

## DECODING THE CONCURRENCY OF LAWS RELATED TO CHILD VICTIMS IN INDIAN CONTEXT - A PERSPECTIVE

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*What happened to you, my child, please tell me?*

*The child of two years old blinks at you and starts crying.*

*Please tell me what happened on that day?*

*A child of five years old, tries to explain what happened, with his/her showing signs and parts of body.*

*Will you be able to narrate what happened to you?*

*Ten years old child tries to bring out, what happened to her, innocently.*

*Yes, say to me what happened to you?*

*Seventeen years child who has married the offender, out of love, tries to depose against the individual conservatively.*

Whether all these four evidences can be weighed by the Special Judge designated, to preside over the children's court in same logarithmic scale? Even prudent man's unhesitant answer will be "No". Then how to decrypt, untangle, interpret; in legal terms and appreciate these evidences?

Sexual abuses, on a child include different senses and multiple meanings, and thus require multiple definitions. It is quite acceptable theory that we are all products of both biology and the environment and children are always part of our system.

Initially, this system was very simple one i.e., of child-mother (or substitute of mother). Later it became child-family, then child-school and later still, child-community. The present statistics reveals that, the child in all these discipline are prone to sexual assault.

### Defining sexual abuse

The beautiful *God made portrayals* are being destroyed by the lascivious humans from time immemorial. "Rape" was the general term used specifically for the

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despoiling of body of the adult women, before including child victim under Protection of Children from sexual offences, Act 2012<sup>1</sup>. The accused charged for rape was tried and punished by Indian Penal Code, 1860 under sections 375 and 376. The word, rape was not justified enough to represent the sexual abuse against the children before puberty, where in there was less possibility of proof i.e., penetration. In “POCSO, Act 2012” the generic term rape has been replaced by the word “Sexual Assault” and definition elaborately considered the degree of assault. Even a minor penetration was sufficient to attract penalizing as per the special act. It has also defined “Penetrative Sexual Assault”, “Sexual Harassment”, “Aggravated form of Penetrative Sexual Assault” and “Sexual Harassment” with similar explanations. “Child Pornography” was added as an offence and the “Abatement and Attempt” for committing the offence was also included as penal provisions.

### **Sexual abuse on children in India – Statistical outlook**

India with 1.21 billion people constitutes the second most populous country in the world, where children represent 39% of total population of the country. The children's population (0-18) is 472 million, as per the statistics of 2011<sup>2</sup>. The National policy for children, declared children as “*National asset*”. The children who are national assets are also prone to be an easy target for the crime. As pertaining to our country, there was not much research on the abuse of the child. A study on Child Sexual Abuse was carried out by “Save the Children” and “Tulir” in 2006 which looked at the prevalence and dynamics of child sexual abuse among school going children in Chennai. The gravity of child abuse revealed in the study demanded the issue to be placed on the national agenda. In the year 2007, the Ministry of Women and Child Welfare, Government of India along with a non-governmental organization undertook a study on child abuse covering 13 States, and with a sample size of 12,447 children. This National Study on Child Abuse was one of the largest empirical in-country studies of its kind in the world. The major findings of the study shocked the conscience of the country. In spite of India being a signatory of the international covenants on child rights, the rights of the child victim remained unfocused. The study revealed that 53.22% children reported having faced one or more forms of

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1 Here in after referred as “POCSO, Act 2012”

2 <http://www.childlineindia.org.in/child-in-india.htm> assessed on 26.5.2016

sexual abuse. 21.90% child respondents reported facing severe forms of sexual abuse and 50.76% other forms of sexual abuse. Out of the child respondents, 5.69% reported being sexually assaulted, and pathetically 50% abuses were by persons known to the child or in a position of trust and responsibility<sup>3</sup>.

An Integrated overview of statistics on the child rape cases in India reports an alarming growth in abuses, wherein 2113 cases registered in 2001 jumped to 7112 cases in 2011. It is evident that there is increase of 336% of child rape cases from 2001 to 2011<sup>4</sup>. In the year 2012, total number of child rape cases in India was 8541 with Tamilnadu contributing 3.42% <sup>5</sup> In the year 2013 total number of rape cases registered against children was 12,363 and Tamil Nadu's contribution was 3.39%<sup>6</sup>.

National Crime Records Bureau, which is a statistical listing unit of the crime rates in India, has listed the POCSO Act, 2012, in its compendium 2014 for the first time. Cases registered under POCSO Act 2012 in whole of India was 8904 cases, with Uttar Pradesh, West Bengal and Tamil Nadu, accounting with 3637, 1058, 1055 cases respectively. Whereas in the year 2015, cases registered under POCSO, Act 2012 in whole of India was 14762 cases, with again Uttar Pradesh, Madhya Pradesh and Tamil Nadu, accounting majority of such cases in country with 3078, 1687, 1544 cases respectively<sup>7</sup>. Yet another fact revealed from the statistical report of NCRB for the year of 2015 on POCSO, Act 2012 that, 94.8% of rape cases saw children being raped by someone they knew, not strangers. These acquaintances include neighbors (3,149 cases) who were the biggest abusers (35.8%). 10% of cases saw children being raped by their own direct family members and relatives<sup>8</sup>. Economic need of a family has led to unknowing sacrifice of the ignorance of the child to the trust of deceptive neighbors.

### **Child Victimization-an ending to childhood**

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- 3 Study on Child abuse in India 2007 Ministry of women and child welfare, Government of India in association with prayas a Non- Governemtnal organization working towards child rights (2007)
  - 4 2013 India's Hell Holes: Child Sexual Assault in Juvenile Justice Homes page 8  
<http://www.achrweb.org/reports/india/IndiasHellHoles2013.pdf> assessed on 2.8.2016
  - 5 <http://ncrb.nic.in/StatPublications/CII/CII2012/Statistics2012.pdf> assessed on 24.12.2016  
Trichirappalli is added as one among 53 mega cities with population more than 10,00,000
  - 6 <http://ncrb.nic.in/StatPublications/CII/CII2013/Statistics-2013.pdf> assessed on 24.12.2016
  - 7 National Crime Record Bureau (NCRB) Report 2014, Ministry of Home Affair , Government of Inda 01.01.2014-31.12.2014
  - 8 2016, recent statistics of child abuse <https://www.savethechildren.in/resource-centre/articles/recent-statistics-of-child-abuse> assessed on 30.12.2016

The eight life events pertaining to childhood are described as death, extreme malnourished, extreme violence, conflict forcing displacement, children being out of school, child labour, children having children and child marriages.<sup>9</sup> To sense it ultimately for the innocence of the child victim who suffered sexual assault, which is extreme violence on her person, the prize given by our society is social death<sup>10</sup>, which is more painful than death itself.

In our country, there is no specific definition for child victim. The term “victim” is defined in section 2(wa) Code of Criminal Procedure ,1973 (amended act 2008). “Victim” means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression “victim” includes his or her guardian or legal heir<sup>11</sup>. Since, there is variance in the definition of the child there can be no definite description of the term child victim. It takes the nature and the age of the legislations enacted identically for specific purpose. In our context child is defined under POCSO, Act 2012 section 2 (d) "child" means any person below the age of eighteen years. Child victim terminology means a child who suffers victimization. It is significant to note a child victim of sexual offence is not identical like other offences. The injury on the child due to the sexual assault vary from child from age of 1 to 18, depending upon the biological development of a child. The Chronological Age as used currently in Britain is as below;

*Neonatal* the first two weeks after birth

*Infancy* the first two years of life

*Early childhood* two to five years of age

*Later childhood* six years to puberty

*Adolescence* from puberty to adulthood<sup>12</sup>

The physical and mental injury caused to the child of 2 - 5 years differs from

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9 [End of Childhood Report 2017](https://campaigns.savethechildren.net/end-of-childhood) Save the Children, lastly assessed on 12 August 2017 <https://campaigns.savethechildren.net/end-of-childhood>

10 Term social death used to on women dowry death and denoting slavery. Claudia Card, *Genocide and Social Death*, Hypatia, Vol. 18, No. 1 (Winter 2003)

11 Ins. by Code of Criminal Procedure (Amendment) Act, 2008 (Act No. 5 of 2009, dt. 7.1.2009)

12 Laxmi Devi, Child development an introduction, Encycloepadia of child and family welfare series, Institute for sustainable development Lucknow and Anmol publication Pvt. Ltd, New Delhi, Anmol Publications Pvt Ltd, First Edition 1998

the “pre-pubescent child”. And the trauma caused to the child at an age of “pre-pubescent” is more than the child who has attained puberty. The pain and damage is much less when the child is of the age of 16 to 18 and has consented out of love for the intercourse with her lover. Their needs for protection, prevention, recovery is entirely different. Hence, it is not just to bring all the group of the children into one meaning as “child”.

Further more the child victim is not only affected bodily but the offence has hurt her soul. She required extraordinary privilege, protection, immunity taking into concern her sanctity. At present the primary role of the State is Prosecuting the offender who has committed the offence against the child. It provides certain measure to take care of the child victim applying the doctrine of “*Parens Patriae*”(Parent of nation), and give her necessary medical treatment for the bodily injury and the counseling for her mental disturbance to rehabilitate and re-integrate her into the society.

### **Trial and Trauma**

There is a common assumption that always a trial is traumatic experience even for an adult. When it comes to the children who have already been traumatized and coupled with it face the trial to support the prosecution. The lengthy procedures in our criminal justice system traumatize them further benefiting the prosecuting offender. Child victim is been navigated through three processes while the state is prosecuting the offender ie., Pre-Trial, Trial and Post-Trial stages. Pre-Trial is the process of detection before judicial trial. Judicial trial is judicial examination and determination of facts and legal issues arising between parties to a civil or criminal action. Post-trial means monitoring the developments of a case after completion of judicial trial and pronouncement of verdict.

A successful sexual abuse prosecution generally requires that the child victim testify against the offender. Often in cases of this nature, there is very little, if any, evidence to corroborate the child's account of the offence, because of the secretive nature of the crime itself. Before the year 2012 the child victim of sexual offences were also treated as other witnesses. The legislators, segmented the rights by emphasizing in the Convention of Child Rights, 1989<sup>13</sup> and protection guaranteed in

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13 Here in after referred as “CRC”

The Constitution of India and enacted the special legislation “POCSO Act, 2012”. The child victim of sexual offences has provided certain valuable rights as to the simplification in procedure of reporting, protection of identity, immediate medical attention, speedy disposal, protection for direct cross examination as provided, child friendly atmosphere, thereby she is protected by all means by State from depicting her in the name of trial.

Section 118 of the Indian Evidence Act,1872 states that all persons shall be competent to testify unless the court considers that they are prevented from understanding the question put to them or from giving rational answers to those questions by virtue of tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind, Therefore all persons irrespective of their age are competent to testify in court provided the adult or child understands the question.

### **Governing Principle for examination of child victim**

A child cannot be treated like an adult when she is brought to the court. The prosecution needs their assistance to convict the offender and the child's innocence also needs to be preserved. The understanding of a child depends upon her/his age and capacity. A child in the stage of infancy, early childhood do not have capacity to understand what happened to her. Her body injury may be more but her innocence would not have been affected by the incident, but by bringing her into the process of criminal justice system her innocence is tampered. A child affected during later childhood already has been victimized and she needs to be handled carefully, by assessing her psychological damage caused by the incident. Adolescence, is a period where the court need to act more cautiously as the harm is not for them alone but a major impact will be to their family and the society they are living in.

The principles listed below are certain guidelines to the officers who are handling the child in criminal justice system. Though human beings of age 0-8 are defined as children, but when we come to handling them, it is quite necessary to differentiate them as per their biological and psychological growth, so that no further harm is caused to them

**i) Principle of “Unique Child”:**

Every child is unique, uncorrupted and vulnerable. They develop resilience when their physical and psychological well-being is being compromised. Therefore, an even rule cannot be applied to all. The need may vary from one child to another i.e., all children cannot be approached under the same platform as their growing environment is diversified. Some may speak up the problem and some may be resilient. Some may be fearless and confident, while some may not confide. The officer’s who are handling the child during investigation and trial can frame the rule keeping in mind the principle of unique child.

**ii) Principle of “Child-Friendliness”:**

An approach of “*child-friendliness*” is prime requirement to handle a child. The child has been psychologically disturbed by the abuser. She should gain confidence and trust on the person who handles her. Only when a child gets confidence she will be able to narrate the total incident happened on her. A sensitive stake holder is a best friend and counselor for the child. “*Child- friendly atmosphere*” is a place where children's opinions are best derived, providing the needs and satisfied i.e., where peace and gender equity are upheld, differences of class, caste and religion are accepted, a place where opportunities for children's participation are extended, both inside the court room, and in the community, safe and secure, free from violence and abuse, safe water and sanitation facilities, first aid supplies, age-appropriate furniture, and resources within reach (bookshelves, chalkboards) etc.

**Provision of Law:**

**Section 33(4) POCSO Act,2012** - The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the Court.

**Section 37 POCSO Act, 2012** - The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:

Provided that, where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to issue a commission in accordance with the provisions of section 284 of the Code of Criminal Procedure, 1973.

**iii) Principle of “Immediacy”:**

Occurrence itself may give rise to a “*sense of urgency*” and “*immediate requirements*” to a victim child. She may require immediate attention on medical assistance, educational assistance and societal assistance. Well-being of the child victim can be taken into concern any appropriate order which will protect the best interest of the child sufficing her immediate requirement to be passed on the first instance when a child victim is produced before the court which will pave a long way in rehabilitation and prevent further harm to her psychological strength.

**Provision of law:**

33(8) POCSO Act,2012 - 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 her/him or for immediate rehabilitation of such child.

**iii) Principle of “Assessment”:**

Assessment is an integral part of passing an interim order and a final order as to the requirement for a better living, for assisting her to unite into the normal stream of living. “*Best interest assessment*” is an assessment made by judge taking action with regard to individual children, designed to ensure that such action gives a primary consideration to the child’s best interests. The assessment can be done alone or in consultation with other stake holders with the required expertise and requires the participation of the child. The Special Judge can record the assessment made by her on the child victim, when he/she saw her during the trial and can pass an order of observation or direction as to any other requirements of the child towards prevention and protection.

**iv) Principle of “Speedy Disposal”:**

The basic principle behind constituting the Special Courts for trying the offence relating to the children who were sexually abused is speedy trial. Section 28(1) POCSO, Act 2012 goes to read as “For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court,

by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act”. Further there are also certain provisions where time frame has been given for victim examination and completion of the case. Though the provisions are only directive in nature, the intention of the legislature is speedy disposal of the cases. The legal maxim “*Justice delayed is Justice denied*” is not only for the accused but for the victim too. Delay in examining the child victim will take the incident from the memory of certain ages, in due course of her psychological growth.

**Provision of law :**

**Section 35 POCSO, Act 2012** - The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.

The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

**v) Principle of “Best Interest of the Child”:**

“*Best interest*” determination describes the formal process with strict procedural safeguards designed to determine a child's best interest particularly when important decisions taken with regarding to the welfare of the child.

Article 3, of CRC goes to read that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of child shall be the primary concern.

**vi) Principle of “Dignity and Care”**

The concept of “**dignity**” expresses the idea that a being has the right to be valued and respected, and to be treated ethically. In the modern context, dignity can function as an extension of the Enlightenment-era concepts of inherent, inalienable rights. Values include a range of concepts such as individuality, choice, privacy, independence, dignity, respect and partnership. This means respecting that everyone is different and making sure they are involved in their care.

**Provision of Law:**

**Section 33(6) POCSO, Act 2012** - The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

**Section 33(7) POCSO, Act 2012** - The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial: Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

*Explanation- For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighborhood or any other information by which the identity of the child may be revealed.*

**vii) Principle of “Supportive Communication/Listening”:**

**“Problem-oriented”** communications focuses on problems and solutions rather than on personal traits. **“Person-oriented”** communications focuses on the characteristics of the individual, not the event. Problem-oriented communications is useful even when personal appraisals are called for, because it focuses on behaviors and events, whereas, person-oriented communications can send the message that the individual is inadequate. Listening and responding effectively to someone else's statements is at least as important as delivering supportive messages. People do not know that they are being listened to, unless the listener makes some type of response.

In general there are four types of responses, that range on a continuum from most directive and closed to most non directive and open.

**“Closed responses”** eliminate discussion of topics and provide direction to individuals. *Closed responses* (advising) are generally useful during later stages of discussion, or when they are requested by the communicator, or when one is in position to offer direction (e.g., an expert).

“Open responses” allow the communicator, not the listener, to control the topic of conversation. *Open responses* (reflecting) are generally useful during early stages of discussion.

**Provision of Law:**

**Section 33(2); POCSO Act,2012** - The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

**Section 33(3); POCSO Act, 2012** - The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

**Section 33(5); POCSO Act, 2012** - The Special Court shall ensure that the child is not called repeatedly to testify in the court.

**Section 38; POCSO,Act,2012** -Wherever necessary, the Court may take the assistance of a translator or interpreter having such qualifications, experience and on payment of such fees as may be prescribed, while recording the evidence of the child.

If a child has a mental or physical disability, the Special Court may take the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed to record the evidence of the child.

**viii) Principle of “Protection”:**

Protection is not only to provide security to the child victim, but to give her a secured feeling when she walks through the criminal justice system. Safe guarding her rights alone will not be enough, necessary protection to be extended to prevent from any further harm on her and her family members. The officers who handle the child victim obligatorily to avoid exposing her to further harm as a result of their actions. Those involved in humanitarian response should take steps to avoid or minimize any adverse effects of their intervention, in particular the risk of exposing child victim to increased danger or abuse of their rights.

**Provision of law:**

**Section 36 POCSO, Act 2012-** The Special Court shall ensure that the child is not exposed in any way 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.

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.

**Conclusion:**

A child should be fully prepared to live an individual life in society and brought up in the spirit of ideals proclaimed in the Charter of United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity. A child for the full and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness, love and understanding. She/he has a valuable right to be protected. There are many social factors traumatizing the child victim, but the judiciary has the responsibility to ensure reestablishment of secure and habitable environment. The judiciary plays an important role in upholding the child victim rights and healing her/his pain. ***“The healing needs to be gentle process for them and not a painful journey”***. This is the tribute we as responsible citizens of this society give to the innocent children for their future.