

Forms and Responses of Criminal Justice System to Child Sexual Abuse in India

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ABSTRACT

Child sexual abuse is a widespread global problem that negatively affects victims, families, communities and society. Sexual abuse including sexual assault or rape of children and adolescence is a violation of human rights, and has many consequences in the short and the long term. The recent trend on the crime statistics, also prove the increase in child sexual abuse in India. Understanding the magnitude of the problem the legislative body of India have passed many ordinances, stringent laws to prevent children becoming victims of sexual abuse. Even though child sexual abuse is a global issue, the legal perspectives and its awareness has not been addressed till the recent past. Analyses of various articles on special courts and judgement from POCSO cases would be done. This paper highlights the various responses of criminal justice system such as POCSO and the ordinance to prevent child sexual abuse in India.

Keywords: *Child sexual abuse, POCSO, Ordinance, Legal perspectives, special courts, Criminal justice system in India*

Child sexual abuse is a widespread global problem that negatively affects victims, families, communities, and society. The United Nations convention on the rights of the child (1989) defines child as "a human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. Sexual abuse including sexual assault or rape of children and adolescence is a violation of human rights, and has many consequences in the short and the long term. The physical, sexual, reproductive health, and mental health consequences of such abuse are wide ranging and needs to be addressed.

Types of child sexual abuse

According to guidelines for medico-legal care for victims of sexual violence. Geneva: World Health Organization (2003), three types of child sexual abuse are often distinguished:(i) non-contact sexual abuse (e.g., threats of sexual abuse, verbal sexual harassment, sexual solicitation, indecent exposure, exposing the child to pornography); (ii) contact sexual abuse involving sexual intercourse (i.e., sexual assault or rape) and (iii) contact sexual abuse excluding sexual intercourse but involving other acts such touching, fondling and kissing.

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Received: January 24, 2023; Revision Received: January 30, 2023; Accepted: February 05, 2023

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Child sexual abuse is often carried out without physical force, but rather with manipulation (e.g., psychological, emotional or material). It may occur on a frequent basis over weeks or even years, as repeated episodes that become more invasive over time, and it can also occur on a single occasion.

Effects of Child sexual abuse

(i) Feeling of powerlessness (ii) Anger (iii) Anxiety (iv) Fear (v) Phobias (vi) Nightmares (vii) Difficulty concentrating (viii) Flashbacks of the events (ix) Fear of confronting the offender (x) Loss of self-esteem and confidence (xi) Feelings of guilt.

Global scenario of the problem

The WHO (2017) estimated that up to 1 billion minors between the ages of 2 and 17 years of age have endured violence physical, emotional, or sexual. Sexual abuse (from groping to rape), according to UNICEF estimates from 2014, affected over 120 million children, representing the highest number of victims. In 2017, the same UN organization reported that in 38 low and middle-income countries, almost 17 million adult women admitted having a forced sexual relationship during their childhood.

Child sexual abuse in India

A survey by United Nations International Children Education Fund (UNICEF) on demographic and health was conducted in India (2005-2013) which reported that 10% of Indian girls might have experienced sexual violence when they were 10–14 years of age and 30% during 15–19 years of age. Overall, nearly 42% of Indian girls have gone through the trauma of sexual violence before their teenage.

The first ever National Study on Child Abuse was conducted by the Ministry of Women and Child Development (2007) covering 12447 children, 2324 young adults and 2449 stakeholders across 13 states with report as "Study on Child Abuse: India 2007". This study brought out that Sexual abuse was reported by 53.22% children, among them 52.94% were boys and 47.06% girls. 21.90% of child respondents faced severe forms of sexual abuse, 5.69% had been sexually assaulted and 50.76% reported other forms of sexual abuse".

Andhra Pradesh, Assam, Bihar and Delhi reported the highest percentage of sexual abuse between both sexes, as well as the highest incidence of sexual assaults. 5-12 year's group faced higher levels of abuse, largely unreported. Severest sexual abuse in age group of 11-16 years, 73% of sexual abuse victims were in age groups of 11-18 years. The age-wise distributions showed that though the abuse started at the age of 5 years, it gained momentum 10 years onward, peaking at 12 to 15 years and then starting to decline.

Responses to the problem of child sexual abuse on the Global Front

In 1989, the General Assembly of the United Nations adopted the Convention on the Rights of the Child (UNCRC), which obliges governments, "to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation". The Committee on the Rights of the Child, which oversees implementation of this convention, has held several thematic discussions on violence against children and called for the UN Study on violence against children, which was published in 2006. This report has been followed by several regional reports and by the appointment in 2009 of the UN Secretary General's Special Representative on Violence against Children, who in 2013 developed the Global survey on violence against children. (Convention on the Rights of the Child. New York: United Nations; 1989).

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In 2003 the World Health Assembly adopted resolution WHA56.24, which called upon Member States to appoint a focal point within their ministries of health and actively make use of the conclusions and recommendations of the World report on violence and health. In 2014, the World Health Assembly drew attention to the important role of health systems in addressing violence, in particular against women and girls and against children, and called upon WHO's Director-General to develop a global plan of action to strengthen the role of the health system in addressing interpersonal violence, in particular against women and girls, and against children (WHA67.15) (UN Report Geneva 2002).

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Until 2012, the only sexual offence against children recognized by the law were covered by three sections of the Indian Penal Code (IPC) not specific to children. The only crimes registered were rape (sexual intercourse without consent—section 376), outraging modesty of a woman (unspecified acts—section 354) and unnatural acts defined as “carnal intercourse against the order of nature with any man, woman or animal” (anal sex, homosexuality or bestiality—section 377). Consequently, other forms of non-penetrative sexual assaults, harassment and exploitation were not explicitly recognized as crimes and therefore not recorded (assuming they were reported).

The Emergence of POCSO Act

To protect children against sexual abuse, sexual harassment and child pornography the Ministry of Law and Justice (Legislative Department) Passed the Act of parliament on 19th June 2012, The Prevention of Children from Sexual Offences Act, 2012 and published the following general information:

The Prevention of Children from Sexual offences Act, 2012-An act to protect children from sexual assault, sexual harassment and provide for special courts for trial of such offences and matters connected therewith or incidental thereto. WHEREAS clause (3) of article 15 of the constitution, inter alia, empowers the state to make special provisions for children and WHEREAS the Government of India has acceded on the 11th December, 1992 to the convention on the Rights of the child adopted by the General assembly of the United Nations, which has prescribed a set of standards to be followed by all state parties in securing the best interest of the child.

WHEREAS it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child and WHEREAS it is imperative that the law operates in manner that the best interest and well-being of the child are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child 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

- The inducement or coercion of a child to engage in any unlawful sexual activity.
- The exploitative use of children in prostitution or other unlawful sexual offences.
- The exploitative use of children in pornographic performance and materials.

WHEREAS sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively followed. Simultaneously the Act came into force on 14 November 2012. (Press release by Ministry of Justice-POCSO ACT).

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POCSO Act defines a child as any person below eighteen years of age, and defines different forms of sexual abuse, including penetrative and non-penetrative assault, as well as sexual harassment and pornography, and deems a sexual assault to be “aggravated” under certain circumstances, such as when the abused child is mentally ill or when the abuse is committed by a person in a position of trust or authority vis-a-vis the child, like a family member, police officer, teacher, or doctor. People who traffic children for sexual purposes are also punishable under the provisions relating to abetment in the said Act. The said Act prescribes stringent punishment graded as per the gravity of the offence, with a maximum term of rigorous imprisonment for life, and fine.

Crime in India 2014 shows that 8,904 and 13,766 cases were registered under the POCSO Act and child rape, respectively. Crime in India 2015 shows that 14,913 cases were registered under the POCSO Act and another 10,854 as cases of child rape. Crime in India 2016 shows that 36,022 cases were registered under the POCSO Act and other relevant IPC provisions.

REPORTING OF OFFENCES UNDER POCSO ACT

Procedure For Reporting

According to Section 19(1) of the act, Notwithstanding anything contained in the Code of Criminal Procedure, 1973 any person (including the child), who has an apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,

- 1) The Special Juvenile Police Unit;
 - a) The local police II.
- (2) Every report given under subsection (1) shall be
 - a) ascribed an entry number and recorded in writing;
 - b) be read over to be informant
 - c) shall be entered in a book to be kept by the police unit
- (3) Where the report under the subsection 1 is given by the child, the same shall be recorded under subsection 2 in a simple language so that the child understands contents being recorded.
- (4) In case contents are being recorded in the language not understood by the child or whether it is deemed necessary, a translator or an interpreter having such qualifications, experience and on payment of such fees as may be prescribed shall be provided to the child if he fails to understand the same.

Failure to Report Child sexual Abuse

The POCSO Act, 2012 provides under Section 21(1) that any person, who fails to report the commission of an offence or who fails to record such offence shall be punished with imprisonment of either description, which may extend to six months or with fine or with both.

Reporting false complaint or false Information

The POCSO Act, 2012 makes it an offence to report false information, when such report is made other than in good faith. It states that any person, who makes false complaint or provides false information against any person, in respect of an offence committed under sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both. Where such information is provided against a child, the punishment may extend to one year.

Punishment for offences under the POCSO Act

The act provides protection to all children under the age of 18 years from the offences of sexual assault, sexual harassment and pornography. It provides for stringent punishments, which have been decided as per the gravity of the offence. The punishments range from simple to rigorous imprisonment of varying periods along with fine.

1. Penetrative Sexual Assault (Section 3) - Not less than seven years, which may extend to imprisonment for life, and fine (Section 4)
2. Aggravated Penetrative Sexual Assault (Section 5) - Not less than ten years which may extend to imprisonment for life, and fine (Section 6)
3. Sexual Assault (Section 7) - Not less than three years, which may extend to five years, and fine (Section 8)
4. Aggravated Sexual Assault (Section 9) - Not less than five years which may extend to seven years, and fine (Section 10)
5. Sexual Harassment of the Child (Section 11) - Three years and fine (Section 12)
6. Use of Child for Pornographic Purposes (Section 13) - Five years and fine and in the event of subsequent conviction, seven years and fine (Section 14 (1))

Relevant Legal Provisions in the Act and Rules and related laws:

Rule 4(2)(e): Where an SJPU or the local police receives any information under sub-section (1) of section 19 of the Act, they must inform the child and his/her parent or guardian or other person in whom the child has trust and confidence of the availability of support services including counselling, and assist them in contacting the persons who are responsible for providing these services and relief.

Rule 5(4)(v): Wherever necessary, a referral or consultation for mental or psychological health or other counselling should be made by the medical professional rendering emergency medical care to the child. Thus, the rules made under the POCSO Act, 2012 provide that the child may be referred for counselling either by the police or by a doctor.

Role of Counsellors

The counsellor's duties will include:

1. To understand the child's physical and emotional state
2. To resolve trauma and foster healing and growth
3. To hear the child's version of the circumstances leading to the concern
4. To respond appropriately to the child when in crisis
5. To provide counselling, support, and group-based programs to children referred to them
6. To improve and enhance the child's overall personal and social development, and his/her health and well-being
7. To facilitate the reintegration of the child into his/her family/ community.

At trial

1. Children have the right to be heard in any judicial and administrative proceedings affecting them. They must be given a reasonable opportunity to express their views all matters affecting him and these must be taken into account. He should also be allowed to provide initial and further information, views or evidence during the proceedings.
2. Children have the right to information about the case in which they are involved, including information on the progress and outcome of that case, unless the lawyer considers that it would be contrary to the welfare and best interests of the child. It

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would be best if the lawyer coordinates with other persons or agencies concerned with the child's welfare, such as the support person, so that this information is conveyed in the most effective manner. Victims should receive the most appropriate information on the proceedings from all their representatives, and the assistance of a support person appointed under Rule 4(7) most often constitutes the best practice in ensuring that full information is conveyed to the victim.

After the conclusion of the trial

1. The lawyer should communicate and explain the given decision or judgment to the child in a language adapted to the child's level of understanding. He should give the necessary information on possible measures that could be taken, such as appeal or other mechanisms for complaints as well as compensation.
2. When a decision has not been enforced, the child should be informed through his/her lawyer of available remedies either through non-judicial mechanisms or access to justice.
3. The child's lawyer, guardian or legal representative should take all necessary steps to claim compensation for the child. Rule 7(6) provides that nothing shall prevent a child or his/her parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government. Thus, if there is any additional scheme for compensation, the child's lawyer should inform the child of this and seek instructions on how to proceed further.

Implementation of POCSO Act-Studies in Special Courts

Gupta.A, Ali.B, Adenwalla.M, Punekar.S studied the cases of special courts in Delhi & Mumbai (2015) under the title "Implementation of the POCSO Act Goals, Gaps and Challenges-analyzing 1803 cases in Delhi court and 154 cases in Mumbai courts. In addition, an in-depth analysis was carried out for 21 judgments available from the 154 Mumbai cases and a similar sample of 21 judgments selected randomly from Delhi cases and had given key recommendations as follows.

Key recommendations

1. There is a need to promote micro and macro research by all-India and state level institutions, such as the NCPCR and State Commissions as well as Universities Colleges, to generate critical information on implementation of the POCSO Act, as also sociological, psychological and legal analysis.
2. Given the significantly high number of cases of children aged 16 to 18 years in romantic relationship coming into the criminal justice system, there is an urgent need for the Ministry of Women and Child Development to facilitate discussions on the issue of age of sexual consent.
3. There should be minute scrutiny by the Special Court prior to granting bail and at all stages of the case so that the child's interests are identified and safeguarded. The Special Courts should ensure that a lawyer represents a child and / or aided by a support person.
4. It should be mandatory for police and the Special Courts to inform children and their families about their right to legal representation and provision of free legal aid, and record the same in their documents, such as, diary entries and daily orders.
5. Special Courts need to have exclusive charge of matters under the POCSO Act to ensure speedy disposal. The necessary infrastructure and human resources required to meet the objectives of the Act should also be set up/engaged. Where necessary,

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more Special Courts should be established with suitable infrastructure and human resources.

6. While the police should inform the Special Courts about assignment of a support person to a child, the Special Courts should also inquire in this regard from the prosecution – Police or Special Public Prosecutor, and should record the same in the daily order, along with the particulars of such support person / organization. If a support person / organization is not appointed, the Special Court should facilitate such appointment.
7. It is imperative to establish a robust coordination and linkage between the justice delivery mechanism under the POCSO Act and the JUVENILE JUSTICE Act to enable the Special Court assess the victim's needs. It is not only in relation to the offence, the CWC also has a pivotal role to play to ensure that the developmental needs of the child are fulfilled, such as education, trauma healing, safe living environment.

Implementation Of The POCSO Act, 2012 By Special Courts: Challenges And Issues –A STUDY

Centre for Child and the Law (CCL) National Law School of India University (NLSIU) have conducted Studies on the Working of Special Courts in Five States such as Andhra Pradesh, Assam, Delhi, Karnataka, and Maharashtra. This study analyses the Structural Compliance of Special Courts with the POCSO Act, 2012 and Procedural Compliance of Special Courts with the POCSO Act, 2012”

Structural Compliance of Special Courts with the POCSO Act, 2012 Establishment of Special courts

1. 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.
2. 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.”
3. 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.

Appointment of Special public prosecutor

1. According to Section 32(1), the State Government should appoint a Special Public prosecutor “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 Special Public prosecutor must exclusively handle POCSO cases.
2. The purpose of this provision is to ensure that Special Public prosecutor 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.

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.”

Tools and facilities to record testimony and prevent exposure

1. 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.
2. Exposure to the accused can destroy the confidence of the child and can trigger the memory of the traumatic assault. 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.

Procedural Compliance of Special Courts with the POCSO Act, 2012

- Child-friendly procedures
- Creation of a child-friendly atmosphere
- Facilitating the right to be heard
- Protection of Privacy
- Speedy trial
- Support to the victim

Key findings of the study

1. 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.
2. 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.
3. 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.

Gaps in implementation of the POCSO Act

- Direct cognizance by the Special Court is not fully implemented
- Practice of direct questioning continues
- Minimizing Appearance and Frequent Breaks
- Child-friendly atmosphere lacking in many courts
- Identity of the child is poorly protected
- Recording of evidence and disposal of cases delayed
- Exposure to the accused not adequately prevented
- Assistance of interpreters, experts, and special educators rarely taken
- Assistance of private legal practitioners seldom taken
- Absence of a robust support system.

Recent Judgments of cases dealt under POCSO Act

The State of Karnataka vs. Sanjay.S on 20 March 2018.

The accused No.1 and 2 are residing at Hampi Nagar, Vijaya Nagar, Bengaluru within the jurisdiction of Vijaya Nagar Police Station and the accused No.2 was running Savan Play Home by taking admission of small children without license. During the academic year of 2015- 2016, the complainant- admitted her daughter- the victim girl, aged about 3½ Years to said play home. The accused No.1 and 2 having common intention on 09-02-2017 from 09.30 a.m., to 12.30 p.m. when the victim girl was at play home the accused No.1 sexually abused the victim. The victim's mother lodged the complaint. The Investigation Officer has investigated the same and filed charge sheet against accused No.1 and 2 for the offences punishable under Section 376 of IPC and Section 3, 4, 5(1), 6, 17 of POCSO Act, 2012. The accused No.1 is sentenced to under go rigorous Imprisonment for a period of ten years and to pay a fine of Rs.25, 000/- for the offence under Section 5(m) read with Section 6 of POCSO Act, and in default of payment of fine, he shall further under go simple Imprisonment for a period of four months.

Ravi Kumar vs. central bureau on 7 July 2018

The petitioner was accused in cr.no.6 of 2018 on the file of 2nd respondent, which was registered on the complaint given by 3rd respondent the defacto complaint on 15.7.2018 alleging that her daughter, a minor girl was sexually assaulted by 15 men multiple times in an apartment in Chennai.

Police submitted 70 pieces of evidence in the case and charged the accused under sections 354-B (Assault or use of criminal force to woman with intent to disrobe), 366 (kidnapping), 376-AB, 376-DB, 506 (i) and 506(ii) of the IPC and sec 5 and 6 of the POCSO Act. The trial was conducted by special public prosecutor N Ramesh before the special court judge from January to December last year. One of the accused, died of ill health during the trial and the remaining 16 faced trial. Special Judge Ms. R. N. Manjula, who had convicted all the 15 accused in the case, while acquitting one of the accused awarded life term till death for four accused, life term to one, seven years jail term to another and five years imprisonment to the remaining nine accused.

The Ordinance

In India, seeing the increasing trend of sexual crimes specially against children exhibiting highest level of bestiality and barbarity in commission of crime since 2012 (evidently in cases such as Nirbhaya Rape Case of 2012 and more recently the Kathua Rape Case of 2018), notoriety of the sexual offender behaving with impunity, there have been series of deliberations & outrage across the country which finally culminated into the decision by the Central Cabinet to promulgate Criminal Law Amendment (Ordinance) 2018 in which the punishment for the offence of rape was enhanced and additional sections are added for the sexual offences against Minors.

It was also decided by the cabinet to establish a National Database of Sexual Offenders and strengthening of investigation and prosecution. (Study Of Cases Of Special Courts In Delhi & Mumbai (2012 - 2015).

Salient Features of The Ordinance

- Minimum punishment for Rape made 10 years
- Minimum punishment of twenty years to a person committing rape on a girl aged below 16

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- Minimum punishment of 20 years rigorous imprisonment and maximum Death penalty/Life imprisonment committing rape on a girl aged below 12
- Fine imposed to meet the medical expenses and rehabilitation of the victim
- Investigation in rape cases to be completed within two months
- No Anticipatory bail can be granted to a person accused of rape of girls of age less than sixteen years.
- Appeals in rape cases to be disposed within six months. (NCRB Journal October 2018)

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

The POCSO Amendment Bill has been introduced by Ministry of Women and Child Development provides for stringent punishments for other crimes against those below 18 years of age. The Amendment is carried out in Section 2, 4, 5, 6, 9, 14, 15, 34, 42 and 45. The bill seeks to enhance punishment for sexual offences against children, with a provision of death penalty.

CONCLUSION AND SUGGESTIONS.

Powerful laws, amendments and ordinances can strengthen our juvenile justice system only with its successful implementation, methodological operations and with a robust support system. Prevention of child sexual abuse should take a community-based perspective to provide a risk free and a child friendly environment. It is the responsibility of every state that the child be taught and educated on the awareness to sexual abuse through child directed prevention programs.

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Acknowledgement

The author(s) appreciates all those who participated in the study and helped to facilitate the research process.

Conflict of Interest

The author(s) declared no conflict of interest.

How to cite this article: Lakshmi, P.J. & Usha, R.S. (2023). Forms and Responses of Criminal Justice System to Child Sexual Abuse in India. *International Journal of Indian Psychology*, 11(1), 327-337. DIP:18.01.035.20231101, DOI:10.25215/1101.035