

JUSTICE TO A CHILD VICTIM OF SEXUAL OFFENCES, RIGHTS OF CHILD VICTIM AND LEGAL PROCESS

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1 Introduction

It is an indisputable and undeniable fact that children are the future of a nation, i.e., the future of the nation depends on its children's growth. It depends on the priority the country gives to the manner of education, the health of the child, holistic development and the nature of kindness and care shown to them not only during adulthood but from conception. For all countries, the upbringing of the child in a proper environment is an important commitment. The status of the children as a whole includes equal values and rights as extended to all adult citizens of a nation. "Every child without any exception whatsoever shall be entitled to basic fundamental rights without distinction or discrimination on account of race, colour, sex, language and religion and political and social background."¹ A girl child is considered as a treasure of a country, as she represents tenderness, delicate emotions, love, sympathy, etc. The growth of her physical, mental, moral, spiritual and social reflects the prosperity of the land. We understand that the girl child's status in a nation demonstrates its developmental prominence in the World. Yet her status in the society is fragile and highly vulnerable. The basic notion in society is that a child should be placed first to receive protection and care in all circumstances. As we have developed, our perceptiveness of civility has taken a back seat, where the term 'Child abuse' has taken a prominent position, as the most destructive problem faced by the citizens of all nations worldwide. The innocence and trustiness of the child's tender age exploited. Their dignity and rights trampled. The violence against the children without reservations reported across the geographical, racial, religious, and cultural boundaries.

Further, it is found that the crime occurs in homes, foster care centres, schools, at workplaces, places of entertainment and even in streets. The range of perpetrators has gone beyond habitual offenders or paedophiles. It nowadays has also included the persons whom the child thinks is a reliable, trustworthy individual like a close family member and caretakers. The situation is such that the child is confused and is not able to trust anyone in future. The state of affair is more pathetic in rural parts as there is a lack of privacy or awareness among the people. "In some situation child is ignorant that they are not aware of what offence has been committed against them or of their rights. Some children even go to the extent to think that it is a part of being a child, because they found that these children don't complain for a long time before they realise the truth. Some children are particularly

¹ United Nations Declaration on Child Rights (1959), Principle 1 <https://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child>.

vulnerable because of gender, race, ethnic origin, disability or social status. This condition is a growing concern prevalent in almost all nations despite their development status.”²

2. Child Meaning in India

There is no universal definition for the term 'child'. Globally the age limit of the child differs in countries and from activity to activity. Biologically, “Childhood is the span of life from birth to adolescence.” “An unborn or recently born human being includes or applies to the adopted, unborn, after born, illegitimate child as per Black Dictionary.”³ Article 1 of the CRC, 1989 says “Every human being below the age of eighteen years unless, under the law applicable to the child, the majority is attained earlier.”⁴

In India, there is multiple various meaning for the word ‘child’. The states are imposed with the primary responsibility to attend needs of the child. They are provided with fundamental human rights. The age of the child regulates their activities. The admission in school, marriage, casting out, joining services and entering into employment are synchronized by the age. Article 45, of the Constitution of India, specifies that “the State shall endeavour to provide early childhood and protection for all children until they complete the age of 6 years. Right to Education, a fundamental right under Article 21A, has made education compulsory for children up to fourteen years.”⁵

Further, the innocence of the child protected under Sec 82 of I.P.C. It reads “nothing is an offence which is done by a child under seven years.” The Children Act, 1960 Section 2(e) is the special Act to protect the rights of the children, where it defines 'child' as “a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years.” Basically, to bring about uniformity in the applicability of laws to person of different religion “The Indian Majority Act, 1875 Section 3 states that unless a particular personal law specifies otherwise, every person domiciled in India is deemed to have attained majority upon completion of 18 years of age, but in case of minor for whose person or property for both a guardian has been appointed or declared by any Court of Justice, the majority may be attained before the age of 18 years.” A person below the age of 18 years has no capacity to contract under Section 3 of The Indian Contract Act, 1872. The Child Labour (Prohibition and Regulation) Act, 1986 Section 2(ii) goes to protect the child until 14 years of age. The Maternity Benefit Act, 1961 Section 3(b) includes a stillborn child. The Minimum wages Act, 1948 Section 2(bb) protects “children who have not completed 14 years of age from exploitation.”

The welfare legislations like The Immoral Traffic (Prevention) Act, 1956 Section 2(aa) defines a child as “person who has not completed the age of 16 years of age.” As to The Protection of Children from the evil of Sexual Offences against them Section 2(d) defines a

² Kofi Annan- World report on violence against children United Nations (2006)-preface <https://www.unicef.org/violencestudy/I.%20World%20Report%20on%20Violence%20against%20Children.pdf>.

³ Dr. Nuzhat Parveen Khan, Concept of Definition of Child, Child Rights and Child Abuse Book “Child Rights and the law”- Universal law publishing co (2012) chapter 2 page 27

⁴ United Nations Convention of the Rights of Child, (1989) Article 1. www.unicef.org/crc/files/Rights_overview.pdf assessed on 1.8.2016.

⁵ Lawmann's Constitution of India (2013) Article 45 and Article 21 A Edition.

child as “any person below the age of 18 years.” Further, when it comes to The Protection of Domestic Violence Act, 2005 Section 2(b) child means “any person below the age of 18 years and includes any adopted, step or foster child.”

In Indian statutes, there are disparities as to the age limit fixed for the term Child. When the state protects the child until 18 years from sexual abuse, only a girl child till her sixteenth year protected from the offence of immoral trafficking. Under 14 years, children are protected from exploitation in the name of child labour. There seems to be no standard scientific parameter of ‘Child’. Till the completion of 18 years, an Indian citizen has a question running in his mind, “Am I still a child?” and “Under which statute?” To extend the Constitutional rights to the children in confirmation with the Child Right Convention, India needs to have a uniform definition for ‘Child’. The legislation in India needs to be amended to have a universal childhood age, which will go a long way of securing justice to the children in India. ⁶

3. Equity of Justice to a child victim of sexual offences

The child victim is not only affected bodily, but the offence has wounded her soul. She requires extraordinary privilege, protection, immunity taking into concern her sanctity. The primary role of the State is prosecuting the offender who has committed the offence against the child. At the same time, it has to provide certain concurrent measures for extending care to child victim applying doctrine “*Paraes Parentis*” and give her necessary medical treatment for the bodily injury and counselling for her mental disturbance, to rehabilitate and final re-integrate her into the society. The State is responsible for the growth of the children.

The system should involve retrospective trial process i.e., pre-trial for the case 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 after the completion of judicial trial and pronouncement of the verdict. “A successful sexual abuse prosecution generally requires that the child victim testifies 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 2012, the child victim of sexual offences treated as other witnesses. The legislators segmented the rights emphasised in the CRC were guaranteed in The Constitution of India and enacted the special legislation “POCSO Act, 2012”. The child victim of sexual offences has been provided certain valuable rights as to the simplification in the procedure of reporting, protection of identity, immediate medical attention, speedy disposal, protection for direct cross-examination are provided, child-friendly atmosphere, thereby she is protected by the state from depicting her in the name of the trial. Commendable achievement can be made on the “Principle of the best interest of the child” only when the implementation is by applying the principle of “unique child” in reparation measures. ⁷

⁶ Finkelhor.D, Sexually assaulted children: National estimates and characteristics <http://www.ncjrs.gov/pdffiles1/ojjdp/214383.pdf> 2008

⁷ Krishna Iyer, V..R.(1985). Foreword in the book, Reading in Victimology. Raviraj, Publication Madras, India.

In this regard, it would be appropriate to quote the words of the Tamil saint Thiruvalluvar, who states that protection of people marks the real splendour of a country. “A country's jewels are these five: unfailing health, fertility, joy, a sure defence (Protection), and wealth.”

4 Procedure of Trial and Child Victim - Judicial approach in India

“Childhood is the most precious stage in a person's life.” As the guardian of the children, the State is bound to fulfil the constitutional obligation of ensuring the right to life for them. A child is a soul with a natural capacity of its own, “who must be helped to grow into maturity with physical, emotional, Intellectual and spiritual energies.” This consciousness is reflected under the various provision of the Constitution.⁸

Article 15(3) enables “the State to make special provisions *inter alia* for the children, Clause (e) and (f) of Article 39 provides that the State shall direct its policy towards securing, the age of children is not abused and that citizens are not forced by economic necessities to enter avocations unsuited to their age and strength, and that children are given facilities to develop in a healthy manner and in conditions of freedom and dignity, and that childhood and youth are protected from exploitation against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution-makers, to protect and safeguard the interest and welfare of children in the country.”

Despite of our nation being the signatory of CRC, there has been no specific legislation in India for child rights protection in particular for the child rape victims. “Special legislation to protect the rights of the child victim of the sexual offence was enacted only in 2012, and in the past 24 years, the judiciary with its innovative and inspiring judgments has proved bedrock of social justice.”⁹ Judiciary felt that “the concept of social justice would remain a myth if protection could not be provided to children, who are the future of our nation. International covenants like CRC enforced in the Indian Legal system even in the absence of a statute.”¹⁰

Relating to child right protection “Sheela Barse *v.* Secretary, Children Aid society”¹⁵ was the case where it was observed by the court that “Every society must, therefore, devote full attention to ensure that the children are properly cared for and brought up in a proper atmosphere where they could receive adequate training, education and guidance so that they may be able to have their rightful place in the society when they grow up.”

In “Vishal Jeeth *v.* Union of India”¹¹, the Supreme Court discussed the plight of child prostitution and issued directions that all State Governments must instruct their law-enforcing authorities to take appropriate steps in short notice against child trafficking and also set up an advisory committee with experts from all fields to make suggestions on the steps needed for the eradication of child prostitution, care and rehabilitation of rescued girls,

⁸ The Beijing Platform for Action(1995) paragraph 213.
<http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>.

⁹ Rao.M Law Relating to Women and Children, Eastern Book Company, Lucknow, (2005) p-430

¹⁰ Muralidharan.S (2004) Rights of Victims in the Indian Criminal Justice System, National Human Rights Commission Journal pg 1

¹¹ Vishal Jeeth *v.* Union of India AIR 1990 SC 1412.

setting up of rehabilitation home and for surveying the existence of devadasi and jogin traditions in their respective states.”

In “Sathyavan Kottarakkara v. State”¹², The High Court holds “Exploitation of children in any form which has the tendency to exploit them, either physically, mentally or otherwise, as objectionable. Any attempt in this direction should be put an end to achieve the goals enshrined by the Indian Constitution makers, which are reflected in various provisions of the Constitution.”

“Gaurav Jain v. Union of India”¹³ is a historical judgment on the rights of children of prostitutes, our Hon'ble Apex Court concluded that “three 'C's, viz., Counselling, Cajoling and Coercion were necessary to enforce the provisions of various statutes effectively. The role of NGOs in rehabilitating and educating the children of the fallen women emphasized. Detailed directions were given for rescue, rehabilitation of prostitutes and children of prostitutes.”

In “State of Rajasthan v. Om Prakash”,¹⁴ it was observed strenuously that, “child rape cases are due to perverse lust for sex where even innocent children not spared in pursuit of sexual pleasure. There cannot be anything more obscene than this. It is a crime against humanity. Many such cases not even brought to light, because of the social stigma attached to it. According to some surveys, there has been a steep rise in child rape cases. Children need special care and protection. In such cases, responsibility on the shoulders of the Court is more onerous to provide proper legal protection to these children. Their physical and mental inability call for such protections. Children are the natural resources of our country. A girl child is in a very vulnerable position, and one of the modes of her exploitation is rape apart from other modes of sexual abuse.”

“Sakshi v. Union of India,”¹⁵ is another landmark decision wherein “directions were given to the judges regarding the manner of holding the trial in child sexual abuse cases. The court directed that a screen or some such arrangement may be made, where the victim or witnesses do not see the body or the face of the accused; 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 presiding officer, who may explain it to the victim in a non-embarrassing manner. The victim of child sexual abuse, while giving testimony should be allowed sufficient breaks as and when required.” (This provision incorporated in the POCSO Act, 2012

4.1 Charter of rights of child survivors of sexual violence

While handling the child victim of sexual offence, certain basic principles, as given under International Conventions and National policies, need to be addressed.

The state governments, with their functionaries, the child welfare committee, the police, the special courts, non-government organizations, professionals and experts assist the child during the process of trial and post-trial and are bound to follow the principles.” Based on our “Constitution, Judicial Pronouncements in the Supreme Court of India, the CRC and

¹² Sathyavan Kottarakkara v. State LAWS(Ker)1996-11-1.

¹³ Gaurav Jain v. Union of India, AIR 1997 SC3021 (3033).

¹⁴ State of Rajasthan v. Om Prakash AIR 2002 SC 2235 at 2240.

¹⁵ Sakshi v. Union of India, AIR 2004 SC 3566

the POCSO Act, 2012”, Charter of Rights of the child is developed to protect the child victim survivors.¹⁶

4.1.1 Right to privacy and confidentiality

Article 3 of the CRC, Preamble to the POCSO Act, 2012, “The name of the child, its family, educational institution wherein she/he is enrolled and other information available for identifying the victim shall be kept confidential.”¹⁷

4.1.2 Right to dignity:

“The child survivor shall be treated with dignity and respect at all stages by including health care workers, police, judiciary, prosecutor, translators, etc.” (Article 39 (f) The Constitution of India, Preamble to the CRC)

4.1.3 Right to non-discrimination:

“There shall be no discrimination against any child, based on religion, race, sex, or caste. The girl children cannot be discriminated against by blaming them for their dress/attire in the incident of a sexual offence. And, all stakeholders shall be sensitive to any special needs of a child. The disabled children medically unfit children or very young children should be accorded special treatment.” (Article 15 (1) The Constitution of India, Article 2 CRC)

4.1.4 The child has the right to express his / her views in all matters affecting the child:

“The wishes of the child shall be given priority with regard to decisions to on institutionalization, medical examination of the child and appointment of a support person. The views of the child shall be given due weight age in accordance with the child’s age and level of maturity.” (Article 12 CRC)

4.1.5 Right to safety and well being:

“The best interest and well being of the child survivor is of paramount importance at every stage of the trial. Each stakeholder under the Act shall act with sensitivity to the healthy physical, emotional, intellectual and social development of the child. The Supreme Court laid down various guidelines for stakeholders under the Act. It held that in cases where the perpetrator of the crime is a family member, utmost care must be taken, is considered at the keeping in mind the interest of the child.”

4.1.6 The child has a right to be protected from all forms of sexual exploitation by the State:

“There can be no exemption in awarding punishment for committing sexual intercourse with a child even if the accused is married to the child.” (Article 34 CRC, Section 42A POCSO Act, 2012)

¹⁶ lack Law dictionary 5 edition <https://smhttp-ssl-70271.nexcesscdn.net/wpcontent/uploads/2015/04/Blacks-Law-Dictionary.pdf>.

¹⁷ Shankar Kisanrao Khade v. State of Maharashtra, 2013 (6) SCALE 277.

4.1.7 Right to Medical Treatment:

“The child survivor shall not be denied medical treatment. The dynamics of child sexual abuse differ from those of adult sexual abuse. In particular, children rarely disclose sexual abuse immediately after the event. Moreover, disclosure tends to be a process rather than a single episode and often initiated following physical complaint or change in behaviour of the child. Therefore, the evaluation of children requires special skills and techniques involving, forensic examination and evaluation. The examiner may also need to address specific issues concerning to consent reporting of child sexual abuse.”¹⁸

5. POCSO Act, 2012- Child Rights

“A society succeeds or fails in direct proportion to the way it enhances or impedes the development of its children.”¹⁹ India's criminal justice system is to control society from its dangerous and destructive behaviour. The moral behaviour of the society is controlled in “family, school and church” and legal behaviour by laws and courts. The punishing power is being vested with our “Criminal Justice System”.

Numerous welfare legislation is being enacted to protect the children of India, but the enforcement of laws seems to be a slow process. The act enacted needs interpretations to ensure a fair trial after the enactment of POCSO, Act 2012.

Section 167 Cr.P.C and POCSO Act, 2012

The Bench was specially constituted through an administrative order of Chief Justice Indira Banerjee to answer references made on the powers and jurisdictions of Special Courts constituted under the Acts, particularly with regard to the remand of an offender. The Madras High Court held “if the investigation of those arrested under the POCSO Act, 2012 cannot be completed within 24 hours, the investigating officer should produce the accused before the nearest judicial magistrate. It continues to read that section 167 Cr.P.C applies for POCSO Act, 2012 also.”

The POCSO Act, 2012 defines a child “to mean any person below the age of eighteen years and raised the age of consent from 16 years under the Indian Penal Code (IPC) to 18 years.” Under the IPC, “sexual intercourse by a man with his wife above 15 years of age is an exception to rape.” “The Criminal Law Amendment Act, 2013” raised the age of consent to 18 years but did not disturb this exception. As a result, “sexual intercourse with a wife above 15 years of age and below 18 years of age will not amount to rape under the IPC.” The Honourable HC goes to observe that “the act adopted a protectionist approach under the assumption that a uniform age of consent would be in accordance with the UN Convention on the Rights of the Child, 1989. The contradictions/controversies/conflict, which touches upon

¹⁸ The International Covenant on Economic Social and Cultural Rights, General Comment 14, Right to Health (11th August 2004), Guidelines for medico-legal care for survivors of sexual violence, World Health Organization, 2003.

¹⁹ Noshpitz JD Issues and approaches in child psychiatry. Hosp Community Psychiatry 25:96-97,

the constitutional validity of the POCSO Act, 2012 regarding the age of the child and age of the consent referred to Honourable Chief Justice of this Court. If deemed appropriate, the Honourable Chief Justice would consider posting this matter before the Division Bench for deciding the constitutional validity of the POCSO Act, 2012."²⁰

6. Conclusions

There is no tool for reparation of the physically and mentally injured child victim affected by sexual offence since the suffering cannot be equalized with money. Still, adequate compensation and rehabilitation measures can secure her future life/livelihood i.e. better sustenance. What about the mother of a toddler as is she not the sole sufferer? Think about the apathy of the family who is upbringing the child born out of rape and the child himself born out of rape is a victim.²¹ These are the some forgotten classes of victims who need immediate attention. Judiciary is doing its work with responsibility and whenever getting chance it is trying to find out the new subclasses of victims and giving them recognition, but still a lot of work is to be done, and judiciary alone cannot do this."²²"It's the combined duty of our legislature and society to find them, give those rights, treat them equally and try to stop further victimisation of the victim by isolating them with the mainstream of society. Leaving the question open that only providing the mechanism of compensation or rehabilitation and giving haste and un-researched legislation without determining the victims to be protected and benefited will be worthless. The aim should not only be rehabilitation or compensation, but it should be to stop their victimisation so that they can come out of vulnerable class."²²

²⁰ Marimuthu v. Inspector of police, Ayakudi Dindigul. W.P(MD) No.12212 of 2016 http://www.lawleader.in/JudgmentFile/11605_22092016123647.pdf assessed on 15.7.2017.

²¹ 'A' through his father 'F' v. State of U.P, Writ Petition No.8210 (M/B) of 2015 All.High Court.

²² Zia ul Mustafa Ansari, Victimology In India with Special Reference to Child Victim Imperial Journal of Interdisciplinary Research (IJIR) Vol-2, Issue-5, (2016) ISSN: 2454 <http://www.onlinejournal.in>.