is obtained by force, fraud, grooming, abuse of authority etc. In order to safeguard children, these cases should mandatorily be reported to the Child Welfare Committee which can recommend police action where appropriate. A scalpel as opposed to a sledgehammer approach would significantly reduce the burden of Special Courts, enable them to reduce delay and provide speedy justice.

4.1.3 Lack of Precedent-Based Appreciation of Evidence

The CCL-NLSIU studies indicate a high level of judicial skepticism about children's testimony. This coupled with disregard of appellate court precedents, which urge empathetic appreciation of evidence, leads to an asymmetric application of the law.

Medical evidence is still considered critical for corroboration of the child's testimony despite 1) research findings that vast majority of children do not show abnormal genital findings;⁴⁷ and 2) judicial rulings that the child's evidence and circumstances of the case should outweigh medical evidence.⁴⁸

46 Sunil Mahadev Patil v. State of Maharashtra, Bail Application No. 1036 of 2015 decided by the Bombay High Court on 03.08.15.

47 Heger et al (2002). *Children Referred for Possible Sexual Abuse: Medical Findings in 2384 Children, Child Abuse and Neglect*, Volume 26: Issues 6-7, June 2002 pp. 645-659. Heger reported that 96.3% of all children referred for evaluation had a normal medical examination.

48 Hunny v. State, Criminal Application No. 841 of 2016 decided by the Delhi High Court on 06.06.17. See also State of Maharashtra v. R. S. Karanjule, Confirmation Case No. 03 of 2013 decided by the Bombay High Court on 11.03.16.

Proof of age, the lynchpin of POCSO cases, is interpreted inconsistently in Delhi as well as Assam even though *Jarnail Singh v. State of Haryana*⁴⁹ provides clear guidance.

Delayed reporting is considered grounds for acquittal despite an overwhelming number of precedents⁵⁰ to the contrary. Overturning an acquittal by the Himachal Pradesh High Court, the Supreme Court stated that “silence is built into the abuse” in incest cases, and intimidation and lack of a witness protection program deters prompt reporting.⁵¹

Discrepancies and contradictions also cause a fair number of acquittals despite precedents to the contrary. An Andhra Pradesh Special Court disbelieved the child due to discrepancies and instead accepted the defense version that a dispute over hay had prompted the family to lodge a false case even though other witnesses testified that the victim disclosed the assault to them.⁵²

Special Courts seem to disregard precedents on empathetic appreciation of evidence. For instance, the Calcutta High Court convicted in a case where the victim and her family had told the police that the defendant had touched her private parts whereas they told the neighbours that he had touched her thigh. The Calcutta High Court reasoned that the family told the truth to the police but embarrassment and shame prompted them to tell a different story to the neighbours.⁵³

In a similar case, the Madras High Court attributed the victim’s two vastly divergent versions to feelings of shame, ambivalence and confusion as triggered by trauma and her continuing contact with the abuser.⁵⁴

49 (2013) 7 SCC 263.

50 Satpal Singh v. State of Haryana, 2010 CrLJ 4283 SC; Bhawna Garg v. State, MANU/DE/0469/2014; Sushil Kumar v. State of Himachal Pradesh, Criminal Appeal No. 246 of 2014 (HP High Court) decided on 19.09.17; Fayaz Rajak Karajagi v. State of Karnataka, MANU/KA/3395/2015; Pramod Kumar v. State, MANU/DE/0673/2016; Lonkaran Parmar v. State of Maharashtra, Criminal Bail Application 2359 of 2016 decided by the Bombay High Court on 28.11.16; Gaya Prasad Pal v. State, Criminal Application No. 538 of 2016 decided by the Delhi High Court on 09.12.16; Sri Shib Sankar v. State of Tripura, CrI.A (J) 4 of 2015 decided by the Tripura High Court on 10.03.17.

51 State of Himachal Pradesh v. Sanjay Kumar @Sunny, Criminal Appeal Number 1231 of 2016 decided by the Himachal Pradesh High Court on 15.12.16.

52 State v. Talari Manjunatha, Sessions Case No. 524 of 2015, decided on 31.08.2016 (Ananthpuramu). in Andhra Pradesh Report, p.48.

53 Bijoy @ Guddu Das v. the State of West Bengal, C.R.A. 663 of 2016 decided on 02.03.17.

54 Kathiresan v. State, MANU/TN/3871/2015.

Even if Special Courts find valid grounds to distrust children's testimony, they must use all the tools at their disposal before issuing acquittals. Section 165 of *The Indian Evidence Act* provides one such tool for the Court to ask its own questions of witnesses. Appellate Courts have turned this discretion to ask *court questions* into a mandate.

The Supreme Court has urged judges to think of themselves as active and effective instruments of justice rather than mere spectators or recording machines⁵⁵ who remain passive when witnesses err; nothing inhibits the power of the judge to ask court questions.⁵⁶ The Calcutta High Court urged judges to play a supervisory role and not act as mere umpires who observe "how the defense is batting or the prosecution is bowling".⁵⁷

According to the Delhi High Court, by actively eliciting evidence⁵⁸ judges can provide a backstop for prosecutorial indifference.⁵⁹ The Bombay High Court upheld the evidence elicited by the questions of the judge who intervened when mentally challenged victims haplessly agreed to the exonerating suggestions of the defense counsel.⁶⁰

Witnesses turning hostile is a major reason for acquittals as the CCL-NLSIU studies demonstrate. The criminalization of all sexual activity, even among older adolescents, leads these witnesses to testify in favour of their partner. But the high preponderance of these "romantic" cases overshadows others where fear and intimidation deters children and families from providing truthful evidence.

High Court precedents can guide Special Courts here. In one child trafficking case, the Punjab and Haryana High Court denied bail to the defendant though he presented affidavits from the children's families that they had provided false statements at the behest of the police. The High Court reasoned that the affidavits, instead of exonerating the defendant, proved his influence over these witnesses.⁶¹

55 Ram Chander v. State, AIR 1981 SC 1036.

56 State of Rajasthan v. Ani @ Hanif, AIR 1997 SC 1023.

57 Uttara Das v. State of West Bengal, C.R.A. No. 290 of 2016 decided on 16.11.16 by the Calcutta High Court.

58 Indian Evidence Act, 1872, Section 165; Cr.P.C, Section 311.

59 State v. Rahul, (2013) ILR III Delhi 1861.

60 State of Maharashtra v. R. S. Karanjule, Confirmation Case No. 03 of 2013 decided by the Bombay High Court on 11.03.16.

61 Vijay Singh v. State of Punjab, CrI.M.No. M-20523 of 2013 decided by the Punjab and Haryana High Court on 08.07.13.

The truth-seeking function of the trial is better served by court questions that elicit reasons for the witness resiling rather than mute acceptance that the initial complaint was false.

The high acquittal rate is troubling. Not every acquittal can be appealed - for many children the trial court is their Supreme Court and it is critical that Special Courts - the first and last resort for many children - make every effort to ensure that their judgments are based on the whole truth.

V. Other Recommendations to Improve the Conviction Rate

5.1 Strengthening Support Systems for Children

Children are the star witnesses of POCSO trials and there is little likelihood of a conviction without their testimony. Therefore, this section provides recommendations on adequate support systems for children who enter a system more likely to work against rather than for them.⁶²

The CCL-NLSIU studies illustrate the support gap for children subjected to sexual assault. When children feel isolated in court, they are more likely to resile or to make fatal errors in testimony. Without a strong support system, Special Courts are unlikely to be effective in providing justice and deterrence.⁶³ Support Persons can facilitate pre-testimony courtroom orientation to de-sensitize children to courtroom trauma and equip them to aid the truth-seeking function of the trial.⁶⁴

The CCL-NLSIU studies show that civil society groups form the support network (except in Delhi where it is provided by the DLSA). The uniform and effective implementation of this critical provision needs the State's intervention.

The State Should Set up Support Networks

The District Child Protection Unit should partner with local community groups and train them to provide this support.

62 Smart, C., *FEMINISM AND THE POWER OF THE LAW* (Routledge, London, 1989) cited in M. Mendonca (2016), *Protection of Children Against Sexual Offences Act, 2012: A Welcome First Step*, Journal of the Delhi Judicial Academy, Volume 9, pp. 270-292.

63 HRW 2017.

64 *Supra* n.36.

The State Should Standardize Quality of Legal Support to Children

Because India has few standardized systems of legal support, the State should take the lead on child witness orientation. For instance, San Diego, United States, offers “neutral support” to children in terms of a courtroom tour and an introduction to court staff.⁶⁵ By de-sensitizing children to courtroom anxiety, it helps them focus on their role as witnesses.⁶⁶

Similarly, in Canada, all child witnesses are invited to play an online game that simulates a courtroom environment, provides orientation on courtroom procedures and helps the child find validation and affirmation through the process of testifying.⁶⁷

5.2 Special Courts Should Appoint Guardians Ad Litem in Cases of Incest

Children subjected to incest have the least support as they are often abandoned by their own families. Guardians *ad litem* may be helpful where the child experiences not only inner conflict but also family and social pressure to tolerate the abuse. In fact, the Delhi High Court held that the Special Court failed in its *parens patriae* duty by neglecting to appoint a guardian *ad litem* for children whose father was sexually assaulting them after they were abandoned by their mother.⁶⁸

Special Courts can appoint guardians *ad litem* to advise them of the child’s best interests by weighing competing priorities like the 1) child’s rights; 2) rights of the family and 3) duty of the State to protect the child.⁶⁹

In case of incest committed by a family member, the affected family may need support and protection. Mechanisms under the *Protection of Women from Domestic Violence Act, 2005* can be activated on grounds of mental and emotional abuse to the mother caused by the sexual assault of her child.⁷⁰

65 B.Ryan, C. Bashant, & D.Brooks, *Protecting and Supporting Children in the Child Welfare System and the Juvenile Court*, 57 JUV. & FAM.CT.J. 61 (2006).

66 *Id.*

67 Canadian Child Abuse Association, Calgary & Area Child Witness Court Preparation Program, http://www.ccaa.org/ccaa_courtacc_program.html

68 Lavanya Anirudh Verma v. State of Delhi, CRL.M.C. 301/2017 decided by the Delhi High Court on 08.02.17.

69 N. Carr, *Guiding the GALs: A Case of Hesitant Policy-making in the Republic of Ireland*, 2009 12(3) IJFL 60 cited in M. Mendonca (2016), *Protection of Children Against Sexual Offences Act, 2012: A Welcome First Step*, Journal of the Delhi Judicial Academy, Volume 9, pp. 270-292.

70 Protection of Women Against Domestic Violence Act, 2005, Section 3 (a).

5.3 The State Should Create Robust Witness Protection Systems

A major reason for acquittals is that children or their families turn hostile out of fear and intimidation, even though they may claim that the initial complaint was false. This section contains recommendations to address and diagnose the issue.

The Police Should Video-Record the Child's Statement

By following the POCSO Act provisions to video-record the child's statement, the police can produce a verifiable record for the Special Court to assess if the initial complaint was indeed false.

The State Should Create Witness Protection Mechanisms

States should create witness protection systems recommended repeatedly by the Supreme Court and by the Law Commission.⁷¹

This may not solve the problem entirely as the CCL-NLSIU studies show that a significant number of cases are reported against family members who may be able to subvert witness protection programs. CCL-NLSIU's Andhra Pradesh Report shows that families enter into extra-judicial settlements to safeguard the child's future. Despite this, a strong witness protection programme may help improve the conviction rate or at least, diagnose the root cause of the problem.

VI. Conclusion

In 1979, the Supreme Court's decision in *Tukaram v. State of Maharashtra*,⁷² evoked outrage when it dwelt on the 16-year old victim's character to find reasons to acquit police officers who allegedly raped her in their police station. Appellate Courts have evolved significantly and their precedents are progressive. But this rhetoric does not match the reality in Special Courts: children today encounter the same judicial suspicion as the young girl whose character was ripped apart decades ago.

71 HRW 2017, "Everyone Blames Me": Barriers to Justice and Support Services For Sexual Assault Survivors in India citing NHRC v. State of Gujarat, 2003 (9) SCALE 329; PUCL v. Union of India, 2003(10) SCALE 967; Zahira v. State of Gujarat, (2004) 4 SCC 158; Sakshi v. Union of India, 2004 Supp (2) SCR 723; Zahira v. Gujarat, 2006 (3) SCALE 104. See also Law Commission of India, "198th report on Witness Identity Protection and Witness Protection Programmes," August 2006.

72 (1979) 2 SCC 143.

In acquitting a case⁷³ of child trafficking, a Delhi District Court spoke of the negative impact of the prosecution's failure to prove its case or to produce a witness who had provided a "spine-chilling" statement under Section 164, Cr.P.C. The Judge noted that this failure weakens society's faith in the criminal justice system and raises questions about its purpose. She urged statutory authorities to conduct a "reality check" to measure the conviction rate in cases of child sex offences, identify causes of failure and take steps towards effectiveness. The author fully agrees with the observations of the judge with one caveat: the judiciary should add itself to the list of institutions that need a reality check.

The high acquittal rate in POCSO cases is a collective failure and every institution will benefit from introspection. Children deserve nothing less than our very best efforts.

73 State v. Sheela, SC No.: 32/2010 in FIR No.: 616/2006 decided on 06.07.11.

Charges and Sentencing Patterns under the POCSO Act, 2012

SHRADDHA CHAUDHARY*

I. Introduction

The Protection of Children from Sexual Offences Act, 2012 (hereinafter, POCSO Act) created specific sexual offences against children which were broader than the corresponding offences which existed in the India Penal Code, 1860 (hereinafter, IPC) at the time. For instance, prior to the Criminal Law (Amendment) Act, 2013 (CLAA), rape was defined only as penile-vaginal intercourse, whereas the POCSO Act included penetration of the anus/vagina/mouth of a child by the penis or fingers of the accused, or by other objects within the definition of 'penetrative sexual assault'. The POCSO Act also prescribed more severe punishments, including mandatory minimum sentences. The following table captures some of the changes in sentencing introduced by the POCSO Act prior to CLAA:

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The article has benefited from the feedback of Swagata Raha and Arlene Manoharan, Juvenile Justice Team at CCL-NLSIU.

Sl. No.	Offence in the IPC (prior to CLAA)	Sentence	Corresponding Offence in the POCSO Act	Sentence
1.	Rape (S. 375 r/w 376(1)): Only penile-vaginal intercourse	Degree: Imprisonment of not less than seven years, but which may extend upto 10 years or imprisonment for life. Nature: No mandatory minimum. Sentences lower than 7 years could be awarded for adequate and special reasons to be mentioned in the judgement.	Penetrative Sexual Assault (S. 3 r/w S. 4): Forms of penetration other than penile-vaginal	Degree: Imprisonment of not less than seven years but which may extend to imprisonment for life. Nature: Mandatory minimum, no discretion.
2.	Aggravated forms of Rape (S. 365 r/w S. 376(2)): Rape by person in positions of authority, rape of a girl under the age of twelve, etc.,	Degree: Imprisonment of not less than ten years, but which may extend upto imprisonment for life. Nature: No mandatory minimum. Sentences lower than ten years could be awarded for special and adequate reasons to be mentioned in the judgement	Aggravated penetrative sexual assault (S. 5 r/w S.6): A far more extensive definition, including, beyond the categories mentioned in the IPC, rape by relatives and family members, repeated penetrative sexual assault, rape which causes disability, and so on.	Degree: Imprisonment of not less than ten years, but which may extend to imprisonment for life. Nature: Mandatory minimum, no discretion.
3.	Assault with intent to outrage the modesty of a woman (S. 354, IPC)	Degree: Imprisonment which may extend to two years, or fine or both Nature: No mandatory minimum	Sexual Assault (S.7 r/w S.8): touching the sexual organs of a child with sexual intent	Degree: Imprisonment which shall not be less than three years, but which may extend to five years Nature: Mandatory minimum, no discretion

4.	No provision corresponding with aggravated sexual assault	N/A	Aggravated Sexual Assault (S. 9 r/w S. 10): Sexual assault by relatives or persons in positions of power, trust or authority, sexual assault of children below the age of 12, or children with disability, gang-assault, etc.	Degree: Imprisonment which shall not be less than five years, but which may extend to seven years. Nature: Mandatory minimum, no discretion.
5.	No specific provision corresponding with sexual harassment, although S. 354 and S.509, IPC would tend to be used.		Sexual harassment (S. 11 r/w S. 12)	Degree: Imprisonment which may extend to three years, and shall also be liable to fine Nature: No mandatory minimum

The philosophical underpinnings and social role of punishment have been discussed at length by scholars such as Albert Camus and Nicola Lacey. Given that the legislation is called the “Protection” of Children from Sexual Offences Act, it is reasonable to deduce that one of the aims of the legislation, though not explicitly stated, is preventing or deterring child sexual abuse. This is reflected in the enhanced punishments and mandatory minimum sentences described above.¹ The deterrent function of criminal law has also been adverted to by the Supreme Court of India when determining the quantum of sentence to be awarded. For instance, in *Shailesh Jasvantbhai & Anr. v. State of Gujarat & Ors.*,² it was observed,

The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet

1 See, Nicola Lacey, *STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* (Routledge, 1988).

2 (2006) 2 SCC 359.

the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of “order” should meet the challenges confronting the society.

In this chapter, the charging and sentencing patterns captured by the studies of the Centre for Child and the Law (CCL), National Law School of India University, Bangalore (NLSIU) on the Working of Special Courts under the POCSO Act, 2012 in five states (hereinafter referred to collectively as ‘the Studies’, and individually as “Andhra Pradesh Report”, “Delhi Report”, etc.) will be examined. The aim of this chapter would be to consider how far enhanced standards of punishment were adhered to by Special Courts, what their impact has been on the sentencing behaviour of judges (as evident from judgement analysis), and whether they are likely to meet their objective of deterring sexual offences against children. This analysis has been done from a feminist perspective, meaning that gender hierarchies and patriarchal perceptions are factored into the analysis of data, and consciousness raising is considered a method of reform more valuable than legislation per se.

II. Findings related to Charges

The framing of charge is the first judicial process in a criminal trial. In an ordinary criminal proceeding, the accused is first committed before a magistrate,³ the prosecutor lists the offences with which the accused is charged, and states the evidence with which this charge is sought to be proved.⁴ In a trial for an offence under the POCSO Act, the accused is produced directly before the Special Court,⁵ and the prosecutor opens her case before the Special Judge. If the Special Judge feels, after hearing the prosecutor and the accused, that no case is made out, the accused may be discharged. However, if the prosecution succeeds, to any degree, in proving a prima facie case against the accused, the Special Judge proceeds to frame charges under Section 228, Code of Criminal Procedure, 1973 (Cr.P.C).⁶ At this stage, if the accused enters a plea of ‘guilty’, she may be convicted thereon, and a date may be set for sentencing. However, if the accused enters a plea of ‘not guilty’, the criminal trial begins.

3 Cr.P.C, 1973, S. 209.

4 Cr.P.C, 1973, S. 226.

5 POCSO Act, 2012, S. 33(1).

6 Cr.P.C, 1973, S. 228.

Section 216, Cr.P.C gives the court the authority to alter or add to the charge against the accused at any stage of the trial before the judgement. If the alteration or addition of charge is likely to prejudice the accused, the Court may adjourn the trial, or order a retrial so as to allow the accused sufficient time to remount her defence.⁷ Similarly, Section 221(2), Cr.PC, gives the Court the power to convict the accused under a provision different from the one with which he has been charged where multiple offences are made out from the alleged acts of the accused.⁸ This was seen in *State v. Moti Lal*,⁹ where the initial charge was under Section 8, POCSO Act because the accused had allegedly made a 3-year-old child hold his penis. The Special Court observed, “although accused has been charged under section 8 of POCSO Act but on careful perusal of provisions of POCSO Act, it is amply clear that offence of aggravated sexual assault as provided in S. 9 (m) of POCSO Act.” The accused was convicted, and sentenced under S.10 to five years rigorous imprisonment and fine. However, cases such as these are the exception rather than the rule. On the ground, the charges originally framed against the accused ordinarily become the basis on which she is tried, evidence against her is presented, and her guilt or lack thereof is adjudicated upon by the Court. Powers available under Sections 216 and 221(2), Cr.PC are rarely exercised by the Special Courts. Therefore, it is imperative that appropriate charges are framed against the accused.

The Assam, Maharashtra and Andhra Pradesh Reports noted that in several cases, though the facts clearly revealed aggravating circumstances, charges were not framed for the corresponding aggravated offence. For instance, even though the child was under the age of 12 or suffered some form of disability, or became pregnant as a result of the rape, or had been raped or sexually assaulted by a relative or teacher, the charges were framed under Sections 4 or 8, instead of Sections 6 or 10, POCSO Act. In Maharashtra, while aggravated charges were warranted in 603 cases, they were not framed in 309 cases (51.24%),¹⁰ and in Andhra Pradesh, aggravated charges were not applied in 35% cases where they were warranted.¹¹

7 Cr.P.C, Section 216.

8 Cr.P.C, Section 221(2).

9 SC No.111/2/2013, decided on 25.04.2015 in CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (2016), p.61, <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf> (Delhi Report).

10 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra* (2017), p 61, <https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf> (Maharashtra Report).

11 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh* (2017), p.54, <https://www.nls.ac.in/ccl/POSCOAP2017study.pdf> (Andhra Pradesh Report).

Even in Karnataka, while the exact numbers are unavailable, it was noted that in certain cases, charges were incorrectly framed. In *State v. C. Krishna*,¹² the accused was a government teacher, who had been accused of sexually assaulting his student. But charges were filed under Section 7 of the POCSO Act instead of Section 9(f), even though an aggravated offence was clearly constituted based on the status of the offender as staff of an educational institution. Similarly, in *State v. Deepak Sunder Singh Vantimoori*,¹³ three victims aged 11, 8, and 5 years, respectively were sexually assaulted by their neighbour, who had allegedly touched their private parts. In this case, all the victims were aged under 12 years at the time of the offence, and therefore, as per Section 9(m), POCSO Act, an aggravated offence had clearly been constituted. Despite this, the accused was charged only under Section 8 of the POCSO Act.

In the Andhra Pradesh Report, it was noted that there was a practice of framing charges under both aggravated and non-aggravated sections where the allegations made out an aggravated offence. As rightly noted in the report, this may be a good practice as a matter of abundant caution if there is lack of clarity as to which offences were made out.¹⁴

Charges under the POCSO Act were found, across the Studies, to have been framed most commonly under Sections 4, 6, 8, 10, and 12, meaning that charges for other offences such as using a child for pornography, or the failure to report an offence under the POCSO Act, were rarely framed. Charges framed under the IPC appear to have mirrored the charges under the POCSO Act, the most common offences being under Sections 376 (rape), 363 (kidnapping), 366-A (procurement of a minor girl), 354 (outraging the modesty of a woman), 354-A (sexual harassment), and 506 (criminal intimidation). Additionally, charges were also framed under the Information Technology Act, 2000 (hereinafter, IT Act), the Immoral Traffic Prevention Act, 1986 (hereinafter ITPA) and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter, Atrocities Act). It must be noted however, that charges under these legislations were framed, across states, in a very small percentage of cases. This indicates that, in all likelihood, charges under the POCSO Act are, likewise, not being framed in cases which are primarily

12 Spl.C No: 26/2015 decided on 30.01.2016 in CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Karnataka* (2017), p.61, <https://www.nls.ac.in/ccl/jjdocuments/posco2012karnataka.pdf> (Karnataka Report).

13 Spl.SC No. 133/2015 decided on 6.04.2016 in Karnataka Report, pp.61-62.

14 Andhra Pradesh Report, pp. 52-53.

seen as “trafficking” or “pornography” cases. This pigeon-hole approach might be attributable to a desire in the police and the prosecution to present only their strongest case before the Court. The unwillingness to frame charges under legislations such as the IT Act, particularly, may suggest that the police are incapable or ill-equipped to deal with electronic devices and media as tools for committing crimes. However, it is worth examining whether it might not be more prudent to cast the net wider, not only because the digital world is increasingly becoming a space for criminal activity,¹⁵ but also because until the police and the prosecution get in the habit of investigating and prosecuting such crimes, they will be unable to plug the loopholes in their methods or equip themselves to deal with digitally sophisticated criminals.

The analysis of charges framed under the Atrocities Act throw up some interesting questions. In the judgements analysed for the Studies, most victims appear to be from lower socio-economic sections. Since Scheduled Castes (SCs) and Scheduled Tribes (STs) are over-represented in this strata, statistically, a majority of victims are likely to be SCs and STs. Yet the numbers paint a completely different picture. The Delhi and Assam Reports suggest that of all the judgements analysed, not one consisted of a charge framed under the Atrocities Act.¹⁶ Similarly, the Maharashtra and Andhra Pradesh Reports revealed the percentage of charges framed under the Atrocities Act to be an abysmal 5.86% and 2.16% respectively.¹⁷ Given the percentage share of the population of SC and ST communities in India,¹⁸ and the heightened vulnerability of these groups to sexual offences, these numbers are indicative of systemic issues which need to be addressed. Either the low percentages of charges under this legislation suggest a lack of awareness amongst members of the target communities and their inability to access the criminal justice system due to economic dependence on their oppressors, or they point to the far more sinister likelihood that even though cases are reported under the Atrocities

15 Unknown, *The Continuing Rise of Cyber Crime*, FINANCIER WORLDWIDE MAGAZINE (July, 2014), , <https://www.financierworldwide.com/the-continuing-rise-of-cyber-crime/#.Wju18DfhXIU> (Last visited on December 20, 2017).

16 Delhi Report, p. 57-58; CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Assam* (2017), p.53, <https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourtassamPOSCOAct2012.pdf> (Assam Report).

17 Maharashtra Report, p. 62; Andhra Pradesh Report, p. 55.

18 As per the Census of 2011, SCs and STs form 25% of the population of India. See Express News Service, *SCs, STs form 25% of population, says Census 2011 data*, (May 1, 2013) THE INDIAN EXPRESS,, <http://archive.indianexpress.com/news/scs-sts-form-25--of-population-says-census-2011-data/1109988/> (Last visited on December 12, 2017).

Act, charges are not framed under the said legislation both by the police and the Special Courts.¹⁹

III. Sentencing Patterns

As noted in the introductory section of the chapter, the IPC, prior to its amendment in 2013, gave discretion to the judge to impose sentences below the statutory minimum by giving adequate reasons. While the purpose of this provision was undoubtedly to account for disparity in the circumstances and the guilt of accused persons, its exercise was often steeped in patriarchal notions and undue sympathy for rapists.²⁰ For instance, in *State of M.P. v. Munna Choubey & Anr.*,²¹ the Supreme Court, reversing the decision of the High Court, noted that the High Court had used its discretion under the IPC to reduce the sentence of both the accused persons to time served, solely on the ground that they belonged to rural areas. Similarly, in *State of M.P. v. Babbu Barkare @ Dalap Singh*,²² the High Court had reduced the sentence of the accused to time served (11 months) on the ground that the accused was an illiterate labourer aged 20 years. In cases such as *State of A.P. v. Polamala Raju @ Rajarao*,²³ and *State of Rajasthan v. Gajendra Singh*,²⁴ the sentences of persons convicted of rape were reduced below the statutory minimum without providing *any* reason, let alone 'special and adequate' reasons. The experience of disparate and unreasonable use of discretion by judges, and the need to deter sexual offences through certain and proportionate punishment,²⁵ led

19 See: Debashis Chakraborty, D. Shyam Babu and Manashi Chakravorty, *Atrocities on Dalits: What the District Level Data Say on Society-State Complicity*, 41(24) ECONOMIC AND POLITICAL WEEKLY (June, 2006); Rahul Banerjee, *Pillar to Post in Quest of Justice*, 40(31) ECONOMIC AND POLITICAL WEEKLY (July, 2005).

20 "An examination of the "adequate and special reasons" used by the courts, however, show the deployment of irrelevant considerations to award less than the minimum sentence of seven years." See, Jhuma Sen, *Mahmood Farooqui and the "Moral Hierarchies" of Rape*, HUFFINGTON POST (September 5, 2016), http://www.huffingtonpost.in/jhuma-sen/mahmood-farooqui-and-the-moral-hierarchies-of-rape_a_21465604/ (Last visited on December 21, 2017).

21 (2005) 2 SCC 710.

22 AIR 2005 SC 2846.

23 (2000) 7 SCC 75.

24 (2008) 12 SCC 720.

25 The role of certain and proportionate punishment as a means of securing law and order and deterring criminal offences has been recognised in several judgements of the Supreme Court. For instance, in *Sevaka Perumal, etc. v. State of Tamil Nadu*, AIR 1991 SC 1463, the Court noted, "... undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine to public confidence in the efficacy of law and society could not long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private

to the introduction of mandatory minimum sentences, first under the POCSO Act, and subsequently under the Criminal Law (Amendment) Act, 2013.

In his seminal work, Dr. Mrinal Satish refers to three common effects of a statutory minimum sentence.²⁶ *First*, even though sufficient mitigating factors are present, because judges have no discretion, all those convicted of the offence would have to be sentenced to the prescribed statutory minimum period. *Secondly*, and as a result of the first effect, where judges feel that the mandatory minimum sentence is too harsh in the particular case, they may choose not to convict, thereby leading to lower overall rates of conviction. In some cases, this discretion may be exercised at the stage of framing of charge, either by the police or by the Court. And *thirdly*, as a result of the 'anchoring effect',²⁷ most rape offenders may be sentenced to the statutory minimum sentence, even where aggravating factors are present.

All three effects were visible in the results of the Studies. Trends observed across the Studies confirmed that Special Courts leaned in favour of imposing the mandatory minimum sentence, and the maximum sentence was awarded in a very small minority of cases. For instance, minimum sentences were awarded in 54.94% cases in Delhi,²⁸ in 75% cases in Assam,²⁹ 72.05% in Maharashtra,³⁰ and 39.39% in Andhra Pradesh.³¹ This trend is indicative of the perception that the mandatory minimum sentences prescribed under the POCSO Act are relatively higher, and therefore, serve as sufficient punishment. In fact, it is likely that a number of judges also believe that the mandatory minimum sentences under the POCSO Act are excessively harsh.³² This is evident from the fact that Special Court

vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

26 Mrinal Satish, *DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA*, 202-204 (Cambridge University Press, 2017).

27 "Anchoring is a cognitive bias that describes the common human tendency to rely too heavily on the first piece of information offered (the anchor) when making decisions. During decision making, anchoring occurs when individuals use an initial piece of information to make subsequent judgments. Once an anchor is set, other judgments are made by adjusting away from that anchor, and there is a bias toward interpreting other information around the anchor." In this case, the mandatory minimum sentence becomes the anchor. See <https://www.pon.harvard.edu/tag/anchoring-effect/> (Last visited on December 18, 2017) for further reading.

28 Delhi Report, p. 60, <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOCSOAct2012.pdf> (Last visited on December 20, 2017).

29 Assam Report, p. 55.

30 Maharashtra Report, p. 63.

31 Andhra Pradesh Report, p. 56.

32 See Delhi Report, p. 121.

judges have awarded sentences below the mandatory minimum, or have limited punishment to the time served, or indeed, have awarded probation for offences that carry a minimum punishment, even though the POCSO Act does not provide for it. Probation as a sentence was awarded in seven cases for offences carrying a minimum sentence in Delhi,³³ in three such cases in Assam,³⁴ and in three such cases in Maharashtra.³⁵ Hearteningly, probation was not awarded in any of the cases in Karnataka or Andhra Pradesh.³⁶ Mitigating factors such as the age of the accused, her past record, or her status as the bread-winner of her family were commonly considered when awarding a sentence below the statutory minimum. The relatively low overall rates of conviction, and the tendency, noted in the previous section, to frame charges under provisions for non-aggravated offences even where aggravating factors were present, may also be attributed, in part, to these effects.

If the purpose of prescribing enhanced maximum, and mandatory minimum, sentences was to deter sexual offences against children, the sentencing pattern observed across the Studies would indicate that the said objective has not been met. In fact, as is usually the case when sentencing discretion is taken away entirely,³⁷ the effect has been quite the opposite. The results of the Studies by CCL-NLSIU would suggest that certain steps must be taken urgently to effectively implement the POCSO Act.

IV. Recommendations

In order to address the issues identified in the previous sections, two changes need to be made in the charging and sentencing framework. *First*, and in the short-run, the police, prosecutors and judges need to be sensitised to the need to frame charges effectively, and trained to better recognise the offences made out. Judges also need to be made aware of the full extent of their powers under the Cr.PC and equipped to use the powers under Sections 216 and 221, Cr.P.C to correct errors in framing of charge without prejudicing the rights of the accused. *Secondly*, and in the long run, the regime of mandatory minimum sentences must be replaced with comprehensive sentencing guidelines. The Malimath Committee on Reforms of

33 Delhi Report, p. 61.

34 Assam Report, p. 56.

35 Maharashtra Report, p. 64-65.

36 Karnataka Report, p. 63; Andhra Pradesh Report, p. 55-56.

37 See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST LAW REVIEW, 199 (1993); Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLORIDA STATE UNIVERSITY LAW REVIEW 935 (2001).

Criminal Justice System, commenting on the disparity in sentencing, recommended such guidelines as far back as 2003. The Report of the Committee observed,³⁸

The Indian Penal Code prescribed offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum may be prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option[s] is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimise uncertainty to the matter of awarding sentence.

In 2007, the Report of the Committee on Draft National Policy on Criminal Justice, led by Dr. N.R. Madhava Menon found,³⁹

Equality in sentencing is not pursued vigorously and there is no serious attempt yet to standardize the sentencing norms and procedures. The objects of punishment are not served in many cases as a result of such incoherent sentencing practices.

... There has to be a radical change in the law and practice of sentencing if punishment should serve the cause of criminal justice. A set of sentencing guidelines may be statutorily evolved to make the system consistent and purposeful. Fixing mandatory minimum sentences may not be a worthwhile solution. More importantly, the policy should be to increase the choices in punishment and make the other functionaries of the system (like probation service and correctional administration) to have a voice in the sentencing process and administration.

In short, sentences and sentencing require urgent attention of policy planners if criminal justice is to retain its credibility in the public mind.

38 Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System Report, 170 (March, 2003), http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf (Last visited on December 18, 2017).

39 Government of India, Ministry of Home Affairs, Report of the Committee on Draft National Policy on Criminal Justice (2007), 5.5.1, http://mha.nic.in/sites/upload_files/mha/files/pdf/DraftPolicyPaperAug.pdf

In the context of the POCSO Act, implementing these recommendations would mean removing mandatory minimum sentencing, and replacing it with comprehensive sentencing guidelines, which lay down the aggravating and mitigating factors which may be considered by judges in awarding sentences below the statutory minimum. Guidelines such as these would serve not only to individualise justice, but also reduce the disparity in sentencing that is currently the hallmark of judicial treatment of sexual offences. The Supreme Court, in *Narinder Singh & Ors. v. State of Punjab*,⁴⁰ observed,

Law prohibits certain acts and/or conduct and treats them as offences. Any person committing those acts is subject to penal consequences which may be of various kind. Mostly, punishment provided for committing offences is either imprisonment or monetary fine or both. Imprisonment can be rigorous or simple in nature. Why those persons who commit offences are subjected to such penal consequences? There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above or a combination thereof can be the goal of sentencing. Whereas in various countries, sentencing guidelines are provided, statutorily or otherwise, which may guide Judges for awarding specific sentence, in India we do not have any such sentencing policy till date. The prevalence of such guidelines may not only aim at achieving consistencies in awarding sentences in different cases, such guidelines normally prescribe the sentencing policy as well namely whether the purpose of awarding punishment in a particular case is more of a deterrence or retribution or rehabilitation etc.

As discussed in the previous section, taking discretion away from judges has not had the effect of deterring sexual offences against children through enhanced and mandatory minimum punishment. In fact, it has had the opposite effect of causing judges to be hesitant in convicting for offences which, in their opinion, do not deserve a sentence as harsh as the mandatory minimum, and in many cases, to award sentences below the mandatory minimum. Judicial discretion framed within clear policy guidelines is, therefore, likely to be more effective increasing the rates of conviction and extending justice to a larger number of victims. This, in turn, would further the deterrent objective of the POCSO Act.

40 (2014) 6 SCC 466.

Compensation under the POCSO Act, 2012

SWAGATA RAHA*

Introduction

The compensation jurisprudence in India has significantly evolved to recognize the role of the State in providing reparation to victims for its failure to protect them from violence,¹ even if the perpetrators are private citizens. Section 33(8) of The Protection of Children from Sexual Offences Act, 2012 (POCSO Act), empowers the Special Courts to direct payment of compensation in addition to punishment, for physical or mental trauma caused to the child, or for immediate rehabilitation. Rule 7, POCSO Rules, 2012 expands upon this provision and prescribes how, when, and on the basis of what factors, compensation can be directed by Special Courts. Inclusion of such provisions within a penal statute is because the POCSO Act is intended as “a self-contained comprehensive legislation” for protection of children from sexual offences², with emphasis on the best interest

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- 1 In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014, (2014)4 SCC 786; Bijoy v. State of West Bengal, C.R.A. 663/2016 decided by the Calcutta High Court 02.03.17.
- 2 Statement of Objects and Reasons, POCSO Act, 2012.

and well-being of the child at every stage of the criminal process, and “to ensure the healthy physical, emotional, intellectual and social development of the child.”

This chapter examines the implementation of the provisions related to compensation under the POCSO Act and Rules based on CCL-NLSIU’s Studies on the Working of Special Courts in Andhra Pradesh, Assam, Delhi, Karnataka, and Maharashtra.³ A brief explanation of the framework of compensation within the Indian criminal justice system is outlined in Part I, along with relevant references to the international human rights law framework. Select findings of CCL-NLSIU’s Studies are analysed and practical and interpretational issues that have arisen is discussed in Part II. Recommendations for better implementation of the provisions related to compensation is contained in Part III.

I. Compensation under the Indian Criminal Justice System and International Human Rights Law

1.1. Constitutional Framework

The constitutional basis of a victim’s right to compensation lie in the fundamental right to life under Article 21, Directive Principles of State Policy under Articles 38 (State to secure a social order for the promotion and welfare of the people) and 41 (public assistance in cases of sickness, disablement, and undeserved want), and the fundamental duty under Article 51-A “to have compassion for living creatures” and “to develop humanism”.⁴ Applying these provisions, the Supreme Court has directed the payment of compensation for violation of fundamental rights in several cases involving unlawful detention, custodial death, police excesses, custodial rape and rape by public servants. Recognising the long-term impact of rape on victims, the need for an attitudinal change within the criminal justice system, and Article 38(1), Constitution of India,

3 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra* (2017), <https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf> (Maharashtra Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (2016), <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf> (Delhi Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Assam* (2017), <https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourttassamPOSCOAct2012.pdf> (Assam Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Karnataka* (2017), <https://www.nls.ac.in/ccl/jjdocuments/posco2012karnataka.pdf> (Karnataka Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh* (2017), <https://www.nls.ac.in/ccl/POSCOAP2017study.pdf> (Andhra Pradesh Report).

4 Law Commission of India, 154th Report on the Code of Criminal Procedure, 1973, Vol 1, (1996) para 11, pp.60-61.

the Supreme Court in *Delhi Domestic Working Women's Forum v. Union of India*⁵ recommended the establishment of a Criminal Injuries Compensation Board. The purpose would be to ensure compensation is ordered irrespective of conviction, after taking into consideration the pain, suffering, shock, and loss of earnings due to pregnancy and the expenses of child birth because of rape. The National Commission for Women was directed to formulate a scheme for victims of rape. The Scheme was developed in 1995 and revised in 2010,⁶ but has not been adopted by the Central Government.

In *Bodhisattwa Gautam v. Miss Subhra Chakraborty*⁷, the Supreme Court held that the power of a court trying rape to order interim compensation would constitute a part of its overall jurisdiction since the offence of rape is an affront to basic human rights and the fundamental right of life and personal liberty. Recognising the obligation to compensate victims when the offender is a private individual, in *Abdul Rashid v. State of Odisha*,⁸ the Odisha High Court observed, "Expanding scope of Article 21 is not limited to providing compensation when the State or its functionaries are guilty of an act of commission but also to rehabilitate the victim or his family where crime is committed by an individual without any role of the State or its functionary."

1.2. Statutory Framework

Under Section 357(1)(b), Code of Criminal Procedure, 1973 (Cr.P.C), a court can direct that whole or part of the fine imposed as part of a sentence, if recovered, be paid towards compensation for any loss or injury caused by the offence, if such compensation could be recoverable in a Civil Court. Compensation under this provision can be ordered only if the accused is convicted. The fine is payable after the period for appeal has lapsed, or after the appeal has been decided.⁹ When the Cr.P.C was recast in 1973, sub-section (3) was added to ensure that a court could direct the accused to pay compensation to the person who has suffered any loss or injury because of the act for which the accused was sentenced, even if fine

5 (1995) 1 SCC 14.

6 National Commission for Women, Revised Scheme for Relief and Rehabilitation of Victims of Rape, (as revised on 15th April 2010) http://ncw.nic.in/pdffiles/scheme_rape_victim.pdf

7 AIR 1996 SC 922.

8 (2014) 1 ILR-CUT 202.

9 Cr.P.C, Section 357(2).

was not a part of the sentence.¹⁰ In *Hari Singh v. Sukhbir Singh*,¹¹ the Supreme Court observed that the power to order compensation under Section 357(3), which is an additional and not ancillary, sentence, “was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system” and reflected a “constructive approach to crime”.

Further, Section 5(1)(a) of the Probation of Offenders Act, 1958 gives the court releasing an offender after admonition or on probation of good conduct, discretion to direct the offender to pay reasonable compensation for loss or injury caused to any person by the commission of the offence.¹²

In *Ankush Shivaji Gaikwad v. State of Maharashtra*,¹³ the Supreme Court mapped international standards and laws in other countries that led to the recognition of a victim’s right to reparation *within* the criminal justice system. It held that given the reasons for its introduction, Section 357 “confers a power coupled with a duty on the Courts to apply its mind to the question of awarding compensation in every criminal case.” Unless a mandatory duty is cast on the court to consider compensation, in every case, the object of the provision would be defeated. In *re: State of Madhya Pradesh v. Mehtaab*,¹⁴ the Supreme Court held that the duty to ascertain if the victim needs financial relief,

continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing **it is obligatory on the part of the court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much.** (emphasis added)

1.2.1. Evolution of State’s Obligation to Compensate Victims of Crime under the Cr.P.C

The Law Commission of India, in its 154th Report on the Cr.P.C, devoted a chapter to victimology in which the historical, constitutional, and international

10 Cr.P.C, Section 357(3). Law Commission of India, 154th Report on the Code of Criminal Procedure, 1973, Vol 1, (1996) para 9.4, p.61.

11 (1988) 4 SCC 551.

12 CCL-NLSIU’s studies showed that this provision was relied upon in one case each in the Maharashtra Report, p.24 and the Assam Report, p.89.

13 (2013) 6 SCC 770.

14 (2015) 5 SCC 197.

human rights law foundation for compensation for victims of crimes was outlined. The Law Commission observed that compensation cannot be confined to fines and penalties and:

[t]he State should accept the principle of providing assistance to victims out of its own funds, (i) in cases of acquittals, or (ii) or where the offender is not traceable but the victim is identified, or (iii) and also in cases when the offence is proved.¹⁵

Based on the Law Commission's recommendations, the Code of Criminal Procedure (Amendment) Act, 2008 introduced Section 357-A, recognizing the State's duty to compensate victims. Pursuant to Section 357-A(1), State Governments should prepare a Victim Compensation Scheme (VCS) in coordination with the Central Government to provide compensation funds for victims or their dependents who have suffered loss or injury because of a crime and require rehabilitation. If the victim needs to be rehabilitated and the amount awarded under Section 357 is inadequate, or if the case ends in acquittal or discharge, the trial court can make a recommendation for compensation.¹⁶ Compensation can be paid even if the accused is untraceable or the trial did not take place.¹⁷ In such cases, the victim or the victim's dependents can apply to the State or District Legal Services Authority (SLSA/DLSA) for compensation.¹⁸ The SLSA/DLSA should complete the inquiry within two months and award adequate compensation based on the inquiry.¹⁹ They can order immediate interim relief, first-aid or medical benefits to be made available to the victim, based on a certificate from a Magistrate of the concerned area or a police officer not below the rank of officer-in-charge of the police station.²⁰

Explaining the State's role in compensating victims, in *In re: Indian woman says gang-raped on orders of Village Court* published in *Business and Financial News*,²¹ the Supreme Court observed:

15 Law Commission of India, 154th Report on the Code of Criminal Procedure, 1973, Vol 1, (1996) para 11, pp.61-62.

16 Cr.P.C., Section 357-A(3).

17 Cr.P.C, Section 357-A(4).

18 Cr.P.C, Section 357-A(4).

19 Cr.P.C, Section 357-A(5).

20 Cr.P.C, Section 357-A(6).

21 (2014) 4 SCC 786.

No compensation can be adequate nor can it be of any respite for the victim but as the State has failed in protecting such serious violation of a victim's fundamental right, the State is duty bound to provide compensation, which may help in the victim's rehabilitation. The humiliation or the reputation that is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace.

In the same vein, in *Bijoy v. State of West Bengal*,²² a case under the POCSO Act, the Calcutta High Court observed, "The philosophy of awarding compensation by the State is in the nature of a reparation to the victim of crime on its failure to discharge its sovereign duty to protect and preserve sanctity and safety of the individual from the ravages of such crime."

Pursuant to Section 357-A(1), VCS have been framed by 29 States and seven Union Territories.²³ The offences under the POCSO Act are not included in the Schedule of Offences attached to the State VCS in any State or Union Territory, except Rajasthan. The Rajasthan VCS also states that the compensation limits specified in the Schedule "shall not apply in case of compensation awarded by the Special Court under the [POCSO] Act."²⁴ A victim under the POCSO Act, her/his parents or guardian or person whom the child trusts are not prevented from seeking relief under other rules or schemes even if they have received compensation already.²⁵ While the Odisha VCS, 2012, had included references to the offences under the POCSO Act, it was revised in 2017 to exclude them from the Schedule.²⁶ Clause 9(j) of the Odisha VCS clarifies that compensation awarded by the Special Court under Section 33(8), POCSO Act would have to be paid from the funds under the Scheme. The Schemes of Rajasthan and Odisha thus recognize the authority of the Special Court to determine compensation. It should be borne in mind that rape under the Indian Penal Code is not a gender-neutral crime and the victim can only be female. Boys subjected to penetrative sexual assault may not therefore receive compensation amount specified for rape under a State VCS.

22 C.R.A. 663/2016 decided by the Calcutta High Court 02.03.17.

23 NCPCR, Victim Compensation Schemes in the States - Status as on April 2017, <http://ncpcr.gov.in/showfile.php?lang=1&level=1&sublinkid=1275&lid=1506>

24 Rajasthan Victim Compensation Scheme, 2011 substituted vide notification No. f.17(154)Home-10/2010 dated 06.04.2015 which came into force w.e.f 08.04.2015, Clause 5(8) proviso.

25 *Id*, clause 5(5) proviso.

26 The Odisha Victim Compensation Scheme, 2017, <http://oslsa.in/wp-content/uploads/2016/08/victim%20compensation%20scheme-New.pdf>.

All States except Maharashtra include the offence of rape in the Schedule appended to the VCS. The varied limits prescribed by the States drew flak from the Supreme Court in *Tekan alias Tekram v. State of Madhya Pradesh*,²⁷ and all States and Union Territories were directed to “formulate a uniform scheme for providing victim compensation in respect of rape/sexual exploitation with the physically handicapped women” and consider the Goa scheme which prescribed a maximum of Rs 10 lakh if injury causes mental agony to women and child. In *Nipun Saxena v. Union of India*,²⁸ the Supreme Court took note of the absence of an integrated system for disbursement, management, and payment of compensation and directed the National Legal Services Authority to constitute a Committee to prepare Model Rules for Victim Compensation for sexual offences and acid attacks.

In Maharashtra, the *Manodhairya Scheme* provides for immediate financial aid to victims of rape under Sections 375-376 IPC, victims of acid attacks under Sections 326A and 326, IPC and victims of penetrative and aggravated penetrative sexual assault under Section 3, 4, 5, and 6 of the POCSO Act.²⁹ The Scheme underwent major revisions in 2017³⁰ that were challenged before the Bombay High Court in *Forum against Oppression of Women v. Union of India*.³¹ A Committee comprising two judges was constituted to consider the grievances against the Scheme and the petition was disposed after the parties including the State arrived at agreement on the provisions of the Scheme.

1.2.2. Compensation under the POCSO Act and Rules

Sub-section (8) of Section 33, POCSO Act, falls within “Procedure and powers of Special Court” and states, “In appropriate cases, the Special Court may, in addition to the punishment, **direct payment of such compensation** as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.”

27 Criminal Appeal No. 884 of 2015 decided by the Supreme Court on 11.02.16.

28 Orders passed by the Supreme Court on 22.09.17 and 12.10.17 in Writ Petition Civil No. 565/2012.

29 Government of Maharashtra, Women and Child Development Department, Government Regulation No. 2011/ Pra.Kra.6-k, Dated - 21 October, 2013. Regarding starting of the Manodhairya Scheme in the State for providing Financial Assistance and Rehabilitation for Victims of Rape, Child Sexual Assault and Acid Attack.

30 Centre for Child and the Law, (CCL) National Law School of India University (NLSIU), Bengaluru, “Government of Maharashtra’s Revised Manodhairya Scheme, 2017- An Analysis”, 17 August 2017, <https://www.nls.ac.in/ccl/jjdocuments/Manodhairyascheme2017.pdf>.

31 Criminal PIL No. 35/2013 decided by the Bombay High Court on 30.11.17.

While the trial court is expected to make “recommendations” under Section 357-A, the Special Court can “direct payment” of compensation under Section 33(8). This distinction points to a crucial difference between compensation under the POCSO Act and that under the Cr.P.C. Bearing in mind, the description of the POCSO Act as a “self-contained comprehensive legislation”, its emphasis on ensuring the well-being of the child at every stage, and the establishment of Special Courts for trial of offences, it can be argued that the POCSO Act empowers Special Courts to determine the quantum of compensation.

While it is not clear under Section 33(8) whether the State can be directed to pay compensation, the Rules suggest that the State Government can be ordered to pay compensation. Rule 7(5), POCSO Rules, states that the compensation awarded should be paid from the Victim Compensation Fund or any other government scheme for compensating and rehabilitating victims under Section 357-A and be paid by the State Government within 30 days of the receipt of the order.³² In its 240th Report on the POCSO Bill, 2011, the Department-related Parliamentary Standing Committee on Human Resource Development (Standing Committee) highlighted the apparent lack of clarity in Section 33(8) as to whether compensation is payable by the offender or the State. The clarification given by the Ministry of Women and Child Development to the Standing Committee on this point is insightful about the power of the Special Court to determine quantum and award compensation:

15.5 Clarification given by the Ministry was that **this sub-clause should be left to the judgment of the courts to decide where it was appropriate to award compensation to the child. It may also be left to the court to decide the manner and quantum of the compensation to be paid as per available provisions in law or government schemes/programmes whether of the Centre or the State including a part of the penalty imposed on the accused to be paid as compensation.** It was also mentioned that a considered view has been taken in consultation with the Ministries of Home Affairs and Law to leave the quantum of fine to the discretion of the court so as to address different situations as has been the case in IPC in respect of serious offences.³³ (emphasis added)

32 POCSO Rules, Rules 7(4) and 7(5).

33 Department-related Parliamentary Standing Committee on Human Resource Development, Two Hundred Fortieth Report on The Protection of Children from Sexual Offences Bill, 2011 (21 December 2011), <http://www.prsindia.org/uploads/media/Protection%20of%20children/SCR%20Protection%20of%20Children%20from%20Sexual%20Offences%20Bill%202011.pdf>

Under Rule 7(1), POCSO Rules, interim compensation can be awarded by the Special Court in appropriate cases, on its own, or based on an application by or on behalf of the child, at any time after the FIR has been registered. A literal interpretation of Section 33(8) may suggest that compensation can be ordered only if the accused is convicted under the POCSO Act. However, such a narrow interpretation may not be sustainable based on a reading of Rule 7(2), POCSO Rules, Section 357-A, Cr.P.C, and an appreciation of the objectives of the POCSO Act. Under Rule 7(2) compensation can be awarded if the accused is convicted, acquitted, or discharged and the Special Court's opinion is that the child suffered loss or injury. Compensation can be paid even if the accused was not traced or identified or untraceable, if according to the Special Court, the child suffered loss or injury.³⁴

Rule 7(3), POCSO Rules, specifies 12 factors related to the loss or injury caused to the victim, that the Special Court should consider before making "a direction for the award of compensation to the victim" under Section 33(8) read with Section 357-A (2 & 3). Rule 7(6), POCSO Rules, clarifies that a child or a child's parent or guardian or a person whom the child trusts or has confidence in, is not prevented from seeking relief under other rules or Government schemes. This is another point of distinction between the Rules and the VCS of most States, as per which a victim who has received assistance or relief from the State Government or any other source, is ineligible to receive compensation under the scheme, or the amounts must be adjusted.³⁵

Another point of distinction is that the POCSO Act and Rules do not link the payment of compensation to the child's testimony in court. However, the VCS of several States and UTs require the victim to cooperate with the police and the prosecution during investigation and trial to be eligible for grant of compensation. For instance, such a requirement appears in the VCS of Andhra Pradesh and Assam.³⁶ While the victim and family may cooperate with the police during the lodging of the FIR and investigation, it is possible that they may turn hostile in court due to pressure or threats from the accused to compromise, social pressures, or other reasons. Making compensation contingent on cooperation with the

34 POCSO Rules, Rule 7(2).

35 See Andhra Pradesh Victim Compensation Scheme, 2015, Clauses 7(2) and (5); Arunachal Pradesh Victim Compensation Scheme, 2011, Clause 5(1); Assam Victim Compensation Scheme, 2012, Clauses 5(2) and 5(5);

36 Andhra Pradesh Victim Compensation Scheme, 2015, clause 5(d); Assam Victim Compensation Scheme, 2012, clause 4(3).

prosecution means that it will not become available to victims when they need it the most. At such time, if money is offered by the accused and his family, it is even possible that the victim's family may accept it and turn hostile.

Table No.1: Contrasting Compensation under the POCSO Act and Rules and Cr.P.C

Factors	POCSO Act & Rules	Section 357-A Cr.P.C	Section 357, CrPC
Payable For?	<ul style="list-style-type: none"> Physical or mental trauma Immediate rehabilitation Loss/injury 	<ul style="list-style-type: none"> Loss or injury as a result of the crime Rehabilitation 	<ul style="list-style-type: none"> Loss or injury caused by the offence
Who can order?	Special Court can <i>direct</i> payment	Trial court can <i>recommend</i>	Trial Court can <i>order</i>
Is payment linked to conviction?	No	No	Yes
Is payment linked to victim's support to police and prosecution?	No express reference to such requirement.	Yes, under most State Victim Compensation Schemes.	No express reference to such requirement.
Who is compensation payable by?	State Government	State Government	Accused
Who determines quantum?	Special Court	District Legal Services Authority/ State Legal Services Authority	Trial Court
Does it provide for interim compensation?	Yes, for immediate needs of the child for relief or rehabilitation.	Yes, immediate free first-aid facility of medical benefits on certificate of police officer in charge of police station or Magistrate.	No

1.3. International Human Rights Law Framework Relevant to Compensation

The Preamble of the POCSO Act, 2012 includes a reference to the UN Convention on the Rights of the Child, 1989 (UNCRC), which requires States Parties to take appropriate measures to protect children from all forms of sexual exploitation and sexual abuse under Article 34. India's accession to the UNCRC is cited in the Preamble and the standards it prescribes that should be adhered to in "securing best interests of the child". Article 19(1), UNCRC requires States Parties to take appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence including sexual abuse, when the child is in the care of parent(s), legal guardian(s) or person having the care of the child. Where appropriate, the judiciary should be involved in ensuring protective measures to children in such situations.³⁷ Article 39, UNCRC requires States Parties to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse..." The Committee on Child Rights explained in General Comment No. 13 on *The right of the child to freedom from all forms of violence* that judicial involvement would entail orders "to ensure compensation and rehabilitation for children who have suffered violence..."³⁸

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985³⁹ provided for restitution by offenders to victims and recognized that State would have to financially compensate victims who have sustained significant bodily injury or physical or mental impairment as a result of crime, when compensation could not be obtained from the offender. The 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, 2005⁴⁰, adopted by the UN General Assembly, emphasized the State's obligation to provide compensation for economically assessable damage for gross violations of international human rights and

37 UNCRC, 1989, Article 19(2).

38 Committee on the Rights of the Child, General Comment No.13 (2011) The right of the child to freedom from all forms of violence, CRC/C/GC/13, 18 April 2011, para 55(e), http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf.

39 A/RES/40/34, 29 November 1985, Clauses 8 and 12,, <http://www.un.org/documents/ga/res/40/a40r034.htm>.

40 Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, Guideline 20, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

humanitarian law. Both, the Declaration (1985) and the Basic Principles (2005) were cited by the Supreme Court in *Ankush Shivaji Gaikwad*.⁴¹

II. Key Findings on Award and Payment of Compensation under the POCSO Act

2.1. Award of compensation – An Exception

Applying the Supreme Court's ruling in *Ankush Shivaji Gaikwad*, the Sikkim High Court held in *Deo Kumar Rai v. State of Sikkim*,⁴² that Section 33(8), POCSO Act and Rule 7, POCSO Rules impose a mandatory obligation on the Special Court to “apply its mind to the question of the award or refusal of compensation” in a case under the POCSO Act.

However, such application was not noticed in majority of the decisions of the Special Courts. Compensation was awarded only in 36 cases out of 667 cases by Delhi Special Courts *i.e.*, 5.39% of cases and in 17 of the 509 cases in Andhra Pradesh, *i.e.*, 3.3% of cases. It was awarded in 38 cases out of 172 cases in Assam, *i.e.*, 22.09%, and in 125 out of 1330 cases in Maharashtra, *i.e.*, 9.39%. Compensation was awarded in only four out of 110 cases from Bangalore and Belagavi (districts in Karnataka), *i.e.*, 3.63% cases.

Compensation was not considered in every case that resulted in a conviction and in most cases that resulted in an acquittal, even though the victim had sustained loss or injury, or become pregnant. There was no reference to interim compensation in any of the judgments in Andhra Pradesh, Delhi, Maharashtra, and Karnataka. The reference to “interim compensation” appeared in only one judgment in Assam.

2.2. Special Court or DLSA: Who Should Determine Compensation?

While in Delhi, Special Courts decided the quantum in all cases except one,⁴³ in Assam, the Special Court recommended compensation to be determined by the DLSA in 16 out of 38 cases, *i.e.*, in 42.10% cases.⁴⁴ In Maharashtra, in 14 cases, *i.e.*, 11.2%, the Special Court asked the DLSA to determine the quantum of

41 *Ankush Shivaji Gaikwad v. State of Maharashtra*, (2013) 6 SCC 770.

42 *Crl. Appeal No. 13 of 2016* decided by the Sikkim High Court on 13.09.2017.

43 *Delhi Report*, p.42.

44 *Assam Report*, p.31.

compensation to be paid to the victim.⁴⁵ Confusion was prevalent on the ground in Delhi, as victims were made to shuttle between the Special Court and the DLSA, thus delaying monetary relief to them.⁴⁶ In Andhra Pradesh, the DLSA was asked to determine the quantum in three cases, while the Special Court determined quantum in only one case, and ordered the fine imposed on the accused to be paid as compensation in 14 cases.⁴⁷

There are at least three significant challenges in determination of compensation by the DLSA/SLSA in case of offences under the POCSO Act:

- The objective of ensuring speedy relief to the victim that may have been the intention of empowering the Special Court to direct payment of interim or final compensation will be frustrated. Under the State Schemes, the DLSA/SLSAs are required to inquire into the claims and ensure that the eligibility conditions are met. These processes are invariably dilatory despite the stipulation of time limits within the Schemes. The victim is also subjected to secondary victimization by having to appear before another forum, narrate the incident, and follow-up on the application.
- Under the IPC, the definition of rape is not gender neutral qua the victim and compensation for an offence under Section 377, IPC is not listed in the Schedule in most State VCS. This results in the exclusion of male child victims of sexual offences from compensation. Further, compensation for other sexual offences such as sexual assault, aggravated sexual assault, sexual harassment, and using a child for pornography are not covered under the Schedule. Children subjected to these offences are thus left without any recourse under the State VCS or can only avail the small sum prescribed for rehabilitation.
- The DLSA/SLSAs are bound by the conditions and limitations of the State VCS. According to the VCS in Andhra Pradesh⁴⁸, Assam⁴⁹, and Karnataka⁵⁰, a victim will be ineligible to receive compensation if she does not cooperate with the police and prosecution during the investigation

45 Maharashtra Report, p.24.

46 Delhi Report, pp. 112-113.

47 Andhra Pradesh Report, p.22.

48 Andhra Pradesh Victim Compensation Scheme, 2015, Clause 5(c and d).

49 Assam Victim Compensation Scheme, 2012, Clause 4(3).

50 Karnataka Victim Compensation Scheme, 2011, Clause 6(3).

and trial of the case. However, no such limitation is placed on Special Courts under the POCSO Act and Rules. Although sparingly, courts have ordered compensation even though victims have turned hostile. This option may not be available to the DLSA/SLSA in the States in which the VCS permits payment of compensation only if the victim supports the prosecution.

In *Gaya Prasad Pal v. State*,⁵¹ the Delhi High Court was of the view that the order of the Special Court for two separate amounts of compensation payable under Section 33(8), POCSO Act and Rule 7(2) and under Section 357A, Cr.P.C read with Rules 7(3) and 7(4), respectively was an incorrect application of the law. The Special Court had directed the State Government to pay a compensation of Rs 13 lakhs to a 13-year-old girl who had been raped and made pregnant by her step-father, under Section 33(8), POCSO Act and Rule 7(2), POCSO Rules. Further, a sum of Rs 2 lakhs was ordered pursuant to Rule 7(3 & 4), POCSO Rules and Section 357-A, Cr.P.C. The High Court observed that the basis for arriving at the quantum of Rs. 13 lakhs had not been indicated in the order and the “amount seems to have been picked up...just from the air.” The High Court was also critical of the failure to specify who is responsible for payment of Rs. 13 lakhs and that no inquiry about the capacity of the offender to pay had been conducted. The High Court concluded that “the consideration of an award of compensation under section 33(8) of POCSO has to be confined, therefore, to the Scheme under rule 7(4) of the POCSO Rules.” It held:

While there can be no quarrel with the proposition that the factors set out in Rule 7(3) of the POCSO Rules are of utmost and crucial import, the difficulty with the guidance provided by the rules stems from the fact that sub-rule (4) of rule 7 of the POCSO Rules refers one back to the Victim Compensation Fund and the Victim Compensation Scheme prepared and enforced by the Government in terms of Section 357A Cr.P.C. **This clause renders Section 33(8) of the POCSO Act nothing but reiteration of what was already on the statute book in the form and shape of Sections 357 and 357A Cr.P.C.** (emphasis added)

As argued in Section 1.5 above, Section 33(8) cannot be construed as a mere reiteration of Section 357 and 357-A, Cr.P.C. The expression used is “direct payment”, which distinguishes it from the obligation of the trial court to consider whether payment of compensation can be recommended to the SLSA or DLSA. As

51 Criminal Application No. 538 of 2016 decided by the Delhi High Court on 09.12.16.

has been held by the Supreme Court in numerous cases, a legislation should be read in its entirety and its objectives should be considered if there is any ambiguity.⁵² The interpretation of the Delhi High Court in *Gaya Prasad Pal* curtails the authority vested in the Special Courts by the Act and the Rules and defeats the spirit of the law. A contrary view was taken by the Calcutta High Court in *Bijoy*,⁵³ wherein it was held that:

[a] conjoint reading of the Section 33(8) of the Act along with Rule 7 of the Rules made it amply clear that the power of the Special Court to award interim/final compensation is not restricted to the terms of the Victim Compensation Fund promulgated by the State but empowers the Court to award such reasonable and just amount as may be determined by it in the facts of the case in the light of the parameters laid down in Rule 7(3) of the aforesaid Rules to provide succour to a child victim.

A Special Court therefore, cannot be bound by the limitations of a State VCS and can offer speedy relief to a victim of a sexual offence under the POCSO Act by determining the quantum of compensation payable by the accused or the State Government.

2.3. Weak enforcement of State's obligation to compensate victims

In Maharashtra, in 109 cases, i.e., 87.2%, the Special Courts directed the compensation to be paid from the fine imposed on the accused, if realized, or ordered the accused to pay a separate sum as compensation to the victim. It is possible that Special Courts in Maharashtra did not exercise their power under Section 33(8), POCSO Act, because of the *Manodhairya* Scheme, 2013, under which the State Government pays compensation to victims of penetrative and aggravated penetrative sexual assault and rape. In Assam, in 12 out of 38 cases, i.e., 31.57% cases, the fine payable by the accused was directed to be paid to the victim as compensation, or the accused was directed to compensate the victim. In Delhi, the State Government was directed to pay compensation to the victim in all cases except one in which the fine amount was directed to be paid as compensation.⁵⁴ In Bengaluru and Belagavi, fine amount was directed to be paid as compensation in

52 *Workmen of Dimakuchi Tea Estate v. Management of Dimakuchi Tea Estate*, AIR 1958 SC 353; *State of U.P. v. C. Tobit*, AIR 1958 SC 414; *Santasingh v. State of Punjab*, AIR 1976 SC 2386; *Mukesh K.Tripathi v. Senior Divisional Manager*, (2004) 8 SCC 387.

53 C.R.A. 663/2016 decided by the Calcutta High Court 02.03.17.

54 Delhi Report, pp. 42-43.

three cases.⁵⁵ In Andhra Pradesh, in 14 cases the fine imposed on the accused or a part thereof was directed to be paid to the victim and in three cases the accused was directed to pay compensation to the victim.⁵⁶ Another observable trend was that Special Courts in all five States seldom made references to Section 33(8), POCSO Act or Rules while passing an order for compensation.

The judgments did not indicate whether the Special Court had inquired into the capacity of the accused to pay compensation. However, in majority of the cases, the Special Court did not direct the State to pay compensation in case the accused failed to do so or over and above the fine amount. By only directing the fine imposed on the offender to be paid as compensation, the victim is effectively denied timely monetary relief, as it is subject to appeals and realization. Besides, in many cases, the socio-economic profile of the offender would make the payment of the fine difficult. It is therefore, imperative that the mandatory obligation to consider compensation under Section 357(1), Cr.P.C be extended to Section 33(8), POCSO Act and Rule 7, POCSO Rules, so that Special Courts consider whether the victim should be compensated by the State for loss, injury, physical or mental trauma, and whether fine alone would serve as a reasonable compensation.

Another drawback is that compensation is considered only if the accused is convicted. CCL-NLSIU's Delhi Report revealed that Special Courts parked the decision to award compensation till after the evidence of the victim is recorded. NGOs and private advocates representing children voiced that such an approach frustrates the objective of interim compensation. Several judges, prosecutors, and police officials interviewed by CCL-NLSIU in Assam, Delhi, Karnataka, and Maharashtra were of the view that victims who turn hostile should not receive compensation. However, some took the view that if the victim supports the commission of the offence, but turns hostile on the point of identity of the accused, compensation may be payable only if the victim has suffered a loss or injury. Several respondents in Andhra Pradesh were of the view that if compensation is paid on time, victims can be prevented from turning hostile.⁵⁷

Victims who turned hostile received compensation in only one case each in Assam and Karnataka⁵⁸, and five cases in Maharashtra.⁵⁹ No compensation was

55 Karnataka Report, p 27.

56 Andhra Pradesh Report, pp.21-23.

57 Andhra Pradesh Report, pp. 24-25.

58 Assam Report, p.31; Karnataka Report, p.26

59 Maharashtra Report, pp. 26-27.

awarded when victims turned hostile in Andhra Pradesh and Delhi. Compensation was awarded in only one case in Maharashtra in which the accused was acquitted and in two cases in Assam. Since majority of the cases in all five States ended in acquittal, compensation to the victim was not even considered despite the fact injuries or pregnancy were on record.

Special Courts need to reflect upon *Rohtash @ Pappu v. State of Haryana*⁶⁰, wherein the Punjab and Haryana High Court observed,

[i]t is a paradox that victim of a road accident gets compensation under no fault theory, but the victim of crime does not get any compensation, except in some cases where the accused is held guilty, which does not happen in a large percentage of cases.

...

How can the tears of the victim be wiped off when the system itself is helpless to punish the guilty for want of collection of evidence or for want of creating an environment in which witnesses can fearlessly present the truth before the Court? Justice to the victim has to be ensured irrespective of whether or not the criminal is punished.

The Orissa High Court in *Abdul Rashid v. State of Odisha*,⁶¹ held “When the State fails to identify the accused or fails to collect and present acceptable evidence to punish the guilty, the duty to give compensation remains.” These decisions need to be considered by the Special Courts even if cases end in acquittals.

Owing to the stigma attached to sexual offences, relationship between the accused and the victim/victim’s family, financial dependence on the accused, and the absence of victim protection measures, it is not uncommon for victims to turn hostile in court. Poor investigations and weak prosecution have also contributed to acquittals. Therefore, an outright rejection of compensation to victims who do not support the prosecution would result in ignoring the failures of the State in protecting victims, and in effectively investigating and prosecuting the accused and in depriving victims of the full extent of the support envisaged under the Constitution and the POCSO Act and Rules.

60 CrI.A. No. 250 of 1999 decided by the Punjab & Haryana High Court on 1.4.2008.

61 (2014) 1 ILR-CUT 202.

IV. Conclusion

The State's responsibility to compensate victims of crime is evident from the overview of the Indian legal framework. In the context of sexual offences against children, the POCSO Act and Rules specifically authorize the Special Court to determine the quantum and direct payment of compensation by the State Government. The State VCS or State Schemes like the *Manodhairya* Scheme cannot limit the powers of a Special Court to order compensation.

Since the POCSO Act and Rules do not lay down any restrictive conditions, the decision to pay compensation should not be deferred by Special Courts till the child victim testifies in court. Considering the routine delays that take place in trials, the child should not be denied monetary relief due to systemic issues plaguing the criminal justice system.

Special Courts should also apply the Supreme Court's decision in *Ankush Shivaji Gaikwad* and proactively consider payment of compensation by not just the accused, but also the State Government, in every case under the POCSO Act. To ensure that compensation is promptly received by the victim, the DLSA/SLSA should be directed to submit a compliance report within 30 days of the order. This was done by one Special Court in Guntur, Andhra Pradesh⁶² and should be emulated to operationalize the compensation provisions under the POCSO Act and Rules.

Finally, the responsibility of ensuring that child victims receive compensation in a timely manner should also be assumed by the Special Public Prosecutors, Support Persons, Investigation Officers, District Child Protection Units, and Legal Aid Lawyers or private lawyers representing the victim. The Special Court should also proactively connect the child and the family to the District Child Protection Unit if they require support under other Schemes. Unless a child victim and her family are supported in their journey by the State and the State demonstrates acceptance of its failure to protect children from sexual violence, justice runs the risk of being reduced to an illusory ideal not worth pursuing.

62 State v. Avaniagadda Yesu Babu, S.C. No 14/2014 decided on 05.12.2016 (Guntur) in Andhra Pradesh Report, p.23-24.

Challenges related to Age-Determination of Victims under the POCSO Act, 2012

SWAGATA RAHA*

I. Introduction

The Sustainable Development Goal No. 16¹ whose target 16.9, requires States to “provide legal identity for all, including birth registration” by 2030,² signifies global recognition of the relationship between birth registration and access to justice, among other things. Registration of child births is also a binding obligation under Article 7(1) of the UN Convention on the Rights of the Child (UNCRC), which recognizes the right of a child to a name and nationality.

The link between birth registration and access to justice came into sharp focus in CCL-NLSIU’s Studies on the Working of Special Courts in Andhra Pradesh, Assam, Delhi, Karnataka, and Maharashtra (Studies).³ The application of the

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- 1 “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institution at all levels”,
- 2 United Nations General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, A/70/L.1 (18 September 2015), , http://www.un.org/ga/search/view_doc.asp?symbol=A/70/L.1&Lang=E
- 3 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra* (2017), <https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf> (Maharashtra Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (2016), <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf> (Delhi

POCSO Act and certain provisions on aggravated sexual assault hinges on the age of the victim. Unless the prosecution can establish that the victim is below 18 years, the provisions of the POCSO Act will not apply. The absence of documentary proof of age emerged in several cases and in some States more than others. Since children above 12 years constituted majority of victims in all States, age-determination was a critical dimension of most cases. Several cases ended in acquittal because of the prosecution's failure to establish the victim's age, or the Special Court's failure to adhere to age-determination procedures.

This Chapter outlines the legislative framework relevant to age-determination, followed by relevant judicial pronouncements. It highlights the issues and challenges that emerged from an analysis of 2788 judgments of Special Courts of five States and offers recommendations to address them.

II. Relevant Legal Framework

The procedure for age-determination was first provided in Rule 12(3) of the Juvenile Justice (Care and Protection of Children), Rules, 2007 (JJ Model Rules, 2007). It stated:

In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot

Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Assam* (2017), <https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourtassamPOSCOAct2012.pdf> (Assam Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Karnataka* (2017), <https://www.nls.ac.in/ccl/jjdocuments/posco2012karnataka.pdf> (Karnataka Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh* (2017), <https://www.nls.ac.in/ccl/POSCOAP2017study.pdf> (Andhra Pradesh Report).

be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

In *Jarnail Singh v. State of Haryana*,⁴ the Supreme Court held that the process described above should be applied to determine the age of a child victim as well.

Reference to age-determination appears in Section 34(2), POCSO Act, which states, “If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.”

Section 34(3), POCSO Act, clarifies that the Special Court’s order will not be rendered invalid, if subsequent proof emerges that the age was not correct. A conjoint reading of the Supreme Court’s decision in *Jarnail Singh* and Section 34(2), POCSO Act would imply that in cases before the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015) came into force, (i.e., on 15 January 2016,) the Special Courts would have to follow the procedure under Rule 12, JJ Model Rules, 2007 to determine the age of the victim or the accused, if that was a question before them.

In *Shah Nawaz v. State of Uttar Pradesh*⁵, the Supreme Court observed that a medical opinion could be sought only if the certificates mentioned in Rule 12 were unavailable. In *Ashwani Kumar Saxena v. State of Madhya Pradesh*,⁶ the Supreme Court observed that several courts were not merely making an inquiry into age as mandated by the JJ Act, but were proceeding to conduct a trial into this matter, and held:

4 *Jarnail Singh v. State of Haryana*, (2013) 7 SCC 263.

5 (2011) 13 SCC 751.

6 *Ashwani Kumar Saxena v. State of Madhya Pradesh*, AIR 2013 SC 553.

There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, J.J. Board or a Committee functioning under the J.J. Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. **Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the J.J. Board or the Committee need to go for medical report for age determination.**⁷ (emphasis added)

The Supreme Court also observed that examination of witnesses including the conduct of ossification test and calling for an odontology report, even if matriculation or equivalent certificate, the date of birth certificate from the school last or first attended, the birth certificate given by a corporation or a municipal authority or a panchayat are available, casting doubt on such certificates and launching into a probe was unwarranted.⁸

Section 94(1), JJ Act, 2015 states that the Child Welfare Committee (CWC) or Juvenile Justice Board (JJB) should treat a person as a child, if, based on appearance it is obvious that the person is a child, without waiting for further confirmation of age. Section 94(2), JJ Act, 2015 specifies the procedure that should be followed when the person's age is doubtful. In such situations, the CWC or JJB should determine age "by seeking evidence by obtaining" the birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination board.⁹ If these are not available, then the birth certificate by a corporation, municipal authority, or panchayat can be considered.¹⁰ If none of the above-mentioned documents are available, then the JJB should order an ossification test or any other latest medical age determination test.¹¹ The JJ Act, 2015 does not make any express reference to a Medical Board or specify that the benefit of the margin of error should be given to the child victim or child in conflict with the law.

7 *Id* at para 36.

8 *Id* at para 37.

9 JJ Act, 2015, Section 94(2)(i).

10 JJ Act, 2015, Section 94(2)(ii).

11 JJ Act, 2015, Section 94(2)(iii).

However, in earlier decisions of *Omprakash v. State of Rajasthan*,¹² and *Birad Mal Singhvi v. Anand Purohit*¹³ it has been held that where the school records are ambiguous and do not conclusively prove majority, a medical opinion cannot be overlooked. However, the ruling in *Ashwani Kumar Saxena*, is later in time and has been reiterated in several cases of the Supreme Court since then, with the aim of ensuring that the benefits of the JJ Act are accorded to a person whose age is doubtful. In the context of child victims, in *State of Madhya Pradesh v. Anoop Singh*¹⁴ involving a charge of statutory rape under section 376 of the IPC against a child who was less than 16 years of age, the Supreme Court overlooked the discrepancy of two days between the birth certificate and the date of birth mentioned in the school records. As per medical opinion, the child was above the age of 15 and below the age of 18 years. The defence argued that since there was a discrepancy in the records of the victim, the medical opinion should be relied upon, which did not confirm that the child was below the age of 16. The Supreme Court, however, rejected the argument and placed reliance on the documentary evidence and considered the discrepancy immaterial.¹⁵

The question that arises is whether Special Courts under the POCSO Act need to follow the procedure prescribed under Section 94, JJ Act, 2015. It may be argued that since Section 94, JJ Act, 2015 does not refer to a “court”, a Special Court under the POCSO Act is not bound to adhere to the age-determination procedure prescribed under the JJ Act, 2015 and that Section 34(2), POCSO Act leaves it to the Special Court as to how age should be determined. Judgments of the Delhi and Madras High Court are instructive in this regard. In *State (Govt. of N.C.T. of Delhi) v. Kishan*,¹⁶ the Special Court had relied on Section 94, JJ Act, 2015 and held that the victim was a child based on the records from the first attended school and no infirmity was found with respect to this aspect of the decision by the Delhi High Court. More specifically, in *Rajendran v. State*,¹⁷ a division bench of the Madras High Court relied on Section 94(2), JJ Act, 2015 to conclude that the victim under POCSO Act was a child, based on the following interpretation:

12 (2012) 5 SCC 201.

13 AIR 1988 SC 1796.

14 (2015) 7 SCC 773.

15 *Id.* at para 11.

16 Crl.L.P. 558/2017 decided by the Delhi High Court on 26.09.17.

17 Crl. A.No. 483 of 2016 decided on 23.12.16 by the Madras High Court. This interpretation was taken by the same division bench in *N.Rasu and Ors. v. State*, Crl. A. Nos. 372, 376, 400, 630 of 2016 and Crl. M.P. No. 10364 of 2016, decided on 14.12.2016.

As per Section 34 of POCSO Act, the age of the victim shall be determined by the court. As indicated in sub-section (1) of Section 34 of POCSO Act, the age of the victim could be determined by following the procedure contemplated in Section 94 of the Juvenile Justice [Care and Protection of Children] Act, 2015.

An application of the above-mentioned rulings and the provisions of the POCSO Act and JJ Act 2015, it would emerge that:

- The Special Courts should undertake age determination, if the age of the victim or accused is doubtful, or is a question before them;
- In trials after the JJ Act, 2015 came into force, the Special Court should adhere to the provision of age determination specified under Section 94, JJ Act 2015, to satisfy itself about the age of a person.
- A person should be presumed to be a child based on appearance, if it is obvious, without waiting for further confirmation of age.
- If the age is doubtful, reliance should be placed on the birth certificate from school, or matriculation or equivalent certificate from the concerned examination board. Only if these are unavailable, the birth certificate by a corporation, municipal authority, or panchayat can be considered. If no certificate is available, only then an ossification test or any other latest medical age determination test can be ordered.

III. Issues Surrounding Age-determination

3.1. Absence of birth certificates and poor maintenance of records

Birth registration is considered “a first step towards safeguarding individual rights and providing every person with access to justice and social services.”¹⁸ Data from the National Family Health Survey (NFHS)-4 (2015-16), reveals that birth of 79.7% children in India below five years was registered, a marked improvement from 41.2% in 2005-06.¹⁹ Yet, there remains a gulf between registration and certification, (See Table No.1), that implicates the determination of the age of victims under the POCSO Act.

18 Report of the Secretary-General, Progress towards the Sustainable Development Goals, E/2017/66 (11 May 2017), p.17, http://www.un.org/ga/search/view_doc.asp?symbol=E/2017/66&Lang=E.

19 Ministry of Health and Family Welfare, National Family Health Survey-4 (2015-16) India Fact Sheet, p.2, <http://rchiips.org/NFHS/pdf/NFHS4/India.pdf>.

Table No.1: Data on Birth Registration and Certification in Five States

State	Children under 5 years whose birth was registered (Source: NFHS 2015-16)	Children below 5 years having birth registration done Source: DLHS (2012-13)	Children below 5 years who received birth certificate (out of those registered (Source: DLHS 2012-13)
Andhra Pradesh	82.7% ²⁰	67.6% ²¹	76.1% ²²
Assam ²³	94.2% ²⁴	87.1%	69.1% ²⁵
Delhi ²⁶	86.8% ²⁷	NA	NA
Karnataka	94.9% ²⁸	85.8% ²⁹	89.1% ³⁰
Maharashtra	95.1% ³¹	88.4% ³²	88.1% ³³

Age determination formed a crucial part of the inquiry in most cases owing to the poor state of age documentation. Birth records are crucial in cases in which the

20 Ministry of Health and Family Welfare, National Family Health Survey -4 (2015-16), State Fact Sheet – Andhra Pradesh, p.2, http://rchiips.org/NFHS/pdf/NFHS4/AP_FactSheet.pdf.

21 Ministry of Health and Family Welfare, District Level Household and Facility Survey-4, State Fact Sheet- Andhra Pradesh, (2012-2013), p.3, <http://rchiips.org/pdf/dlhs4/report/AP.pdf>.

22 *Id.*

23 Vital Statistics Division, Office of the Registrar General & Census Commissioner, India, “Annual Health Survey 2011-2012 Fact Sheet – Assam”, p.100, http://www.censusindia.gov.in/vital_statistics/AHSBulletins/AHS_Factsheets_2012-13/FACTSHEET-Assam.pdf.

24 Ministry of Health and Family Welfare, National Family Health Survey -4 (2015-16), State Fact Sheet – Assam, p.2, http://rchiips.org/NFHS/pdf/NFHS4/AS_FactSheet.pdf.

25 *Supra* n.22.

26 Ministry of Health and Family Welfare, National Family Health Survey -4 (2015-16), State Fact Sheet – Delhi, p.2, http://rchiips.org/NFHS/pdf/NFHS4/DL_FactSheet.pdf.

27 *Id.*

28 Ministry of Health and Family Welfare, National Family Health Survey -4 (2015-16), State Fact Sheet – Karnataka, p.2, http://rchiips.org/NFHS/pdf/NFHS4/KA_FactSheet.pdf.

29 Ministry of Health and Family Welfare, District Level Household and Facility Survey-4, State Fact Sheet- Karnataka, (2012-2013), p.3, <http://rchiips.org/pdf/dlhs4/report/KA.pdf>.

30 *Id.*

31 Ministry of Health and Family Welfare, National Family Health Survey -4 (2015-16), State Fact Sheet – Maharashtra, p.2, http://rchiips.org/NFHS/pdf/NFHS4/MH_FactSheet.pdf.

32 Ministry of Health and Family Welfare, District Level Household and Facility Survey-4, State Fact Sheet-Maharashtra, (2012-2013), p.3, <http://rchiips.org/pdf/dlhs4/report/MH.pdf>.

33 *Id.*

victim refuses a medical examination, particularly in cases in which the victim is admittedly in a 'romantic relationship' with the accused and claims to be above 18 years of age. For instance, in *State v. Budheswar Bhumiz*³⁴ and *State v. Hunmoni Nath*,³⁵ the victims admitted to being in a relationship with the accused and denied a medical examination. In *Nath*, the victim's father claimed that she was 14 years old, while the victim stated that she was 17 years old; and in *Bhumiz*, the victim stated that she was 18 years old. In the absence of documentary proof and the medical report, the judge concluded that the victim's age was not conclusively established.

The poor maintenance of birth records resulted in their rejection by some Special Courts. In *State v. Kanwaljeet Singh*,³⁶ a Special Court in Delhi did not rely upon the birth certificate as it stated the prosecutrix to be 'male'. In *State of Maharashtra v. Atish Suresh*,³⁷ a Municipal Council clerk was examined to determine the age of the victim. He produced the birth registration register which contained the date of birth, which matched the date stated by the victim. However, the register was not paginated, the births were not recorded chronologically and there was no proof to show that the birth register was maintained by the Department of Municipal Council. The victim was born in 2000, but the birth certificate had been issued in 2007, although it should have been issued within 30-90 days of birth. Owing to the poor maintenance of the register, the Special Court concluded that the prosecution had not established that the victim was a child, as it could not be said that the "birth extract was made by public servant in discharge of his official duty and it is a public official book register or record".

3.2. Non-application of JJ Act

The application of *Jarnail Singh* and the age-determination procedures in the JJ Model Rules, 2007 were an exception in Delhi³⁸, Maharashtra³⁹, and Assam.⁴⁰ In *State v. Bhavdu @ Somnath Rama Nandede*,⁴¹ a Special Court in Maharashtra applied

34 POCSO Case No. 28/15 decided on 01.08.2016 (Assam).

35 POCSO Case No. 24/15 decided on 21.11.2015 (Assam).

36 S.C. No. 43/14 decided on 29.09.2014 in Delhi Report, p.100.

37 Spl. Case No.-91/2014 decided on 19.9.2016 (Thane) in Maharashtra Report, p.91.

38 Delhi Report, p.97.

39 Maharashtra Report, pp. 40-41.

40 Assam Report, p.75.

41 Sessions Case No. 235 of 2014, decided on 10.04.2015 (Nashik) in Maharashtra Report, p.41.

Rule 12(3), JJ Model Rules, 2007. While no birth certificate was available, the school register from the time of admission of the victim to Standard I was produced by the prosecution. The age mentioned in the register was based on the date of birth stated by the father of the victim. The Special Court considered this sufficient proof of the victim's age, because the parent of the victim would be most likely to know the date of birth of the victim, and nothing had been brought forward during the cross-examination of the father of the victim to falsify his testimony.

There was no reference to *Jarnail Singh* or the JJ Model Rules, 2007 or JJ Act, 2015 in the judgments studied in Andhra Pradesh and three districts in Karnataka. Most Special Courts failed to exercise their power under Section 34(2) read with these provisions and order a medical test when no birth certificate was placed on record by the prosecution.⁴² Some Special Courts in Assam,⁴³ for instance, noted the absence of documentary proof of age, even though the child victim attended school and were critical of the police's failure to collect the necessary documents.

3.3. Inconsistent Appreciation of School Records

Where school records were adduced, it emerged in many cases that the age of the child was entered only upon the oral statement of the parents and not based on any birth certificate.⁴⁴ While in some cases in Maharashtra, Special Courts accepted the date of birth based on school records, in most cases it was rejected because the basis on which it was recorded was not established before the Special Court.⁴⁵ In *State v. Vaibhav Vinayak Choudhari*,⁴⁶ the defence contended that the birth certificate issued by the Municipal Corporation could not be relied upon, unless an officer from the Municipal Corporation was examined. The prosecution relied on Section 35, Indian Evidence Act, 1872, (IEA), and the Supreme Court's decision in *Birad Mal Singhvi v. Anand Purohit*,⁴⁷ as per which three conditions should be satisfied for a document to be admissible under Section 35, IEA:

firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant

42 Assam Report, pp. 78-79; Maharashtra Report, p.91.

43 *State v. Krishna Sahu*, G.R. Case No. 870 of 2014 decided on 27.07.2016; *State v. Uttam Gogoi*, PCSO case 25/14 decided on 01-12-15 in Assam Report, p.79.

44 Delhi Report, p.96; Maharashtra Report, p.91.

45 Maharashtra Report, p.42.

46 Session Case No. 21/2014 decided on 28.07.2016 (Thane) in Maharashtra Report, p.42.

47 AIR 1988 SC 1796.

fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law.

The prosecution argued that the birth certificate fulfilled all three conditions and was therefore an admissible piece of evidence. The presumption as to genuineness of certified copies under Section 79, (IEA), and production of certified copies to prove contents of public documents under Section 77, IEA, were relied upon. The Special Court in Maharashtra concluded that the genuineness of the birth certificate should be presumed as it was a certified copy of a public record and was therefore a trustworthy piece of evidence about the victim's age.

In *State v. Siddheshwar Dattoba Pawar*,⁴⁸ the victim's age was 13 years as per oral evidence and the school records. No proof of the basis on which the age was recorded by the school was adduced before the Special Court. The Special Court observed, "in usual practice, school record is presumed genuine for ascertaining the age of a student." It concluded that, in ordinary course, if the child had passed every year since admission, she would be between 13 and 14 years on the day of the incident, and thus a child under the POCSO Act.

Most Special Courts did not accord face value to the documents adduced because the victim herself testified that the date of birth given at the time of school admission was incorrect. For instance, in *State v. Chiranjit Lal*,⁴⁹ the documentary proof showed that the victim was below 18 years, but reliance was not placed on it because it was recorded based on the oral statement of the father. Reliance was placed on *Birdi Mal Singhavi v. Anand Purohit*,⁵⁰ a case under the Representation of the People Act, 1951, in which the Supreme Court held that no evidentiary value could be given to date of birth entry, in absence of material on which entry is made.

In *State v. Dildar Kesharwani*,⁵¹ though the head mistress was examined and true copies of the school register and leaving certificate were filed, the Special Court in Maharashtra held that the prosecution had not established the accuracy of these documents. It observed:

The entry as regard the date of birth taken ... is merely carry forwarded from the entry of the previous school record. There is nothing on the record to demonstrate

48 Special (POCSO) Case No. 09/2014 decided on 11/02/2015 (Beed) in Maharashtra Report, p.42.

49 S.C. No. 199/13 decided on 30.08.2014 in Delhi Report, p.99.

50 1988 Supp. SCC 601.

51 S.T. No. 423/2014 decided on 05.04.2016 (Nagpur) in Maharashtra Report, p.42.

as to who supplied the information as regard the date of birth of the prosecutrix in her previous school. Therefore, it cannot be said that it is the primary evidence as regard the date of birth of the prosecutrix. Even otherwise, entries in school record made by Head Master or Head Mistress in discharge of their official duties, can be regarded as pieces of circumstantial evidence and not as direct evidence of the date of birth of the prosecutrix. A school admission register or leaving certificate is not a conclusive evidence of the age of the prosecutrix.

In some cases, in Delhi, even though as per the school record, the victim was a minor, the accused was acquitted, because the prosecution had failed to adduce a government record.⁵² In *State v. Chandan*,⁵³ it was held that where there was a confusion as to age, preference should be given to the age as stated by the family members. In *State v. Sonu Sobrati Khan*,⁵⁴ a Special Court in Maharashtra held, “non-production of birth certificate on record on the basis of which entry of date of birth of the girl in school record is made has to be held as fatal lacuna and create doubt about exact age of the girl.”

3.4. Laxity in “romantic cases”

It was observable that Special Courts in Delhi, Maharashtra and Andhra Pradesh adopted a lenient approach towards age-determination in cases in which the allegation revealed that the child was in a relationship with the accused or had married him. The Special Courts leaned in favour of deeming the victim a major, in cases in which the victims were married to the accused or admitted to be in a relationship with them and turned hostile. In these cases, the Special Court did not scrutinize the age of the victim carefully, or order any age determination tests.

For instance, in *State of Delhi v. Ajit Kumar*⁵⁵ the victim had married the accused and even had a child with him. While the mother initially claimed that the victim was 14 years old, at trial, she and the victim both turned hostile and testified that she was 20 years old when she eloped. The victim also testified that the date of birth

52 *State v Praveen*, S.C. No. 254/14 decided on 04.06.2015 (Delhi); *State v. Muntiaz*, S.C. No. 26/15 decided on 04.08.2015 (Delhi) in Delhi Report, p.101.

53 S.C. No. 127/13 decided on 06.01.2015 in Delhi Report, p.101.

54 Special Case No. 82/2014 decided on 23.07.2015 (Thane) in Maharashtra Report, p.43.

55 SC No. 39/14 decided on 28.07.2015 in Delhi Report, p.100. The lens adopted by judges while scrutinizing the testo be unreliable. The appreciation of the child of her child. relevant cha The lens adopted by judges while scrutinizing the testo be unreliable. The appreciation of the child of her child. relevant cha The lens adopted by judges while scrutinizing the testo be unreliable. The appreciation of the ch

provided by her parents to the school was wrong. The Special Court thus decided not to rely on the school records. In *State of Andhra Pradesh v. Jayanti Manikanta*,⁵⁶ the accused and the victim had eloped and performed a marriage. The victim's family alleged that the marriage had been performed and registered, based on a fake school leaving certificate obtained by the accused. The victim turned hostile and claimed she was a major and her family also turned hostile and stated that they had no complaint against the accused. The principal of the school from which the allegedly fake certificate was obtained denied issuing any certificate as to the age of the victim. Nevertheless, the Special Court held that the prosecution had failed to prove minority and acquitted the accused.

In *State of Assam v. Md. Jakir Ali*⁵⁷, a 14-year-old girl had allegedly been kidnapped by the accused and subjected to penetrative sexual assault. During chief examination, the victim's father stated that she was 17-18 years at the time of occurrence. The radiological examination pegged her age at 16-17 years. In his cross examination, the father stated that the matter had been resolved amicably at the village level and that the girl had eloped with the accused willingly. He indicated his desire to get the girl married to the accused. The victim stated that she was in love with the accused and his parents had approached her parents, but they had turned down the proposal, leaving her with no alternative but to elope. In her cross-examination, she categorically stated that she was 18 years at the time of the incident. The Special Court observed that since the margin of error was two years on either side, she could be treated as a major at the time of occurrence and thus considered legally competent to consent.

3.4. Benefit of Margin of Error seldom given to the victim

In majority of the cases, the benefit of the margin of error with respect to ossification test results was not given to the victim. If the victim's age as per radiological examination was above 14 years and below 16 years, or above 16 years and below 18 years, based on margin of error of plus or minus two or three years, many Special Courts in Maharashtra added two or three years to the upper age, to conclude she was not a child, while few gave the benefit to the victim. This is contrary to the Supreme Court's ruling in *State of Karnataka v. Bantara Sudhakara*⁵⁸

56 Sessions Case No. 48/2014 decided on 01.05.2015 (Visakhapatnam) in Andhra Pradesh, p.82.

57 Special (POCSO) Case No.13/16 decided on 14.07.2016 in Assam Report, p.65.

58 *State of Karnataka v. Bantara Sudhakara*, (2008) 11 SCC 38; *State of U.P v. Chhoteylal*, (2011) 2 SCC 550.

that "...merely because the doctor's evidence showed that the victims belong to the age group of 14 and 16, to conclude that the two years age has to be added to the upper age limit is without any foundation."

In *State of Assam v. Md. Abdul Kalam*,⁵⁹ the accused committed penetrative sexual assault on the victim on a couple of occasions, based on a promise to marry her. When she became pregnant, he refused to marry her. She was five months pregnant when the FIR was lodged. The medical report did not specify a range, but stated that she was below 18 years. In her statement under Section 164, Cr.P.C, that was recorded at least six months after the incident, the victim stated that she was 18 years old. Although she had attended school and had dropped out a year before the incident, no school records were produced or sought. Her father stated she was around 17 years at the time of the incident. According to the Special Court, the parents' testimony about the sequence of birth of the children and the number of years they were married, would suggest that she was a minor at the time of the incident. With respect to the margin of error, the Special Court held:

if benefit of doubt of variation of two years in estimation of age on the basis of the Radiological report by Doctor is given to the accused in POCSO cases, no child who do not have a birth certificate and who is above the age of 16 years will get justice under the Provisions of the Protection of Child from Sexual Offences Act, 2012.

In *State v. Varun*,⁶⁰ a Special Court in Delhi held that "in view of the objectives of the Protection of Children from Sexual Offences Act, 2012 if there is any doubt about the age of the girl child, we must lean towards the juvenility of the victim."

However, the position taken by the Special Courts in *Abdul Kalam* and *Varun* are an exception. Majority have applied the principle that the view in favour of the accused should be adopted when two views are possible and interpreted the results of an ossification test accordingly.

In *State of Maharashtra v. Nitin Suryawanshi*,⁶¹ the victim had allegedly been raped by the accused. Her age was 14 years as per the FIR, the entries in the school record, and her mother's testimony. Even though her testimony was recorded a year after the incident, she stated her age as 14 years, causing the Special

59 Special (POCSO) Case no. 23 of 2015 decided on 10.03.2016 in Assam Report, p.78.

60 SC No. 108/13 decided on 29.10.13 in Delhi Report, p.102.

61 Special Case (POCSO) No. 49/2014 decided on 16.07.2016 (Latur) in Maharashtra Report, p.43.

Court to regard her statement about her age as being unclear and unreliable. The Head Master of the school in which the victim studied, who had personally filled the information, was examined. The validity of this record was questioned because the victim's guardian's name was not recorded and the date of birth was mentioned orally by the parents and no birth certificate or extract issued by the Gram Panchayat or Municipality was produced. The prosecution also examined the doctor who referred the victim to a radiologist who in turn stated that she was above 14 years and below 16 years. The doctor who testified, had not personally examined the victim and admitted that, as per Modi's Jurisprudence, the margin of error may be up to three years plus/minus. The Special Court relied on *Balasaheb v. State of Maharashtra*,⁶² a judgment of the Bombay High Court which predated the JJ Act, 2000, and held that the error in case of age-based ossification test can be plus/minus three years and concluded that the advantage of the margin of error should be given to the accused, as based on the margin of error, the victim appeared to be 19 years of age.

In *State of Andhra Pradesh v. Dukka Suresh & Anr.*,⁶³ the accused was acquitted of the charges under the POCSO Act, because the prosecution failed to prove that the victim was a minor. The victim stated she was 12 years in her statement to the police in one statement and 18 years in another. The radiologist stated that she was above 16 years and in the age group of 16 to 17 years. The Special Court relied on *Satpal Singh v. State of Haryana*,⁶⁴ a judgment predating *Ashwani Kumar Saxena*, wherein the Supreme Court observed:

...very often parents furnish incorrect date of birth to the school authorities to make up the age in order to secure admission for their children. For determining the age of the child, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc., the entry in the school register is to be discarded.

62 1994 Cr.L.J. 3044 Bom.

63 POCSO Sessions Case No. 21 of 2015, decided on 24.03.2016 (Vizianagaram) in Andhra Pradesh Report, p.81.

64 2010 CRI.L.J.4283.

The Special Court then observed,

It is well settled Law when there is no clear cut age proof and the evidence itself goes to show that she is aged about 18 years, the benefit has to be given to the defence counsel since there is no cogent proof placed by the prosecution with regard to the age of the victim girl that she is below 18 years to come under the definition of section 2 (d) of the Protection of Children from Sexual offences Act and, therefore, the prosecution has miserably failed to prove that the victim girl is a child within the definition of section 2 (d) of the Protection of Children from Sexual Offences Act.

3.5. Investigation Lapses and Gaps in Prosecution

The police and prosecution, both play an important role in ensuring that the victim's age is established and the age-determination procedure is followed. In Assam and Delhi, it was observed that Investigating Offices (IO) routinely ask the doctors to assess the age of a child even when birth certificates are available. For instance, in the case of *State v. Manoj Rajput*,⁶⁵ an ossification test was conducted even though school records were produced by the prosecution proving her to be a minor as on the date of the incident. The ossification test estimated the age of the child to be between 17 and 18 years, and this led to the acquittal of the accused.

A major lapse across States was the failure of the IO in collecting documents related to the age of the child or requesting a medical test when the documents were unavailable. In *State v. Gurdeep Singh*,⁶⁶ a Special Court in Delhi reprimanded the IO for not having done an age determination as per procedure. The Special Court lamented:

It has been repeatedly observed by this court that the Investigating Officers make no effort to collect documents relating to age of the victim/prosecutrix in border line cases, where the age of the victim/prosecutrix is between 15/16 years and above, thus, giving a readymade defence to the accused to take a plea that the victim was above 18 years of age as on the date of commission of offence. This also has an adverse effect of taking the case out of the purview of the POCSO Act, which prescribes more stringent punishment for offences of sexual assault and sexual harassment etc. as compared to corresponding provisions under the Indian Penal Code. It is unfortunate that the I.Os in such cases come up with plea that such cases are amongst first few cases investigated by them. Even

65 S.C. No. 110/13 decided on 31.10.2013 in Delhi Report, p.102.

66 S.C. No. 61/13 decided on 11.04.2014 in Delhi Report, p.90.

then, the duty of the senior officers i.e. the SHO and the ACP concerned, who forward the charge sheet to scrutinize the same does not get absolved. Such instances indicate malafide intention on the part of the Investigating Officers/ Investigating Agency and is required to be addressed through appropriate directions/standing orders in this regard, from the Commissioner of Police.”

IV. Conclusion

While India is making strides in improving the rate of birth registrations in recent years, the gaps between certifications and registrations in the past has severely disadvantaged child victims under the POCSO Act. In many cases, the ossification test is the only tool available to determine a victim’s age. The lack of uniformity in the interpretation of ossification tests by Special Courts has deprived many victims of the benefit of the POCSO Act.

While standards of fair trial should be strictly adhered to and interpretations that favour the accused are always preferred in criminal trials, Special Courts need to bear in mind that the objectives of the POCSO Act is “to protect children” from sexual offences and it is a special law for children, enacted pursuant to the constitutional obligation under Article 15(3). Opting in favor of the upper limit of an ossification test will invariably deprive adolescent children of the protection under law.

Special Courts should exercise their duty under Section 34(2), POCSO Act to satisfy themselves about the age of a child victim. This would entail adhering to the procedure prescribed under Section 94, JJ Act, 2015, ensuring that the documents mentioned in Section 94(2) are brought on record and ordering an ossification test, if they are unavailable.

Accountability should be imposed on the IOs by senior police officers for failure to collect documents that establish the victim’s age.

Lastly, extensive training should be given to the police, prosecutors, and judges of Special Courts about age-determination procedures if the object of the POSCO Act is to be fulfilled.

Appreciation of Medical Evidence by Special Courts in POCSO cases

DR. JAGADEESH. N*

Medical evidence still plays a pivotal role in the adjudication of sexual offence cases. Its presence is often connected to convictions and its absence, to acquittals. Such heavy reliance on the presence of medical evidence in every case of sexual violence to get a conviction is however, not justifiable. What is not understood is the fact that in the absence of medical evidence, there could still be convictions in trials on cases of sexual violence.

This Chapter outlines the scientific basis of medical evidence in sexual offences cases; and then analyses judgements in POCSO cases with regard to the appreciation of medical evidence and its link to convictions or acquittals, based on the CCL-NLSIU Studies. It concludes with a discussion on these two aspects.

I. Understanding Medical Evidence on scientific basis

Medical evidence in sexual offence cases is of five types – (1) trace evidence, (2) injuries, (3) Sexually Transmitted Infections (STI), (4) pregnancy and its complications and (5) evidence of treatment. Proper interpretation of medical evidence by courts may help in adjudicating cases, even if the victim turns hostile.

1.1. Trace Evidence¹

Based on Locard's principle of exchange², the trace evidence, (e.g. semen,

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1 Jagadeesh Narayanareddy, *Medical Evidence – Based On Recent Changes In Examination Of Rape/ Sexual Assault Survivor*, RECENT ADVANCES IN FORENSIC MEDICINE -2, pp 1-38 (Jaypee publishers, 2017)

2 Locard's principle of exchange, <http://www.forensichandbook.com/locards-exchange-principle/>

spermatozoa, blood, hair, cells, dust, paint, grass, lubricant, fecal matter, body fluids, or saliva), if detected, (depending on the type of sexual violence), is a good corroboration of the contact between the victim and accused. But unfortunately, this evidence has several limitations³ in getting detected, because it depends on the time when the medical examination is carried out after the alleged crime. — with delays accounting for loss of trace evidence; post-assault activities like washing, bathing, douching, urination, defecation ; type of offence (like penetration with object or body parts or non-penetrative offences) not leaving enough of trace evidence or evidence of semen or spermatozoa; expertise of the doctor in understanding and collecting the evidence; the type of laboratory test adopted by the Forensic Science Laboratories (FSL), and also the FSL's infrastructure and expertise in determining which type of trace evidence gets detected easily, etc. There are again Sensitive tests, Specific tests and Confirmatory tests for detecting trace evidence³. Many FSLs may not examine trace evidence by performing all these tests, or their reports may not specify the implications of their results in the terms of false positive and false negative results. For example, mere detection of fluorescence of a stain by using Wood's lamp as semen stain is wrong, as there are several false positive results for the same, with saliva, lubricant, and antibiotic cream also fluorescing under Wood's lamp. Confirmatory test for semen would be to demonstrate spermatozoa, as no other body fluid will have presence of spermatozoa in such huge numbers, (i.e., in millions).

In sexual offence cases, Investigating Officers (IOs), doctors, judges and lawyers mostly believe that spermatozoa should be detected from the crime scene/victim in all cases. What is not understood is that, unless the test is done immediately on a sample collected from the crime scene within 24 hours, the morphology of the spermatozoa is lost. Morphology of intact spermatozoa means the sperm head and neck connected to a tail. As there is delay in examination, the sperm heads only are visible without tails. As the time interval between collection and examination gets prolonged, the chance of positive detection of spermatozoa decreases. However, conclusive opinions are often drawn on mere absence of spermatozoa (negative spermatozoa results) that a 'sexual offence was not committed' — which is gross injustice to the victim. There are several causes for absence of spermatozoa, even in a case of sexual offence — either there was no ejaculation, azoospermia (absence of spermatozoa in semen), vasectomy, use of condoms, etc., or, just delayed examination of the sample which led to disintegration of spermatozoa, or, special stains to detect spermatozoa were not employed in that case. Unless the sperm is human (species identification) and DNA analysis proves that it is from the

3 An overview of presumptive and confirmatory tests, <https://forensicsforum.net/2017/03/17/an-overview-of-presumptive-and-confirmatory-testing-in-the-forensic-sciences/>

accused, we cannot conclusively call it a positive match. All these issues are never discussed in the court room due to ignorance and apathy of the prosecution. Thus, it is necessary for all the stakeholders involved to understand, whenever testing for spermatozoa is being carried out, which is the test being done, when is it being done, and what is being detected.

The mere absence of spermatozoa does not mean that a forensic sample does not contain semen. There are several tests to detect semen / seminal stains. and all that fluoresces under Wood's (UV) lamp is also not semen. This is because there are several sources for false positive results, viz., saliva, nasal or leukorrhoeal discharges, detergents, antibiotic cream, or petroleum jelly, - all of which also fluoresce under Wood's lamp. Wood's lamp examination for semen fluorescence is therefore only a screening test and not a confirmatory test. Test results may be affected by dilution from washing, exposure to rain and water, and even attempts to wash it off, etc. Chemical tests, (Florence test / Barberio's test being the usual arsenal of Indian scientists, but which are also primitive tests), to detect semen, are often not done routinely. The detection of acid phosphatase both qualitatively and quantitatively should provide an answer, but it is unfortunate that such tests to detect acid phosphatase to prove the presence of semen are not done routinely. Moreover, acid phosphatase detection decreases in older seminal stains and they are not species specific (being found in semen of higher apes). If prostate specific antigen (PSA or p30) is detected, it may prove the stain is semen, with the caveat that research has shown presence of PSA even in female urine, fecal matter, sweat and breast milk. The currently accepted method of detection of PSA is by using ABA card test strips.⁴

Use of seminal stain for DNA detection/DNA match with the accused looks impressive, but is an effective test only when the stain sample is intact, not denatured, as the accused person (of the stain sample) should not have had a vasectomy or tested sterile due to azoospermia. All these situations decrease the chance of detection of DNA from semen stain sample. The procedure to collect the DNA samples is not uniform-EDTA coated vacutainers, dry gauge, FTA cards, etc., all depending on the wishes/infrastructure available in each laboratory.

4 Research has shown the detection of semenogelin or seminal vesicle specific antigen (a substrate for PSA) in seminal fluid in higher concentrations than PSA has greater value, but this detection requires the use of immunochromatographic test strip assay. In developed countries, DNA laboratories screen first with PSA and semenogelin, (as there are false positive reports of both of these individually, but when both are positive, it indicates semen), before going further with DNA markers and profiling.

Another issue to consider before DNA evidence is accepted is the possibility of 'Touch DNA' and its proper interpretation.⁵ On physical and /or sexual contact between the accused and victim, the amount of DNA transferred depends on DNA shedder status, type of contact, length of contact, type and amount of pressure applied.⁵ Again, these discussions never reach courtrooms, resulting in grave injustice to the victim.

Another issue in the Indian context, is that we have only FSLs (Government laboratories) doing the DNA analysis. Many of them are not accredited or standardized, leaving lot of scope for criticism in interpretation of their analysis and of their results. It is important that standardized and accredited sources of test material be used. The pending Human DNA Profiling Bill 2015, if passed, may bring some change, with all laboratories including government laboratories mandated to obtain licenses only after strict scrutiny of quality of their analysis and infrastructure. Unlike Western crime laboratories, the Indian laboratories, when conducting their DNA analysis, never give the probability ratio of the match of DNA comparison. DNA evidence is comparable evidence. Unless the accused is arrested, we cannot have the DNA sample of the accused) to compare with.

Though there are some proposals that contemplate the building a database of DNA of all arrested criminals, a start may be made with creating a database of at least criminals convicted of the various categories of profiled crimes. However, such a start raises several ethical, legal and scientific issues to ponder about. If the DNA database becomes a reality in India, then, the DNA profile of all arrested persons may be maintained, even if they are not finally convicted. Unless removed immediately (recognizing that there may be bureaucratic issues resulting in a delayed response / corruption) on acquittal, there may be theoretical possibility of several DNA profiles on the database, which are of those who may not have been involved in sexual offences. These individuals can always challenge the legality of such a database. Also, suppose a person who is actually innocent, but is ignorant of these false implications of presence of one's DNA in the DNA database, then this also poses ethical challenges. Thus, it is necessary for all the stakeholders, whenever testing for semen is being carried out, to understand which the test is done, when is it done, what is being detected and the final inferences which can be

5 Perez WA, Ng J, Oldt R, Green WM, Panacek E, et al. (2015) *Changes in Yield of Contact DNA over Time after a Physical Assault*, JOURNAL OF FORENSIC RESEARCH (2014), , <https://www.omicsonline.org/open-access/changes-in-yield-of-contact-dna-over-time-after-a-physical-assault-2157-7145.1000253.php?aid=36042>

drawn. Usually in India, tests carried out for semen routinely are Barberio's test or Florence test; and very rarely acid phosphatase test and P30 assay. Besides, DNA testing is not done routinely, but carried out only in high profile cases and in those attracting media attention.

Another common test expected to be undertaken at any crime scene, is the detection of blood. IOs and/or doctors would have collected samples for detection of bloodstains. The tests employed in most of the FSLs are just basic presumptive or screening tests, such as benzidine test, (a test that is still used, even though it is carcinogenic and discarded all over the world since a few decades), and rarely, in some laboratories – the luminal test.⁶ The tests are sensitive, but the specificity is not very satisfactory. The mere detection as 'blood' is of no use, unless further analysis indicates whether it is human blood or not, to which blood group it belongs; and whether it corresponds to the accused person's blood sample. These are questions which remain unanswered in most of the crime scene investigations, leading to acquittal of several accused, again resulting in grave injustice. When asked why further specific tests were not done for detection of blood, the ready answer given is that such tests were not asked for/sought by the IO. Thus, it is necessary here again, for all the stakeholders involved, whenever testing for blood is being carried out, to know which is the test being done, when is it being done and what is being detected.

1.2. Injuries⁷

If injuries are present in a case and also if timing of those injuries is done, this helps in diagnosing the crime, as well as accounting for the timing of the alleged rape or penetrative sexual assault. WHO evidence⁷ states that in only 33% of cases of sexual violence, (penetrative cases), there are injuries. This means that out of three cases of penetrative sexual violence, one would not find injuries in two of the cases. And these too depend on when the medical examination is carried out after the alleged crime - since healing of such injuries occurs within a short period of time. Injuries are sustained when the victim offers resistance. Absence of injuries could be due to various reasons – the victim being unconscious, either due to trauma, or being drugged / intoxicated, overpowered, or silenced due to

6 This information is based on personal communication with staff of State FSL.

7 World Health Organization, Guidelines for medicolegal care for victims of sexual violence, 2003, http://www.who.int/violence_injury_prevention/publications/violence/med_leg_guidelines/en/

fear. The use of a lubricant in sexual violence cases also decreases the chances of infliction of injuries. Unfortunately, the Indian Courts have heavily relied on the fact of whether the victim offered resistance in deciding whether the sexual act was consensual or nonconsensual. But, Explanation 2 to Section 375, IPC, introduced by the Criminal Law (Amendment) Act, 2013, states that if someone does not resist the sexual violence that alone cannot be construed as offering consent to the act. The Indian law therefore does not insist that the woman offer resistance and thus dispels the need for the presence of resistance injuries.

Then comes the issue of detecting micro injuries (injuries which are not visible to the naked eye), on mucosa of the penetrated orifices, by use of Colposcopy, or by use of the Toluidine blue dye test. Before these tests are attempted, it has to be considered that the presence of injuries itself is not required by law, to prove a case of sexual violence. Moreover, the micro injuries could be inflicted on mucosa even in consensual sexual acts. That means detection of micro injuries on mucosa will not help differentiate whether the sexual act was consensual or non-consensual. It should also be noted, that even during medical examination of genitals, there is a possibility of infliction of micro injuries. Similar would be the possibility of micro injuries with penetration by body parts, (fingering), or objects. Stakeholders within the criminal justice system, including the courts, should appreciate the presence or absence of injuries in sexual offence cases, in the background of this medical research evidence and changes in the law.

1.3. Sexually Transmitted Infections⁸

Based on Locard's principle of exchange, if either the victim or accused is suffering from a STI at the time of the alleged assault, then there is a possibility of transfer of microorganisms (causing that STI), through body contact, from one person to another. Thus, properly conducting and interpreting the tests to detect the transmission of STIs as a result of contact during the alleged rape/ sexual assault could help in corroborating the offence. But, this evidence is often not collected properly, as at least two medical examinations are warranted to detect these infections, –one as early as possible and the other, after the lapse of the incubation period, depending on the alleged STIs (gonorrhoea, syphilis, herpes, HIV, or hepatitis). For example, in gonorrhoea infection, the incubation period is three to four days and thus if first medical examination is on the day of assault itself then the second medical examination should at least be after a gap of three

8 *Id.*

to four days. Similarly, the incubation period for syphilis is three to twelve weeks, for herpes it is one day to three weeks, for HIV it is four weeks to 12 weeks and for hepatitis it is six weeks to 24 weeks. It may be argued that mere infliction of STI on the victim cannot prove that there was a penile sexual act. The defense lawyer may put forth the argument that such STIs could be transmitted from one person to another by fomite transfer, (i.e., somebody touching the secretions / discharges of this STI infection then touches another person, or when the secretions / discharges of this STI infection comes in contact with the other person). Such a defense may not be successful, as the definition of rape and penetrative sexual assault have been expanded and use of body parts and / or objects for penetration is also an offence; and thus the STI transfer with the use of objects or body parts other than penis, will fall within the definition of rape and penetrative sexual assault.

Next, the corroboration of these findings between the victim's examination and the examination of the accused does not occur routinely, as these medical examinations are either not done by the same doctor or by the same hospital, or, the findings are not corroborated by the IO or the prosecutor. Thus, an important piece of medical evidence goes waste, resulting in failure of arriving at the logical and scientific conclusions warranted. Hence to prevent this evidence loss, all stakeholders - doctors, police, prosecutor and judges should use this medical evidence, by properly conducting the tests first and later, ensuring its corroboration in order to scientifically prove or disprove the alleged sexual contact and the possible transfer / acquiring of STIs.

1.4. Pregnancy and its complications⁹

Unwanted pregnancy and/or miscarriage of an existing fetus and/or infertility and/or repeated unsafe abortions are often noticed post sexual violence. The physical and mental trauma accompanying the unwanted pregnancy, including the social implications, should be dealt with adequately and on priority. The products of conception, in cases of medical termination of pregnancy, (MTP), if carried out, serve as medical evidence. If the baby is already born, then the DNA materials of the foetus, when compared with that of the mother and the alleged father, would help in identifying the biological father of the child. Repeated sexual violence may also result in unsafe abortions and pose a threat to the life of the mother, risking anaemia, infection, etc.

⁹ Jagadeesh N, *Certificate Course on Medical & Forensic Evidence in Child Sexual Abuse*, Module 3, Chapter 3, (under print).

1.5. Evidence of Treatment¹⁰

This is a new piece of medical evidence available in the form of evidence of treatment and its documentation, in case sheets, discharge summaries, prescription sheets, and pharmacy bills, etc. With compulsory treatment in every case of rape/sexual assault, this evidence will be available in all cases in which the victim has visited a hospital and consulted a doctor, post sexual violence. If there is proof in the form of medical prescriptions / case sheets / discharge summaries / pharmacy bills / analgesic drugs consumed post-assault, then these could act as indirect evidence of the pain sustained by the victim after the assault. If there is proof of antibiotic drugs consumed, then this too could act as indirect evidence of infection contracted by the victim post-assault. Again, if there is proof of antidepressant drugs consumed post-assault, then it could serve as indirect evidence of depression sustained by the victim after the assault. Finally, even proof of the psychological counseling sessions undergone could act as proof of psychological disturbances, post-assault, that warranted the need for counseling, post-assault.

These crucial pieces of medical evidence need to be understood by all the stakeholders, including the judiciary, so that they can adjudicate sexual violence cases based on such medical evidence of treatment, which almost always exists, rather than searching for medical evidence that may not exist, such as trace evidence, injuries, or STIs, as explained above.

II. Analysis of Appreciation of Medical Evidence by Special Courts

CCL-NLSIU has studied the working of Special Courts under the POCSO Act in Andhra Pradesh, Assam, Delhi, Karnataka and Maharashtra. This section examines the appreciation and non-appreciation of medical evidence by these Special Courts while adjudicating POCSO cases.

2.1. Medical Evidence leading to Convictions

Pregnancy – Largely, it was noticed that convictions¹¹ were recorded when

¹⁰ *Supra* n.7.

¹¹ State v. Alluru Benjamin, POCSO Special case No. 1/2015, decided on 06.12.2016 (Nellore); State v. Gochipata Rambabu, S.C.No.57/ 2015, decided on 4.10.2016 (Guntur); State v. Mannam Prasad, Sessions Case No. 6/2013, decided on 29.09.2015 (Guntur; State v. Turugopi Venkateswara Rao, Sessions Case No. 37 of 2015, Decided on 7.6.2017 (West Godavari); State v. Shivdas Umaji Bhil, Special Case No. 3 of 2015, decided on 2-3.12.2016 (Dhule); State v. Somraj Sahebrao Gavali,

the victim was pregnant, or when she delivered the fetus as a consequence of sexual violence. These convictions were arrived at with or without DNA analysis. DNA evidence in some cases was appreciated as conclusive proof and there was an overreliance on this evidence, without understanding its limitations.²¹ In a gang rape, one may not find DNA of all accused persons. However, this alone cannot be the basis of an acquittal, if there is other evidence connecting the accused persons to the crime.

Bite marks – This evidence, either alone, or, in combination with other medical evidence, lead to convictions in some sexual assault cases. The courts have appreciated the documentation of bite marks in the medical reports and the corroboration of the same in the victim’s testimonies.¹²

Physical injuries – This was appreciated by the Special Courts in the form of scratches, abrasions, bruises, either independently, or, in addition to other medical evidence connecting to the sexual offence.¹³

Genital injuries – Though there is an inclination to look at hymenal injuries, several Special Courts have appreciated the presence of other genital injuries such as redness, tenderness, abrasions, contusions of labia/ vagina in medical reports and connected them with the sexual violence.¹⁴

Trace evidence – Largely, trace evidence, in the form of semen or spermatozoa or blood were appreciated in those cases of convictions awarded by the courts.¹⁵ This was considered as independent evidence and also along with other medical

Sessions Case No. 151 of 2014, decided on 16.06.2015 (Nashik); State v. Ganesh @ Vastad Gulab Wankhade, Special Case No. 76 of 2013, decided on 01.08.2016 (Buldana); State v. Dilip Kacharu Salunke, Sessions Case No. 153 of 2015, decided on 18.11.2016 (Nashik); State v. Irfan, Special Case (POCSO) No. 2/2014, decided on 03.03.2015.

12 State v. Suresetty Narayana, POCSO SESSIONS CASE No.86 of 2015, decided on 16.11.2015 (Ongole); State v Abdul Samada, Spl SC no. 235/2013, decided on 24.01.2015.

13 State v. Sri Sitesh Karmakar, POCSO Case No. 06 (T) of 2015, decided on 01.12.2015.

14 State v. Bavanam Peri Reddy, POCSO SESSIONS CASE No.1 of 2016, decided on 18.04.2016 (Ongole); State v. Ankush, Spl. Case [Child] No.01 of 2013, decided on 02.09.2013 (Jalna); State v. Bhagwan Punjaji Jadhav, Sessions Case No. 178 of 2014, decided on 26.06.2015 (Nashik);

State v. Laxman Namdeo Gangurde, Sessions Case No. 178 of 2014, decided on 26.06.2015 (Nashik); Ramachandrappa v State of Karnataka, 2007 Cr LJ 3504; State v. Raju Das, Spl. (POCSO) Case No. 5 of 2015 (Assam); State v. Akshay Sarma, SC 252/2013 decided on 16.03.2015; State v Khogen Chetri, PCSO Case no.5/13, decided on 03-10-15 & 06-10-15.

15 State v. Manoj Jaibhim Chahand, Sessions Case No. 322 of 2015, decided on 20.12.2016 (Nashik); State v. Raju Das, Spl. (POCSO) Case No. 5 of 2015, decided on 24.08.2015.

evidence. In some cases, the courts also gave reasoning for absence of trace evidence – like delayed examination¹⁶ and non-penetrative sexual assault.¹⁷

2.2. Medical Evidence leading to Acquittals

Pregnancy – Even when pregnancy was a consequence of sexual violence in a child, there were acquittals.¹⁸ The reasoning given by the courts was it was consensual sexual activity, even though law does not permit any consensual sexual relations with a person less than 18 years of age. Reasoning put forth by the courts was in the form of maturity, puberty attained, ability to understand the consequences of consent to sexual activity, etc., defeating the very purpose of justice. In some cases, a mere DNA analysis of the products of conception or fetus would have proved the identity of the biological father and thus the sexual offence. Failure of the IO to carry out DNA analysis during investigation and also the court failing to order the DNA analysis (atleast at the trial stage), – raises the issue of how different courts look at the same piece of medical evidence differently; in one case concluding it for conviction, and in another, acquitting the accused. In another case,¹⁹ just because the DNA analysis was not done, the Special Court gave a clean chit to the accused, even though injuries along with semen were present. It concluded that sexual assault is proved, but the accused’s involvement is not proved. In another case,²⁰ the court held that even though the medical evidence proved the identity of the accused as the biological father, the accused was acquitted, as the victim testified that she had been married to the accused for a long time, and that they were living together happily.

Age – The Special Court in one case²¹ held that the victim on the date of incident had attained 17 years 8 months of age, and had also attained puberty, and thus the victim was mature enough to understand the consequences of her actions, (even though she had not attained majority), and therefore, her consent was valid.

16 State v. Jawngblam Narzary, Special Case No.3/2014, decided on 05.08.2015.

17 State v Kapil Tyagi, SC No: 135/13 decided on 22 July 2015; State v. Ram Avtar Giri, S.C. No. 78/13, decided on 30.03.2015.

18 State v. Konda Balakrishna, S.C.No.1/2015, decided on 01.02.2016 (Guntur); State v. Rupesh @ Banti Bajirao Mokal, Sessions Case No. 302 of 2015, decided 20.10.2016 (Nashik).

19 State v. Darla Ratnam, S.C.No.8/2014, decided on 07.11.2015 (Guntur).

20 State v. Shaik Inthiyaz , SC No.366/2015, decided on 10.08.16 (Anantapuramu) in Andhra Pradesh Report, p.78.

21 State v. Konda Balakrishna, S.C.No.1/2015, decided on 01.02.2016 (Guntur); State v. Rupesh @ Banti Bajirao Mokal, Sessions Case No. 302 of 2015, decided 20.10.2016 (Nashik).

When all sexual activity with a person less than 18 years of age is illegal, then the above reasoning is difficult to accept.

Injuries and Trace evidence – A Special Court in Maharashtra²² held that medical evidence indicated that there had been no penetration, hence the accused was acquitted of the charges of penetrative sexual assault and rape, but convicted of sexual assault and sexual harassment. In another case,²³ a Special Court in Karnataka held that the mere evidence of the doctor reporting about the rupture of the hymen of the victim girl and the potency of the accused to have sexual intercourse is not sufficient to prove the guilt of the accused beyond all reasonable doubt, and therefore, in the absence of cogent and convincing evidence, the prosecution had failed to prove beyond all reasonable doubt that the accused has committed rape on the minor victim girl. In another case,²⁴ even though the injuries were present, a Special Court in Assam observed that whether the accused caused those injuries on the victim is not proved and therefore acquitted the accused. In another case from Assam,²⁵ the medical report indicated injuries to the victim's private parts and also signs of sexual assault. The accused was acquitted in this case because the doctor stated during cross-examination that the injuries could have been caused by a fall. A Special Court from Maharashtra held in one case,²⁶ that even though the medical reports suggested injuries on right labia majora, left labia minora, and perianal and torn hymen, the accused was acquitted. This is because the victim and her parents turned hostile in the court, stating that the cause of the injury was due to a fall and not sexual assault.

2.3. Medical Evidence Ignored

Injuries - The victim, a mentally challenged person in one case from Delhi,²⁷ had a fresh tear and a little blood oozing out of her private part, and yet the Special Court did not consider this medical evidence in final adjudication of the case. A Special Court from Maharashtra held in another case²⁸ that the medical evidence showed that the victim's hymen was ruptured, but there were no signs of "recent"

22 State v. Kishan Dadarao Ghode, Special Case (POCSO) No. 2 of 2016, decided on 25.08.2016 (Parbhani).

23 State v. Babu R, Spl CC No.34/2015 decided on 12.04.2016.

24 State v Rajib Mahanta & Ors. POCSO case 4/14, decided on 19-08-15.

25 State v. Rangai Borah, Sessions Case No. 113(NL) 2014, decided on 19.04.2016.

26 State v. Vilas Balkiram Susar, Special (Child) Sessions Case No. 96/2015, decided on 26.05.2016 (Pune).

27 State v Aasif, SC No.206/13, decided on 08.09.2014.

28 State v. Amol Munjaji Jire, Special Case (Under POCSO Act) No. 08/2013, decided on 28/08/2015 (Beed).

sexual intercourse. The Special Court noted that the medical test was conducted three days after the incident because of the delay in filing the FIR, and that the use of the term 'recent' in the medical report was ambiguous and that such a doubt must be resolved in favour of the accused. Doctors should refrain from committing such errors in documentation. They can refer to the manual prepared by Ministry of Health and Family Welfare on Guidelines and Protocols – Medicolegal care for survivors / victims of sexual violence whenever they have difficulty in interpreting the injuries.²⁹

DNA – One Special Court in Maharashtra³⁰ held that it is not enough when the prosecutrix and the parents turn hostile, to rely only on the DNA evidence alone, even though by DNA analysis, it was proved that the accused was the biological father of the child of the victim. The victim and the accused had been married in the interim, and the accused was providing for the victim and their child. In criminal matters like sexual violence cases, scientific evidence cannot be ignored just because the witnesses turned hostile. Unbiased scientific evidence should have taken precedence over hostile witnesses. Witnesses could have turned hostile due to social compulsions and / or gender issues – recognizing that in a patriarchal society, the wife is dependent on the husband for food, shelter, money, social status, etc.

In another case from Maharashtra,³¹ a Special Court held that, the medical report showed that the hymen was torn, the vagina admitted two fingers and that the uterus was bulky due to pregnancy of 20 to 22 weeks. The DNA test showed that the accused was the father of the child. However, there was no record of the collection of blood for the DNA tests or its refrigeration, as per the prescribed procedure. The Special Court relied on the decision of the Supreme Court,³² wherein it was held that if the DNA evidence is not accompanied by the necessary authorization, and the relevant expert is not examined in relation to it, it would not be held against the accused. Thus, the Special Court held that while there was strong suspicion against the accused, this was not sufficient to convict him.

29 Guidelines & Protocols – Medicolegal care for survivors/victims of Sexual Violence, Central Government, MOHFW, 2014, <http://mohfw.nic.in/showfile.php?lid=2737>.

30 State v. Vijay Laxman, Special Case No. 17 of 2015, decided on 18.04.16 (Ratnagiri).

31 State v. Bhagwan Keshavrao Deshmukh, Special (POCSO) Case No. 10 of 2015, decided on 02.12.2016 (Beed).

32 Rajiv Singh v. State of Bihar, SC 2016(1-2) SBR 273.

In another case from Maharashtra,³³ the Special Court held that the DNA test confirmed that the accused was the biological father of the child born to the 13-year-old victim. However, the victim and her father turned hostile in court. The Special Court relied on a case,³⁴ in which the High Court had observed, "Positive D.N.A. report can be of great significance where there is supporting evidence. However, such report cannot be accepted in isolation i.e. as sole piece of evidence to record conviction in rape case." Based on this, the accused was acquitted. Independent, unbiased scientific evidence being overruled on technicalities would cause gross injustice to victims for no fault of theirs. In the current legal system in India, especially in criminal matters, the victims have to present their case through prosecution only. Serious lapses like these could result in injustice meted out to the victims, due to the faults of the investigating agency and / or prosecuting agency.

III. Issues for Consideration

Consent under Section 164A CrPC - Many Courts have reasoned that the victim, (or the victim's parents, wherever applicable), did not consent for medical examination and thus a crucial evidence is not available. But what is not considered is the appreciation of the legal right of the victim to consent to medical examination,³⁵ as per sub-clause (7) of Section 164A, CrPC and not that she was not cooperating with the prosecution.

Hospitals for medical examination - Many a time such cases are largely taken to Government hospitals only. Ideally speaking victims should be taken to any hospital, including private hospital,³⁶ whichever is the nearest, so that medical care and treatment along with evidence collection is immediate and not affected or delayed. However, the victim is often transferred or referred from one hospital to another, for want of proper infrastructural facilities - including the availability of a female doctor, a doctor with special expertise/ specialist, ultrasonography, qualified counsellor, etc. What is not understood is that Section 357C, Cr.P.C, mandates every hospital to conduct such examinations, but despite this, such transfers or referrals still happen. Such practices ignore the hardships incurred by the victim due to travel, loss of confidentiality, loss of privacy, loss of support,

33 State v. Amol Sonkhamble, Spl. Case (POCSO) No. 44 of 2014, decided on 17.11.2015 (Latur).

34 Premjibhai Bachubhai Khastya v. State of Gujarat & Anr., 2009, Cri.L.J. 2888.

35 Cr.P.C, Section 164 A.

36 Cr.P.C, Section 357C.

compulsions to participate in criminal investigation, etc., despite the trauma, and fail to ensure timely medical care and examination, which is her legal right.

Voluntary reporting to hospitals – Given Section 357C Cr.P.C, Section 27 and Rule 5 of POCSO Rules, it is very clear that there is no need for police requisition,³⁷ or a court order,³⁸ in order to conduct a medical examination. Victims of sexual violence are however not even aware of these legal rights. From the CCL NLSIU Studies, it is observed that the medical examinations were carried out only with the police requisition. Advocacy on creating the awareness on this is a priority. This is because often, there is a delay in getting a police requisition, which is possible only after the police complaint is lodged by the victim. The victim's participation in criminal investigation is possible only after she overcomes the social pressure faced due to sexual violence, and by that time, there is often a delay in the medical care and treatment of the victim as well as loss of vital medical evidence.

DNA – DNA is good comparative evidence. However, unfortunately, in India, in order to compare, the accused should be arrested and then samples should be collected. At present, stakeholders are using a DNA mismatch to exonerate the accused. This is not acceptable, as the DNA analysis may fail to match, due to disintegration or denaturation of the DNA sample, contamination of the DNA sample, failure to extract the DNA sample due to decomposition and also other extraneous weather conditions. Positive match is acceptable, but a negative match should be properly analysed to exclude technical reasons for mismatch, before a clean-chit is given to the accused. Another issue to consider is based on Section 164A CrPC and 53A CrPC, which make it mandatory to collect DNA evidentiary materials,³⁹ in all cases involving sexual violence, and from both the victim and accused.. However, in practice, only in high profile cases, the IO gets the DNA analysis done and ignores it in the rest. This means there could be erroneous conclusions drawn, in both convictions and acquittals of many accused, causing gross injustice to several victims of sexual violence, and also some accused persons who may even be innocent of the charges against them.

37 POCSO Act, Section 27.

38 POCSO Rules, Rule 5.

39 Cr. P.C., Sections 164A and 53A.

IV. Conclusion

Earlier, when the law defined rape as penetrative peno-vaginal sexual intercourse, courts were giving lot of credit to medical evidence, in order to prove a charge of rape. The laws on rape and child sexual assault have now changed, recognizing even non-penetrative acts and penetration of the vagina, anus, and urethra by either penis or objects or body parts (fingering) and of the mouth by the penis. In such a scenario, it needs to be noted that there could be several situations of rape/sexual assault with no medical evidence at all. This presence and/or absence of medical evidence and its scientific basis or reasoning, should therefore be clearly understood by doctors, police, lawyers, courts, and all stakeholders in providing justice to victims of sexual violence.

Appreciating the testimonies of children and adolescents

DR PREETI JACOB*, DR KAVITA JANGAM**

I. Introduction

No longer does one have to convince people that child sexual abuse is a reality and does indeed occur in India today. In fact, not a week goes by that one does not read or learn of yet another brutal rape, assault and abuse of a child or adolescent by an adult. This adult is often times someone in authority, or someone close to the child or even someone, in whose care the child is placed. Although systematic data is sparse, the Study on Child Abuse in India (2007) published by the Ministry of Women and Child Development, Government of India reported that 53.2% of the population studied experienced some form of sexual abuse, which is staggering.¹ When the media reports a case there is often outrage, public concern and horror, but this outrage does not extend to all cases or indeed even for every child. This discrepancy in the way we react to reports of abuse, we believe, arises from our own biases rather than the evidence. Law enforcement and indeed the judiciary come from this very same society and thus are subject to similar biases including disregarding the child's version of events, believing that a child is not a reliable witness and can be manipulated, or disbelieving reports of intrafamilial abuse as it is not in keeping with our culture, or not understanding the limitations a child has in reporting events, given their developmental level, etc.

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1 Study on Child Abuse: India 2007, Ministry of Women and Child Development, Government of India, , <https://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf>

According to the World Health Organisation (WHO), a child is a person 19 years or younger unless national law defines a person to be an adult at an earlier age and a person who falls into the 10 to 19 age category they are referred to as an adolescent.² This chapter seeks to highlight the extraordinary courage that a child/adolescent has to summon in order to report to anyone, especially to someone in authority, about the abuse that they have faced or are currently facing, is highlighted. Children/adolescents are acutely aware that by disclosing sexual abuse to someone (even close to them) they are likely to be disbelieved, admonished, blamed or even punished for it. It is no wonder then that children take time or even refuse to report abuse. When the children/adolescents are disbelieved, or are asked to keep quiet about the abuse, the ramifications for them in terms of their psychological well-being is huge. In the aftermath of abuse, they may suffer from emotional or behavioural problems, which when observed strictly through a legal lens further puts them at risk to be disbelieved. For example, if children post-abuse have school refusal or do badly in academics, then they are regarded as children who are “bad” or “difficult” and thus children whose account cannot be believed. Eventually, when they do come in touch with a competent authority to report the abuse that they have suffered, the system often times responds with skepticism or mistrust and this then becomes the children’s lived experience. Indeed, the harsh realities that many of these children have to live through in order to obtain “justice” are formidable.

Under the criminal justice system, although a child witness is considered competent to testify, the trial courts are expected to exercise caution while appreciating the testimony. In *Dattu Ramrao Sakhare v. State of Maharashtra*,³ the Supreme Court held “[t]he only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.” In *Golla Yelugu Govindu v. State of Andhra Pradesh*,⁴ the Supreme Court observed:

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any

2 WHO, “Definition of key terms – Consolidated ARV Guidelines”, June 2003, <http://www.who.int/hiv/pub/guidelines/arv2013/intro/keyterms/en/>

3 (1997) 5 SCC 341.

4 (2008) 16 SCC 769.

examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

Thus, in an effort to record children's evidence and accord justice, the criminal justice system may and does indeed further traumatize the child/adolescent.

This chapter is an attempt to help appreciate children's testimonies from their perspective taking into account what it means for a child/adolescent to understand, process, and report abuse.⁵ All the judgments discussed in this chapter are from the reports published by the Centre for Child and the Law, National Law School of India University (CCL-NLSIU) on the working of the Special Courts under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) in Delhi (2016), Assam (2017), Karnataka (2017) and Maharashtra (2017).⁶

II. Circumstances of Child Sexual Abuse, its Dynamics and Reportage

There are different kinds of trauma that a child undergoes when the child is a victim of sexual abuse. The abuse per se is one kind of trauma, but the life changing events that occur post disclosure or discovery, is another kind of trauma. Journeying through the criminal justice system could potentially be the final nail in the coffin of traumatic experiences that often scar the child for life, particularly

5 S.Ramaswamy & S.Seshadri, *Our failure to protect sexually abused children: Where is our 'willing suspension of disbelief?'* INDIAN JOURNAL OF PSYCHIATRY, 59(2), pp.233-235, (2017).

6 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra* (2017), <https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf> (Maharashtra Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (2016), <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf> (Delhi Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Assam* (2017), <https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourtassamPOSCOAct2012.pdf> (Assam Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Karnataka* (2017), <https://www.nls.ac.in/ccl/jjdocuments/posco2012karnataka.pdf> (Karnataka Report).

due to secondary victimization. Intrafamilial abuse deserves special mention here as in such cases, the child already has a relationship with the abuser (eg. father, uncle, grandfather, etc.) and the abuser uses that position of trust to abuse the child. The abuser in exchange for affection, attention and/or gifts engages in sexual behaviour with the child which is not in keeping with the child's developmental level such that sexual activity becomes distorted in the child's mind. This is called "traumatic sexualization". The child/adolescent experiences great conflict and confusion about the relationship, as on one hand they like the person who is perpetrating the abuse, and on the other hand they are confused regarding the sexualization of their relationship. Once the child has given in to the abuse, the perpetrator blames the child for the abuse and therefore strong-arms the child into maintaining secrecy and silence. Once the pattern of abuse is set, the child feels trapped in that vicious cycle of abuse. Ultimately, the child experiences betrayal, as someone who was meant to protect him/her has violated that trust.⁷

The POCSO Act takes into account this very dynamic and has mandated reporting as part of the law, under Section 19(1). The Model Guidelines under Section 39, POCSO Act states:

... the nature of sexual abuse, the shame that the child victim feels and the possible involvement of a parent, family friend or other close person, makes it extremely difficult for children to come forward to report sexual abuse. This is why the law provides for mandatory reporting, placing the responsibility to report not on the child but on a surrounding adult who may be in a better position to help.

The sense of powerlessness that the child feels, often adds to the child's distress and symptoms. These factors underlie the intrapsychic processes that result in delayed disclosure; or the psychological symptoms that the child may often have but suffer with silently; or even why they ultimately turn hostile.⁸

It cannot be reiterated enough that the people who abuse children are often in positions of trust and authority and can manipulate children and adolescents, or even the family, such that the child/adolescent does not reveal the abuse till much later; or even if they do, no one believes. In Maharashtra, the accused was known

7 D.Finkelhor & A. Browne, *The traumatic impact of child sexual abuse: a conceptualization*, THE AMERICAN JOURNAL OF ORTHOPSYCHIATRY, 55(4), pp.530-541 (1985).

8 *Id.*

to the victim in 77% of the cases studied.⁹ In fact, this secondary trauma when the abuse is disclosed or discovered, can have a significant impact on the child/adolescent's mental health and even long-term consequences. More often than not, children's disclosures of abuse are anyway met with skepticism and disbelief, and so this abandonment by the adults (whether it is a non-offending parent, or a teacher, or even an officer from law enforcement) who are meant to protect the child, has serious implications for the child and indeed the system as well.¹⁰ In fact, Dr. Summit said,

Whatever a child says about the sexual abuse, she is likely to reverse it. Beneath the anger of impulsive disclosure remains the ambivalence of guilt and the martyred obligation to preserve the family. In the chaotic aftermath of disclosure, the child discovers that the bedrock of fears and threats underlying the secrecy are true.¹¹

When one looks at the impact of disclosure/discovery on survivors of abuse, the most consistent factor that emerges is the response and support of the non-offending parent. It is vital for the survivor's mental health and recovery from the abuse.¹² Given this, the atmosphere of the court, and the manner in which the child is questioned in court, has a significant bearing on whether the child will actually state the traumatic events that have occurred cogently, or will turn hostile.¹³ Although Section 33(6), POCSO Act has explicitly states that character assassination of the child must not be allowed, it nonetheless happens as seen in the *State v. Somashekhara*,¹⁴ where it was argued by the defence that a virgin would bleed during a rape and in the absence of bleeding, the allegations of penetrative sexual assault were not made out.¹⁵ In another case from Maharashtra,¹⁶ where the victim had allegedly been raped by her father on multiple times, she was repeatedly questioned about her friendships with boys in order to undermine her

9 Maharashtra Report, p 66.

10 R.Summit, *The Child Abuse Accommodation Syndrome*, CHILD ABUSE AND NEGLECT, 7, pp.177-193 (1983).

11 The Child Abuse Accommodation Syndrome, p. 14.

12 J Conte & J.Schuerman, *Factors associated with an increased impact of child sexual abuse*, CHILD ABUSE AND NEGLECT, 11(2), pp.201-211 (1987).

13 Ceci, S., Bruck, M. & Battin, D., *The suggestibility of children's testimony. In False memory creation in children and adults*. MAHWAH, NJ: ERLBAUM, pp. 169-201, (2000).

14 Spl.SC 74/ 2014 decided on 29.04.2016 in Karnataka Report, p.71.

15 Karnataka Report, p.71.

16 Spl. C. No. 146/2014 decided on 22/12/2016 (Thane).

credibility.¹⁷ It is thus important that the above-mentioned factors are kept in mind when children/adolescents are victims of abuse so that their statements can be understood in context of their traumatic experience.

III. Delay in disclosure – Is the child to be doubted and/or blamed?

Although delay in disclosure has been highlighted in the earlier section, it warrants further discussion. Delay in disclosure is often taken by courts and law enforcement as a reason to doubt the veracity of the child/adolescent's account. What made the child/adolescent wait? Why did the child/adolescent not tell their mother immediately? There are a number of reasons why a child does not report abuse immediately. Some of these reasons are discussed below.

Firstly, children/adolescents often fear that they will be held responsible for the abuse or they will be blamed as they invited the abuse in some manner and so this one of the biggest deterrents for children/adolescents not to report abuse. Secondly, many children/adolescents blame themselves and thus experience embarrassment and shame and this also plays in role in delaying children's disclosure of abuse to a trusted adult.¹⁸ Thirdly, "grooming" is another important reason for delayed disclosure.

When there is grooming, there is not much resistance and this is often held against the child, as in the case of *State v. Thumyhanghrim Hmar*,¹⁹ where the accused was the victim's paternal uncle who had stepped in to care for her when her father passed away;²⁰ and in *State v. Kailas Jayram Karawanje*,²¹ where the accused was the victim's cousin.²² Fourthly, the abuser often times uses different methods of coercion to prevent the child from revealing the abuse. Sometimes this is in the form of psychological coercion, where the abuser may tell the child that if other family members discover the abuse, they will send the abuser away or that the family will break up and that the child will be responsible for tearing the family apart. The abuser may also tell the child that he/she may be sent away to a hostel

17 Maharashtra Report, pp. 18-19.

18 Pipe, M.-E. & Goodman, G.S. *Elements of secrecy: Implications for children's testimony*, BEHAVIORAL SCIENCES & THE LAW, 9(1), pp.33-41 (1991).

19 Spl PCSO 4 of 2015 decided on 04.07.2015 (Assam).

20 Assam Report, p.87.

21 Special Case No. 47 of 2014, decided on 26.08.2015 (Ratnagiri).

22 Maharashtra Report, p.94.

or that no one will believe them. These are some of the child's worst fears and when the abuser uses the child's fears against them, disclosure is delayed until it is discovered by other means. It must be considered that, almost always, sexual abuse is perpetrated by someone close to the child and thus the abuser has a lot of influence over the child and knows the child's environment well.

According to Crime in India, 2016, in cases of rape under Section 376, Indian Penal Code and penetrative sexual assault under Sections 4 and 6, POCSO Act, the offender was known to the victim in 94.6% cases.²³ This is also borne out by CCL-NLSIU's studies as per which the perpetrator was known to the victim in majority of the cases.²⁴ The abuser may also tell the child that no one in the family will believe them or that the child is in some way responsible. These mind games that the abuser plays with the child can often cause long lasting damage to the child's psychological well-being. In the case of children/adolescents, the balance of power more often than not is tilted towards the adult. Thus, children and adolescents fear not being believed or being blamed for the abuse which frequently even comes true. The abuser may also use physical coercion by actually hurting the child, or by threatening the child, or another loved family member (example, the child's mother or sibling) with physical harm, if the child does not keep quiet about the abuse.²⁵ Children who are very young or who have intellectual disabilities do not have the necessary communication skills to talk about the abuse, and this may be another reason for delayed disclosure or discovery. Judges must be cognizant of these factors in order to fully understand the milieu in which the abuse has occurred and therefore the behaviour of the child from that context.

Lastly, one cannot be removed from the socio-cultural factors prevalent in our country which similarly contribute to the way in which abuse is perceived or reported and may also lead to delay in reportage or non-reportage or even recantation after reportage. In countries like India, where blaming and shaming the victim (or in children's cases, the victim's mother) is prevalent; and where the need to protect the "honour", maintain family secrets is paramount and ingrained

23 National Crime Records Bureau, *Crime in India 2016*, Table 3A.4 Offenders relation to victims of rape-2016.

24 According to CCL-NLSIU's Studies, the perpetrator was known to the victim in 75% cases in Andhra Pradesh, 78% cases in Assam, 80% cases in Delhi, 70% cases in three districts in Karnataka, and 77% cases in Maharashtra.

25 S. Oz, *The 'wall of fear': The bridge between the traumatic event and trauma resolution therapy for childhood sexual abuse survivors*, JOURNAL OF CHILD SEXUAL ABUSE, 14(3), pp.23-47 (2005).

in the ethos of the family, the victim is often left without any social support.²⁶ Naming, shaming and blaming the victim is a common enough practice in India and although under POCSO, 2012 it is expressly forbidden, it does happen. What is a matter of greater concern is that it seems to have influenced judgements as for instance, in the case of *State of Maharashtra v. Ramkishor Sharma*²⁷ wherein the child's personal relationships and her mother's second marriage and abortion were considered while evaluating their credibility as witnesses.

Often times, children are expected to behave in a certain manner after they have gone through sexual abuse. This is often taken as an indicator or even evidence of whether the abuse has indeed occurred as in the case of *State v. Kailas Jayram Karawanje*²⁸ where the court doubted the victim's testimony, because the victim had not disclosed the abuse by her cousin to her grandmother and no evidence was brought on record that she was sad and quiet after the incident.²⁹ In *State v. Avinash Gupta*³⁰ the victim girl had gone ahead with a class after her step-father sexually abused her, causing the Special Court to question why she had not informed her mother immediately about the incident and thereby concluded that her conduct was not "natural."³¹ In the absence of what adult's term as "appropriate victim behaviour" or "normal victim behaviour," the child is disbelieved and further pushed into self-blame, behavioural and emotional problems. However, each victim reacts differently to abuse and some of the factors that influence this include the characteristics and nature of abuse, their own age and understanding of abuse, the degree of closeness to the abuser, whether the abuser is in a position of power, whether they have a supportive family, etc. Therefore, doubting that the abuse even took place based on such a fallacy would be an injustice to the child victim. And most importantly, because the child did not behave in the manner that we expect, does not negate the experience of abuse.³²

26 See J.E. Korbin, *Culture and child maltreatment: Cultural competence and beyond*, CHILD ABUSE & NEGLECT, 26, pp.637-644 (2002); D. Carson, J. Foster, & A. Chowdhury, CHILD SEXUAL ABUSE IN INDIA: UNDERSTANDING AND IMPACTING INDIVIDUALS, FAMILIES, AND SOCIO-CULTURAL SYSTEMS, (Saarbrücken: LAP Lambert Academic Publishing, 2015).

27 Special (Child) Sessions Case 84/2013 decided on 27.02.2015 (Pune) as cited in the Maharashtra Report, pp. 57, 93.

28 Special Case No. 47 of 2014, decided on 26.08.2015 (Ratnagiri) in Maharashtra Report, p.93.

29 Maharashtra Report, p.95.

30 SC No. 135/13 decided on 30.9.2015 in Delhi Report, pp.103-104.

31 Delhi Report, pp.22, 103-104.

32 R. Summit, The Child Abuse Accommodation Syndrome. Child Abuse and Neglect, 7, pp.177-193 (1983).

Child sexual abuse can have an immediate, short-term and long-term impact on the child's development in all areas.³³ There could be a considerable time gap between the actual abuse, reporting of the same to law enforcement and the recording of the testimony. Thus, the symptoms and signs that the child had in the immediate aftermath of the abuse may not be seen or evident during the trial process or in the case of delayed disclosure, even during the recording of the 161 statement under the CrPC. For example, children may develop bed wetting, sleep and appetite problems, multiple aches and pains, academic decline or refusal to go to school, fear, anxiety, depression, suicidal thoughts and/or attempts, anger outbursts, sexualized behaviour etc., post or during the abuse. The family may or may not understand that such behaviour is due to the abuse and may have even sought medical/psychiatric consultation for the same. Many of these symptoms will resolve with time or may evolve into different symptoms. If the abuse is not discovered, then the child continues to suffer silently with these behavioural and emotional problems, often without any resolution.

We would like to highlight this point with the help of a case vignette. "S" is a 3.5-year-old girl child who presented with history of bedwetting at night after having attained bladder control, clinginess with the mother and extreme fearfulness to go to school for the past two months. This was not her usual behaviour. She was usually happy to go to school, had full control of her bladder and liked to play with her friends in the apartment without her mother's constant presence. The child was sexually abused by her uncle two months ago. On the day of the abuse, the child lost bladder control during the day (which according to the mother did not happen after 2.5 years of age). The child also slept excessively on that day, was extremely cranky and not her usual self. The following day, post-abuse, when her mother bathed her she noticed that the child's private parts were red and on consulting with a pediatrician, the high probability of abuse was confirmed. The child had trouble sleeping at night for the next 10 days, post-abuse. When the child went for her follow up to the pediatrician 10 days post-abuse, the redness in the private area was no longer present and the child had once again attained bladder control during the day. When she came to us for consultation two months after the abuse, the symptoms she had were bedwetting only at night with clinginess to the mother and refusal to go to school due to fear. As can be seen in the above-mentioned case

33 J.N. Briere & D.M. Elliott, *Immediate and long-term impacts of child sexual abuse*, THE FUTURE OF CHILDREN, 4(2), pp.54-69 (1994); S.P. Seshadri, *Short term and long terms effects of child abuse*, IN MANAGING CHILD ABUSE: A HANDBOOK FOR MEDICAL PRACTITIONERS (New Delhi: World Health Organisation, 2004).

vignette, some of the child's symptoms resolved and other symptoms were more evident over time. The signs and symptoms of abuse don't remain static over time.

However, it has to be reiterated that lack of these symptoms does not negate the experience of abuse. But if the parents or caregivers have indeed sought medical/psychiatric help for the symptoms mentioned above, then those reports must be admitted as medical evidence and given its due importance by the court.

IV. Role of “memory” - why is it difficult for a child to testify in court?

As per Section 35(1), POCSO Act, evidence must be recorded within 30 days of the Special Court taking cognizance of the offence. Although a delay for any reason ought to be recorded by the Special Court, CCL-NLSIU's Studies noted that that reasons for delay were not provided in any judgment, except in some districts of Andhra Pradesh, where also, the reasons were mostly mechanical in nature.

This is an extremely important provision, as the longer the trial takes, the more vulnerable the child/family is to the influence of the other family members/society who may want to hush up the abuse and therefore the child and family may become hostile over time. Secondly, the longer the time between the actual event (s) and giving of evidence, the more difficult it is for children to retain in their memory, exact details of the events. If the child is below 8-10 years of age, reporting temporal information is difficult (for example, the date or time of the event). Children also have difficulty in reporting events methodically and completely, and may inadvertently miss out details during one of the many times that they have to give an account of their ordeal to the police, Magistrate, medical practitioner, and the Special Court. Again, this must not be held against them, as in the case of *State v. Gaurav Goswami*,³⁴ where an 11-year-old child testified against her father, but did not mention all the details stated by her in her statement to the police.³⁵ Children find it difficult to state their experiences verbatim every time. The court must also keep in mind that badgering witnesses who are children/adolescents, by repeated questioning, or by being confrontational, negatively affects the accuracy and consistency of their responses.³⁶ Despite the POCSO Act

34 SC No. 51/2014 decided on 06.06.15.

35 Delhi Report, p. 105.

36 S. Krahenbuhl, M. Blades, & C. Eiser, *The effect of repeated questioning on children's accuracy and consistency in eyewitness testimony*, LEGAL AND CRIMINAL PSYCHOLOGY, 14, pp.263-278 (2009).

stating that the questions must be posed to the child by the Special Court under Section 33(2), CCL-NLSIUs reports from the different states revealed that this does not occur in practice. Thus, the environment during the cross-examination is hostile, confrontational and does not allow children to counter allegations made by the defence.

Another ploy often used by the defense is that the child was “coached” or “tutored” and therefore their testimony is unreliable. This was seen in the case of *State v. Suraj Tiwari*,³⁷ where an 8-year-old girl, allegedly subjected to penetrative sexual assault by her father, stated in her cross-examination, that her mother had asked her to state the facts of the abuse perpetrated by her father. The child was viewed as “being coached” as the child said that her mother told her “Itna hi baat bolna hai jitna maine bataya hai”. This statement was given more importance than her examination -in-chief and her cross-examination” which was quite consistent and lucid.³⁸ Children are simply not prepared for the courtroom and do not know what to expect. It is understandably a frightening experience and one in which they must narrate incidents and experiences of extreme trauma. Some preparation is required for child victims, otherwise, they are at a massive disadvantage in Court which is terribly unfair. The child may not remember all the details given at the time of the 164 statement or may miss out details during the child’s examination-in-chief given their cognitive ability at that age. For an individual child, preparation for trial may be required in order to facilitate the process of justice as narration of events in a temporally relevant and cogent manner may be difficult for children, especially when they are young. Thus, preparing a child for a decidedly difficult and unforeseen situation must be distinguished and not misconstrued as “coaching” or “tutoring”.

V. Conclusion

Child sexual abuse is a complex issue and made even more complicated if the abuse is intrafamilial, or if the child is very young or disabled. The abuse per se is traumatic enough for the child to scar them for life. Functionaries of the criminal justice system must take care to prevent secondary victimization post-disclosure, especially by diligently adhering to the legal provisions and processes that are intended to enable a child-friendly trial. The law is only as good as its execution and so if the letter and spirit of the POCSO Act must be realized, then we must be

³⁷ SC No. 97/13 decided on 14.09.2015 in Delhi Report, p.104.

³⁸ Delhi Report, pp. 104-105.

fair to the children who come to the Courts seeking justice, to right the wrongs that have been done to them. The criminal justice system must truly be child-friendly and appreciate the circumstances and issues from the perspective of children and adolescents, taking into account their unique psycho-social circumstances and stages of development, in order to truly serve justice to the most vulnerable amongst us.

“Love”, Consent and the POCSO

SHRADDHA CHAUDHARY*

I. Introduction

The depiction of teenage love in popular media has largely been innocent, fuzzy, and perhaps as a consequence, unrealistically platonic. Darker aspects of these relationships are frequently left out of the narrative. At the heart of ‘romantic’ adolescent relationships is a paradox. On the one hand, almost all adolescents begin experiencing sexual desires, and feel the need to explore sexually. They date, hold hands, text, kiss, and even have sex sometimes, most of which is perfectly normal behaviour. On the other hand, teenagers often confuse sexual curiosity with love, they frequently engage in sexual behaviour that they have very little knowledge of, and may also end up having sexual relations with adults. In many of these cases, children are left vulnerable to sexual abuse. The Protection of Children from Sexual Offences Act, 2012 (hereinafter, POCSO Act) was enacted to meet the obligation of the State under the United Nations Convention on the Rights of the Child (hereinafter, UNCRC) to prevent the inducement or coercion of a child to engage in any unlawful sexual activity.¹ However, studies by the CCL-

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The article has benefited from the feedback of Swagata Raha and Monisha Murali, the Child Protection Team at CCL-NLSIU.

1 Preamble of the Protection of Children from Sexual Offences Act, 2012: “AND WHEREAS the State parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent—(a) the inducement or coercion of a child to engage in any unlawful sexual activity;”

NLSIU on the functioning of Special Courts established under the POCSO Act, have revealed that the rate of conviction in cases where a romantic relationship is alleged between the victim and the accused is nearly 10% lower than other cases under the same legislation.²

This chapter considers the following questions in light of the central paradox of romantic relationships involving adolescents:

1. How does the law approach the 'consent' of minors? What are the pros and cons of this approach?
2. Is the blanket criminalisation of all sexual contact with minors appropriate? Why or why not?
3. What are 'romantic cases'? How have they been dealt with by Special Courts under the POCSO Act, 2012?
4. What are the challenges posed by 'romantic cases'?
5. What are close-in-age exemptions? Would they be an effective solution to the challenges posed by 'romantic cases'?

The chapter first looks at the treatment of the 'consent' of minors by legal systems across the world, to provide a theoretical framework to assess the way adolescent sexual relationships are dealt with by the POCSO Act. It then considers the implementation of the law by Special Courts on the ground, based on the studies by the CCL-NLSIU, and the particular challenges that are posed by such cases, both theoretically and practically. And finally, it examines close-in-age exemptions as a potential legal solution to the problems created by the central paradox of adolescent relationships, and explores other long-term, socio-legal solutions.

This chapter is written using a feminist legal methodology, meaning that the 'woman question' is asked when examining purportedly objective concepts such as 'consent', hierarchical gender dynamics are made the focal point of the inquiry, and an attempt is made to bring out the violence and inequality in seemingly 'normal' relationships. Further, consciousness raising is considered a solution equally, if not more, effective as legal reform.

2 See CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra* (2017), p 75, available at <https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf> (Maharashtra Report).

II. The Consent of a Child

2.1. A Brief Historical Background

The question of the consent of a minor is both contentious and complicated. Given that the physical, mental, and emotional capacity of such persons, usually categorized as ‘children’, is not fully developed, they are not considered as having the agency to make certain decisions and exercise certain rights. These may include casting a vote, owning a gun, or driving a car, having sex or getting married, filing a suit or entering into a contract. These restrictions are uniformly applicable across jurisdictions, although the age of consent/majority may differ. For instance, a person is allowed to drive at the age of 16 in the U.S.A, but cannot drive in India till the age of 18.³ Similarly, the age at which a person may marry, or give consent to sexual activity also varies, and may even depend on factors such as age difference between the parties, and the specific act being performed.

In order to understand the way the consent of a child is treated in law, it is important to first understand what consent means, and how the right to consent has been granted to different social groups. The idea of consent draws from the capacity of ‘reason’, which, in Western societies, was considered the preserve of the healthy, adult, white man.⁴ Coloured and tribal people, women, children, and persons with disability were thought to be ruled by their bodies, and therefore, incapable of reason. It followed, then, that they could not be given the right to consent, and the white man had to act on their behalf.⁵ Through colonization, this conception reflected even in the laws in non-western societies.⁶

Over time, most of these groups were able to win limited political rights and freedoms on the grounds of autonomous individualism, though the exercise of these rights continues to be subordinated to the rights of dominant social groups. Feminist analyses of consent have shown, taking gender as a frame of reference, that there may be a world of difference between a person’s capacity to consent, the recognition of this capacity in law, and the actual practice of consensual sexual activity.⁷ These discrepancies are most obviously visible in the law’s attempt to contain the complications of adolescent sexuality through an age of consent.⁸

3 Motor Vehicles Act, 1988, Section 4(1).

4 Matthew Waites, *THE AGE OF CONSENT: YOUNG PEOPLE, SEXUALITY AND CITIZENSHIP*, 19-22 (2005).

5 *Id.*

6 *Id.* n.4.

7 Catherine A. Mackinnon, *TOWARD A FEMINIST THEORY OF STATE*, 171-183 (1989).

8 Ruth Dixon-Mueller, *How Young is “Too Young”? Comparative Perspectives on Adolescent Sexual, Marital and Reproductive Transitions*, 39(4) *STUDIES IN FAMILY PLANNING* 247, 257 (December, 2008).

The first age of consent appeared in Western Secular law in 1275 in England. Westminster 1, as the statute was called, made it illegal to “ravish a maiden” under the age of 12, with or without her consent.⁹ In the North American English colonies, a 1576 law made it a felony to have carnal knowledge of a girl under the age of 10.¹⁰ In the same century, certain German and Italian states also adopted 12 as the age of consent.¹¹ As a new vision of childhood as a time of growth and development began to take root after the Enlightenment, children were seen as being more distinct from adults than previously imagined, and therefore, more vulnerable to exploitation. In the 18th and 19th centuries, several other states enacted laws specifying an age of consent.¹² By and large, these laws increased the age of consent to around 12 or 13, usually on the ground that women attained puberty around that age. Over time, reform movements began focusing on developmental factors other than the physiological, and argued for a higher age of consent on the ground that psychological development did not necessarily coincide with physical growth.¹³ However, the age of consent was not increased till well into the 20th century.¹⁴ In India, the Indian Penal Code, 1860 had initially pegged the age of consent at 12, even as the legal age for marriage was 10, in the hope of delaying consummation within marriage and thereby protecting girls who were married early.¹⁵

The UNCRC defines a ‘child’ as a person below the age of 18 years, unless the age of majority is set lower by the laws of a country. It is no wonder then, that ranging from 12 in Mexico to 18 in several states of the U.S.A, in Egypt, and in India, the age of consent for heterosexual sex varies widely across countries even today.¹⁶ The differences are justified in terms of culture, climate, biology, and psychology, but almost every age line is arbitrary and incapable of dealing with the complexity and diversity within age groups. In some countries, the age of consent for lesbian

9 Stephen Robertson, *Age of Consent Laws*, CHILDREN AND YOUTH IN HISTORY, <http://chnm.gmu.edu/cyh/case-studies/230> (Last visited on November 20, 2017).

10 *Id.*

11 *Id.* n.10.

12 *Id.* n.10

13 *Id.* n.10.

14 E.D.K. Jr., *History of the Changes in the Law on the Age of Consent*, VIRGINIA LAW REVIEW 11(1), 81 (November 1924).

15 *Id.* n.10.

16 UNICEF, *20 Years of the Convention on the Rights of the Child- Are You Old Enough?*, https://www.unicef.org/rightsite/433_457.htm (Last visited on November 21, 2017).

and gay relationships is different from heterosexual relationships,¹⁷ and, in some cases, may also be different for men and women within heterosexual relationships. In a large number of countries, homosexuality continues to be criminal, and therefore, no age of consent is provided for such relationships.¹⁸ The Monitoring body of the UNCRC, the Committee on the Rights of the Child (hereinafter, the Committee), however, has encouraged states to review the age of majority if it is set below 18 years.¹⁹

While there is no mention of an ‘age of consent’, the UNCRC does recognise the evolving capacity of adolescents, defined as “an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies.”²⁰ Parental direction and guidance under Article 5 of the UNCRC is required to be provided in a manner consistent with the evolving capacities of adolescents, progressing gradually to “an exchange on an equal footing.”²¹ At the same time, the evolving capacities of adolescents cannot be a ground for the state to shirk its responsibility to protect the child. In other words, the principle of evolving capacities must be applied in harmony with the overarching principle of the best interest of the child.²² This means that consideration should be given to factors affecting decision making, including the potential of exploitation, the level of risk, the competence and maturity of the child, and so on.²³ “Age considerations precisely represent one expression of the [UNCRC’s] delicate balance between children’s right to be protected and the recognition that they also have evolving capacities and should therefore have progressive autonomy in making decisions about their lives.”²⁴

17 For instance, the age for anal intercourse outside marriage is 18 in Canada, though the federal age of consent is 16. Refer to: <http://www.pinknews.co.uk/2014/08/11/gay-canadians-still-face-an-inequality-which-may-surprise-you/> (Last visited on November 23, 2017).

18 *Supra* n.17.

19 UNICEF Fact Sheet: A Summary of the Rights under the Convention on the Rights of the Child, https://www.unicef.org/crc/files/Rights_overview.pdf (Last visited on November 23, 2017).

20 Committee on the Rights of the Child general comment No. 7 on Implementing Child Rights in Early Childhood (2005), para.17, , <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf> (Last visited on November 23, 2017).

21 General comment No. 12 on the Right of the Child to be Heard (2009), para. 84, <http://www.refworld.org/docid/4ae562c52.html> (Last visited on November 23, 2017).

22 Article 3, United Nations on the Convention on the Rights of the Child (1989).

23 General Comment No. 20 on the Implementation of the Rights of the Child during Adolescence (2016), para. 20,, <http://www.refworld.org/docid/589dad3d4.html> (Last visited on November 23, 2017).

24 UNICEF, Legal Minimum Ages and the Realisation of Adolescents’ Rights: A Review of the

2.2. Age of Consent in India

The age of consent in India used to be a contested subject, until it was recently clarified by a division bench of the Supreme Court in a Public Interest Litigation challenging the constitutionality of Exception 2 to Section 375, Indian Penal Code, 1860 (hereinafter, IPC).²⁵ Prior to its amendment in 2013, the IPC provided that sexual intercourse with a woman under the age of 16 would be rape, notwithstanding her consent.²⁶ It also provided that sexual intercourse by a man with his wife, the wife not being under the age of 15 years, would not be rape.²⁷ The Prohibition of Child Marriage Act, 2006 (hereinafter, PCMA) provided that a male under the age of 21, and a female under the age of 18, would be considered children,²⁸ and the marriage of such persons would be voidable at the option of either party till two years of the child(ren) obtaining majority.²⁹ This means that a male married before he attained the age of 21, or a female married before she was 18, could petition the District Court to have the marriage declared void, either before attaining their prescribed age of majority, or upto two years after having attained it.

Situation in Latin America and the Caribbean (January 2016), , [https://www.unicef.org/lac/20160406_UNICEF_Edades_Minima_Eng\(1\).pdf](https://www.unicef.org/lac/20160406_UNICEF_Edades_Minima_Eng(1).pdf) (Last visited o November 20, 2017).

25 Independent Thought v. Union of India, W.P. (Civil) No. 382 of 2013, decided on 11.10.17 (Madan B. Lokur and Deepak Gupta JJ).

26 Section 375, Indian Penal Code, 1860, prior to its amendment by the Criminal Law (Amendment) Act, 2013: A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

Sixthly: With or without her consent, when she is under sixteen years of age.

27 Section 375, Indian Penal Code, 1860, prior to its amendment by the Criminal Law (Amendment) Act, 2013:

Exception II: Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

28 Section 2(a), Prohibition of Child Marriage Act, 2006: “child” means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age;

29 Section 3, Prohibition of Child Marriage Act, 2006: (1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage: Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.

(2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend alongwith the Child Marriage Prohibition Officer.

(3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.

Notably the Karnataka amendment, made child marriage *void ab initio*, meaning that such a marriage would never be valid in law.³⁰ The PCMA also provides for criminal punishment for those adults who perform or abet child marriages. At the same time, certain personal laws provide for a lower marriageable age. For instance, Muslim personal law provides that a woman may be married at the age of 15, or when she attains puberty, whichever is lower. Similarly, the marriage of persons under the age of 18 years (for women) and 21 years (for men) would not be invalid, but only voidable under the Hindu Marriage Act, 1955.³¹

In 2012, the POCSO Act set the age of consent for both penetrative and non-penetrative sexual activity at 18 years.³² Section 42-A of the POCSO Act provided that the provisions of the law would override contradictory provisions in any other law for the time being in force.³³ It also made sexual intercourse or sexual assault by a person related to the victim by marriage an aggravated offence,³⁴ indicating the clear intention to set the age for consummation of a voidable underage marriage at 18. The Criminal Law (Amendment) Act, 2013 harmonised the provisions of the IPC with the POCSO Act to the extent that sexual intercourse with a woman under the age of 18, with or without her consent, was defined as rape. However, the marital rape exemption endured.

30 Section 2, The Prohibition of Child Marriage (Karnataka Amendment Act), 2016: 2. Substitution of section 3.- In the Prohibition of Child Marriage Act, 2006 (Central Act 6 of 2007) (hereinafter referred to as the principal Act), In section 3, after sub-section (1) the following shall be inserted, namely:-

“(1A) Notwithstanding anything contained in sub-section (1) every child marriage solemnized on or after the date of coming into force of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 shall be void ab initio.”

31 Hindu Marriage Act, 1955, Section 12(c).

32 Section 2(d): “child” means any person below the age of eighteen years.

33 Section 42A, Protection of Children from Sexual Offences Act, 2012: The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

34 Section 5(n), Protection of Children from Sexual Offences Act, 2012: whoever being a relative of the child through blood or adoption or **marriage** or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child.

Section 9(n), Protection of Children from Sexual Offences Act, 2012: whoever, being a relative of the child through blood or adoption or **marriage** or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child

In *Independent Thought v. Union of India*,³⁵ the Supreme Court held this exemption unconstitutional, insofar as it applied to girls between the ages of 15 and 18. The intention of the Court was to rectify an exemption which sought to legitimize the practice of child marriage. It read down the provision, which stood thus altered, “Marital rape by a man with his wife, the wife not being less than 18 years of age, would not be rape.”

What, then, is the age of consent in India today? If laws are read strictly, and in isolation from each other, it would appear that the age of consent for any sexual activity is 18 years, whether the parties are married or not. The legal age at which a person may consent to marriage is 18 for women, and 21 for men, although lower ages of consent might be acceptable under personal laws. The marriage of younger children would not be invalid per se, except in the state of Karnataka,³⁶ but could be invalidated by either party to the marriage. Criminal liability would be attracted for adult persons who played a role in performing or facilitating such a marriage. However, if the laws are read in relation with each other, it would be clear that even if children are married (either by their parents, or of their own choosing) before the legal age of marriage, they cannot engage in any sexual activity unless they are 18 years old. The POCSO Act, being a special law, and due to the express provision of section 42-A, would override all other laws.

III. Insights from Romantic Cases

The Studies by the CCL-NLSIU on the functioning of special courts under the POCSO Act, 2012, in five states, (hereinafter collectively referred to as ‘the Studies’ or individually referred to as ‘the Delhi Report’, ‘the Maharashtra Report’, etc.) offer interesting insights into the way sexual relationships involving minors, and the consent of minors is treated by Special Courts. The Studies define ‘romantic cases’ as cases in which the victim admitted to being in a romantic relationship with the accused at any stage of the investigation or trial, or in which a romantic relationship was inferred by the judge based on the facts or evidence placed before her.

The most crucial insight that comes through the Studies is that the notion that most, if not all, cases under the POCSO Act comprise consensual sexual

35 *Independent Thought v. Union of India*, W.P. (Civil) No. 382 of 2013, decided on 11.10.17 (Madan B. Lokur and Deepak Gupta JJ).

36 It must be noted that this provision is not currently being implemented.

relationships gone wrong, or eloped lovers dragged to Court by disapproving parents,³⁷ is incorrect. In Karnataka, six of the 110 (5.45%),³⁸ in Delhi, 144 of 667 (21.58%)³⁹ judgements analysed were 'romantic' cases, and in Assam, 27 out of 172 cases (15.69%) were 'romantic' in nature.⁴⁰ The percentages in Maharashtra,⁴¹ and Andhra Pradesh⁴² were found to be 20.52% and 21.21% respectively.

It must be acknowledged, however, that in most cases where the victim *was* in a romantic relationship with the accused, the FIR was lodged by a family member, usually the parents of the victim. The victim was the informant in such cases very rarely, and usually only when the accused had refused to marry her.⁴³ Since data on the religion, caste and class of the victim and the accused was not available in the judgements, nor specifically adverted to by special judges, it is difficult to say whether these factors could have been the motivating reasons for disapproving parents to initiate the criminal justice process. Another common trend observable across the Studies was that romantic cases almost always resulted in an acquittal because the victim either refused to testify against the accused, or turned hostile, denying that the alleged offence had ever taken place.⁴⁴ Alternatively, they would state that they had consented to the sexual act in question, and despite the express mandate of the POCSO Act that the consent of minors be treated as irrelevant, Special Courts recorded acquittals on this ground. In *State v. Akhilesh Harichandra Mishra*,⁴⁵ the victim was 15-years-old when she eloped and married the accused.

37 Bhavya Dore, *The Law's Blindness to Teenage Sexual Consent is Criminalising Young Boys*, SCROLL.IN (August 2, 2016), <https://scroll.in/article/812464/the-laws-blindness-to-teenage-consent-is-criminalising-traumatising-young-boys> (Last visited on November 21, 2017). Though this article refers to juveniles accused of sexual offences, this sentiment was expressed almost uniformly regarding POCSO Cases in the Special Courts as well by the stakeholders interviewed for the Studies.

38 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Karnataka* (2017), p. 66, <https://www.nls.ac.in/ccl/jjdocuments/posco2012karnataka.pdf> (Karnataka Report).

39 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (2016), p.67, <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf> (Delhi Report).

40 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Assam* (2017), p.63 <https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourtassamPOSCOAct2012.pdf> (Assam Report).

41 Maharashtra Report, p. 75.

42 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh* (2017), p.64, <https://www.nls.ac.in/ccl/POSCOAP2017study.pdf> (Andhra Pradesh Report).

43 Delhi Report, pp 65-69, Assam Report, p. 52, Maharashtra Report, p. 39.

44 Andhra Report, p. 64.

45 Spl. C. No. 165 of 2015 decided on 28.01.2016 (Thane) in Maharashtra Report, p.82.

They had a child before the trial was completed. The accused was acquitted because the informant stated that the couple was married and she had no grievances. The Special Court noted that the matter had been compromised. It rejected the PP's argument about consent being irrelevant under the POCSO Act, and mentioned the ratio of certain judgements of the High Court of Bombay, without citing them:

Our Hon'ble High Court in the recent cases took a view that if the girl is enough mature to understand the consequences of her consensual physical relations with the partner then the boy cannot be held alone guilty of having sex with the girl though not attained majority. Considering the particular fact of this case in which the lover couple got married with each other irrespective of their age hurdle I find no propriety to punish them for their act when they are enjoying their happy marital life with each other. Moreover, the family members of both the families are also having no grievance about their act at this stage.

This case points to another observable outcome common to all the Studies: the sympathy and lenience of Special judges in cases where the victim and the accused appeared to have been married, especially if the victim had become pregnant or given birth to a child as a consequence. If the law were to be applied strictly, marriage, and especially pregnancy could be considered conclusive evidence to convict the accused. However, it was seen that in such cases the rate of conviction dropped even lower. Thus, the rate of conviction in cases where the victim and the accused were married was 0% in Assam⁴⁶ and Andhra Pradesh,⁴⁷ 1% in Delhi⁴⁸ and 3% in Maharashtra.⁴⁹ It is likely that such a view is taken by Courts in light of practical considerations which, if ignored, would defeat the ends of justice. For instance, the fact that the accused is providing for the victim and her child, or that if the accused were sent to prison, it would be next to impossible to rehabilitate the victim and her child into a narrow-minded society. Marriage gives legitimacy and social acceptance to the relationship, and therefore, protects the victim and her child from further victimization by society. For instance, in *State v. Parhlad*,⁵⁰ the 17-year-old victim had eloped with the accused, and the two had got married. However, since the essential ceremonies of marriage had not been performed, the marriage was not considered valid, and the victim was placed in a Children's

46 Assam Report, p. 60.

47 Andhra Pradesh Report, p. 65.

48 Delhi Report, p. 65.

49 Maharashtra Report, p. 68.

50 SC No. 113/13 decided on 31.07.2014 in Delhi Report, pp.85-86.

Home (CH). Throughout the trial, she claimed that she had willingly accompanied the accused. On attaining the age of 18 years, the victim was released from the CH, and married the accused again. Since the prosecution had conclusively proved the minority of the victim, the accused was found guilty under S. 6, POCSO Act. It is interesting to note, however, that while the minimum sentence under S. 6, POCSO Act is 10 years imprisonment, the accused was sentenced only to the time already served during trial, based on a list of mitigating factors drawn by the Court. These factors included the fact that the victim and the accused appeared to be in love, that they had *first got married before having sexual intercourse, and had got married again once the victim was released*, that the actions of the accused indicated that he wanted a long term relationship with the victim, and was not simply using her for sex, and finally, that the victim was 5-months pregnant with the child of the accused.

At the same time, it must be remembered that in some cases the victim may have agreed to marry the accused out of societal pressure, coercion, or a lack of alternatives after actually having been raped or groomed by the accused. But it does not appear that any effort was ever made by Special Courts to consider whether the victim actually consented to the marriage, and if so, under what circumstances.

The lack of inquiry into the nuances of consent is reflected also in the complete absence of analysis of the difference in the ages between the victim and the accused, which, in some cases, was over ten years.⁵¹ While it is not for anyone to prescribe an age difference if both parties are adults, significant differences in age may be a red-flag for grooming in cases where one of the parties is a minor.⁵²

Similarly, consent seems to have been viewed rather one-dimensionally by the Special Courts. For instance, where it appears that the victim ever expressed feelings of love or affection for the accused, or agreed to go with him to a certain place, or even agreed to some sexual act, such as, say kissing, it is assumed that she also consented to the entire gamut of sexual activity, upto and including sexual intercourse. This may be the case even when the victim explicitly stated that she

51 Maharashtra Report, p. 78, Andhra Pradesh Report, p. 67.

52 Grooming refers to steps taken by a sexual predator to make his child victim compliant with his abuse. This may include several steps such as gaining the trust of the child, fulfilling an emotional or financial need of the child, isolating the child from her/his peers and controlling her/his interactions with other people, sexualizing the interactions the predator himself/herself has with the child, and so on. For a primer on grooming, see <http://www.icmec.org/wp-content/uploads/2016/05/Behaviors-of-Sexual-Predators-Grooming.pdf> (Last visited on November 23, 2017).

did not consent to the act in question. For instance, in *State v. Indla Venkatesh & Ors.*,⁵³ the accused no.1 and two of his friends had pulled the 16-year-old victim out of school pretending that her grandfather had died, and allegedly attempted to kidnap her, because the accused no.1 wanted to “satisfy his sexual lust” with her. In the Special Court, however, the defence argued that the victim had been in love with the accused, and had asked him to take her with him in several letters written to him. While the victim denied having had a love affair with the accused, the Special Court in Andhra Pradesh inferred the same from the letters exhibited by the accused, and concluded that the victim had accompanied him willingly, even though two independent witnesses testified that they had heard the cries of the victim, and accosted the accused, and upon their arrival, the accused had fled the scene, leaving the victim behind. There does not appear to be any reason why the Special Court concluded that the victim had accompanied the accused willingly, merely because she had written a few letters to him previously, without considering whether her feelings had changed in the interim, or whether she could have refused consent to accompany him, even if she had feelings for him.

In *State v. Rajendra Bhaskar Bagul*,⁵⁴ the prosecution had failed to prove that the victim was below the age of 18 years. While the victim testified that she had been threatened by the accused, and lured into accompanying him on the promise of marriage, a Special Court in Maharashtra felt that the material question was whether she had consented to the intercourse or not. It found that the accused and the victim had previously been meeting and having sexual intercourse, and that the victim in her statement to the police, had admitted to having a romantic relationship with him. The Special Court observed that the natural conduct of any girl who had been abducted and subjected to forceful intercourse would be to tell people and seek help. The victim, on the other hand, had willingly accompanied the accused, and had not complained or raised an alarm at any point, even though she had the opportunity to do so. Therefore, it was held that the testimony of the victim was unreliable. Her conduct showed that she had consented to sexual intercourse with the accused and the prosecution had failed to prove any element of *force*, which, it is important to note, is not an element required to be proved in law. This very rationale was used by the High Court of Delhi in *Mahmood Farooqui v. The State of NCT*,⁵⁵ to find that it is common for women to resist sexual advances

53 S.C.No.57/ 2015, decided on 04.10.2016 (Guntur) in Andhra Pradesh Report, pp.94-95.

54 Sessions Case No. 24 of 2015, Decided on 28.01.2016 (Nashik) in Maharashtra Report, p.82.

55 CRL.A.944/2016, decided by the Delhi High Court on 25.09.2017 [Ashutosh Kumar J.].

even when they do in fact wish to consent, and that where the victim has had a sexual history with the accused, a 'feeble no' does not really count. These trends confirm what noted feminist lawyer Catherine A. Mackinnon said as far back as 1989,

The age line under which girls are presumed disabled from consenting to sex, whatever they say, rationalizes a condition of sexual coercion which women never outgrow. One day they cannot say yes, and the next day they cannot say no.⁵⁶

In fact, one Judge of a Special Court in Delhi held that in cases involving children between 16 and 18 years, the term 'assault' (in sexual assault) would be interpreted to mean coercion, intimidation, fear or exploitation, relying on the definition of 'assault' in the IPC.⁵⁷ In *State v. Suman Dass*,⁵⁸ the Special Court observed that the concept of consent is absent in POCSO Act and the focus is instead on 'assault'. With respect to the charge under Section 3, POCSO Act, it was held, "bare perusal of the said provision provides that sexual intercourse with a child is punishable u/s 4 of the POCSO Act provided it is in the nature of an 'assault'." The Court relied on the IPC definition of the term 'assault' which means, "any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person." This was used to reject the argument that under the POCSO Act, a married man could not have sex with his wife if she is a minor. While the Court acknowledged that marriage at such a tender age is a concern, it took the view that "(the) law cannot and should not prohibit teens from experimentation of such nature."

The sympathy of Special Courts for such cases often also translates into the court entirely ignoring the minority of the victim, and focusing solely on the alleged 'love affair'. It was noted almost uniformly across the Studies that Special Courts would consider the alleged consent of the victim valid, even when she was not above the age of 18. In fact, it was also noted that the police and the prosecution often failed to produce the necessary evidence to prove the minority of the victim in such cases, presumably from the same sense of sympathy for the couple. In

56 Mackinnon, p. 175.

57 Delhi Report, p. 79-80.

58 SC No. 66/13 decided on 17.08.2013 in Delhi Report, p.79.

Andhra Pradesh, particularly, it was seen that where the victim turned hostile, the Court did not even consider the question of her minority.

In *State v. Akshay Balu Bacchav*,⁵⁹ the victim had admitted in her statement to the police under Section 161, Cr.PC, to having a love affair with the accused. While she was below the age of 18, and therefore, her consent ought not to have mattered, it was observed that the prosecution had failed to prove that she was below the age of 16, even though the age of consent is 18 years. Thus, it was held that the accused could not have been faulted for believing that she was above the age of 16. Similarly, in *State v. Sachin Gotiram Kedar*,⁶⁰ the Court held that though the victim was below the age of 18 years, she was above the age of 17, and therefore, mature enough to understand the nature and consequences of her actions.

The problem with this approach is not just that it willfully ignores the legislative mandate of the POCSO Act, but more importantly, that it takes a gender and context-blind approach to sexual relationships involving minors. Whether it stems from a romanticized vision of adolescent relationships, or the idea that the adult male in the situation is being wrongfully punished, or that adolescent girls first consent to sexual relations and then cry wolf ('misuse'), is unclear. In this regard, it is interesting to note that if adolescent males were being raped by adult males, the question of their "consent" would never have arisen. Special Courts would not be found scrutinizing the acts and omissions of the victim, but would convict the accused based solely on the ground that sexual intercourse/contact occurred. One reason for this might be that homosexual relationships are criminalised,⁶¹ and consent to such acts is, therefore, irrelevant. But if that is the rationale, sex with minors is also criminally punishable, and the consent of minors to such relationships should be considered irrelevant as well. The more likely reason is the sexualisation of the adolescent female- the view that post-pubescent girls *are* objects of sexual desire, and therefore, can be treated differently from their male counterparts.⁶² Whatever the underlying motivations may be, it is clear that Special Courts cannot be exercising discretion where none is granted by the law. Not only is that a usurpation of legislative authority, but it can also have severe consequences when this discretion is extended to other cases- such as where there

59 Sessions Case No. 338 of 2015, Decided on 03.09.2016 (Nashik) in Maharashtra Report, p.81.

60 Sessions Case No. 25 of 2015, Decided on 25.04.2016 (Nashik) in Maharashtra Report, p.81.

61 S. 377, Indian Penal Code, 1860.

62 J. Shoshanna Ehrlich, *From Age of Consent Laws to the "Silver Ring Thing": The Regulation of Adolescent Female Sexuality*, 16 HEALTH MATRIX 151, 158 (2006).

was no romantic relationship alleged, or the Judge decides whether the victim was 'asking to be raped' by wearing certain kinds of clothes or being out at a certain time, or having a promiscuous lifestyle.⁶³

IV. Challenges Posed by “Romantic Cases”

The key challenges highlighted by 'romantic cases' and their treatment by Special Courts is that there is disconnect between the mandate of the law on the one hand, and social reality on the other. Though the POCSO Act criminalises any and all sexual activity with a minor, the fact is that minors do begin exploring their sexuality once puberty hits. Sexual exploration by minors may be with other teenagers, or with adults, all of which would be considered criminally punishable under the current law.

In the case of *Teddy Bear Clinic for Abused Children v. Minister of Justice and Constitutional Development*,⁶⁴ the Constitutional Court of South Africa recognised the evolving sexual capacity of adolescents,⁶⁵ and declared Sections 15 and 16 of the Sexual Offences Act unconstitutional. These provisions provided for the prosecution of persons who sexually assaulted or had sexual intercourse with a child between the ages of 12 and 15. Section 56(2)(b) of the Sexual Offences Act also provided for a close-in age exemption to a child charged with sexual assault, though not with statutory rape, provided both parties were children, and the age difference between them was not more than two years.

The Constitutional Court held that the statute had been enacted with the *legitimate* aim of preventing or deterring children from engaging in sexually risky behaviour, or sexual behaviour for which they were not physically, mentally and emotionally prepared. However, it was found that the legislation had not succeeded in its stated aim, as children continued to engage in sexual behaviour sought to be prevented by the Sexual Offences Act. If anything, the Act prevented children from seeking, and professionals from providing, the necessary medical and sexual health care to vulnerable adolescents, thereby increasing the risk of disease, and pregnancy. It was noted that the Sexual Offences Act had the effect of silencing adolescents, and made unhealthy behaviour and poor sexual choices

63 See, for instance, the Application for Bail and Suspension of Sentence of Vikas Garg & Ors., Cr.M.No.23962 of 2017 in Cr.A.No.S-2396-SB of 2017, decided by the Punjab and Haryana High Court on 13.09.2017 [Mahesh Grover and Raj Shekhar Attri JJ.].

64 Case CCT 12/13 [2013] ZACC 35 (Constitutional Court of South Africa).

65 *Teddy Bear Clinic*, para 45, p. 21.

more likely.⁶⁶ The statute was also held to be inherently contradictory to the extent that it treated children as incapable of making sexual choices, but capable of criminal responsibility for sexual acts.⁶⁷ At the same time, the Court affirmed,

...notwithstanding their flaws, the impugned provisions serve an important function insofar as they impose criminal liability for an adult engaging in sexual conduct with a consenting adolescent. No other provision in the Sexual Offences Act serves this essential function. Any relief granted must preserve the criminalisation of such conduct by an adult.⁶⁸

At the time when the POCSO Act was being debated, the National Commission for Protection of Child Rights (NCPCR) had suggested that the age of consent in the IPC (16 years) prior to the Criminal Law (Amendment) Act, 2013, be retained, so that teenage relationships and consensual sexual activity are not criminalised.⁶⁹ It had also recommended “close in age” exemptions, which would protect consensual non-penetrative sexual acts between two children above 12 years of age who are either of the same age or within two years of each other and consensual penetrative sexual acts between children above 14 years who are either of the same age or within three years of each other.⁷⁰ The NCPCR Bill also proposed criminalization of non-consensual sexual acts with children between 16 and 18 years under specified circumstances. Such close-in-age exemptions also exist in other jurisdictions, notably Canada, where the age of consent is 16 years, but a 14 or 15 year old can consent to sexual activity as long as the partner is not more than five years older, and there is no relationship of trust, authority or dependence between them.⁷¹ Several states in the United States of America also have these exemptions, called “age-span” provisions or Romeo and Juliet Laws.⁷²

66 Teddy Bear Clinic, para 47, p.22.

67 Teddy Bear Clinic, para 79, p.38.

68 Teddy Bear Clinic, para 107, p. 50.

69 Pallavi Polanki, *Time to Lower Age of Consent for Sex? National Child Rights Body Thinks So*, FIRSTPOST (March 6, 2013), , <http://www.firstpost.com/india/time-to-lower-age-of-consent-for-sex-national-child-rights-body-thinks-so-650471.html> (Last visited on November 23, 2017).

70 NCPCR, Protection of Children from Sexual Offences Bill, 2010, exceptions to Clause 3.

71 Janine Benedet, *The Age of Innocence: A Cautious Defence of Raising the Age of Consent in Canadian Sexual Assault Law*, 13(4) THE NEW CRIMINAL LAW REVIEW: AN INTERNATIONAL AND INTERDISCIPLINARY JOURNAL 665, 666 (2010).

72 Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22(2) YALE JOURNAL OF LAW AND FEMINISM 279, 293 (2010).

While these exemptions are not foolproof and suffer from the same arbitrariness that a rigid age of consent does, it might be worth debating whether they ought to be included within the POCSO Act or the Juvenile Justice (Care and Protection) Act, 2015, as a defence for minors charged with offences under the POCSO Act. However, such an amendment must be preceded by research into the cases in which minors are charged under the POCSO Act for ‘consensual’ sexual activity with other minors, and the way these cases are treated by the Juvenile Justice Boards. The Studies by CCL-NLSIU focus only on cases where an adult is charged under the POCSO Act, and the findings of these Studies cannot, therefore, be used to justify close-in-age exemptions for teenagers.

In this regard, there is something to be learnt from the *Teddy Bear Clinic Case*. Even as the Court recognised the evolving sexual capacity of adolescents, it retained the criminal sanction against sexual relationships between adults and minors, regardless of the minors’ consent. One of the main reasons for this is that the law places a greater burden on adults to ensure that they do not engage in sexual behaviour with minors- something of an absolute liability. And given the risks of grooming, the prevalence of child sexual abuse and the increased vulnerability of children to adults, this absolute liability is both justified and desirable.

However, the Studies by CCL-NLSIU show that this liability has not translated to actual deterrence on the ground. In part, this may be because the Special Courts do not take such cases seriously and display, as shown in the previous section, a misplaced sympathy for the accused. But it is also, in large part, because of the culture of silence about sex. It is important to have age-appropriate sex education for children at every stage in school, in institutions where children are housed, and through community effort, in places where children do not go to school and are not part of an institutional set-up. Until children are empowered to make risk-free sexual choices, and have their questions answered by receptive, understanding adults, adolescents will continue to be at risk of sexual abuse by their adults and peers.

V. Conclusion

The evolving capacities and sexual autonomy of adolescents needs to be balanced with the responsibility of the state to protect children from sexual abuse. While it is true that most adolescents begin exploring sexually after they attain puberty, it is equally pertinent that children of this age are extremely vulnerable to grooming and exploitation.

The predicament of teenage lovers due to the blanket criminalisation of the POCSO Act has been widely discussed, suggesting the adoption of close-in-age exemptions or age-span provisions such as may be found in Canada, the U.S.A., or South Africa. However, much of the discussion has been based on anecdotal evidence, which is likely to be inaccurate and suffer from common societal biases. It is important, therefore, to have empirical data regarding the cases of adolescents charged under the POCSO Act for being in 'consensual' romantic relationships, and the manner in which such cases have been treated by JJBs. This, in conjunction with studies regarding the sexual practices of teenagers in India, might provide the framework for an amendment to the POCSO Act.

Insofar as the criminalisation of sexual relations between adults and minors is concerned, the legislation attempts to encapsulate the legitimate purpose of protecting children from exploitation by adults. Of course, in borderline cases (such as when one of the parties is 19 years and the other is 17 years), the absolute prohibition may seem absurd. But as a matter of policy, placing this absolute liability on adults is justified. And yet, it would appear that Special Courts are lenient in cases where a romantic relationship between the child victim and the adult accused is alleged. This lenience may stem from practical considerations about the well-being of the victim or her child, but is often also based on patriarchal notions of consent, and a lack of nuance in analysing the circumstances in which the consent was given. By construing consent as an absence of force, overt violence or resistance, Special Courts ignore the high likelihood of grooming and the difference in power between the victim and the accused.

The sympathy of Special Courts to romantic cases belies deeper problems that needs to be urgently addressed. Why are minors being treated as sexual beings by adults who ought to know better? Why are so many teenagers getting married and/or pregnant while still in school? Why are so many children left vulnerable to exploitation by adults? Why is the adolescent female viewed as an object of sexual desire by adult males? Why does the law lose its legitimacy before bodies (Special Courts) that are meant to apply and uphold it?

These are questions that need to be examined and answered keeping in mind a number of factors that affect adolescents in India today. First, the culture of shame and silence surrounding sex means that sexually curious adolescents have no legitimate means of having their questions answered, and also have no sense of what sexually appropriate behaviour is. Secondly, the marked reluctance of the

government to introduce age-appropriate sex education to the curricula in schools, and to awareness programmes in institutions which house children, is making the youth of the country vulnerable to sexual abuse. Thirdly, the absence of other sources of information, and access to internet pornography may be contributing to skewed perceptions of sex, and to the sexualisation of the teenage girl in particular. Links between online pornography and objectification of children needs to be explored, and addressed through the dissemination of accurate, accessible information. Unless this is done, the aim of protecting children from sexual abuse and exploitation will continue to be a farce.

Children with disabilities and the Special Courts

ANUROOPA GILIYAL*

I. Introduction

In India, rights of persons with disabilities including that of children are laid down under the Rights of Persons with Disabilities Act, 2016 (RPD Act). The RPD Act replaced the Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995 (PWD Act), in order to harmonise with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), 2006, ratified by India in 2007. The RPD Act places responsibility on the State to ensure that children with disabilities enjoy their right to participate in matters affecting them¹ and right to access courts and authorities with judicial, quasi-judicial, or investigative powers.²

The specific rights of children with disabilities who are victims of sexual offences are laid down under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). For instance, with a view to facilitate their right to be heard and access to justice, the POCSO Act gives discretion to the police, magistrate and the Special Courts to take assistance of qualified professionals to aid recording

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The article has benefitted from the feedback from Swagata Raha and Shraddha Chaudhary at CCL-NLSIU.

1 RPD Act, Section 4(2).

2 RPD Act, Section 12.

of statements and evidence.³ Offences against children with disability is also recognised, for the first time, as aggravated forms of sexual abuse. The Criminal Law (Amendment) Act, 2013 introduced several substantive and procedural changes that have a bearing on children with disabilities. For instance, a statement made by a child with physical and mental disability who is victim of rape before a Magistrate can be admitted as examination-in-chief and the child can be cross-examined on its basis.⁴ There was also a language shift with reference to persons with disabilities in the Indian Evidence Act, 1872 (IEA) from “dumb witness” to “witness unable to communicate verbally”.⁵

The Census of India, 2011 revealed that children with disabilities constitute approximately 2% of the entire child population, at 7.8 million.⁶ The CCL-NLSIU studies⁷ on the Functioning of Special Courts under the POCSO Act found majority of children with disabilities to be with some form of intellectual disability and/or with speech and hearing impairment. However, children with other forms of disabilities may also have to access the Special Courts. Support services in each case would vary and range from assistance to access the court buildings to support for deposition in the courts.

This chapter analyses specific issues relating to children with disabilities and the response of Special Courts that emerged in these studies.

3 POCSO Act, Sections 26 and 38.

4 Cr.P.C, Section 164(5A)(b).

5 IEA, Section 119.

6 Referred in National Plan of Action 2016, <http://wcd.nic.in/sites/default/files/National%20Plan%20of%20Action%202016.pdf>

7 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra* (2017), <https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf> (Maharashtra Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (2016), <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf> (Delhi Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Assam* (2017), <https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourtassamPOSCOAct2012.pdf> (Assam Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Karnataka* (2017), <https://www.nls.ac.in/ccl/jjdocuments/posco2012karnataka.pdf> (Karnataka Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh* (2017), <https://www.nls.ac.in/ccl/POSCOAP2017study.pdf> (Andhra Pradesh Report).

II Right to Equality and Non-discrimination

2.1. Equality before law and non-discrimination

The essence of this right is that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.⁸ States have the responsibility to prohibit all discrimination on the basis of disability and to guarantee equal and effective legal protection.⁹ To achieve this, positive measures for reasonable accommodation¹⁰ have to be taken.¹¹ This is equally applicable to children with disabilities. Denial of reasonable accommodation would amount to discrimination.¹² “Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others, of all human rights and fundamental freedoms...” is considered discrimination on the basis of disability.¹³ The RPD Act also prohibits any form of discrimination based on disability and places an obligation on the Government to ensure that a person with disability enjoys the right to equality, life with dignity and respect for his or her integrity, equally with others.¹⁴ The Special Courts have the responsibility to ensure that children with disabilities are not deprived of their right to be part of the judicial process. The Constitution of India also guarantees equality before law as a fundamental right.¹⁵ The responsibility is on the State to ensure that no person, including a person with disability is denied this right. All the rights listed below are linked to this fundamental principle and are essential for full realisation of the right to equality before law.

2.2. Reasonable accommodation and non-discrimination

Reasonable accommodation is the prerequisite for enjoyment of fundamental freedoms and human rights such as equality and non-discrimination.¹⁶ The right of

8 UNCRPD, Article 5(1).

9 UNCRPD, Article 5(2).

10 RPD Act, Section 2(y); UNCRPD, Article 2.

11 UNCRPD, Article 5(3); RPD Act, Section 3(5).

12 UNCRPD, Article 2; RPD Act, Section 2(h).

13 *Id.*

14 RPD Act, Section 3(1).

15 Constitution of India, Article 14; Article 14 reads ‘The State shall not deny to any person equality before the law and equal protection of laws within the territory of India’.

16 UNCRPD, Article 5(3).

access to justice has no meaning for a child with disability, without guaranteeing reasonable accommodation. Section 2(y), RPD Act, states:

“reasonable accommodation” means necessary and appropriate modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others.¹⁷

Structural modifications therefore, have to be made to the Special Court buildings and courtrooms in furtherance of the right to access to justice.

2.3. Equal Recognition before the Law

Article 12 of the UNCRPD recognises the right to equal recognition before law, which flows from the right to equality and non-discrimination.¹⁸ The key components of this provision include recognition of persons with disabilities as persons before the law,¹⁹ the right to enjoy legal capacity on an equal basis with others in all aspects of life,²⁰ and the right to access to support required to exercise their legal capacity.²¹ Legal capacity is recognised as an inherent right of all people, including persons with disabilities. The UN Committee on the Rights of Persons with Disabilities, has in General Comment No.1 explained it as:

Legal capacity consists of two strands. The first is legal standing to hold rights and to be recognized as a legal person before the law. The second is legal agency to act on those rights and to have those actions recognized by the law. It is this component that is frequently denied or diminished for persons with disabilities.²²

Therefore, both strands of legal capacity must be recognized for the right to legal capacity to be fulfilled; they cannot be separated.²³

Facilitating communication of a child with disability is an essential component of this right. The obligation to provide the support required to exercise legal capacity is with the State.²⁴ For instance, assistance of a sign language interpreter is

17 This definition is similar to UNCRPD, Article 2.

18 UNCRPD, Clause (h) of the preamble; UNCRC, Article 2(1).

19 UNCRPD, Article 12(1).

20 UNCRPD, Article 12(2).

21 UNCRPD, Article 12(3).

22 Committee on the Rights of Persons with Disabilities, General Comment No. 1(2014) CRPD/C/GC/1 19 May 2014, para 14.

23 *Id* para 16.

24 UNCRPD, Article 12(3).

a form of support required for a person facing difficulty in verbal communication to exercise legal capacity. The support provided should respect the rights, will, and preferences of children with disabilities.²⁵ Denying a child with disability the support to communicate simply means that one of the most important rights of a person with disability, the right to exercise 'legal capacity' is denied, or not fully recognised. Hence, it becomes important for the Special Courts to take assistance of professionals and experts in all cases of children with disabilities and to comply with the mandatory requirement in cases of children who cannot communicate verbally.

III. Use of Appropriate Terminology

With the active involvement of the disability sector, derogatory terms have been replaced with more suitable and appropriate words to refer to disability. The shift towards politically correct terms began in the 1990s, but to this date, such references are not uniform across legislations. For instance, "disability" was defined to mean blindness, low vision, leprosy-cured, hearing impairment, locomotor disability, mental retardation and mental illness under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (PWD Act).²⁶ Cerebral palsy and Autism were included in the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (NATA).

Disability is not defined under the recently passed RPD Act and instead the term "person with disability" is defined. Specific terms such as blindness and low vision, deaf and hard of hearing, locomotor disability, cerebral palsy, leprosy cured, dwarfism, muscular dystrophy, autism, intellectual disability, specific learning disability and mental illness are used in the context of reservation in employment and defined in the Schedule to the RPD Act.²⁷ The Schedule also mentions additional forms of disability such as speech and language disability.²⁸

The POCSO Act uses broader terms dividing all the disabilities into two broad categories-physical and mental disability.²⁹ The Special Courts in some cases

25 *Supra* n.22, para 17.

26 PWD Act, Section 2(i).

27 RPD Act, Section 34.

28 RPD Act, Schedule.

29 POCSO Act, Sections 5(k),9(k), 26(3) and 38.

are still behind time irrespective of their progressive views on other aspects. For instance, in *State v. Avaniagadda Yesu Babu* while granting a good compensation order used terms that are not in line with the spirit of the RPD Act. The child could not be examined due to her disability in this case. The Special Court observed:

The court is also convinc[ed] with the submission made by father of victim as the victim is uneducated, nobody could understand the signs made by victim. If victim was joined in any deaf and dumb or mentally retarded school, certainly the tutors there, would teach some signs to the victim. As the victim is not tutored, the victim and her family members conveniently exchanging their views by their own signals. Therefore, the question of summoning an expert to come to court and to explain the meaning of signals that are making by the victim does not arise. Therefore, this court has not examined the victim. Mere non-citing and examination of victim is not fatal to the case of prosecution as the "Act" is a beneficial legislation for minor children and **mentally retarded, unsound, lunatic, idiot** etc. (Emphasis added)

Through the Criminal Law (Amendment) Act, 2013 (CLAA), the term 'dumb witness' was substituted with 'unable to communicate verbally' under the IEA.³⁰ Yet, in judgments, 'deaf and dumb' is the most common term used in the context of a child who is unable to communicate verbally. Other words used include 'handicap',³¹ 'mentally handicap',³² 'dumb',³³ 'mentally challenged',³⁴ 'girl of unsound mind',³⁵ 'deaf, dumb and mentally retarded',³⁶ and 'dumb and cannot speak'.³⁷ With the passing of the RPD Act, terms mentioned in the RPD Act should be adopted in POCSO cases. In the given context, terms in the PWD Act could be used which would have been more appropriate, considering that several of these judgments were passed prior to the passing of the RPD Act. Alternatively, it would have been apt for the Special Court Judges to use the language adopted by the POCSO Act.

30 IEA 1872, Section 119.

31 *State v. Sarjerao*, Special Case [POCSO] NO.31 of 2014(Latur) in Maharashtra Report, p.32.

32 *Id.*

33 *Id.*

34 *State v. Aasif* SC No: 206/13 (Rohini) in Delhi Report, p.94.

35 *Id.*

36 *State v. Arun Gulabrao Ingole*, Special (Child) Case No. 9/2014 decided on 2.04.2015 (Hingoli) in Maharashtra Report, p.33.

37 *State v. Kotni Pentayya* S.C.No.110/2016 (Vishakapatnam).

Lack of technical understanding of the differences was evident in judgments where words with different meanings were used interchangeably. For instance, ‘mental disability’, ‘handicap and mentally ill’, and ‘mentally handicap’ were used in one case with respect to the very same child.³⁸ The observations made with good intention lose their meaning if basic knowledge in the area is lacking. The situation highlights the inadequacies in the trainings and draws attention to the need to have comprehensive training modules that comprise child rights legislations, communication with child, and are in keeping with the terminologies used in current disability legislation. Noting the situation, CCL-NLSIU studies made recommendations for periodic training of Special Court Judges in the above areas.³⁹

IV. Access to Justice

4.1. Legal Framework

Access to physical environment, to transportation, to information and communications on an equal basis with others is considered a prerequisite for persons with disabilities to live independently and participate fully and equally in society.⁴⁰ A closely connected right is the right to access to justice on an equal basis with others, recognised under Article 13 of the UNCRPD. States Parties have the obligation to provide “procedural and age-appropriate accommodations to facilitate their effective role as direct and indirect participants, as witnesses in all legal proceeding, including at investigative and other preliminary stages”.⁴¹ “In order to seek enforcement of their rights and obligations on an equal basis with others, persons with disabilities must be recognized as persons before the law with equal standing in courts and tribunals”.⁴²

Section 12 of the RPD Act, 2016 also provides a reference to the right to access to justice for persons with disabilities. According to Section 12(1) “the appropriate Government shall ensure that persons with disabilities are able to exercise the right to access any court, tribunal, authority, commission or any other body having judicial or quasi-judicial or investigative powers without discrimination on the basis

38 *Supra* n.31.

39 Karnataka Report, p.78, Maharashtra Report, pp.19, 109, Delhi Report, pp.116, 125, Assam Report, pp 91, 94.

40 UNCRPD, Article 9.

41 UNCRPD, Article 13(1).

42 *Supra* n.22, para 38

of disability.” The child victims of violence involved in judicial process should be treated in a child-friendly and sensitive manner. Their personal situation, needs, age, gender, disability and level of maturity should be taken into account and their physical, mental and moral integrity should be respected.⁴³

4.2. Access to Special Courts

Physical access to court buildings is an indeed essential component of access to justice but it should not be construed narrowly. For the full enjoyment of this right, the court complex, courtrooms, court offices, waiting rooms and basic amenities should all be accessible to children with disabilities, as it is to other children.

CCL-NLSIU studies showed violation of accessibility provisions as envisaged under the UNCRPD and the RPD Act. Special Courts have not adhered to the accessibility norms and the basic amenities are not adequate. It is a challenge for a child with disability or for that matter a family member with disability to access the Special Courts. In some places, the Special Courts appear to be physically accessible, as they are on the ground floor, or have a lift, but access is still not easy. There are at least a few steps to access the court buildings⁴⁴ and lifts are not meant for the use of litigants and their family.⁴⁵ In Maharashtra, Special Courts were located on multiple floors, and lifts or ramps were not available.⁴⁶ Basic amenities such as drinking water,⁴⁷ waiting rooms⁴⁸ and toilets are either not in the vicinity of the courts or not open to public.⁴⁹ Toilets meant for persons with disability were either non-existent⁵⁰ and wherever available, were used as storage spaces.⁵¹ This only demonstrates the apathy towards persons who need to access basic amenities to exercise their right to justice. It was seen that similar infrastructural gaps

43 Committee on the Rights of Child, General Comment No. 13 (2014) CRC/C/GC/ 18 April 2011, para 54(b).

44 Assam Report, p. 24.

45 Karnataka Report, p. 22.

46 Maharashtra Report, p. 15.

47 Andhra Pradesh Report, p.95, Maharashtra Report, p.15.

48 Assam Report, p.24.

49 Karnataka Report, p. 22.

50 Karnataka Report p. 22; Assam Report, Table No 1.1, p. 25; Maharashtra Report, Table No 1.1, p 16; Andhra Pradesh Report, p. 13.

51 Karnataka Report, p. 22.

regarding regular toilets,⁵² toilets for persons with disabilities,⁵³ waiting rooms,⁵⁴ drinking water⁵⁵ existed in the buildings where Juvenile Justice Boards conduct their sittings as well.

V. Right to be Heard

5.1 Legal Framework

The right to be heard is considered one of the four general principles of the UNCRC.⁵⁶ Article 12, UNCRC recognises the right of a child capable of forming his or her views to express those views freely in matters affecting the child. The views of the child should be given due weight in accordance with age and maturity of the child.⁵⁷ It also mandates the States to provide the opportunity to be heard in judicial and administrative proceedings affecting the child.⁵⁸

The expression “capable of forming his or her own views” in Article 12

...should not be seen as a limitation and the States have an obligation to assess the capacity of the child to form an autonomous opinion to the greatest extent possible.

...States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.⁵⁹

In case of a child with disability also, this principle should apply in the same manner. The presumption should exist and specific assistance required for a child should be provided by the State in furtherance of this right. The right of the child to be heard is applicable in all judicial proceedings involved in different capacities even as a victim of any form of violence including sexual abuse.⁶⁰

52 Karnataka Report, p. 19

53 *Id*, p. 19

54 Karnataka Report, p.18; Maharashtra Report, p.15; Andhra Pradesh Report, p.14; Assam Report, p.22.

55 Karnataka Report p.19.

56 Committee on the Rights of Child, General Comment No. 12(2009) CRC/C/GC/12 1 July 2009 para 2.

57 UNCRC, Article 12(1).

58 UNCRC, Article 12(2).

59 *Supra* n.56, para 20.

60 *Id*, para 32.

This principle is further articulated under the UNCRPD in the context of children with disability. According to Article 7(3):

States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

All children with disabilities may not be able to communicate verbally or express their views like other children of the same age, due to a disability. Engaging an expert or a person familiar with the manner of communication is the means by which the right of children with disabilities to be heard can be actualised. Assistance from experts may have benefitted some of the children before the Special Courts.⁶¹ This also is contingent on the child having basic formal education in sign language, the degree of disability or the age of the child.⁶² This provision under the UNCRPD specifies that such right should be based on the non-discrimination principle and that the child should be given age appropriate assistance to be able to part of a judicial process. There are also instances when the child was not called as a witness and also cases when the child could not answer the questions, despite efforts being made.⁶³ Drawing from the UNCRPD, the fundamental question is whether an effort to provide support was made in these cases? Simply stated, not doing so would amount to denial of a right to be heard.

The State has an obligation to ensure realisation of the right to be heard specifically for 'children experiencing difficulties in making their views heard'.⁶⁴

5.1. Assistance from professionals and experts

Accessibility to services to aid communication and to be part of the judicial process is another aspect of the rights discussed above. A child with disability who is a victim of sexual offence may be provided appropriate assistance to record the evidence. In case of a child with "mental or physical disability",⁶⁵ the Special Court

61 Assam Report p.15.

62 State v. Arun Gulabrao Ingole, Special (Child) Case No. 9/2014 decided on 2.04.2015 (Hingoli) in Maharashtra Report, p.33.

63 Andhra Pradesh Report, p. 27.

64 *Supra* n.56, para 21.

65 The terms used in this chapter are similar to the POCSO Act so as to encompass all forms of disabilities that Special Courts are referring to. The Special Courts have used terms

may take assistance of a special educator or any person familiar with the manner of communication of the child⁶⁶ or an expert in that field, having such qualifications and experience.⁶⁷ Section 119, Indian Evidence Act, 1872 was amended, mandating Courts to take the assistance of an interpreter or a special educator in recording statement of a witness who is unable to communicate verbally. It also requires the statement of such witnesses to be videographed.⁶⁸ When a child with disability is before the Special Court, there is a duty imposed on the court to therefore provide the assistance of such interpreters or special educators free of cost.⁶⁹ This being a mandatory clause, reasons for failure to meet the requirement should be provided by the Special Courts.

Judgment analysis indicated that in a majority of the cases across the Studies, children with disabilities either suffered some form of intellectual disability, or were speech and/or hearing impaired, indicating that sign language interpreters or special educators would have been required to facilitate communication. However, it was found that sign language interpreters or special educators are not provided as a routine practice to record the testimony of children with disabilities.⁷⁰ In some cases, in fact, there is no reference to the manner in which the testimony of the child with disability was recorded, even when the child's disability is advanced (for instance, 80% intellectual disability).⁷¹

5.2. Ensuring availability of assistance

The obligations of the Special Court under the POCSO Act and the IEA are clear: it is discretionary under the former Act, and mandatory under the latter, with respect to certain forms of disability. The responsibility of sourcing the expert is not on the Special Court, but on the District Child Protection Unit, which has

interchangeably in some cases.

66 The importance of this provision was also highlighted in the Department-Related Parliamentary Standing Committee on Human Resource Development, *Two Hundred Fortieth Report On The Protection Of Children From Sexual Offences Bill, 2011*, (Standing Committee Report on POCSO Bill) para 16.2, <http://www.prsindia.org/uploads/media/Protection%20of%20children/SCR%20Protection%20of%20Children%20from%20Sexual%20Offences%20Bill%202011.pdf>

67 POCSO Act, Section 38(2).

68 Indian Evidence Act, Section 119 - The proviso reads "provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be videographed."

69 POCSO Rules, Rule 3(6).

70 Maharashtra Report, p. 32.

71 Special Case No.17/2013 decided on 20/09/2014 (Buldhana).

the responsibility to maintain a register with names, addresses and other contact details of interpreters, translators, special educators and experts for the purposes of the Act.⁷² The register has to be made available to the Special Juvenile Police Unit, local police, magistrate and the Special Court, when required. CCL-NLSIU Studies showed that such registers were not available in any of the five states.⁷³

5.3. Quality of Services

Sign language interpreters and special educators should have relevant qualifications in sign language, and special education experts should have the qualifications in the relevant discipline from a recognized University or an institution recognized by the Rehabilitation Council of India.⁷⁴ The gender preferences of the interpreter, special educator or an expert expressed by the child receiving the services may also be taken into consideration.⁷⁵ The service provider has to be unbiased and impartial and should disclose any real or perceived conflict of interest.⁷⁶ The Special Courts have the responsibility to ensure that the child should be able to communicate without fear. This would mean that the accused person or anybody connected to him ought not to be used in such a capacity under any circumstances. Judgments analysed in the studies did not mention the extent to which these criteria were generally met.

In cases of children with disabilities, the response of the Special Courts has not been uniform. In a case from Delhi, where the victim was apparently a child with intellectual disability, the Special Court allowed the child's older sister who was familiar with her language and gestures to communicate the questions and her responses.⁷⁷ In another case, a teacher from School of the Deaf was asked to interpret in the case of a child with intellectual disability and hearing problem.⁷⁸ The child could have probably benefitted better from a special educator or an expert from different discipline. In *State v. Asif*,⁷⁹ the victim was referred to as

72 POCSO Rules, 2012, Rule 3.

73 Karnataka Report, p. 38; Delhi Report, p. 45; Assam Report, p. 91; Maharashtra Report, p. 31; Andhra Pradesh Report p.29.

74 POCSO Rules, Rule 3(5).

75 POCSO Rules, Rule 3(7).

76 POCSO Rules, Rule 3(8).

77 *State v. Manoj*, SC No.114/13 decided on 03.12.2014 in Delhi Report, p.45.

78 *State v. Arun Gulabrao Ingole*, Special (Child) Case No. 9/2014 decided on 2.04.2015 (Hingoli) in Maharashtra Report, p.33..

79 *State v Aasif* SC No: 206/13 (Rohini) in Delhi Report, p.94.

'mentally challenged' and a teacher from a 'Nursery Primary School for Deaf and Dumb' was engaged.

Due to unavailability of a list, in some cases the Special Courts have relied on the police to bring experts whom they may have used during investigation.⁸⁰ These practices carry a high risk of quality of services being compromised.

5.4. Communication linked to disposal outcome

CCL-NLSIU studies showed that in cases where the victims suffered some form of disability, one of the most common problems was that the child could not communicate effectively. Further, information about whether a professional was engaged,⁸¹ or reasons for not engaging professionals,⁸² or for having tested the child's ability to depose, is not mentioned in the judgments, barring a few exceptions.⁸³ The frequency and consistency with which experts were engaged to record the testimony of children with disabilities varied from state to state. For instance, while in Maharashtra it was seen that such experts were rarely engaged,⁸⁴ in Andhra Pradesh, it was noted that experts were engaged frequently.⁸⁵

In many of the cases, where an expert was engaged and the child supported the prosecution, the accused was convicted.⁸⁶ For instance, in *State v. Kannuri Sanyasi Rao*⁸⁷ a 'deaf and dumb' child with 75% disability deposed with the help of a teacher from a School for the Deaf. The accused was convicted based on the child's evidence.

The cases in which the child could not communicate despite assistance from

80 Andhra Pradesh Report, p.27.

81 Maharashtra Report, p.32.

82 There are a few exceptions such as in the case of *State v. Avanigadda Yesu Babu* (S.C. No 14/2014, decided on 05.12.2016 (Guntur) in Andhra Pradesh Report, pp. 27-28. Reason for not examining the child was clearly mentioned in this case.

83 *State v. Aasif*, SC No.206/13, decided on 08.09.2014 in Delhi Report, p.94, the Special Court found a child with mental disability to be incompetent to testify.

84 Maharashtra Report, p.31.

85 Andhra Pradesh Report, p. 27.

86 *State v. Gopavarapu Mohan Rao* POCSOA Sessions Case No 101/2015, decided on 20.04.2016 (Guntur) ; *State v. Kannuri Sanyasi Rao @ Bujji* POCSO S.C NO.111/2015, decided on 22.03.17 (East Godavari) in Andhra Pradesh Report, p.27.

87 POCSO S.C NO.111/2015, decided on 22.03.17 (East Godavari) in Andhra Pradesh Report, p.17.

an expert, or the efforts of the Special Court to provide support, were usually cases where the disability of the child was severe. Special Courts have in such cases convicted the accused based on other evidence, considering the circumstances of the child and the disability. In *State v. Arun Gulabrao Ingole*,⁸⁸ the five year old child, who was intellectually disabled and hearing impaired, was unable to testify, despite assistance from an expert. Teachers from a School for the Deaf were present in court to help record the testimony of the victim. However, she was unable to testify, as she could not understand the questions put to her, even with the help of experts. The accused was convicted because of the testimony of other witnesses and forensic evidence which supported the case of the prosecution. In *State v. Avanigadda Yesu Babu*,⁸⁹ the Special Court asked the father to arrange for an expert to record the evidence of the 17-year-old victim who had intellectual disability, and speech and hearing impairment. The father, however, clarified that she was never sent to school and cannot be understood by anyone except the family members. Convinced by the same, the court did away with the examination of the girl. The accused was convicted by the Special Court and sentenced to life imprisonment, based on the evidence of other witnesses.

VI Analysis of Charges

6.1 Disability as an aggravating factor

The POCSO Act for the first time recognised penetrative sexual assault and sexual assault on a child with disability,⁹⁰ and such sexual offence resulting in a disability,⁹¹ as aggravated offences. Through this, the POCSO Act acknowledges the vulnerability of a child with disability, thereby making provisions for enhanced punishments. A Special Court also has the authority to change the charges if the accurate one is not included in the charge sheet. Sections 5 (k) and 9(k) of the POCSO Act makes commission of penetrative sexual assault and sexual assault, respectively, by taking advantage of a child's mental or physical disability, an aggravated offence. Section 376(2)(l) also considers rape on a women suffering from mental or physical disability has prescribed higher minimum mandatory punishment. CCL-NLSIU's Studies have shown that the Special Courts have not

88 Special (Child) Case No. 9/2014 decided on 2.04.2015 (Hingoli) in Maharashtra Report, p.33.

89 S.C. No 14/2014, decided on 05.12.2016 (Guntur) in Andhra Pradesh Report, pp.27-28.

90 POCSO Act, Sections 5(k) and 9(k).

91 POCSO Act, Sections 5(j)(i) and 9(j)(i).

always applied the correct charges. For instance, in *State v. Vadupala Ramana*,⁹² the accused, a neighbour was alleged to have committed penetrative sexual assault against a 16-year-old girl with mental retardation. The child had not been examined due to disability. The Special Court, relying on the medical evidence and evidence of other witnesses, convicted the accused for penetrative sexual assault under Section 4 of the POCSO Act. The Special Court failed to take note of the medical certificate of disability and to charge the accused of aggravated sexual assault under Section 6 of the POCSO Act.

Under Section 92(a), RPD Act, whoever “intentionally insults or intimidates with intent to humiliate a person with disability in any place within public view” is liable for minimum imprisonment of six months, which can extend to five years and fine. Hence, use of an insulting term could also be treated as an offence under this Act. Further, Section 92(b), RPD Act, criminalizes assault or use of force to outrage the modesty of a woman with disability or dishonour a person with disability and Section 92(d) criminalizes the sexual exploitation of a child with disability by a person in a position to dominate the will of the child.

6.2. Interpretation of taking advantage of disability

For a sexual act with a child with disability to be considered an aggravated offence, the accused should have taken advantage of a child’s mental or physical disability. Knowledge of the disability would, therefore, be a prerequisite. There have not been many cases where the Special Courts have probed into this aspect. In *State v. Arun Gulabrao*,⁹³ a child aged five years was ‘deaf dumb and mentally retarded’ was subjected to penetrative sexual assault by the accused who was from the same village. While convicting the accused, the court observed ‘I hold that accused is perpetrator of the crime. Accused had taken disadvantage of dumbness, deafness, physical and mental condition of ... a minor child.’ Accused was convicted under Sections 325 and 376 of Indian Penal Code, Section 4, POCSO Act and under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act.

92 S.C.No.335/2015(Vishakapatnam).

93 Special Child Case No.09/2014 (Hingoli) in Maharashtra Report, p.33.

VII. Conclusion

The POCSO Act is a progressive legislation in so far as certain provisions regarding children with disabilities are concerned. These provisions are in line with the requirements under the UNCRPD and the RPD Act. The implementation of these provisions is, however, unsatisfactory. The support by way of interpreter, special educator or an expert as per the requirement of the child, as recommended under the Act, has to be followed mandatorily in order to achieve the objective of these provisions. The State Government has the responsibility of facilitating this by maintaining a list of contacts of such professionals.

The judiciary also needs to adopt a disability-sensitive vocabulary into their everyday functioning in order to fully comply with the requirements under the UNCRC, UNCRPD and the RPD Act. The terminologies should not only align with the current disability legislations, but also be supported by the medical certificate regarding disability. There is a need to recognise access to justice of a person with disability and reasonable accommodation as the foundation of any right based and sensitive approach to children with disability.

The system should focus on the person whose need may be higher in a given context and the modifications should be inclusive in nature. Therefore for an effective implementation of the POCSO Act, the needs of persons with disabilities accessing the justice system should be accorded utmost priority. The State Government and the judiciary should therefore take pro-active steps towards achieving the rights of children with disabilities and build their trust in the justice system.

Child Sexual Abuse and the culture of shame and silence

URMILA PULLAT*

I. Introduction

1.1 Child Sexual Abuse in India

According to the 2007 MWCD Report on Child Abuse in India, 53.22 % of children reported having faced one or more forms of sexual abuse and in 50% of the cases, the abusers were known to the children or in a position of trust and responsibility.¹ It was also found that 72.1% of the children did not disclose the matter to anyone.² The NCRB's report *Crime in India, 2016*, indicate that 94.6% of those alleged to have committed rape, penetrative sexual assault and aggravated penetrative sexual assault were known to the victim.³ Studies undertaken by the Centre for Child and the Law (CCL), National Law School of India University (NLSIU) show that the accused was known to the victim in 80% of the cases

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- 1 Ministry of Women and Child Development, Government of India, *Study on Child Abuse in India* (2007), <https://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf>.
- 2 *Id.*
- 3 National Crime Records Bureau, *Crime in India, 2016*, Table 3A.4 Offenders Relation to Victims of Rape -2016.

analysed for Delhi, 78% for Assam, 77% for Maharashtra, 74.85% for Andhra Pradesh and 70% for Karnataka.

Research conducted internationally shows that there is a significant psychological impact and myriad interpersonal problems faced by individuals who have experienced child sexual abuse (CSA), as compared to those who have not.⁴ To protect children from sexual abuse in India, the POCSO Act was enacted in 2012, criminalizing sexual acts against children by broadening the definition of CSA beyond penile-vaginal intercourse and mandating the designation of Special Courts in every district to try sexual offences against children. The Act is gender-neutral and protects both male and female children who could be victims. The POCSO Act has specific provisions that are intended to make the courts and the judicial process ‘child-friendly,’ including provisions for support before, during, and after the trial, and mechanisms to reduce chances of re-traumatization of the child victim.⁵

1.2 The How Revealing Website Project

The true extent of sexual violence in India, its depth, breadth and intensity are difficult to measure accurately. The murder and gang-rape of a 23-year old physiotherapy student, in December 2012, led to tremendous media attention, giving the impression that sexual violence in India was increasing. It also led to more people, especially women, opening up about their own experiences of sexual violence.

It is against this backdrop that the *How Revealing* website project⁶ (hereinafter the project) was set up in January 2017, with the aim⁷ of providing a safe online space for people⁸ to share experiences of sexual assault in India. As of 15 October 2017, the project has published 138 submissions, of which 10 are international submissions. Of the remaining 129 submissions, more than 60% are of CSA, making

4 John N. Briere and Diana M. Elliot *Immediate and Long-Term Impacts of Child Sexual Abuse*, THE FUTURE OF CHILDREN , Vol. 4, No.2 , Sexual Abuse of Children, pp.54, pp. 54-55 (Summer-Autumn 1994)

5 POCSO Act, 2012, Sections 33(4) and 33(6).

6 The majority of the submissions on the website are not reported, to the best of the author’s knowledge.

7 The project aims to be a dedicated platform for people to share along with the links to support organisations. It is not a forum to ‘report’ incidents of sexual assault.

8 Anyone can share, whether they directly experienced it or not, or if they want to share an incident that occurred to someone else. See more at <https://howrevealing.com/about>.

the project relevant to CCL-NLSIU studies on Special Courts under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act).

II. Methodology and Hypothesis

This chapter is written with the limited focus of understanding the profile of perpetrators and its implications on testimony and outcomes, drawing from the analysis in the CCL-NLSIU Studies and the submissions on the project. The grounds on which witnesses turning hostile as shown by the studies and the reasons for not disclosing and reporting an incident of CSA, as evidenced by the stories on the project will be studied to examine emerging patterns.

Though limited, there is some international research on the implications of perpetrator profiles on disclosure and on victim testimony and this has been studied to help understand the patterns and also identify potential areas for new research in India. It is hypothesized that the lack of support systems within the criminal justice system under the POCSO Act 2012, especially in cases where the perpetrator is known to the victim results in victims turning hostile and subsequently, a high acquittal rate in POCSO cases.

The chapter will enable a clearer understanding of both legislative and implementation gaps with respect to support systems and whether they are victim-friendly. The larger issues that are sought to be answered are regarding how the criminal justice system can work with other disciplines to ensure justice and ensuring that legislative reform is better informed by the inputs of experts from other fields like criminology and psychology, fields that are cross-cutting with the issue of sexual violence.

It is argued that what is lacking is a clear understanding that the law alone is not sufficient to obtain justice⁹. The law cannot be the only arbiter for providing redress and single-mindedly focusing on punishing the accused in the absence of strong psycho-social support frameworks and witness protection systems is futile, as evidenced by the high rate of acquittal in POCSO cases.

9 Atiya Bose, *For children who have suffered sexual abuse, criminal law is not enough*, THE WIRE, 09.05.2017, <https://thewire.in/133427/for-children-who-have-suffered-sexual-abuse-criminal-law-is-not-enough>

2.1. Limitations

The sensitive and complex nature of sexual offences limits the scope and possibility of empirical and scientific study in this field. With respect to the implications of perpetrator profiles on child victim testimony, while there are no large-scale studies in India that have specifically examined this while the CCL-NLSIU studies briefly touch on this aspect.¹⁰ Given that many studies¹¹ find that a majority of the cases of CSA are perpetrated by people known to the victims, it is difficult to envisage a counter-factual situation that could enable researchers and policy makers to compare the disclosure patterns between a known perpetrator and an unknown perpetrator. Further, even if one were to proceed on the assumption that a known perpetrator might result in a lower probability of disclosure, the exact nature of the relationship (for example, father, brother, neighbor etc.) is also relevant and important. Additionally, there have been very few studies conducted in the world to understand the impact of giving courtroom testimony on CSA survivors and its relationship to the profile and identity of the perpetrator. The limitations of the methodology and the existing data are:

1. Lack of sufficient reliable and specific data in the field of research related to sexual offences in India.
2. Difficulty in establishing counter-factual situations to test hypotheses or establish clear relationships between variables.
3. Absence of large-scale studies that have interviewed child victims before and after trial
4. With respect to the project, lack of specific and relevant questions regarding interactions with the criminal justice system.
5. The testimonies on the project are by adult survivors of CSA while the CCL-NLSIU studies are about child-victims.

10 See CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra* (2017), <https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf> (Maharashtra Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (2016), <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf> (Delhi Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Assam* (2017), <https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourttassamPOSCOAct2012.pdf> (Assam Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Karnataka* (2017), <https://www.nls.ac.in/ccl/jjdocuments/posco2012karnataka.pdf> (Karnataka Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh* (2017), <https://www.nls.ac.in/ccl/POSCOAP2017study.pdf> (Andhra Pradesh Report).

11 *Id.*

6. Inability to verify the submissions on the project as most of them are submitted anonymously and may suffer from recall bias.

Every effort has been made to keep the author's confirmation bias at a minimum.

III. Patterns emerging from the submissions on the *How Revealing* website project

As on 15 October 2017, all the submissions on the project were by adult survivors or bystanders in incidents of sexual violence. There are no stories or accounts of abuse submitted by children. In March 2017, two new fields were added to the form on the website i.e.

- Did you report this incident to an inquiry committee or file a criminal complaint?
- If no, why didn't you report the incident?

Although the universe of stories on the project relating to CSA is much larger, a sample of 30 stories¹² was selected using a purposive sampling technique. There are 62 stories with data on whether people reported the incident and reasons for not doing so. Out of these 32 stories were discarded for different reasons (such as they were stories from abroad or were not related to CSA). The remaining 30 stories thus form the sample for this chapter and were studied using the following details:

1. Victim age
2. Gender
3. Place where the assault took place eg., home, school etc.
4. Identity of perpetrator
5. The nature of abuse, i.e., sexual assault, aggravated sexual assault, penetrative sexual assault¹³ etc.
6. Whether the abuse was disclosed or not (either immediately or later)
7. Whether the incident was reported or not

12 The stories on *How Revealing* are in the public domain and those who submit the stories agree to the 'Terms and Conditions' on the website which details the various uses of the stories. However, the names of those who submit stories are not reproduced anywhere, for reasons of privacy, even if they have been entered on the project.

13 This has been classified by the author using the definitions in the POCSO Act 2012.

Most stories have details of the effects of the abuse and since there are no specific questions in the form that are intended to examine this, all the stories are analysed for broad patterns relating to negative impact of abuse and factors affecting disclosure.

IV. The Culture of Shame and Silence

4.1. Mapping trends from the POCSO Studies conducted by CCL-NLSIU

State	Number of cases analysed	Rate of acquittal	Victims turned hostile	Rate of acquittal due to hostility*	Accused known to the victim
Karnataka	110	96%	94%	98%	70%
Maharashtra	1330	81%	47%	57%	77%
Delhi	667	83.2%	67.5%	81%	80%
Assam	174	76%	32%	100%	78%
Andhra Pradesh	509	89%	77%	100%	75%

*Number of acquittal cases in which acquittal was due to hostility

Reasons for hostility:

- A high percentage of victims turn hostile in cases where the perpetrator is known to them and this could be because of threat, coercion and pressure to change the testimony or due to a lapse in memory due to the trauma of abuse.
- Fear of facing the accused in the courthouse during the trial, although this detail was not studied
- Long delay between the date of the incident or when it was reported, to the time of taking testimony, which gives the accused a chance to apply pressure, threaten or coerce the victim.
- Compromise is frequently cited as a reason for acquittal, although it is illegal.

Compromise is a big part of cases of 'elopement' or consensual love affairs involving an underage girl, where the family of the victim files false cases, usually of rape, kidnapping and under the POCSO Act, against the accused, as they do not

approve of the relationship. Although compromise is illegal¹⁴, as sexual assault and CSA are not compoundable offences, the parties do reach a settlement, resulting in the victim and the complainant turning hostile. Compromise usually takes place in cases when the perpetrator is known to the victim and it is possible that the accused was able to coerce or pressure the victim and/or her family members to drop the case against him. According to a Public Prosecutor interviewed for the Maharashtra Report, the victim and the complainant can face a lot of pressure from the community to compromise.¹⁵

In the Delhi Report, respondents, which included prosecutors, lawyers, support persons, police officers etc. stated that the victims turned hostile because of pressure to compromise, because the witnesses are not protected as they are handed over to the families and if the accused is a family member or neighbor, it is easier to threaten and exert pressure¹⁶. In the Karnataka Report, some respondents felt that the long lapse of time between the incident and the evidence resulted in gaps in memory, and speeding up the process could reduce the numbers of victims turning hostile¹⁷ and this was also borne out in the Assam Report¹⁸. Respondents from the judiciary that were interviewed for the Maharashtra Report stated that frequent adjournments sought and given was done to prolong the matter to exert pressure to try and make the witnesses turn hostile¹⁹. Respondents interviewed for the Andhra Pradesh Report stated the pressure exerted by family members to compromise results in the victim turning hostile²⁰. Therefore, pressure to compromise leaves the victim vulnerable to threats, especially in cases where the accused is known or in close proximity to the victim.

Profile of perpetrators and relation to victim testimony

The Karnataka Report reveals²¹ that the accused was acquitted in 100% of these cases where victim turned hostile, except when the accused was a neighbor (79%) and acquaintance (89%). In three cases, the victim turns hostile

14 See State of M.P. v. Madan Lal (2015) 7 SCC 681 and Shimbhu & Anr. v. State of Haryana (2014) 13 SCC 318.

15 Maharashtra Report, p.53.

16 Delhi Report, p.103.

17 Karnataka Report, pp. 32-33.

18 Assam Report, p.21.

19 Maharashtra Report, p.29.

20 Andhra Pradesh Report, p.46.

21 Karnataka Report, p.65.

during cross-examination even though they testified against the accused during the examination-in-chief. In another case, the 14-year-old victim as well as the complainant (the mother of the victim) turned hostile in a case of rape against the victim's maternal uncle.²² Even though she was found to be four months pregnant, the court acquitted the accused. There is a similar case²³ in the Maharashtra Report where the perpetrator is the hostile victim's father who had impregnated her for the third time, showing that this was not a one-time occurrence, and that the victim had been silenced multiple times in the past.

In the Maharashtra Report, it was found that 159 cases or 25.27% were when the victim and accused were in a "romantic relationship", and 31 or 5.06% were cases in which the accused was known to the perpetrator, i.e., a father, brother or step-father.²⁴ In Delhi, in a breakdown of the identities of perpetrators known to the victim, it appeared that acquaintances made up 15% and boyfriends made up 10%, and 19% were cases in which the accused and the victim were married before or during the trial.²⁵ In Assam, in a breakdown of the identities of perpetrators known to the victim, acquaintances made up 28% and neighbours made up 24%, 16% were relatives and 12% of the accused was a boyfriend.²⁶ In Andhra Pradesh, in a breakdown of the identities of perpetrators known to the victim, acquaintances made up 27.29% and neighbours made up 18.1%, 16% of the accused was a boyfriend and 12% of the accused was a husband.²⁷

Victims turning hostile commonly stated that no assault had taken place in incest cases, or pleaded that the complaint was lodged due to a quarrel or at the instance of a police or NGO. In *State v. Raju*,²⁸ the victim, a 11-year old girl alleged that her father had sexually assaulted her through digital and oral penetration but later said that she was influenced to say this by an NGO person and the police. In *State v. Mohd. Sallaudin*,²⁹ a 13-year-old victim accused her father of digital penetration but later recanted saying he had only scolded her.

22 *State v. Ravindra Ravi*, Spl.CC No. 431/ 2014 decided on 10.03.2016 in Karnataka Report, pp.55-56.

23 Special Case No. 02/2015, decided on 10/27/2016 (Buldana) in Maharashtra Report, p.45.

24 *Id.*

25 Delhi Report, pp.62-68.

26 Assam Report, pp.56-60.

27 Andhra Pradesh Report, p.59.

28 SC No. 45/2015 decided on 29.09.2015 in Delhi Report, p.73.

29 SC No. 35/14 decided on 02.09.2014 in Delhi Report, p.73.

In the Delhi Report a regression analysis³⁰ was conducted, and it was found that the possibility of becoming hostile when the alleged perpetrator is known to the victim is no different from that of own family members and decreases when the perpetrator is a stranger as compared to a family member.

4.2 Emerging patterns from the submissions on the project

Of the sample of 30 stories selected, 23 were of females, 6 were male and one was non-binary i.e. 77% female and 20% male. Only one of these stories were reported and as far as could be gleaned from the stories, 40% of the stories were disclosed to someone whereas 33% stories were not disclosed. In the rest of the stories, whether or not there was disclosure was unclear. In 70% submissions, the perpetrator was known to the victim, and of these, 43% submissions were about abuse by a family member. The abuser was a stranger only in one submission. With regard to the nature of the abuse, 43% submissions detailed aggravated penetrative sexual assault, 47% submissions were of penetrative sexual assault, 7% were of sexual assault and 3% of sexual harassment.

The overwhelming pattern that has emerged from analysing the sample is the lack of robust support systems and insufficient awareness about CSA and that it is wrong. Of the sample, 97% of the submissions state that the incidents were not reported, for a variety of reasons. Self-blame and shame, and feelings of fear and stigma feature predominantly. Some of the survivors write about 'not knowing' that they could report the incident and others write about not knowing how to, thus underlining the need for an accessible complaints system. Few survivors stated that they were too young at the time of incident and felt guilty that it would ruin the family or the relationships within the family, and these were borne out especially in cases where the perpetrator was related to the victim, like an uncle or cousin brother.³¹

Feelings of shock, disgust, anger, confusion, and fear of not being believed emerge clearly from the 29 stories, in various degrees. Only four of these were disclosed to someone and none of them were reported to any authority. Of the four submissions, one disclosed the incident to her mother, and was instructed to keep quiet, while repeatedly being exposed to the perpetrator.³²

30 Delhi Report, p.69.

31 See Story nos. 115 and 133 on www.howrevealing.com

32 See Story no. 114, <https://howrevealing.com/story/view/114>

A lot of survivors blame themselves for the abuse and this prevents them from speaking about it or disclosing it. For those who do disclose it to their parents or teachers, they are silenced or not believed, thereby increasing the stigma and victimization. Some stories also speak of the survivor being unable to react at the time of the incident. In one incident, a woman details her experience of being molested by a family friend at her home:

While we were chatting and before I knew it, his hand was inside my tshirt fondling my breasts, I didn't know how to react I wanted to push him away but I was completely paralysed.(sic).³³

In one submission, a woman detailed how she was raped and molested by her uncle at home when she was 8-years-old and her experience when she disclosed it to her mother,

I told my mother about it after a week of gathering courage. She didn't believe me. She told me that either I was making it up or I must have wanted it and that I am a 'dirty girl'. I stopped playing outside after that and told my friends they should never tell their 'dirty secrets' to their parents. I also told them to not show their 'susu wali jagah' to their uncles because they will hurt it.(sic)³⁴

Survivors can be forced into silence³⁵ due to the identity of perpetrators, sometimes for many years, as is demonstrated by some of the submissions which detail that the first time they have spoken about being abused is on the project or many years later to someone else. Some of the submissions speak of the feeling of being 'used' and feeling 'dirty' but also enjoying it, unsure and confused. For instance, a boy who was abused for over two years by his brother, writes,

I knew when it was happening, yet I did not move. I still don't know why. May be i enjoyed it?...

...Initially i was just confused, then i would start to feel very dirty about it. I would go to the bathroom .and wash my face multiple times. His kisses were all over my body and i would feel that may be it is because I have been masturbating that this is happening to me. If i stopped masturbating then it would go away (sic).³⁶

33 'It's always people you know and are close to', Story no.117, <https://howrevealing.com/story/view/117>

34 'Susu Wali Jagah', Story no.147 <https://howrevealing.com/story/view/147>

35 See story nos. 132 and 134 on www.howrevealing.com.

36 'I knew when it was happening yet I did not move. I still don't know why.', Story no. 107, <https://howrevealing.com/story/view/107>

The culture of shame that is associated with sexual assault is borne out by most of the stories, the guilt or blame that the victim is made to feel when they disclose it, as if it is some act of theirs that 'invited' the attention, that 'made' the perpetrator abuse them.³⁷

This reasoning finds its way into our legal system, where the child's body and behaviours are located within this ecosystem of shame, relied upon to break the victim, and make them believe that it happened because of their character or their actions.³⁸ In one of the first ethnographic studies³⁹ on rape trials in India, Chapter 3 follows the trial of a case of CSA in Gujarat, in which a 12-year-old girl was raped by her step-father. It shows the power of a defense counsel to wear down a victim, continuously trying to show that she is lying and also trying to break the child's testimony by attacking her mother, the complainant.⁴⁰ The courts also discard the victim's testimony on fallacious grounds of expected or 'normal' behaviour of the victim post the offence, and this is borne out in some of the judgments analysed in the CCL-NLSIU Maharashtra Report.⁴¹

V. Implications of the data from the project and from the CCL-NLSIU studies

Those survivors who have been abused by people known to them have increased feelings of fear and confusion, often unsure about whether the abuse was wrong as it was perpetrated by someone known to them. The need for awareness raising is thus clear, children need to be educated about what amounts to abuse and what does not. In these situations, disclosure is extremely difficult given that the perpetrator might be residing in the same house or be someone the survivor meets often, making them afraid to talk openly about it. There is an emerging pattern of victim-blaming and shaming or the fear of being blamed and told that one is responsible for the abuse, even as children.

37 See story no.114, <https://howrevealing.com/story/view/114>

38 See *State v. Ramkishor Sharma Special (Child) Sessions Case 84/2013* decided on 27.02.2015 (Pune) and *State v. Hanumant Nararyan Giri Special (POCSO) Case No. 01/2014* decided on 31/10/2014 (Beed) in Maharashtra Report, pp.57, 93.

39 Pratiksha Baxi, *PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA* (2013).

40 *Id.* at pp. 1-41.

41 See for example *State v. Mohan alias Falkya Shamrao Pawar, Special Case No. 28/2015*, decided on 4/19/2016 (Buldana) in Maharashtra Report, p.95.

The stories on the project also show that victims are scared or unsure whether to disclose the abuse when the abuser is a close family member and the negative reactions accompanying the disclosure can cause the victim to stay silent thereafter. In one story,⁴² a woman discloses that she was abused by her grandfather on more than one occasion and she was scared and worried that no one would believe her. A 25-year old woman writes of being abused by her cousin when she 8 or 9 years old.⁴³ She has not disclosed the incident to her parents but told her fiancé at the beginning of their relationship. On discovering that the abuser was invited to her wedding,

Lately, I have been finding it difficult to communicate properly with anyone. I have my guards up too high. My speech is fumbled again and I despise looking at myself in the mirror. I feel guilty of not being able to talk to my fiance properly anymore. I really don't want to see that man again. Especially on my wedding day. It's taken years to get out of it and I cannot be reminded of that unfateful incident time and again.

In a study on adult CSA survivors conducted in the United States, it was discovered that cases where there is abuse by relatives are more serious abuse experiences and elicited greater negative social reactions to abuse disclosures, especially in childhood.⁴⁴ Negative reactions to disclosures of abuse by relatives may be associated with more trauma symptoms overall and regardless of age of abuse disclosure, negative social reactions are related to more symptoms of post-traumatic stress disorder (PTSD).⁴⁵

In a landmark study, also in the United States, the effects of criminal court testimony on a sample of 218 child sexual assault victims were analysed.⁴⁶ The respondents were interviewed in the court-house before and after testifying, and it was found that the main fear that the children expressed was having to face the

42 'Okay, I didn't tell you that I was probably 6-7 at the time', Story no. 132, <https://howrevealing.com/story/view/132>

43 'I saw him after many years at a family member's wedding' Story no.134, <https://howrevealing.com/story/view/134>

44 Dr. Sarah E. Ullman, *Relationship to Perpetrator, Disclosure, Social Reactions, and PTSD Symptoms in Child Sexual Abuse Survivors* (16:1), JOURNAL OF CHILD SEXUAL ABUSE, pp.19 (2007)

45 *Id.*

46 Gail S. Goodman, Elizabeth Pyle Taub, David P. H. Jones, Patricia England, Linda K. Port, Leslie Rudy, Lydia Prado, John E. B. Myers and Gary B. Melton, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims* Vol. 57, No. 5, MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT, pp.1.159, p. 16 (1992)

ccused⁴⁷ and those who seemed to be more afraid of the accused at the time of giving their testimony, were also less able to answer the prosecutor's questions.⁴⁸ This is also seen in the HAQ-CSJ study wherein a child victim who sees the accused in the courtroom during her testimony stops testifying due to re-traumatization⁴⁹

The fear and re-traumatization that can take place when the victim has to face the perpetrator could be a reason for victims turning hostile in POCSO cases. The POCSO Act accounts for this possibility in Section 36,⁵⁰ which mandates that the child is not to see the accused at the time of testifying and the court must ensure this using video conferencing facilities or other devices such as curtains etc. The CCL-NLSIU studies, however, show that this is not always followed. In the Delhi Report, it was found that a confrontation between the accused and the victim usually takes place as the entrance to the courtroom is the same.⁵¹ In the Maharashtra Report, while some efforts were taken to limit exposure inside the courtroom, exposure outside the courtroom was common.⁵² The strict implementation of Section 36 is thus necessary to prevent re-traumatization of the victim and the probability of the victim turning hostile.

One of the findings of the United States study was that closer the victim's relationship to the accused, the less cooperative the child was while being cross-examined by the defense counsel.⁵³ The study explored the relationship between the use of innovative courtroom techniques and similar to India⁵⁴ found that tools such as videotaped testimony was used infrequently. In terms of having a parent or loved one in the courtroom while testifying (similar to Section 33(4) of the POCSO

47 *Id.* at v. See also the Maharashtra Report, p.30.

48 *Id.*

49 See the story of Kanta on p. 12, *Protecting our Children: A Look at Delhi's Implementation of the Protection of Children from Sexual Offences(POCSO) Act, 2012* by HAQ: Centre for Child Rights and Counsel to Secure Justice (2016)

50 Section 36, POCSO Act. Child not to see accused at the time of testifying:

“(1) The Special Court shall ensure that the child is not exposed in anyway to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

(2) For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.”

51 Delhi Report, p. 44.

52 Maharashtra Report, p. 30.

53 *Supra* n.46 at p.82.

54 See CCL-NLSIU Reports.

Act), it was judged that the child victims were less frightened of the accused and more likely to provide consistent testimony.

Another study recommended that community programs must have 'appropriately trained professional staff the criminal justice system must respond in a flexible manner to the 'special needs of children as victims and witnesses' and the justice system must utilize support systems that offer 'maximum comfort and support for the child'.⁵⁵

The findings above show that every effort must be made to reduce the negative reactions associated with disclosure, complaining and later, testifying in court, and these may be related to other aspects such as identity of the perpetrator and the nature of the relationship and the fear of facing the accused, which is related to the ability to answer questions in court.

VI. Suggestions for law and policy reform

The preceding analysis suggests that there are significant gaps in the data and a huge potential for future research that can better inform policy changes. As suggested in the CCL-NLSIU studies, it is crucial that a robust witness protection system for CSA victims, complainants and their families is established and to ensure that all the child-friendly provisions in the POCSO Act are followed and strict guidelines are evolved for the same. Crucially from the analysis, it is apparent that the victim must not be in contact with the accused and this must be ensured right from the time the complaint is made. According to General Comment No.13 (2011) of the Committee on the Rights of the Child, reporting mechanisms for reporting violence against children must be 'help-oriented' services that offer public health as well as social support, rather than "triggering responses that are primarily punitive."⁵⁶ Therefore, it is incumbent on the Indian state to ensure that the child is not re-victimized or re-traumatized by the criminal justice system.

The provision of a support person or a counsellor who can help the victim process their feelings associated with the abuse, along with a system of protection where the child is not in contact with the accused, (especially in cases where the accused is known to the victim) can go a long way in ensuring that the victim

55 Lucy Berliner and Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Assault*, Volume 40, No.2, JOURNAL OF SOCIAL ISSUES, p.125 (1984).

56 General Comment No.13 (2011) *The right of the child to freedom from all forms of violence*, the Committee on the Rights of the Child, p.20.

provides reliable testimony. The importance of existing provisions is reiterated, i.e., the child's testimony should as far as possible, be recorded in a separate room and/or through videotaping and cross-examination must be conducted such a way that the accused can see the child, but the child cannot see the accused. The Special Courts must explore options for the victim and accused to have separate entry and exit points into the courtroom.

The findings and analysis above show that disclosure and/or reporting of an incident of CSA is extremely difficult, overwrought with various considerations and emotional reactions. It is crucial that the persons listening to the disclosure or reporting responds in an appropriate and sensitive manner to ensure that the victim is not forced into silence and re-traumatized. To make it easier for children to disclose instances of abuse, sex education classes must be included in schools and parents must be educated on how to talk to children about sex and sexuality⁵⁷ in a sex-positive manner. Further, parents, teachers and caregivers must be trained on ways to respond to disclosures of CSA without resorting to silencing and/or victim-blaming and shaming. While suggestions for training of judges and prosecutors to deal with children in a developmentally appropriate manner have been made in the CCL-NLSIU studies, this chapter recommends that specific training programme must be established to train the different actors of the criminal justice system i.e. the police, prosecution, advocates and judges on the nature of CSA, the various ways in which CSA victims respond after an incident of abuse and to learn to respond to victims of CSA in a more sensitive and humane manner, without resorting to character assassination and victim-blaming and shaming.

VI. Areas for future research

While the patterns that have emerged from the project and from the CCL-NLSIU studies cannot show the impact of perpetrator profile on victim testimony, it is able to clearly show that there are significant implications that the identity of the perpetrator has on disclosure and victim testimony. Further research is needed to understand whether the nature of the relationship i.e., father/brother/uncle/acquaintance etc., and being in close proximity with the abuser have different effects on disclosure and victim testimony. Future research can also test the impact of specific support provisions under the POCSO Act, for instance, the presence of a loved one or a trusted person in the courtroom, on victim testimony. Another potential area of research can be to interview the victim and complainant before

⁵⁷ See CCL Delhi Report, p.126.

and after trial with a view to understand better the trauma caused due to their interactions with the criminal justice system. Future research must be cautious of the potential re-traumatization that can be caused when victims are interviewed and asked to repeat details of the abuse, especially sensitive information relating to the sexual act.

VIII. Conclusion

The patterns that have emerged from the submissions on the project as well as the findings of the CCL-NLSIU studies show that victims of CSA do not want to approach the criminal justice system and even if they do, there is a high probability of victims turning hostile and resulting in an acquittal. Every step in the process of seeking 'justice' can be arduous and daunting, from filing a complaint at the police station, to testifying against your abuser in court, to the cross-examination by the defense counsel and finally, the long wait for the judgment. Each step of this journey leaves one open to victim-shaming and blaming, with the different players in the system trying to pin the responsibility of the assault on the victim and reduce the culpability of the accused. The submissions on the project show that even disclosure to family members can result in victim-shaming and the probability of not being believed. The effects of CSA are far-reaching, and the trauma can exist well into adulthood, forcing victims to remain silent for years together. The importance of strong and sensitive support systems is therefore, evident from the findings of this chapter. The existing support systems within the legal system must be strengthened, and new ways of preventing re-victimization and reducing trauma explored, with inputs from experts from fields such as psychology, psychiatry and criminology.

Support Gaps and Linkages Between the Criminal Justice and Child Protection Systems

*KUSHI KUSHALAPPA & SUJA SUKUMARAN

I. Introduction

The concept of child protection in India as reflected in legislations and policies is largely geared towards protection of children from violence, various forms of exploitation and abuse, based on the obligation under Article 19 of the UN Convention on the Rights of the Child, 1989 (UNCRC).¹ However, prevention of violence against children is ignored, despite this being an obligation under Article 19(2), UNCRC. In a country like India where a large population of children are in need of care and protection, the basic needs like food, shelter, education and health services remain in focus, while protecting the rights of children, rolling out preventive measures, creating awareness on protection, ensuring child participation and empowerment, most often, slide down on the agenda, and are only on paper.

Several new laws have been passed in India in recent years, in an attempt to improve the child protection mechanisms and to reform the existing systems to make it more child-friendly. Although the laws currently in force such as the Juvenile Justice (Care and Protection of Children) Act 2015 (JJ Act), and the

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1 UNCRC, Article 19.

Protection of Children from Sexual Offences Act, 2012 (POCSO Act), were aimed at bringing about significant substantive and procedural changes in cases involving children, there exist several lacunae in the implementation of these laws.

The POCSO Act was passed to effectively address sexual abuse and sexual exploitation of children.² The POCSO Act and Rules have provisions aimed at preventing re-victimization of the child during the criminal-justice process. They provide for child-friendly measures at all stages of the investigation and trial including a provisions for a Support Person to be appointed to assist the child during these processes.

Studies conducted by Enfold Trust,³ as well as the Centre for Child and the Law (CCL), National Law School of India University (NLSIU), henceforth CCL-NLSIU Studies,⁴ have found that though the law prescribes convergence of support systems in the best interest of the child, much of it is not seen on the ground due to multiple reasons. Children who have faced sexual abuse are often re-traumatized and re-victimised during their journey seeking justice. The CCL-NLSIU Studies reveal startling gaps in the practical aspects of the implementation of the law, especially when it comes to Support Persons. The POCSO implementation research study in Karnataka, conducted by Enfold Trust in collaboration with the Department of Women and Child Development, Government of Karnataka (DWCD) and UNICEF, (henceforth the Enfold Study) also corroborates findings by CCL-NLSIU, regarding the challenges and gaps.⁵

This article examines the criminal justice system vis-a-vis the linkages that exist and the gaps in the support services and structures, in the context of sexual offences against children. It intends to draw attention to the absence of strong

2 POCSO Act, Preamble.

3 Implementation of POCSO Act in Karnataka State: Research Report, Enfold Trust, in collaboration with DWCD, Karnataka and UNICEF (Unpublished) (Enfold Report).

4 CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra* (2017), <https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf> (Maharashtra Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (2016), <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf> (Delhi Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Assam* (2017), <https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourttassamPOSCOAct2012.pdf> (Assam Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Karnataka* (2017), <https://www.nls.ac.in/ccl/jjdocuments/posco2012karnataka.pdf> (Karnataka Report); CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh* (2017), <https://www.nls.ac.in/ccl/POSCOAP2017study.pdf> (Andhra Pradesh Report).

5 Enfold Report.

supportive structures, that have led to breakdown in the delivery of justice, in an attempt to improve the experience of the child victim in the criminal-justice system, increase trust in the legal system and consequently, increase the reporting of such offences. The following questions will be addressed:

- What are the existing mechanisms in place to support child victims under the POCSO Act and are they working efficiently at all levels?
- What are the issues concerning the support systems during the implementation of the POCSO Act based on various research studies and reports?
- What are the challenges faced by specific groups of children?
- To what extent are the provisions pertaining to Support Persons being implemented?

II. Taking Stock of the Existing Support System

2.1. Overview of Legal Provisions

The POCSO Act and Rules have elaborated the manner in which each stakeholders, such as the the police, doctors, Special Public Prosecutors, Child Welfare Committees (CWC) and Special Courts, are required to carry out their duties. The POCSO Rules have also provided for the child and family to have access to a Support Person under Rule 4(7-10). The Support Person, who is appointed by the CWC, becomes an important liaison between authorities and the child and his/her family, while assisting them as they journey through the justice system, from the time of registering a complaint, till the closure of trial and ultimate rehabilitation and social re-integration of the child.

Besides child-friendly procedures at the police station,⁶ and during recording the statement of the child,⁷ the child's medical examination is required to be conducted in a manner that ensures that the agency of the child is respected at all times.⁸ The POCSO Rules provide for emergency medical care and counselling. The Ministry of Women and Child Development has notified the setting up of One Stop Centers in each district across the country to address the gaps in the medical

6 POCSO Act, Section 24 and POCSO Rules, Rule 4(1-3).

7 POCSO Act, Sections 25, 26.

8 POCSO Act, Section 27,

system.⁹ Furthermore, each district across the country is required to designate a Sessions Court as a Special Court to try offences under Section 28(1), POCSO Act. Trials in these courts should be conducted in accordance with the child-friendly provisions specified under the POCSO Act.

2.2. Challenges in Implementation Affecting Children and Families

Despite all the above provisions, the processes are often confusing, lengthy, and insensitive. Following a First Information Report (FIR) being registered at the police station, the child is sent for a medical examination, for identification of the accused, for crime scene investigation and for recording of child's statement before the Magistrate under Section 164, Cr.PC. The child and family are then required to depose in court, often months after the case was registered. In the experience of the authors accompanying families to all of these locations, the child's and family's engagement has been extremely difficult and uninformed. Families get very consumed by these processes, so much so that the emotional needs and general well-being of the child, which is so important for the recovery of a child who has faced sexual abuse, is most often neglected completely. The challenges they encounter during their interactions with functionaries within the system often acts as a deterrent in the justice seeking process.

Families who participated in the Enfold Study on implementation of the POCSO Act¹⁰ stated that the criminal justice system is not as child-friendly as it is intended to be. When the families of child victims under the POCSO Act were asked to list out the challenges they faced entering the criminal justice system, the primary challenge that was reported was that they have low confidence in the existing systems, including the legal system.¹¹ In addition, re-victimization of the child who has faced abuse because of delays, adjournments and repeated visits to the court was also reported as a major challenge.¹² It was also observed in the Enfold Study that lack of convergence of all stakeholders was an issue that needed to be addressed, to make the implementation effective on the ground.¹³

9 Ministry of Women and Child Development, Revised One Stop Centre Scheme, http://wcd.nic.in/sites/default/files/Final%20approved%20by%20Secy%20OSC%20Scheme%20_0.pdf

10 Enfold Report, p.39.

11 *Id.*

12 *Id.*

13 *Id.* at p. 86,

Stakeholders who are part of the process have often shown an insensitive attitude, resulting in mismanagement of cases, long hours of wait at police stations, hospitals and courts, multiple or repeated interviews of victims and trivializing the abuse as just another offence.¹⁴ Further attesting this observation are the recommendations in the CCL-NLSIU Studies, that caution will have to be exercised to ensure that the care and protection needs of the child are not compromised or conflated with the outcome of the criminal trial. The Maharashtra Report, for instance, stated that “Unless stakeholders in the criminal justice system and the child protection system can understand and address grooming, the social consequences, and pressures in cases of sexual offences, and institutionalise a robust support system, the rate of victims turning hostile cannot be reduced.”¹⁵

Child's testimony in court

With a lot of weightage being given to the child's testimony in trials conducted by the Special Courts, inconsistencies in the child's statements are used to weaken the case by the lawyers for the accused. The Special Public Prosecutor (SPP) plays an important role in preparing the child for the court experience. Interacting with the child before trial commences, eases the child, ensures familiarity with court and the proceedings and enhances the possibility of the child providing a full and cogent testimony, while reducing the chances of children turning hostile. This interaction will ensure that the SPP is familiar with the child's capabilities, limitations and language skills. The SPP can accordingly inform the court to take necessary steps, be it arranging for interpreters or special educators, or setting up a time that suits the need of child witnesses, such that when the child appears in court for testimony, it is recorded the same day, without adjournments. This is currently a limitation in most courts across the country, due to high volumes of cases the SPP deals with and lack of time to implement the same.¹⁶

Information regarding the status of the case to child and family

With long gaps between registering the FIR and the trial, the child and family receive almost no information from either the police or the prosecution. As a result, important information about the arrest and bail of accused, the status of investigation, the framing of charges in court, the start and closure of

14 *Id at p.79.*

15 Maharashtra Report, p.105.

16 Enfold Report, p.72.

trial, etc., almost never reach the families. POCSO Rules 4 (12)(i)-(x) has placed the responsibility of families receiving this information on the police, who are required to, either directly, or through the Support Person, keep the child and family informed. There have been instances where the child's family has not even been informed about the disposal of the case and they were under the impression that the case was still underway.¹⁷ If all families are kept informed about the status of their case, they may stay committed to the case. With almost all families being in possession of mobile phones, this information can be disseminated to families in a practical and time-bound manner, rather than depending on the police, who are already overburdened with investigation and charge-sheeting. Information can also be provided through Support Persons, who should be appointed in each case.

On-going training and sensitization

Stakeholders at all levels are ill-equipped to engage with children, leave alone, child victims of sexual abuse. Most do not have the necessary skills that enable them to elicit information from children in a non-threatening and child-friendly manner. The authors have seen that the stakeholders are well versed with the provisions, offences and procedures under the POCSO Act. However, child-friendly management of specific cases and interacting with children is where the gaps have been noticed. Trainings have to be more geared towards case management and judgments passed by High Courts and the Supreme Court, rather than only on the provisions of the Act itself. Better understanding of the need for convergence of stakeholders should also be emphasized during training, convergence that has been witnessed among stakeholders in Karnataka.¹⁸

As Standard Operating Procedures (SOP) have not been notified for each stakeholder on how to deal with POCSO cases as yet, there are no clear guidelines for stakeholders to follow for standardised basic management of cases. Since several of the stakeholders who engage with child victims work directly at the grass root level, the manner in which a case of child sexual abuse is addressed varies vastly within districts and across the state, depending on the training, demographics, culture and mindset of the local functionaries.

17 Enfold Report, p.38.

18 Enfold Report, p.86.

III. Support Needs of Specific Groups of Children

While the criminal justice system throws up challenges for all categories of children reporting sexual offences, there are some groups of children who are further marginalized or vulnerable, based on certain factors including their identity, location, and age. It is therefore, important that support systems take into account their unique needs.

Considering that a large population of children in India live in rural areas, their access to the legal and support systems is further complicated. For instance, with regard to access to quality medical care and examination, most taluk hospitals are not willing to examine victims, and the child is made to travel long distances in order to be examined by a medical doctor at the district level.¹⁹ This leads to delay in accessing medical care, conducting medical examination and in the timely collection of forensic samples.²⁰ Training for medical personnel at the taluk level needs to be undertaken to ensure that children in rural areas receive the same standard of care as children in urban areas.²¹ Problems related to transportation is another issue that is faced in the rural areas, as public transport is limited and police do not have vehicles which are exclusively dedicated for this purpose.²²

Many of the cases that the authors have served as Support Persons are cases of migrant families, who often feel the need to relocate once the case is registered with the police station. Migrant population most often do not have any specific form of identification, address proof or permanent address, thus making it difficult for stakeholders like the police, CWC, DCPU and Support Persons to trace the families. In the absence of an address (temporary or permanent), opening bank accounts to which funds from compensation and other sponsorship schemes can be transferred becomes an issue, which is another barrier in accessing justice. Often there is no awareness on reporting mechanism of crimes among children who are employed and from migrant families, and in such cases, the abuse most often goes unreported. Child protection and support systems need to have an extensive reach in order to reach children from these backgrounds. Another major issue the migrant population faces is the absence of any day care facilities or proper child

19 Enfold Report, pp. 63-64.

20 Enfold Report, p.62.

21 Enfold Report, p.63.

22 Enfold Report, p.64.

protection systems by the employers due to which child victims are vulnerable and exposed to further abuse and threat from strangers or anyone else in the vicinity.

With any sexual activity with a person below the age of 18 considered as a crime under the POCSO Act, the legislature is curbing and criminalizing adolescent sexuality. According to the Enfold Report, 63% of the POCSO cases registered in Karnataka are in the age group of 16-18 years.²³ The CCL-NLSIU's studies revealed that "romantic cases" constituted 29% of the total cases in Delhi, 21% in Maharashtra, 20% in Assam, and 28% in Andhra Pradesh. Not only does this lead stakeholders to believe that all cases are 'false', it also distracts the system from responding sensitively to cases of younger child victims. It should, however, be noted that not all cases in the age group of 16-18 years are of children engaging in consensual relationships, as there have been several instances of grooming and coercion by an older person. With inadequate life skills, sexuality education and legal awareness in schools and communities, and criminalization of sexual exploration and activity by all persons below 18 years, adolescents, in particular, have been rendered very vulnerable. The response has to be a more concerted effort at all levels, including families, school staff, community and children, at addressing adolescent sexuality in an open, non-judgmental and non-threatening manner, while educating children about consent, grooming, and sexual abuse.

IV. Issues related to provision of Support Persons

During the course of the investigation and/or trial, there have been situations where key witnesses turn hostile or are absent in court proceedings. Some of the possible reasons for this are that families have been forced to relocate following reporting the case, or they have been threatened or forced into a compromise and therefore do not want to follow through with the case. There have been instances where the 'victim' and 'offender' are married and do not want to pursue the case. Some families shared that since they had not received any information regarding the case for an extended period of time, they believed that the case had been closed and did not wish to relive the trauma all over again.

According to CCL-NLSIU's Maharashtra Report, 89.98% victims turned hostile on the point of sexual offence. Of these, 23.67% were 'romantic' cases, and 13.25% were cases in which the accused was related to the victim.²⁴ This study

23 Enfold Report, p.28.

24 Maharashtra Report, p. 53.

also brought to light that in certain cases, the victim turned hostile because a compromise had been reached with the accused and sometimes, the victim was hostile on other grounds, stating that the medical examination had not been conducted, that the clothes sent for forensic analysis did not belong to her, or that she had never filed the FIR. Other reasons for hostility reported in the study was due to the age component, the identity of the accused, out of court compromises and during the cross examination in the court.²⁵

The response of those within the criminal justice system, however, was largely punitive towards the victims. In fact, a respondent in this Study from the police, was of the view that hostile witnesses should be strictly punished and that “there is no problem of pressuring victims into turning hostile, as they can always tell the Judge if they feel pressured.”²⁶ In fact, some Special Courts even directed the victim to return the compensation under the *Manodhairya* Scheme after she turned hostile.²⁷

The Delhi Report also showed that POCSO cases in which the victim turns hostile are contributing to the perception that false cases are being filed under the POCSO Act and that affects the mindset of the police, prosecutor and judge dealing with such cases.²⁸ Thus, there is a need for better appreciation of the situations and reasons that prompt a child to retract. Some have acknowledged that the delay in the trial frustrates victims and their family. In some cases, the victims get married and relocate; because of which families are reluctant to disturb the victims for fear that it may disrupt their marital life. Compromises take place between the victim’s family and the accused, as the criminal justice system offers little support to them. The rate of hostility, as observed from judgement analysis in Andhra Pradesh was a shocking 77.5 %, one of the highest rates observed amongst all the states where CCL-NLSIU conducted such Studies.²⁹ Other than Delhi, no victim and witness protection scheme is in place in other States. This is a serious issue that needs to be looked into.

A cadre of trained Support Persons needs to be created who can assist the child and family and convey the needs of each child to the officials at the district level,

25 Maharashtra Report, pp 53-55.

26 Maharashtra Report, p 104.

27 *Id.*

28 Delhi Report, p. 120.

29 Andhra Pradesh Report, p. 92.

so that necessary interventions can be provided. In the absence of such trained Support Persons, information regarding the challenges faced by specific children do not reach the district officials, nor is a Child Protection Plan, as stipulated under POCSO Guidelines³⁰, created for each child.

As seen in CCL-NLSIU's Delhi Report, there is a huge gap in the availability Support Persons and the duration of their engagement with child and family. Support Persons are not available to the child throughout the legal process, except in some rare cases in which a Support Person has been appointed by the CWC. NGOs in Delhi providing support services who were interviewed by CCL-NLSIU shared the positive impact of support on the child and the family.³¹

Similarly, in Assam, the support gap is apparent from interviews with respondents from the child protection system and the judiciary in Kamrup (Metro) and Dibrugarh. There is reason to believe that this is true for the remaining districts as well. The crucial role of the Support Person in the POCSO Rules is not sufficiently appreciated. The report stated that

There is an urgent need to create a pool of persons who can be trained on law, legal procedures, and communicating with children so that they can offer the much-needed support to child victims and their families during the investigation and trial.³²

According to CCL-NLSIU's Karnataka report,⁵ the support gap was strongly felt in the interviews and observations made in the three districts of Karnataka. Bengaluru Urban is the only district where CWCs have appointed Support Persons but even then, the disparity between supply and demand is substantial. There are over 1,000 cases under the POCSO Act filed in the district, with only four Support Persons. In most cases, the stakeholders were not aware of the provision for providing Support Persons under the Act which is depriving the child victim of assistance during the criminal justice proceedings.³³

Need for Support Persons was shared by many respondents especially with respect to initial handholding, providing emotional support through the

30 Ministry of Women and Child Development, Model Guidelines under Section 39 of the Protection of Children from Sexual Offences Act, 2012 – Guidelines for the Use of Professional and Experts under the POCSO Act, 2012, September 2013, pp. 53-54.

31 Delhi Report, p. 116.

32 Assam Report, p.86

33 Enfold Report, p.91.

journey, providing essential information to children and families and in liaising with agencies to avail benefits under different schemes. The report found that lack of adequate support increases the child's and family's vulnerability towards pressures from extended families to withdraw cases and compromise. There is no mechanism to share important information such as that POCSO offences are non-compoundable, compromise does not guarantee an end to the abuse and that the case will have to continue till the court passes the final judgment. All this is necessary information that can have a huge impact on getting justice.³⁴

The Karnataka Report also described the government's One Stop Centers (OSCs) which were set up under the Nirbhaya Fund in many District government hospitals. These Centers were set up post November 2014 to provide necessary support to women and children who face domestic violence or are victims of sexual abuse and assault.³⁵ While several States across the country have set up OSCs in district hospitals, the functioning of these centers needs to be evaluated in terms of the range of services provided, staffing, training given and the confidence of the public to approach these centers in the event of a sexual offence. Although the Ministry of Health and Family Welfare has issued detailed guidelines and protocols for the structure and functioning of OSCs in 2015, response mechanisms and management of cases in each of these centers varies, based on the hospital where the center is located. These centers can be strengthened to provide the necessary support system as first responders to cases.³⁶

V. Conclusion

The authors' experience as Support Persons for over five years has repeatedly shown that when the child and family are supported from the time they report or up until the trial is completed, they are able to remain committed to the case, pay attention to the emotional, medical and educational needs of the child and move forward, beyond the abuse. With the families sharing the burden of these aspects with the Support Persons, the caregivers move away from shaming, blaming and holding the child responsible for what has happened, to caring for the child who has faced abuse and normalizing the child's routine. There have been instances where the families have not been ready or willing to file a case, as they felt that in doing so, they would be faced with an adversarial criminal justice system,

³⁴ Karnataka Report, p. 73.

³⁵ Karnataka Report, pp. 36-37.

³⁶ Enfold Report, p.13.

possible stigma from society and the family and financial difficulties. The authors have assisted these families to take a decision to report sexual abuse of their child and to remain committed to the case. While as Support Persons, the authors cannot pretend to journey with the child and family in every way, they believe that through their interventions and extended support, they have been able to make the journey of the child and family through the criminal justice system a little less traumatic, help them make informed choices, and thereby promote active participation through investigation and trial.

The positive outcomes achieved through sustained and intensive engagement of Support Persons with child victims and their families through the criminal justice system and beyond, in terms of ongoing social re-integration, processes, have given the authors immense inspiration and strength to remain committed to the case and the cause of child victims. Through their interventions, child victims have found and built trusted relationships with adults who have stood by them throughout their journey; extended family members have been identified who take on the much needed supportive roles; schools have been sensitized to respond in a timely and child rights based and compassionate manner to cases of child sexual abuse, donors have been roped in to help with rehabilitation; communities have become more aware and sensitive to the issue; training of stakeholders has become enriched from the grassroot insights that are ploughed into training resources; and lawyers and mental health practitioners have been inspired to take on cases on *pro bono* basis. All this consistently triggers a renewal of their commitment to retain the focus on enabling the wellbeing of the child victim, and of the energy to play these extremely challenging roles given the gaps in the child protection system - to move on, no matter what the odds are or the legal outcome of each case is.

A well-coordinated and robust support system, with increased number of trained Support Persons in every district in the country will provide the required reassurance to the child victim and her family, reducing the number of victims turning hostile. In addition, having a cadre of trained legal aid lawyers to assist Special Public Prosecutors with cases, ensuring that there are medical health practitioners in every district who are trained in providing therapy and counselling to children who have faced abuse and ensuring that all stakeholders who engage with child victims of sexual abuse have the necessary skills to communicate effectively with children with different developmental capacities, ages, across socio-economic strata and genders will bring a sea of change in the implementation of the POCSO Act, 2012.

Currently, all stakeholders involved in the implementation of the POCSO Act work in isolation, with barely any convergence or collaboration. If systems to enable effective collaboration and coordination between actors in the child protection system and criminal justice system can be institutionalized, the system may be able to respond better to victims of sexual violence. A Multi-Disciplinary Team approach to discuss cases and provide the psycho-social and legal support that these families require over an extended period of time, the chances of children and families turning hostile could be minimized. A sincere attempt needs to be made by all stakeholders to address cases from a multidisciplinary perspective, rather than working independently. Strategies have to be ideated to create a platform for stakeholders to come together in order to make prosecution stronger, taking into account the best interest of the child. Adopting a more integrated approach, like Multi-Disciplinary Case Conferencing (MDCC), rather than a hierarchical one may bring about positive changes in the management of and the outcomes in POCSO cases.

Finally, there is a need for sensitization of all stakeholders in the criminal justice system. Various aspects of child development, dynamics of child abuse particularly incest, sexuality and gender sensitivity need to be part of training programs on the POCSO Act.³⁷ This could effectively prevent the child and family from turning hostile when pursuing justice while avoiding re-victimization for the child and family. All of this in turn would lead to speedy rehabilitation as well.

37 Enfold Report, p.52.

Conclusion

ARLENE MANOHARAN*

Social change requires not only mobilization, but also creating and sustaining institutions capable of social engineering and transformation. CCL-NLSIU has undertaken 22 years of work on child rights, policy and law, since 1996, in order to engage with ways in which law can be instrumental to the development and leadership of social change, specifically on issues concerning children. This includes knowledge generation, capacity building, establishing and facilitating networks, and contributing to transformative processes aimed at bringing about changes in policy, law and programmes on child rights.

The CCL-NLSIU Studies, the Chapters in this publication and the National Consultation, are together, a fine example of how a group of researchers, in association with experts from a wide range of disciplines, as well as law students from eight law universities/colleges spread across the country¹ can generate evidence backed knowledge from research and grass root experience, towards a common cause. The outputs of such collective wisdom and synergy is likely to culminate in a consolidated road map for the future, which in turn can have an invaluable impact on policy, law and practice related to child sexual abuse at State and National Levels. It is also a significant contribution to ongoing efforts aimed at 'breaking the silence' about child sexual abuse, - triggering hard questions that stakeholders in the Child Protection and Criminal Justice Systems- such as police, prosecutors, doctors, judges, child protection authorities/functionaries, lawyers/

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1 These eight Universities/Colleges are NLSIU, Bangalore; NALSAR, Hyderabad; NLU-Odisha; School of Law and Governance, Central University of South Bihar, Gaya, Bihar; School of Law, Christ University, Bangalore; WBNUJS, Kolkatta; ILS Law College, Pune and NLU, Bhopal

legal service authorities, State Child Protection Societies, DCPUs, academic institutions, NGOs and the wider community, must reflect on and find answers. These efforts will be that much more productive if the knowledge and solidarity generated is used as a means to trigger attitudinal change, dialogue, accountability and concrete action on the ground. Ultimately, this must result in a shifting of the balance of power that is at the heart of child sexual abuse, empowerment of children aimed at preventing such abuse, and of child victims aimed at enabling them to reclaim their childhood and dignity as equal citizens.

This publication is akin to a rich tapestry woven from the varying coloured threads of academic research, (including the voices of child victims), and of practitioners' expertise, drawn from a range of disciplines - law, psychology, child and adolescent psychiatry, social work, forensic science, and medicine, all woven into the primary fabric of the five CCL-NLSIU Studies. It reflects the rich outputs that result from conscious engagement with and integration between evidence-based empirical research on the one hand, and knowledge generated from practice on the other. It also affirms the importance of a multi-disciplinary approach to engagement with law and its implementation. In essence, this is an endeavor that operationalizes one of the objects of the NLSIU:²

to advance and disseminate learning and knowledge of law and legal processes and their role in national development, to develop in the student and research scholar a sense of responsibility to serve society in the field of law by developing skills in regard to advocacy, legal services, legislation, law reforms and the like, to organize lectures, seminars, symposia and conferences to promote legal knowledge and to make law and legal processes efficient instruments of social development....

More specifically, it operationalizes CCL-NLSIU's own organizational vision and mission in very tangible terms, and is a replicable model for other Research Centres on Child Rights Law in other Law Universities to consider adopting.

The chapters in this report deal with a wide range of thematic issues including the functioning of the Special Courts, strengthening investigation and prosecution, sentencing patterns, state of compensation, age-determination, treatment of romantic cases, appreciation of children's testimonies, child victims who are also children with disability, the state of support systems, and the culture of shame and silence. A consolidated set of Recommendations emerging from the CCL-NLSIU

2 National Law School of India Act, 1986, Section 4(1).

Studies, and the Regional and National Round Table Consultations on The Effective Implementation of the JJ Act - Linkages with the POCSO Act, 2012³, is provided as an Annexure, as this could be used as a tool to help trigger more nuanced action plans. This concluding section therefore provides only a brief overview of some of the key thematic issues, along with some additional recommendations for research, policy debate and system reform, that could be considered while determining the way forward. (**Annexure A: Recommendations**)

1. Positive Measures as an inalienable and fundamental duty of stakeholders in child protection

The fundamental principle of positive measures has been provided for in Section 3(vii), Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act). It states:

All resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.

Article 4, UNCRC requires all States Parties, including India⁴ to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights’ recognized in the UNCRC, and with regard to economic, social and cultural rights, ‘undertake such measures to the maximum extent of their available resources...” Article 19(1), UNCRC also specifically obligates States Parties to take “all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.” Understandably, sexual abuse has been specifically highlighted in this provision, indicating the importance that needs to be given to addressing this form of harm towards children, if the radical vision of this treaty is to be realized in concrete terms. The duty of the State to ensure equal opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and against moral and material abandonment,⁵ is enshrined in the Indian Constitution. All

3 These consultations were organized in 2017 under the aegis of the Supreme Court Committee on Juvenile Justice, with technical support from CCL-NLSIU, and supported by UNICEF.

4 India acceded to the UNCRC in 1992.

5 Constitution of India, Article 39(f).

these provisions impose an inalienable duty on stakeholders to actively strive towards effective protection of children, and in this context, the protection of children from sexual offences envisaged under the POCSO Act.

Effective implementation of the principle of positive measures and the POCSO Act would also require effective implementation of the Integrated Child Protection Scheme (ICPS).⁶ The target group of children covered by the scheme⁷ includes “children in need of care and protection and children in conflict as defined under the JJ Act and with children who come in contact with the law, either as victim or as a witness or due to any other circumstance.” It also provides preventive, statutory and care and rehabilitation services to any other vulnerable child including children at risk of sexual abuse, and sexually exploited children. The purpose of the scheme includes “clearly articulated responsibilities and enforced accountability for child protection”; “established and functioning structures at all government levels for delivery of statutory and support services to children in difficult circumstances;’ and ‘operational evidence based monitoring and evaluation.”⁸ That the Supreme Court Committee on Juvenile Justice has decided to now focus on the effective implementation of the ICPS during the fourth round of Regional Round Table Consultations that began on 17 February 2018 is very fitting. This has helped trigger consultative processes on the need for greater budgetary allocation for child protection, and better utilization of available resources under this particular scheme - a logical next step after the last round that focused on the effective implementation of the JJ Act and Linkages with the POCSO Act.

2. Towards effective implementation of child protection laws and law reform processes

As evidenced from the CCL-NLSIU Studies and some of the chapters in this report, the implementation of the POCSO Act is tardy and the POCSO courts are anything but ‘special’. There are no cadres of judicial officers dealing with matters related to children and youth, police, Support Persons⁹, and others such as forensic

6 The ICPS is a Central Scheme adopted by the Ministry of Women and Child Development, Government of India in 2009, which was subsequently revised in 2014 and is available at http://icds-wcd.nic.in/icpsmon/pdf/icps/final_icps.pdf (ICPS)

7 ICPS, Section 4, p.11.

8 *Id*, Purpose of the Integrated Child Protection Scheme, Ministry of Women and Child Development, Government of India, 2009, p. 8.

9 *Effective Implementation of the Juvenile Justice (Care and Protection of Children) Act, 2015 : Focus on Rehabilitation Services and Linkages with the POCSO Act, 2012*, Consolidated Report of Third Round of Regional Level Round Table Consultations, August 2017, pp.9-11, 16, <http://unicef.org>.

doctors/ psychologists/ social workers, to focus specifically on matters related to child sexual abuse. There is also little or no attention given to child protection in academic courses in medicine, social work, psychology or law. Unless attention is given to building up such cadres, implementation of child protection laws will naturally be undertaken by functionaries who are either untrained or multi-tasking or both, resulting in serious compromises being made in service delivery.

All child victims are in need of care and protection by loved ones, and some, due to the lack of a protective environment, are in need of this care and protection by the State in its *parens patriae* role, through the authorities, courts and services that are made available in the Child Protection System. The Child Protection System in India however, has not reached the stage of evolution to be termed as a 'system' in the true sense of the word. Instead, it is largely a fragmented set of State responses¹⁰ with little or no convergence, and barely any civil society involvement. As eloquently explained by some of the authors in this publication, these children are not only attempting to recover from the trauma of the sexual abuse, but also the stigma and alienation they experience due to system-induced trauma. The large numbers of child victims turning hostile, the extremely low conviction rates, and the high rates of acquittal, also suggest that this 'system' is not achieving the objectives of the POCSO Act. This trauma, combined with their innate vulnerability and dependence on the State for protection, results in child victims being unable to question the availability or quality of these child protection services, to which they are entitled as a matter of right. Article 12, UNCRC, recognises children's right to be heard, and requires a radical paradigm shift, ordaining that children mandatorily be recognized as persons with agency, who have a right to participate in decisions concerning them. The UN General Comment on the right of the child to be heard, encourages States parties "to introduce legislative measures requiring decision makers in judicial or administrative proceedings to explain the extent of the consideration given to the views of the child and the consequences for the child."¹¹ The JJ Act provides for the fundamental principle on right to participation¹² which

[in/Uploads/Publications/Resources/pub_doc147.pdf](#)

- 10 Recommendations Related to Social Audit on Juvenile Justice for Inclusion in the XIIth Plan, Submission made by the author as member of Working Group on Child Rights set up by the Planning Commission for the XII Plan, July 2011, p.9, <https://www.nls.ac.in/ccl/jjdocuments/jjsocialaudit2015.pdf>
- 11 UN General Comment no. 12 on The right of the child to be heard (2009), available at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>, para 33.
- 12 JJ Act, 2015, Section 3(iii).

has to be adhered to in the administration of the Act. Given these legal provisions, the Special Courts and the Child Welfare Committees could move towards being vigilant in engaging with this right of child victims, a measure that would certainly boost their sense of autonomy, while also ensuring more effective child protection.

In this context, one way in which the wealth of knowledge that has been captured and generated through the CCL-NLSIU Studies, the chapters in this publication, and the National Consultation can be taken forward, is to feed the findings back to child victims and non-offending parents/families. Such a step could empower them to join in and enhance the quality of the narratives and discourse on child sexual abuse, potentially enabling more in-depth qualitative studies of the lived experience and aspirations of child victims/adult survivors of child sexual abuse. This could in turn help in strengthening the system and providing more nuanced and validated empirical evidence to inform policy and law reform.

3. Monitoring the Effective Implementation of the POCSO Act

The enactment of the POCSO Act, 2012 has fulfilled one aspect of the legal obligation under Article 4, UNCRC. However, while recognizing that the implementation of the POCSO Act, 2012 is in its nascent stage, it is incumbent on all duty bearers to assess where each one stands in terms of the effective administration of this Act, and then develop plans for achieving short term and long term goals. However, government officers at various levels feel under resourced and unable to act on a number of issues that they know warrant attention. There is also a general defensiveness and reluctance to engage in processes that demand transparency and accountability. Such responses should be handled sensitively, bearing in mind that problems in the system are not only because of failures on the part of individuals, but because of a faulty and fragmented system as well.¹³

Monitoring of the effective implementation of the POCSO Act, therefore requires sensitively designed protocols and tools, which can identify gaps and the systemic bottlenecks that are the structural causes for such gaps. What is equally, if not more important, is to ensure that such protocols also study good practices adopted by Courts, functionaries and civil society actors. These practices could be documented and replicated elsewhere, and could also be the basis for affirming performance of those who demonstrate a genuine dedication to duty, particularly

13 ICPS, p. 9.

given the extremely challenging nature of work in this area.

The Commissions for Protection of Child Rights Act, 2005, empowers the National Commission for Protection of Child Rights (NCPCR) and State Commissions for Protection of Child Rights (SCPCR) to examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation.¹⁴ The NCPCR has indeed played a significant role in the formulation of policy, law and guidelines on child sexual abuse. A POCSO Cell has been established in some State Commissions¹⁵ to enable complaints of child sexual abuse to be addressed. It is now perhaps time for a commitment from the NCPCR and/or SCPCRs to develop a monitoring tool kit and to undertake more systematic affirmative performance appraisals and review of the implementation of the POCSO Act, following which concrete recommendations are made for reform of the law and the system, as appropriate.

The Regional and National Round Table Consultations on The Effective Implementation of the Juvenile Justice (Care and Protection of Children) Act, 2015-Linkages with the POCSO Act, 2012, have indeed resulted in enhanced levels of convergence between a wide range of stakeholders¹⁶ at National and State level, and in some States such as Bihar and Karnataka, within Districts as well. One of the most tangible outcomes of these consultations has been the monitoring of the implementation of the JJ Act by the High Court-Juvenile Justice Committees (HCC-JJ) in all States, through regular review meetings with the concerned departments, functionaries, NGOs and others. The consultations have also played a key role in triggering conversations and action plans for effective implementation of the POCSO Act, 2012. Secretariats have been set up, or are in the process of being established, to provide administrative support to the HCCs-JJ. This kind of state-civil society engagement augurs well for constructively identifying and addressing structural and systemic barriers that come in the way of achieving positive child protection outcomes.

This monitoring role may of course also be performed by other stakeholders

14 Commissions for Protection of Child Rights, 2005, Section 13(1)(a).

15 For example, the Kerala SCPCR established a POCSO Cell in 2014 with technical support from CCL-NLSIU, and UNICEF. See <http://www.kescpcr.kerala.gov.in/>

16 The Consultations brought together representatives from a range of Departments involved in the implementation of the JJ Act, as well as representatives from the judiciary, academic institutions, media, NGOs and experts working with children. *Supra* n.8, p.18.

too, such as academic institutions. Section 55(1), JJ Act, 2015 provides for independent evaluation of structures. There is absolutely no doubt that we have immense intellectual capability, technological brilliance, vast human resources and a deep yearning by the people for greater accountability and transparency in government, as well as in the functioning of the judiciary and the legislature, to enable a more vibrant democracy. All these are also valuable ingredients for effective evaluation of the Child Protection System. Though this provision provides a mandate for government as well as other independent institutions to evaluate 'structures', it is hoped that such evaluations are designed to also evaluate procedural compliance, and whether these structures are able to function as part of a scientifically designed 'system'. If these evaluation processes could be designed as social audits that provide platforms for civil society actors, children and families, as well as government functionaries to unabashedly voice their critical concerns and views, then they could help to build the faith of the constituency that this law is meant to serve. Moreover, it could also boost the morale of functionaries and the commitment of stakeholders, which could bolster the system as a whole.

Finally, for monitoring to be genuinely effective, it would need to trigger not only system reform, but also positive results that impact the hearts and minds of victims, and their loved ones. One concrete way to enable this, as mentioned earlier in the context of action oriented research, is by developing mechanisms by which action taken reports on recommendations arising from the monitoring process for effective implementation of the POCSO Act and the JJ Act is fed back to child victims and adult survivors of child sexual abuse. This would not only help deeper levels of accountability to the beneficiaries of these laws, but in due course, inspire a deeper trust in the system itself.

4. Prevention of child sexual abuse and safeguarding child victims from further harm

Article 19(2) of the UNCRC obligates States Parties to establish protective measures which:

should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

However, there are little or no efforts being made by the State to develop a robust prevention program. Models of programs on sexuality, gender and prevention of sexual abuse developed by NGOs and others urgently need to be reviewed and replicated across the country, preferably through state run schemes that are accessible to all children, particularly in rural and other geographically underserved areas.

Unfortunately, even less is being done to prevent child victims from further risk or harm. In this regard, though the JJ Model Rules 2016¹⁷ provides for an institution or an organization to be recognized as a 'fit facility' specifically for the purpose of providing witness protection, there is little being done to develop a witness protection scheme for child victims of sexual abuse, or for that matter, for children alleged/found to have committed a heinous sexual crime, who are also vulnerable to acts of violence and vigilante justice.

5. 'Social programs to provide necessary support' to child victims

With reference to protective measures for child victims, Article 19(2), UNCRC obligates that

Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore.....

As evidenced from the CCL-NLSIU Studies and the articles by some of the authors¹⁸, the confidence and succour that a child victim gets from a dedicated Support Person, has dramatically impacted the way these victims have experienced the justice system. It seems imperative that a cadre of Support Persons is put in place as an essential component of such a social program. These individuals could provide this much needed support for the child through the arduous journey of seeking justice. However, equally, if not more vital, is how they can empower a child victim to also access services that could enable healing of her body and mind, given that very often, victims have experienced betrayal by the perpetrator, by the family, by the system, and then sometimes, even by the criminal justice system - her

17 JJ Model Rules, 2016, Rule 27(10)(vii),.

18 See Chapter 2 authored by Sonia Pereira and Swagata Raha, as well as Chapter 12 authored by Kushi Kushalappa and Suja Sukumaran.

last bastion of hope. It is this healing that could more effectively empower her to transition from feeling like, or being perceived as a 'victim,' as it could address the effects of the abuse and also prevent further victimization - the journey towards becoming a 'survivor'.

Some of the CCL-NLSIU studies have also revealed insights that have emerged from the interviews with child victims conducted with the assistance of Support Persons. These insights enabled a deeper understanding of how these victims experienced the legal system, and have informed recommendations for law reform and system reform. It is hoped that such social programs, including the proposed cadre of Support Persons, also contribute to ongoing action oriented research on the ground. Such initiatives will be valuable in helping to amplify the voice of these child victims, voices which will undoubtedly strike a deep chord in the hearts and minds of all duty bearers, galvanizing them towards transformative action.

6. Therapeutic and Restorative Approaches as an emerging alternative to retribution - the hallmark of the failing Criminal Justice System

The POCSO Act, 2012 and the Amendment to the Criminal Law Amendment Act, 2013 brought about changes in sentencing options for judges dealing with cases of sexual offences. However, the public outrage that gripped the nation post the Delhi gang rape in December 2012, is now being fuelled by retributive fervour that is taking shape in the form of calls for death penalty for sex offences, and a sex offender registry (that would even include children who have been found to have committed a sexual offence). More recently, there are proposals to bring in the death penalty for rape against a child below the age of 12 years, a proposal that has been converted into a legislative bill that has been passed by both houses of the Madhya Pradesh legislature on December 4th, 2017, and is now awaiting Presidential assent.¹⁹ In such times, an urgent public policy research issue that requires attention, is therapeutic approaches in engaging with the root causes of sexual violence such as sex offender treatment programs, rather than punitive measures.

It is imperative that evidence backed policy research is undertaken to inform such policy and legislative measures, which internationally have proven to be counterproductive and ineffective in dealing with sexual violence.

19 PTL, "Death Penalty for rape of girls aged 12 and below: MP Assembly passes bill", THE HINDU, 4 December 2017, <http://www.thehindu.com/news/national/other-states/death-penalty-for-rape-of-girls-aged-12-and-below-mp-assembly-passes-bill/article21260343.ece>

The Outcome Statement that emerged from a meeting of feminist advocates for sexual, reproductive and gender justice is a valuable contribution to conversations around criminalization.²⁰ The authors stated that:

...despite all the effort exerted in adopting laws that criminalize sexual and reproductive rights violations, the structural problems that lead to these rights violations often remain unaddressed. From our various experiences across the globe in advocating for sexual and reproductive justice, it is clear that criminal law has not adequately addressed impunity nor has it sufficiently addressed/reduced sexual and reproductive rights violations.

Furthermore, the criminalization of people's behaviors in the sexual and reproductive realms happen within the context of neoliberal economic structures such as the global care economy, the health- and prison-industrial complexes, militarization and structural violence, trafficking in persons, and states' growing use of the criminal justice system as a response to economic and social problems. Criminalization is thus promoted under the guise of providing protection (presumably for the survivors of violations) and preserving morality (often of women). These dominant narratives gain momentum from religious, ethnic, and right-wing fundamentalisms and ideologies. They operate within systems of institutionalized patriarchy, racism, and oppression that maintain and reinforce diverse forms of inequalities, including those based on race, ethnicity, class, gender identity, sexuality, sexual orientation, geographic location, legal status, ability, health status, age, and religion, among others.

It is therefore critical to expand the debate around sexual and reproductive rights violations, in order to analyze, discuss and draw a comprehensive strategy that does not rely solely on criminalization in combatting sexual and reproductive rights violations and protecting gender justice.²¹

It is perhaps time, now more than ever, for such conversations, pilot programs and policy research to be undertaken in India on viable alternatives to the crumbling criminal justice system, and whether the death penalty for sexual crimes against children below the age of 12 years of age, is in the interest of victims, or public safety.

In this context, the emerging body of wisdom that is emanating from

20 Shortcomings of Penal Policies in Addressing Sexual Rights Violations, Outcome Statement, April 16-17, 2016, Resurj, <http://resurj.org/sites/default/files/2017-07/Shortcomings%20of%20Penal%20Policies%20Meeting%20Statement-English.pdf>

21 *Id.*

Restorative Approaches and practices around the world warrants keen attention and engagement, as it is becoming evident that these processes can be much more effective than the retributive criminal justice system. There is a growing body of empirical evidence²² that demonstrates that Restorative Approaches can not only hold persons who commit harm to account, they can also enable the repairing of harm experienced the victim, and also by the person who has done harm or crime and other persons directly or indirectly involved or associated with the harm or crime. They can also facilitate the healing of relationships in families and communities, an aspect that the current criminal justice system utterly ignores. Objectively critiquing the criminal justice system and alternatives to this system that are emerging in response to the obvious failure of this system to deliver 'justice,' naturally leads one to think more deeply about some fundamental questions. These include- what is the meaning of 'justice', what is required to enable justice, and who determines whether or not such justice is really done. These are jurisprudential questions that should continue to be engaged with, if India has to truly fulfil the Constitutional vision of dignity for every citizen. The answers to these questions could also help stakeholders in the child protection system to perform their functions with clarity of purpose - to keep the best interest of child victims of sexual abuse, children alleged to be in conflict with law alleged/found to commit sexual harm, and also children alleged/found to have committed sexual abuse against another child, as a primary consideration in all decision making that affect their lives.

7. Children in conflict with law who are also child victims of sexual offences - a complex challenge for judicial bodies and service providers

Engagement with child victims of sexual offences who are also children alleged or found to be in conflict with law has been absolutely miniscule; be it at the level of policy research, justice delivery or child protection services. This is perhaps because the juvenile justice system creates an artificial segregation between children in need of care and protection by the State, and children in conflict with

22 The Effects of Restorative Justice Programming: A Review of the Empirical, Department of Justice, Government of Canada, http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00_16/p1.html; Zvi D. Gabbay, "Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices", J. DISP. RESOL.(2005), <https://scholarship.law.missouri.edu/jdr/vol2005/iss2/4>, and Lawrence W. Sherman and Heather Strang, *Restorative Justice: The Evidence*, The Smith Institute, 2007, http://www.iirp.edu/pdf/RJ_full_report.pdf

law. The JJBs²³ and the Children's Courts who decide to find a child in conflict with law aged 16-18 years charged with a heinous crime guilty, should include an Individual Care Plan as part of the final orders.²⁴ It is therefore incumbent on both the JJBs and Children's Courts to pass orders that enable their ultimate rehabilitation and re-integration into the community.

These provisions highlight the need to understand and deal with a child or an adolescent holistically, and not just from the prism of innocence or guilt. They also recognize that children cannot be fitted into the distinct and separate boxes of 'a child in need of care and protection', a 'child victim' or a 'child alleged/found to be in conflict with law'. It is in this context that other enabling provisions providing the means by which children in conflict with law who may also be victims of a sexual offence in another matter, need to be underscored. The JJ Act, 2015 enables children alleged/found to be in conflict with law to be dealt with simultaneously by the JJB and the CWC,²⁵ given that one of the functions of the JJB involves "transferring to the Committee, matters concerning the child alleged to be in conflict with law, stated to be in need of care and protection at any stage, thereby recognising that a child in conflict with law can also be a child in need of care simultaneously and there is a need for the Committee and the Board to be both involved." The JJ Act also provides for the JJB to transfer a child is found innocent of the charges against him to the Committee, if it appears that such child is indeed a child in need of care and protection.²⁶

There is therefore no argument that there is an urgent need for all stakeholders to be more vigilant in assessing the circumstances and needs of each individual child or adolescent, to work in coordination with professionals from other disciplines, and to find or create means by which the fundamental principle of the best interest of the child, be it a child victim or a child in conflict with law for having committed a sexual offence, is adhered to as the primary consideration in every stage of the legal proceedings. In this context, the challenges that a Special Court established under the POCSO Act is likely to face while hearing/trying a case of a child alleged to have committed a heinous sexual crime against another

23 JJ Act, 2015, Section 8(3)(h).

24 JJ Act, 2015, Section 19(2),

25 JJ Act, 2015, Section 8(3)(g).

26 JJ Act, 2015, Section 17(2).

child, while conducting a proceedings as a JJB²⁷ or as Children’s Court²⁸ as the case may be, is an unenviable legal obligation.

8. Towards ensuring the Best Interests of the Child - a Clarion Call for Competency Building on Child Protection

A reading of the CCL-NLSIU studies and the chapters in this publication highlight how divorced the child protection system is from what these legal mandates require, be it functionaries who are part of the executive wing of government, or the courts/Child Welfare Committees that play a judicial role. It highlights how many miles we, as a nation have to go, before we can call refer to child protection services as an effective ‘system.’

It is notable that Section 2(9), JJ Act, 2015 defines ‘best interest of the child’ as “the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development”. Stakeholders are now obligated to ensure that while making decisions relating to either a child victim found to be in need of care and protection, a child witness of a sexual crime, or a child alleged or found to be in conflict with law, they screen the decision for compliance with this definition, as well as the fundamental principle of best interest enshrined in Section 3(iv), JJ Act, 2015, which requires ensuring that these decisions “help the child to develop full potential”. Together, these provisions obligate all stakeholders to ensure that decisions they make on matters relating to children are not only in their best interest, but that these decisions also take into account all their rights provided for by law.

Effective fulfillment of the constitutional vision and the implementation of laws such as the POCSO Act and the related JJ Act will therefore require urgent attention to be given to training of Special Courts and other stakeholders, a legal obligation that is also placed on the National and State Governments.²⁹ It is incumbent on every duty bearer, including the wider community of adult citizens, to reflect on and contribute to breathing life into the Constitution. This may be undertaken by actively contributing to co-creating conditions of ‘freedom and dignity’ for every child, who are not just the country’s future, but citizens of

²⁷ JJ Act, 2015, Section 19(1)(i).

²⁸ JJ Act, 2015, Section 19(1)(ii)

²⁹ POCSO Act, 2012, Section 43, and JJ Act, 2015, Section 108, require the Central and State Governments to promote public awareness of these laws and capacity building of stakeholders.

today. However, child victims of sexual abuse, and particularly those that suffer multiple vulnerabilities such as child victims with disability, victims of incest in a family shrouded by silence, and those from oppressed castes and classes, should get much more serious attention. This will naturally also require much more scientifically designed and implemented capacity building of stakeholders to bolster the Child Protection System and to promote linkages between the Child Protection System and the Criminal Justice System. All stakeholders in the Child Protection System should therefore be trained in child rights and laws relating to children, not just for a few days in order to fulfill a legal obligation, but till the stage of achieving competence in fulfilling this paramount duty of acting in the best interest of the child through a child rights based approach. This is indeed an onerous but necessary goal, given the life-changing impact that decisions made by stakeholders (including the courts) have on the lives of vulnerable children.

It is only when the Child Protection 'System' is re-engineered and strengthened as a robust 'system', staffed by sensitized and competent stakeholders, that the POCSO Act and the JJ Act can be effectively implemented. It is then that more holistic justice encompassing healing and social integration for child victims, and children who commit sexual crime, can be genuinely achieved, while also building a more caring and protective community in which children can thrive. It is hoped that this publication, the CCL-NLSIU-Studies and the National Consultation result in strategic action plans and monitoring mechanisms that become milestones towards this end.

Annexure A: Recommendations

All the five CCL-NLSIU Studies include a range of recommendations that would be useful to trigger further debate and action. The recommendations that emerged from Regional Round Table Consultations and National Consultation on The Effective Implementation of the Juvenile Justice Act - Linkages with the POCSO Act, 2012 organized by the SCC-JJ are important contributions to this well-spring of knowledge, and are extracted here.

I. Key Recommendations Emerging from CCL-NLSIU's Studies

1.1. Recommendations for the Hon'ble High Courts

It is recommended that the Hon'ble High Court, in consultation with the State Government, consider:

1. **Establishment of dedicated Special Courts** to exclusively deal with cases under the POCSO Act, particularly in districts where pendency is high.
2. **Construction of waiting rooms** in all court complexes specifically for child victims of sexual abuse and their families, in a manner that they are not exposed to the accused or to other adult accused persons and the police, with separate entrances. The waiting rooms and toilets should also **be accessible to persons with disabilities** in accordance with the Rights of Persons with Disabilities Act, 2016. Use of the funds made available under the National Mission for Justice Delivery and Legal Reforms for improvement of courtroom infrastructure should be considered, to ensure that the ambience of the court complex is child-friendly.

3. **Allocation of funds to:**

- enable **prior courtroom orientation** for children and their families by trained support persons;
- enable the creation of an **accessible and child-friendly court-complex and pictorial brochures**, explaining the courtroom structure, people present in the courtroom, sequence of events and the procedures that will be followed during deposition;
- ensure that the **JJBs and Special Courts have means available to prevent the exposure of the child victim to the accused, and to provide clean toilets, and drinking water facilities**. Use of cupboards and thin curtains should be avoided as means to prevent exposure.
- invest in an **electronic intimation mechanism**, that will alert victims and their families at least 24 hours in advance, if the hearing is being rescheduled.

4. Creation of a **cadre of trained para-legal volunteers** to support child victims during the entire course of the investigation and trial. CWCs could then draw from this cadre for the appointment of **Support Persons**.

5. The Hon'ble High Court may consider issuing the following **guidance notes**:

- To Special Courts, on the award of **interim and final compensation** in cases under the POCSO Act, clarifying the respective roles of Special Court in awarding and the DLSAs in disbursing compensation amounts. It should also be clarified that other State Schemes will not affect the powers of the Special Court to award compensation under Section 33(8), POCSO Act and Rule 7, POCSO Rules. Special Courts should not avoid exercising their powers by directing victims to seek compensation under other Schemes.
- To Special Courts, on the **procedures** that should be followed and the evidence necessary while **determining the age** of the victim, especially given Section 94, JJ Act, 2015.
- To Special Courts, on **core minimum measures** that should be taken to ensure compliance with the **child-friendly procedures** under the POCSO Act. For instance, children should not be made to wait unnecessarily when they attend the court for recording of their testimony. Exposure

of the child to the accused should be avoided even while the child is waiting to testify. The identity of the victim as well as the victim's family members should be suppressed in the text of the judgment, to ensure compliance with Section 33(7), POCSO Act. The identity of the accused should also be suppressed in cases in which he is the victim's father or closely related to her/him.

- **To Magistrates, on core minimum measures** that should be taken to ensure compliance with the child-friendly procedures under the POCSO Act.
6. **Training of judges and Magistrates on age and developmentally appropriate techniques of interviewing children and appreciating their statement.** The training should also address preparation of a child victim and how it is different from tutoring
 7. Instructions may be issued to the **State Judicial Academy** to:
 - Seek the **assistance of experts in child development, child psychology, and child psychiatry** to develop **training modules** for judges, prosecutors, advocates, support persons, and court staff on interviewing children and building rapport with them.
 - Include **components and methods of age determination, dealing with hostile witnesses, and appreciation of children's testimony** in the training modules for judges and prosecutors.
 - Include **aspects of the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act 2015)** to ensure that a Special Court is equipped to deal with a case of a child alleged to be in conflict of law transferred by the JJB, as per Section 19, JJ Act 2015.
 8. Introduction of **certificate courses for court staff** attached to Special Courts, to encourage and enable them to acquire the sensitivity and skills required to interact with traumatized children and their families.
 9. Urgently request the State Government to ensure that a list of **qualified translators, interpreters, special educators and experts** who could assist in the recording of testimony of the child be made available to all Special Courts.
 10. Placing of a **suggestion box outside Special Courts**, for seeking suggestions and feedback for improvement from child victims and others, of their experience of testifying before/engaging with the Special Court.

11. Seeking feedback from Special **Courts** on a regular basis on the challenges they face in trying cases under the POCSO Act, measures they have taken to make the courtroom experience child-sensitive, and to solicit suggestions for improvement. The good practices that emerge from the feedback should be collated, analyzed, and disseminated to all Special Courts.
12. Instruct Special Courts to **display data on disposal and pendency** in POCSO cases on their website on a regular basis after having taken care to suppress identifying information.

1.2 Recommendations for the State Government

The State Government should consider:

1. **Appointment of Special Public Prosecutors (SPP)** as mandated under Section 32(1), POCSO Act, to exclusively deal with the POCSO cases
2. Trainings:
 - **Periodic trainings of prosecutors** on the POCSO Act as well as on developmentally appropriate techniques of interviewing children and preparing them for trial, the procedure for filing compensation applications, and the process for age determination.
 - **Periodic trainings of police** on the POCSO Act, investigation methods, collection of samples, age-determination procedures, as well as developmentally appropriate techniques of interviewing children. The training should also address the protocol in cases in which the victim is pregnant.
 - **Joint trainings of police and prosecutors** on the POCSO Act, lapses that should be avoided, and the manner of investigation and prosecution of sexual offences.
 - **Periodic training of Chairperson and Members of Child Welfare Committees** on their role under the POCSO Act and Rules.
 - **Periodic training of the Principal Magistrate and Members of the Juvenile Justice Board** and **joint trainings** of the Principal Magistrates along with Members of the JJB, on the POCSO Act.

- **Periodic training of doctors of government hospitals** on conducting medical examination in accordance with the POCSO Act and on the age determination process.
3. Development of an **Action Plan to address the support gap and to facilitate greater coordination between support persons, lawyers, prosecutors, as well as children and their families.** The Action Plan should indicate measures that will be taken to ensure the availability of competent and sensitive Support Persons immediately after an FIR is lodged, till the completion of trial. The Action Plan should also address the counselling and support services that will be extended to girls who become pregnant because of the alleged assault and the protocol that should be followed to ensure that termination of pregnancies, if desired by the child, are carried out in a timely manner.
 4. Development of **Victim and Witness Protection Scheme** similar to the Delhi model.
 4. Creation of a **trained cadre of Support Persons with the assistance of the State Legal Services Authority and District Child Protection Units** under the JJ Act.
 5. Allocation of **funds to enable Child Welfare Committees to provide remuneration and travel expenses to Support Persons** appointed in POCSO cases.
 6. Allocation of **dedicated funds and transport to the police** to enable them to escort child victims for medical examination and to present them before the CWC.
 7. Allocation of **funds to JJBs**, to ensure that adequately opaque curtains or other means are available to ensure that the **child victim is not exposed** to the child alleged to be in conflict with the law.
 8. Direction to **District Child Protection Units, to prepare a list of qualified translators, special educators, interpreters and other experts** to assist the police, Magistrate, and Special Court, with the recording of statement of the child.
 9. Allocate **budget for payment of services rendered by the Support Persons and fix fees** for their services.
 10. Construction of **waiting rooms** for child victims and their families, to prevent exposure to the CICL in JJB buildings. **Waiting rooms for children and**

families should be located close to the JJBs to prevent exposure to the child alleged to be in conflict with the law while going from the waiting room to the JJB. Drinking water, lifts, toilets should be available, and should be accessible to children with disabilities in accordance with the Rights of Persons with the Disabilities Act, 2016.

11. Establishing **One Stop Crisis Centres** to enable children to access all services under one Unit. Create a **platform through which the State Government receives suggestions regularly** from the JJBs to ensure that the child-friendly measures are implemented.
12. Sharing **information regarding compensation schemes** applicable to all children, the specific scheme available for specific groups, medical relief or any other scheme that are available to a child victim of sexual assault, with the police department. Police being the first point of contact in most cases can assist the children to apply for compensation with loss of time.
13. Issuing a **public call inviting volunteers** and representatives of NGOs to volunteer as Support Persons, while including the necessary qualifications/ experience required.

Miscellaneous

14. Ensuring that **sex education** is included in the curriculum for children along with information about offences under the POCSO Act and in curriculum for teachers on recognizing and responding to sexual abuse. Parent Education Programmes should also be launched to enable parents and other family members to talk to children about sex and sexuality at home, and to focus more on sensitizing boys about how to respect girls.
15. Facilitating the **establishment of community level support groups** to create awareness about child sexual abuse, the legal framework, and support services available to all children, particularly children out of school, children with disabilities, children living on the street, and children living in residential institutions.
16. **Collaborating with mass media** to devise and promote awareness about applicable laws and to challenge attitudes and harmful gender stereotypes that perpetuate the tolerance and condoning of violence against children in all its forms; and to also use the media to promote positive attitudes towards children.

17. Developing **safe, well-publicized, confidential and accessible support mechanisms within the community**, for children to report sexual abuse, with specific attention to reporting mechanisms within residential institutions.
18. Developing **guidelines for reporting by professionals** such as doctors and others working directly with children.
19. Ensuring **regular inspections of Child Care Institutions**, by Inspection Committees under the JJ Act 2015, JJBs, and CWCs.
20. **Commissioning research** on evidence-based studies on the implementation of the POCSO Act and on treatment programs for persons at risk of sexually abusing children and on root causes of sexual violence against children.
21. **Organizing quarterly meetings** with police, prosecutors, doctors, CWCs, JJBs, and support persons to understand the problems they face in the implementation or application of the POCSO Act and its linkage with the JJ Act.
22. **Identifying training needs, documenting good practices**, and identifying measures that should be taken to support stakeholders in the discharge of their functions.

1.3. Recommendations for State Legal Services Authority

1. Ensure that **DLSA's disburse compensation** ordered by the Special Court **within 30 days** of the order being passed.
2. **Designate Legal Aid Lawyers and para-legal volunteers to provide orientation about the legal procedure** and the courtroom to child victims and their families, as well as children alleged to be in conflict with the law, who may have been transferred by the JJB to the Special Court for trial as an adult.
3. Assign **Legal Aid Lawyers** to provide assistance to child victims in filing an **interim compensation** application before the Special Court.
4. Conduct **awareness programmes in the community and schools** with special focus on rural areas to make the wider public aware of the compensation scheme.

1.4 Recommendations for Special Courts

1. Consider the needs of the child as per the child's **developmental age before scheduling testimony**. Judges should verify if the child is hungry, sleepy, or needs to use the toilet, before commencing with the testimony.
2. Care should be taken to ensure that the **child is not kept waiting for lengthy periods of time on the day of the testimony**.
3. **Complete the examination-in-chief and cross-examination on the same day, as far as possible**. Breaks should be allowed, if necessary.
4. **Do not allow the defence or the prosecution to question the child directly**, as required under the POCSO Act.
5. Admit the **statement of a child with disability** recorded under Section 164(5A)(a) Cr.P.C as examination-in-chief.
6. Take the **assistance of a special educator** or a person familiar with the manner of communication of children in every case of a child with an intellectual disability, mental retardation, or any other disability.
7. Take the **assistance of a child development expert** or any other expert or person familiar with the child's communication, when the child is very young.
8. Ensure that the **child is not exposed to the accused** inside or outside the court, by designating a waiting area within the court complex.
9. Proactively consider **awarding interim compensation** and indicate reasons in writing as to why compensation is not being awarded.
10. Direct the **DLSA to file a compliance report within 30 days** of the award of compensation.
11. **Examine the child in the chamber or any other suitable room** in the court complex, if the courtroom is likely to intimidate the child.
12. While **determining age** of the child victim, apply the rulings of the apex court in *Jarnail Singh v. State of Haryana*¹ on the point of age determination and **Section 94, JJ Act 2015**. **Refrain from adding two years to the upper age** mentioned in an ossification report, in view of *State of Karnataka v. Bantara Sudhakara*,² wherein the Supreme Court observed that "...merely because the

1 (2013) 7 SCC 263.

2 *State of Karnataka v. Bantara Sudhakara*, (2008) 11 SCC 38; *State of U.P v. Chhoteylal*, (2011) 2 SCC 550.

doctor's evidence showed that the victims belong to the age group of 14 and 16, to conclude that the two years age has to be added to the upper age limit is without any foundation."³

13. Recognise that owing to the taboo associated with sexual offences and the lack of an effective support and protection system, victims and their families may not fully support the prosecution. It is therefore important to **appreciate other forms of evidence available** to arrive at a decision and to also bear in mind that such cases are non-compoundable.
14. **Add appropriate charges under the aggravated offences** if they are not added in the chargesheet.
15. When it is brought to the notice of the Court that there was **delay in filing of FIR due to non-registration of the same by police officials, the Court must take action against the police** as per provisions under the POCSO Act and the IPC.

1.5. Recommendations for the State Commission for Protection of Child Rights

1. **Develop monitoring indicators** to assess the State Government's compliance with the POCSO Act.
2. **Conduct inspections of Child Care Institutions** to assess measures in place to protect children from sexual offences and recommend remedial action.
3. **Review the care and protection arrangements available for victims** under the POCSO Act in all districts.

1.6. Recommendations for the Child Welfare Committees

1. Identify **individuals with necessary qualifications** to be **Support Persons** and appoint them in all appropriate cases.
2. Maintain a **database of Support Persons** who could be appointed at any stage of a case if the child desires or needs assistance.
3. Issue **authorization letters to all Support Persons** providing services in POCSO cases in a prescribed format.

3 State of Karnataka v. Bantara Sudhakara, (2008) 11 SCC 38; State of U.P v. Chhoteylal, (2011) 2 SCC 550.

4. Ensure that a **Child Protection Plan** is prepared for children who are provided services by the Support Person, in accordance with the Model Guidelines under Section 39, POCSO Act, published by the MWCD, Government of India.

1.7. Areas of further research

CCL-NLSIU's Studies have underlined the need for more empirical studies and research on the following areas:

- Challenges faced in the investigation and prosecution of cases under the POCSO Act;
- Quality and nature of support provided by different functionaries available to child victims of sexual abuse;
- Empirical study on the implications of assignment of Support Persons in POCSO cases.
- Evidence-based treatment programs for persons at risk of sexually abusing children;
- Nature of medical evidence sought and its implications on cases under the POCSO Act;
- Ethnographic study of the journey of child victims under the POCSO Act;
- Challenges faced by JJBs in dealing with cases under the POCSO Act;
- Empirical study on the treatment of children alleged to be in conflict with the law in "romantic" cases;
- Challenges faced by CWCs in dealing with cases under the POCSO Act;
- Children's experience of the criminal justice system;

1.2. Recommendations based on Regional Round Table Consultations held under the aegis of the Supreme Court Committee on Juvenile Justice

Extracted from: *Effective Implementation of the Juvenile Justice (Care and Protection of Children) Act, 2015 : Focus on Rehabilitation Services and Linkages with the POCSO Act, 2012*, Consolidated Report of Third Round of Regional Level Round Table

3.1. Issues and Recommended Solutions: Challenges in JJ Act -POCSO Act interlinkages

Several systemic, operational and attitudinal challenges that hindered linkages between the JJ system and the criminal justice system in the context of the POCSO Act, 2012 were identified by participants in the regional consultations. An overview of these challenges is as follows:

- **Lack of coordination** amongst stakeholders.
- **Need for linkage between Special Court/Magistrates and CWCs.**
- **Non-production of victims** before the **CWC** in requisite cases as per Rule 4(3) POCSO Rules and failure to report all cases to the CWC by police.
- **Social stigma** acts as a barrier for victims in accessing the criminal justice system.
- Delays in award and disbursement of **compensation**.
- Challenges presented by **“love” cases** i.e., cases in which the victim and the accused claim to be in a relationship.
- Problems related to **age verification** of victims and CICLs.
- **Acute support gap.**
- Absence of exclusive CWPOs and SJPU in every district affects the way in which child victims as well as CICLs are handled.
- Challenges associated with **restoration of victim to the family in incest cases.**
- Absence of **database of service providers** and experts.
- **Lack of procedural compliance** with the POCSO Act.
- **Lack of child-friendly Special Courts and JJBs.**
- **Pendency of cases** in JJBs and Special Courts.
- **Mandatory reporting** affecting privacy and access to healthcare, including mental health services.
- **Multiplicity of proceedings** causing trauma to the victim.

- **Conflict between laws:** Whether the presumption under Sections 29 and 30, POCSO Act should be applied in cases involving a child in conflict with the law? Whether a child who is a victim under Sections 77 and 78, JJ Act, 2015 can be treated as a child in conflict with the law for possession of drugs under the NDPS Act, 1985? Treatment of two children involved in a relationship under the POCSO Act. Child marriage among tribals.

The solutions identified by participants to address the above challenges included:

- **Improving convergence and coordination** among stakeholders **through SOPs and uniform training modules.**
- Improving **convergence between the criminal justice system and child protection system** by recognizing the CWC's role in rehabilitation of child victim and the role of DCPUs and POs in monitoring the progress of CICL in the Place of Safety.
- **Enhancing the role performance of police through** sensitization, training, institutionalizing a policy of fixed tenures and creating a dedicated cadre of officers dealing with children.
- **Regular and periodic training** for all stakeholders.
- **Sensitization of judges**, including on matters related to award of **interim compensation** and ensuring **disbursal within 30 days.**
- **Support should be enhanced** through the empanelment of **Support Persons in every district, and the initiation of a Victim and Witness Protection program in every State.** One-Stop Centres (OSC) for women and children should be considered as they can serve as a single platform for information, shelter and legal and psychological support for child victims.
- **Creation of resource directories of experts and facilitating its dissemination to all authorities.**
- **Amending the law to** ensure that the child does not have to testify multiple times in multiple fora, - ie., the victim should be made to testify only once, and this testimony should be considered for all proceedings.
- **Ensuring that additional Special Courts are established** at the sub-divisional level and that Special Courts deal exclusively with POCSO cases. Where that is not possible, POCSO cases should be heard on a specific day

only. Infrastructure should be made child-friendly, instead of using ad-hoc mechanisms to make existing courtrooms child-friendly.

- Ensuring child-friendly JJBs and Special Courts where safety of the child victim is ensured.
- **Ensuring timely disposal** through time bound investigation, trial and pendency reviews, exclusive Special Public Prosecutors, video-conferencing facilities, and by constituting additional JJBs or increasing the number of their sittings.
- **Age-determination** procedures under Section 94, JJ Act should be followed.
- **Clarity on issues:**
 - With respect to application of presumptions, pursuant to Section 34(1), POCSO Act, and Section 1(4)(i), JJ Act, 2015, the presumptions under the POCSO Act will not apply while dealing with a CICL. Instead, the presumption of innocence under Section 3(i), JJ Act, 2015 and the best interest principle will apply.
 - An exception like Rule 9(3), JJ Model Rules 2016 can be considered in the State Rules to clarify whether children used for peddling drugs can be treated as CINCP or as CICL. Section 64A, NDPS Act, 1985 on immunity from prosecution to addicts volunteering for treatment also needs to be implemented.
 - Clarity is required on how to deal with cases in which the victim and the accused are both minors and willingly indulge in a sexual act, especially as to whether they are to be both to be treated as CICLs or as CINCPs, given the gender neutrality of the POCSO Act.
 - To address tribal practices of child marriage, awareness about the POCSO Act and the adverse repercussions on the health and future well-being of the couple should be created among the community members.

3.2. Challenges in and Solutions for Rehabilitation of Children including Children who are Victims of Sexual Offences

- **Lack of provisions for rehabilitation** of child victims, except awarding compensation. Rehabilitation is a greater challenge when the accused or child alleged to be in conflict with the law lives in the vicinity or is a family member.

- **Rehabilitation of vulnerable groups** such as transgendered children, male victims of sexual abuse, children of sex workers, children addicted to substances, and mentally ill children is a challenge due to the absence of CCIs or expertise within CCIs to cater to their needs.
- There is confusion about dealing with **pregnant victims** as the child gets affected due to poor coordination between doctors, police, and courts. There is a need for guidelines on medical termination of pregnancy.
- **Non-institutional care programs such as Foster Care not functional** because of non-availability of foster parents and fit persons.
- **Inadequate professional rehabilitative services** due to paucity of trained Support Persons, interpreters, translators, special educators and other experts required to enable the rehabilitation of children.
- The **negative attitudes** towards girls who have been victims of a sexual offence is a cause of concern as they are re-victimized after the incident and also not allowed to continue their education.
- Lack of **adequate number of CCIs, especially for children with special needs** results in poor rehabilitation and support to such children.
- **Difficulties in establishment of identity of the child** create problems during the admission of the child in various institutions like schools/colleges.
- There is a **need for a medical cell to cater to the needs of child victims** for testing for communicable diseases and HIV.
- **ICPs** prepared by the POs are of very poor quality, as they are largely prepared in a **mechanical manner without the required process work and individualized approach necessary** to ensure compliance with an ICP that is comprehensive, in the best interest of the child, and one that takes into account the views of the child.
- **Needs of children with disabilities not fully addressed.**
- **Attitudes of frontline persons** dealing with the child victim needs to be more sensitive.
- **Role confusion** impacts children's rehabilitation.

- **Restoration and repatriation** is a challenge because of poor coordination between stakeholders across States.

An overview of the Solutions identified for the above challenges is as follows:

- A **nuanced understanding of rehabilitation** is necessary. Rehabilitation should be age and case specific. A quality follow-up mechanism is necessary.
- Establishment of **Victim-Support Units**.
- **Family counselling** by trained and professional counsellors (appointed by a District level panel) to ensure the creation of family safety net to retain the child in family.
- **Rehabilitation of vulnerable children** by involving the community and linking families to poverty alleviation programs/ schemes. Homes for transgendered children and children with mental illness should be established.
- **Counselling and legal aid support** should be provided to pregnant victims. An **SOP** should be developed to outline the procedures to be followed in such cases.
- **Non-institutional care should be promoted**.
- **Trained mental health professionals** should be appointed in adequate numbers.
- Training should be provided on **preparation of ICPs**.
- **Medical examination** should be conducted in compliance with the guidelines issued by the Ministry of Health and Family Welfare.
- **De-addiction centres exclusively for children** should be established. Sufficient funding should be provided to these centres.
- **Attitudinal changes** should be effected through intensive training and capacity building.
- **Principle of fresh start in the JJ Act 2015** should be applied to victims of sexual offences as well.
- **Clear guidelines** will have to be provided to clarify the role of each stakeholder within the JJ system.

- **For smoother restoration and repatriation**, efforts have to be intensified for convergence and coordination between concerned stakeholders in both States.

3.3. Challenges in and Solutions for Rehabilitation of Children alleged and found to have committed offences including sexual offences

- **Lack of counsellors, psychologists, probation officers, special educators**, and others who can assess the emotional and mental needs of the CICL.
- **Absence of de-addiction centres exclusively for CICLs.**
- Children involved in **petty offences** fall through the cracks and do not receive any rehabilitative services.
- Non-compliance with Section 24, JJ Act 2015 dealing with the removal of disqualification on the findings of an offence affects job prospects.
- Lack of **after-care programmes**, especially given that the JJ Act 2015 does not provide for after care organizations.
- **ICPs and SIRs not prepared**; or if prepared, are not of good quality, and also not considered
- Absence of individualized **follow-up** of ICPs and rehabilitation plans.
- **Societal barriers** hinder social re-integration.
- **Delays in disposal** affect rehabilitation.
- **Absence of a professional Probation System for children.**
- CICLs involved in **adolescent relationships** are difficult to work with.
- **Preliminary assessments** are difficult because of lack of experts and scientific tools to assess mental capacity.
- **Lack of infrastructure** for CICLs such as Place of Safety, and OH in every district.
- **Lack of coordination and convergence** among Probation Officers and the police, and State Departments on vocational training and rehabilitation.

An overview of the solutions identified for the above challenges is as follows:

- Appointment of **trained and qualified Counsellors** in adequate number so as to ensure effective staff: child ratio.
- Exclusive de-addiction centres should be established for children under 18 years in every district.
- **Rehabilitative interventions** for CICLs repeatedly involved in **petty offences** should be designed and implemented.
- Section 24, JJ Act 2015 relating to removal of disqualification on finding of an offence should be strictly applied.
- States should develop an **effective after-care programme and post-release follow-up mechanism** to ensure social reintegration.
- **Rigorous training** should be provided to functionaries and stakeholders having the responsibility of preparing the SIR and ICP, including competence development in assessing, collecting information and basic communication skills..
- **Probation should be strengthened** and customized for CICLs.
- **Delays in disposal** by JJB should be addressed through constituting additional JJBs, additional sittings, etc.
- **CCIs for CICLs should be well-equipped and** provide quality rehabilitative services
- **Counselling** should be offered **to families** and community should be sensitized through the VLCPC and BLCPC so as to change their outlook towards CICLs.
- For preliminary assessment, in the absence of psychiatrist, a panel of mental health professionals should be constituted in each district to assess the mental capacity.

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