

CHAPTER III

LEGAL PROVISIONS AGAINST SEXUAL ABUSE OF CHILDREN IN INDIA

“There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they grow up in peace.”

---Kofi Annan¹

The problem of child abuse and child rights violation is prevailing on large scale all over the world including India. Child abuse is a state of emotional, physical, economic and sexual maltreatment meted out to a person below the age of eighteen and is a globally prevalent phenomenon.² However, in India, as in many other countries, there has been no understanding of the extent, magnitude and trends of the problem. The growing complexities of life and the dramatic changes brought about by socio-economic transitions in India have played a major role in increasing the vulnerability of children to various and newer forms of abuse.

Most of the nations in the world have witnessed child rights violation very often and from time immemorial, but the concern for protection of child rights is gaining momentum only in the recent years. United Nations has always placed child on the top of

¹ Kofi Atta Annan was a Ghanaian diplomat who served as the seventh Secretary-General of the United Nations from January 1997 to December 2006. Annan and the UN were the co-recipients of the 2001 Nobel Peace Prize. The quote was used in the United Nations Report on Child Abuse. (2000). *“The State of the World's Children”*. UNICEF.

² S. Rinchin & S. Maitra, *Child Sexual Abuse and Social Factors Preventing Disclosure: Adolescent girls narratives* 301(Sage Publications, New Delhi, 1st edn., 2001)

their policies. Based on the international policies famed by the UN the national governments including India have enacted special laws and policies to protect the children from exploitation and abuse. Among the many, Article 15(3), 24, 39(e), 39(f) and 45 of the Constitution of India,³ Juvenile Justice Act & Prevention Of Children from Sexual Offences Act are of vital importance. The Protection of Children from Sexual Offences(POCSO) Act has been birthed out of the very need to enact a specific legislation to tackle with the increasing sexual abuse against children in the form of rape, pornography, various forms of penetration and criminalizes acts of immodesty.

3.1. Constitutional Provisions:

Unfortunately, sufficient attention was not given over the future citizens of India in the Constituent Assembly deliberation but, still there are certain bare references that can be traced in the constitutional promise. The nation promises a positive discriminatory treatment for the children in pursuance of the provision as laid down under Article 15(3) of the Constitution of India for their betterment.⁴ Provisions for protection of children are scatted in the Indian Constitution, which can be discussed under the following heads:

3.1.1. Provisions under the Preamble:

The inclusion of the expression ‘social justice’⁵ in the preamble is the recognition of the greater good to a larger number of people. This expression ‘social justice’ demands equality along with liberty. Thus, the nation has promised

³ D.D. Basu, *Shorter Constitution of India* (Lexis Nexis, Wadhwa, 14th edn., 2010)

⁴ Art. 15(3). Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth-

(3) Nothing in this article shall prevent the State from making any special provision for women and children

⁵ R. C. Lahoti, *Preamble: The Spirit and Backbone of the Constitution of India* 72 (Eastern Book Company, Lucknow, 1st edn., 2004)

to itself that every possible means should be used to improve the condition of the weaker section of the society which would definitely include children. Thus, provisions had been inserted in the constitution for orderly growth and development of the citizens of India including children. For the welfare of the children, for their protection from exploitation, for eradication of the problem of child labour from society, the constitution provides certain provisions which are given due weight age from time to time.⁶

3.1.2. Provisions under Fundamental Rights:

Fundamental rights may be well called the soul of the Indian constitution. These are the very basic rights that are universally recognized as fundamental to human existence and indispensable for human development. These rights are so important that in the absence of these rights man's social and spiritual life would be rendered worthless.

The fundamental rights fall under 6 broad categories, they are; right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights and right to constitutional remedy. Although these rights are not directly related to protection from sexual abuse of children but still on wide interpretation we can relate these provisions with right against exploitation and abuse of children. The obligation imposed on the State by Article 14⁷ is for the benefit of all persons within the territory of India and thus, no body including the children should be denied any equality of status and opportunity as all are equal before the eye of law.

⁶ S.K. Chatterjee, *Offences Against Children And Juvenile Offences*, 05 (Central Law Publication, Allahabad, 2nd edn. 2016)

⁷ Art. 14. Equality before law-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

Article 15(3) enables the State to make special provisions for children⁸ which indicate that it seeks to protect the interest of women and children and nothing else. The most important right provided in the list is the right to life and personal liberty.⁹ The phrase right to life and personal liberty had been widely interpreted by the judiciary in a plenary of cases to give maximum rights to the people. In *Sunil Batra case*¹⁰ the Supreme Court held that the phrase ‘protection of life’ means not only mere physical survival but include the right to live consistently with human dignity and decency. It means the state is obliged to see that there is no violation of human rights of any person irrespective of age; i.e. including children.

Articles 23¹¹ & 24¹² further enshrine fundamental protections against exploitation. Although there is no specific mention of children in article 23, but it may be inferred that it do include ‘children’ in its contours as the children are regarded as most vulnerable and can be exploited at any time. The words ‘traffic in human being’ includes traffic of women & children for immoral and other purpose. Similarly, the term ‘forced labour’ means made to do work forcefully without the consent of the worker. Thus, as there is protection against forced

⁸ D.D. Basu, *Shorter Constitution of India* (Lexis Nexis, Wadhwa, 14th edn., 2010)

⁹ P. Nautiyal & A. Mal, “Towards Protection Of Children Against Sexual Abuse: No Childs Play”, 3 *NUJS LAW REV.* 44 (2010)

¹⁰ *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675

¹¹ Art. 23. Prohibition of traffic in human beings and forced labour

(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them

¹² Art. 24. Prohibition of employment of children in factories, etc No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment Provided that nothing in this sub clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub clause (b) of clause (7); or such person is detained in accordance with the provisions of any law made by Parliament under sub clauses (a) and (b) of clause (7)

labour it means that it also protects all children from the hazard of sexual exploitation of children in workplace.

3.1.3. Provisions under Directive Principles of State Policy (DPSP):

The Directive Principles are the guiding principles for governance of India. These Principles provide the social and economic guidance for Indian democracy and pave the way for the establishment of a true welfare state. As the name indicates, these Principles command the state and its instrumentalities to follow certain fundamental principles while formulating and pursuing policies. The Directive Principles envision for all citizens the equality of opportunity and adequate means to livelihood, avoiding concentration of wealth in few hands.

Article 39(e)¹³, directs the state to adopt protective measures so that, the tender age of children are not abused and that citizens are not forced by economic necessity avocations unsuited to their age and strength. Thus, it imposes a ban on the employment of children in any occupation injurious to the lives of tender aged children.

The provision contained in Article 39(f)¹⁴ urges upon the state to see that children are given all types of opportunities to develop in a healthy manner and thus are protected against exploitation. Article 45 is a directive to the state to provide for childhood care and education for all children until the age of 6 years.

¹³ Art. 39(e) the State shall, in particular, direct its policy towards securing to ensure that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

¹⁴ Art. 39(f) the State shall, in particular, direct its policy towards securing to ensure 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.

Article 46¹⁵ provides that the state shall take measures to promote and protect the weaker section of the society so that they do not suffer from social injustice and exploitation. Thus, the provisions under DPSP are meant to protect the children from various types of abuse including sexual abuse.

3.1.4. Provisions under the Fundamental Duties:

There can be no right without duties. Perhaps the legislators had that in mind when they invoked Article 51 A and Part IV A into the Constitution by the 42nd Amendment in the year 1976. The provision enumerates Fundamental Duties, which although unenforceable in the courts of law but are still useful in judicial construction of such legal provisions that admit of two constructions.

Although fundamental duties are not justifiable in nature but it cast a list of moral duties upon its citizens to perform for the greater interest of the nation. Primarily there was no duty towards the children within Article 51 A but later clause (k)¹⁶ was inserted in the year 2002 by 86th Amendment whereby it was made a fundamental duty of parents or guardian to look after their children's at least till the age of 14 years. The parents or guardian need to make necessary arrangement for education of their child. It is necessary because illiteracy and poverty are interrelated concepts. In majority of cases illiteracy leads to poverty and poverty and illiteracy in combination leads to economic and social backwardness which ultimately increases the vulnerability of the already vulnerable groups like children's. Increase of vulnerability leads to problem like trafficking, beggary, child labour and sexual abuse in general. Thus, fundamental

¹⁵ Article 46 -The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

¹⁶ Article 51A(k)- who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

duty in the form of clause 'k' is a back force to protect the children from various types of abuse and give them a dignified life.

3.2. Procedural Law Provisions:

Procedural laws are inseparable part of the penal law and the effectiveness of the latter depends much upon the proper implementation of the former. Without proper procedural law, the substantive criminal law, which defines offences and provides punishment for them would be almost worthless. For the purpose of this research, we study the provisions of Criminal Procedure Code as well as Evidence Act that directly or indirectly deals with the trial of sexual offences related to Children under two different headings.

3.2.1. The Code of Criminal Procedure, 1973:

A few of the important provisions of Criminal Procedure Code, which are applicable to sexual offences including CSA, are discussed below:

As per Section 53A¹⁷ of Criminal Procedure Code which was inserted on 2005 by amendment to the Criminal Procedure Code provides that it is lawful for a

¹⁷ Section 53A.- Examination of person accused of rape by medical practitioner.—(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometres from the place where the offence has been committed, by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:— (i) the name and address of the accused and of the person by whom he was brought, (ii) the age of the accused, (iii) marks of injury, if any, on the person of the accused, (iv) the description of material taken from the person of the accused for DNA profiling, and (v) other material particulars in reasonable detail.

registered medical practitioner to examine the arrested person without delay and prepare a report regarding his examination which shall include information relating to name, age and address of the accused as well as the person by whom he was brought, the description of the materials collected for the purpose of DNA profiling, any mark of injury if found on the body of the accused person and any other particular which the medical practitioner feels to be necessary relating the case. The report shall further specify the reason for the conclusion arrived at by the practitioner and the time of examination. The said report after being prepared shall be forwarded to the investigating officer of the case who shall submit the same to the magistrate. The provision also provides that in case of non availability of medical practitioner of a government run hospital such examination can be performed even by any other registered medical practitioner if requested by a police officer not below the rank of a Sub Inspector. The constitutional validity of this section was challenged before the Karnataka high court in the case of *Shreemad Jagadguru Shankaracharya v. State of Karnataka*¹⁸ on the ground that unfettered power has been given to the police officers to use force against arrested person if booked under offences of sexual abuse which is violative to Article 21 of the constitution and examining the arrested without previous intimation is violative to Article 14 as it is arbitrary in itself. But the court have observed that fear of misuse of police powers conferred by a law doesn't violate Article 21 and police power not to inform the arrestee about the type of examination in detail cannot be said to be arbitrary and hence upheld the constitutional validity of the section.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of subsection (5) of that section.

¹⁸ 2014 SCC OnLine Kar 5639

Section 273 originally provides that evidence from the witnesses shall be taken only in the presence of the accused person or in the presence of his pleader but, it had been amended in the year 2013, whereby an exception¹⁹ had been added, which state that, the provision of section 273 will not be applicable in cases where the witness is a female victim of sexual offence below the age of 18 years. Thus, the new insertion has made it easy for a female child victim of rape or any other sexual abuse to not face the accused at the time of depositing statements in the court. Although this new amendment give privilege only to the female victims but in the case of *State v. Ananta Singh*²⁰ it was made clear that where there is an express provision of taking evidence in the absence of the accused the above general provision under section 273 will not be applicable.

Section 164 empowers a judicial or metropolitan magistrate to record statement made to him by any person in the course of the investigation before the commencement of inquiry and trial. Clause (5-A) has been inserted to Section 164 in the year 2013 which provides that in those cases which are related to sexual abuse and are punishable under various Sections of IPC, such as; Section 354²¹, 354-A²², 354-B²³, 354-C²⁴, 354-D²⁵,

¹⁹ Inserted by the Criminal Law (Amendment) Act, 2013

²⁰ 1972 Cr.LJ 1327(SC)

²¹ Sect. 354.- Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine].

²² Sect. 354A. -Sexual harassment and punishment for sexual harassment.—(1) A man committing any of the following acts— (i) physical contact and advances involving unwelcome and explicit sexual overtures; or (ii) a demand or request for sexual favours; or (iii) showing pornography against the will of a woman; or (iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment. (2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both. (3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

376(1) & 376(2)²⁶, 376-A²⁷, 376-AB²⁸ 376-B²⁹, 376-C³⁰, 376-D³¹, 376-DA³², 376-DB³³ and 376-E,³⁴ the statement of the victim shall be recorded as soon as the

²³ Sect. 354B.-Assault or use of criminal force to woman with intent to disrobe.—Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

²⁴ Sect. 354C. Voyeurism.—Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

²⁵ Sect. 354D. Stalking.—(1) Any man who— (i) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or (ii) monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking: Provided that such conduct shall not amount to stalking if the man who pursued it proves that— (i) it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or (ii) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or (iii) in the particular circumstances such conduct was reasonable and justified.

²⁶ Sect. 376. Punishment for rape.—(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which 1 [shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine].

(2) Whoever,— (a) being a police officer, commits rape— (i) within the limits of the police station to which such police officer is appointed; or (ii) in the premises of any station house; or (iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or (b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or (c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or (d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or (e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or (f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or (g) commits rape during communal or sectarian violence; or (h) commits rape on a woman knowing her to be pregnant; or 2 * * * * (j) commits rape, on a woman incapable of giving consent; or (k) being in a position of control or dominance over a woman, commits rape on such woman; or (l) commits rape on a woman suffering from mental or physical disability; or (m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or (n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term

which shall not be less than ten 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.

²⁷ 376A. Punishment for causing death or resulting in persistent vegetative state of victim.—Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, 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, or with death.

²⁸ Section 376AB. Punishment for rape on woman under twelve years of age.—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

²⁹ Section 376B. Sexual intercourse by husband upon his wife during separation.—Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

³⁰ Section 376C. Sexual intercourse by a person in authority.—Whoever, being— (a) in a position of authority or in a fiduciary relationship; or (b) a public servant; or (c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or (d) on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

³¹ Sect. 376D. Gang rape.—Where a woman 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 rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to 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.

³² Sect. 376DA. Punishment for gang rape on woman under sixteen years of age.—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

offence is reported to the police. All those statements shall be recorded on oath by the magistrate in such a manner that it can be used as evidence during the trial of the case. It is immaterial whether the magistrate has the jurisdiction over the case or not. However, if the person making the statement is a disabled person, the magistrate may take the assistance of a special educator in recording the statement.

A new proviso was added to section 439 sub clause(1) whereby, it was made mandatory for the court to give notice to the Public Prosecutor within 15 days from the date of receiving application for bail to an accused under section 376(3), 376 AB, 376DA and 376DB.³⁵ Further, under section 374 an appeal filed against a sentence passed under the section penalizing rape shall be disposed of within a period of 6 months from the date of making the appeal.³⁶

Section 164-A³⁷ which was inserted by Cr.P.C (Amendment) Act, 2005 cast a duty upon the investigating officer or the Officer in charge of the police station to make

³³ Sect. 376DB. Punishment for gang rape on woman under twelve years of age.—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

³⁴ Sect. 376E. Punishment for repeat offenders.—Whoever has been previously convicted of an offence punishable under section 376 or section 376A or 1 [section 376AB or section 376D or section 376DA or section 376DB,] and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.]]

³⁵ Criminal Law (Amendment) Act, 2018

³⁶ Criminal Law (Amendment) Act, 2018

³⁷ Section 164A. Medical examination of the victim of rape.—

(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered

necessary arrangement for the medical examination of the Victim of rape or attempt of rape by a registered medical practitioner preferably employed in a government run hospital within a period of 24 hours from the time of receiving the information regarding the commission of the offence. However, it is compulsory for the police to take the prior consent of the victim or any other person who could give consent on her behalf before sending her for medical examination.

Further, Section 357-B³⁸ instruct the hospitals irrespective of government or private to provide immediate first aid treatment to the victim of rape/gang rape without charging any fee from the victim or guardian. It is also the duty of the hospital to inform the case to the police station as soon as possible but this doesn't mean that they would not provide the first aid treatment until the police arrive.

medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:— (i) the name and address of the woman and of the person by whom she was brought; (ii) the age of the woman; (iii) the description of material taken from the person of the woman for DNA profiling; (iv) marks of injury, if any, on the person of the woman; (v) general mental condition of the woman; and (vi) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of subsection (5) of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf

³⁸ Sect. 357C. Treatment of victims.—All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code (45 of 1860), and shall immediately inform the police of such incident.]

Victim compensation scheme has been introduced in the Cr.P.C by inserting Section 357A³⁹ to the Code, which very well states that the every State government in harmony with the Central government have to prepare a scheme in order to provide funds to those victims who suffered with loss so that the victims and their dependents could restore themselves to some extent. Thus, the sole object of this section is to rehabilitate the victim by providing some financial support by the state wherever it is necessary. The DLSA or the SLSA as the case may be is authorized under this provision to decide the quantum of compensation whenever recommended by the trial court. Such recommendations are generally made when the court is of the opinion that compensation under Section 357 is not adequate or when the victim needs rehabilitation. Further, an application can be made directly to the DLSA or SLSA by the victim or his dependents when the accused is not identified on the basis of which the DLSA or the SLSA can award compensation after due inquiry with a period of two months. In addition, the DLSA or SLSA also

³⁹ Sect. 357A. Victim compensation scheme.—(1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

have the power to award immediate medical facility to the victim at the state expense if a certificate issued by a police officer not below the rank of Officer in charge or Magistrate is enclosed along with the application seeking for same.

3.2.2 The Indian Evidence Act, 1872:

Section 53A was inserted in the Evidence Act with an intention that, while trying cases relating to sexual abuse under Section 354, 354A, 354B, 354C, 354D, 376, 376 A, 376 AB, 376B, 376C, 376D, 376 DA, 376 DB or 376E, where the question arises in the case is, whether the victim had consented or not, the previous character regarding sexual experience of the victim cannot be used or produced as evidence to prove that the victim had consent for the act.⁴⁰ This section is also applicable for attempt to commit the above mention offences.

While prosecuting an offence of rape committed under the conditions given under section 376(2) from (a) to (n) it is established that sexual intercourse was committed by the accused, the court shall presume that the victim had not given consent for the same if the victim denies her consent for the act.⁴¹

In a trial of offence under the sections defining and punishing rape, the victim is protected from any questions which relating to her immoral character or previous sexual experience.⁴² In simple this proviso bars the defense counsel from attacking the victim by putting question on her character or past sexual experience in order to prove that there is every possibility of consent of the victim.

⁴⁰ Criminal Law Amendment Act, 2013 and Criminal Law Amendment Act, 2018

⁴¹ Sect. 114 A inserted by Criminal Law Amendment Act, 2013

⁴² Sect. 146 amended by Criminal Law Amendment Act, 2013

3.3. Other Statutory Laws for Protection of Child Rights against Abuse:

Apart from the provisions under the Indian constitution, the Parliament of India has enacted several statutes from time to time for the betterment and protection of the children of the nation from hardship, exploitation and abuse in different forms including sexual abuse; in the light of the Constitution of India and the international laws regarding child welfare to which India is a signatory. A few of the statutory laws prevalent in India for protection of children from sexual abuse directly or indirectly are discussed below:

3.3.1. Indian Penal Code(IPC):

IPC is the primary substantive criminal law of India enacted by the British Government when India was a colony of the British Rule. IPC has various provisions prescribing for strict punishment to the convict in the cases of sexual offences against women and children's. The provisions are:

Section 293⁴³ provides for an aggravated form of offence described under Section 292 which states that the act of sale, import, export, hire, distribution or circulation in any manner of obscene material such as books, pamphlets, drawing, painting or objects to a child below the age of 20 years is a punishable offence. The section strictly states that even an attempt to do the above activities is punishable under Section 293. The punishment provided is 3 years imprisonment and fine of two thousand for first conviction and a maximum of seven years

⁴³ Sect. 293. Sale, etc., of obscene objects to young person.—Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished 1 [on first conviction with imprisonment of either description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees]

imprisonment with fine which may increase to five thousand in case of second conviction.

Section 354⁴⁴ punishes an indecent assault on a woman. In order to constitute an offence under this section there must be intention or knowledge on the part of the accused that the woman's modesty will be outraged. Assault committed with the intention of committing rape is not covered by this section. However, what constitutes an outrage to female modesty is nowhere defined. The Supreme Court in the case of *State of Punjab v. Major Singh*⁴⁵ held that when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that act must fall within the mischief of this section.

Section 354A⁴⁶, 354B⁴⁷ & 354C⁴⁸ had been inserted by the 2013 amendment to the IPC which gave the definition of sexual harassment and made it

⁴⁴ Sect. 354. Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine].

⁴⁵ AIR 1967 SC 63

⁴⁶ Sect. 354A. Sexual harassment and punishment for sexual harassment.—(1) A man committing any of the following acts— (i) physical contact and advances involving unwelcome and explicit sexual overtures; or (ii) a demand or request for sexual favours; or (iii) showing pornography against the will of a woman; or (iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

⁴⁷ Sect. 354B. Assault or use of criminal force to woman with intent to disrobe.—Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

⁴⁸ 354C. Voyeurism.—Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the

a punishable offence. As per section 354A a man will be guilty of committing sexual harassment on a women if he involve in sexual contact or demand for sexual favour or show pornography or make sexually coloured remarks against the will of the women. For such act he may be punished with a maximum of 3 years imprisonment. Section 354B provides punishment for assault or abetment to assault a women with an intention to disrobe her or forcing her to make herself naked. The punishment prescribed is minimum imprisonment of 3 years and maximum of 7 years. Similarly, Section 354C makes ‘voyeurism’ a punishable offence which means, if any person involve in the act of watching, peeping or capturing picture of a women while engaging in private activities like changing cloths, using washroom or engagement in sexual activities he will be guilty of voyeurism and may be punished with not less than 1 year and more than 3 years. The act also prescribes a punishment of maximum 3 years for the act of physically following or monitoring women with a malafide intention.⁴⁹ The punishment may increase to 5 years if the offence is a repeated one.

Section 366⁵⁰ punishes kidnapping, abduction or inducing a women to compel her for things specified in the section such as forceful marriage, illicit

perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

⁴⁹ Sect. 354 D IPC

⁵⁰ Sect. 366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; 1 [and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid].

intercourse etc. The offence under this section is merely an aggravated form of the offence under section 363.⁵¹ The term women used in this section include both adults and children. If a girl is eighteen or above, she can only be abducted and not kidnapped, but if she is under eighteen years of age she can be kidnapped as well as abducted if the taking is by force or the taking is by deceitful means.⁵² The punishment provided is imprisonment upto 10 years with or without fine.

Section 366 A⁵³ was inserted in the code in the year 1923 to give effect to certain Articles of the International Convention for Suppression of Traffic in Women and Children, 1910. The section intends to punish the export and import of girls for prostitution. The punishment prescribed for the offence is maximum imprisonment up to 10 years along with fine. Thus, the aim of the provision is to prevent immorality and it has been framed more with the desire of safeguarding the public interest in morality than the chastity of a particular women.

Section 366-B⁵⁴ is similar to section 366-A. However, the material difference between the two Sections is that under the preceding section procurement of girls for prostitution is done within the territory of India, whereas under this section the procurement is done outside India and imported to India.

⁵¹ Sect. 363. Punishment for kidnapping.—Whoever kidnaps any person from 1 [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

⁵² B.N. Mani Tripathi, *Criminal law: Indian Penal Code*, 336 (Allahabad Law Agency, Allahabad, 6th edn., 1996).

⁵³ Sect. 366A. Procurement of minor girl.—Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

⁵⁴ Sect. 366B. Importation of girl from foreign country.—Whoever imports into 3 [India] from any country outside India 4 [or from the State of Jammu and Kashmir] any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, 5 *** shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

Again, under this section the age of the girl should be below 21 years instead of 18 years.

Section 370⁵⁵ had been amended in the year 2013 and thereby trafficking of any person irrespective of age of the person for the purpose of exploitation is made a punishable offence with minimum punishment of 7 years and maximum of 10 years rigorous imprisonment. The term 'trafficking' here means and includes any act which leads to physical or sexual exploitation or practice of slavery or removal of organs. The section further provides that if the act is done against a

⁵⁵ Sect. 370. Trafficking of person.—(1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by— First.—using threats, or Secondly.—using force, or any other form of coercion, or Thirdly.—by abduction, or Fourthly.—by practising fraud, or deception, or Fifthly.—by abuse of power, or Sixthly.— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation 1.—The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2.—The consent of the victim is immaterial in determination of the offence of trafficking.

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

(6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

minor, *i.e.*; a child the minimum punishment gets increased to minimum 10 years rigorous imprisonment which may extend to imprisonment for life.⁵⁶

Section 370 A⁵⁷ is an allied provision to section 370 which provides that if any person uses any minor or child for purpose of sexual exploitation knowing that the child is a victim of trafficking shall be punished with minimum rigorous imprisonment of 5 years which may be extended to 7 years.

Section 372⁵⁸ punishes the sale of minor girls below the age of eighteen years for the purpose of prostitution, or illicit intercourse, or for other unlawful and immoral purposes. The provision envisages protection of the chastity of girls and applies to both married and unmarried female minors. The offence consists in the intentional or conscious exposure of a minor to the danger of degradation. This section declares as a matter of general law, that no person under the age of

⁵⁶ Sect. 370(4)

⁵⁷ Sect. 370A. Exploitation of a trafficked person.—(1) Whoever, knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than five years, but which may extend to seven years, and shall also be liable to fine.

(2) Whoever, knowingly by or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished with rigorous imprisonment for a term which shall not be less than three years, but which may extend to five years, and shall also be liable to fine.]

⁵⁸ Sect. 372. Selling minor for purposes of prostitution, etc.—Whoever sells, lets to hire, or otherwise disposes of any [person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[Explanation I.—When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

Explanation II.—For the purposes of this section “illicit intercourse” means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation.]

majority, shall be devoted to a life of prostitution, nor employed in, nor used for any unlawful or immoral purpose.⁵⁹

Section 373⁶⁰ goes hand in hand with Section 372 because both these sections conjointly punish both giver as well as the receiver of a child *i.e* below 18 years of age for immoral purpose with maximum imprisonment for a term of 10 years accompanied by fine. The section does not specify the nature of the possession nor its duration nor intensity. It merely specifies the object, that is, for the purpose of or with intention or knowledge of prostitution or illicit intercourse.

‘Rape’ is perhaps the worst form of sexual offence that takes place against women including girl child of even very tender age. The offence of rape is defined under Section 375⁶¹ which had been amended in the year 2013 after the famous

⁵⁹ S.K. Chatterjee, *Offences Against Children And Juvenile Offences*, 254 (Central Law Publication, Allahabad, 2nd edn. 2016)

⁶⁰ Sect. 373. Buying minor for purposes of prostitution, etc.—Whoever buys, hires or otherwise obtains possession of any [person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[Explanation I.—Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

Explanation II.—“Illicit intercourse” has the same meaning as in section 372.

⁶¹ Sect. 375. Rape.—A man is said to commit “rape” if he— (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:— First.—Against her will. Secondly.—Without her consent. Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt. Fourthly.—With her consent, when the man knows that he is not her

Nirvaya case to make the definition more wide so that none can escape from punishment. As per the new definition, a man will be liable for committing rape, if he penetrates his penis; or any other object; or part of the body to any part of the body of the women; or compels the women to penetrate herself; or even if he applies his mouth to the private parts of her body; or compel her to do so with him; or with any other person without her free consent; or against her will. However, consent is immaterial in case the women is a child below 18 years or is incapable of communicating consent. According to the honorable Supreme Court of India,⁶² the concept of ‘consent’ as provided under section 375 of IPC has to be understood differently, keeping in mind the provisions of section 90 IPC, according to which a consent given under fear/coercion or misconception/mistake of fact is not a free consent, at all. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.

husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly.—With or without her consent, when she is under eighteen years of age. Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

⁶² *Satpal Singh v. State of Haryana*, 2010 Cri LJ 4028 (SC)

Punishment for the offence of rape is provided under Section 376⁶³ as minimum imprisonment for a term of 10 years(as amended in 2018) but if it is committed against a child below age of 16 years or if the crime is committed by a guardian or teacher or relative of a women basically child the punishment is severe

⁶³ Section 376. Punishment for rape.—(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which 1 [shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine]. (2) Whoever,— (a) being a police officer, commits rape— (i) within the limits of the police station to which such police officer is appointed; or (ii) in the premises of any station house; or (iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or (b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or (c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or (d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or (e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or (f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or (g) commits rape during communal or sectarian violence; or (h) commits rape on a woman knowing her to be pregnant; or 2 * * * * (j) commits rape, on a woman incapable of giving consent; or (k) being in a position of control or dominance over a woman, commits rape on such woman; or (l) commits rape on a woman suffering from mental or physical disability; or (m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or (n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten 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.

Explanation.—For the purposes of this sub-section,— (a) “armed forces” means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government; (b) “hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation; (c) “police officer” shall have the same meaning as assigned to the expression “police” under the Police Act, 1861 (5 of 1861); (d) “women's or children's institution” means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

(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 sub-section shall be paid to the victim.

in nature because it is prescribed to be minimum of 10 years which may extend to life imprisonment along with fine. Section 376A⁶⁴ was inserted after section 376 by the 2013 amendment to IPC whereby a minimum of 20 years imprisonment and maximum of death sentence was prescribed for those who while committing rape inflict injury to the victim, which may result into death or persistent vegetative state. Further, few more sections regarding specific punishment have been added by 2018 amendment to the IPC specially taking into consideration the commission of rape against children. Section 376AB⁶⁵ provides that the minimum punishment for committing rape on child below 12 years is 20 years with maximum of life imprisonment along with fine. Again, Section 376DA⁶⁶ provides minimum punishment of life imprisonment in case of rape to a girl below 16 years with fine. Similarly, Section 376DB⁶⁷ provides minimum punishment as life imprisonment

⁶⁴ Sect. 376A. Punishment for causing death or resulting in persistent vegetative state of victim.—Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, 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, or with death.

⁶⁵ Sect. 376 AB. Punishment for rape on woman under twelve years of age.—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

⁶⁶ Sect. 376DA. Punishment for gang rape on woman under sixteen years of age.—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

⁶⁷ Sect. 376DB. Punishment for gang rape on woman under twelve years of age.—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

with fine or death sentence as the punishment for committing gang rape to a girl below 12 years of age.

Section 509⁶⁸ punishes word, gesture or act intended to insult the modesty of a woman. The word ‘modesty’ does not lead only to the contemplation of sexual relationship of an indecent character. A person convicted under this section may be punished with a maximum imprisonment of 3 years.

3.3.2. Rights and Protection under Juvenile Justice(Care and Protection of Children) Act, 2015:

The word ‘juvenile’ originates in the *latin* word namely ‘*juvenis*’ which means young. Juvenile justice is the legal system that aspires to protect all children, bringing within its ambit the children in need of protection, besides those in conflict with law. However, the word has come to be used together and often interchangeably with ‘delinquency’ – which describes children who are in conflict with law.⁶⁹

Prescribing different treatment for juvenile offenders is an offshoot of the new penology, which came to be applied with the realization that courts, procedures and prisons meant for adult offenders could hardly be expected to serve the interests of juvenile offenders. Thus, with this intention in mind the Juvenile

medical expenses and rehabilitation of the victim: Provided further that any fine imposed under this section shall be paid to the victim

⁶⁸ Section 509. Word, gesture or act intended to insult the modesty of a woman.—Whoever, intending to insult the modesty of any woman, utters any words, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, [shall be punished with simple imprisonment for a term which may extend to three years, and also with fine].

⁶⁹ M. Adenwalla, *Child Protection and Juvenile Justice System: for Juvenile in Conflict with Law*, (CHILDLINE India Foundation, Bombay, 1st edn., 2006). (Visited on August 22, 2018 <http://childlineindia.org.in/pdf/CP-JJ-JCL.pdf>)

Justice Act 1986 was enacted which replaced the Children's Acts formerly in operation in the States and the Union Territories. It can be proclaimed as the first all-India child welfare enactment seeking to promote the best interests of the juveniles' by incorporating into its fold not only some of the major provisions and clauses of the Indian Constitution and National Policy Resolution for Children declared by India in 1974, but also universally agreed principles and standards for the protection of juveniles such as the United Nations Declaration of the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

The primary object of juvenile justice system under this aforesaid act can be highlighted as below:

- prevention (ensuring that children do not come in conflict with the law),
- diversion (that children are kept away from formal criminal justice system and into community based and restorative processes to prevent repeat delinquency),
- protection (of juveniles-in-conflict-with-law from human rights violations and the children from exploitation and abuse).

Thus, the mission is not to simply punish the violators but to help the young violators of law to get back in the society on the right path, the focus being to look into the complexity of the life situation of the child and thus offering commensurate rehabilitation program in the best interest of the child, thus ensuring aftercare and reintegration of all the children who have been left out, back into the society. Some of the specific changes brought in by the Juvenile Justice Act are as follows:

- an uniform definition of juvenile for the whole country
- a wider role to voluntary organizations

- prohibition for imprisonment of children under all circumstances, and
- an uniform structure of juvenile justice for the whole country.

However, in order to make the juvenile justice system more effective and up to date the JJ Act, 2000 was enacted which repealed the JJ Act, 1987. The JJ (care and protection of children) Act, 2000 marked a new beginning; it mirrored a sincere desire to realize the two-fold constitutional aspirations i.e. that the State has an obligation to provide ideal conditions for development of the child and that it must also act to protect them against exploitation⁷⁰. However, later this Act was further amended in the year 2015 which changed the age of juvenile under the Act. A few of the important provisions dealing with rights of child are discussed below:

Post apprehension rights:

As soon as a juvenile in conflict with law is apprehended by police, he shall be placed under the charge of the special juvenile police unit or the designated police officer, who shall produce the juvenile before the Board without any loss of time but within a period of twenty- four hours of his apprehension excluding the time necessary for the journey, from the place where the juvenile was apprehended, to the Board⁷¹. However, a safeguard had been provided here for the juveniles in conflict with law in the Proviso to the section which says, *'Provided that in no case, a juvenile in conflict with law shall be placed in a police lock-up or lodged in a jail'*.

In addition to the above provisions regarding rights of juveniles, there are some specific provision provided under the Juvenile Justice Rule 2007 which

⁷⁰ The Juvenile Justice (Care & Protection of Children) Act 2015, Sections 14, 15, 30, 33 & 39

⁷¹ Sect. 57, Cr.P.C., 1973

provides for the guidelines for prevention of sexual abuse of children. These are mentioned below:

Every institution shall have systems of ensuring that there is no abuse, neglect and maltreatment and this shall include the staff being aware of what constitutes abuse, neglect and maltreatment as well as early indicators of abuse, neglect and maltreatment and how to respond to these.⁷²

In the event of any physical, sexual or emotional abuse, including neglect of juveniles and children in an institution by those responsible for care and protection, the following action shall be taken:

- (i) the incidence of abuse and exploitation must be reported by any staff immediately to the Officer-in-Charge
- (ii) when an allegation of abuse comes to the knowledge of the Officer-in-Charge, he shall place it before the Board or Committee
- (iii) the Board or Committee shall direct the local police station or Special Juvenile Police Unit to register a case, take due cognizance of such occurrences and conduct necessary investigations
- (iv) the Board or Committee shall take necessary steps to ensure completion of all inquiry and provide legal aid as well as counseling to the juvenile or child victim
- (v) the Board or Committee shall transfer such a juvenile or child to another institution or place of safety or fit person

⁷² Juvenile Justice Rules, 2007, Rule 60

3.3.3. Protection under the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986:

The problem of Child labour is one of the most prominent and worst forms of child exploitation in a civilized society and it has been more or less same in all countries but it is more pervasive in the developing countries like India. The child labours in India are made to work in all types of factories, industries, agricultural fields, construction sites and even in small sectors like households, hawkers, restaurants, *dhabas*, rag picking etc. As per ILO poverty, unemployment, rapid growths of population, illiteracy are few of the prominent factors responsible for increase in the practice of child labour. Primarily in all unorganised sectors the children are compelled to work without proper wage, time limit and safety measures, because they come from weaker section of the society and lead to live in the state of degradation and hardship. Thus, they are exploited in all possible manner which include economic exploitation, physical exploitation, emotional exploitation and even sexual exploitation.

In order to eliminate and control this abuse, The Child Labour (Prohibition and Regulation) Act was enacted in the year 1986. But, due to some new challenges this act was amended in the year 2016 where after the short title of the act was changed to 'Child and Adolescent Labour (Prohibition and Regulation) Act, 1986'. The act defines a child to be a person below 14 years of age.⁷³ The new amendment introduced the term 'adolescence'. As per the act 'adolescence' are those person who have completed 14 years but are less than 18 years.⁷⁴ The Act prohibits the employment of child⁷⁵ but allows the adolescent to work to some extent. However, even the adolescents are not allowed to work in hazardous

⁷³ Child Labour (Prohibition and Regulation) Act, 1986, Sect. 2(ii),

⁷⁴ *Ibid.*, Sect. 2(i)

⁷⁵ *Ibid.*, Sect. 3

working conditions.⁷⁶ If any person in violation of section 3 of the act employs a child, he/she shall be punished with imprisonment for a term of minimum 6 month, which may extend to 2 years and a fine of minimum twenty thousand to a maximum of fifty thousand.⁷⁷ The same amount of punishment is also applicable for a person who employs or allows an adolescent to work in contravention of the provision of Section 3A of the Act.⁷⁸

3.3.4. Rights of Child under the Commission for the Protection Of Child Rights Act, 2005:

The object behind this piece of legislation is to ensure that all laws, policies, programs and administrative mechanisms are in consonance with the child rights perspective as enshrined in the Constitution of India, special statutes for protection child rights as well as in, the United Nation Convention on the Rights of the Child, which India ratified in the year 1992. This act although does not define the term ‘Child’ but it defines the term ‘child rights’. As per the act, *“Child rights includes the children's rights adopted in the United Nations convention on the Rights of the Child on the 20th November, 1989 and ratified by the Government of India on the 11th December, 1992”*.⁷⁹ The act in order to achieve its objectives provides for establishment of two Commissions in two different levels i.e. one at the central level and one at the state level. The Central Government need to constitute a Commission, namely; the National Commission for Protection of Child Rights with its head quarter at Delhi⁸⁰ and each State Government need to constitute a State Commission, namely; the State

⁷⁶ *Supra* note. 73, Sect. 3A

⁷⁷ *Ibid.*, Sect. 14(1)

⁷⁸ *Ibid.*, Sect. 14(1A)

⁷⁹ The Commission for the Protection Of Child Rights Act, 2005, Sect. 2(b)

⁸⁰ *Ibid.*, Sect. 3

Commission for Protection of Child Rights with its head quarter at any place where the State Government think fit.⁸¹

The basic powers and functions of these Commissions^{82 83} regarding protection of child rights from being abuse are-

- the commission may examine and review the safeguards under any law for the protection of children and if found that these laws are not properly implemented they could recommend measures for their effective implementation
- the commission need to prepare annual report regarding working and implementation of the safeguards provided under various laws. However, the commission may also prepare mid-term report if at all necessary and present the same to the Central Government or the State Government as the case may be.
- It is empowered to make inquire into violation of child rights and initiate criminal proceeding against the violator in such cases
- To conduct research in order to find the probable factors that hinder the enjoyment of rights of children those are affected by HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography & prostitution and so on so that appropriate recommendation can be given to the Government to remove those hurdles.
- Take necessary steps for implementation of the provisions under law for betterment and protection of children.

⁸¹ *Supra* note 79, Section 17

⁸² *Ibid.*, Section 13

⁸³ *Ibid.*, Section 24

- Spread and promote awareness regarding provisions that are available for protection of child rights through various means like seminar, awareness program, media etc.
- Inspect shelter homes, observation homes, orphanage, rehabilitation centre for children, Jails etc. under the control of the Central Government or State Government and recommend necessary measures that need to be taken care off for betterment of these institutions.

Under the power to make inquiries the Commission can enjoy the power of a Civil Court while trying a suit under CPC, 1908.⁸⁴ Apart from the power to recommend measures to Government for better implication of any act, the Commission can also approach the higher judiciary for the suitable order and direction to the enforcement machineries.⁸⁵

Further, the act empowers the High Courts to designate at least one special court or for every district by the name 'Children Court' to try the cases against children or where the child is the Victim.⁸⁶ Simultaneously, the State Government shall appoint one Special Public Prosecutor from among the advocated having a experience of at least seven years in the bar for such Children Court.⁸⁷

3.3.5. Rights Of Child Under Prohibition Of Child Marriage Act, 2006:

Child marriage is a customary practice in many parts of the world including India. There are various reasons of child marriage in India. It is violation of basic human rights of a child as because it leads to various types of abuse such

⁸⁴ Section 14, The Commission for the Protection Of Child Rights Act, 2005

⁸⁵ Section 15(ii), The Commission for the Protection Of Child Rights Act, 2005

⁸⁶ Section 25, The Commission for the Protection Of Child Rights Act, 2005

⁸⁷ Section 26, The Commission for the Protection Of Child Rights Act, 2005

as physical, psychological and sexual abuse.⁸⁸ Child marriage performed by whatever reason has severe impact upon the victim because the word ‘child’ itself indicate that the person is not biologically prepared for sexual activities. Thus, when a child is married and his/her spouse tries to enjoy the conjugal rights upon the child he/she are left with no option but to surrender themselves physically or commit suicide. In both these cases the child is abused to the maximum extent. Again in many cases child marriage is just a mode of trafficking whereby the child is sold out in the brothels for some considerations. Sexual intercourse with a child either by way of rape or marriage the result is same i.e. the child suffers from severe pain and agony which is a serious violation of child right.

In order to control the problem of child marriage prevalent in India the then Imperial legislative Council enacted ‘*The Child Marriage Restraint Act, 1929*’ for application in Indian territory of British domain. However, the act was not successful in achieving its objectives due to which the government of India had brought the Prohibition of Child Marriage Act, 2006 with drastic modification in The Child Marriage Restraint Act, 1929. The very purpose of this new legislation was to eradicate the problem of child marriage which lead to sexual and physical abuse of a child. Under this piece of legislation every child has a right not to get married in a very tender age. The term ‘Child’ is defined as a person who have not completed the age of 18 years if she is a female and 21 years if he is a male person.⁸⁹

⁸⁸ M. Adenwalla, *Child Protection and Juvenile Justice System: for Juvenile in Conflict with Law*, (CHILDLINE India Foundation, Bombay, 1st edn., 2006). (Visited on August 22, 2018 <http://childlineindia.org.in/pdf/CP-JJ-JCL.pdf>)

⁸⁹ The Prohibition Of Child Marriage Act, 2006, Sect. 2(a)

According to this law a child marriage is a marriage to which either of the parties is a child⁹⁰. The act declares child marriage as an illegal activity punishable by law. Any adult male if marries a child would be punished with rigorous imprisonment for a maximum period of two(2) years with or without fine which may extent to one lakhs rupees.⁹¹ The act punishes persons performing, conducting, directing, or abetting any child marriage, with rigorous imprisonment which may extend to two (2) years and fine which may extend to one lakh rupees.⁹² Even the act provides for punishment of those persons who promotes, attends, permits or fails to prevent a child marriage with the same amount of punishment as provided under section 10.⁹³ All offences under this act are made cognizable and non-bailable.⁹⁴

There is also provision for appointment of Child Protection Officer by the State Governments with specific power and functions, which can be used for preventing child marriage, investigating any matter related to child marriage, to collect evidence for prosecution, move the court for issuing order, create awareness among the public regarding the evil of child marriage and so on.⁹⁵ The act empowers the Judicial Magistrate first class to issue injunction in order to prevent solemnization of child marriage if, the magistrate is informed of the same by the Child Marriage Prohibition Officer or any other reliable source.⁹⁶

⁹⁰ *Supra* note 89, Sect. 2(b),

⁹¹ *Ibid.*, Sect. 9

⁹² *Ibid.*, Sect. 10

⁹³ *Ibid.*, Sect. 11

⁹⁴ *Ibid.*, Sect. 15

⁹⁵ *Ibid.*, Sect. 16

⁹⁶ *Ibid.*, Sect. 13

3.3.6. Protection under The Immoral Trafficking (Prevention) Act, 1956:

Trafficking and commercial sexual abuse of children is one of the fastest growing business run by criminal syndicate all over the world. Nearly two billion children are trafficked every year throughout the world.⁹⁷ In India, nearly 15% of the victim of commercial sexual exploitation that include trafficking are children below the age of 15 years and 25% below the age group of 18 years.⁹⁸

The popular belief that trafficking takes place from country to county that is across international borders is one side of the problem but within the country trafficking takes place from one state to another and from one city to another and also from rural to cities which is another side of the problem.⁹⁹

In India poverty, illiteracy, and practices like child marriage, dowry, *debadashi* etc. are the key factors for trafficking specially of girl child. Trafficking takes place for several purposes namely; prostitution, cheap labour, forced marriage, illegal adoption, drug peddling, begging etc.

The Parliament of India has enacted the Suppression of Immoral Traffic in Women and Girl Act, 1956. This act was amended in 1986 and renamed as The Immoral Trafficking (Prevention) Act, 1956. The amendment act widened the scope of the law and enhanced penalties for offences involving children and minors. The act did not define the term trafficking, but the object of the act is to prevent immoral trafficking of human being for various purposes such as, prostitution or sex trade, slavery, trade of human organ etc.¹⁰⁰ Although this act is a

⁹⁷ Nirmal Kanti Chakrabarty, M. Kumar Nag & S.S Chatterjee, *Law and Child* 162 (R. Cambray & Co. Private Ltd., Kolkata, 1st edn. 2004).

⁹⁸ Government Of India, *Study by the Central Social Welfare Advisory Board*, 2009.

⁹⁹ *Supra* note. 97 at 164.

¹⁰⁰ N. Nath & M. Kohli, “*Child Abuse in India: Some issues*” (1988) (*National Seminar on Child Abuse in India*, New Delhi)

general Act applicable to all irrespective of age and sex but still it defines child as a person below 16 years of age¹⁰¹ and minor as a person below 18 years but above 16 years of age.¹⁰² The act prescribes stringent action against inducing children below 16 years and minor between 16 to 18 years in the offence of procuring, inducing or taking a person for the sake of prostitution.¹⁰³ Prostitution is a worst form of abuse that can be committed against a human being irrespective of his or her age. Children are often victim of such crime due to the high demand in international market. Thus, this act has declared such activities as illegal and punishable under this said law. The punishment under this act is not less than 7 years of imprisonment but which may extend to life imprisonment.¹⁰⁴ It also provides that where any person is found with a child in a brothel, or a child or minor is found to have been sexually abused, it shall be presumed that he has committed an offence of detaining a person in premises where prostitution is carried on. He shall be punished with imprisonment for seven years or life term with or without fine.

3.3.7. The Legal Services Authority Act, 1987:

The marginalized section of the society which also include children are always dominated and their rights are violated by the powerful people. The government has taken several initiatives to promote these weaker sections of the society by framing policies and special laws, whereby they are given some special preferences and upper hand but these policies and law fails to protect them because lack of legal awareness and expensive Court procedure due to which they do not prefer to go to court for justice. Legal assistance and free legal advice is the

¹⁰¹ The Immoral Trafficking (Prevention) Act, 1956, Sect. 2(aa)

¹⁰² *Ibid.*, Sect. 2(cb)

¹⁰³ *Ibid.*, Sect. 5

¹⁰⁴ *Ibid.*,

only way to guarantee equal protection of law to the poor and marginalized section of the society. Thus, in order to solve this problem the Government of India enacted a very comprehensive and unique piece of legislation namely, “Legal Services Authority Act, 1987”. This act has all the potential to legally empower the powerless, the poor and the ignorant to uphold their own rights through some of the ways such as Legal Literacy Campaigns, Para-legal training programmes, out of court settlement of disputes, Lok Adalat and free legal aid.¹⁰⁵ As per the definition of the Act ‘legal services’ would include “*rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter*”.¹⁰⁶ Section 12¹⁰⁷ provides the criteria and list of persons those who are entitled to legal services and among them children and victim of trafficking recognized as two primary category of person who shall be entitled to get free legal services. Free legal aid services would include legal advice, penal advocate, and concession in

¹⁰⁵ Sect. 2(d) “Lok Adalat” means a Lok Adalat organised under Chapter VI;

¹⁰⁶ Sect. 2(c)

¹⁰⁷ Sect.12. Criteria for giving legal services.—Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is—

(a) a member of a Scheduled Caste or Scheduled Tribe;

(b) a victim of trafficking in human beings or beggar as referred to in article 23 of the Constitution;

(c) a woman or a child;

[(d) a person with disability as defined in clause (i) of section 2 of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);]

(e) a person under circumstances of underserved want such as being a victim of a mass disaster, ethnic, violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

(f) an industrial workman; or

(g) in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956), or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986), or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987); or

1 [(h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.]

court fee or other such court proceeding while fighting for justice in the court of law.¹⁰⁸ In short the child will not be denied justice if he is a victim of abuse even though he belong to a very poor family. In the cases of CSA a authority namely the District Legal Services Authority(DLSA) established under the said act at the district level plays very important role in determining and giving compensation to the victim and his family as per the Victim Compensation Scheme.¹⁰⁹

3.3.8. The Indecent Representation of Women (Prohibition) Act, 1986:

This Act was enacted to punish any person involved in the act of indecent representation of women. “*Indecent representation of women means the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals*”.¹¹⁰ The act does not define the term ‘women’ but if we go with literal meaning women would also include a girl child who attained puberty. Any person who is found guilty under this act shall be punished with maximum of 2 years of imprisonment if he is an first time offender and maximum of 5 years if he is found to have repeated the same offence.¹¹¹ There is also a minimum punishment prescribed *i.e.* 6 month imprisonment in case of second time offender. Thus, this act prohibit advertisement of indecent which have depiction of indecent representation of a women any form what so ever and also prohibit publication or

¹⁰⁸ The Legal services Authority Act, 1987, Sect. 12(c)

¹⁰⁹ *Ibid.*, Sect. 10 and 11

¹¹⁰ The Indecent Representation of Women (Prohibition) Act, 1986, Sect. 2(c)

¹¹¹ *Ibid.*, Sect. 6

sending of books or pamphlets containing indecent representation of women.¹¹²
However, there is a list of exception to it.¹¹³

3.3.9. The Protection of Human Rights Act, 1993:

The Protection of Human Rights Act was the result of international pressure which was enacted with the sole purpose of protecting the human beings from violation or abuse. As per the Act human rights means all those rights which are guaranteed to us by the Constitution of India or the International laws.¹¹⁴ Although the Act don't have any special provision regarding children but wider interpretation of the definition of human rights would definitely include rights of child against abuse because children are included within the meaning of human being and they have equal rights as that of the adults to enjoy their right free from abuse and exploitation. The Act provides for establishment of National Human Rights Commission¹¹⁵ and State Human Rights Commission¹¹⁶ to look after the

¹¹² The Indecent Representation of Women (Prohibition) Act, 1986, Sect. 3 & 4.

¹¹³ Sect. 4. Prohibition of publication or sending by post of books, pamphlets, etc., containing indecent representation of women.—No person shall produce or cause to be produced, sell, let to hire, distribute, circulate or send by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form: Provided that nothing in this section shall apply to— (a) any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure— (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure is in the interest of science, literature, art, or learning or other objects of general concern; or (ii) which is kept or used bona fide for religious purposes; (b) any representation sculptured, engraved, painted or otherwise represented on or in— (i) any ancient monument within the meaning of the Ancient Monument and Archaeological Sites and Remains Act, 1958 (24 of 1958); or (ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose; (c) any film in respect of which the provisions of Part II of the Cinematograph Act, 1952 (37 of 1952), will be applicable.

¹¹⁴ Sect. 2 (d) “human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India

¹¹⁵ The Protection of Human Rights Act, 1993, Sect. 3

¹¹⁶ *Ibid.*, Sect. 21

matters of human right violation and to take all possible steps and measures to protect the human rights from being violated. The Act empowers the commissions¹¹⁷ with wide powers for doing the same. The Act further provides for establishment of Human Rights Court in districts of the states.¹¹⁸ However, unfortunately until 2019 no such courts has been established by the government in any state. But, recently on 24th November 2020, the Government of Delhi has taken the first move by designating the Additional Session judge court as the Human Right Court in each District of Delhi.¹¹⁹

3.3.10. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013:

The concept of sexual harassment of women at workplace was widely interpreted by the judiciary in the land mark case of *Vishaka v. State Of Rajasthan*.¹²⁰ The apex court has declared sexual harassment of a working woman at her place of work as amounting to violation of rights of gender equality and right to life and liberty which is clear violation of Article 14, 15 and 21 of the constitution. It is on the basis of this judgment that the government of India had enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act in the year 2013. This act was enacted with the object of providing protection to working women of any age from sexual harassment by the employer or co-employee and thereby feels safe to work. The act has made

¹¹⁷ The Protection of Human Rights Act , 1993, Sect. 12, 13 & 14

¹¹⁸ Sect. 30.- For the purpose of providing speedy trial of offences arising out of violation of human rights, the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Session to be a Human Rights Court to try the said offences. Provided that nothing in this section shall apply if (a) a Court of Session is already specified as a special court; or (b) a special court is already constituted, for such offences under any other law for the time being in force.

¹¹⁹ Editorial, “Even Lawyers in the Dark About Functioning of Delhi's Newly Designated Human Rights Courts” *The Wire*, 08 Jan, 2021 available at: <https://thewire.in/law/delhi-human-rights-court-functioning-lawyers-information-cases> (visited on January 12, 2021)

¹²⁰ AIR 1997 SC 3011

provisions for prevention as well as redressal of complaint made by any victim women. As per section 2(a) of this Act the term ‘women’ would include any women irrespective of her age which means that even a girl child basically above 14 years but less than 18 years who is employed in any factory, industry or household will also be covered under this Act.¹²¹ Sexual harassment here means and includes “any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely:— (i) physical contact and advances; or (ii) a demand or request for sexual favours; or (iii) making sexually coloured remarks; or (iv) showing pornography; or (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature;”¹²²

3.3.11. Information Technology Act, 2000:

Technology and more specifically information technology is regarded as a boon for the society through which the entire world is converted to a global village because now knowledge or information is no longer concentrated in one region of the world rather it get transferred within no time to the whole world through the medium of Internet. Therefore development of technology requires a review of knowledge, ethics, right to freedom, and institutional settings. But due to lack of such periodic review information technology has been in use for non-fruitful purposes mostly by the children and adolescence which in turn lead them to victimization in various ways like child cyber pornography. Activities like online sexual grooming, obscene video chat, publication of nude images, porn videos in pedophilic sites are some of the common activities in which children’s are used by

¹²¹ Sect. 2(a) “aggrieved woman” means— (i) in relation to a workplace, a woman, of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent; (ii) in relation to dwelling place or house, a woman of any age who is employed in such a dwelling place or house;

¹²² The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 Sect. 2(n)

consent or forcefully, as they are soft target of the offenders to such crime. Thus, vulnerability management is a big challenge to the IT in developing countries like India. Trafficking in teenage girls for the purpose of sex industry, including pornography, is occurring throughout the world and appears to be a growing social problem in countries like India due to the various causes leading to trafficking in India.

Internet is fast becoming an electronic red light district distributing violent pornography and helping organize pedophilic ring. It is reported that until 2001 there are over 1000 computer bulletin board services which offer pornography.¹²³ When a person named Robert Thomas was arrested and later convicted by the US court for internet distribution of pornographic images, the police recovered about 25,000 hard-core pornographic images among which 6000 were of young children.¹²⁴ Not only the child pornography images on the internet replicable infinitely, but also they remain in cyberspace indefinitely, with consequences from childhood to adulthood and for sexually exploited child, from one generation to another, precisely because the images are indelible.¹²⁵

Keeping in view of the fact that Indian Legal Framework is lacking in electronic governance the Information Technology Act, 2000 was passed by the Indian Parliament. This act is one of the modern Act, which was enacted in order to deal with offences relating to internet or cyber space which are relatively new kind of offence because the modus operandi is different while committing such crime. The Act *inter alia* provides provisions-

¹²³ Nirmal Kanti Chakrabarty, M. Kumar Nag & S.S Chatterjee, *Law and Child*, 219 (R. Cambray & Co. Private Ltd., Kolkata, 1st edn. 2004).

¹²⁴ *Ibid.*

¹²⁵ Second World Congress, “*Report of the Second World Congress against Commercial Sexual Exploitation Of Children*”, (Japan, December, 2001)

- to combat cyber crime and
- to establish a regulatory authority for implementation of cyber laws and cyber crime.

Among the various offences that are committed through internet, child sexual abuse in the virtual mode is a very frequent one and hence the act had provision for dealing with such activities. Section 67 states that publishing or transmitting any type of obscene material in internet is an offence for which the person may be penalized with imprisonment up to 3 years for first time offender and 5 years for repeated offenders.¹²⁶ However, section 79¹²⁷ of the act provides an escape hatch to network service providers. There is every possible chance that the network

¹²⁶ Sect. 67. Punishment for publishing or transmitting obscene material in electronic form.—Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees

¹²⁷ Section 79. Exemption from liability of intermediary in certain cases.—(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him. (2) The provisions of sub-section (1) shall apply if— (a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or (b) the intermediary does not— (i) initiate the transmission, (ii) select the receiver of the transmission, and (iii) select or modify the information contained in the transmission; (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf. (3) The provisions of sub-section (1) shall not apply if— (a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act; (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner. Explanation.— For the purposes of this section, the expression —third party informationl means any information dealt with by an intermediary in his capacity as an intermediary

service providers will not be responsible for the third party information if he proves that it was without his knowledge.

Further, the Information Technology Act, 2000 have been amended in the year 2008 and thereby inserted section 67B penalizing any act related to publishing or transmitting any material depicting children in sexually explicit act in the internet or cyberspace.¹²⁸ The punishment prescribed is maximum of 5 years for first time offender and 7 years for the second time or repeated offender.

Section 75 of the act provides extra-territorial jurisdiction for taking cognizance of any offence committed in contravention of this act even outside the territory of India irrespective of his nationality.¹²⁹ This provision was necessary because the offences recognized by this act can be committed even from any part of the world

¹²⁸ Sect. 67B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form.—Whoever,— (a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct; or (b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or (c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource; or (d) facilitates abusing children online, or (e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees: Provided that provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting representation or figure in electronic form— (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting representation or figure is the interest of science, literature, art or learning or other objects of general concern; or (ii) which is kept or used for bona fide heritage or religious purposes. Explanation—For the purposes of this section, —children means a person who has not completed the age of 18 years

¹²⁹ I.T Act, 2000, Section 75. Act to apply for offence or contravention committed outside India.—(1) Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality. (2) For the purposes of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

without coming to India. Thus, *prima facie* the IT Act conferred with extra territorial jurisdiction. The element of extra territoriality of the act is potent enough to generate the conflict of jurisdiction in future between nations.

3.3.12. Provisions under the Protection Of Children from Sexual Offences (POCSO) Act, 2012(with amendment in 2019):

Child Sexual Abuse is any type of sexual behavior directed towards a person under the age of 18 years. Any child below the age of consent may be deemed to have been sexually abused when, a sexually mature person has by design or by neglect of the usual societal or specific responsibilities in respect of the child engaged or permitted engagement of the child in activity of a sexual nature, which is intended to lead to the sexual gratification of the abusive person. Until 2012 it was the IPC provisions which were used to deal with the sexual offences irrespective of whether the victim is a child or adult because those provisions does not distinguish child from adult. Thus, in order to overcome this problem of child sexual abuse the government of India had brought the Protection Of Children from Sexual Offences (POCSO) Act, 2012.

The Protection of Children from Sexual Offences Act, 2012 was enacted in order to follow the guidelines issued for the best interest of the child in the Convention on the Rights of Child, adopted by the General Assembly of the UN. The Government of India ratified the said Convention on 11th December, 1992 whereby it had bound itself to secure best interest for every child in India. The Act specifically address the issue of sexual offences like sexual harassment, sexual assault and pornography committed against children. While explaining the object and scope of the POCSO Act the hon'ble Supreme Court observed that,

“.....the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to

secure the best interest of the child. On an avid and diligent discernment of the preamble, it is manifest that it recognizes the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. Best interest and well being are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The statement of objects and reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention, which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act.”¹³⁰

The act defines the term ‘child’ as any person who has not completed the age of 18 years.¹³¹ It recognizes and defines various types of sexual offences that are or may be committed against a child. The offences along with punishment are stated below:

Section 3 defines penetrative sexual assault to a child. As per the definition a person would be guilty of penetrative sexual assault if he penetrates his penis or

¹³⁰ *Eera through Dr. Manjula Krippendorf v. State (NCT of Delhi) and another* (2017) 15 SCC 133

¹³¹ POCSO Act, 2012, Sect. 2(1)(d)

inserts any part of his body or object into the vagina, anus, mouth or urethra of a child or makes the child to do so with him or any other person and so on.¹³²

The punishment for penetrative sexual assault is provided in section 4¹³³ under two headings. Firstly, sub-clause (1) of section 4 provides punishment for a minimum imprisonment of 10 years which may extend to life imprisonment along with fine. Secondly, Sub-clause (2) which is a new insertion to the act provides for more drastic punishment with minimum of 20 years imprisonment which may extend to remaining life of the convict along with fine if the victim is below 16 years of age. The new amendment had also added that the fine imposed should be reasonable enough to compensate the victim and incur the medical expenses.¹³⁴

Section 5 defines the list of activities which are to be treated as aggravated penetrative sexual abuse on a child. If the offence of penetrative sexual assault is committed by a person in power or authority such as police, member of armed forces, public servant, doctor, guardian of a custodial home, hospital staff, school teachers or members of management and so on, upon a child; within their custody or jurisdiction or if the child is physically or mentally challenged or is below 12 years etc. the convict shall be punished with a minimum of 20 years imprisonment

¹³² Sect. 3. Penetrative sexual assault.—A person is said to commit "penetrative sexual assault" if— (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or (d) 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.

¹³³ POCSO Amendment Act, 2019

¹³⁴ POCSO Act, 2012, Sect. 4(3)

which may extend to imprisonment for rest of his life with fine or with death.¹³⁵ Again the fine imposed should be sufficient for rehabilitation of the victim.

Sexual assault is defined under section 7 as non-penetrative sexual behavior of a person towards a child, which may include the act of touching the personal parts of a child such as breast, penis, vagina or anus. Simultaneously, if the person makes the child to do so the same to him/her or any other person it would also amount to sexual assault. The punishment for such offence is prescribed to be minimum of 3 year that can be extended to 5 years imprisonment with appropriate amount of fine.¹³⁶

The offence of Sexual assault is deemed to be aggravated in nature, if it is committed by a person in power or authority such as police, member of armed forces, public servant, doctor, guardian of a custodial home, hospital staff, school teachers or members of management and so on, upon a child; within their custody or jurisdiction or if the child is physically or mentally challenged or is below 12 years etc., the convict shall be punished with a minimum of 5 years imprisonment which may extend to 7 years imprisonment with fine.¹³⁷ Further, if any person forces or attempts to insert hormone, drug or substance in a child to make the child sexually mature before the natural age of maturity such act would also be consider as aggravated sexual assault.¹³⁸

The third type of offence recognized under the act is sexual harassment of a child.¹³⁹ Sexual harassment includes words, gestures, sounds or showing object made with intention to sexually abuse a child or act of following a child and so on.

¹³⁵ POCSO Amendment Act, 2019, Sect. 6

¹³⁶ POCSO Act, 2012, Sect. 8

¹³⁷ *Supra* note. 135, Sect. 6

¹³⁸ *Ibid.*, Sect. 9

¹³⁹ *Supra* note. 136, Sect. 11

However, the most important essential element to constitute the offence is intention of the abuser. Sexual harassment is defined as an offence under this act in order to bring the non-touch sexual abusive behavior within the ambit of POCSO Act so that no abuser goes unpunished. The punishment prescribed for the offence of sexual harassment is imprisonment for a maximum period of 3 years with fine.¹⁴⁰

The act in order to deal with pornographic act involving a child defines the offence of 'using a child for pornographic purpose'. A person would be held guilty of such offence if he uses a child in any form of media for sexual gratification.¹⁴¹ Such first time offender shall be punished with imprisonment which shall not be less than 5 years along with fine and if the offender has repeated the offence the minimum imprisonment will be 7 years with fine.¹⁴² However, as per the new amendment of 2019, if the offender commits any other offence along with offence under section 13, he shall be punished for both the offence.

The Act also declares possession or storage of obscene or pornographic material involving a child as an offence punishable under this act. For this purpose the act has classified three types of possession on the basis of its object.

- ✓ The first category is simple possession or storage of obscene or pornographic material involving a child and forgetting to erase the same with an intention to share those materials. For such offence the punishment is fine of amount 5 thousand rupees but if the offence is repeated the fine would increase to 10 thousand rupees.¹⁴³

¹⁴⁰ POCSO Amendment Act, 2019, Sect. 12

¹⁴¹ POCSO Act, 2012, Sect. 13

¹⁴² *Supra*. note. 140, Sect. 14

¹⁴³ *Ibid.*, Sect. 15(1)

- ✓ The second category is possession or storage of obscene or pornographic material involving a child with the object of propagating, transmitting or distributing with certain exceptions. In such cases the punishment may amount to 3 years imprisonment with fine.¹⁴⁴
- ✓ The third category is possession or storage of obscene or pornographic material involving a child with the intention to do business. This is the most severe form among the three and hence the punishment is minimum 3 years and maximum 5 years imprisonment with or without fine which increases to minimum 5 years and maximum 7 years imprisonment with or without fine in case of repeated offender.¹⁴⁵

Abetment of an offence defined under this act is also considered as an offence,¹⁴⁶ and therefore, section 18 states that, if a person abets an offence and the offence is committed as a result of such abetment, the abettor will be liable for the same amount of punishment as prescribed under the said provision as if he himself had committed the offence.¹⁴⁷ Section 18 further provides that attempt to commit an offence recognized by POCSO Act is itself an offence and the offender would be liable to half of the maximum punishment that is prescribed for accomplishment of the offence.

Apart from defining offences and providing punishment for such offences, the act also provides for various measures and procedures that need to be taken

¹⁴⁴ POCSO Amendment Act, 2019, Sect. 15(2)

¹⁴⁵ *Ibid.*, Sect. 15(3)

¹⁴⁶ POCSO Act, 2012, Sect. 16

¹⁴⁷ *Ibid.*, Sect. 17

care of by an individual or authority when he/she comes to know of such offence being committed against a child.

The act makes it obligatory for a person to inform the juvenile police unit or the local police if he comes to know of an offence of sexual abuse committed against a child or is about to be committed as soon as possible.¹⁴⁸ The police should record such information in a record register kept for such purpose preferably in the language known to the informant and should be read over to him/her.¹⁴⁹ In cases where the police found that the victim is in need of special care and protection, arrangement should be made for medical treatment or shelter home as the case may be within a period of 24 hours.¹⁵⁰ The police also have to inform the incident to the CWC(Child Welfare Committee) and Special Court stating the condition of the child and steps taken by police without unnecessary delay.¹⁵¹ The persons of media, hospitals, lodge, club etc. is bound to inform the juvenile police or local police regarding sexually exploitative material or object relating to child if it comes to their knowledge.¹⁵² If any person fails to inform the police under section 19(1) and if the police do not record the information as per section 19(2) he/she may be punished with imprisonment up to a term of 6 month with or without fine.¹⁵³ However, the punishment may increase to one year imprisonment if the person is a authority of an institution in which the offence took place and he failed to report the same.¹⁵⁴

The act bars the media from disclosing the identity of the victim child in any manner whatsoever without the prior permission of the Special Court trying the

¹⁴⁸ POCSO Act, 2012, Sect. 19(1)

¹⁴⁹ *Ibid.*, Sect. 19(2)

¹⁵⁰ *Ibid.*, Sect. 19(5)

¹⁵¹ *Ibid.*, Sect. 19(6)

¹⁵² *Ibid.*, Sect. 20

¹⁵³ *Ibid.*, Sect. 21(1)

¹⁵⁴ *Ibid.*, Sect. 21(2)

case.¹⁵⁵ If such disclosure is made in any manner like publication of name, photo, address, school etc. the publisher as well as the proprietor will be held jointly responsible.¹⁵⁶ In such cases the offender may be punished with imprisonment for a period of not less than 6 month and may extend to one year with or without fine.¹⁵⁷

The act provides with a brief procedure to be followed by a police officer while recording the statement of a child. The law states that it is always preferable that the statement is recorded by a woman police officer not below the rank of sub-inspector at any place of the child's choice or the residence of the child.¹⁵⁸ The officer should be in civil dress¹⁵⁹ and he should make sure that at any point of time; the child does not come in contact with the accused.¹⁶⁰ The police need to ensure that the child is not detained in the police station at night¹⁶¹ and that the identity of the child is not disclosed to the public or media.¹⁶²

Magistrate is empowered under section 164 of Cr.P.C to record statement and the Magistrate while recording such statements shall record the statement in the language in which the child deliver the statements.¹⁶³ However, the proviso under section 164 which allow the presence of an advocate during recording of statement is not applicable under section 25(2) of POCSO Act.

¹⁵⁵ POCSO Act, 2012, Section 23(2)

¹⁵⁶ *Ibid.*, Sect. 23(3)

¹⁵⁷ *Ibid.*, Sect. 23(4)

¹⁵⁸ *Ibid.*, Sect. 24(1)

¹⁵⁹ *Ibid.*, Sect. 24(2)

¹⁶⁰ *Ibid.*, Sect. 24(3)

¹⁶¹ *Ibid.*, Sect. 24(4)

¹⁶² *Ibid.*, Sect. 24(5)

¹⁶³ *Ibid.*, Sect. 25(1)

Section 26 provides some special procedure that need to be followed by the police officer or the magistrate while recording the statement of the child for better protection of the child and so that the child is not re-victimized.

- ✓ Firstly, the police officer or magistrate recording the statement should permit the parents or any person whom the child trust to be present during the entire process.
- ✓ Wherever, the magistrate think necessary may take the help of interpreter, translator or special educator at the cost of state.
- ✓ Thirdly, it is preferable to make a audio-visual arrangement for recording such statement.

Medical examination is compulsory for the victim of sexual abuse, that shall be done as per the provision laid down under section 164A of Cr.P.C.¹⁶⁴ Such examination shall be conducted in the presence of the parents or any other person whom the child trust¹⁶⁵ and in absence of such person the head of the hospital may nominate any women.¹⁶⁶ If the child is a girl examination is to be conducted by a women doctor.¹⁶⁷

This act provides for designation of a Special Court for each district to try the cases under POCSO Act for speedy disposal of case with an object to give quick justice to the victim. The State Government is empowered to designate such court in consultation with the Chief Justice of respective High Court.¹⁶⁸ The Special Court is empowered to presume that the offence of penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual

¹⁶⁴ POCSO Act, 2012, Section 27(1)

¹⁶⁵ *Ibid.*, Sect. 27(3)

¹⁶⁶ *Ibid.*, Sect. 27(4)

¹⁶⁷ *Ibid.*, Sect. 27(2)

¹⁶⁸ *Ibid.*, Sect. 28(1)

assault and sexual harassment is committed, or attempted, or abetted by the accused person i.e. the burden of proof will be upon the accused.¹⁶⁹

The offences under this act which requires ‘intention’ as an essential requirement for determining guilt of a accused, in such cases the Special Court may presume that ‘the accused committed the act with intention’.¹⁷⁰ However, it is to be noted that existence of intention should be proved beyond reasonable doubt to establish the case and the accused will get all the opportunity to prove that he did not had such mental element while doing the act.¹⁷¹

For every Special Court the State Government shall appoint one Special Public Prosecutor (SPP) with an experience of at least 7 years in practice for prosecuting the cases under registered under POCSO Act.¹⁷² The procedure and power of the Special Court while trying cases under this act are-

- ❖ The entire trial of the case shall be conducted *in camera*.¹⁷³
- ❖ The SPP or the defence Advocate shall put questions to the child only through the Special Court during Examination in- Chief, Cross Examination and Re-Examination.¹⁷⁴ The court should also make sure that the child is not re-victimised during trial by aggressive questioning or character assassination of the child¹⁷⁵ or by repeatedly calling him/her to the court.¹⁷⁶

¹⁶⁹ POCSO Act, 2012, Section 29

¹⁷⁰ *Ibid.*, Sect. 30(1)

¹⁷¹ *Ibid.*, Sect. 30(2)

¹⁷² *Ibid.*, Sect. 32

¹⁷³ *Ibid.*, Sect. 37

¹⁷⁴ *Ibid.*, Sect. 33(2)

¹⁷⁵ *Ibid.*, Sect. 33(6)

¹⁷⁶ *Ibid.*, Sect. 33(5)

- ❖ The court shall make arrangement for creating a child friendly atmosphere by allowing the parents or any person in whom the child trust to be present during trial of the case.¹⁷⁷ Further, the court shall allow frequent breaks to the child during the trial.¹⁷⁸
- ❖ In special cases, the Court may order to pay compensation along with punishment for immediate rehabilitation of the child if he is found to be suffering from physical or mental trauma.¹⁷⁹
- ❖ If there arise a confusion or dispute regarding the age of a child for the purpose of prosecution, the special court shall determine the age by satisfying itself beyond reasonable doubt.¹⁸⁰
- ❖ If the accused is itself a child then the trial will take place as per the Juvenile Justice(Care and Protection) Act, 2000.¹⁸¹
- ❖ The evidence of the child shall be recorded within a period of 30 days from the date in which the Special Court took cognizance of the case and if the court fails to do so it shall give reasons.¹⁸²
- ❖ The court shall make such arrangement that the victim does not face the accused at any time while coming to court.¹⁸³ In order to avoid such circumstance the Court can testify the child through video conferencing.¹⁸⁴

¹⁷⁷ POCSO Act, 2012, Section 33(4)

¹⁷⁸ *Ibid.*, Sect. 33(3)

¹⁷⁹ *Ibid.*, Sect. 33(8)

¹⁸⁰ *Ibid.*, Sect. 34(2)

¹⁸¹ *Ibid.*, Sect. 34(1)

¹⁸² *Ibid.*, Sect. 35(1)

¹⁸³ *Ibid.*, Sect. 36(1)

¹⁸⁴ *Ibid.*, Sect. 36(2)

- ❖ Every possible effort should be made by the Special Court to complete the trial within a period of one year for the sake of speedy justice.¹⁸⁵
- ❖ The court may take the help of translator or interpreter or special educator in cases where the court feels necessity at the state expense.¹⁸⁶

The act also provides facility to the child to take the help and assistance of organization and institution who are expert in the fields of psychology, mental health and so on during trial as well as before trial.¹⁸⁷ The child also have a right to consult or take assistance of a lawyer of his choice or his family for offence under POCSO Act subject to the proviso of Section 301 of Cr.P.C.¹⁸⁸ For proper monitoring of implementation of the POCSO Act, the Act itself empowers the NCPCR and SCPCR constituted under the Commissions for Protection of Child Rights Act, 2005.¹⁸⁹ For the success of any law the most important this is awareness about the law and hence the POCSO Act inserted a provision which cast a responsibility upon the Central and State Government to aware the public as well as train the public servants including Police officials for effective implementation of the act.¹⁹⁰

3.3.13 Provisions under the Protection Of Children from Sexual Offences (POCSO) Rules, 2020:

The Central Government makes the Protection Of Children from Sexual Offences (POCSO) Rules, 2020 under the power provided to it under section 45 of

¹⁸⁵ POCSO Act, 2012, Section 35(2)

¹⁸⁶ *Ibid.*, Sect. 38

¹⁸⁷ *Ibid.*, Sect. 39

¹⁸⁸ *Ibid.*, Sect. 40

¹⁸⁹ *Ibid.*, Sect. 44

¹⁹⁰ *Ibid.*, Sect. 43

the POCSO Act, 2012 whereby it replaces the Protection Of Children from Sexual Offences (POCSO) Rules, 2012.

Under Rule 3(1), the Central Government as well as the State Government should prepare curriculum and study material for children that need to be distributed in school among the students. The material or curriculum prepared should be age appropriate and should be informative regarding the issues such as; gender sensitisation, measures to prevent themselves from being victim of sexual abuse, reporting mechanism, Child line service and so on.

The respective Government shall take steps to disseminate all the above mentioned information in public places, like; Bus Stop, Railway Station, Police Station, Panchayat Office, Municipality Office, Cinema Hall, Colleges, Internet, Television, Radio etc.¹⁹¹ The Government shall also take any other measures to spread awareness on the problem of CSA and its preventive measures as well as services available for a victim or would be victim.¹⁹² Apart from awareness program, the respective Governments should take initiative to give periodic training and refresher course to all the employees working in any sector who come in close contact with child on day to day basis, such as; school teacher, police personal, NGO'S working for children etc.¹⁹³

The institutions or organisations who keep children as resident shall must ensure police verification and background check of every staff member working in such institution or organisation irrespective of whether the nature of employment is a permanent or contractual.¹⁹⁴ Along with the above the management of such

¹⁹¹ POCSO Rules, 2020, Rule 3(2)

¹⁹² *Ibid.*, Rule 3(3)

¹⁹³ *Ibid.*, Rule 3(6)

¹⁹⁴ *Ibid.*, Rule 3(4)

institutions are duty bound to organise sensitisation program to train and aware its employees.

When any information is given to the Special Juvenile Police Unit (hereinafter referred to as SJPU) or the local police, regarding a commission of an offence or apprehension of offence as provided under Section 19(1), the officer taking the report shall immediately inform the person giving the information about his/her name, designation, phone number and the name & designation of his superior officer under whom he/she works.¹⁹⁵

If the information regarding the commission of offence or apprehension of offence is received in the Child helpline service i.e. 1098, the Child Line shall immediately forward the same to the SJPU or local police for necessary action.¹⁹⁶ The police after receiving the information shall register FIR and thereupon proceed as per the relevant provisions of Cr.P.C and POCSO Act.¹⁹⁷ In certain cases, the police should make appropriate arrangement for forensic test on an immediate basis.¹⁹⁸

The SJPU or the local police need to produce the child before the Child Welfare Committee(CWC) within 24 hours if the police is of the opinion that the child is in need of care and protection because of the fact that the child resides in the same house hold where the person against whom the complaint was made resides or if the child is in a shelter home without parental support.¹⁹⁹ The production of the child before CWC shall be accompanied by a application and reasoning as to why he need special care.

¹⁹⁵ POCSO Rules, 2020, Rule 4(1)

¹⁹⁶ *Ibid.*, Rule 4(2)

¹⁹⁷ *Ibid.*, Rule 4(3)(a)

¹⁹⁸ *Ibid.*, Rule 4(3)(d)

¹⁹⁹ *Ibid.*, Rule 4(4)

The CWC after taking cognizance over the matter should follow the procedure prescribed under section 31 of JJ Act to determine the same within a period of three days from the date of taking cognizance. The CWC can take the help off NGO or any social worker to find out whether the child is actually in need of care and protection or not and if yes should he/she be taken out of the present custody.²⁰⁰ However, while determining the custody of the child, the child opinion and preference is to be taken into consideration.²⁰¹

The CWC have a duty to inform the child or his parents or any other person on whom the child has trust that, the child could take the help and assistance of support persons if required, who shall assist the child in the pre-trial as well as trial period.²⁰² If such assistance is claimed by the child, the CWC should appoint such person at the state expense. Such support persons shall maintain the confidentiality of the child regarding the case but have to inform regarding the proceeding of the case to the child or his parents or the person whom the child trust.²⁰³ The appointment of support persons shall be notified to the Special Court within 24 hours by the SJPU or local police after they receive the information regarding such appointment from the CWC.²⁰⁴ The CWC may ask for monthly report of the child and his status from the support persons which they need to submit as directed.²⁰⁵ The support persons may be terminated by the CWC at any time if the child apply for the same or if the child complain regarding such Support Persons.²⁰⁶ The SJPU or the local police as the case may be and the

²⁰⁰ POCSO Rules, 2020, Rule 4(5)

²⁰¹ *Ibid.*, Rule 4(6)

²⁰² *Ibid.*, Rule 4(8)

²⁰³ *Ibid.*, Rule 4(9)

²⁰⁴ *Ibid.*, Rule 4(10)

²⁰⁵ *Ibid.*, Rule 4(12)

²⁰⁶ *Ibid.*, Rule 4(11)

support persons shall provide the child or his guardian all information related to the case including the services and facilities available to the child.²⁰⁷

Rule 5 provides the rules regarding support persons, experts, translators, interpreters and special educators. As per the Sub Rule 1 of Rule 5 it is the duty of the DCPU to maintain the list of persons who may be engaged as support persons, experts, translators, interpreters and special educators whenever necessary. There should be a separate list for every district a copy of which shall be provided to the SJPU, local police, CWC and the Special Court. The persons who are appointed as support persons, experts, translators, interpreters and special educators shall be qualified and experienced to perform their duty as prescribed under these Rules.²⁰⁸ All these persons are bound to maintain confidentiality of the child and the proceeding of the case.²⁰⁹

Rule 6 provides the steps to be taken by Medical staff when a child victim is taken to the hospital for emergency medical care by SJPU or local Police. The hospital shall provide with all the necessary medical help without waiting for any requisition from magistrate for doing the same.²¹⁰ The treatment and examinations of the child shall be performed in confidentiality in the presence of the parents or guardian or any other person whom the child trust so that the child is not re-victimised.²¹¹ The registered medical practitioner may collect sample for forensic test if he things necessary as per the proviso of POCSO Act.²¹² If the doctor found that the girl is pregnant, the victim should be counselled and the parents or guardian or the person whom the child trust should be informed about the lawful

²⁰⁷ POCSO Rules, 2020, Rule 4(14 and 15)

²⁰⁸ *Ibid.*, Rule 5(2)

²⁰⁹ *Ibid.*, Rule 5(12)

²¹⁰ *Ibid.*, Rule 6(3 and 4)

²¹¹ *Ibid.*, Rule 6(2)

²¹² *Ibid.*, Rule 6(6)

option available to the victim under the Medical Termination of Pregnancy Act 1971.²¹³ After examination and treatment of the victim, the Medical Practitioner shall compulsorily prepare a report on the condition of the child within 24 hours, a copy of which need to be handed over to the Officer bringing the child to the hospital.²¹⁴

The CWC have a duty to recommend the DLSA to provide with necessary legal aid and assistance, which the victim deserves as per the provisions of the Legal Services Authorities Act, 1987.²¹⁵ The CWC may also make recommendation to the DLSA or the DCPU for making immediate payment to the child if the CWC is of the opinion that the child is in need of some special relief for essentials.²¹⁶ In case such recommendation is made the payment should be made within a period of one week from the date of recommendation.

Rule 9 states that the Special court is empowered to order interim compensation to a child victim for relief and rehabilitation suo motto or on an application on behalf of the child after registration of the FIR. The interim compensation awarded should be adjusted with the final compensation that is awarded to the child at the end of trial. Such final compensation should be paid by the State Government within a period of 30 days, out of the Victim Compensation fund or any other fund established for the purpose under section 357 A of Cr.P.C. The final compensation shall be on recommended by taking into consideration the various factors listed out under Rule 9 (3)²¹⁷ of the POCSO Rules, 2020.

²¹³ POCSO Rules, 2020, Rule 6(7)

²¹⁴ *Ibid.*, Rule 6(5)

²¹⁵ *Ibid.*, Rule 7

²¹⁶ *Ibid.*, Rule 8

²¹⁷ *Ibid.*, Rule 9(3) Where the Special Court, under sub-section (8) of section 33 of the Act read with sub-sections (2) and (3) of section 357A of the Code of Criminal Procedure, 1973 (2 of 1974) makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss

The fine imposed by the Special Court while convicting the offender under the POCSO Act shall be paid to the victim within specified period and the realisation of the fine amount from the convict should be monitored by CWC in co-ordination with the DLSA and DCPU.²¹⁸

Rule 11 provided with the procedure to report pornographic materials involving a child to the SJPU or local police or Cyber branch whenever a person notice such pornographic material available with him or any other person. It also provides the steps that need to be taken by the police of cyber cell after receiving such information.

The NCPCR and the SCPCR are entrusted with certain special duty under Rule 12 of the POCSO Rules to monitor the implementation of the POCSA Act provisions in addition to the functions conferred under the Commissions for Protection of Child Rights Act, 2005. The specific functions are-

- To monitor the steps taken by the State Government for designation of Special courts and appointment of Special Public Prosecutor in those courts

or injury caused to the victim, including the following:- (i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child; (ii) the expenditure incurred or likely to be incurred on child's medical treatment for physical or mental health or on both; (iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason (iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason; (v) the relationship of the child to the offender, if any; (vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time; (vii) whether the child became pregnant as a result of the offence; (viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence; (ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence; (x) any disability suffered by the child as a result of the offence; (xi) financial condition of the child against whom the offence has been committed so as to determine such child's need for rehabilitation; (xii) any other factor that the Special Court may consider to be relevant

²¹⁸ POCSO Rules, 2020, Rule 10

- To monitor formulation of guidelines to be used by the NGO's, support persons, professionals etc under the POCSO Act while assisting the child.
- To supervise the modules prepared for training the official and persons associated with child
- Support Government in spreading awareness about the POCSO Act through all possible means
- Collect information and prepare report on various aspects of CSA specially under POCSO Act, such as; cases reported and disposed off.

3.4. Discussion:

Constitution of India that was drafted and adopted by independent India is the lengthiest written constitution of the world, which had a burden to run the world's largest democracy, always have a answer to every socio-legal problem. In order to address the problem of Child Sexual Abuse although the constitution do not have any direct provision but certain provisions on interpretation give solution to such problem.

Thorough analysis of the constitutional brings to light the various provisions that can be applicable for protection of children from sexual abuse along with other type of exploitation. The expression 'social justice' within the preamble of the constitution indicates achieving welfare of all people including children. Clause (3) of article 15 enables the state to make special provision for children and Article 21 always gives protection to every individual to live a life with dignity. Article 23 and 24 further enshrines fundamental protection against exploitation, which definitely include sexual exploitation.

Article 39(e), 39(f), 45 and 46 imposes duty upon the state to take all possible steps for welfare of the children community including protection from abuse and exploitation. The constitution also cast a moral obligation upon the parents of every child

to protect their children from all sorts of danger and give them dignified life by inserting section clause 'k' to Article 51A.

The procedural law namely the Cr.P.C and Evidence Act plays significant role in all criminal cases. On analyzing the procedural law in references to criminal cases it was found that many of the provisions were specifically applicable for sexual offences only, whereas; a few other were general provisions which are also applicable to sexual offences along with other offences.

Section 53A was inserted in 2005 to the Code which provide detail procedure of examination that need to be followed by the police and medical staff including the registered medical practitioner after arrest of the accused in rape cases, so that the prosecution have sufficient evidence to establish the case. Again, section 273 of the code was amended in the year 2013 to protect the girl child victim of sexual offence in a manner that she now need not give her statement in presence of the accused. This proviso had made it easy for a child victim of rape or any other sexual offence, to not face the accused during the entire trial. The only demerit of this proviso is that it is female centric and not applicable to a boy or transgender victim of sexual assault or abuse which is quite common nowadays.

In order to produce strong evidence in cases of sexual abuse clause 5-A was inserted to section 164 of the Code in the year 2013 which makes it obligatory for the police to take the victim of sexual offences to the nearest magistrate and it is mandatory for the magistrate to record the statement of the victim on oath. This provision is quite effective as it can be used for contradiction or corroboration as well as serves as substantial evidence, with greater evidentiary value in comparison to a statement recorded by police under section 162 of the code.

The Criminal Law Amendment Act, 2018 is another step to prevent immediate easy bail to the accused of rape or aggravated rape by insertion of sub clause (1) to section

439 which states that court prior to granting bail have to issue notice to the Public Prosecutor. Provision has also been made for quick disposal of appeal, *i.e.* an appeal from a judgement of rape should be disposed off within a period of six(6) months by the appellate court for the sake of speedy justice to the victim.

For the purpose of collecting evidence and proper medical treatment to the victim of rape or attempt to rape, it was made compulsory for immediate medical examination of the victim by inserting the proviso of 164-A to the Code. The private hospitals along with Govt. hospitals were also entrusted with the duty to give treatment to the victim of rape without any charge from the victim. In addition to these, section 357 A was inserted for the welfare of the victim which can be used in order to claim compensation for his/her rehabilitation.

While analyzing the Evidence Act, it was found that Section 53A and 114 A are the most important provisions, which are useful during trial of sexual offences. These provisions stop the defendant from producing any evidence regarding previous sexual experience of the victim or questions relating to her immoral character.

One of the oldest substantial law that defines and punishes offense in India is IPC which has broad application for almost every offence. The IPC although is a old legislation but still there are various sections which recognizes sexual offences and prescribes strict & proportionate punishment for those offences with an idea of deterrence. The phrase 'sexual abuse of children' is not defined and recognized as a specific offence under IPC but it has recognized the several types of sexual abuse as offence under the headings, namely; sale of obscene object to young persons, indecent assault on a women, sexual harassment, use of criminal force to disrobe a women, voyeurism, following a women with malafide intention, inducing a women to compel her for forceful marriage, procreation of minor girl, importation of girl from foreign countries, selling a minor for purpose of prostitution, rape, aggravated form of rape and any act intending to insult the

modesty of a women. There are few provisions which are although directly not related to sexual offence but are co-related, such as; kidnapping, trafficking and exploitation of a trafficked person.

Among the many, few of the provisions are having special mention of girl child such as procreation of minor girl, importation of girl from foreign countries, rape of minor girl & selling a minor for purpose of prostitution and the rest are all women centric, i.e. applicable for women of all age. The sections like 376AB, 376DA & 376DB are special provisions inserted lately through amendment which prescribes severe punishment for offences of rape on girl child below 12 years of age, gang rape of girl child below the age of 16 years and gang rape of girl child below 12 years of age. It simply means that provisions under IPC are not covering the offence of sexual abuse of a male child or a transgender, which is definitely a point of criticism of these laws. Moreover, the exception no. 2 to definition of rape under section 375 IPC is not acceptable because as per the exception, a sexual intercourse with a married girl by her spouse would not amount to rape even though the girl is below 18 years. This provision encourages a male to marry a girl child just above 15 years age, which thereafter result in sexual abuse of the girl child if we go by the provision of POCSO Act and Prohibition of Child Marriage Act.

Certain other special legislation are available in addition to IPC which directly or indirectly deals with the right and safeguard of a child. The JJ Act deals with two types of children namely 'juvenile in conflict with law' & 'child in need of care and protection'. The act provides with special procedure that need to be adopted for a child in conflict with law after his taking into custody, such as; not detaining the child in police station at night, keeping the child in separate custody away from the jail etc. Similarly, there are provision for children in need of care and protection such as; the victim of sexual abuse, who are to be treated in a child friendly manner and proper arrangement is made for their rehabilitation. The JJ Act not only take care of the victim of abuse but also it takes care that a child in conflict with law is not abused in the hands of authorities.

There are also provision under the “*Child and Adolescence Labour (Prohibition and Regulation) Act, 1986*” for protection of a child from physical and emotional abuse at the hands of employer by prohibiting employment of children below 14 years and restrictive employment of children(adolescence as per the Act) between the age group of 14 to 18 years. This act is although not applicable for sexual abuse on child, but it acts as a preventive measure because many times it is seen that children are abused by the employers taking advantage of dominance but this act prohibit employment of child below 14 years whereby the chance of abuse at the hands of employer are reduced.

The “*Commission for Protection of Child Rights Act*” is of much importance because it is this act due to which the NCPCR and SCPCR with wide range of power and duty came into existence with the sole object to protect the rights of children from being violated and to give extensive protection to the children’s from all forms of abuse.

Child marriage being a cause of sexual abuse of child, the Parliament of India enacted the “*Prohibition of Child Marriage Act, 2006*”(herein after PCMA) replacing the old “*Child Marriage Restraint Act, 1929*” with the object of discouraging and eradicating child marriage and the matters incidental there too by declaring them to be a offence under the Act. This legislation too suffers from some drawbacks that need rectification. To start with, there is no provision for punishment of the Child Marriage Prohibition Officer(CMPO) for dereliction of his/her duty as prescribes under the act as a consequence of which the CMPO is not liable and can neglect his duty. The PCMA is in contradictory to the personal laws, such as; Muslim Personal law. The Muslim Personal law allows a girl to get married once she attains puberty without consideration of age. In the case of *Mohd. Samim V. State of Haryana*²¹⁹ and ors, the Punjab & Haryana High Court held that marriage of children after attaining puberty is not illegal and do not fall under the scope of PCMA. Again, child marriage is declared to be voidable at the option

²¹⁹ Cri. W. P. No. 532 of 2018, Date of decision: 26.09.2018

of parties under section 3 of the act which is a sever drawback as because in maximum cases the party do not approach the court for such order of nullity and thereby child sexual abuse continues in the gaze of child marriage.

Another legislation namely, “*The Immoral Trafficking (Prevention) Act, 1956*”, with the primary object to prevent immoral trafficking of human being for purposes like prostitution, sex trade, trade in human organ and so on. The act prescribes stringent action against inducting children below 16 years and minor below 18 years in the offence of procuring, inducing or taking a person for the sake of prostitution. The punishment prescribed for the offences are not less than 7 years imprisonment which may extend to life imprisonment. However, the drawback of the act lies in the fact that it differentiates the term ‘child’ from ‘minor’ on the basis of age, which contradicts the definition of child under the POCSO Act. Due to the difference in definition of the term child from minor, punishment prescribed under section 5 of the act also differs. As per section 5, if the offence of procuring, inducing or taking a person for purpose of prostitution take place against a child (below 16 years as per the definition of the act), the maximum punishment prescribed is imprisonment for life, but if the same offence is committed against a minor i.e. below 18 but above 16 years of age, the maximum punishment is 14 years imprisonment which is not justifiable by means.

The “*Legal Services Authority Act*” is an additional statute that empowers the child victims to get legal aid and assistance from the DLSA or SLISA as the case may be during pre trial and trial of the case. The DLSA established under the act is also responsible for giving compensation under the Victim Compensation fund on the order of Special Court or recommendation of the CWC.

To prevent indecent representation of women the act, namely, “*Indecent Representation of Women (Prohibition) Act*” was passed but unfortunately the act did not define the term ‘women’ and hence, it leads to a confusion that whether a girl child would

be considered as women under this act to punish a culprit who indecently represent a girl child. However, if literally interpreted the term 'Women' would include only a adult female and a girl who attained her puberty.

Sexual abuse being a violation of human rights, "*the Protection of Human Rights Act*" on broader interpretation encompasses the provision to protect children from sexual exploitation. The Act provides for establishment of two commissions namely, NHRC and SHRS to look after the cases of human right violation and the matters connected thereto. For this, the act had empowered these commissions with wide range of powers and duties. As child come under the definition of human, hence the commissions are also responsible to look after the rights of children, so that they do not become victim of any abuse or exploitation and if are victimized actions need to be taken against the offender. The Act also provides for establishment of Human Rights Court in each district for fast tract disposal of matters relating to human rights.

Sexual harassment which is a type of sexual abuse is addressed by a special legislation namely, "*Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*", in addition to the IPC provisions. However, this legislation is applicable only for those sexual harassment which takes place against the working women in the work place either by the employer or her co workers. The scope of the act is limited to working women but the provision under this act can be invoked if the victim is a girl child worker above 14 years which is permitted by law. The term '*sexual harassment*' has been given the widest possible meaning in the definition under the act.

In order to deal with Child Pornography the "*Information Technology Act*" can be utilize for penalizing any act related to publishing or transmitting any material depicting children in sexually explicit act in the internet. Further, section 75 of the act gives extra territorial jurisdiction, so that an offender who commits any offence under this act and is out of India can be punish. The extra territorial jurisdiction gives extra power to the

enforcement machinery so that they could prevent such crime, but it also potent enough to generate conflict of jurisdiction in future between nations.

Until 2012, there was no specific legislation enacted to address the problem of sexual offences against the children irrespective of his/her gender. As a result of which even the most sensitive issues of CSA were dealt in under the IPC and other related laws which again mostly did not differentiate between adult and child victim. Moreover, the provisions that dealt with sexual offences were only applicable in cases where the victim is a female child. Thus, the challenge for law was that the male child or transgender child victim of CSA had no recourse to law, since it was a presumption that only female could be victim of CSA at the hands of male.

In order to sought out these problems the POCSO Act was enacted in the year 2012 for specifically addressing the problem of CSA which was amended in the year 2019 for enhancement of punishment under the Act so as to deter the perpetrators' and ensure safety & security for a child. The act is gender neutral and is applicable for every child under the age of 18 years irrespective of his/her gender which means that this act has clearly recognized that CSA can take place against a male, female or even a transgender child.

The act also recognizes that apart from offence of penetrative sexual assault & aggressive penetrative sexual assault even a female or transgender offender can commit all other offences defined and punishable under this act. Six types of offences are recognized under this act. They are-

- Penetrative sexual assault
- Aggravated penetrative sexual assault
- Sexual assault
- Aggravated sexual assault
- Sexual harassment

➤ Using a child for pornographic purpose

All the possible types of sexual abuse that can be committed against a child were inserted under this act. Abetment and attempt to commit any of the offence is also made punishable offence under the act. Even the act of non-reporting a offence to the police or police refusing to register a case under this act is also a punishable offence.

The punishments prescribed under this law are stringent and are commensurate with the gravity of the offence specifically after the amendment in the year 2019. For every offence, a minimum punishment is prescribed with a maximum punishment of death sentence for offence like aggravated penetrative sexual assault upon a child.

To see that the victim is not re-victimized in the hands of enforcement agencies, the act has made few special arrangements, which are-

- Provision for Special Court and Special Public Prosecutor, for speedy disposal of case with child friendly trial procedure.
- Burden of proof upon the accused
- Non-disclosure of identity of the child
- Recording of statement of the victim by magistrate instead of Police
- Production of child before the CWC for immediate and adequate care and protection
- Evidence through video conferencing so that the victim do not face the accused
- Provisions for in-camera trial
- Interim compensation and final compensation to the victim
- Free legal aid and assistance from DLSA
- Appointment of Support persons for the help and assistance of the Victim
- Complete trial within a period of one year

Apart from the above provisions the act entrust duty upon the government for making public aware about such offence and provision about the act. For implementation of the act the NCPCR & SCPCR are authorised with the power to supervise and monitor the steps taken by the enforcement machineries in implementation of the act.

However, although the POCSO Act has many positive provisions for dealing with the problem of CSA but lacunas stand as hurdle in achieving the object of the act. They are-

Section 24(1) of the POCSO Act makes a provision that a women police officer should record the statement of the child victim, so that, the child feel comfortable and do not hesitate while giving his/her statement. This provision is not satisfactory because a male child above 14 years, i.e. in the age of adolescence will never feel comfortable to state experience regarding his sexual exploitation before a officer of opposite gender.

The provision under section 26(4) of POCSO Act which provide for audio-visual recording of statement made by child before the police and magistrate is not mandatory to be followed and hence the person taking the statement least bother about such arrangement which hampers the object with which the provision was inserted in the act.

No minimum punishment has been prescribed for the offence of sexual harassment under section 12 of the act which means that the offender may get very little punishment which may not have any deterrent effect.

The minimum experience required for appointment of Special Public Prosecutor under the POCSO Act is 7 years of standing in court which is contradictory to Section 24(8) of Cr.P.C which prescribes 10 years as period of experience for being eligible to be appointed as Special Public Prosecutor for a Class of cases.

In order to supplement the POCSO Act, the POCSO Rules were framed in the year 2012 itself but recently it was repealed and a new set of rules were laid down in the year 2020.

These rules are necessary for guiding the enforcement machineries under the POCSO Act while discharging their duties. The key provisions under these rules are-

- Steps and Procedure to be adopted by Government, NCPCR & SCPCR for awareness generation of general public and capacity building of the officials
- Procedure to be followed by the Juvenile Police Unit or local police and the CWC, DLSA & DCPU regarding care and protection of child victim
- Rules regarding appointment, qualification, engagement, duties, and removal of interpreter, translator, special educator, expert and support persons
- Rules regarding medical aid, legal aid, special relief, compensation, reporting of pornographic material, and monitoring the implementation of the act.

Among all these municipal laws it is only the POCSO Act and the POCSO Rules that are specifically meant for protection of Children irrespective of gender from the sexual offences that are committed against them. All other legislations including the POCSO Act are having some lacunas in them, which need rectification for properly addressing the problem of CSA in India.