

# **CHILD INCEST: IS IT TIME TO RELOOK AT POCSO ACT, 2012?**

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## **Introduction**

A home and family are boded to be a sanctuary for a child's physical, psychological, and emotional well-being but tragically, this is not always the case. Child incest is extensively acknowledged as a mass epidemiological obstacle, and pegging it away is a quandary faced by nations around the globe all alike. But in India, deficiencies in both state and community responses, add to the problem. Studies augur, that children victimized by a family member, often prolong the communication of the incident, sensing remorse and abashment, and fearing ramifications. Furthermore, POCSO Act, 2012, is inconsistent with rape law as provided under S. 375 of the IPC and the personal laws governing marriages. Thus, there is a need to study the laws governing child incest in light of international laws in this regard as well as the stand-point of Indian Judiciary in the present shifting paradigm. An endeavour, to carve up the paper into three sections, has been made, wherein, the first part brings home the infirmities in the legislative framework. The second part attempts to throw light upon the view-point adopted by the judicial mechanism and the third part concludes the research with certain improvements in the legal system as suggested by the researcher.

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## **PART – I**

### **The Standpoint of Indian Judiciary with Respect to the Issue of Child Incest**

The major controversy as regards the instances of Sexual Abuse of minors within the domestic set-up, is the double- standard slant assumed by the legislature, towards married girls falling within the age-bracket of 15-18 years. Whereas, a primal comprehension of the statutory provisions establishes the rule that sexual intercourse, even forcefully performed on a girl aged between 15 and 18 years, is NOT rape, if the perpetrator happens to be her husband, the judiciary apparently tends to take a different standpoint on the question of IFCSA from that of legislators, as is manifest from its discernment in the case – *Independent Thought v. Union of India and Another*<sup>1</sup> It was via this judgment that the Apex Court of the country demonstrates an opinion in stark contrast to the clear rule contained in the Exception to S. 375 of IPC, which absolves the criminal liability of a man for forcing carnal intercourse on an under-aged girl, for a simple reason, that he is her husband.

### **Facts and Submissions of the Case**

A writ petition was filed u/A. 32 by an NGO- Independent Thought with a view to draw the attention of the Court on the violation of the rights of the girls who are married and are between 15 and 18 years of age.<sup>2</sup>

It was submitted by the petitioners that merely the fact that a girl in that age bracket has been given in marriage doesn't mean that the girl ceases to be a child or that she has become mentally and physically capable of indulging in sexual activity. The provision takes away the right of a married girl so aged to refuse

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<sup>1</sup> (2017) 10 SCC 800

<sup>2</sup> Independent Thought v. Union of India, (2017) 10 SCC 800, para. 3

to a sexual indulgence, as well as her right to object to a non-consensual sexual intercourse.<sup>3</sup>

The provision places females within this category at a great disadvantageous position and is in gross violation of the provision and spirit of Art.15 (3). It has a propensity to place the husband of such a woman in absolute charge of her and leaves him to treat her as he pleases.

The counter contentions of the opposite counsels centered around the idea that if sexual indulgence of a married couple were to be brought in contempt in court of law, for the reasons submitted by the supporters of the motion, it would result in disturbing the sanctity of the very institution of marriage. Since in India, child marriages are a very glaringly existing social phenomenon, a whole slew of criminal cases would be instituted and marriages and families broken, if the provision were amended to be given the argued effect.<sup>4</sup>

### **Court Judgment and the Reasons Thereof**

1. The Court deliberated on all the issues raised and contentions and arguments forwarded by the counsels appearing both, for the motion and against the motion. On the question of incongruity between the provisions of the POCSO Act and the exception to s.375, IPC, the Court held that there is a need to cogitate ss. 5 and 41 of the IPC along with s.42A of the POCSO Act.<sup>5</sup> S.5<sup>6</sup> provides for a special law to have an over-riding effect over the provisions of IPC, while s.41<sup>7</sup> defines special law as a law applicable to a particular subject. S. 42A<sup>8</sup> of the

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<sup>3</sup> Supra note 1, para. 4 and 5

<sup>4</sup> Supra note 1, para. 8

<sup>5</sup> Supra note 1, para. 49

<sup>6</sup> *Id*

<sup>7</sup> *Id*

<sup>8</sup> S.42A of the Act is not in derogation of any other law. – the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions

POCSO Act provides for the Act to be in addition to and not in derogation of any other law and to have an over-riding effect in the event of inconsistency. (The provision was added by Criminal Law Amendment Act, 2013, based on the recommendations of Justice Verma Committee, which came into effect on Feb. 3, 2013.)

2. The Court also opined that it would be wise for that States to follow the example of Karnataka in so much as the State Government has inserted sub-section (1A) to section 3 of the PCMA, voiding child marriages altogether and thus ruling out the scope for contended confusion created by the apparently contradictory provisions.<sup>9</sup>
3. The Court in its words as under, rebuffed the demand of the illusory contrariety in the provisions of both the Acts:

“An anomalous state of affairs exists on a combined reading of the IPC and the POCSO Act. An unmarried girl below 18 years of age could be a victim of rape under the IPC and a victim of penetrative sexual assault under the POCSO Act. Such a victim might have the solace (if we may say so) of prosecuting the rapist. A married girl between 15 and 18 years of age could be a victim of aggravated penetrative sexual assault under the POCSO Act, but she cannot be a victim of rape under the IPC if the rapist is her husband since the IPC does not recognize such penetrative sexual assault as rape. Therefore, such a girl child has no recourse to law under the provisions of the IPC notwithstanding that the marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the POCSO Act. We see no rationale for such an artificial distinction.”

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of this Act shall have over-riding effect on the provisions of any such law to the extent of the inconsistency.

<sup>9</sup> Supra note 2, para. 75

Thus, the Court taking a diverging route from the statute book held that sexual intercourse by a man with his own minor wife, whether consensual or non-consensual, is rape and settled the long-standing controversy for once and all.

## **PART – II**

### **Lacunae in the Legal Provisions Pertaining to Child Incest**

The majority of the problematic scenario pertaining to child incest that exists, owes to the legislative gaps. It is because of the infirmities in the laws that the judicial activism too, fails in the face of constitutional morality. There are patent gaps in the legislative framework as it is, and judiciary cannot be assigned the task of remedying the shortcomings of the legislature, banking on precedents. Nor can the executive be expected to act in a void of provisions to act upon. Thus, it is important to get an extensive understanding of the legislative shortcomings which have been discussed in three parts as under:

- i) shortcomings in IPC
- ii) shortcomings in POCSO Act
- iii) the Frailties in IPC Provisions relating to Sexual Violation of a Minor

The provisions of IPC dealing with sexual offences against children, albeit, indirectly suffer from certain gaps, which are:

1. An incestuous relationship, in the absence of a distinct offence, could only be brought indirectly within the purview of IPC only if it amounted to 'child-rape' (when the victim of incest is below 18 years of age.)<sup>10</sup> IPC, 1860, thus, does not forbid sexual intercourse within consanguinity unless it amounts to 'incest-child- rape'. It, thereby, does not make any distinction between an

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<sup>10</sup> Gajrajsingh v. State of M. P., 2000 CriLJ 3765; Pooran Ram v. State of Rajasthan, 2001 CriLJ 91 and Mangoo Khan v. State of Rajasthan, 2001 CriLJ 3001.

incestuous relative and a stranger who establishes sexual liaison with either an under-aged girl (with or without her consent). It is needless to mention that the 'child-rape' - 'sexual abuse outside family' - is obviously different from the 'incest-child-rape' - 'sexual abuse within family'. The latter is not merely linked with exploitation of the (victim) child by a person because of his position of authority and trust but it also is the abuse of the relationship of trust and dependency. Such a peculiar relationship gives an ample opportunity to the person to 'persuade', by resorting to his familial exploitative and pressure tactics, his victim child for the sexual relationship and to perpetuate it. The 'incest-child-rape', compared to the 'child-rape', invariably, leads to a continuous sexual exploitation, wherein the child (even after the age of statutory consent) does not have any other alternative except to yield to a variety of pressures from the perpetrator and to suffer in silence.<sup>11</sup>

In fact, such an abuse of relationship of trust and dependency deserves to be treated as an 'aggravating factor' while quantifying punitive measures against the perpetrators. But provisions of sec. 375 r/w 376, IPC, do not mandate such judicial discretion.<sup>12</sup>

2. Next, the provisions relating to the offence of rape, as contained in s.375 of IPC are gender specific in nature and they do not encompass the situation where a male child has been violated and thus, in absence of any log with respect to male victims, section 377 of IPC had to be attracted.<sup>13</sup>

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<sup>11</sup>Sudesh Jhaku v. K.C.J., 1998 CriLJ (Delhi); K. I. Vibhute, Sexual Violence against Children and the Indian Penal Code: Proposals for Reform 22 DLR 21-43 (2000)

<sup>12</sup> K.I. Vibhute, Incest: A Blissful or Miserable Omission of the Indian Penal Code of 1860? 44 JILI 85(2002)

<sup>13</sup> The Indian Penal Code, 1860, s.377. Unnatural offences.— whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with

3. Lastly, the main provisions read with the explanations make it amply transparent that the case of domestic child sexual abuse would fall within the purview of sections 375 and 377 only if there were a violation of the child's body by the way of penetration whereas the concept of sexual offences includes within itself a wide range of offensive sexual activities. Thus, case falling short of "rape" and "unnatural offence", as defined under the respective sections, could be penalized under Section 354, IPC.<sup>14</sup> This provision suffers from its own set of defaults when it comes to tackling the problem of Child Sexual Abuse. The first being that this provision, taking exactly after section 375, is gender specific in respect of the victim and likewise doesn't account for the outrage of modesty committed against a male child and further, it doesn't clearly specify the meaning of the term 'modesty'.

Major Provisional Infirmities in the POCSO Act as regards to Child Incest are as follow:

1. A cursory glance at these provisions would reveal that the offence that is graver in nature is gender specific in respect of the offender. The word 'he' used in clauses (a) to (d) of section 3 while defining Penetrative Sexual Assault, depicts the idea of the legislation that while framing the provision they specifically sought to exclude women from being penalized as initiators of sexual assault.<sup>15</sup> (And by extension of this provision,

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imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.— Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

<sup>14</sup> The Indian Penal Code, 1860, s.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 may extend to two years, or with fine, or with both.

<sup>15</sup> Section 3: Penetrative Sexual Assault- A person is said to commit "penetrative sexual assault" if-

Aggravated Penetrative Sexual Assault, as defined u/s. 5(n),<sup>16</sup> being built on the premise of s. 3 itself, happens to be gender specific in its scope and extent.) On the other hand, Section 7, defining Sexual Assault uses the word 'whoever'.<sup>17</sup> (Likewise, Aggravated Sexual Assault, as defined u/s. 9(n),<sup>18</sup> is an augmentation of s. 7 and is gender neutral.) Combating the panoramic impression, the survey conducted by the Government of India on Child Abuse, in the year 2007, revealed that the overall ratio of male children who'd been incestuously violated was much higher than that of female children.<sup>19</sup>

The provisions under scrutiny for the current purpose are seemingly quite removed from the ground reality as researchers and activists suggest that of cases relating

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(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.

<sup>16</sup> Section 5(n): Aggravated Penetrative Sexual Assault- whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child is said to commit aggravated penetrative sexual assault.

<sup>17</sup> Section 7: Sexual Assault- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

<sup>18</sup> Section 9 (n): Aggravated Sexual Assault- whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child is said to commit aggravated sexual assault.

<sup>19</sup> Kritanjali Sarada, *Child Sexual Abuse Laws in India* 3 International Journal of Legal Developments and Allied Issues 46 (2007); Government of India, Study on Child Abuse: India, 2007 (Ministry of Women and Child Development)



to child incest, most happen to have been perpetrated against boys of tender years. And, what renders the situation more unbecoming is the fact that the stated inferences are drawn on the basis of cases which come to be reported somehow, as the agencies involved also endorse the idea that in cases where boys have been violated, the disclosure rate tends to be abysmally low for the fear of gender-oriented harassment and humiliation.<sup>20</sup>

2. Secondly, the provisions of the POCSO Act viewed in juxtaposition with the provisions of the IPC and those of customary marriage laws, bring to the foreground the major contradiction as regards the concept of marital rape where a marriage of girl under the age of 18 years has been solemnized.<sup>21</sup>
  - i. According to Section 5(iii) read with Sections 11 and 12 of the Hindu Marriage Act, 1955, the marriage of Hindu girl aged less than 18 years is neither void u/s.11, nor voidable u/s. 12. The grounds listed under both ss. 11 and 12 are exhaustive. Therefore, in absence of a direct provision declaring the marriage void or voidable, it is a perfectly valid marriage (though, it is an offence punishable u/s. 18(a)<sup>22</sup> of HMA).
  - ii. Under the Muslim personal laws, the age for contracting a valid marriage is age of discretion, which is admittedly taken to be the age of attaining puberty. Even in cases where the

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<sup>20</sup> Ajay Joshi, "1 in Five Children is Victim of Incest: Expert" *The Tribune*, Dec. 19, 2019; available at: <https://www.tribuneindia.com/news/jalandhar/1-in-five-children-is-victim-of-incest-expert-13891> (Last visited on Feb. 24, 2020)

<sup>21</sup> Surbhi Garg, *The Protection of Children from Sexual Offences: A Critical Analysis* 4 JLSR 412 (2018); available at: <http://thelawbrigade.com/wp-content/uploads/2019/05/Surbhi-Garg.pdf> (Last Visited on Feb. 6, 2020)

<sup>22</sup> Section 18(a) of Hindu Marriage Act, 1955 provides that a marriage in contravention of s. 5(iii) is punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees, or with both.

parties to marriage have not attained the age of discretion, their marriage can be contracted validly by their guardians.

- iii. Even u/s. 3(1) of the Prevention of Child Marriages Act (PCMA) 2006, a child marriage is voidable at the option of any contracting party who was a child at the time of the marriage. The marriage can be declared a nullity in terms of the proviso to Section 3(1) of the PCMA through an appropriate petition filed by the child within two years of attaining majority and by approaching an appropriate court of law. That is, if the party who was a child at the time of marriage, chooses to go down that road, which, by practical experience, has a thin chance of happening. Because, a party would see the need to initiate a proceeding of nullity only if, either the marriage had been forced – in which case the marriage would be void ab-initio altogether as per s.12(b) of PCMA<sup>23</sup> –, or if they are dissatisfied with the familial relationship.

‘Husband’, clearly falls within the category of ‘domestic relationship’ as defined u/s. 2(1)(e) of the POCSO Act r/w s. 2(f) of the Protection of Women from Domestic Violence Act. Accordingly, sexual activity with an under-aged wife by her husband, even with her consent, falls within the purview of this Act (*consent of a person aged less than 18 years of age is not considered as a valid consent*)<sup>24</sup>. But, the exception to section 375 clearly states that sexual intercourse by a man with his wife, where the wife is not under 15 years of age is NOT rape. Even a base-level understanding of these provisions firmly instates the idea that the law chooses to adopt a differential

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<sup>23</sup> S. 12. Marriage of a minor child to be void in certain circumstances.—*Where a child, being a minor—*

(b) by force compelled, or by any deceitful means induced to go from any place; or

such marriage shall be null and void.

<sup>24</sup> The Indian Penal Code, s. 90

attitude towards a 'married' girl child and an 'unmarried' girl child. To this day and age, child marriage remains a fairly common practice in semi-urban, rural and remote societies of India; grace - the legally validated customary laws. And, by the virtue of the exception to s. 375, IPC, sexual activity, even forcefully committed against a 'married' girl child by her husband does not qualify as a 'wrong' by the standards of IPC. Therefore, it is unequivocal and conspicuous that both the major morsels of statute are in rebuttal.<sup>25</sup>

3. The reporting mechanism as provided under Chapter V of the Act is imposing in its form and content. S. 19<sup>26</sup> provides that if any person (including the victim-child), have knowledge of the offence having been committed, or even an apprehension that the offence might be committed, is bound to provide information to Special Juvenile Police Unit, or to the local police. The failure to mete out the obligation is dealt with punishment provided u/s. 21.<sup>27</sup> These provisions paint a fairly deceptive picture, passing an idea that the justice system has a very fierce approach towards the offenders and that there is no stone left unturned in ensuring a child's safety. But the ground reality is a far

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<sup>25</sup> Independent Thought v. Union of India, (2017) 10 SCC 800

<sup>26</sup> S.19. - Reporting of offences.-

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

- a. the Special Juvenile Police Unit, or
- b. the local police.

<sup>27</sup> S.21. Punishment for failure to report or record a case.-

(1.) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2.) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

cry from this imagery. In actual, as is seen invariably, there is hesitation on the part of the child in disclosing the commission of misdeed – because of a number of reasons ranging from a sense of shame to a fear of victim-blaming – more so on the part of child’s parent(s) or immediate confidants, for the apprehension of family name being soiled and the child being tagged as a victim of a sexual more for the remainder of their life.

4. The Act does not create any provisions for the personnel dealing with the cases of IFCSA to be given any kind of specialized training. The situation of a child having been subjected to sexual abnormality by a person in position of trust and confidence is rather delicate. And the police have but a flimsy reputation for trying to bring about a compromise between the perpetrator and the victim, instead of taking a harsh action against the cold-blooded offenders. (Though, there is a whole chapter dedicated towards the directed behaviour of the police and the SJPU while handling the cases of sexual offences against children,<sup>28</sup> the provisions have a dead letter’s equivalent value when the question of IFCSA arises, because of the reasons explicitly discussed earlier.)
5. The imposition of death penalty upon the offenders of IFCSA u/s. 6<sup>29</sup> of the Act, tends to create an exorbitant pressure upon the child and the family and is certain to induce them to never report instances of being abused by their caregivers, or to turn hostile at later

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<sup>28</sup> See parts 1.2.2. and 1.3.1 of Chapter 1, Section II of P.M. Nair, *A Handbook on the Legal Processes for the Police in respect of Crimes Against Children* (The Centre for Police Studies and Public Security, Tata Institute of Social Sciences, Mumbai and Bureau of Police Research & Development Ministry of Home Affairs, Govt. of India, New Delhi, 2018); available at: <https://bprd.nic.in/WriteReadData/News/A%20Hand%20book%20on%20the%20Legal%20Processes%20for%20the%20Police%20in%20respect%20of%20Crimes%20Against%20Children.pdf> (Last visited on Feb. 7, 2020)

<sup>29</sup> S.6. Punishment for aggravated penetrative sexual assault.-

Whoever, commits aggravated penetrative sexual assault, 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 and shall also be liable to fine.

stages of the proceedings (in cases where such matters have however been reported and prosecution case sufficiently established.)

6. After having fought its way through the above-mentioned mire of barricades, if a case is finally filed, the protracted process gives the accused plentiful time to goad the victims into taking back their complaints.<sup>30</sup> And, it has been observed that more often than not, the child-victim, who is considered a sterling witness in such cases, turns hostile<sup>31</sup> and thus resulting in the accused be given a carte blanche despite their otherwise obvious guilt. The fact that turns the whole prosecution situation all the more embroiled is that when the child-victims abjure from their statements as made to the police, they cannot be prosecuted for the offence of perjury as s. 22(2) of the POCSO Act sheathes them from such charges.<sup>32</sup>
7. Another problem which cranes up is that a number of cases of child incest happen to be romantically motivated (for an instance, in cases where the perpetrators are major and the victims happen to be young adults, who often mistake infatuation for the bases of a steady relationship) and in such cases, the statement of the victim would naturally tend to incline in the favour of the accused.
8. Topping it all, it is a matter of common knowledge in Court parlance that, defence counsels use all ways they can avail to manipulate the provisions of procedural laws, in order to orchestrate the evidence of

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<sup>30</sup> HAQ Centre for Child Rights, POCSO: Why Cases of Child Sexual Abuse Mostly End in Acquittal, 2019, available at:

<https://www.haqrc.org/news/pocso-cases-child-sexual-abuse-mostly-end-acquittal/> (Last visited on Feb. 4, 2020)

<sup>31</sup> HAQ Centre for Child Rights, POCSO: Why Cases of Child Sexual Abuse Mostly End in Acquittal, 2019, available at:

<https://www.haqrc.org/news/pocso-cases-child-sexual-abuse-mostly-end-acquittal/> (Last visited on Feb. 4, 2020)

<sup>32</sup> Section 22 - Punishment for false complaint or false information.

(2) Where a false complaint has been made or false information has been provided by a child, no punishment shall be imposed on such child.

prosecution in a self-serving fashion. It is pretty much customary for the defence counsels to either altogether omit cross examining the victim or omitting certain obviously important questions in due turn and then move under s. 311 of CrPC to re-examine the victim, usually after the accused has been released on bail and the family or other societal agents have had sufficient time to coerce and/or brainwash them, clearly mocking the limitation period for recording the evidence of the victim as provided under S.35(1).

A detailed study of the developing trends of the legislations with respect to Intra-Familial Child Sexual Abuse suggests sufficiently well that the central legislations in India are not, till date, apposite to uproot the evil entirely.

## **PART – III**

### **Suggestions**

Based on the deductions made after having indulged in discursive and itemized deliberation about the demerits in the legal framework, the researcher proposes the following recommendations and overtures, in view of the above-mentioned lacunae, in the following manner, to all the major stakeholders, where the problem of Child Incest is concerned:

- ❖ The Legislature
- ❖ The Judiciary
- ❖ The Executive
- ❖ The General Public

All the other participating agencies can only do so much when there is a lucid lack of provisions.

- ❖ The Legislature

In a democratic set-up, where every governmental tier is supposed to function in congruence with each other,

without overpowering the other, it is an unequivocal onus upon the legislature to overcome the hurdles posed by gaps within the provisions as it is.

➤ Gender Oriented Provisions

In the year 2017, the filmmaker Insia Dariwala, initiated a public petition addressed to the then Women and Child Development Minister, Maneka Gandhi through a petition website 'change.org', claiming that there is a need to 'Order an In-Depth Study on Male Child Sexual Abuse in India'.<sup>33</sup> Via her petition, the filmmaker, who herself is a survivor of child incest, brought to the foreground her concern about the gender-specific nature of the offences as listed out in the POCSO Act, sharing the first-hand experience of her husband, who too had been victimized by sexual abuse at the tender age of 5, at the hands of a trusted caretaker. She bore into the idea that the misery of a male victim is even more rueful for the reason that he'd feel obligated to keep the secret buried within for the fear of being subjected to ridicule, infamy, dejection and masculinity-targeting-attacks. They live with the pain and often end up unleashing it by victimizing others. She also submitted that having been subjected to molestation as children, and having been forced to live with it just fine all through their lives, is what tends to turn men insensitive and oppressive towards women, as it is, they are not born that way, and it is rather, an acquired behavior which they learn from people around them. She suggested that a detailed study into this issue would deliver insights into the reasons of violence men initiate by shedding light into their mindsets, pent up agonies and might actually end helping curb violence right at its onset. Another

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<sup>33</sup> Editorial, "Govt. Proposes Amendment of the POCSO Act to Make it Gender-Neutral" *The Indian Express*, Jun. 10, 2020; Available at: <https://indianexpress.com/article/gender/govt-proposes-amendment-of-pocso-act-to-make-it-gender-neutral-5154795/> (Last visited on Mar. 25, 2020)

question she arose, which does call to be thought upon, was “Why Have We Invested So Much in Cure but So Little in Prevention?”<sup>34</sup>

The petition generated a hash tag - *#EndTheIsolation* - to popularize the movement and garnered as many as 1.25 lakh supporters who actively signed the petition. Consequently, it came to the notice of the Women and Child Development Ministry and on April 25<sup>th</sup>, 2018, the WCD minister, Maneka Gandhi responded to the petition notifying the general public that after having been acquainted the matter in September 2017, she had instructed the National Commission for Protection of Child Rights (NCPCR) to look into the issues and following a few meetings, a core team was organized and conferences were commissioned. And, as per the recommendations emerging from the conference, the Ministry had reached a unanimous decision that there actually was a need to bring about amendments in the POCSO Act to the effect that all the categories of sexual assaults listed out in the Statute became gender neutral in their scope and purview.<sup>35</sup>

But, despite the proposals, the Amendment Act of 2019 lacked amendments to that effect.

➤ **Contradiction with IPC and Personal Marriage Laws**

There is a clear contradiction in the provisions of the POCSO Act when viewed with the provisions of IPC that deal with the offence of rape and those of the personal laws relating to marriage. Whilst the POCSO Act brings a husband committing sexual violation upon his minor

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<sup>34</sup> Available at: <https://www.change.org/p/maneka-gandhi-minister-for-women-and-child-development-order-an-in-depth-study-on-male-child-sexual-abuse-in-india-endtheisolation> (Last visited on Mar. 20, 2020)

<sup>35</sup> Available at: <https://www.change.org/p/maneka-gandhi-minister-for-women-and-child-development-order-an-in-depth-study-on-male-child-sexual-abuse-in-india-endtheisolation/responses/40971> (Last visited on Mar. 23, 2020)



wife within the purview of criminal action, s. 375 of the Indian Penal Code referred together with the provisions relating to marriage governed by the personal laws, absolves his criminal liability altogether.<sup>36</sup>

And, as has been clearly laid down by the Supreme Court in *Independent Thought v. Union of India*<sup>37</sup>, there is unequivocally, a need to bring about amendment in the rape laws in the IPC and personal laws governing marriage, so as to have the child incest provisions in POCSO Act apply fully well to the married minor girl.

➤ Dissonant Reporting Mechanism

Further, there is a need to understand the sense of stigma our society attaches with a sexual more and the consequent hesitation of the victim-child/ parents/ confidants when it comes to the disclosure of the offence. Hence, it necessitates that the penalty<sup>38</sup> imposed for non-disclosure of the offence be alleviated. The imposition of a penalty is an equivalent of jarring a double-edged sword through the already wounded sense of pride and safety of the victim and that of their

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<sup>36</sup> Refer Chapter III

<sup>37</sup> *Independent Thought v. Union of India and Another*, (2017) 10 SCC 800

<sup>38</sup> S.19. - Reporting of offences.-

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

a. the Special Juvenile Police Unit, or

b. the local police; and,

S.21. Punishment for failure to report or record a case.-

(1.) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2.) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

confidants. What rather needs be done is setting up a reporting mechanism that is sensitive towards the disturbed psychology of the victim and their associates.

Though, there have been commendable efforts made by certain State Governments for promoting a projection of their 'standing guard to the victims' interests' image, there needs to be done a lot more to implement the objects of the POCSO Act in its true sense and to its complete extent. More initiatives like that of the Punjab Govt. in regard to make the POCSO e-Box better conventional and rife, need to be simultaneously adopted so that the reporting mechanism becomes an aide of the victim, rather than being a deterrent.

➤ Unchartered Personnel

The personnel dealing with the IFCSA cases need to be much defter than the personnel dealing with sexual offences, even than that dealing with cases of Child Sexual Abuse. The reason being, as discussed earlier, that the psychological terrain of a child violated at the hands of a person per se entrusted with their safety and well-being, is extremely precarious, and the chances of a dilettante interviewer treading on deleterious territory are rather extortionate. Therefore, the personnel entrusted with the first – hand interaction with the victim children need to be extremely sensitive towards the misery of the victim, in both their approach and action. And, in tandem with masterfully schooled personnel, there must be strict prohibitions imposed against the authorized officers who try to bring about a 'settlement' amongst the parties by resorting to inducement or coercion.

➤ Provision for Death Penalty on Conviction

It has been suggested by activists that the death penalty provide u/s. 6<sup>39</sup> of the Act needs to be stricken down for the obvious reason that there are inordinate chances of the victim and perpetrator's family would pressurize the victim and the confidante adult (if any,) to retort from their reports or complaints if, and when then matter does reach the court, as has already been enunciated in the previous chapters. What's more is that within a family set up as they're styled in our country, seldom would a family allow the family name be soiled by bringing out such a tabooed issue for the public scrutiny, let alone involving police and court procedures that as it is have a reputation to go on forever. Adding a death sentence to the equation is sure a recipe for disaster.

Then, there are romantically endorsed cases, where there is experimentation, but no exploitation and in such cases, conviction is absolutely futile.<sup>40</sup>

➤ Absence of Punishments for Sham Accusations

Another very drastic drawback of the procedure laid down in the Act is that there is no provision fixing a liability for false complaints. Rather, S. 22 of the Act, clearly states that in case of a false complaint made by a child, they cannot be tried for perjury and S. 19(7) provides protection the informant adult. It has been very commonly observed within the usual court

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<sup>39</sup> S.6. Punishment for aggravated penetrative sexual assault.-

Whoever, commits aggravated penetrative sexual assault, 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 and shall also be liable to fine.

<sup>40</sup> A Principal Judge at the family court in Delhi who has dealt with cases u/ POCSO Act and has served at the DLSA opined so while explaining the reasons as to why most POCSO cases result in acquittals; HAQ Centre for Child Rights, POCSO: Why Cases of Child Sexual Abuse Mostly End in Acquittal, 2019, available at: <https://www.haqcrc.org/news/pocso-cases-child-sexual-abuse-mostly-end-acquittal/> (Last visited on Feb. 4, 2020)

practices that people having ill will against somebody cloak behind the child and initiate fallacious proceedings against an otherwise innocent person. And the interminable nature of proceedings, coupled with the innate nature of the offence being of a kind that once a person accused of such an offence is permanently tagged with the title of paedophile.

What is required is that there needs to be a preliminary filtering out procedure included within the trial process so as to ensure the genuineness of the complaint, without delaying the justice providing procedure from being set into motion.

#### ❖ The Judiciary

Mere enactment of provisions after provisions just cannot serve the purpose of the Legislative action until there is practical consonance of judicial mechanism right from the stage where they take over the justice administration process.

##### ➤ Prejudiced Position of the Victim

Apart from passing more and more Judgments and setting precedents, the Courts need to adopt an attitude of utmost sympathy towards the victims and their confidants/supporters. Also, it is needed of the judicial officers to make sure that the victim and/or their confidants are stationed away from the accused and/or their supporters, or anybody in general who can pressurize the victim into retracting from their complaints for the entire duration of trial.

##### ➤ Guileful Approach of the Defence Counsels

The manipulative ways defence counsels go about the examinations and re-examinations of the prosecution witnesses by scheming around the provisions of the procedural laws, over a masterfully elongated period of time tends to bring about certain discrepancies in their

statements they've made before the Court and then they use those discrepancies to cancel out the very story of the prosecution.

The Supreme Court, in regard to the badgering of the victim during the cross examination, held in the *Gurmit Singh case*<sup>41</sup> that the Court should not sit a silent spectator and must control the very recording of evidence so as to not let it turn into a means of harassment and humiliation of the victim.

#### ❖ The Executive

In addition to the functions performed by the Legislative and the Judiciary, the Executive needs to perform its own part in sensitizing the general public in regard to the offence of Child Incest and in making sure that the provisions enacted, rules made and judgments passed do not remain as effective as a dead letter in the book of law.

##### ➤ Vigilance Pageantries

Like the initiatives of the Punjab Government, there should be congruous endeavours by the State Executives in order to bring the offence and, as well as the preventive actions, as warranted by the Legislative and Judicial manoeuvres, into the mainstream. It solely is the calling of the State Executives to suffuse observance and perception amongst the masses.

#### ❖ The General Public

Over and beyond the ventures of the government sector, certain duties fall in the general public's crook. Policy making, judicial department and awareness programmes have a limited print run in absence of a parallel action by the proletariat.

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<sup>41</sup> State of Punjab v. Gurmit Singh, (1996) 2 SCC 384

➤ Fight the Vice, Not the Victim

The very phenomenon needs to be regarded independent of the anathema society attaches with incidences of the sexual violation. It is because of these proscriptions and interdictions that the incidences often go unreported and the victims are forced to live with a sense of shame, even where there is no fault of theirs.

➤ Keeping a Close Monitor on the Child's Association and Changes in the Behaviour Pattern

It is quintessential to pay close attention to any unexplained changes in the usual behavioural pattern of the child. Owing to the uber-busy lifestyle of millennial parents, children are left under the custody and supervision of nursemaids or day-care centres/nurseries and children often do not get the parental attention that the problem at hand warrants. But, having regard to the fact that problem of IFCSA is all pervasive, persistent and none-sparing, the need for close parental attention cannot be pressed enough.

### **Concluding Note**

The issue of Intra-Familial Child Sexual Abuse is still a taboo in India. Majority of the people remain numb about this issue. This silence is due to the fear of indignity, denial from the community,<sup>42</sup> social stigma,<sup>43</sup> not being able to trust

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<sup>42</sup> World Health Organization, *World Report on Violence and Health* (United Nations Organization, 2002);

D. Collin-Vezina, I. Daigneault, M. Hebert, *Lessons Learnt from Child Sexual Abuse Research: Prevalence, Outcomes and Preventive Strategies* 7 *Child and Adolescent Psychiatry and Mental Health* 22 (2013).

<sup>43</sup> R.T. Haile, N.D. Kebata, G.M. Kassie, *Prevalence of Sexual Abuse of Male High School Students in Addis Ababa, Ethiopia* 13 *BMC International Health Human Rights* 24 (2013);

government bodies,<sup>44</sup> and gap in communication between parents and children about this issue.<sup>45</sup> Majority of the healthcare professionals do not have the abilities and are not trained to examine and manage cases of Child Sexual Abuse. A chief concern in India is the dearth of good monitoring of various juvenile residential institutes and there is no punishment for institutes that do not follow the laws. Institutions fear they will lose their dignity if incorrect information is disclosed. Hence cases are not reported and are settled within the institution. Same is the situation in cases where the accused and the victim hail from the same family, for the absolutely similar set of reasons as discussed above. A number of factors confound the identification a Child Sexual Abuse victim. Some of them do not reveal characteristic signs and symptoms. Many instances of Child Sexual Abuse don't include penetrative sex, victims usually clean themselves following attack, and hence the medical investigation does not provide any evidence of sexual indulgence.<sup>46</sup> Child Sexual Abuse victims and their families experience the panorama of legal proceedings that can continue for several years.<sup>47</sup> Adding to the problem, the execution of laws and initiatives in India is a challenge and there is lack of funding for programs for child safety.<sup>48</sup>

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A. Verelst, M. Schryver, E. Broekaert, I. Derluyn, Mental Health of Victims of Sexual Violence in Eastern Congo: Associations with Daily Stressors, Stigma and Labeling 14 *BMC Women's Health* 106 (2014);

M.O. Folan, N. Odetoyinbo, A. Harrison, B. Brown, Rape in Nigeria: A Silent Epidemic Among Adolescents with Implications for HIV Infection 7 *Global Health Action* 25583 (2014)

<sup>44</sup> Human Rights Watch, *Breaking the Silence: Child Sexual Abuse in India* (USA, 2013)

<sup>45</sup> Ministry of Women and Child, *Development Study on Child Abuse: India* (Government of India, 2007)

<sup>46</sup> *Supra* note 44.

<sup>47</sup> *Supra* note 12; P.B. Behere, A.N. Mulmule, *Sexual Abuse in 8 Year Old Child: Where Do We Stand Legally?* 35 *IJPM* 203-205 (2013), Available at: <http://www.ijpm.info/text.asp?2013/35/2/203/116256> (Last visited on Jan. 30, 2020).

<sup>48</sup> *Supra* note 44; UNICEF: India, *The Legislative and Institutional Framework for Protection of Children in India* (United Nations Organisation, 2010).