

# RESEARCH PAPER

---

## ANALYSIS OF INDIAN LEGAL POSITION ON CHILD SEXUAL ABUSE

---

### Contents

CHAPTER I INTRODUCTION	3
Area of Research	3
Significance of the research	3
Research question	3
Aims and Objectives of the Research	3
Study of literature	4
Chapterisation	4
CHAPTER II ANALYSIS OF INDIAN CRIMINAL LAW	5
CHAPTER III ANALYSIS OF JUDICIAL PRONOUNCEMENTS	11
CHAPTER IV COMPARATIVE ANALYSIS OF LAWS OF DIFFERENT COUNTRIES	13
CHAPTER V CONCLUSION	20

### CHAPTER I INTRODUCTION

## **Area of Research**

This paper seeks to examine the application of Indian Criminal Law to the cases of sexual offences involving children. The researcher has specifically analyzed IPC Section 375, 376, 377, 354, 509, the Indian Evidence Act and the Protection of Children from Sexual Offences Act, 2012. The researcher has also done a comparative analysis of laws of different countries dealing with sexual offences against children.

## **Significance of the research**

Child sexual abuse is increasing at an alarming rate all over the world. India is among the top five countries of the world facing highest rate of sexual offences involving children. Yet, the criminal law in India is inadequate in many respects to deal with such a sensitive and serious issue. The Law Commission in its 172<sup>nd</sup> Law Commission report<sup>1</sup> has reviewed complete law dealing with sexual offences after *Sakshi v UOI* case<sup>2</sup>. The Commission appealed for numerous amendments to the laws dealing with the subject. Some amendments were made to the IPC after the Nirbhaya case by the 2013 Criminal Law amendment bill. Nonetheless, the law at present is inadequate to deal with sexual offences involving children.

## **Research question**

The primary research question is whether the Criminal law of our country adequate to deal with the cases of sexual offences involving children even after the implementation of POCSO, 2012?

Secondly, are the various agencies like Police, Doctors and Courts effective enough to impart justice to the victims?

## **Aims and Objectives of the Research**

The paper:

- Outlines the rules and procedures involved in the Criminal Justice process
- Explains the law on child sexual abuse and its implication on investigation process and collection of evidence involving agencies like Police, doctors and courts.

---

<sup>1</sup> <http://www.lawcommissionofindia.nic.in/rapelaws.htm>

<sup>2</sup> *Sakshi v UOI*, AIR 2004 SC 3566

- Explains change in law related to evidence in order to make the law more child friendly which will ensure that more and more cases of child sexual abuse are reported.
- Suggests ways in which the various NGOs and social workers can work more effectively in this regard.

### **Study of literature**

The researcher has relied on various primary and secondary sources including judicial pronouncements, IPC, POCSO Act, legislations and Criminal of UK, USA, South Africa, Zimbabwe, Netherlands, Germany and Canada, reports on child sexual abuse by UNICEF and other national and international agencies and NGOs.

### **Chapterisation**

The entire paper is divided into 5 chapters

1. Introduction
2. Analysis of Indian Criminal Law
3. Analysis of judicial pronouncements
4. Comparative analysis of laws of different countries
5. Conclusion

### **Utility and limitations**

The paper is aimed at creating more awareness about the legal position of India on the issue of child sexual abuse. It also throws light on the loopholes in our judicial system and inadequacy of the criminal law. The paper can also be used in its entirety for a general understanding of Indian Criminal justice system's approach in responding to victims of sexual abuse.

The research is limited to the judicial decisions which were accessible to the researcher as very few cases actually reach High Court and the Supreme Court.

## **CHAPTER II**

## ANALYSIS OF INDIAN CRIMINAL LAW

India is home to 430 million children which is approximately includes one in every five children below the age of 18 years, in the world.<sup>3</sup> They face staggering challenges from the day they are born. Malnutrition, illiteracy, trafficking, forced labor, drug abuse, sexual abuse pornography etc. are not uncommon among the children in India.<sup>4</sup> The paper particularly deals with the problem of child sexual abuse in India. Child sexual abuse includes physical or psychological maltreatment of a child usually by a person who is in a position of trust and confidence in relation to the child.<sup>5</sup> The person uses the child for sexual stimulation or for sexual gratification. National study undertaken by the Ministry of Women and child development<sup>6</sup> defined ‘sexual assault’ as making the child fondle with his/her private parts or making the child exhibit private body parts and being photographed in the nude.<sup>7</sup> However, the report did not exhibit the true reality because most of the cases go unreported because of the stigma attached to it in our society. A study conducted by the UNICEF after the 2012 Delhi gang rape revealed that one in every three rape cases, the victim is a child and these incidences are increasing at an alarming rate.<sup>8</sup> Approximately 7200 children including infants are raped every year which is an issue of serious concern.<sup>9</sup> Before May 2012, various sections of the IPC dealing with sexual offences were also applied to the cases of child sexual abuse resulting in serious miscarriage of justice as the provisions were not reasonably sufficient for their application to cases of child sexual abuse. Section 354 IPC punishes a person for outraging the modesty of a woman by use of criminal force but if we apply this section to case of say sexual assault of an infant the serious problem which would arise is what modesty does a child of 2 years have?

---

<sup>3</sup> The Planning Commission, Government of India, “Report of the Working Group on Child Rights for the 12th Five Year Plan (2012–2017),” [http://planningcommission.nic.in/aboutus/committee/wrkgrp12/wcd/wgrep\\_child.pdf](http://planningcommission.nic.in/aboutus/committee/wrkgrp12/wcd/wgrep_child.pdf) (Last accessed October 7, 2015), p. 8

<sup>4</sup> United Nations Children’s Fund, “The Situation of Children in India – a profile,” May 2011, [http://www.unicef.org/india/The\\_Situation\\_of\\_Children\\_in\\_India\\_-\\_A\\_profile\\_20110630\\_.pdf](http://www.unicef.org/india/The_Situation_of_Children_in_India_-_A_profile_20110630_.pdf) ( Last accessed October 7, 2015).

<sup>5</sup> The Problem of Child Sexual Abuse in India Laws, Legal Lacuna and the Bill – PCSOB-2011, <http://medind.nic.in/jal/t12/i2/jalt12i2p170.pdf> (Last accessed October 7, 2015)

<sup>6</sup> Ministry of Women and Child Development, Government of India, “National Study on Child Abuse: India 2007,” 2007, <http://wcd.nic.in/childabuse.pdf> (Last accessed October 7, 2015) p. 1

<sup>7</sup> *Ibid.*

<sup>8</sup> UNICEF, “UN in India condemns the gang rape of a student in New Delhi,” December 31, 2012, [http://www.unicef.org/media/media\\_67097.html](http://www.unicef.org/media/media_67097.html) (Last accessed October 7, 2015).

<sup>9</sup> *Ibid.*

The application of provisions dealing with adults created numerous problems when applied to cases of child sexual abuse. Therefore, to solve these problems parliament enacted a special legislation POSCO Act in May 2012.<sup>10</sup> Under this law, all forms of child sexual abuses are specific offences with specific punishments for the perpetrators. Earlier, there was no law covering any non- penetrative sexual act committed against boys which is now clearly defined. The new law has also laid down certain guidelines for police and court authorities to deal with the victims. Special child courts are also setup to deal with the issue however the effective application of these guidelines still remains a point of concern. The problem of implementation has highly hampered the protection of children from sexual abuse in the country. Furthermore, National Commission for the Protection of Child Rights which was established as an independent body in 2007 which ensures that all such laws, policies, and programmes, are in agreement with the child rights enshrined in the Constitution of India and the UN Convention on the Rights of the Child.<sup>11</sup> The Commission has also been assigned the task of overseeing the implementation of the POSCO Act.<sup>12</sup>

Apart from these domestic laws, India is also a party to various international human rights treaties and covenants, including the International Covenant on Civil and Political Rights and the Convention on the Rights of Child, which provide specific protection for the rights of children. They demand various effective measures to prevent and punish abuses and ensure that the government adopts and implements effective measures to prevent such abuse. Human Rights network makes it mandatory for the Indian government to adopt and enforce policies that will prevent and redress sexual violence against children effectively and which will ensure justice.

### **Change after the ‘Nirbhaya case’**

After the 2012 Delhi gang rape case, media along with other non-governmental played a very vital role in increasing awareness about child sexual abuse in the country. The media and the NGOs stressed on the increasing rates of child abuse and on the inability of the system to protect

---

<sup>10</sup> <http://wcd.nic.in/childact/childprotection31072012.pdf> (Last accessed October 12, 2015)

<sup>11</sup> “Home”, National Commission for the Protection of Child Rights, <http://www.ncpcr.gov.in> (Last accessed October 12, 2015)

<sup>12</sup> *Ibid.*

children, thus pressurizing and forcing the government to address the problem and to act accordingly in the interest of the child population.

As a follow up, the government took a major step and the parliament enacted its first law in May 2012 to protect child sexual abuse.<sup>13</sup> The need for this law became more immediate after the case of Mrs. Madhu v. State of Haryana<sup>14</sup> involving Ruchika Girhotra, who was molested by a police officer when she was 14. In this case, the accused asked Ruchika's parents to send her to Canada as she was a brilliant tennis player. The case was filed under Section 354 read with Section 509 IPC. The accused, SPS Rathore escaped prosecution for years even though there was an eye witness to the alleged acts.<sup>15</sup> However the Indian Government has yet to build a strong and effective social network to protect the well-being of the children.

### ***The flaws in the justice system***

It is very critical to say anything about what happens after a child has been sexually abused which holds significance not only for his/her well-being but also for the protection of other children, because if the perpetrator is never identified or if/she allowed to move free, there are high chances of further abuse. Sometimes, the complaints of the children are simply rejected by the family members, Police and the medical experts. In most of the cases, the perpetrator is often a family member or a person entrusted with care and custody of the child. In such cases, the child would refrain from speaking up because of constant threat of the family members. In a case before the Delhi court, the accused was convicted for having abducted and raped a 6 year girl who was member of his family. The accused has earlier raped another girl of his family but the case was not reported because of the stigma attached as the family members believe that reporting a case will bring shame to their family. Also, there have been cases where the mothers didn't take any action because of fear of being thrown out of the house by the in-laws. In other cases, the family members fear of being ostracized from the society.

One of the most significant reasons why families don't come forward to report the cases of child sexual abuse because they think that they will not be treated sympathetically by the police and the medical experts which further adds to their trauma. Many doctors in India lack the

---

<sup>13</sup> *Supra note 8*

<sup>14</sup> *Mrs. Madhu v. State of Haryana*, 1998(4) RCR 854

<sup>15</sup> *Ibid.*

competence to take such sensitive cases. Their role should include treating child well and counselling him/her. Police officials also try to persuade the parties to take back their cases. Sometimes courts also drag cases for years. This shows the inability of our criminal justice system to deal with the sexual offences including minor which is a highly sensitive issue. Furthermore, children are also abused in institutions like NGOs for orphans etc. which are primarily established for the protection, welfare and development of a child. They are bestowed with the responsibility of taking care of the children residing in such institutions. Nonetheless, the cases of sexual abuse of children in these institutions are very common.

### ***Protection of Children from Sexual Offences Act, 2012***

POCSO which was enacted in 2012 is gender neutral, makes it mandatory for the victims to report the abuse, lists all kind of sexual offences against children and provides for their protection during the judicial process. Some of the mandated laid down under POCSO are<sup>16</sup>

- The police officers in every circumstance must bring a case to the attention of the Child Welfare Committee within 24 hours of receiving a report.
- The police officers must also be in civil clothes while recording the minor's statement so that the child does not get intimidated.
- The statement of the minor must be recorded in presence of the person whom he/she trusts.
- The medical examination of the child for the collection of forensic evidence should only be conducted by a lady doctor in presence of a person that the child trusts.
- Special courts have been set up under the act to conduct speedy and in-camera trials. It is the duty of these court to ensure that the minor is not exposed to the accused while recording his/her statement, the identity of the minor remains undisclosed, the minor is not asked to repeat his/her testimony in court and that minor can also give his/her testimony through a video, the cases are not delayed and are disposed of within a year from the date of it being reported, an interpreter, translator, special educator or any other expert should be present in court if the minor needs any assistance, and the family of the minor should be awarded compensation for medical treatment and rehabilitation.

---

<sup>16</sup><http://wcd.nic.in/childact/childprotection31072012.pdf> (Last accessed October 12, 2015)

## **Punishments under the Act**

### **1. Penetrative sexual assault<sup>17</sup>**

The penetration can either be penile-vaginal, penile-oral, penile-urethral or penile-anal, or object penetration. Section 4 of the act provides for punishment not less than 7 years which may extend to life imprisonment and a fine.

### **2. Aggravated penetrative sexual assault committed by a person of trust or authority<sup>18</sup>**

Section 6 of the act lays down the punishment which should not less than 10 years; it may also extend to rigorous life imprisonment, and a fine.

### **3. Non-penetrative sexual assault committed with a sexual intent<sup>19</sup>**

Non penetrative sexual assault includes touching the vagina, penis, anus or breast of the child or asking the child to touch the vagina, penis, anus or breast of the perpetrator or any other person or any other act done with sexual intention. In such cases, Section 10 provides for punishment for not less than 3 years which may extend to 5 years and a fine.

### **4. Aggravated non-penetrative sexual assault done by a person of trust and authority<sup>20</sup>**

Section 10 lays down the punishment which should not be less than 5 years and it may also extend to 7 years, and a fine (Section 10).

### **5. Sexual harassment<sup>21</sup>**

Sexual harassment is caused by indecent and sexually explicit remarks, emails or telephone calls; taunting, jeering, or posing a request for sexual favour.

The punishment is 3 years and a fine (Section 12).

### **6. Using a minor for pornographic purposes<sup>22</sup>**

It includes producing or distributing any pornographic content via print or electronically. The punishment is 5 years and a fine and in case of second conviction, the punishment would be 7 years and a fine (Section 14 (1))

### **7. Attempt of offence<sup>23</sup>**

Section 18 of the act provides for 1 year punishment and fine.

---

<sup>17</sup><http://wcd.nic.in/childact/childprotection31072012.pdf> (Last accessed October 12, 2015)

<sup>18</sup> *Ibid.*

<sup>19</sup> *Supra note 15*

<sup>20</sup> *Ibid.*

<sup>21</sup> <http://wcd.nic.in/childact/childprotection31072012.pdf> (Last accesses October 12, 2015)

<sup>22</sup> *Ibid.*

<sup>23</sup> *Supra note 15*



**8. Abetment<sup>24</sup>**

The definition of abetment is same as defined under Section 107 and 108 of the IPC. The punishment is same as that of the offence which is provided under Section 17 of the act.

**9. Failure to report an offence<sup>25</sup>**

The punishment is six months and a fine provided under Section 21 of the act

---

<sup>24</sup> *Ibid.*

<sup>25</sup> *Supra note 15*

## CHAPTER III ANALYSIS OF JUDICIAL PRONOUNCEMENTS

### **Pre POCSO, 2012**

#### ***Sakshi v UOI***<sup>26</sup>

This was the case filed by an NGO called 'Sakshi' raising concern about the dramatic increase of sexual violence against women and children and the implementation of the provisions of IPC namely 377, 375/376 and 354. The petitioners raised the problem of confining rape cases only to penile-vaginal penetration which has now been amended by the 2013 Criminal Law amendment as it was violative of Article 21 of the Constitution. A number of statistical data has revealed that children are often abused in manner other than the penile/ vaginal penetration. It is often by means of penile/anal penetration, penile/oral penetration, finger/vaginal penetration or object/vaginal penetration. Also, putting these cases within the ambit of Section 377 would be highly unjust. Petitioners had put emphasis on Article 15 (3) of the Constitution which provides for special provisions for women and children which necessarily implies 'adequate provisions'.

#### ***Bachpan Bachao Andolan v UOI***<sup>27</sup>

A PIL was filed in the Supreme Court on the wake of serious violations of child rights. The petition was filed specifically to discourage child trafficking from circuses all over India. Children are very frequently sexually abused at these places, which is a violation of Juvenile Justice Act and other international treaties and covenants.

### **After POCSO:**

POCSO, 2012 was implemented to make it easier for the victims of sexual abuse to get justice. The Act directs the use of more humane ways to deal with victims and prohibit victimization of the child at the hands of the judicial system. Because of which, the reporting of such cases has doubled due to increased awareness.

---

<sup>26</sup> *Supra note 2*

<sup>27</sup> *Bachpan Bachao Andolan v UOI*, AIR 2011 SC 3361

***Nishu v Commissioner of Police, Delhi and ors.***<sup>28</sup>

Petitioner was a minor girl, kidnapped and repeatedly raped by a group of nine people. One among the nine people was a police constable In Haryana Police. The prosecution failed to present any medical reports or a copy of the FIR under Section 376D of the IPC and relevant provisions of the POSCO, Act. The Court in this case said that it would be inappropriate to exercise its jurisdiction under Article 32 as the case has been investigated by the Haryana Police.

***Avinash v State of Karnataka***<sup>29</sup>

The appellant kidnapped the victim and had multiple sexual intercourses with her. A charge sheet was filed against the victim under Section 366 of the IPC and Section 4 of the POCSO, Act. The honorable High Court emphasized on the age of victim as it is the major deciding factor and the court set aside the conviction in support of getting reliable evidence and disposing the case in accordance with law.

The courts have showed an inclination towards giving maximum punishment to the convicts under Section 12 of the POCSO Act, 2012 to give strong message to society because crimes of child sexual abuse are on continuous increase. However that is possible only when reliable evidences without any distortion are presented by the Police and the medical experts. In a case before the Delhi district court where the accused was charged with Section 8, 12 and 11 of the POCSO Act and Section 506 of the IPC for misbehaving with the victim, the court said though proper evidences are not disclosed by the investigative agency, the testimony of the child victim inspired trust and confidence

In another case, a girl was abused by her father since she was 12 years of age. The court acknowledged that the investigation was done in a most casual and irresponsible even though the girl was abused for around five years. The court refused to proceed with the matter until further examination is done by the investigation agency and the Police since the medical report and the charge sheet had numerous loopholes. This is a classic case where the victim became more vulnerable because of the inadequacy of investigative agency and the police and the matter was delayed.

---

<sup>28</sup> *Nishu v Commissioner of Police*, 2014(3)ACR2516(SC)

<sup>29</sup> *Avinash Shetty v State of Karnataka*, 2004 (13) SCC 375

## CHAPTER IV

### COMPARATIVE ANALYSIS OF LAWS OF DIFFERENT COUNTRIES

Internationally, child sexual abuse is recognized as a serious crime against children. However, the laws vary from country to country by their local definition of who is a child and what constitutes child abuse. Child sexual abuse is a violation of every child's right when an adult tries to have a sexual intercourse with a minor who is *doli incapax* for giving consent. This is also called as statutory rape.<sup>30</sup> The researcher has examined the laws of some countries where rate of child sexual abuse is very high and others where the rate is relatively low.

#### *South Africa*

South Africa is one among the top five countries which have the highest rate of child sexual abuse.<sup>31</sup> According to a 2009 report by trade union solidarity helping hand, one child is raped every three minutes in South Africa.<sup>32</sup>

Chapter 3 of the Criminal (Sexual offences and related matters) Act, 2007 deals with sexual offences against children.<sup>33</sup> It envisages

- i. Statutory rape which includes acts of consensual sexual penetration<sup>34</sup>
- ii. Statutory sexual assault which includes acts of consensual sexual violation.
- iii. Sexual exploitation and sexual grooming of children
- iv. Exposing children to explicit pornographic content and using children for pornographic purposes
- v. Forcing and casing child to witness sexual acts, self-masturbation and display of genital organs.
- vi. Sexual exploitation of disabled children in the ways mentioned above.

---

<sup>30</sup> [http://www.unicef.org/zimbabwe/resources\\_15420.html](http://www.unicef.org/zimbabwe/resources_15420.html) (Last accessed October 12, 2015)

<sup>31</sup> <http://www.ibtimes.co.uk/child-sexual-abuse-top-5-countries-highest-rates-1436162> (Last accessed October 12, 2015)

<sup>32</sup> *Ibid.*

<sup>33</sup> <http://www.justice.gov.za/legislation/acts/2007-032.pdf> (Last accessed October 12, 2015)

<sup>34</sup> [http://www.gov.za/sites/www.gov.za/files/38977\\_7-7\\_Act5of2015CriminalLaw\\_a.pdf](http://www.gov.za/sites/www.gov.za/files/38977_7-7_Act5of2015CriminalLaw_a.pdf) (Last accessed October 12, 2015)

The South African Supreme also made it illegal for a person previously convicted of a sexual offence to loiter near public places like schools, playgrounds etc. in order to protect children from sexual assault.<sup>35</sup>

### ***United Kingdom***

UK also witnesses very high rate of child sexual abuse. According to National Society for Prevention of Cruelty to Children, in 2011/12 there were 36000 cases of sexual offences against children were recorded.<sup>36</sup>

The 2003<sup>37</sup> Sexual Offences Act deals with following sexual offences:

- i. Trafficking children for the purpose of sexual exploitation
- ii. Child sexual abuse by means of prostitution and pornography which includes encouraging or facilitating prostitution or pornography.
- iii. Sexual abuse of children with mental disorder.
- iv. Voyeurism, exposure of ones genitals to the child and engaging in sexual acts in public lavatory.

Also, the accused can no longer argue that the child consented for the sexual act. Any sexual intercourse and other non-penetrative activities like sexual assault, or causing or inciting a child to engage in sexual activity. These cover a range of both physical and non-physical contact.

### ***Netherlands***

Child abuse as form of maltreatment of children has the lowest rate (4%) in Netherlands. The probable reason for this is the child sexual abuse policy in the country. In Netherlands, various Advice and Reporting Centers on Domestic Violence and Child Abuse (AMHK) are setup and children or adult who suspect sexual abuse are given a reporting code.<sup>38</sup> These centers are very child friendly with counseling centers. As soon as any case is reported at the center, it assumes

---

<sup>35</sup> *Ibid.*

<sup>36</sup> <http://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/child-sexual-abuse/sexual-abuse-facts-statistics> (Last accessed October 12, 2015)

<sup>37</sup> [http://www.cps.gov.uk/news/fact\\_sheets/sexual\\_offences/](http://www.cps.gov.uk/news/fact_sheets/sexual_offences/) (Last accessed October 12, 2015)

<sup>38</sup> <http://www.youthpolicy.nl/yp/Youth-Policy/Youth-Policy-subjects/Youth-policy-Youth-Policy-Child-abuse/Child-abuse-policy> (Last accessed October 12, 2015)

the responsibility of investigating the circumstances and finding out if there is a need of filing a case in law and in case of need, the center ensures that the adequate action is taken by the courts in order to protect child's interest. Child abuse in the country is primarily seen as a family-related, medical or psychosocial problem. The legal proceedings against child abuse can be instituted under these laws

i. The UN Convention on the Rights of the Child which was ratified by the Netherlands in March 1995. Articles 4, 5, 6, 18, 19 and 27 of the Covenant are relevant to deal with the instances of child abuse.<sup>39</sup>

ii. Dutch civil Law

An important advancement in the area of child rights was the inclusion of an additional reference in Article 247 which reads as "*Parents are under an obligation to take care of their children and to raise them without using either mental or physical violence or any other type of humiliating treatment*". This has resulted in reduction of child sexual abuse cases.<sup>40</sup>

iii. Criminal Law

Criminal law finds its reference in very serious cases of physical sexual offences.

iv. Action plan 'children safe'

The current action plan for year 2012 to 2016 was initiated in November 2011. Its primary objectives are

- To prevent parents from abusing their children.
- To encourage reporting of cases of child abuse.
- To put an end to existing abuse.
- To limit the damaging consequences of abuse.<sup>41</sup>

### ***US Federal Law***

All states in US have their different laws dealing with child sexual abuse. Federal Law is applicable on the federal lands which include areas such as military base, Indian territories and other government owned places. 18U.S.C. Section 2241, 2242, 2243, 2244<sup>42</sup> deal with

---

<sup>39</sup> *Ibid.*

<sup>40</sup> *Supra note 40*

<sup>41</sup> *Ibid.*

aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward respectively.<sup>43</sup> Offenders under these sections are fined as well as punished. An offender faces harsh sentences if the crime that occurred is of aggravated nature for instance he/she abused the children by posing threat of serious injury like death, he/she kidnapped the child for committing child sexual abuse.

Section 2256 of title 18 U.S.C. provides for definition of child pornography as visually depicting any sexually explicit conduct involving a minor (less than 18 years of age).<sup>44</sup> These representations include images, videos or computer generated images which indistinguishable from the actual minor, any data stored on the computer which can be converted into an image of child pornography.<sup>45</sup> Any depiction of minor less than 18 years of age is illegal irrespective of the child's consent.<sup>46</sup> Under Section 2251, persuading, enticing, coercing and inducing child to engage in any sexually implicit act is illegal. Any individual who attempts to conspire for such purpose is also subjected to punishment under the federal law.<sup>47</sup> Furthermore, Section 2251A of Title 18, United States Code, specifically prohibits selling, buying or transferring the custody of minor for purposes of producing child pornography specifically done by the parents or any legal guardian or other person in custody or control of that minor under the age of 18.<sup>48</sup>

Lastly title 18 United States Code, Section 2260 makes it illegal for a person outside the United States to produce, receive, transport, ship, or distribute child pornography with the intention to import or transmit such visual depiction into the United States.<sup>49</sup> Any violation of federal law is a serious offence and the perpetrators are subjected to severe punishment with fine. Convicted offenders may even face harsher punishment in case they have been earlier convicted of the same crime. In addition to federal law, sexual offender can also be punished under the state law.

## *Canada*

---

<sup>42</sup> <http://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-sexual-abuse> (Last accessed October 12, 2015)

<sup>43</sup> *Ibid.*

<sup>44</sup> <http://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography> (Last accessed October 12, 2015)

<sup>45</sup> *Ibid.*

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

<sup>47</sup> *Ibid.*

<sup>48</sup> *Supra note 46*

<sup>49</sup> *Ibid.*

The Criminal code and the Canada evidence Act are two federal laws covering criminal justice matters in Canada. The amendment to these laws in January 1988 created child sexual abuse offences thus expanding the opportunity for courts to take the testimony of child in cases of their sexual abuse.<sup>50</sup> These are the offences related to children covered under the Canadian Criminal Code:

- i. Sexual interference
- ii. Invitation to sexual touching
- iii. Sexual exploitation of a young children
- iv. Anal intercourse
- v. Bestiality
- vi. Offences involving parents or guardian in sexual activity of a child
- vii. Exposing genitals to a child
- viii. Vagrancy
- ix. Offences in relation to child prostitution
- x. Incest
- xi. Indecent acts
- xii. Sexual assault
- xiii. Sexual assault with a weapon or with a threat of causing bodily harm
- xiv. Aggravated sexual assault<sup>51</sup>

The definition of these crimes under the Criminal Code reinforces the protection and mental development of a child. Individual who sexual abuse a child cannot take a plea that a child consented to such sexual activity. Under Canadian law, children above 12 years but below the age of 14 years are considered incapable of giving consent to any sexual activity.<sup>52</sup> Furthermore, the consent given by persons above 14 years of age but below the age of 18 is considered invalid if the other person engaged in the sexual act is in a position of trust and or authority over them.<sup>53</sup> An offender cannot take a defense that he believed that the child was older; this defense can only sustain if he/ she took reasonable steps to find the age of the concerned child. Child victims are

---

<sup>50</sup> <https://www.ncjrs.gov/pdffiles1/Digitization/128329NCJRS.pdf> (Last accessed October 12, 2015)

<sup>51</sup> *Ibid.*

<sup>52</sup> *Supra* note 52

<sup>53</sup> *Ibid.*



also protected at the time of the prosecution. Corroboration of a child's testimony is not required for conviction of the accused. Publication of the information about the child which would identify the child victim is prohibited. A child can also testify outside the court room in presence of a judge or jury who will carefully observe the child while he/she is giving the testimony. Video clips recorded by the child for testimony within a reasonable time are also admissible.

Other institutions also exist for the protection of the child. The child welfare systems protect children, while the criminal justice system protects the society from potential offenders. Both of these institutions work side by side to carry out the dual responsibility to ultimately achieve the same goal of protecting members of the society. Further, prosecution under Criminal law is designed in a way not only to protect the child but also to safeguard the rights of the accused in order to balance the interest of both the concerned parties.<sup>54</sup>

### ***Germany***

Germany follows legal codes and procedures which give more protection to children as compared to many other countries. According to the Section 176 of the German Criminal law, children under 14 years of age are considered doli incapax for giving consent to any kind of sexual activity. Under Section 174, engaging in sexual activity with a person below 18 years is also punishable in certain circumstances for e.g. when the child is adopted and is in a state of dependence. The criminal procedure also guarantees maximum child protection. Responsible police officers themselves interrogate the child as soon as they receive any complaint.

### ***Zimbabwe***

According to the Zimbabwe Police reporting, 100 girls are sexually abused every day in Zimbabwe.<sup>55</sup> Mostly, children of the development workers are the victims of the abuse but the issue is how should they confront such a menace?

Zimbabwe has ratified the UN convention on the rights of the child<sup>56</sup> and the African Charter on the rights and welfare of the child.<sup>57</sup> These covenants recognize the fundamental duties and

---

<sup>54</sup> <https://www.ncjrs.gov/pdffiles1/Digitization/128329NCJRS.pdf> (Last accessed October 12, 2015)

<sup>55</sup> [http://www.unicef.org/zimbabwe/resources\\_15420.html](http://www.unicef.org/zimbabwe/resources_15420.html) (Last accessed October 12, 2015)

<sup>56</sup> United Nations Convention on the Rights of the Child U.N. Doc A/44/49 (1989) (CRC).

responsibilities of the parents and legal guardians to work in the best interest of the children. Children under legal framework are still considered as those who need protection.

To tackle the problem of increasing child sexual abuse, Zimbabwe has dual theory of law comprising of Roman-Dutch Common Law statutes and the African Customary laws. This dual theory of Justice System is sanctioned by the Constitution. Criminal Law (codification and reform) Act and Domestic violence Act are the special legislations to protect the children from sexual abuse.<sup>58</sup> Acts resulting in child abuse are criminalized and are made punishable with imprisonment or fine. The prosecution is generally done by the state represented by its official attorney and in some cases there is also a provision for private proceedings. The primary aim of the state is to punish the accused and not to benefit the victim however it is the duty of the victim to give genuine testimony otherwise she'll be punished for breaching such duty under the law. The criminal procedure and evidence act which was amended in 1997 makes it mandate for a criminal court to adopt protective measures for vulnerable witnesses. Such measures would include appointing intermediaries and support-staff for the witnesses and the state will ensure that the witness gives evidence in a position or place where the likelihood of the witness suffering from any kind of stress and fear is very less.<sup>59</sup> It may be in or out of presence of the accused. The victim and the witnesses are given constant moral support by the intermediaries hired by the state.

---

<sup>57</sup>African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990) (African Charter) (Last accessed October 12, 2015)

<sup>58</sup> *Supra note 57*

<sup>59</sup> *Ibid.*

## **CHAPTER V**

### **CONCLUSION**

After thorough analysis of Indian Criminal law, judicial decisions and the laws of other countries, it could be concluded that the present law is inadequate in many respects. Furthermore, when Law is clear at certain instances, the guidelines laid down are not strictly implemented by the Police, doctors and the courts which seriously hamper justice for the child victim. The researcher appeals for further reforms in the rules and procedure under law and their strict implementation for furthering the interest of the child victims. The Government can also accommodate some of the principles from the laws of the other countries which are more children friendly and work towards the advancement of justice. These reforms may include:

- Setting up of centers similar to those in Netherlands who will assume the responsibility of overseeing that complete justice is done to the child and the child is not further victimized by the judicial process.
- Making child pornography and voyeurism strictly punishable in every form.
- To make the working of child welfare institutions more effective so that it goes in consonance with the judicial system to protect victim's interest and the interest of the Society. The same structure is followed in Canada.
- Also, some the Government should also lay down some rules in order to protect the interest of the vulnerable witnesses.