

CHILD CENTRIC JURISPRUDENCE IN INDIA

NATIONAL JUDICIAL ACADEMY 25.11.2021

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RECENT LEGISLATIONS RELATING TO CHILDREN

- JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT 2015
- THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT 2012

GENERAL PRINCIPLES FOR ADMINISTRATION (SECTION 3 JUVENILE JUSTICE ACT)

- Principle of presumption of innocence
- Principle of dignity and worth
- Principle of participation
- Principle of best interest
- Principle of family responsibility
- Principle of safety
- Positive measures
- Principle of non stigmatising semantics

PRINCIPLES CONTINUED

- Principle of non waiver of rights
- Principle of equality and non discrimination
- Principle of right to privacy and confidentiality
- Principle of institutionalisation as last resort
- Principle of repatriation and restoration
- Principle of fresh start
- Principle of diversion
- Principles of natural justice

UNDERSTANDING AND ASSESSING BEST INTEREST

- Concept of best interest arises in two areas of law
- Juvenile justice child can be both a victim and a child in conflict with law
- Custody issues

UNDERSTANDING BEST INTERESTS FROM JASON M POBJOY (PG 1867)

- Considering long term effects that a decision or action may have on the child's welfare and development
- View of the child
- Specific situation and circumstances of the child- age, level of maturity and vulnerability
- Rights protected under the law

PROCESSES UNDER THE CONSTITUTION

- A fair trial process is guaranteed under the Constitution. Fair trial process implies that a person charged with an offence is assured of certain rights both at the pre trial and the trial stage.
- These include the right not to be compelled to give evidence against oneself and the right to be produced before a competent authority within twenty fours. (article 21 and 22)

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- The right to legal aid and speedy trial.

(Hoskot vs State of Maharashtra AIR 1978 SC 1548, Common Cause Laws vs Union of India AIR 1996 SC 1619)

- Delay in investigation and commencement of trials violates the Constitutional right of the individual to a speedy trial. *(Pankaj Kumar vs State of Maharashtra AIR 2008 SC 3077)*

PRE TRIAL STAGE POCSO

- ❖ Recording statement of child at the residence of child or at the place of his/her choice Section 24
- ❖ Child not to come in contact with the accused Section 24 (3)
- ❖ No child to be detained in police station in night Section 24 (4)

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

- Various categories of sexual assault
- Various categories of penetrative sexual assault
- Various categories of aggravated sexual assault
- Using child for pornographic purposes

RECORDING UNDER SECTION 164 CRPC

Subsection 5 gives absolute discretion to the magistrate to record the statement in a manner which in his/her opinion is best suited in the circumstances of the case

Subsection 5A in its application for recording statements of victims/survivors gives the same discretion.

RECORDING STATEMENT UNDER SECTION 26 OF POCSO

- Statement to be recorded as spoken by the child
- In the presence of parents or guardian or a person in whom the child has confidence
- If necessary to use translator or an interpreter or special educator
- To be recorded by audio-video electronic means

CONTINUED

- ❖ Media barred from disclosing identity of child - Sec 23
- ❖ Publisher and Owner – jointly and severally liable for acts of omission of employee
- ❖ Punishment not less than 6 months extendable to a year or fine or both
- ❖ Provision for compensation for immediate relief and long-term rehabilitation of child
- ❖ Provision for free legal aid
- ❖ (pg 1927 of materials) Inre child rape casesf

TRIAL STAGE, SECTIONS 33,34,35, 36, 37,38 POCSO

- ❖ Frequent breaks for child during trial
- ❖ Child not to be called repeatedly to testify
- ❖ Identity to be protected (includes the family, school, place of residence)
- ❖ No aggressive questioning or character assassination of child
- ❖ Children with disabilities given special consideration in giving evidence
- ❖ Shielding of child from accused – screen, one way mirror video conferencing
- ❖ Child can also be examined in a place other than court Sec 284 CrPc including issue of a commission

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- Evidence of the child to be recorded in thirty days and trial to be completed within one year.

SPECIAL FEATURES OF POCSO

- The focus is child centric without taking away the rights of the accused
- The focus is to provide access to justice in a very harmonised way to all
- The focus is to facilitate witnesses to depose in the best possible way.

SECTION 38 AND 39

- Experts include special educators, or persons familiar with the manner of communication with the child
- Professionals and experts or persons having knowledge of psychology, social work, physical or mental health and child development.

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- for the first time there is **focus on the process of recording evidence** which is often given short shrift in our system making the process itself a punishment.
 - The method adopted not only makes it easier for the child to give evidence without any fear it also makes it speedier as the child and other witnesses would articulate the evidence in a much better form at a faster time.

SPECIAL FEATURES OF POCSO

- The focus is child centric without taking away the rights of the accused
- The focus is to provide access to justice in a very harmonised way to all
- The focus is to facilitate witnesses to depose in the best possible way.
- GENDER NEUTRAL

MANDATORY REPORTING

- Section 19 makes it mandatory for any person who has apprehension that an offence under the Act may be committed. Failure not to report is an offence under Section 20 (in other jurisdictions there are list of persons who are mandatory reporters)

CONSENSUAL SEX BELOW 18 AN OFFENCE INTERPLAY WITH FAMILY LAWS

- all forms of contact is an offence of those below 18
- Marital sex even with consent of those below 18 is an offence INDEPENDENT THOUGHT VS UNION OF INDIA AND OTHERS
- Under personal laws marriage below the age of 18 are not per se null and void except under the Special Marriage Act.
- They only give rise to punishment of the adults

EIGHTEEN AS THE CUT OFF AGE FOR OFFENCES UNDER POCSO, INTERPLAY WITH JUVENILE JUSTICE ACT

- Adolescents below eighteens years consent is immaterial both will be victims
- Instances where one is just below eighteen years and another just above eighteen years

An offence under POCSO

Vijayalakshmi vs State of Tamil Nadu 2020. Recommendation that the age of the offender not to be more than five years and that of the girl above 16 year <https://indiankanoon.org/doc/35224205/s>

Sabari vs State of Tamil Nadu issued to the Government to raise awareness about pocso and sexual behaviour

direction <https://indiankanoon.org/doc/197077895/s>

MANDATORY REPORTING UNDER POCSO

- Section 19 makes it mandatory for *any person* who has apprehension that an offence under the Act may be committed.
- sub section 7 of Section 19 has the clause of good faith in protecting the person who makes a complaint.
- Section 21 makes failure not to report an offence and uses the term *any person* in the category

COMPLEXITIES

- Role of doctors- doctors have to report all cases even if the parents do want to do so.
- Role of NGO's – they also come within the purview
- Role of Courts- Matrimonial cases sometimes one parent makes an allegation of sexual abuse against the other parent but does not want to file a criminal case
- Complaints are made in court referred mediation processes-

ADDITIONAL CONCERNS

- betrays the trust of the child in fiduciary relationships where the child feels the confidence to speak about the offence – such as student-teacher, patient-doctor, student-counsellor and child-parent
- Under section 16 illegal omission is taken as intentionally aiding an offence under the Act and is considered as abetment. A combined effect of Section 16 and 19 can be used to prosecute persons.

COMPENSATION UNDER POCSO

- Section 7 of the Rules gives the guidelines and

Court on its own or on an application pass an order of compensation at any stage after the filing of the FIR.

Compensation can be interim, and final with the interim amount to be adjusted in the final amount.

ISSUES TO BE CONSIDERED FOR COMPENSATION

- Single or multiple offences
any pregnancy due to the offence,
- Contraction of HIV
- Any occurrence of disability due to the offence
- Financial condition of the family
- Any other category
- Compensation to be paid within 30 days of the order

WELFARE TO BEST INTERESTS IN FAMILY LAW

- Under the tender age theory also rests on the doctrine that children are incapable of accepting change and any change in their living situation will be detrimental to their well being.
- the shift from welfare to best interests in the shift from parental rights to the child to the child's rights towards its parents

BEST INTERESTS

- In some other jurisdictions the development of best interests has resulted in the concept of joint custody.
- The concept of best interests weigh the overall development of the child as against parental rights. For example, the right of the child to see his/her grandparents and framing this in courts have developed from the principle of best interests.

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- Emphasis on positive test for custody- Question is not whether the father is unfit to have the child a positive test whether such a custody will be for the welfare of the child. Nil Rattan Kundu vs Abhijit Kundu AIR 2009 SC (Supp) 732
 - Custody of one parent should not insulate the child from the other parental touch and influence. Ruchi Majoo Vs Sanjeev Majoo AIR 2011 SC 1952

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- Dr V Ravi Chandran vs Union of India 2009 14 SCALE 27
 - 2015 Surya Vadanana Vs State of Tamil Nadu
 - Cases relating to children in different jurisdictions
 - <https://indiankanoon.org/doc/1655422/> Athar Hussain vs Syed Siraj Ahamed addressed the views of the children differentiated between guardianship and custody

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- Even though Joint Custody has yet to be recognised in law family courts do use this concept to decide custody issues
 - Parties also enter into elaborate memo of understanding in this regard and these are filed as documents in the case
 - These arrangements work if parents are equally placed in terms of employment, education and other factors