



resorting to inducement or coercion of child for prostitution purpose or for indulging in pornography. The Convention of Child Rights fixes age of a child below 18 years and therefore, any child who is exploited by person of trust or by person in authority either through physical contacts with his or her body or by way of non-body contacts viz. gestures, sound, expression falls within the ambit of sexual abuse.

## **GLOBAL INCIDENCE AND PREVALENCE OF CHILD SEX ABUSE**

A meta study from the University of Barcelona published in 2009 in *Clinical Psychology Review*, *Prevalence of Child Sexual Abuse in Community and Student Samples: A Meta-Analysis* found that<sup>2</sup>

1. An estimated 7.9% of men and 19.7% of women globally experienced sexual abuse prior to the age of 18.
2. The highest prevalence rate of child sexual abuse geographically was found in Africa (34.4%) Europe showed the lowest prevalence rate (9.2%). America and Asia had prevalence rates between 10.1% and 23.9%.
3. South Africa has the highest prevalence rates for both men (60.9%) and women (43.7%). Jordan presents the second-highest prevalence rate for men (27%), followed by Tanzania (25%). Rates between 10% and 20% are reported for males in Israel (15.7%), Spain (13.4%), Australia (13%) and Costa Rica (12.8%), while the remaining countries all have prevalence rates below 10%.

For women, seven countries reported prevalence rates above 20%: Australia (37.8%), Costa Rica (32.2%), Tanzania (31.0%), Israel (30.7%), Sweden (28.1%), the United States (25.3%) and Switzerland (24.2%).

## **INTERNATIONAL LAWS GOVERNING CHILD RELATED SEXUAL OFFENCES:**

The Articles 34 and 35 of the Convention on Rights of Child 1989 addresses and urges all signatories' nations to the convention to safeguards and protect the children from trafficking in to prostitution and exhibiting them for pornographic and commercial exploitation.

## **CONVENTION ON THE RIGHTS OF THE CHILD:**

### **Article 34**

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent<sup>3</sup>:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

### **Article 35**

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

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<sup>2</sup>University of Barcelona, *Prevalence of Child Sexual Abuse in Community and Student Samples: A Meta-Analysis* (*Clinical Psychology Review*, April, 2009)

<sup>3</sup>Convention on the Rights of the Child, 2000 available on <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

## **INTERNATIONAL CONFERENCE ON COMBATING CHILD PORNOGRAPHY ON THE INTERNET**

The International Conference on Combating Child Pornography on the Internet was held in Vienna in 1999. The conference concluded with several recommendations which is not binding. It advocated zero tolerance for child pornography on the internet and stressed the need for global partnership and worldwide criminalization of child pornography. It also called for the strengthening of law enforcement and closer cooperation and partnership between governments and the internet industry

## **OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY, 2000**

### **Article 3**

1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:

(a) In the context of sale of children as defined in article 2:

(i) Offering, delivering or accepting, by whatever means, a child for the purpose of:

a. Sexual exploitation of the child;

(b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2;

(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.

### **Article 10**

1. States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation<sup>4</sup>, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism. States Parties shall also promote international cooperation and coordination between their authorities, national and international non-governmental organizations and international organizations.

## **LEGAL FRAMEWORK IN INDIA FOR ADDRESSING THE PROBLEMS OF CHILD SEXUAL ABUSE:**

### **PREVENTION OF CHILDREN FROM SEXUAL OFFENCES ACT 2012 (POCSO ACT 2012)**

India housed 42 % of its total population which is under 18 years of age. The need for the enactment of legislation for the child victims of sexual offences was felt since there was no provision in the Indian

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<sup>4</sup>Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2012 available at <https://www.ohchr.org/en/professionalinterest/pages/opsccrc.aspx>

Penal Code for addressing the sexual offences against the children which is the most vulnerable sections of the society. The offences like sexual harassment, stalking was conspicuous by its absence in the Indian Penal Code and therefore, urgency was felt to enact gender neutral law for redressing all the sexual offences committed by the offender against the Children. The Article 15 (3) of the Indian constitution confers power on the State to make special provisions for the women and children. Further, the Article 39 (f) of Indian Constitution mandates the State to formulate policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Therefore, in view of the International Laws and conventions and the affirmative action in the Constitution for safeguarding the best interests of child, the Prevention of Children from Sexual Offences Act was enacted in the year 2012.

There are six types of sexual offences which are covered under the POCSO Act of 2012 and are as under:

1. Penetrative Sexual Assault (Section 3)
2. Aggravated Penetrative Sexual Assault (Section 5)
3. Sexual Assault (Section 7)
4. Aggravated Sexual Assault (Section 9)
5. Sexual Harassment of Child (Section 11)
6. Use of Child for Pornographic Purposes (Section 13)

1. Penetrative Sexual Assault (Section 3) As the name suggests, it includes inserting of penis in to the vagina, urethra, anus and mouth of the child or making the child to do the same to the perpetrator or any other being or he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

2. Aggravated Penetrative Sexual Assault (Section 5) The Penetrative Sexual Assault converts in to Aggravated Penetrative Sexual Assault during the following circumstances:

1. Whenever it is performed by the Police officer
2. Committed by member of armed force.
3. Committed by public servant.
4. Committed by member or staff of jail etc.
5. Committed by member or staff or management of Hospital
6. Committed by member or staff or management of educational or religious institution.
7. Gang penetrative sexual assault.
8. Committed by using deadly weapon.
9. Penetrative Sexual Assault result in to injury
10. Penetrative Sexual Assault result in to incapacitation of child
11. Penetrative Sexual Assault result in to pregnancy.
12. Results in to HIV to a child
13. Committed on Specially abled children
14. Committed by child Habitual sex offender
15. Committed on child below 12 years of age.

16. Management or staff of child related institution
17. Committed by person who is in a position of trust or authority
18. Commits on pregnant child
19. Commits on child with attempt to murder
20. Committed during communal or sectarian violence
21. Committed by habitual offender
22. After committing, parade the child naked

Sexual Assault (Section 7) Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault. As the Act is gender neutral, therefore, covers touching genitals part of both the boys and girls under the purview of this section

Aggravated Sexual Assault(Section 9): The Sexual Assault converts in to Aggravated Sexual Assaults subjects to certain conditions as laid down in case of Aggravated penetrated Sexual Assault. Therefore, the legislation has made the sexual assault committed by person of trust and custody and by the public person etc. aggravated and prescribed more stringent punishment for aggravated form.

Sexual harassment (Section 11): In this type of offence against the child, there is absence of physical contacts with the child, however, uttering words, making sound, gestures, exhibiting any object to the child with sexual intent amounts to Sexual harassment. It further stipulates that making child to watch pornographic contents and exhibiting his/her bodily part to the public or in any media also under the purview of Sexual Harassment. The child enticement for pornographic purposes for consideration also made offence under this Act.

Section (16) The punishment for committing the abetment is the same as that of actual committing the crime. The trafficking of children for sexual purpose falls under the abetment and invites the same punishment as is for actual offence commissioned.

Section (18) The attempt to commit sexual offence on children is also punishable under this act and the quantum of punishment for this attempt is half of the punishment of actual punishment.

Any offence committed on the child is required to be reported to the Special Juvenile Police Unit or to the local police. The SJP Unit is bound to provide the child in need of care of protection within 24 hours of reporting of crime. Further, the child is to be produced before the Child Welfare Committee or the Special POCSO Court within 24 hours

Reporting of child sexual offences under the act is made mandatory and failure to do so amounts to imprisonment up to six months under Section 21 (1) of the Act. It is obligatory on police to register the case under the Act and failure to register the case is punishable offence with six months or fine or both. In case of non-reporting of child sexual offence commissioned in the Child care Institutions, the punishment is enhanced up to imprisonment up to one year. One of the special features of the act is that the onus to prove innocence lies with the accused unlike other acts where the victim is to prove that the accused is the guilty. The statement of the child under the Act is recorded under Section 164 of Cr. P C in the language spoken by the child. During recording of the statement, the assistance of translator, interpreter or special educator may be taken in case, the police is finding difficulty in deciphering what the child wants to say.

## **IMPORTANT JUDGMENTS ON SEXUAL ABUSE IN INDIA**

Sakshi v Union of India (UOI) and Ors. AIR 2004 SC 3566<sup>5</sup>

The Hon'ble Apex Court while deciding the case passed slew of directions to the State:

(1) The provisions of sub-section (2) of Section 327 Cr.P.C. shall in addition to the offences mentioned in the sub-section would also apply in inquiry or trial offences under Sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:

(a) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the President Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

It was in view of the above directions passed by the Hon'ble Apex Court that the appropriate amendments in the POCSO Act and POCSO Rules are made

Independent Thought v. Union of India and Another<sup>[1]</sup> (2017) 10 SCC 800<sup>6</sup>

The Hon'bel Apex Court of India held that Exception 2 to Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:-

(i) It is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India

(ii) It is discriminatory and violative of Article 14 of the Constitution of India and

#### **COMPARISONS OF PENAL PROVISIONS FOR SEXUAL OFFENCES IN POCSO ACT 2012 AND POCSO AMENDMENT ACT 2019**

Sr. No	Category of Sexual Offence	Punishment under POCSO Act 2012	Punishment under POCSO Amendment Act 2019
1.	Use of Child for pornographic purpose (Section 13)	Minimum 5 years and fine and in case of subsequent convictions, 7 years and fine	Minimum 5 years
2.	Store or possess pornographic material in any form involving a child for commercial purpose (Section 15)	Three years and fine	Minimum three years, may extend to five years or with fine or with both, on second or subsequent conviction imprisonment not less

<sup>5</sup>Sakshi Vs Union of India (UOI) and Ors. AIR 2004 SC 3566

<sup>6</sup>Independent Thought v. Union of India and Another<sup>[1]</sup> (2017) 10 SCC 800

			than five years ,may extend to seven years and fine
3.	Penetrative Sexual Assault (Section 3 )	Minimum 7 years Maximum :Life imprisonment	Minimum: 10 years Below 16 years Child: 20 years Maximum: Life imprisonment (Imprisonment for remainder of life)
4.	Aggravated Penetrative Sexual Assault	Not less than 10 years, may extend to life imprisonment and fine (Section 8)	Minimumrigorous imprisonment of 20 years which may extend to life imprisonment for remainder of life and fine or death penalty
5.	Sexual Assault	Not less than 3 years, may extend to 5 years and fine (Section 8 )	No Change
6.	Aggravated Sexual Assault	Not less than 5 years, may extend to 7 years and fine (Section 10 )	No Change
7.	Sexual Harassment(Section 11)	Three years and fine (Section 12)	No change

### CHILD SEXUAL ABUSE STATISTICS IN INDIA

It is estimated by the World Health Organization that 150 million girls and 73 million boys under 18 were forced to sexual intercourse or other forms of sexual violence involving physical contact. The family members or other people residing in or visiting a child's family normally trusted by children and often responsible for their care inflicted the sexual violence. The above estimate of the World Health Organization is underestimate as majority of the cases of sexual offences performed in closed relations are either non reported or they are under reported.

A study Prevalence & Dynamics of Child Sexual Abuse Among School Going Children in Chennai<sup>7</sup>conducted by an NGO of Chennai i.e. bySave the Children and Tulir in 2006 found startling facts about Child Sexual abuse:

1. The study was performed on 4211 school going children and it was found that 42 % of the respondents were victims of one or other type of sexual abuse.
2. The Another startling facts about the study was that the sexual abuse was more amongst the boys than girls .There were 48 % boys and 39 % girls who faced one or more type of sexual abuse.
3. It was found during the study that the majority of child sexual abuse was performed by the persons who were either close relative of the children or were holding position of trust.
- 4.The child sexual abuse in public places was noticed from the strangers who were not the part of family set up.

<sup>7</sup>Save the Children and Tulir,Report on Prevalence & Dynamics of Child Sexual Abuse Among School Going Children in Chennai(2006)

A Study on Child Abuse: India 2007<sup>8</sup>, was conducted by the Ministry of Women and Child Development in the year 2007 and startling findings of the study is that 53.22 % of children respondents faced one or other type of sexual abuse. More astonishing fact in the study was that among the victims of sexual abuse there were 52.94% boys and 47.06% girls.

DipankarBala, BenojkMaji, JyotiranjanSatapathy, Rakesh K. Routray<sup>9</sup>in their study of Prevalence of child abuse in eastern India: a tip of iceberg reported that 61.69% of respondents having physical abuse, 17.17% report one of the major form of sexual abuse, whereas 55.22% faced one of the other form of sexual abuse, 30.85% of children faced emotional abuse and 61.17% of girl child report of gender bias in the family.

State and Genderwise distribution of Child Sexual Abuse (Table I)

State	% of Boys Sexually Abused	State	% of Girls Sexually Abused
Delhi	65.50	Gujarat	63.41
Mizoram	59.96	West Bengal	56.29
Uttar Pradesh	55.73	Maharashtra	50.57
Kerala	55.04	Goa	47.73
Andhra	54.21	Rajasthan	47.50
Assam	53.48	Madhya Pradesh	47.46
Bihar	52.96	Bihar	47.04
Rajasthan	52.50	Assam	46.52
Goa	52.27	Andhra	45.79
Maharashtra	49.43	Kerala	44.96
West Bengal	43.71	Uttar Pradesh	44.27
Madhya Pradesh	52.54	Mizoram	40.04
Gujarat	36.59	Delhi	34.36

Delhi, Mizoram and Uttar Pradesh shares first three position in terms of sexual abuse in India, however, in terms of sexual abuse amongst Girls, Gujarat is at the first place, followed by West Bengal and Maharashtra

Distribution of Sexual Abuse amongst different Social settings (Table II):

Social Setting/Group	Percentage of abused
Child abused by the Family Member	53.18
Children in School	49.92
Children at work (Shop, factory or other places)	61.61
Children on street	54.51
Children in Institutional Care	47.08

The prevalence of sexual abuse in children is more prevalent and pronounced at the workplace of children, followed by sexually abuse of children in the street and abuse by the family members is at the third place. As the legal age for the employment of children is more than 14 years, therefore, it can be concluded that the sexually abuse of children is highest amongst the children of more than 14 years of age. It was also found during the study that amongst these sexually abused children, 39.58% were

<sup>8</sup> Ministry of Women and Child Development, A Study on Child Abuse: India 2007 (2007)

<sup>9</sup> DipankarBala, BenojkMaji, et. al, Prevalence of child abuse in eastern India: a tip of iceberg IJCP (2015)



in the age group of 5- 12 years, 35.59% in the age group of 15-18 years and 24.83% in the age group of 13-14 years which corroborate the inference that the children above 14 years are sexually abused more viz. a viz. other age groups.

### **THE CRIMINAL LAW (AMENDMENT) ACT, 2018**

The following amendments are made in the Indian Penal Code,1860 by the Criminal Amendment Act,2018 <sup>10</sup>and slew of measures are introduced for the sexual offences against woman under 16 years of age

#### **Section 376(3)**

Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine: Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim: Provided further that any fine imposed under this subsection shall be paid to the victim.

Section 376AB. Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death: Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim: Provided further that any fine imposed under this section shall be paid to the victim.

Section 376DA. Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine: Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim: Provided further that any fine imposed under this section shall be paid to the victim

Section 376DB. Where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death: Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim: Provided further that any fine imposed under this section shall be paid to the victim.

Pursuant to the amendments made in the POCSO Act of 2012 in 2019, the POCSO Rules of 2012 is repealed under the power conferred on the Govt. under Section 45 of POCSO Act2012 creating awareness among the children and other stakeholders involved in the implementation

Protection of Children from Sexual Offences Rules, 2020.Salient feature of the Rules:

Rule 3 of POCSO Rules, 2020 <sup>11</sup>provides for Awareness generation and capacity building.--(1) The Central Government, or as the case may be, the State Government shall prepare age-appropriate educational material and curriculum for children, informing them about various aspects of personal safety, including-- (i) measures to protect their physical, and virtual identity; and to safeguard their emotional and mental wellbeing; (ii) prevention and protection from sexual offences; (iii) reporting

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<sup>10</sup> The Criminal Law (Amendment) Act, 2018 (Act 22 of 2018)

<sup>11</sup>Ministry of Women and Child Development, Protection of Children from Sexual Offences Rules,2020 (2020) available at <https://wed.nic.in/sites/default/files/POCSO%20Rules%20merged.pdf>

mechanisms, including Child helpline-1098 services; (iv) inculcating gender sensitivity, gender equality and gender equity for effective prevention of offences under the Act.

Rule 6 provides for Medical aid and care within 24 hours.--(1) Where an officer of the SJPU, or the local police receives information under section 19 of the Act that an offence under the Act has been committed, and is satisfied that the child against whom an offence has been committed is in need of urgent medical care and protection, such officer, or as the case may be, the local police shall, within 24 hours of receiving such information, arrange to take such child to the nearest hospital or medical care facility centre for emergency medical care

Rule 8: Special relief.--(1) For special relief, if any, to be provided for contingencies such as food, clothes, transport and other essential needs, Child Welfare Committee may recommend immediate payment of such amount as it may assess to be required at that stage, to any of the following:- (i) the District Legal Services Authority under Section 357A; or; (ii) the DCPU out of such funds placed at their disposal by state or; (iii) funds maintained under section 105 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)

### **FINDINGS AND SUGGESTIONS:**

The legislation provides for disposal of the cases of child sexual abuses within one year, however, in practice it is not feasible to decide the case within the time lines stipulated in the Act. There are more than 1,00,000 cases of child abuses which are pending adjudication in the Courts in India and in the absence of adequate number of POCSO Special Courts, to decide the cases within one year does not seem the reality. The POCSO provides for the establishment of Special Juvenile Police Units at the District level for addressing the crimes committed by the children and crimes committed against the children, however, the establishment of Special Juvenile Police Units is a distant reality. There is a provision of making non-reporting of child sexual abuse an offence, however, offences commissioned by the person of trust or family members are not reported and therefore, sexual offences are highly under reported. The Act has not adequately addressed the counselling and rehabilitation of the sexually abused child as the child undergoes traumatic and horrific experience post abused. There is no section in the act which is specifically catering to the rehabilitation and counselling of the children, but there is provision for victim compensation fund in the Act. Despite the enactment of such a stringent legislation, the conviction rate among the child offenders are paltry 4.2 %. A report by the National Law School Bangalore, which analysed 667 judgments between 2013 and 2015, shed light on this phenomenon. It stated that alleged victims turned hostile in 67.5% cases, and testified against the accused in only 26.7% cases. The magnitude of sexual abuse can be gauged from the fact that out of every four girls and every seven boys there is a girl or a boy sexually abused. The awareness part of the Act is lacking across the general public as well as with the stakeholders involved in the implementation of the Act. The majority of the cases are not registered under the Act rather other provision of Indian Penal Code where the penal provision for curbing sexual offences is less stringent. The Commission for protection of Child Rights Act 2005 mandates establishment of National Commission for Protection of Child Rights and State Commission for Protection of Child Rights at the State level for regulating, controlling and supervision of child rights, however, despite a wholesome law, the implementation of the provision of the Act in the earnest manner is a distant dream.

The specific penal provisions have been made in the Criminal Amendment Act 2018 in the Indian Penal Code of 1860 for the women below 16 years of age which corresponds to the Amendments incorporated in the POCSO amendments Acts 2019 and therefore, these provisions are overlapping with each other. The pendency of cases of sexual offences against children in 2014 was 95.1 %, in 2015 it was 90.2% and in 2016 the pendency was 89%. The Session courts have been designated as Special Court for adjudicating the cases of sexual offences against children, however, there is need for constitution of exclusive POCSO Court in the district which has substantial number of cases pending for disposal under POCSO Act as observed by the Hon'ble Apex Court so that the pendency is reduced.

Further, it is required dedicated Special Public Prosecutors is to be appointed, however, public prosecutors entrusted with the POCSO cases are also performing other duties . The underreporting of child sexual offences is major impediments in fuller realisation of the potential of POCSO Act. As the large number of cases under POCSO is commissioned by the family members or the person having care of child, therefore, there is no mechanism in the Act which can address these issues, though, the non-reporting of sexual offences is made punishable with six months imprisonment. It is also noticed that there must be social audit of the Child Care Institutions involved in the implementation for determining whether the provisions of POCSO Act and POCSO Rules are being implemented in its right perspective. It is also observed that the police officials are required to be in plain cloth especially in Special Juvenile Police Units, however, in practice such child friendly environment is conspicuous by its absence in these police stations. Therefore, a lot is to still to be done at the ground level to bridge the gap between the provisions in the act and its implementation on the ground

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