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# INDIAN JOURNAL OF CHILD & YOUTH JUSTICE

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## **Message from the Vice-Chancellor**

It gives me great pleasure to place before our readers the first Volume of the Indian Journal of Child & Youth Justice, a publication conceived by the Centre for Child and Youth Justice, NALSAR University of Law in collaboration with Child Rights You (CRY) under the project on “Access to Justice for Children through systems strengthening on child protection issues”. This Journal is a welcome extension of the Centre’s mission to serve children through law and to contribute to the legal scholarship grounded in justice and compassion.

The National Academy of Legal Studies and Research (NALSAR) has, since beginning, believed that the study and practice of law must respond meaningfully to the lived realities of society. Among these realities, the rights, safety and well-being of children and young people demand particular care, sensitivity and sustained attention. The launch of this Journal reflects that belief and marks an important step in deepening academic and legal engagement with issues that affect some of the most vulnerable members of our society.

The Indian Journal of Child & Youth Justice seeks to create a thoughtful and rigorous space for dialogue that engages with the full spectrum of child rights and youth justice concerns. The articles engage with legal, social, psychological, developmental and policy perspectives through both

doctrinal and empirical research that is not only analytically sound but also responsive to socio-legal ground realities.

I extend my sincere appreciation to the authors for their contributions, the editorial team for their dedication, the peer reviewers for their rigorous evaluation and notably to Dr. D. Bala Krishna, Head of the Centre for Child and Youth Justice at NALSAR for their collective efforts in ensuring the highest academic standards for this Journal.

I have no doubt that the Indian Journal of Child & Youth Justice will evolve into a credible forum for critical engagement starting from its first Volume. It will serve as a valuable source of insight for its readers and make a meaningful contribution to contemporary dialogues on child rights.

**Prof. (Dr.) Srikrishna Deva Rao**  
Vice-Chancellor  
NALSAR University of Law, Hyderabad

## **About the Centre for Child and Youth Justice NALSAR University of Law, Hyderabad**

The National Academy of Legal Studies and Research (NALSAR) was established in 1998. Since its inception, the university has been home to vital conversations on law and justice and used law as an instrument of social change. The university has anchored and supported justice education be it land rights, disability empowerment, the administration of criminal justice, child and youth justice, and international law. NALSAR is committed to the creation of an ethical legal culture that protects and promotes the rule of law. The university believes that the cause of building a rule-of-law society is a continuous enterprise that is sustainable. With students admitted from all over the country and faculty drawn from home and abroad, NALSAR is counted among the top law schools in the country.

The Centre for Child and Youth Justice (CCYJ) was established by NALSAR University of Law as a specialised centre dedicated to advancing the rights and welfare of children & youth through research, advocacy, and education. The mission of the Centre is to serve the children through law. The Centre collaborates with government bodies, international organisations, civil societies and stakeholders working in the field of child rights to shape policies and laws that protect and empower children and young individuals.

The Centre serves as a hub for interdisciplinary research, legal education, advocacy, stakeholder engagement, capacity-building and providing policy recommendations in line with national and international standards in the areas of child and young people's rights. The Centre is currently running a project on "Access to Justice for Children through systems strengthening on child protection issues" funded by CRY - Child Rights and You.

## EDITORIAL

The Centre for Child and Youth Justice (CCYJ), NALSAR University of Law, takes immense pleasure in presenting the inaugural volume of the Indian Journal of Child & Youth Justice. CCYJ is committed to promoting rigorous academic dialogue on critical issues pertaining to child rights and youth justice. In furtherance of its objectives, this scholarly publication attempts to enrich discussions on child rights by providing a platform for examining their legal, social, psychological, developmental, and policy dimensions. The journal seeks to address the multifaceted challenges confronting children and propose innovative legal and systemic interventions. Through this initiative, CCYJ aspires to contribute meaningfully to the growth of child rights jurisprudence and to the broader effort of building a just, equitable, and protective environment for children.

As we navigate an era marked by profound technological, cultural, and socio-legal transformations, the protection of children has never been more urgent or more complex. Emerging digital spaces, shifting family structures, strengthened rights discourses and the rapid evolution of artificial intelligence present both unprecedented opportunities and new threats. Simultaneously, longstanding challenges related to trafficking, child marriage, juvenile justice, and procedural safeguards continue to demand sustained attention. It is in this context that the launch of the Indian Journal of Child & Youth Justice becomes significant.

It offers an academic space for analysis, critique, and constructive dialogue. The present volume captures these complexities through a diverse range of contributions that collectively highlight the necessity of child-centric governance, harmonized laws, empathetic enforcement, and evidence-based policy reform.

The first article, *“Analysing the POCSO Act, 2012 in the context of Adolescent Relationships in Meghalaya”*, examines the application of the POCSO Act within the socio-cultural framework of Meghalaya’s matrilineal society. The authors critically analyse how the criminal law responds to consensual adolescent relationships and highlight judicial unease with the rigid application of POCSO. The article argues for context-sensitive and nuanced legal approaches that better reflect lived realities while safeguarding children’s rights.

The second article, *“The Age Ambiguity: Interrogating the Legal Limbo in Child Marriage Prohibitions”*, explores inconsistencies across Indian statutes concerning the definition of a child and the prescribed age of marriage. The authors demonstrate how these contradictions weaken enforcement mechanisms and perpetuate vulnerabilities, particularly for girls.

In the third article, *“Regulating AI-Generated Child Sexual Abuse Material: Legal Imperatives and Policy Challenges in India”*, the authors address the alarming rise of Artificial Intelligence (AI) generated child sexual exploitative and abuse material (CSEAM) and the legal vacuum surrounding it. It argues for

criminalization of such material and recommends strengthening India's regulatory and enforcement mechanisms to meet this emerging threat.

The fourth article, *"Home and the World: A Comparative and Intersectional Approach to Adoption Reforms in India"*, offers a detailed analysis of India's adoption regime through comparative and intersectional perspectives, focusing particularly on inter-country adoption and adoption by same-sex couples. It identifies key legal gaps and advocates reforms that embrace inclusivity while ensuring children's best interests.

The fifth contribution titled *"In The Line of Law: Balancing the Scales Between Court-Martial Procedures and POCSO Safeguards"*, explores how POCSO, as a special legislation, interacts with the distinct military legal framework. It highlights the gaps that arise when cases involving children are handled through Court-Martial procedures and stresses the need for coordination between civil and military systems to ensure child-focused justice.

In *"Beyond Punishment: The Evolution and Efficacy of India's Juvenile Justice System"*, the authors trace the historical development of India's juvenile justice framework and evaluate its rehabilitative objectives. The article critically assesses the effectiveness of existing mechanisms and challenges in implementation, calling for reforms that reinforce restorative justice principles and child-centric interventions.

The seventh article, *“Harvested Hope: The Exploitation of Children for Organs”*, exposes the grave realities of child organ trafficking and the systemic failures that allow it to persist. It calls for stronger legislation, targeted enforcement, and improved documentation of vulnerable children to curb this deeply exploitative practice.

In *“Safeguarding Kidfluencers: Intersection of Child Rights and Parental Responsibility in the Emerging Digital Media Workplace”*, authors examine the rise of child influencers on social media and the resultant ethical and legal concerns arising from their participation in digital labour. They argue for stronger regulatory safeguards to prevent economic exploitation and to ensure responsible parental oversight in a rapidly expanding digital marketplace.

In the ninth article, *“Dark Patterns and Digital Manipulation – How Online Platforms Exploit Children in Cyberspaces”*, the authors analyse how design strategies used by online platforms manipulate children’s behaviour and compromise their autonomy and privacy. The article exposes regulatory gaps and calls for stronger child-specific digital protection norms to counter exploitative online practices.

The article, *“Section 16 of The Hindu Marriage Act, 1955 – A Welfare Section Which Needs to be Revisited and Reformed”*, revisits the legislative intent behind Section 16 concerning legitimacy of children born out of void or voidable marriages. The author critiques inconsistencies in interpretation and application and advocates for reforms that ensure

comprehensive protection of children's rights within evolving family structures.

*"Socio-economic Barriers to the Right to Education: A Case Study"* examines how structural inequalities and socio-economic constraints hinder effective realisation of the right to education. Through a focused case study, the article brings out gaps between legal entitlements and ground realities, demanding targeted policy interventions to ensure inclusive and equitable access to education.

In the final piece, *"Unseen Scars: The Hidden Battle Over Intersex Children's Bodily Integrity"*, the authors critique non-consensual gender-normalizing surgeries performed on intersex children and trace its historical and medical foundations. They call for rights-based reforms, including bans on non-essential surgeries and greater recognition of intersex autonomy in Indian law.

The Editorial Board extends its sincere gratitude to the Patrons, Advisory Board, Contributing Authors, Editors, Research Team and dedicated peer reviewers whose commitment and expertise made this volume possible. Their rigorous engagement has ensured that this inaugural issue sets a strong foundation for scholarly inquiry and meaningful advancement in the field of child and youth justice.



**ANALYSING THE POCSO ACT, 2012 IN THE CONTEXT OF  
ADOLESCENT RELATIONSHIPS IN MEGHALAYA**

*Dr. Ankita Chakraborty\* and Dr. Umeshwari Dkhar♦*

**ABSTRACT**

*The Protection of Children from Sexual Offences Act (POCSO) of 2012 defines a “child” as an individual below eighteen, raising the age of consent for sexual activities to 18 years. While intended to protect children from sexual offences, the POCSO Act poses unique challenges when applied to consensual romantic relationships among adolescents in Meghalaya. In Khasi matrilineal and matrilocal system, women hold a dignified position, and lineage is derived from the mother. Children’s legitimacy is unquestioned, regardless of whether they were born out of wedlock, cohabitation, or void/voidable marriage. However, problems arise in situations where the consequences of adolescent sexuality led to complicated trial processes, only to subsequently discover that the prior sexual conducts*

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\* Assistant Professor of Law at Xavier Law School, St. Xavier’s University, Kolkata, with a doctorate in Gender Justice and Criminal Law. Her research focuses on sex trafficking, domestic violence, child protection, and victim-centric criminal justice, with publications in reputed national and international journals. Her work has also informed wider public and policy discourse, including being cited by *National Geographic* for her doctoral research on sex trafficking in India. *Email: ankita.hlc@gmail.com*

♦ Assistant Professor at National Law University Meghalaya, bringing extensive expertise in legal education, research, and public training throughout the Northeast. Her work connects customary law, constitutional principles, and social justice, with a particular emphasis on gender justice. She is also a dedicated researcher and national-level legal trainer. *Email: udkhar@nlumeg.ac.in*

*between the concerned teenagers, were non-coercive and non-exploitative. This article examines the legislative and judicial stance on “romantic cases” under the POCSO Act in Meghalaya, citing instances where special courts and High*

*Courts have expressed reservations about criminalizing consensual adolescent relationships. The analysis, including a pilot study, underscores the need for a nuanced approach, emphasizing the importance of aligning the POCSO Act with the evolving socio-cultural landscape surrounding romantic relationships in a matrilineal context. It suggests a critical re-evaluation of age of consent norms and exemptions.*

***Key words:*** *child, romantic cases, POCSO, consent, assent*

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## **1. Background**

On 20<sup>th</sup> June 2012, India implemented the Protection of Children from Sexual Offences Act (hereinafter, the POCSO Act) to combat instances of child sexual abuse and to incorporate child-centred measures during the investigative and trial phases. Apart from prohibiting and penalizing various forms of sexual abuse against children, this legislative action was driven by the objective of child welfare throughout the entire legal process, facilitated by the establishment of specialized courts.<sup>1</sup> In *Vijayalakshmi v. State Rep. the Inspector*

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<sup>1</sup> Seth, R. et al. (2017) ‘Child sexual abuse: Management and prevention, and protection of children from sexual offenses (POCSO Act),’ *Paediatric Rheumatology*, 54, p949–950.

of Police<sup>2</sup> the court observed that the statement of objects and reasons of the POCSO Act reflects the clear intention of protecting children from offences of sexual assault, sexual harassment, and pornography, in tune with Article 15 of the Constitution of India<sup>3</sup> and the International Convention on the Rights of the Child, 1989.<sup>4</sup>

However, in recent times, a large array of cases filed under the POCSO Act are arising out of complaints registered by the families of adolescents and teenagers who are involved in romantic relationships with each other; even though the scheme of the Act clearly reflects that it did not intend to bring within its scope or ambit, cases of such nature.<sup>5</sup> Additionally, it is argued that sexual activity among teenagers in India is neither uncommon nor unheard of. For example, in the year 2020, a study conducted by the BMC Public Health on “*Transitions in Adolescent boys and Young Men’s High Risk Sexual Behaviour in India*” reflected that the initiation of first sexual activity among male adolescents in India pertains to the age of sixteen.<sup>6</sup> However, by criminalizing such activities instead of focusing on spreading sexual education and promoting safe and healthy sexual practices, the legislative

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<sup>2</sup> AIR 2021 SCC Online Mad. 317.

<sup>3</sup> The Constitution of India, 1950, see article 15.

<sup>4</sup> United Nations Convention on Rights of Child, Nov. 20, 1989, U.N.T.S 1577.

<sup>5</sup> *Ibid.*

<sup>6</sup> Sharma, S.K., et al. (2020) ‘Transitions in adolescent boys and young men’s high-risk sexual behaviour in India,’ *BMC Public Health*, 20(1089), p1-7.

intent behind the POCSO Act, 2012, stands compromised.<sup>7</sup> According to another analysis conducted by the Enfold Proactive Health Trust with UNICEF India; approximately 24.3% of the 7064 cases registered and adjudicated under the POCSO Act in the special courts of Assam, Maharashtra, and West Bengal between 2016 and 2020 were categorized as “romantic cases.”<sup>8</sup> These were instances where the girls and their family members considered the relationships as “consensual.” In majority of these cases (1058 or 61.7%), the special courts expressly concluded that “*the relationship between the accused and the girl was consensual in nature or that they were having a love affair.*”<sup>9</sup> In similar lines, the High Courts of other states like Delhi and Madras adopted the rationale to express a more forgiving stance while handling POCSO cases labelled as “romantic” in comparison to other instances under the Act. For example, in 2019, the Madras High Court observed that the relationship amongst minors or minors with persons who are slightly above the teen years was not unnatural or alien but a result of the natural biological attraction and suggested a re-evaluation of the age of consent

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

<sup>8</sup> Ramakrishnan, S. and Raha, S. (2023) “‘Romantic’ cases under the POCSO Act: An analysis of judgments of special courts in Assam, Maharashtra & West Bengal”, *Enfold Proactive Health Trust*, 10 October. Available at: <https://www.girlsnotbrides.org/learning-resources/child-marriage-research-action-network/crank-research-tracker/romantic-cases-under-the-pocso-act-an-analysis-of-judgments-of-special-courts-in-assam-maharashtra-amp-west-bengal/> (Accessed: 15 December 2024).

<sup>9</sup> *Ibid.*, at 5.

and the possibility of introducing exemptions for the same.<sup>10</sup> Similarly, in the case of *Atul Mishra v. State of UP and others*,<sup>11</sup> it was indicated that the criminalization of consensual sexual activity in the context of romantic relationships is a matter of concern. Yet, courts like the Madras High Court clarified that situations where teenage girls blame themselves or believe they have given consent should not be overlooked.<sup>12</sup> Universally validating the authenticity or situation of the accused in every case involving a romantic relationship between the accused and the child victim may be a wrong presumption since it is a subjective experience. Thus, such determinations should ideally be based on the specific facts and circumstances of the individual cases.<sup>13</sup>

That said, till the “consent” is determined, the consequences of child sexuality result in complicated trial processes, only to subsequently discover (in many situations) that the prior sexual conduct between the concerned teenagers, were non-coercive and non-exploitative. By then, due to the severity of the POCSO Act, the trial processes turn into punitive experiences for the alleged teenagers who also face ostracization and stigmatization in society.<sup>14</sup> A significant

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<sup>10</sup> *Sabari v. Inspector of Police*, A.I.R. 2019 3 RCR (Cri) 452.

<sup>11</sup> AIR 2022 SCC ONLINE ALL 420.

<sup>12</sup> *Sabari v. Inspector of Police*, AIR 2019 (3) MLJ CrI 110.

<sup>13</sup> *Ibid.*

<sup>14</sup> Anchan, V., et al. (2021) ‘POCSO Act, 2012: Consensual sex as a matter of tug of war between developmental need and legal obligation for adolescents in India’, *Indian Journal of Psychological Medicine*, 43(2), p158-161.

number of these teenagers might also fall within the category of “*children alleged and found to be in conflict with law*” as per the provisions outlined in the Juvenile Justice Act of 2015 (hereinafter, JJ Act).<sup>15</sup> Thus, although the POCSO Act of 2012 regards the well-being of children as paramount at every stage of the trial, in many contemporary scenarios, it fails to fulfil this role and instead becomes a source of fear for adolescents engaged in consensual sexual activities.<sup>16</sup>

## **2. Prevalent Customs Vis-À-Vis 2012 POCSO: A Dilemma**

In traditional and custom-driven societies like Meghalaya, the implementation of the POCSO Act presents unique challenges, making the situation even murkier. Traditional societies like the Khasis and other tribes follow a matrilineal and matrilocal system where women not only enjoy a position of dignity and importance but the lineage is also derived from the mother.<sup>17</sup> Since maternity is above social institutions, even

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<sup>15</sup> ‘*Child in conflict with law*’ means a child who is alleged or found to have committed an offence & who has not completed eighteen years of age on the date of commission of the offence; see sec.2(13), The Juvenile Justice Act, 2015, No. 2, Acts of Parliament, 2016 (India).

<sup>16</sup> Gupta, N., et al. (2020) ‘Adolescent sexual behaviour and its determinants: A hospital-based study’, *Journal of Family Medicine and Primary Care*, 9(11), p5511–5513. see also, Jain, T., et al. (2014) ‘Sexuality in adolescents: Have we explored enough? A cross-sectional study to explore adolescent health in a city slum in Northern India’, *Journal of Clinical and Diagnostic Research*, 8(8), p8–10. see also, Ramteke, R.U., et al. (2023) ‘Adolescent sexual behavior in rural central India: Challenges and interventions’, *Cureus*, 15(11), p1–3. see also, Ramadugu, S. (2011) ‘Understanding sexuality among Indian urban school adolescents’, *Indian Psychiatry Journal*, 20(1), p49–50.

<sup>17</sup> Tombling, T. (2023) ‘Marriage and divorce law among indigenous North East tribes of India: Comparative study of Mizoram and Meghalaya’,

in cases of illegal/void/voidable marriages, and/or cohabitation without a formal ceremony or marriage registration, legitimacy of the child born out of the wedlock is never questioned.<sup>18</sup> In such situations, adolescent relationships present a complex dilemma in the practical application of the POCSO Act. For example, a 2015 study on “*Child Marriage and Early Motherhood*” conducted by a research team from the Centre of Excellence on Adolescents and Youth at the Tata Institute of Social Sciences (TISS), India revealed that despite the absence of dowry or bride price and elevated literacy rates in Meghalaya, the State experiences an increase in premarital sex, teenage pregnancies, and child marriages.<sup>19</sup> In the context of the POCSO Act, these adolescent relationships and teenage sexualities pose greater challenges since a “minor” here, defined as “a person below 18 years of age,” is deemed incapable of giving consent for sexual intercourse. This lack of consideration fails to account for the potential for consensual and non-exploitative sexual activities among adolescents.

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ResearchGate, p8. Available at: [https://www.researchgate.net/publication/349140253\\_COMPARATIVE\\_LEGAL\\_ANALYSIS\\_OF\\_INDIGENOUS\\_CUSTOMARY\\_INSTITUTIONS\\_AMONG\\_MIZO\\_KHASI\\_AND\\_PAITE\\_TRIBES\\_OF\\_NORTH\\_EAST\\_INDIA](https://www.researchgate.net/publication/349140253_COMPARATIVE_LEGAL_ANALYSIS_OF_INDIGENOUS_CUSTOMARY_INSTITUTIONS_AMONG_MIZO_KHASI_AND_PAITE_TRIBES_OF_NORTH_EAST_INDIA) (Accessed: 14 January 2024)

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

<sup>19</sup> Mitra, N., et al. (2023) *Child marriage and early motherhood*, UNFPA TISS, p33. Available at: <https://feministlawarchives.pldindia.org/wp-content/uploads/CMEM-REPORT.pdf> (Accessed:14 January 2024)., see also: *Our Reporter* (2012) ‘Teen pregnancy cause of high fertility rate in M’laya’, *Shillong Times*, 23 March.

For instance, in the case of *John Franklin Shylla v. State of Meghalaya*,<sup>20</sup> a young accused in his early twenties was charged under sec. 363 IPC, 1860, and sec. 3(a) and 4 of the POCSO Act, 2012, for engaging in sexual activity with his 16-year-old girlfriend. The court considered this to be a typical case involving two young individuals—a boyfriend and girlfriend—who had eloped, married, and consummated their marriage. Justice Wanlura Diengdoh quashed the FIR against the accused petitioner, considering the physical and mental development of the victim girl and her capability to make conscious decisions regarding her well-being and sexual activity.<sup>21</sup> Similarly, in the case of *Shri. Shembhalang Rynghang and another v. State of Meghalaya*,<sup>22</sup> the same court expressed grave concerns about scenarios where adolescent couples elope, get married, consummate their marriage, and subsequently, their parents or families file an FIR for kidnapping under the IPC, 1860, along with several provisions under the POCSO Act, 2012.<sup>23</sup> The court pointed out that such FIRs typically result in the young man's arrest,

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<sup>20</sup> AIR 2023 SCC ONLINE MEGH 303.

<sup>21</sup> Makhdoomi, B.A. (2023) *16-Yr. Old Capable of Making Conscious Decision About Sex: Meghalaya High Court Quashes POCSO Case Against Boyfriend*. Available at: <https://www.livelaw.in/high-court/meghalaya-high-court/meghalaya-high-court-quashes-pocso-fir-conscious-decision-sexual-intercourse-16-year-old-victim-consent-231142#:~:text=Basit%20Amin%20Makhdoomi&text=Quashing%20an%20FIR%20for%20offences,an%20act%20of%20sexual%20intercourse.> (Accessed: 23 June 2023)

<sup>22</sup> AIR 2022 SCC ONLINE MEGH 401.

<sup>23</sup> *Shri. Shembhalang Rynghang and another v. State of Meghalaya*, AIR 2022 SCC ONLINE MEGH 401.

abruptly disrupting his youthful life; whereas, in reality, adolescents undergoing hormones and biological changes, with their decision-making abilities still evolving, should receive support and guidance from their parents and society.<sup>24</sup> Likewise, in the case of *Shembhalang Rynghang & Anr. Vs. State of Meghalaya*,<sup>25</sup> Justice W. Diengdoh allowed a petition which was filed praying to quash the criminal proceedings pending in the Court of the Special Judge (POCSO) under Section 5(j)(ii)/6 POCSO Act, 2012, whereby the Petitioner 1 was facing trial, after Nazareth Hospital in Shillong reported to the police that his 17-year-old wife, Petitioner 2, was pregnant following a medical checkup.<sup>26</sup>

The counsel for the petitioner argued that both petitioners lived together as husband and wife, with the knowledge and consent of their families. A male child was born from their relationship, and none of the family members wished to pursue legal action against Petitioner 1. The counsel further emphasized that the situation was not the result of a heinous crime, but rather stemmed from a relationship between two young individuals in love.<sup>27</sup>

### ***3. Age Of Consent, Teenage Sexuality, And the Stigma of Criminalization***

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

<sup>25</sup> AIR 2021 08 MEG CK 0007.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

On a positive note, the POCSO Act, 2012 marked an advancement in the country's commitment to safeguard children under the age of 18 from sexual crimes, including assault, harassment, exploitation for pornography etc. The legislation offered a detailed categorization of sexual offenses against children and introduced child-centric procedures for reporting, evidence recording, investigation, and swift prosecution of these crimes, all conducted in Special Courts designed for this purpose. It also defined "child" as an individual below the age of eighteen, thereby raising the minimum age of consent for sexual activities to 18 years<sup>28</sup> and the requirement for doctors, hospitals, and all private citizens, including school staff and parents, to mandatorily report any sexual activity involving children and adolescents to the police.<sup>29</sup> The POCSO Act introduced uniformity in the age of consent and addressed the previously unclear and gender-differentiated legal framework surrounding the minimum age of consent in India. For example, under Section 375 of the erstwhile Indian Penal Code, 1860 (IPC), which addressed rape, the age of consent for females was set at 16 years until the Criminal Law (Amendment) Act of 2013 was passed, which increased it to 18 years.<sup>30</sup> The Prohibition of Child

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<sup>28</sup> The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (India).

<sup>29</sup> Pitre, A., et al. (2022) 'Age of consent: Challenges and contradictions of sexual violence laws in India', *Sexual and Reproductive Health Matters*, 29(2), p461-462. See also, Batra, N. (2024) 'Navigating the conundrum of mandatory reporting under the POCSO Act: Implications for medical professionals', *Indian Journal of Medical Ethics*, 9(1), p58-62.

<sup>30</sup> *Ibid*, at 463-464, ANCHAN, *supra* note 14, at 159.

Marriage Act (PCMA) of 2006 established the legal age for marriage as 18 for females and 21 for males. Marriages below these ages are considered voidable, with some exceptions based on jurisdiction where it could be annulled through a legal action within a specified period after reaching the legal age.<sup>31</sup> Various religious laws also specify marriage ages (till date), such as the Muslim Personal Law allowing girls to marry post-15 years or upon reaching puberty, and the Hindu Marriage Act and the Code of Canon Law for Christians stipulating marriage ages at 18 for females and 21 for males, emphasizing the necessity of mutual consent.<sup>32</sup> The POCSO Act, 2012 superseded all these laws through the provisions of Section 42-A.<sup>33</sup> However, its primary aim of prohibiting non-consensual sexual acts and child abuse overlooked the complexity of framing adolescent romantic relationships within a fixed age limit.

According to the 2019-2021 National Family Health Survey (NFHS) report, amongst the women surveyed (aged between 20-24 years), 26.8% married before the age of 18 and the adolescent fertility rate for woman aged between 15-19 years

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<sup>31</sup> *Ibid.*

<sup>32</sup> Lakshmi, P. (2012) 'Personal laws and the rights of women', *Christ University Law Journal*, 1, p91-95.

<sup>33</sup> See The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (India) at sec. 42A: "Act 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 of this Act shall have over riding effect on the provisions of any such law to the extent of the inconsistency."

was 51%.<sup>34</sup> A study conducted at a tertiary care centre in North India further revealed that 47% of the sample studied began full sexual relations within the age of 16-20 years.<sup>35</sup> Another cross-sectional survey where 1022 adolescent students aged between 14-19 years were interviewed, revealed that 89% of the respondents were exposed to sex-related materials and 19.2% of them indulged in intimate friendship with their partners.<sup>36</sup> Thus, various studies highlight the prevalence of adolescent sexual relationships, with varying rates of sexual behaviour observed among teenagers in rural and central India.

Conversely, there exists an on-going debate on children's competence to give informed consent. It centers around certain ethical and legal aspects that recognize that a gradual development of decision-making capacities reflects children and adolescents. Under such situations, employing a fixed age limit (for example, 18 years) as a criterion to determine consent, though justifiable, may not be a practical and effective measure to understand biological maturity vis-a-vis

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<sup>34</sup> National Family Health Survey (NFHS-5) (2019-2021). Available at: [https://main.mohfw.gov.in/sites/default/files/NFHS-5\\_Phase-II\\_0.pdf](https://main.mohfw.gov.in/sites/default/files/NFHS-5_Phase-II_0.pdf) (Accessed: 31 March 2025).

<sup>35</sup> Agarwal, N., et al. (2021) 'Sexual behaviour and practices among adolescents and young people: Study and results from a tertiary care centre of North India,' *International Journal of Community Medicine and Public Health*, 8(6), p2937-2939.

<sup>36</sup> Kumar, D., et al. (2017) 'Sexual behaviour of adolescent students in Chandigarh and their perceptions regarding family life education', *Journal of Family Medicine and Primary Care*, 6(2), p399-400.

romantic love.<sup>37</sup> The major drawback of relying solely on a fixed age limit is its binary nature, which fails to recognize the nuanced differences among individuals and their subjective experiences.<sup>38</sup> This approach inevitably leads to inaccuracies; for example, it may unjustly classify some individuals who are above the age limit as competent despite their lack of competence and, conversely, label some competent individuals below the age threshold as incompetent. This also gives rise to the informed consent versus assent debate. With regards to sexual intimacy, while assent is a simple expression of agreement or approval, informed consent is a voluntary, affirmative, and conscious decision by a person to engage in a mutually agreed upon sexual relationship, the consequences of which are known to both parties.<sup>39</sup>

The POCSO Act equates “assent,” “informed consent,” and the “minimum age of marriage” under the uniform standard that the legal age for consenting to sexual activities is 18. While gender-neutral, this provision often leads to statutory rape charges under both the IPC and POCSO Act against male partners, particularly in cases of adolescent elopement or

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<sup>37</sup> Varghese, N. S. (2021) ‘The double-edged sword of consent law in India’, *International Journal of Legal Research and Studies*, 6(3), p27–33.

<sup>38</sup> Bhatia, A. (2012) ‘Criminalization of consensual juvenile relationships under POCSO Act: A defeatist interpretation of the law’, *International Journal of Food and Nutritional Sciences*, 11(10), p3398–3400.

<sup>39</sup> Brady, S. S. (2023) ‘Communication about sexual consent and refusal: A learning tool and qualitative study of adolescents’ comments on sexual health website’, *American Journal of Sexual Education*, 17(1), p19–21.

pregnancy, where families disapprove.<sup>40</sup> This conflation of the “age of consent” with the “age of marriage” stems from a protective intent but is often critiqued as a form of sexual control disguised as safeguarding.<sup>41</sup> The rationale lies in the evidentiary challenges of determining consent, particularly when the accused holds a position of trust relative to the victim, requiring reliance on circumstantial evidence and nuanced examination of the context.

As child right experts and activists continued to raise their concerns about the over-criminalisation of “consensual sexual relations” between teenagers, the Law Commission of India in September 2023 took up the task of re-considering the age of consent under POCSO Act, 2012. After a thorough analysis of judgments rendered by the High Court of Karnataka in *State of Karnataka v. Basavraj S/o Yellappa Madar*<sup>42</sup> and the High Court of Madhya Pradesh in *Veekesh Kalawat v. State of Madhya Pradesh & Ors.*<sup>43</sup>, alongside extensive discussions with the National Commission for Protection of Child Rights (NCPCR), legal experts, child rights activists, NGOs, and scholars; the National Law Commission reviewed the child

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<sup>40</sup> Sriram, R. (2024) ‘POCSO and the age of consent: Question of teenage sexual exploration and bodily autonomy’, *Outlook India*, 31 March. Available at: <https://www.outlookindia.com/national/pocso-and-the-age-of-consent-question-of-teenage-sexual-exploration-and-bodily-autonomy-news-305925> (Accessed: 16 December 2024).

<sup>41</sup> Mathew, L. A. (2019) ‘Right to sexual autonomy of children - Implications of the UNCRC upon the Indian law on the age of consent’, p121, 126.

<sup>42</sup> AIR 2023 I AIR Kant R 231.

<sup>43</sup> Misc. Criminal Case No. 4521 of 2023, High Court of Madhya Pradesh

protection laws. The study analysed data from all High Courts and the National Crime Records Bureau (NCRB), contextualizing it against persistent issues such as child abuse, trafficking, and prostitution. Thereafter, it reached to a consensus that altering the current age of consent under the POCSO Act will result in more harm than protecting child rights. However, the Commission recognized the necessity for amendments in the POCSO Act to address situations involving individuals aged 16 to 18 years where there is an “implicit approval” or “assent” between two teenagers but not legal consent, arguing that such instances should not be treated with the same severity intended for the core scenarios envisioned by the POCSO Act. It proposed the introduction of controlled judicial discretion in sentencing for these cases to maintain a balance in the law, prioritizing the welfare of the child.<sup>44</sup> It expressed its opposition to the automatic decriminalization of consensual sexual activities involving individuals aged 16 to 18 years, highlighting the potential for consent to be artificially construed, raising concerns that police or investigative bodies might prematurely categorize genuine POCSO cases as consensual, thus preventing their trial. Additionally, it emphasized that lowering the age of consent could adversely affect efforts to combat child

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<sup>44</sup> Law Commission of India (2023) Age of consent under the Protection of Children from Sexual Offences Act, 2012, Report No. 283, September. Available at: <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2023/09/20230929466194485.pdf> (Accessed: 31 March 2024).

marriage and bride trafficking.<sup>45</sup> It advocated for judicial discretion in modifying the minimum sentencing guidelines under the POCSO Act, particularly when the age gap between the victim and accused is under three years and where there is implicit approval. It was added that this discretion should also be considered when the accused has no prior criminal record, has shown good behaviour post-offense, and when there is no evidence of force, coercion, child trafficking, or use of the child in pornography, among other criteria.<sup>46</sup>

The authors contend that although well intended, the Law Commission Report (the Report) did not resolve the problem of unnecessary criminalization in consensual romantic relationships that continue to stigmatize young adolescents in situations of mere moral turpitudes.<sup>47</sup> The Minimalist Theory of criminalization maintains that criminal law should be used as the last resort (*ultima ratio*). Stringent conditions must be satisfied before any State is justified in enacting criminal laws.<sup>48</sup> However, the Report failed to address these issues and only substantially related to the legitimate purpose of curbing manufactured consent. It also failed to consider that the accused would bear the burden of proving consent under

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

<sup>46</sup> *Ibid.*

<sup>47</sup> Dasgupta, S. (2024) 'As Law Commission recommends against lowering the age of consent, questions on the stigma of criminalization remain,' *The Wire*, 25 March. Available at: <https://thewire.in/law/expert-view-law-commission-lowering-age-of-consent> (Accessed: 31 March 2024).

<sup>48</sup> Husak, D. (2004) 'The criminal law as last resort', *Oxford Journal of Legal Studies*, 24(2), p207–208.

Section 105 of the Indian Evidence Act, 1872, (now, section 108 of the Bharatiya Sakshya Adhiniyam, 2023) and established a sentencing exception without clear guidelines, leaving sentencing entirely to the judge's discretion. The commission while suggesting “judicial discretion in sentencing” as a nuanced approach to balance protection of children from sexual exploitation while addressing consensual sexual acts between persons aged 16 to 18; reserved this discretion for Special Courts and indicated that it should apply in cases where factual consent from a child above 16 is evident.<sup>49</sup> However, it did not carve out “specific parameters” which should be considered by the adjudicating Judge to accurately determine that the child’s consent was genuinely free of coercion, deceit, or manipulation.<sup>50</sup> Additionally, the Commission failed to address scenarios where the male is aged between 18 and 19 years, and the female is 16 or older but still under 18, in its discussion. It failed to consider the Probation of Offenders Act, 1958, and does not alleviate the lifelong stigma associated with a trial for an offense involving moral turpitude. Although the Commission recommended that a boy aged 16-18 involved in a romantic relationship with a teenage girl be dealt with under the JJ Act, 2015, which offers broader discretion in cases where consent is proven, it

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<sup>49</sup> Chaudhary, S. (2024) ‘Law Commission of India and the debate on the age of consent’, *Economic and Political Weekly*, 59(6), p1-3.

<sup>50</sup> Basu, Y. (2024) ‘Age of consent: Law panel report simply diagnoses, doesn’t solve the problem’, *The Quint*, 20 March. Available at: <https://www.thequint.com/opinion/law-commission-report-on-pocso-age-of-consent> (Accessed: 31 March 2024).

overlooked the harsh reality of legal processes. These processes can act as a form of punishment, particularly when they lead to detention in juvenile homes.

The present pilot study was conducted in response to the Law Commission's Report, which, despite recommending some flexibility, failed to address larger concerns with regards to the unnecessary criminalization of consensual romantic relationships among young individuals. It aimed to critically examine over-criminalization of consensual romantic relationships, as discussed in the theoretical and policy discourses, while also evaluating the practical implications of the Act and its alignment with the social and cultural realities of a matrilineal society like Meghalaya.

#### ***4. Findings from the Pilot Study***

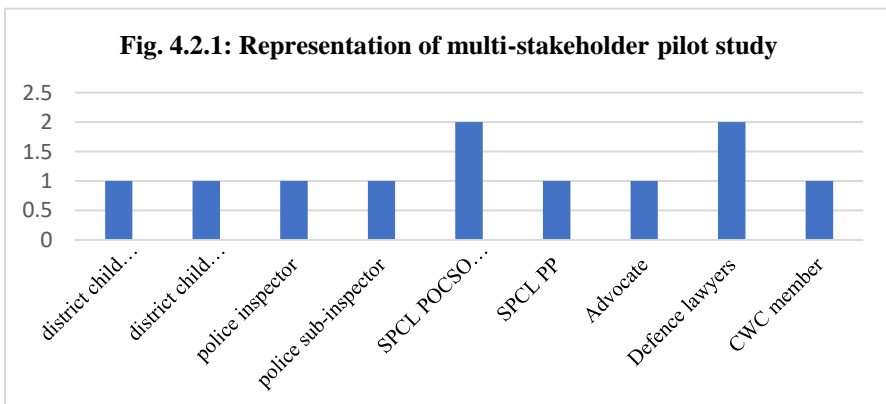
##### ***4.1 Methodology***

The pilot study employed a qualitative research methodology using non-probability sampling techniques (snowball and purposive sampling) to identify and engage relevant stakeholders involved in either handling or adjudicating POCSO cases in the East-Khasi Hills District of Meghalaya. Semi-structured, open-ended questionnaires were used to conduct in-depth interviews with the key informants, including a district child protection psychologist, police officers, special judges, a public prosecutor, defence counsels, an advocate, a Child Welfare Committee (CWC) member, and a district child protection officer handling POCSO cases in the

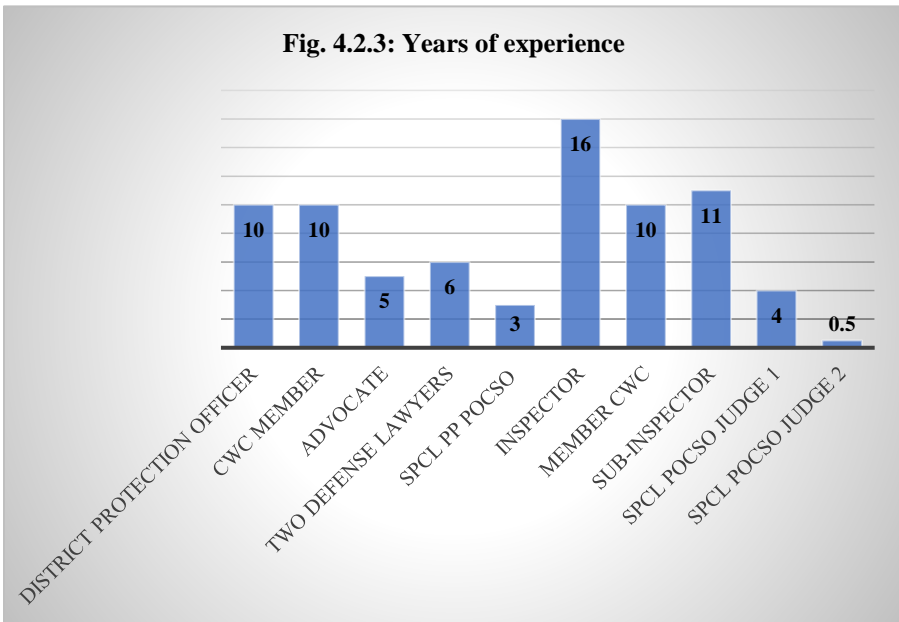
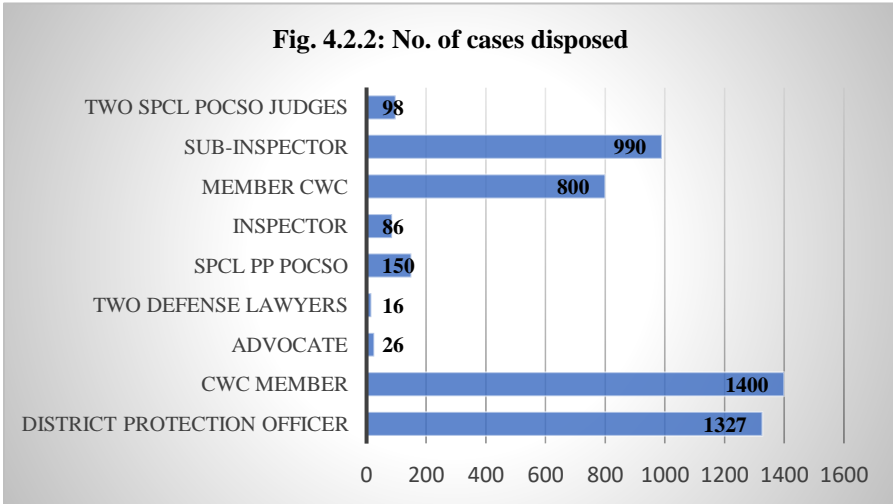
said District. The detailed analysis and researchers' observations are discussed herewith.

#### **4.2 Key Findings of the Study**

The pilot study employed a multi-stakeholder approach to examine the application of the POCSO Act in adolescent relationships within Meghalaya's matrilineal context (Fig.4.2.1). Open-ended questionnaires were used to collect qualitative data from the key stakeholders (already indicated) focusing on two key areas: (1) the implementation of the POCSO Act in adolescent relationships and its interaction with traditional matrilineality, and (2) the balance between protecting minors and avoiding unnecessary criminalization of consensual relationships, as recommended by the Law Commission. Questions probed stakeholders' perceptions of the Act's objectives versus its practical outcomes, criteria for distinguishing consensual relationships from exploitation, and the role of judicial discretion. Collected data were transcribed and analysed to identify key research trends, which are discussed in the following sections.

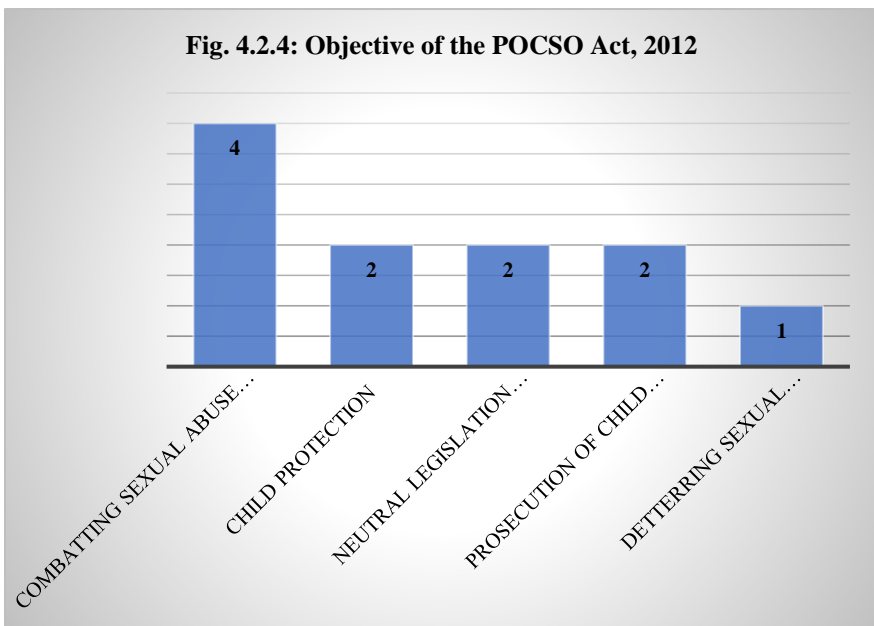


The data revealed the number of POCSO cases disposed of by various stakeholders (Fig. 4.2.2) and their individual years of experiences in the field (Fig. 4.2.3), with the CWC member handling the maximum number of cases (1,400 cases) (Fig. 4.2.2) in a time span of 10 years (Fig. 4.2.3).



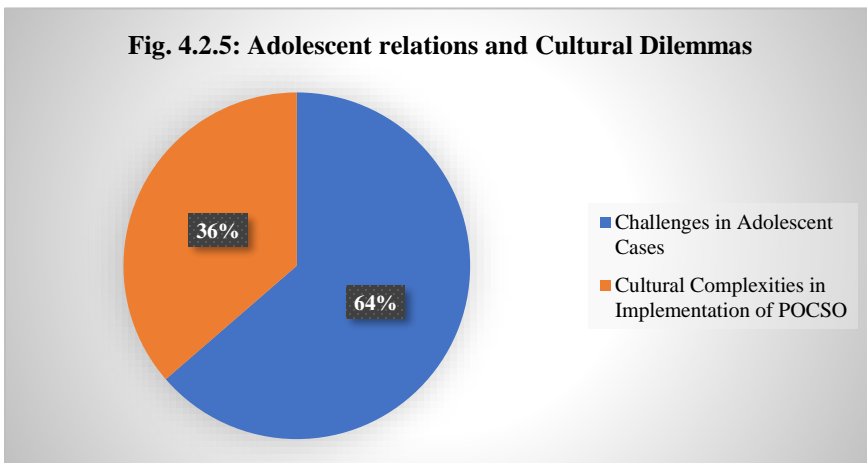
#### **4.2.1 Application of the POCSO Act vis-à-vis adolescent romantic relationships in Meghalaya**

*Consensus on POCSO Act's Objective and Challenges in Adolescent Relationships:* All stakeholders (n=11) agreed that the POCSO Act is a neutral legislation aimed at addressing all forms of child sexual abuse with stringent punishments. While the Act was primarily enacted to tackle the rising cases of child sexual abuse and clearly defines various offences against children, it is often invoked in cases involving the complexities of consent in romantic relationships among adolescents and young adults (Fig. 4.2.4).



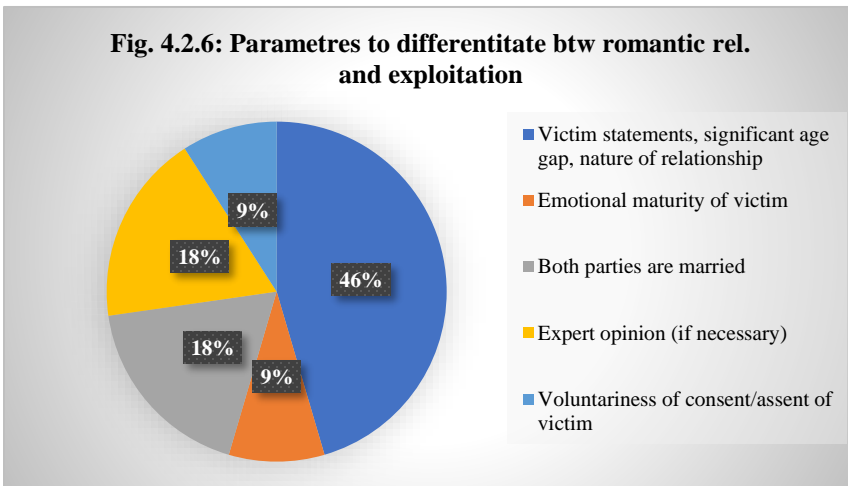
*Complexities of Applying the POCSO Act in Adolescent Romance within Matrilineal Societies:* More than sixty percent of the stakeholders highlighted challenges in applying the POCSO

Act to cases involving adolescent romance due to its strict interpretation. Since individuals below 18 cannot legally give consent, any physical relationship is deemed unlawful, regardless of mutual agreement. Even when the victim acknowledges the relationship as consensual and part of a romantic bond, courts cannot fully absolve the accused under the Act (Fig. 4.2.5). Thirty six percent of the stakeholders noted that cultural practices among the Khasis and other tribes in Meghalaya often complicate the implementation of the POCSO Act. In traditional societies, relationships may develop outside formal marital ceremonies, sometimes leading to teenage pregnancies. In such cases, the older boy is prosecuted, and the maturity of the minor girl is not considered, regardless of how consensual or romantic the relationship may have been (Fig. 4.2.5).



*Parameters for Distinguishing Adolescent Romance from Exploitation:* To differentiate between romantic relationships and exploitative situations in adolescent cases, majority of the

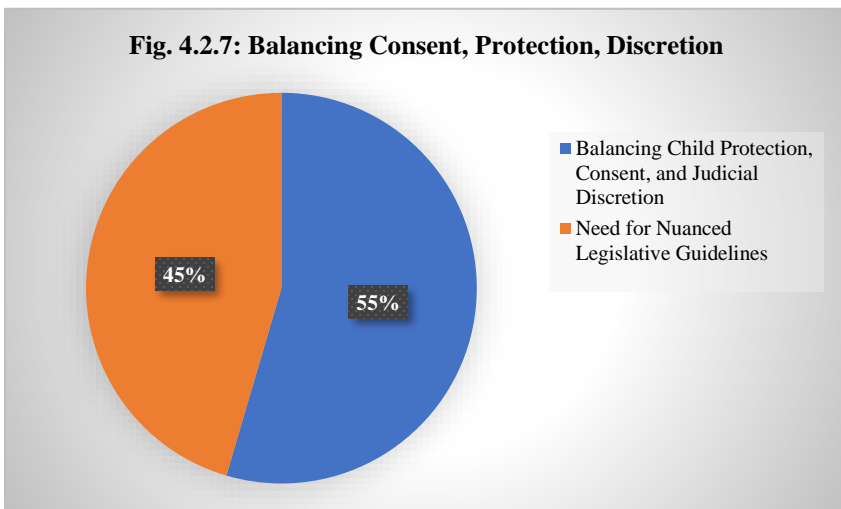
stakeholders (forty six percent) emphasized key parameters like victim statements (which can aid in quashing FIRs at the respective High Courts), a significant age gap (such as a 15-year-old victim and a 30-year-old accused, which often suggests the presence of manipulation or coercion), and the nature of the relationship (for example, if the accused holds a position of authority like he being the guardian, employer, teacher etc., the consent is likely to be influenced by pressure or power dynamics). In crux, the criteria for the assessment vary on a case-to-case basis (Fig. 4.2.6).



#### ***4.2.2 283rd Law Commission Report: Balancing Child Protection with Consensual Adolescent Relationships***

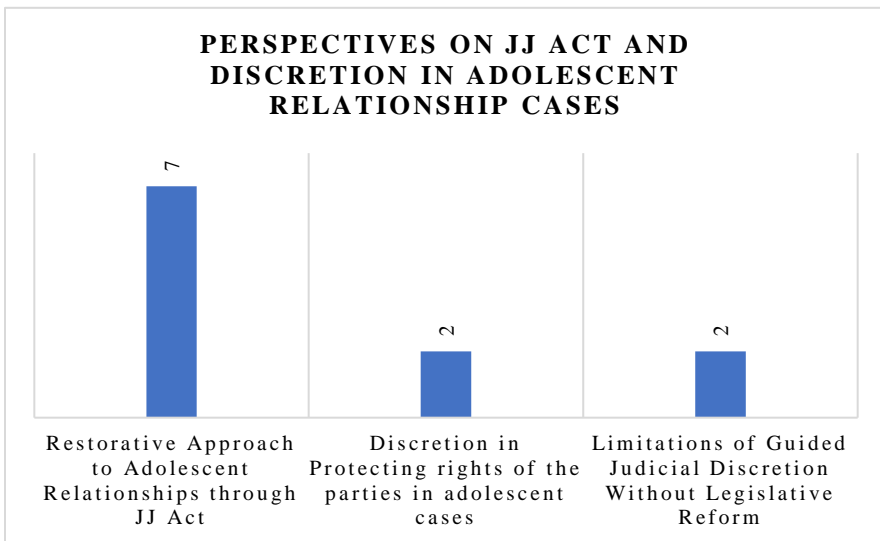
*Balancing Consent, Child Protection, and Judicial Discretion Under POCSO:* Out of eleven stakeholders, six emphasized the need to balance unconditional protection for minors with recognizing consent, cautioning that consent under 16 years should not be deemed valid due to potential fraud (Fig. 4.2.7).

They further indicated that while the Law Commission's recommendation for controlled judicial discretion aims to protect minors from sexual abuse, unchecked discretion risks undermining justice and enabling misuse. Five stakeholders noted that the present law's broad scope lacks nuance and recommended clear legislative guidelines, including exemptions for consensual relationships between adolescents close in age, criteria to distinguish between consensual and non-consensual relationships, factors to assess relationship dynamics, review mechanisms to prevent arbitrary sentences, and a clear definition of terms like "assent" and "consent" (Fig. 4.2.7).



*Perspectives on JJ Act and Discretion in Adolescent Relationship Cases:* Out of the eleven stakeholders, seven emphasized that the Juvenile Justice Act offers a more suitable framework for handling consensual adolescent relationships, focusing on rehabilitation and restorative justice, which aligns better with

adolescent dynamics than the POCSO Act's punitive approach (Fig.4.2.8). Two stakeholders (police personnel) noted that in the absence of specific protocols, they often notify the court or issue a notice instead of making an arrest, especially when the accused is the future caregiver for the baby. While handling cases from remote areas, they are cautious about disrupting families and they submit reports (rather than immediately arresting) if the parties are cohabiting or the boy is a juvenile (Fig.4.2.8). Others indicated that even though the Law Commission has supported guided judicial discretion in cases where the child is 16 or older and the accused is within three years of age, provided tacit consent exists; it does not solve the problem. Without legislative amendments to the POCSO Act, convicting only the accused, even with reduced punishment, undermines justice and creates a gendered deterrent that leaves the other consenting party unaccountable (Fig.4.2.8).



In crux, the stakeholders unanimously recognized the POCSO Act's gender neutrality and its intent to combat child sexual abuse but highlighted its rigid interpretation, which often criminalizes consensual adolescent relationships. They emphasized the need for clear parameters, such as victim statements, age gaps, and relationship dynamics, to distinguish the consensual relationships from the exploitative ones. Cultural practices in matrilineal societies like Meghalaya further complicate the Act's application, as informal relationships and teenage pregnancies are common. The 283rd Law Commission Report's recommendation for guided judicial discretion stands limited without the required legislative amends (as highlighted in the qualitative narratives). These insights highlight the urgent need for legislative reforms, cultural awareness, and tailored judicial frameworks to address the complexities of adolescent relationships, particularly in a matrilineal society like Meghalaya.

### ***Suggestions And Conclusion***

Given the complexities highlighted in the preceding pilot study, the following legal suggestions are proposed to refine and improve the situation:

*Recognition of Age-Proximity Exception:* Introduce a specific provision acknowledging a "close-in-age exemption" for relationships where both parties are adolescents, and the age gap does not exceed a certain number of years (e.g., three

years). This would help mitigate the criminalization of consensual relationships between peers.

*Recommendation for Bail in Cases Involving Consensual Adolescent Relationships:* Following the preliminary inquiry under the BNSS, 2023, if the police determine the possibility of a consensual romantic relationship, bail should be granted to the accused. This should apply where there is no indication of coercion or exploitation, and the circumstances suggest mutual consent within the parameters of the law.

*Clear Guidelines for Judicial Discretion:* Develop precise criteria for judges to follow when they exercise discretion in sentencing POCSO cases of such nature which indicates consensual sexual acts between individuals aged 16 to 18 years. These guidelines should detail factors such as the nature of the relationship, the presence of mutual consent, expert opinions from psychologists and doctors to ascertain the absence/presence of coercion or exploitation etc.

*Probation of Offenders Act Integration:* Amend the Probation of Offenders Act, 1958, to explicitly include provisions for young offenders involved in consensual relationships, ensuring that these cases can be resolved with alternatives to incarceration, such as counselling or community service (as indicated under the BNS, 2023), to avoid lifelong stigma.

*Utilization of the Juvenile Justice (JJ) Act, 2015:* Ensure that the JJ Act is applied with a focus on rehabilitation and not punishment for adolescents involved in consensual

relationships, emphasizing non-custodial measures and reintegration support.

*Incorporation of Education and Awareness Programs under JJ Act:* Implement comprehensive sex education and legal rights programs for adolescents in schools and within the community, aiming to promote informed and respectful relationships while clarifying the legal ramifications of their actions.

Incorporating these measures into the legal system could ensure a more balanced and fair approach to addressing consensual adolescent relationships, particularly in traditional and matrilineal societies like Meghalaya, while minimizing unnecessary criminalization and safeguarding young individuals from exploitation and abuse.

## THE AGE AMBIGUITY: INTERROGATING THE LEGAL LIMBO IN CHILD MARRIAGE PROHIBITIONS

Ratna Mugdha Mishra and Ayush Mehta\*

### ABSTRACT

*In a bid to promote gender equality and strengthen legal safeguards against child marriages, the Indian government has proposed an amendment to raise the legal age of marriage for women from 18 to 21 years under the Prohibition of Child Marriage Act (PCMA), 2006. While this move is portrayed as a progressive step towards women's empowerment, it has not been free from controversy. The core issue lies in whether this amendment aligns with the principles of personal liberty and autonomy guaranteed under Article 21 of the Indian Constitution or merely imposes a new form of patriarchal control under the guise of protection. The legislative framework of the PCMA, which allows child marriages to be voidable instead of void ab initio, further complicates the scenario by placing the burden of annulment on minors who often lack the legal awareness, financial independence, and social support necessary to initiate such proceedings this paper focuses on the inconsistencies within the current legal framework by examining the voidability clause, which paradoxically grants a form of legal recognition to child marriages unless actively annulled. Furthermore, it critically assesses the implications of the proposed*

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\* The authors are third-year law students at Symbiosis Law School, Noida. They can be reached at [ayush.mehta@symlaw.edu.in](mailto:ayush.mehta@symlaw.edu.in) and [ratna.mugdha.mishra@symlaw.edu.in](mailto:ratna.mugdha.mishra@symlaw.edu.in)

*amendment in light of judicial pronouncements and international standards. The analysis also draws insights from the Karnataka State Amendment to the PCMA, which has declared child marriages void ab initio, presenting a potential model for national legislation. By juxtaposing the intent behind the proposed amendment with its potential impact on women's rights, this paper argues that the path to genuine empowerment lies not in raising the marriage age but in addressing the underlying socio-economic factors that perpetuate child marriages. The real challenge, therefore, is to strike a balance between protection and autonomy without undermining constitutional freedoms.*

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## **INTRODUCTION**

In recent years, the proposal to amend the “Prohibition of Child Marriage Act, 2006” by raising the legal marriage age for women from 18 to 21 has reignited debates about its necessity and implications. The introduction of the Prohibition of Child Marriage (Amendment) Bill, 2021<sup>1</sup> in the Lok Sabha has sparked intense discussions among legal scholars, policymakers, and activists, focusing on its potential impact on women’s rights, personal autonomy, and the broader socio-economic landscape. The government has presented this amendment as a step towards bridging gender equality, emphasizing improved maternal and child health as well as enhanced socio-economic opportunities for women.

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<sup>1</sup> *Prohibition of Child Marriage (Amendment) Bill*, Bill No. 163 of 2021, Lok Sabha, India (2021).

However, a deeper analysis raises significant concerns that merit closer scrutiny.

One of the primary concerns is whether the disputed provisions have been genuinely scrapped or merely repackaged in the recent Bill. The ultimate bone of contention lies in the provision to increase the legal age of marriage, which, although presented as a measure to promote equality, appears to curtail the bodily and reproductive autonomy of women. Additionally, the Bill's intent to override personal laws has been perceived as a reformative step. However, the increase in the legal marriage age seems to conflict with the principles of individual liberty and the right to choose.

India has long struggled to eliminate child marriage. While the PCMA, 2006 has been instrumental in this regard, significant reforms are still needed, particularly concerning the voidability framework. The current framework, which renders child marriages voidable rather than void ab initio (invalid from the outset), continues to place young girls in vulnerable positions. Notably, some states, such as Karnataka, have adopted a more progressive stance by declaring child marriages void ab initio, a move that has received judicial approval and commendation. This highlights the need for a uniform and more stringent approach at the national level.

The Standing Committee Report of 2004 on the PCMA<sup>2</sup> had made recommendations concerning the voidability aspect, urging for a shift towards making child marriages void ab initio. However, despite assurances, no recent Standing Committee report has been issued for the new Bill. The Chairman of Rajya Sabha granted an extension of four months starting 24th January 2024 for the Standing Committee on Education, Women, Children, Youth, and Sports to examine the Bill. As of now, no report has been presented, leaving a significant gap in legislative scrutiny. Consequently, this paper relies on the 2004 Standing Committee Report to analyse the existing legal framework and propose necessary reforms.

The proposed amendment also aims to harmonize the marriageable age for women with that of men to promote equality under Article 14 of the Constitution, which guarantees equality before the law. While the intention appears gender-neutral, critics argue that it overlooks the socio-economic factors that drive early marriages in India. The Law Commission of India, in its 205th Report (2008), emphasized that merely increasing the legal marriage age is insufficient to curb child marriages without addressing underlying issues such as education and financial stability.

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<sup>2</sup> Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, *Thirteenth Report on the Prevention of Child Marriage Bill, 2004*, Rajya Sabha, Nov. 29, 2005, accessible at <<https://feministlawarchives.pldindia.org/wp-content/uploads/13th-Standing-Committee-Report-on-PCMB-2004.pdf>>

Therefore, this paper seeks to examine whether the proposed amendment represents a genuine step towards gender justice or merely a superficial reform. By analysing legal precedents, committee reports, and empirical data, this paper aims to provide a comprehensive critique of the amendment and suggest a path forward that truly upholds women's rights and autonomy.

### **I. Revisiting the Voidability Framework: A Case for Declaring Child Marriages Void ab Initio**

The enactment of the "Prohibition of Child Marriage Act (PCMA), 2006", was a pivotal legislative measure aimed at curbing the prevalence of child marriages in India. In a notable departure from previous legal frameworks such as the CMRA<sup>3</sup>, the current act conferred upon the minor contracting party the discretion to render a child marriage voidable<sup>4</sup>, thereby providing a statutory mechanism for annulment. However, it's a paradoxical piece of legislation that condemned child marriages as illegal yet refused to invalidate them, effectively granting them legal recognition<sup>5</sup>. This glaring inconsistency explains why child marriages persist despite the prohibition<sup>6</sup>. With the introduction of the

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<sup>3</sup> Child Marriage Restraint Act, No. 19 of 1929, INDIA CODE (1929).

<sup>4</sup> The Prohibition of Child Marriage Act, 2006, §3.

<sup>5</sup> Court on its own Motion (Lajja Devi) v. State, (2013) Cri L J 3458, where the Court acknowledged its inability to declare certain child marriages invalid.

<sup>6</sup> "Though the PCMA contains several penal provisions aimed at preventing child marriages, conviction rates continue to be dismal. For instance, in 2010, only 111 cases were reported under the PCMA, and

new bill in parliament a spark of hope for reform is raised but it seems that the new bill is nothing but old wine in a new bottle, as the bill fails to take the decisive step of declaring all child marriages void ab initio, thereby allowing such unions to retain legal validity unless actively annulled by the child upon attaining the age of majority.<sup>7</sup> This legal lacuna has been explicitly acknowledged by the “Law Commission of India”<sup>8</sup>, which observed that the “Existing law does not invalidate child marriages outright, irrespective of whether they occur in infancy, puberty, or adolescence.”

#### **A. Burden on the Minor: A Flawed Legal Framework**

Rather than declaring child marriages void ab initio, the legislature has merely rendered them voidable, creating a fundamental legal inconsistency by shifting the burden of annulment onto the minor. This approach perpetuates a systemic flaw, as it places an onerous and inequitable responsibility on children who often lack agency<sup>9</sup> and the

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only 11 convictions were secured. See, National Crime Records Bureau” in UNICEF Information Factsheet on child marriage, November 2011, UNICEF, accessible at <[http://www.unicef.org/india/Child\\_Marriage\\_Fact\\_Sheet\\_Nov2011\\_final.pdf](http://www.unicef.org/india/Child_Marriage_Fact_Sheet_Nov2011_final.pdf)>

<sup>7</sup> Supra note. 2

<sup>8</sup> Law Comm’n of India, 205th Report on Proposal to Amend the Prohibition of Child Marriage Act, 2006 (2008), accessible at <<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081072-1.pdf>>

<sup>9</sup> Tata Institute of Social Sciences, Child Marriage & Early Motherhood, Understandings from Lived Experiences of Young People 38 (2015), available at <http://coeay.tiss.edu/cmap/wp-content/uploads/2015/10/CMEM-REPORT.pdf> [hereinafter Understandings

requisite educational empowerment and legal awareness to navigate the complexities of annulment.

While Section 3(2) of the PCMA<sup>10</sup> permits a guardian, next friend, or the Child Marriage Prohibition Officer (CMPO) to initiate annulment proceedings on behalf of the minor, the practical reality remains that the primary onus still rests upon the child. This expectation is not only impractical but also profoundly unjust, particularly in cases of forced or coerced marriages, where minors are often deprived of legal literacy, financial autonomy, and familial support<sup>11</sup>.

Also, it is often observed that, families of both parties not only condone but actively enforce child marriages, thereby significantly restricting the minor's ability to seek annulment. Under such coercive circumstances, the legal expectation that a minor will independently pursue annulment is disconnected from socio-cultural realities, reflecting a fundamental oversight in addressing systemic coercion and the existing legal framework remains structurally inadequate, failing to provide comprehensive protection against the enduring consequences of child marriage.<sup>12</sup> A significant

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from Lived Experiences of Young People] or  
<<https://feministlawarchives.pldindia.org/wp-content/uploads/CMEM-REPORT.pdf>>

<sup>10</sup> The Prohibition of Child Marriage Act, 2006, §3(2).

<sup>11</sup> Child Marriage and Domestic Violence, ICRW, available at <[http://www.icrw.org/files/images/Child\\_Marriage-Fact-Sheet-Domestic-Violence.pdf](http://www.icrw.org/files/images/Child_Marriage-Fact-Sheet-Domestic-Violence.pdf)>

<sup>12</sup> Payal Shah et al., *Ending Impunity for Child Marriage in India: Normative and Implementation Gaps* at 20 (Ctr. for Reprod. Rts. & Ctr. for L. & Pol'y Rsch. 2018), <<https://reproductiverights.org/wp->

question also arises that only allowing a girl to annul a marriage within “two years of reaching majority” can be accompanied by other difficulties. For instance, young girls tend to experience pressures to demonstrate fertility early in their union and therefore could be pregnant or have small children in their first two years of marriage, which can present additional struggles when trying to exit a marriage.

***B. Statistics around legal awareness***

A survey conducted by Child Rights and You (CRY)<sup>13</sup> further reveals that minors often lack the legal awareness and capacity to recognize and report instances of child marriage. This informational deficit also leads to low rates of case reporting. The data highlights that only 31% of parents-in-law and 26% of child brides or grooms were aware of the appropriate authorities to report such cases<sup>14</sup>. A significant majority erroneously believed that child marriage-related grievances could be addressed by local Panchayat members, while others misconceived the police as the sole authority responsible for intervention. Alarmingly, a mere 7% of respondents accurately identified the Child Marriage Prohibition Officer (CMPO) as the designated authority under PCMA. Further it was observed that most child brides

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content/uploads/2020/12/Ending-Impunity-for-Child-Marriage-India-WebUpdate-0218.pdf>

<sup>13</sup> Child Rights & You (CRY), *Child Marriage in India: A Research Study* (2013), available at <<https://www.cry.org/downloads/safety-and-protection/Child-Marriage-in-India-A-Research-Study.pdf>>

<sup>14</sup> *Id.* at 62

(97%) were unaware of any NGO/SHG<sup>15</sup> working in their community to prevent child marriages which shows that Lack of awareness among community members, particularly women, results in low resistance and reporting of child marriage incidents and thus once such marriages are done, they still face repercussions.

This widespread lack of legal awareness highlights a critical gap in enforcement mechanisms, necessitating comprehensive public education initiatives and systemic reforms to ensure effective implementation of the law. Government schemes play a major role in declining such practices but data show that Over half of parents-in-law (54%) and 67% of child brides/grooms were unaware of government education schemes for girls and 70% of parents-in-law and 75% of child brides/grooms were unaware of government employment initiatives for adolescent girls/youth.<sup>16</sup> To effectively address these challenges, the government must bridge this awareness gap by implementing functional Village Child Protection Committees (VCPCs), integrating awareness programs within educational institutions, and launching targeted campaigns. Collaborating with local NGOs familiar with community dynamics would enhance outreach efforts, ensuring that these initiatives reach and educate vulnerable populations more effectively.

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<sup>15</sup> *Id.* at 87

<sup>16</sup> *Id.*

### ***C. Socio-Economic Dependence and Limited Mobility***

One of the main reasons which can be seen as to why the child who has been married not able to report or take any action is due to educational deprivation. It is usually seen in girls that, limited access to education significantly heightens the probability of early marriages. And ones they are married, child marriage precipitates school dropouts, curtailing future economic opportunities and entrenching socio-economic dependence. Educational deprivation both exacerbates and results from child marriage, thereby perpetuating a cycle of systemic vulnerability. The exclusion of minors from formal education not only impedes their socio-economic mobility but also severely constrains their legal consciousness.

A minor coerced into marriage, having been disengaged from educational institutions, is unlikely to possess the requisite awareness of their rights or the legal redress mechanisms available for challenging such unions. Moreover, the high dropout rates among girls signify a dual deprivation, academic exclusion coupled with an absence of legal literacy. This systemic deficiency further compounds their disempowerment. The current framework places the victim in a paradoxical position, where they must actively initiate legal proceedings despite lacking financial, social, or emotional support. This expectation can be aptly compared to: *“Handing medical tools to a critically ill patient and expecting them to treat themselves while the doctor merely watches.”*

#### ***D. International and National stance***

“International human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)”, emphasize that child marriages should have no legal effect. Article 16 of CEDAW<sup>17</sup> explicitly states that the marriage of a child shall not be legally recognized, reinforcing the principle of zero tolerance toward such practices. As a signatory to CEDAW, India has an international obligation to align its domestic laws with this standard and ensure that child marriages are legally void across all states.<sup>18</sup> Similarly, the “Convention on the Rights of the Child (CRC)”<sup>19</sup> mandates protection for children from all forms of physical and mental violence, as well as sexual exploitation and abuse. These international standards underline the urgency for India to amend its domestic laws to ensure that child marriages are not only prohibited but also rendered legally void across all states, thereby aligning national legislation with global human rights obligations.

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<sup>17</sup> Convention on the Elimination of All Forms of Discrimination Against Women art. 16, Dec. 18, 1979, 1249 U.N.T.S. 13, available at <<https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cedaw.pdf>>

<sup>18</sup> Apparel Export Promotion Council v. AK Chopra, Vishaka v. State of Rajasthan, Vellore Citizens Welfare Forum v. Union of India, See: Prem Shankar Shukla v. Delhi Admn. (1980) 3 SCC 526; Mackinnon Mackenzie and Co. Ltd. v. Audrey D' Costa (1987) 2 SCC 469; Sheela Barse v. Secy., Children's Aid Society [(1987) 3 SCC 50, 51] SCC at p. 54; Vishaka v. State of Rajasthan (1997) 6 SCC 241; People's Union for Civil Liberties v. Union of India (1997) 3 SCC 433 and D.K. Basu v. State of W.B. (1997) 1 SCC 416, 438

<sup>19</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

However, a major milestone in tackling child marriages came in April 2017 with the Karnataka State Amendment to the Prohibition of Child Marriage Act (PCMA)<sup>20</sup>. The amendment, passed in pursuance of the recommendations made by the Justice Shivraj Patil Committee Report<sup>21</sup> on Child Marriages in Karnataka, clearly renders such marriages void ab initio. Accordingly, no marital relationship of husband and wife arises between the parties, and the exception is not available to such marriages under the Karnataka Amendment Act. a uniform nationwide approach is needed to bring clarity, consistency, and stronger enforcement against child marriages. Without such measures, legal loopholes may persist, allowing child marriages to continue.

The Parliamentary Standing Committee, in its 13th Report on the Prevention of Child Marriage Bill, 2004<sup>22</sup>, extensively examined child marriage in India. Based on alarming reports, the “National Commission for Women (NCW)”

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<sup>20</sup> Prohibition of Child Marriage (Karnataka Amendment) Act, No. 26 of 2017 (India).

<sup>21</sup> Justice Shivraj V. Patil, Report on Prevention of Child Marriages in the State of Karnataka (2011), <<https://www.concernedforworkingchildren.org/wp-content/uploads/Report-on-prevention-of-child-marriages-in-Karnataka-Vol-1.pdf>>

<sup>22</sup> Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, Thirteenth Report on the Prevention of Child Marriage Bill, 2004, Rajya Sabha, Nov. 29, 2005, <<https://feministlawarchives.pldindia.org/wp-content/uploads/13th-Standing-Committee-Report-on-PCMB-2004.pdf>>

recommended<sup>23</sup> that marriages violating the Act be declared void ab initio to effectively deter the practice, thereby eliminating any legal recognition of such unions from the outset.

### ***E. Courts on this matter***

In India, through various judgements a request has been made to the government to amend the laws in "*Aisha Kumari v. State of NCT of Delhi & Ors*"<sup>24</sup>, it was argued that the consent of a child under 18 years of age for marriage cannot be deemed valid and that such marriages should be declared void ab initio rather than merely voidable. The Court also facilitated a plea demanding response from government to adopt a stricter stance by declaring all child marriages void ab initio<sup>25</sup>. Similarly, in "*Independent Thought v. Union of India*"<sup>26</sup>, the position taken by the State of Karnataka was considered the most appropriate and pragmatic resolution to address the issue, reinforcing the need for an absolute prohibition of child marriages to protect the rights and

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<sup>23</sup> Parliamentary Standing Committee on Personnel, Public Grievances, Law & Justice, Rajya Sabha, *Thirteenth Report on the Prevention of Child Marriage Bill, 2004*, 10 ¶ 7 (Nov. 29, 2005), <<https://feministlawarchives.pldindia.org/wp-content/uploads/13th-Standing-Committee-Report-on-PCMB-2004.pdf>>

<sup>24</sup> Delhi High Court, W.P. (C) No. 44677/2023 (order dated 25.07.2023 & 01.09.2021)

<sup>25</sup> Zeb Hasan, Delhi High Court Seeks Central Govt's Response on Plea to Declare All Child Marriages Void Ab Initio, Bar & Bench (Mar. 21, 2022), <<https://www.barandbench.com/news/delhi-high-court-seeks-central-govts-response-plea-to-declare-all-child-marriages-void-ab-initio>>

<sup>26</sup> AIR 2017 SC 4904

welfare of minors. Same was reiterated in “*Daya Ram And Anr vs State Of Haryana And Others on 10 June, 2021*”<sup>27</sup> These cases emphasise declaring marriages of children void ab initio to achieve justice as well as to secure the rights of children. On affirming absolute prohibition, courts emphasize the enforcement of a legal approach that protects and promotes the best interests of, and autonomy over, children higher than procedural formalities.

***F. Irreversible Physical and Psychological Consequences: The Failure of Voidability***

The voidability framework of the Prohibition of Child Marriage Act, 2006 (PCMA) does not touch the long-term harm caused to child brides. Child marriage exposes children<sup>28</sup> (some in early teenage) to sexual and other forms of abuse<sup>29</sup>, often causing serious physical and psychological harm. It was also observed in case of *Association for Social Justice & Research vs. Union of India*<sup>30</sup> that Women who marry at an early age are more likely to experience abuse and violence, leading to unavoidable psychological and physical consequences. While the law provides a mechanism for annulment, it fails to consider the practical realities of a

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<sup>27</sup> Punjab and Haryana High Court, CRWP-5212-2021.

<sup>28</sup> Child Marriage in India: Achievements, Gaps and Challenges, OHCHR, <<https://www.ohchr.org/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/HAQCentreForChildRights1.pdf>>

<sup>29</sup> Child Marriage and Domestic Violence, ICRW, <<http://www.icrw.org/files/images/ChildMarriage-Fact-Sheet-Domestic-Violence.pdf>>

<sup>30</sup> 2010 SCC OnLine Del 1964.

child's vulnerability. A minor who has already suffered trauma and coercion is now expected to initiate legal proceedings against their own family or spouse, an expectation that is both unrealistic and unjust. By placing the burden of annulment on the victim, the legal system perpetuates their suffering rather than alleviating it. True justice requires a victim-centric approach, where the law proactively invalidates child marriages and provides institutional support to survivors, rather than forcing them to relive their trauma through legal battles.

As seen in the recent assam child marriage crackdown, thousands of people were arrested under child marriage cases, resulting in a significant 81% drop in child marriages, a commendable outcome. yet, this sweeping action by the government also left thousands of child brides and their families without shelter, as the arrest of the sole breadwinners led to widespread devastation.<sup>31</sup> A community-driven approach should be adopted to spread awareness about child marriages while being considerate of the impact of penalization on families and communities.<sup>32</sup>

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<sup>31</sup> Crackdown on Child Marriage Tears Apart Families in India's Assam, Al Jazeera (Feb. 21, 2023),

<<https://www.aljazeera.com/news/2023/2/21/crackdown-on-child-marriage-tears-apart-families-in-indias-assam>> See also: Assam Model Helps Slash Child Marriage by 81%: Report, The Hindu (Mar. 7, 2024), <<https://www.thehindu.com/news/national/assam/assam-model-helps-slash-child-marriage-by-81-report/article68416830.ece>>

<sup>32</sup> Society for Enlightenment & Voluntary Action v. Union of India, 2024 SCC OnLine SC 3362

## **II. Legal Age of Marriage: Addressing Symptoms, Ignoring Causes**

The proposal to increase the legal age of marriage for girls is described as a progressive reform with aim to promote health and gender equality. However, the actual situation on the ground requires addressing more deeper structural issues. There is a change over the period which can be observed in the rationale for raising the marriage age, from concerns about “reducing maternal mortality, enhancing nutritional standards, and addressing associated health risks” in 2020 to a focus on “advancing women’s autonomy and social empowerment.” This change suggests a deliberate attempt by the legislature to divert attention from underlying structural problems.

Maternal health, which is frequently in discussion with reference to this bill, is not determined by a legal age threshold alone, but rather is of access to quality healthcare, reproductive autonomy, and socio-economic empowerment.<sup>33</sup> In the same way, gender equality cannot be achieved through “legislative tokenism” alone, but must also remove systemic barriers, rather than merely aligning legal ages. As it is often said, a law that ignores socio-economic realities isn’t reform, it’s just a “veil of progress”. If the

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<sup>33</sup> Goli, S. & Jaleel, A.C.P. (2014). What is the cause of the decline in maternal mortality in India? Evidence from Time Series and Cross-sectional Analyses. *Journal of Biosocial Sciences*, 46(3), 351-365.

objective is to genuinely safeguard young women's rights and agency, the emphasis must shift toward substantive reforms.

A careful perusal of the 205th Law Commission Report on PCMA<sup>34</sup> reveals that most brides are married off even before the age of 15. This data is generally cited as the main driving force behind the government's intention to raise the age for women. However, if marriages continue to take place below the age of fifteen despite the existing legal threshold of eighteen, as the Report itself demonstrates, it is difficult to assume that increasing the age limit to twenty-one will, by itself, be effective. Without addressing these root causes, a higher age would merely be "a paper tiger", an impressive rule with little real-world impact.

If we assess the on-ground realities it is found that those girls who married at the age of 21 or later had superior health, improved nutrition, higher levels of education, and greater career opportunities compared to those who were married earlier. However, is their advantage truly a result of delaying marriage, or is it because they belong to more affluent households, were able to continue their education, have at least one parent with a higher level of education, and do not come from socially marginalized castes and tribes?<sup>35</sup>

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<sup>34</sup> Supra note 6

<sup>35</sup> Why Raising Marriage Age of Women Won't Achieve Its Stated Goal, HAQ: Centre for Child Rights (Dec. 17, 2021), <<https://www.haqrc.org/new-at-haq/why-raising-marriage-age-of-women-wont-achieve-its-stated-goal/>>. See, Myna Trivedi, *Child Marriage in an International Frame: A Feminist Review from India* (2021),

Increasing the marriageable age of women by expanding the definition of “child marriages,” would ironically reclassify more young women as “children,” thereby entangling the already sensitive issue of consent in further legal complexities. In India, it is common for the families of young brides to invoke criminal law provisions to allege rape against the groom when a minor enters into a consensual marriage (“elopes” in colloquial usage) without parental consent<sup>36</sup>. Raising the age of marriage to 21 would exacerbate this issue, with a dramatic rise in criminal charges being brought against consenting adults. Instead of empowering young women, this approach risks trapping them in a legal contradiction, where they are deemed mature enough to vote, work, and exercise reproductive autonomy, but too young to give consent for marriage.

Moreover, the persistence of child marriages indicates a deep-seated resistance to change, often coupled with violent retaliation against those who seek to challenge entrenched customs. One tragic example is the 1992 case of Bhanwari Devi<sup>37</sup>, a social worker in Rajasthan, who was gang-raped brutally for attempting to stop a child marriage. Similarly, in

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<sup>36</sup> UNICEF, which warns that the misapplication of child marriage laws can unjustly criminalize young couples, making a well-intentioned protection into a tool for coercion and control. UNICEF India, *Drivers, Trends and Strategies for Ending Child Marriage in India* (2019), <<https://www.unicef.org/india/media/2556/file/Drivers-strategies-for-ending-child-marriage.pdf>>

<sup>37</sup> Pallavi Gupta, 'Child Marriages and The Law: Contemporary Concerns' (2012) 47 *Economic and Political Weekly* accessed 27 February 2025

May 2005<sup>38</sup>, Shakuntala Verma, an activist who was trying to prevent child marriages was subjected to a similar brutal attack. A man broke into her house and seriously injured her, despite her attempts to make people aware of the ill effects of child marriage, her attack showed the strong societal root of this practice.

Most recently in May 2023<sup>39</sup>, personnel from the Vidisha Social Welfare Organisation (VSWO) and the police faced violent resistance from villagers while preventing five child marriages in Lateri tehsil, Madhya Pradesh. Despite the hostility, they stopped the marriages of minors under 17. This incident underscores the limitations of legal amendments alone and highlights the need for a more comprehensive approach.

Data indicates a strong correlation between higher education levels and delayed marriage among women. Nearly 45% of women with no formal education were married before 18, whereas this percentage declines significantly as education

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<sup>38</sup> National Human Rights Commission (NHRC), *Reported Attack on Welfare Department Official in Madhya Pradesh for Campaigning Against Child Marriage: NHRC Seeks Comments from State Government* (May 13, 2005), <<https://nhrc.nic.in/press-release/reported-attack-welfare-department-official-madhya-pradesh-campaigning-against-child>>

<sup>39</sup> *Free Press J .*, *Bhopal: Hundreds of Villagers Turn Violent as 5 Child Marriages Stopped* (May 4, 2023), <<https://www.freepressjournal.in/bhopal/bhopal-hundreds-of-villagers-turn-violent-as-5-child-marriages-stopped>>

levels rise, a well-established trend<sup>40</sup>. Education not only postpones marriage but also fosters financial independence and greater participation in family decisions, including access to contraception and safe abortions, as reflected in NFHS data<sup>41</sup>. However, rather than addressing this critical factor, the government's approach overlooks the root causes. Enhancing educational opportunities for girls would be a far more effective means of raising the marriage age than merely imposing legal restrictions.

Moreover, the current bill raises significant concerns, including potential conflicts with Article 21 of the Constitution as to infringements on women's bodily and reproductive autonomy, and raise concern of government understanding of art 14, which are examined in greater detail in the subsequent sections of this paper.

#### *A. Equality or formality? Analysing the marriage age amendment through article 14*

The Statement of Objects and Reasons of the bill emphasizes achieving gender equality by prescribing a uniform marriageable age for men and women. However, this rationale appears insufficient to fulfill its intended objective. While the proposal is seemingly rooted in the promise of

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<sup>40</sup> Akanksha A. Marphatia and others, 'How Much Education is Needed to Delay Women's Age at Marriage and First Pregnancy?' (2020) 7 *Frontiers in Public Health*.

<sup>41</sup> Ministry of Health & Family Welfare, Govt. of India, National Family Health Survey (NFHS-5), 2019-21 (2021), <<https://rchiips.org/nfhs/>>

equality under Article 14 of the Constitution<sup>42</sup>, it misunderstands the true essence of this guarantee. Article 14 ensures both “equality before law” and “equal protection of laws,” which do not imply identical treatment for everyone but rather require recognizing and addressing the unique challenges faced by different groups<sup>43</sup>. Imposing a uniform marriageable age risks offering only formal equality, a superficial semblance of fairness that treats everyone the same without acknowledging socio-economic realities. Women in India continue to face significant disadvantages in terms of education, employment, and social mobility. By mandating an identical age of marriage without addressing these underlying issues, the bill may unintentionally reinforce existing inequalities rather than dismantle them.<sup>44</sup>

A rigid application of identical treatment can lead to injustice. For example, socio-economic disparities across states mean that women in rural areas may face different challenges compared to those in urban settings. Also, raising the marriage age might inadvertently criminalize marriages that are a result of economic compulsion or social customs prevalent in certain communities. A uniform marriage age fails to address these regional and social disparities. Similarly, the idea of “equal protection of laws” demands that laws

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<sup>42</sup> INDIA CONST. art. 14.

<sup>43</sup> M P Jain, Jasti Chelameswar and Dama Seshadri Naidu, *Indian Constitutional Law* (8th edn, LexisNexis 2018) Pp. 1219 & 1220

<sup>44</sup> Catharine A. MacKinnon, 'Sex Equality Under the Constitution of India: Problems, Prospects, And “Personal Laws”' (2006) 4 *International Journal of Constitutional Law*.

apply equally to those in similar situations but also requires differential treatment for those facing distinct disadvantages. True equality, as envisioned by the Constitution, demands substantive equality. A uniform age requirement, without parallel measures to improve access to education and economic opportunities for women, might fail to achieve its intended outcome. Moreover, if gender neutrality is genuinely the goal, an alternative approach could be to lower the marriageable age for men to 18 instead of raising it for women. This would align the marriageable age with other legal competencies granted at 18, such as the right to vote, enter contracts, and criminal liability. Such a move would prevent the imposition of additional restrictions on women's autonomy while ensuring that neither gender is disproportionately burdened.

This perspective finds support in the 2008 Law Commission report<sup>45</sup>, which advocates for a uniform marriage age of 18. The report argues that if individuals are deemed competent to make other significant life decisions at 18, marriage should not be an exception. Moreover, international bodies such as CEDAW, to which India is a signatory, have also recommended a similar approach, reinforcing the case for a uniform marriage age of 18<sup>46</sup>. Therefore, the essence of equality lies in the understanding that “one size does not fit

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<sup>45</sup> Supra note 6

<sup>46</sup> Supra note 16

all”, there is a need for differential treatment to address the unique challenges faced by different sections of society.

In essence, while the intent of achieving gender equality is commendable, the method of imposing a uniform marriageable age appears misguided. A more effective approach would involve comprehensive reforms addressing factors like poverty, lack of education, and inadequate enforcement of existing child marriage laws. Thus, more nuanced and context-sensitive approach, one that genuinely addresses the root causes of gender inequality such as improving educational opportunities, ensuring financial independence, and enhancing legal awareness among women, especially in rural areas would be more effective in realizing the Constitution’s promise of substantive equality for all.

### ***B. Autonomy at Stake: The Hidden Costs of Delaying Legal Marriage Age***

The proposal to raise the legal marriage age for women from 18 to 21 poses a risk to women’s autonomy by imposing restrictive controls in the name of empowerment. At the core of reproductive autonomy in India lies Article 21 of the Constitution<sup>47</sup>, which enshrines the right to life and personal liberty. The Supreme Court has significantly expanded the scope of this right to include the dignity inherently vested in every individual, thereby recognizing the right to make

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<sup>47</sup> INDIA CONST. art. 21.

reproductive choices as an indispensable facet of personal dignity.

In the landmark case of "*K.S. Puttaswamy v. Union of India*"<sup>48</sup>, the right to privacy was unequivocally upheld as a fundamental part of Article 21. This right encompasses spatial control, decisional autonomy, and information control, all crucial for safeguarding individual dignity and personal life choices. Furthermore, the Court has emphatically emphasized that personal aspects such as family, marriage, procreation, and sexual orientation are inextricably linked to one's autonomy and dignity, thus warranting robust constitutional protection.

Currently Prohibition of Child Marriage Act (PCMA) strike a delicate balance between safeguarding individual liberty and curbing the societal evil of early marriage. By setting the minimum marriage age at 18 for women and 21 for men, the law sought to impose a measured restriction, one that protected young girls from the detrimental effects of child marriage without unduly infringing upon their reproductive autonomy. This age threshold acknowledged the unique biological and societal roles of women as child-bearers, ensuring that their right to make reproductive choices was not unreasonably curtailed.

However, the recent bill proposing to raise the marriage age for women to 21 introduces a significant and arguably

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<sup>48</sup> AIR 2018 SC (SUPP) 1841

excessive constraint on their personal freedom. While it purports to advance gender equality, this move risks undermining women's autonomy by imposing an extended period of legal incapacity to marry, a decision that should fundamentally reside with the individual. The amendment's stringent restriction appears to conflict with the spirit of Article 21 of the Constitution, which guarantees the right to life and personal liberty, including the freedom to make intimate and personal choices.

Paradoxically, at 18 women are legally empowered to engage in relationships and exercise their reproductive rights. Yet, societal norms continue to condemn them if they become pregnant outside of marriage. In a society where a woman's worth is still regrettably intertwined with notions of chastity, this change risks exacerbating social vulnerabilities rather than alleviating them.<sup>49</sup> By imposing a higher marriage age, the amendment could intensify the stigma faced by young women, pushing them into a precarious space between legal freedoms and societal condemnation.

Moreover, marriage in India has long served as the cornerstone of family planning,<sup>50</sup> with most women opting to have children only within the institution of marriage. By

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<sup>49</sup> Shri Kant Singh, Deepanjali Vishwakarma & Santosh Sharma, An Epidemiology of Premarital Sexual Behaviour in India: Exploring Gender Differences, 22 J. Health Mgmt. 1 (2020)

<sup>50</sup> Poonam Muttreja & Sanghamitra Singh, Family Planning in India: The Way Forward, 148(Suppl. 1) Indian J. Med. Res. S1 (2018), <[https://doi.org/10.4103/ijmr.IJMR\\_2067\\_17](https://doi.org/10.4103/ijmr.IJMR_2067_17)>

delaying the age of marriage while maintaining sexual autonomy at 18, the law inadvertently forces women into a perilous dilemma, one where they are legally autonomous yet socially ostracized. This paradox not only amplifies the risks of unsafe abortions, secrecy, and coercion but also exposes young women to greater societal and familial pressures. Such consequences run counter to the intended spirit of the amendment, which was to empower women and enhance their agency.

Additionally, many young couples enter into marriage without parental or societal approval in order to escape opposition to love marriages. Under the proposed law, a legally adult woman (18–20 years old) who chooses to marry without parental consent could be treated as a “child,” rendering her marriage voidable and potentially criminal. This provision empowers parents to annul marriages and press charges against the husband, effectively stripping women of their right to choose their own partners.

From an international perspective, Articles 3 and 17 of the International Covenant on Civil and Political Rights (ICCPR)<sup>51</sup> emphasize the right to privacy and equality, which includes the right to make autonomous decisions about intimate matters like marriage and reproduction. At 18, women are granted full legal capacity to make decisions regarding contraception, abortion, and other reproductive

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<sup>51</sup> International Covenant on Civil and Political Rights arts. 3, 17, Dec. 16, 1966, 999 U.N.T.S. 171.

matters. However, restricting their ability to marry until 21 creates an inconsistency that undermines the principle of personal autonomy. If a woman is deemed competent to make decisions about her own body including whether to conceive or terminate a pregnancy, she should also possess the capacity to determine when and whom to marry.

Rather than dismantling regressive norms, the law seems to reinforce them by creating new barriers to women's autonomy. This raises a fundamental question: can genuine empowerment be achieved by delaying choice rather than expanding it? Thus, a re-evaluation of the legislative approach is necessary, one that prioritizes education, awareness, and socio-economic support over mere age-based restrictions.

**C. The measure is not least rights restrictive:**

In this era of evolving legal jurisprudence, where the law is moving beyond mere societal regulation to actively safeguarding individual autonomy, laws must reflect this shift by imposing minimal restrictions on individual rights. In a system that values self-determination, any legal intervention must meet the highest threshold of necessity and proportionality. Governments must justify any intrusion into personal liberty, ensuring laws empower rather than constrain.

The principle of using the least restrictive means<sup>52</sup> is rooted in the idea that state intervention in personal choices should be proportionate and necessary, avoiding any unwarranted encroachment on fundamental rights. Such an approach ensures a balanced solution that protects individual freedoms while advancing legitimate state interests.

However, the proposal to raise the legal marriage age for women to 21 significantly departs from this principle. The government's stated objective preventing child marriage and promoting women's empowerment is undoubtedly valid. Yet, the chosen approach is overly restrictive, undermining women's right to autonomy. By imposing a blanket prohibition on marriage until 21, the law fails to respect the agency of women who are legally recognized as adults at 18, capable of making decisions about voting, contracts, and reproductive health. This creates an inherent legal inconsistency and raises questions about the government's trust in women's decision-making ability.

A least rights-restrictive alternative would involve targeted interventions such as improved educational opportunities, economic empowerment, and strict enforcement against forced or child marriages below 18, measures that would address the root causes without stripping adult women of their freedom to marry. For instance, Nordic countries<sup>53</sup> and

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<sup>52</sup> *Anuradha Bhasin v. Union of India*, A.I.R. 2020 S.C. 1308 (India).

<sup>53</sup> United Nations, Department of Economic and Social Affairs, SDG Indicator 5.3.1: Proportion of Women Aged 20–24 Married Before Age 18,

several European nations<sup>54</sup> have successfully reduced early marriages through comprehensive education and awareness programs rather than by raising the marriage age. These approaches respect individual rights while achieving similar objectives more effectively.

By choosing a broad and restrictive measure instead of a nuanced approach, the government appears to prioritize control over empowerment, contradicting its stated intent.<sup>55</sup> This not only weakens the legitimacy of the law but also risks alienating the very population it seeks to protect.

The principle of using the least rights-restrictive means requires that state intervention should be necessary and proportional. While the objective of preventing child marriages is valid, raising the marriage age to 21 is overly restrictive and fails to address the root causes such as poverty, lack of education, and patriarchal norms. Countries like Bangladesh and Nepal have shown that enhancing access to education, reproductive healthcare, and economic

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Norway 0 %, Finland 0.02 %, Denmark 0.3 % (latest available), in United Nations Sustainable Development Goals Report 2025, <<https://unstats.un.org/sdgs/dataportal>> See Also Denmark, Child Marriage Atlas (Child Marriage Data Portal), available at <<https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/atlas/denmark/>>

<sup>54</sup> Evolution in the Evidence Base on Child Marriage 2000–2019, UNFPA-UNICEF Global Programme to End Child Marriage (Jan. 2021) (Anju Malhotra & Shatha Elnakib eds.), available at <<https://aa.unfpa.org/sites/default/files/resource-pdf/Child-marriage-evidence-report-2021.pdf>>

<sup>55</sup> *Om Kumar v. Union of India*, A.I.R. 2000 S.C. 3689 (India).

opportunities for girls can significantly reduce child marriages without raising the legal age.<sup>56</sup> For instance, Bangladesh's success with community-based education programs led to a notable decline in child marriages, demonstrating that empowering young women through education and financial independence is more effective than merely altering age thresholds.<sup>57</sup>

Hence, adhering to the principle of least rights-restrictive measures would better balance the state's objectives with women's fundamental rights, ensuring that protective laws do not transform into instruments of unnecessary control.

## CONCLUSION

The Prohibition of Child Marriage (Amendment) Bill, 2021, represents a significant yet incomplete step towards eliminating child marriages and promoting gender equality in India. While raising the legal marriage age for women to 21 aims to harmonize gender norms, the Bill's failure to make

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<sup>56</sup> Int'l Ctr. for Research on Women [ICRW], *Asia Child Marriage Initiative: Summary of Research in Bangladesh, India and Nepal* (Plan Asia Reg'l Off., Jan. 2013), <<https://www.icrw.org/wp-content/uploads/2016/10/PLAN-ASIA-Child-Marriage-3-Country-Study.pdf>>. See also, Elizabeth Presler-Marshall, *GAGE Digest: Adolescent Girls' Capabilities in Nepal, A Synopsis of the Evidence* (Gender & Adolescence: Glob. Evidence [GAGE], Dec. 2017), <<https://gage.odi.org/wp-content/uploads/2019/01/Nepal-synopsis.pdf>>

<sup>57</sup> Sajeda Amin, J.S. Sahab & J.A. Ahmed, *Skills-Building Programs to Reduce Child Marriage in Bangladesh: A Randomized Controlled Trial*, 63 *J. Adolesc. Health* 687 (2018), <<https://www.jahonline.org/action/showPdf?pii=S1054-139X%2818%2930194-0>>

child marriages void ab initio and its potential infringement on women's autonomy raise critical concerns that cannot be overlooked. To transform this legislative intent into a truly effective reform, a comprehensive and balanced approach is essential. The current framework that treats child marriages as voidable rather than void ab initio significantly weakens the law's protective potential. An amendment making child marriages void from the outset, similar to Karnataka's progressive stance, is imperative. This would deter such practices more effectively and uphold the dignity and rights of young girls.

Establishing fast-track courts and special task forces to address cases of child marriage swiftly can enhance the law's efficacy. Training law enforcement and judicial officers on gender-sensitive approaches is also crucial to ensure empathetic handling of cases. Increasing the marriageable age alone will not curb child marriages unless accompanied by robust socio-economic measures. Expanding access to secondary education, vocational training, and financial literacy programs for young women can empower them to make informed decisions about marriage and their future. Conditional cash transfer schemes that incentivize families to support girls' continued education to ensure girls complete secondary and post-secondary education at least till they reach the legally prescribed marriageable age could serve as an effective deterrent.

Government and civil society organizations must collaborate to launch awareness campaigns targeting rural and marginalized communities, emphasizing the legal implications of child marriages and the benefits of delaying marriage. Engaging religious and community leaders in advocacy efforts can further legitimize these messages and promote compliance with the law.

Mandating periodic reviews by the Parliamentary Standing Committee to assess the law's impact, address implementation challenges, and suggest timely amendments can ensure the legislation evolves in line with ground realities. The prompt submission of the committee's report is essential for informed legislative action.

Lastly, the path to eliminating child marriage and promoting gender equality in India lies not merely in raising the legal marriage age but in addressing the socio-economic roots of the problem and safeguarding women's autonomy. A holistic strategy that includes legal reforms, education, economic empowerment, and community-driven advocacy can transform the Amendment Bill from a symbolic gesture into a substantive instrument of change.

**REGULATING AI-GENERATED CHILD SEXUAL ABUSE  
MATERIAL: LEGAL IMPERATIVES AND POLICY CHALLENGES IN  
INDIA**

*Anshid C K and Hammad Siddiqui\**

**ABSTRACT**

*The rise of AI has brought a novel challenge in the form of AI-generated child sexual abusive material, beseeching us to revisit how 'child pornography' is defined. The ability of AI to generate hyper realistic images indistinguishable from real images poses an issue in detecting real abusive materials. Apart from this, it also possesses some inherent harms, which opens the prospect of its criminalization. Since the production of these contents does not harm any actual child, criminalizing its generation and simple possession needs sound justification in legal theory. The paper explores these issues at a considerable length. The paper argues for the criminalization of AI CSAM generation and possession. It analyses the legal framework in India and its efficacy in tackling AI CSAM. The paper concludes by suggesting measures to strengthen legal frameworks and enforcement mechanisms.*

**Keywords:** AI, CSAM, POCSO, Child Protection, Child Abuse

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\* The authors are third-year B.A. LL.B. (Hons.) students at Jamia Millia Islamia, New Delhi. They can be reached at [hammadinam03@gmail.com](mailto:hammadinam03@gmail.com).

## I. INTRODUCTION

“There’s something bad in everything good and something good in everything bad”, says Michael Lewis. The first part of the statement captures the development of Artificial Intelligence (AI). The proliferation of AI has introduced extraordinary challenges in child protection, particularly with the emergence of AI-generated Child Sexual Abuse Material (CSAM). The Internet Watch Foundation (IWF) has started investigating AI-generated CSAM. They discovered a ‘world of text-to-image technology.’ They have published two reports, one in October 2023<sup>1</sup> and the other in July 2024.<sup>2</sup> They found 20,254 AI-generated images during one month on a single dark web CSAM forum and assessed 416 as criminal as per the UK law. The July report found 3,512 criminal images on the same forum. The images assessed were more severe and hardcore. IWF has also found the first videos in circulation underscoring the evolving nature of this threat.

The issue is transnational and not restricted to any national boundary. India cannot remain immune to this malaise, as it is already one of the largest producers of real CSAM.<sup>3</sup> The UK

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<sup>1</sup>Internet Watch Foundation, *How AI Is Being Abused to Create Child Sexual Abuse Imagery* (Oct. 2023).

<sup>2</sup>Internet Watch Foundation, *What Has Changed in the AI CSAM Landscape?* (July 2024).

<sup>3</sup>R. Kannan, *Most Online Content on Child Sexual Abuse from India*, *The Hindu* (Apr. 18, 2020), (Mar. 7, 2025, 11:30 AM) <https://www.thehindu.com/news/national/most-online-content-on-child-sexual-abuse-from-india/article31377784.ece>

is bringing new legislation to address AI CSAM.<sup>4</sup> The existing legal frameworks are designed to address exploitative acts involving real children. However, advancements in AI have facilitated the creation of photorealistic depictions of minors, posing significant ethical, legal, and societal quandaries. This paper aims to define and underpin the need for the criminalization of AI-generated CSAM. It seeks to analyse the adequacy of current legislation, identify gaps, and advocate for comprehensive reforms, in law and enforcement mechanism, to address this emerging threat.

The paper is divided into five chapters. The first chapter lays the foundational understanding by defining child pornography and AI CSAM. It explores existing legal definitions, including those provided by the United Nations and the Protection of Children from Sexual Offences (POCSO) Act in India. The second chapter presents the primary justifications for criminalizing AI-generated CSAM, including its simple private possession, on the Harm Principle. It highlights the potential harms such as grooming, normalization of child abuse, and the objectification of children. In the next chapter, a technical analysis of the generation of AI CSAM has been made. It explains deep learning and the role of text-to-image models in producing photorealistic depictions. The chapter also discusses the

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<sup>4</sup>E. Goodman, *The Intersection of AI and CSAM: A Reflection on the UK's Online Safety Act*, MEDIA@LSE (Mar. 6, 2025), (Mar. 8, 2025, 12:20 PM) <https://blogs.lse.ac.uk/medialse/2025/03/06/the-intersection-of-ai-and-csam-a-reflection-on-the-uks-online-safety-act/>.

distinction between open-source and closed-source AI models and their respective challenges for law enforcement and regulatory efforts. The fourth chapter analyses the existing Indian legal frameworks, particularly the POCSO Act, the Information Technology (IT) Act, and the Indecent Representation of Women (Prohibition) Act, in their ability to address AI-generated CSAM. It highlights certain shortcomings of these legislations in the present context. The final chapter proposes that a new chapter should be added to the POCSO Act to define and punish AI CSAM, regulate AI models, increase accountability for tech companies, and establish specialized enforcement units.

## **II. DEFINING CHILD PORNOGRAPHY**

To define child pornography, it is imperative to define pornography, and the depiction of a child in it would by default be considered child pornography. Though the term pornography is commonly in usage, it is difficult to give a legal definition. Perhaps this is the reason why Justice Stewart said that 'I know it when I see it.'<sup>5</sup> Justice Hidayatullah understood pornography as writings and pictures intended to arouse sexual desire.<sup>6</sup> It may be tweaked a bit to keep up with the technology and to include other visuals, such as videos and animations. In this way, pornography can be understood as visual or written material that is sexually explicit or arousing.

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<sup>5</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

<sup>6</sup> *Ranjit D. Udeshi v. State of Maharashtra*, 1964 SCC OnLine SC 52 (India).

Defining a child may seem easy at first, but it has its own complexities. In India, the POCSO Act defines a child as any person below the age of eighteen years.<sup>7</sup> However, this age of majority is not universal, though prevalent.<sup>8</sup> It may be problematic to decide the culpability of a person watching pornography in which the actor is major as per the law where it was produced but not where she is being watched. This only shows the difficulty which law enforcement may face in curbing the issue. Nonetheless, the paper should avoid this debate since it is concerned with AI-generated materials, where this problem is not likely to arise.

UN Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography defines child pornography as<sup>9</sup>:

“Any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representations of the sexual parts of a child for primarily sexual purposes.”

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<sup>7</sup> The POCSO Act, 2012, §2(d).

<sup>8</sup> Some Australian states define the age of majority as 17 and 16. In South Australia, a child is a person up to the age of 17 years (Criminal Law Consolidation Act 1935 (SA), s 62). In Queensland, New South Wales, and Western Australia, a child is someone 16 years or under (Criminal Code Act 1899 (Qld), s 207A; Crimes Act 1900 (NSW), s 91FA; Criminal Code Act Compilation Act 1913 (WA), s 217A).

<sup>9</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, art. 2(c), adopted Nov. 25, 2000, 2171 U.N.T.S. 227.

The POCSO Act defines it as ‘any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer-generated image indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child.’<sup>10</sup> But what constitutes child pornography is complex and influenced by legal and cultural factors.<sup>11</sup> It may refer to a broad range of materials, from depictions of sexual assault to innocuous material such as non-sexualised pictures of children in swimsuits in a clothing catalogue.<sup>12</sup> Because of these reasons, there is a requirement of some parameters to determine criminality. There are two common scales for this purpose. One is the COPINE (Combating Paedophile Information Networks in Europe) scale, and the other is the Oliver scale. COPINE scale uses ten level categorizations with increasing severity. Levels 1 and 2 are not illegal. The Oliver scale was developed in an English case<sup>13</sup> that classifies material into five categories. It is pertinent to mention this since these issues will resurface when we discuss AI-generated materials. Since the term ‘pornography’ implies consent<sup>14</sup> The term ‘child sexual abuse material (CSAM)’ is used hereafter.

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<sup>10</sup> The POCSO Act, 2012, §2(da).

<sup>11</sup> O’Donnell, I., Thomas Sutton and Milner, C. *Child Pornography: Crime, Computers and Society* 66 (Willan Publishing 2011).

<sup>12</sup> Ethel Quayle And Maxwell Taylor, *Child Pornography: An Internet Crime* 5 (Routledge 2003).

<sup>13</sup> *R v. Oliver*, (2003) 1 Cr. App. R. 28 (Eng.).

<sup>14</sup> Alisdair A. Gillespie, *Child Pornography: Law and Policy* 338 (Routledge 2011).

### **A. What Is AI-Generated CSAM?**

AI may be used to generate different forms of CSAM, including virtual child pornography and ‘pseudo child pornography.’ Virtual child pornography refers to computer-generated images of fictitious characters who appear to be children.<sup>15</sup> Pseudo child pornography, on the other hand, is created through ‘morphing.’ It involves placing a minor’s picture in a pornographic context.<sup>16</sup> With advancements in AI, it has been able to generate more lifelike images and visuals. The increase in realism often confuses experts and LEA. The use of AI to generate CSAM depicting lifelike children, which may be indistinguishable from real CSAM, is the primary concern of this paper. When the paper uses AI CSAM, it refers to this form of CSAM. The production process, enforcement challenges, and other relevant matters will be considered in later sections. For now, we must know why it must be curbed and criminalized.

### **III. WHY CRIMINALIZE AI CSAM?**

The topic tempts a jurisprudential enquiry, but we must resist. There are various theories on criminalization, such as the Harm Principle, the Offence Principle, and Legal Moralism.<sup>17</sup> Since the Harm Principle is the most liberal one,

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<sup>15</sup> Hedeel Al-Alosi, *The Criminalization of Fantasy Material: Law and Sexually Explicit Representations of Fictional Children 4* (Routledge 2018).

<sup>16</sup> T. Krone, *A Typology of Online Child Pornography Offending, Trends & Issues in Criminal Justice*, No. 279, Australian Inst. Of Criminology (2004),

<sup>17</sup> For an interesting discussion on whether criminalization of fictional CSAM can be justified through any of these theories, see Hedeel Al-Alosi,

the paper tends to justify criminalization primarily on the perceived harms of AI CSAM.

J.S. Mill, in his seminal work *On Liberty*, writes that 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'.<sup>18</sup> Since Mill did not define the term 'harm', it has been a challenge since then. Joel Fienberg, whose analysis of the Harm Principle has influenced several academics, extended the Harm Principle to public harm. Both Mill and Fienberg permitted the criminalization of actions creating a risk of harm.<sup>19</sup> One of the objectives of the Harm Principle is harm prevention, and actions do not need to be inherently harmful; it is sufficient if they cause a risk of harm.<sup>20</sup> We must restrict this discussion here and take an examination of the harms.

## **B. AI CSAM as a Matter of Harm**

To point out the harms of real CSAM or pseudo CSAM is simple. In the former case, the lack of consent makes it a production or outcome of molestation, abuse, or suppression. The production is also common with exploitative practices,

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The Criminalization of Fantasy Material: Law and Sexually Explicit Representations of Fictional Children 83-127 (Routledge 2018).

<sup>18</sup> John Stuart Mill, *On Liberty* 13-14 (Gertrude Himmelfarb ed., Penguin Books 1991) (orig. 1859).

<sup>19</sup> Hedeel Al-Alosi, *The Criminalization of Fantasy Material: Law and Sexually Explicit Representations of Fictional Children* 85 (Routledge 2018).

<sup>20</sup> Antony Duff, *Answering for Crime: Responsibility And Liability In The Criminal Law* 125 (Hart Publishing 2007).

including child sex tourism, prostitution, and trafficking.<sup>21</sup> The latter harms the dignity, reputation, and privacy of the child whose picture is being used. It has the potential to harm the victim in future. These reasons provide a strong rationale to criminalise pseudo CSAM.<sup>22</sup> The case of AI CSAM becomes complex since no real child is being exploited or harmed. It is thus difficult to show direct harm, but studies point out how CSAM, both real and virtual, can be used for grooming.<sup>23</sup> It may also normalize child abuse and desensitize the viewers, serving as a contributing factor in actual abuse or molestation of a child.

Grooming is the process by which a person prepares a child and environment to facilitate sexual abuse, including gaining access, compliance, and maintaining secrecy.<sup>24</sup> It may occur either online or offline.<sup>25</sup> IWF has evidence of children as young as three years of age being manipulated into sexually abusive acts ranging from sexual posing and masturbation to sadism, degradation, and even sexual acts with animals.<sup>26</sup>

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<sup>21</sup> Yaman Akdeniz, *Internet Child Pornography and The Law: National and International Responses* 4 (Ashgate 2008).

<sup>22</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242 (2002).

<sup>23</sup> Ost S., *Child Pornography and Sexual Grooming: Legal and Societal Responses* (Cambridge University Press 2009).

<sup>24</sup> Craven, S., Brown, S., & Gilchrist, E. *Sexual Grooming of Children: Review of Literature and Theoretical Considerations*, 12 *Journal of Sexual Aggression* 287 (2006).

<sup>25</sup> Kim, C., *From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children*, 1(3) *Am. Prosecutors Res. Inst. Update* (2004).

<sup>26</sup> *Internet Watch Foundation, Under-Sixes Manipulated into Disturbing Sexual Abuse While Playing Alone Online, as IWF Says Regulation Can't Wait*,

Continuous exposure to CSAM may habituate the viewer with that which 'initially evoked strong emotional or behavioural reactions'.<sup>27</sup> It may desensitize the viewer to such a point that the materials become insufficient to satisfy sexual needs.<sup>28</sup> It also has the potential to mislead the viewers into believing that what he is watching is normal and thus increases the risk of the viewer committing child sexual abuse.<sup>29</sup> The research mentioned had been undertaken to find the effects of consumption of CSAM on viewers. Since AI CSAM is becoming indistinguishable from the real, it is safe to assume that these harms will result from AI CSAM too.

While delineating the perceived harms, we must not lose sight of rather important values of children's right to equality and dignity. CSAM 'plays on children's inequality'.<sup>30</sup> It has been described as hate propaganda, dehumanizing its targets and converting them into mere sexual commodities.<sup>31</sup> 'It is a

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Internet Watch Foundation, <https://www.iwf.org.uk/news-media/news/under-sixes-manipulated-into-disturbing-sexual-abuse-while-playing-alone-online-as-iwf-says-regulation-can-t-wait/> (last visited Mar. 10, 2025).

<sup>27</sup> B. Paul & D. Linz, *The Effects of Exposure to Virtual Child Pornography on Viewer Cognitions and Attitudes Toward Deviant Sexual Behavior*, 35 COMM. RES. 13, 34 (2008).

<sup>28</sup> Ethel Quayle and Maxwell Taylor, *Child Pornography: An Internet Crime* 25-26 (Routledge 2003).

<sup>29</sup> O'Donnell, I., Thomas Sutton and Milner, C. *Child Pornography: Crime, Computers and Society* 74 (Willan Publishing 2011).

<sup>30</sup> R v. Sharpe, [2001] 1 S.C.R. 45, 158 (Can.).

<sup>31</sup> J. Bailey, *Confronting Collective Harm: Technology's Transformative Impact on Child Pornography*, 56 U.N.B. L.J. 65, 102 (2007).

crime against childhood as a universal.<sup>32</sup> Legislature is required to prevent the social harm from the unconscious acceptance of child abuse, which may foster a tolerant culture undermining the seriousness of such abuse.

### **C. Criminalization of Private Possession**

The criminalization of private possession of CSAM raises questions of individual liberty, privacy, and the requirement of balance between them and child abuse. Most countries punish mere possession of real CSAM, the primary reason being that such materials cannot come into existence without the abuse and exploitation of children somewhere.<sup>33</sup> Another reason for prohibiting this is the dynamics of demand and supply. Possessors, by maintaining demand, can perpetuate the market for CSAM and, consequently, child abuse.<sup>34</sup> Since these dangers are absent in AI-generated CSAM, it raises the question of whether to punish self-generated private possession of AI CSAM. The issue of possession of virtual or computer-generated CSAM elicited contradicting reactions

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<sup>32</sup> D. Oswell, *When Images Matter: Internet Child Pornography, Forms of Observation and an Ethics of the Virtual*, 9 *Info. Comm. & Soc'y* 244, 252 (2006).

<sup>33</sup> *R v. Booth*, [2009] NSWCCA 89, ¶ 41 (Austl.).

<sup>34</sup> Ethel Quayle And Maxwell Taylor, *Child Pornography: An Internet Crime* 24 (Routledge 2003).

from different jurisdictions. USA<sup>35</sup> and Canada<sup>36</sup> do not punish simple possession of virtual or fantasy CSAM, though they do not recognize a right to access. The UK<sup>37</sup> and Australia<sup>38</sup>, on the other hand, have criminalized mere possession.

An analysis of the relationship between simple possession and actual molestation may give guidance and make things clearer. There is evidence of the link between possession of CSAM and contact offending.<sup>39</sup> Many offenders charged with simple possession have been found to have a previous conviction of child abuse.<sup>40</sup> As a corollary, many convicted offenders of child abuse have also been found in possession of CSAM.<sup>41</sup> Though the inverse, possessors committing child abuse, may not be true, the harms discussed above will

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<sup>35</sup> See 18 USC § 1466A(a), simple possession is not prohibited, unless it is with the intention of distribution. The Supreme Court refused to recognise a correlative right to access such material (e.g. see *United States v Whorley*, 550 F.3d 326).

<sup>36</sup> *R v. Sharpe*, [2001] 1 S.C.R. 45 (Can.), the Canadian Supreme Court recognized the right to possess self-created materials but did not permit a right to access.

<sup>37</sup> Criminal Justice Act 1988, c. 33, § 160 (UK).

<sup>38</sup> Crimes Act 1900 (NSW) s 91H.

<sup>39</sup> M.C. Seto, J.M. Cantor & R. Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 *J. Abnormal Psychol.* 610 (2006).

<sup>40</sup> M.C. Seto & A.W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 *Sexual Abuse* 201 (2005), M.L. Bourke & A.E. Hernandez, *The "Butner Study" Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 *J. Fam. Violence* 183 (2009), J.A. McCarthy, *Internet Sexual Activity: A Comparison Between Contact and Non-Contact Child Pornography Offenders*, 16 *J. Sexual Aggression* 181 (2010).

<sup>41</sup> Janis Wolak, David Finkelhor, Kimberly Mitchell & Michele Ybarra, *Online "Predators" and Their Victims*, 63 *Am. Psychol.* 111 (2008).

remain present. It carries a risk that it might 'come into the hands of someone who would use it to harm children.'<sup>42</sup> Moreover, the use of AI to generate sexual and paedophilic materials only reflects the thoughts of the user. The likelihood of them being paedophiles is high, and the threat of an unhealthy mind that can act out its fancies always looms larger. It is not necessary for the legislature to provide scientific proof; a reasoned apprehension' is sufficient.<sup>43</sup>

#### **IV. HOW IS AI CSAM BEING GENERATED?**

Though the concept of Artificial Intelligence (AI) has been with us since World War 2,<sup>44</sup> It has gained unprecedented public attention in the last few years, especially after the release of the text-generating program ChatGPT.<sup>45</sup> Broadly speaking, AI systems are trained to look for connections and patterns in data. The learning process of AI, known as machine learning, may be supervised or unsupervised, that is, guided by humans or algorithms.<sup>46</sup> In supervised machine learning, the model learns from labelled data. In unsupervised learning, the model looks for patterns in unlabelled data. AI generally used to generate CSAM are

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<sup>42</sup> R v. Sharpe, [2001] 1 S.C.R. 45, 100 (Can.).

<sup>43</sup> Id at 85.

<sup>44</sup> Nils J. Nilsson, *The Quest for Artificial Intelligence* (Cambridge Univ. Press 2009).

<sup>45</sup> Gadi Eshed, *The Rise of Chatbots: Is the Chatbot a Threat or an Opportunity for Security Organizations?* Int'l Inst. for Counter-Terrorism 9 (2023).

<sup>46</sup> IBM, *AI vs. Machine Learning vs. Deep Learning vs. Neural Networks*, (Mar. 10, 2025, 11:20 AM) <https://www.ibm.com/think/topics/ai-vs-machine-learning-vs-deep-learning-vs-neural-networks>.

trained by a process called deep learning. Deep learning is a subset of machine learning that processes information like a human brain by using artificial neural networks.<sup>47</sup> It is effective in handling large and complex datasets like images, videos, and texts.

Most of the common AI systems deal only with texts. They are trained on huge quantities of text, and their function is to generate text. They are called large language models (LLMs) and are commonly used in online chatbots.<sup>48</sup> AI systems may extend into more modalities, such as audio, video, image, or code.<sup>49</sup> Systems that are trained on huge datasets of images and whose function is to generate images are called text-to-image models.<sup>50</sup> They translate from one modality into another.<sup>51</sup> AI models can either be open-source or closed-source.

Closed-source models do not disclose or open to the public the code that comprises its software. Such software has full

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<sup>47</sup> *Id.*

<sup>48</sup> Amazon Web Services, *What Is a Large Language Model?*, AWS (Mar. 09, 2025, 02:10 PM), <https://aws.amazon.com/what-is/large-language-model/>.

<sup>49</sup> NVIDIA, *Multimodal Large Language Models*, NVIDIA, (Mar. 09, 2025, 01:20 PM) <https://www.nvidia.com/en-us/glossary/multimodal-large-language-models/>.

<sup>50</sup> Colocation America, *What Is a Deep Learning Text-to-Image Model?*, (Mar. 09, 2025, 10:40 AM) Colocation America, <https://www.colocationamerica.com/blog/what-is-a-deep-learning-text-to-image-model>.

<sup>51</sup> Google, *How AI Creates Photorealistic Images from Text*, Google Blog, (Mar. 09, 2025, 12:20 PM) <https://blog.google/technology/research/how-ai-creates-photorealistic-images-from-text/>.

control over model training and use. It can moderate the content by either restricting the training data (it cannot generate what it has not been exposed to) or restricting the prompts that can be used to generate a particular kind of image. Open-source models keep their code public.<sup>52</sup> As a result, the code becomes editable by the users. These models may attempt to moderate the content, but since the code is editable, malicious users can easily remove safety guardrails<sup>53</sup> and fine-tune the base model on further images to generate CSAM. Text-to-image models that are open-sourced are the preferred choice amongst AI CSAM generators.<sup>54</sup>

AI CSAM are often generated by fine-tuning a model with datasets that feature a particular individual child. This child is often a known victim of child sexual abuse or a famous child celebrity.<sup>55</sup> For both these categories, a large set of image datasets exists. In the case of a known victim, there may be in existence pornographic images. This makes the task easier since there would not be any need to fine-tune the model with other pornographic materials. Perpetrators often have their ‘favourite’ victim, and now they can generate as much CSAM they want of that child.<sup>56</sup> Similarly, these models can also

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<sup>52</sup>Mike Sexton. *What Is “Open” AI?* Third Way, 2024. JSTOR.

<sup>53</sup>Rishi Bommasani et al., Issue Brief: Considerations for Governing Open Foundation Models, Stanford Univ. Human-Centered Artificial Intelligence

<sup>54</sup>Internet Watch Foundation, *How AI Is Being Abused to Create Child Sexual Abuse Imagery* (Oct. 2023).

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

generate CSAM of celebrity children by transposing them into any setting, scenario, or activity, all the while maintaining the likeness to their facial features.

The users can adopt several methods to generate AI CSAM. They can use base versions of open-source models that are trained on pornographic data to generate CSAM.<sup>57</sup> If these models have any restrictions, either in training data or prompts, they can be overcome by rewriting or altering the code. However, this action requires some technical know-how and is not common among low-tech users.

Another method of generating AI CSAM is through websites dedicated to this purpose. These platforms usually offer various options for customization of image features, such as body, age attributes, pose or activity, setting, and more. Some also allow positive and negative prompts and multi-image generation. These websites use the built-in model to provide the service, and IWF has found an increase in the number of these sites.<sup>58</sup>

Users also go through websites designed for 'nudifying' images.<sup>59</sup> The user has to only upload a clothed image of the individual; the model removes the clothes and gives a naked image of the individual. While this may be done through software editing, using AI for this purpose results in more realistic images. It signifies the difference between shallow-

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

fake and deepfake. AI CSAM can be generated through any of the methods discussed, and there is, in principle, no technological barrier.

The recent report of IWF shows that AI CSAM videos have also started to surface.<sup>60</sup> Dark forum hosts guides to create AI CSAM images and new models.<sup>61</sup> Users are also circulating paedophile manuals.<sup>62</sup> IWF has found one such manual where a section explicitly recommended the readers to use ‘nudifying’ tools to generate material to blackmail children.<sup>63</sup>

## **V. EXISTING LAWS IN INDIA GOVERNING AI CSAM**

AI CSAM will primarily be governed by the Protection of Children from Sexual Offences Act, 2012 (“POCSO Act”), the Information Technology Act of 2000 (“IT Act”), and the Indecent Representation of Women (Prohibition) Act, 1986. The POCSO Act is the self-contained comprehensive legislation to provide for the protection of children from sexual abuse and pornography<sup>64</sup>. The IT Act also contains provisions criminalising the publication and transmission of pornographic materials, in particular, child pornography. The

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<sup>60</sup> Internet Watch Foundation, *What Has Changed in the AI CSAM Landscape?* (July 2024).

<sup>61</sup> Internet Watch Foundation, *How AI Is Being Abused to Create Child Sexual Abuse Imagery* (Oct. 2023).

<sup>62</sup> Internet Watch Foundation, *What Has Changed in the AI CSAM Landscape?* (July 2024).

<sup>63</sup> *Id.*

<sup>64</sup> The Protection of Children from Sexual Offences Act, 2012, Statement of objects and reasons.

Indecent Representation of Women (Prohibition) Act, 1986, prohibits the publication of books, pamphlets and other documents containing indecent representation of women, including girl children. Although these statutes effectively curb the sexual exploitation of children through conventional pornography, this chapter enquires into their effectiveness in controlling and mitigating virtual (AI-generated) child pornography, as the focus of this paper is solely on AI-generated materials.

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

The POCSO Act was enacted in line with Article 15 (3) of the constitution, which empowers the state to make special provisions for women and children. The enactment gave effect to the Convention on the Rights of the Child, adopted by the United Nations General Assembly in 1989. The convention mandates the state parties to prevent the coercion and inducement of children to sexual activities and the exploitative use of children in pornographic performances<sup>65</sup>. The original Act, though it contained provisions to curb child pornography, failed to effectively regulate the sexual exploitation of children, especially since it couldn't keep up with the new ways of exploitation with the unprecedented growth in technology.

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<sup>65</sup> Convention on the Rights of the Child art. 34, Nov. 20, 1989, 1577 U.N.T.S. 3.

Against the backdrop of the increase in the incidences of child sexual abuse, the POCSO Act was amended in 2019 to enhance the punishment for sexual offenses committed against children<sup>66</sup>. The amendment proposed to empower the central government to make rules for the manner of deleting, destroying, or reporting pornographic material in any form involving a child<sup>67</sup>. It introduced section 4 (da), providing for a panoramic definition of “child pornography”<sup>68</sup>. Additionally, the amendment overhauled section 15 of the Act, criminalizing the possession and storage of child pornographic materials, extending beyond possession for commercial purposes<sup>69</sup>.

The POCSO Act defines “Child Pornography” as follows:

*“‘child pornography’ means any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer-generated image indistinguishable from an actual child, and image created, adapted, or modified, but appear to depict a child.”<sup>70</sup>*

The definition provides that the depiction of a child in sexually explicit conduct in a computer-generated image is

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<sup>66</sup> The Protection of Children from Sexual Offences (Amendment) Act, 2019, Statement of Objects and Reasons.

<sup>67</sup> *Id.*

<sup>68</sup> The Protection of Children from Sexual Offences (Amendment) Act, 2019, § 2 (India).

<sup>69</sup> *id. at* §8.

<sup>70</sup> The Protection of Children from Sexual Offences Act, 2012, § 2(da) (India).

child pornography. The term “indistinguishable from an actual child” suggests that a virtual image generated by artificial intelligence, not necessarily involving an actual child, would still be considered child pornography if it portrays an unreal child identical to an actual child. It is pertinent to note that the American rationale of “harm in production”<sup>71</sup> is not the rationale behind the proscription and criminalization of child pornography in India. Instead, every “child sexual exploitation and abuse material” (CSEAM)<sup>72</sup>, regardless of whether the harm caused in production comes under the ambit of “child pornography”. This interpretation is substantiated by a series of judicial decisions.

SC in *Independent Thought v. Union of India* held that all “child-friendly” statutes are essentially for the well-being of the child and their provisions ought to operate and be interpreted in a manner that would be in the best interest and well-being of the child<sup>73</sup>.

In *Attorney General for India v. Satish*<sup>74</sup> This Court had to examine the entire legislative scheme of the POCSO. It held that each provision of the POCSO should be construed viz-a-viz the other provisions of the Act and with reference to the context or background with which the legislation was

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<sup>71</sup> *New York v. Ferber*, 458 U.S. 747, 749–52 (1982), *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

<sup>72</sup> *Just Rights for Children Alliance & Anr. v. S. Harish & Ors.*, 2024 SCC OnLine SC 2611 (India).

<sup>73</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India).

<sup>74</sup> *Attorney General v. Satish*, (2022) 5 SCC 545 (India).

enacted; the courts shall not lean to interpret the statutes in a way that will leave the objective and purpose of the enactment redundant.

Similarly, in *Eera v. State (NCT of Delhi)*<sup>75</sup>, the apex court held that, albeit the act is a penal statute, given that it is beneficial legislation, it is to be construed keeping in mind the legislative intent. The court also acknowledged the evolution of the rule of interpretation applied by the courts to construe the penal statutes, from the strict rule of interpretation to Heydon's rule<sup>76</sup>, meaning the construction is to be made with due consideration to the mischief sought to be alleviated and the consequential remedies proposed to be achieved.

Addressing the definition of "child pornography" under the act, the Delhi High Court in *Tulir Charitable Trust v. Union of India*<sup>77</sup> observed that in terms of Section 2(da) of the POCSO Act, any sexually explicit material involving a child - even appearing to depict a child - would fall under the definition, thereby suggesting that only a *prima facie* inference of

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<sup>75</sup> *Eera v. State (NCT of Delhi)*, (2017) 15 SCC 133 (India).

<sup>76</sup> Heyden's rule evolved in the English case *Heydon case*, (1584) 3 Co Rep 7a, the rule proposed four points on which statutes, especially new statutes, were to be interpreted. These are *firstly*, what was the common law before the making of the Act; *secondly*, what was the mischief and defect for which the common law did not provide; *thirdly*, what remedy Parliament resolved and appointed to cure the disease plaguing the society; and *lastly*, the true reason of the remedy. As cited in *Attorney General v. Satish* (2022) 5 SCC 545, para. 63.

<sup>77</sup> *Tulir Charitable Trust v. Union of India*, 2024 SCC OnLine Del 3563(India).

involvement of a child is sufficient for any sexually explicitly material to be categorized as such.

These court rulings draw the inference that provisions of the POCSO Act are to be interpreted in a manner that will effectuate the objectives of the legislature, and it is obvious that the legislature, by including the term “computer-generated image, indistinguishable from an actual child” rightly intended to bring virtual pornography under the ambit. Moreover, it is absolutely in the child's interest to adopt a constructively expansive interpretation.

The statement of reasons and objectives for the 2019 amendment references the cases of *Machhi Singh v. State of Punjab*<sup>78</sup> and *Devender Pal Singh v. State (NCT of Delhi)*<sup>79</sup> to highlight that society condones the death penalty in the rarest of the rarest cases - those that profoundly prick its conscience. In the same vein, crimes against children are regarded as heinous offences that leave the societal conscience aghast. The inclusion of such a statement highlights that the legislature unequivocally proposed to criminalise child pornography as it is socially undignified. Indian society, with deeply rooted conservative values, looks at the possession of child pornography antagonistically, no matter how they are made. This disapproval is not only the reflection of societal norms but also stems from the belief that child pornography is inherently unnatural and is a prelude to unlawful acts.

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<sup>78</sup> *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470 (India).

<sup>79</sup> *Devender Pal Singh v. State (NCT of Delhi)*, (2002) 5 SCC 234 (India).

The underlying principles of International Human Rights Law are the inherent and inalienable right to dignity, freedom and security. These principles seamlessly flow through all human rights instruments, including the United Nations Declaration on Human Rights (UDHR) and the Convention on the Rights of the Children (CRC). The POCSO Act also contain the implications of these foundational principles. In *Eera through Dr Manjula Krippendorf v. State (Govt. of NCT of Delhi)*<sup>80</sup>, the Hon'ble Supreme Court observed:

18..... The dignity of the child has been given immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act.

63..... The protection of the dignity of the child is the spine of the legislation.....

AI-generated child pornography, though materially unharmful, seriously endangers the autonomy and dignity of children. Sexualisation and eroticization of children through pornography produce deleterious effects on all children by encouraging a societal perception of children as sexual objects<sup>81</sup>.

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<sup>80</sup> *Supra* note 72.

<sup>81</sup> Pub. L. No. 110-358, title I, section 102(11)(A) as cited in Carissa Byrne Hessick (ed.), *I Refining Child Pornography Law Crime, Language, and Social Consequences* 96-99 (University of Michigan Press, United States of America, 4th edn., 2019).

## **The Information Technology Act, 2000**

The Information Technology Act of 2000 was enacted to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", giving effect to the United Nations resolution A/RES/51/162 on "Electric Commerce"<sup>82</sup>. Before the 2008 amendment, the act was predominantly preventive and curative, with only a limited number of penal provisions addressing cybercrimes. The amendment introduced penal provisions, including Section 67B, that specifically criminalise the transmission and publication of materials that depict children in a sexually explicit act<sup>83</sup>. This section was incorporated following the recommendation by the 50th Report of the Standing Committee on Information Technology on the 'Information Technology (Amendment) Bill, 2007'. The report advocated for a distinct provision addressing "child pornography", arguing that relying on Section 67A, which criminalizes transmission and publication of pornography in general, wouldn't accurately reflect the gravity of menace that is permeating society<sup>84</sup>.

Section 67B reads as follows:

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<sup>82</sup> Information Technology Act, 2000, Preamble (India).

<sup>83</sup> The Information Technology (Amendment) Act, 2008, § 32 (India).

<sup>84</sup> Standing Comm. on Info. Tech., *50th Report on the Information Technology (Amendment) Bill, 2007*, at 65 (2007) (India).

*“67-B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form. – Whoever –*

*(a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct; or*

*(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or*

*(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resources; or*

*(d) facilitates abusing children online; or*

*(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:.....”*

Sub-section (b) stipulates that creating texts or digital images in any electric form depicting children in an obscene, indecent or sexually explicit manner is punishable. The legislature here advertently used the words “creating digital image” alongside “texts”, where “creation” signifies bringing something new into existence. The term “digital image” can refer both to a representation of a real image that can be stored in a digital computer and an image entirely generated by computer technology. In our case, the legislature intended to encompass both these interpretations within the scope of the provision.

Interpreting “digital images” in conjunction with “texts”, which don’t necessarily contain any harm in production nor circulation, gives rise to a presumption by implication that the motive of punishment was not commensurate with the harm inflicted on the children in the course of creation. Instead, the objective was to address the broader social infirmity such materials might cause in the long run.

The apex court’s interpretation of the subsection that the term ‘material’ in the subsection includes any electronic content substantiates an expansionary interpretation of the provision<sup>85</sup>. The Delhi High Court in *X v. Union of India*<sup>86</sup> stated that a combined reading of Sections 67, 67A, and 67B concludes that Section 67 is a parental provision, and subsequent provisions specify the offences with enhancement

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<sup>85</sup> *Id.*

<sup>86</sup> *X v. Union of India*, AIR ONLINE 2021 DEL 527.

of the punishments. Hence, the implication of the parental provision will be read into subsequent provisions, too.

Under Section 67, the publication or transmission of material that is lascivious, sexually explicit, or likely to corrupt or deprave individuals is a punishable offense, with increasing penalties for repeat violations. The provision reflects the legislative intention to criminalize the transmission and publication of obscene material, recognising the potential psychological and moral impacts on the viewers. This legislative intent will be nothing but more meaningful and efficacious if it is read into the subsequent provision for “child pornography”, reinforcing the necessity of a purposive interpretation of Section 67B.

In addition to the creation, the subsection also punishes collection, seeking, browsing, downloading, advertising, promoting, exchanging or distributing material in any electronic form depicting children in an obscene, indecent or sexually explicit manner. Browsing herein includes mere viewing<sup>87</sup>. Given the earlier interpretation that digital images encompass AI-generated material, this understanding extends to these actions as well, ensuring that such content, regardless of how it is produced, falls within the ambit of the provision.

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<sup>87</sup> *Supra* note 70 at para 150.

## **The Indecent Representation of Women (Prohibition) Act, 1986**

The Indecent Representation of Women (Prohibition) Act was enacted by the parliament to prohibit the indecent representation of women in any manner. The term “women” includes girls under 18 years of age, ensuring their protection. Consequently, depiction of girl children in a way prohibited by this act, including AI-generated materials, comes under the scope of this act and is subject to punishment.

Section 2 (c) of the act defines “indecent representation” as follows:

“indecent representation of women” means the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals”

The definition in explicit terms suggests that the depiction of women in any manner in such a way as is likely to deprave, corrupt or injure the public morality or morals squarely comes under its ambit. Here, the legislative intent is also to curb the potential moral depravation caused by such materials. AI-generated materials stimulate the same moral turpitude as it is done by actual materials, making it equally harmful.

Therefore, to effectively address the mischief, a purposive interpretation is essential, ensuring that AI-generated materials are covered under the provisions.

## **VI. STRENGTHENING LEGAL AND POLICY FRAMEWORKS**

The existing statutes and regulations in India offer a robust safeguard against the creation, possession and distribution of AI CSAM. However, there are substantial as well as procedural aspects that the current legal framework lacks, highlighting the need for strong enforcement mechanisms and legislative reforms to address the challenges created by AI-generated materials.

One critical loophole is that the IT Act doesn't criminalize the creation of child sexually abusive videos; since the videos have also started to appear, it is expedient to include them in the definition. Additionally, the act of grooming, manipulation, and blackmail poses a serious risk, further aggravated by the circulation of paedophile manuals that give instructions for such exploitation.

The existing legal gaps make it evident that piecemeal changes will not be sufficient to counter the challenges posed by AI-CSAM. Instead, a comprehensive overhaul in the legal framework is necessary to ensure effective regulation, enforcement and deterrence in the evolving digital space.

While other countries are considering separate legislation, India must, at the very least, introduce a chapter in the

POCSO Act to address this issue specifically. The chapter must contain extensive definitions and legal provisions to curb grooming, related activities, and the possession and distribution of paedophile manuals. Moreover, it should encompass provisions to regulate tech companies and introduce an inclusive and dedicated enforcement mechanism to ensure effective implementation.

### **Incorporating AI-Generated CSAM within Existing Legal Definitions**

As AI technologies continue to evolve, they will enable the production of hyper realistic CSAM without the need for real children. The creation of these materials, therefore, poses an equally significant threat as traditional CSAM. It is imperative that these legal frameworks be amended to include AI-generated CSAM in their definitions, criminalizing its creation, distribution, and possession explicitly. To ensure clarity and uniformity, a standardized classification system, such as COPINE, should be introduced to assess and determine the severity of the criminal content. This would ensure that AI-generated CSAM falls under the purview of child protection laws, treating it with the same severity as traditional CSAM.

AI CSAM can facilitate grooming and manipulation, with perpetrators using sophisticated AI tools to coerce and blackmail minors into creating explicit content or engaging in exploitative activities. The Indian legal framework must be reformed to criminalize acts of grooming, manipulation, and

blackmail. These activities should be explicitly prohibited and criminalized.

The availability of paedophile manuals and guides on the internet has exacerbated the problem. These resources provide step-by-step instructions on manipulating and abusing children to exploit them sexually, which poses a significant risk to child safety. These manuals and guides facilitate effortless learning of the process rather than resorting to dark webs and other unsafe and unencrypted platforms. Appropriate reforms must be made to prohibit and penalize the publication and distribution of paedophile manuals and guides in physical as well as electronic forms.

### **Regulating Tech Companies**

Tech companies, especially those developing Generative AI and large language models (LLMs), must be held more responsible. Though these companies prohibit the generation of CSAM in their terms and conditions, the existing content moderation mechanisms are insufficient to mitigate the risks. They must implement effective content moderation methods, and companies providing closed-source models must be held accountable for regulating the data used for training AI systems. Similarly, open-source models should not be allowed to enter the market unless they incorporate effective safeguards to prevent misuse.<sup>88</sup>

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<sup>88</sup> See, David Thiel, Identifying and Eliminating CSAM in Generative ML Training Data and Models, Stanford Internet Observatory (Dec. 23, 2023).

AI tools that allow deepfakes and manipulation of images, such as nudifying tools, pose a serious threat to the safety and dignity of children. The development and usage of deepfakes and nudifying tools must be prohibited. To prevent the development and exploitation of such tools, a robust enforcement mechanism must be introduced. Anyone attempting to access and use the tools maliciously must be subjected to legal consequences.

Another preventive measure is deindexing links to fine-tuned AI models generally used for generating AI CSAM.<sup>89</sup> Deindexing a page from a search engine involves removing it from the engine's search results while it remains accessible online, visible to those who visit it directly. Prominent search services like Google and Bing adhere to a strict procedure when processing deindexing requests. They deindex links on selected grounds, such as explicit or personal information, personally identifiable information, irrelevant sexual content, and CSAM.<sup>90</sup> The removal requirement usually includes a *locus standi*, meaning the content sought to be removed must depict the complainant.<sup>91</sup> It is doubtful whether these requirements would be fulfilled in the case of fine-tuned AI models. Search engines do not deindex links on their own, relying on external requests. Regulation must be in place to

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<sup>89</sup> Internet Watch Foundation, *How AI Is Being Abused to Create Child Sexual Abuse Imagery* (Oct. 2023).

<sup>90</sup> Google, *Remove Content from Google Search*, (Mar. 08, 2025, 10:40 AM) <https://support.google.com/websearch/troubleshooter/3111061?hl=en>.

<sup>91</sup> Google, *Report Content on Google*, (Mar. 08, 2025, 10:40 AM) <https://support.google.com/websearch/answer/9116649>.

require search engines to monitor and remove the websites that assist in the generation, publication and distribution of AI-CSAM.

### **Establishing A Dedicated Police Cell**

The current enforcement mechanism is insufficient to effectively monitor, investigate and prosecute the offenders involved in AI-CSAM. Given the sensitive and complex nature of evidence and victims, Law Enforcement Officers require specialized training to handle them appropriately. Establishing a dedicated police unit for this purpose will be a more effective approach. The special police unit proposed to be established must contain qualified enforcement officials as well as technical experts.

Suspicious websites must be constantly monitored by the cell to facilitate effective investigation and prosecution of the preparators. Initially, the websites may be given a caveat if they are found to be used for these activities. If the controlling body of the website voluntarily implements preventive measures following the notice, further actions shall be withheld. However, if the website fails to comply, it must be de-indexed. If, despite the de-indexing, the platform continues to be prone to such activities, steps must be taken to take it down.

The committee should be empowered to ask for the removal of content on the web. Section 69A of the IT Act empowers the Central Government to block public access to information in

the interest of sovereignty, defence, foreign relations, and other like grounds. The committee should be given similar powers for instant blocking and further removal of the contents consisting of CSAM.

The committee should collaborate with established organizations working in this domain, such as the IWF and Thorn. Furthermore, it should establish a structured complaint-receiving mechanism that enables internet users to report any explicit content featuring children. Such a mechanism would facilitate investigation and appropriate action by the committee. A comprehensive response must incorporate these recommendations for ensuring a child's right to dignity and safety in the digital age.

## **VII. CONCLUSION**

The unscreened proliferation of AI CSAM poses a grave risk to society's moral fabric, eroding fundamental protection for children and exposing them to something from which they have been conventionally shielded. If left unregulated, such material would contribute to a dangerous cultural shift, desensitizing society to child exploitation and eroding the legal and ethical boundaries that protect children. Although existing laws like the POCSO Act and IT Act criminalize child pornography, they were not drafted to address AI-generated content. As a result, they fall short of effectively preventing the creation, possession and distribution of AI CSAM.

This paper has dealt with the definitional and jurisprudential complexities surrounding AI-generated CSAM, the potential harm it poses, and the technological process enabling its creation. The paper provides justification for criminalizing AI-generated CSAM, even in cases of private possession, based on the Harm Principle. Moreover, the paper underscores the need for legal reforms, including the introduction of a dedicated chapter in the POCSO Act to define and criminalize AI-generated CSAM and stringent regulations on AI models, which will be critical in protecting children from digital exploitation.



**HOME AND THE WORLD: A COMPARATIVE AND  
INTERSECTIONAL APPROACH TO ADOPTION REFORMS IN  
INDIA**

*Kaustubh Chakrabarti\**

**ABSTRACT**

*Children are the greatest assets of any country. Nurturing them with the right resources can yield immense social and economic standing for the country. Unfortunately, many children all over the world do not have homes and families where they can be brought up with love and affection. Adoption, therefore, is one of the most integral legal frameworks that facilitates such children to be rehabilitated in homes where they can receive the right kind of upbringing for their development. This paper argues that India's adoption laws need to be reformed and rethought. It particularly focuses on two such aspects, namely, inter-country adoption and adoption by same-sex couples. The article delves into a cross-country comparison as well as an intersectional comparison to highlight gaps in India's legal framework and the reforms that should be brought in to become an ambassador of human rights.*

**Keywords** - *Adoption Reforms, Inter-Country Adoption, Same-Sex Couples, Child Rights*

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\* The author is a third-year law student at Hidayatullah National Law University, Raipur, Chhattisgarh. He can be reached at [kaustubhchakrabarti@gmail.com](mailto:kaustubhchakrabarti@gmail.com)

## **INTRODUCTION**

The practice of adoption is not something that has developed in recent years due to the rising clamours of child rights in society. While it has not been explicitly recognized or acknowledged in the erstwhile Islamic, Zoroastrian or Christian personal laws, the traditional Hindu societies had duly acknowledged this practice. It was a common practice even among holy sages to take in children whose parentage were not known and raise them as their own.

In Classical Hindu Law, there were many restrictions that were imposed on adoption. Only a son was allowed to be adopted by a family who had no natural son of their own. Thus, daughters could neither be adopted nor was a natural daughter a bar on the adoption of a son. The primary justification for adopting a son was that only a son could perform the obligations and rites of his paternal ancestors from the father's side after their death. Also, to uphold the Doctrine of Incest, it was necessary that the father taking in adoption and the mother giving in adoption should not have been capable of contracting a valid marriage.

Another condition of adoption used to be that women were not allowed to take in adoption. A son could be adopted by a widow only if the husband had permitted so before his death or if the male sapinda relations of the deceased husband agreed to the adoption. Even then, a widow had no right to adopt to herself but only to her husband. This adopted son also had

the right to divest other male relations of the property to the extent of his share.

With time these rules came under the scanner of the educated and enlightened public who pushed for more fairness in the process of adoption. Thus, after about a decade of independence, the Parliament attempted to codify the personal laws and passed the “Hindu Adoptions and Maintenance Act, 1956” [Hereinafter, the HAMA]. And in 2015, a secular law dealing with children rights, the “Juvenile Justice (Care and Protection) Act” [Hereinafter, the JJ Act] was passed that had a chapter dedicated to adoption.

It is important for law to keep up with the aspirations and morality of the society. This article focuses on two aspects: inter-country adoption and adoption by LGBTQ+ community, and analyses India’s role in evolving and reforming its adoption laws to make them more inclusive and set a progressive example in the domain of child rights.

## **INTER-COUNTRY ADOPTION**

The first thing that must be noted is that unlike all the other Hindu personal laws, the HAMA does not have extra-territorial application as is laid down in S.1. Inter-country adoption, therefore, also does not find any explicit mention in this act.

It started with the case of “*Laxmi Kant Pandey Vs Union of India*”<sup>1</sup> in 1984 where the Supreme Court first acknowledged

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<sup>1</sup> *Laxmi Kant Pandey v. Union of India*, (1987) 1 SCC 66

the need of a central agency to regulate the law regarding inter-country adoption in India. Thus, in 1990, the Central Adoption Resource Authority was set up to supervise adoptions in India. Simultaneously, state authorities were also established.

India is a signatory to “The Convention on the Rights of the Child, 1989”<sup>2</sup> [Hereinafter, the CRC]. Article 21 lays down in detail some of the provisions of inter-country adoption. It puts the responsibility on receiving states to ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption and also take appropriate measures to ensure the adoption is only taking place in consideration of paramount welfare of child and not for some illegal and immoral monetary gain.

India also ratified the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption in 2003<sup>3</sup>. Article 23 of the convention provides for the recognition of the adoption in the Contracting States (91) if made in compliance with the provisions of this convention unless as Article 24 provides it is directly in contravention of the public policy of the country.

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<sup>2</sup>Convention on the Rights of the Child | OHCHR, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

<sup>3</sup> “Convention On Protection of Children and Co-Operation in Respect of Intercountry Adoption, 1993 | <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>”

Thus, if there is an inter-country adoption between India and a State that is not a party to the Hague convention, they would have to evolve their own set of agreements and eligibility criteria and establish a mechanism to ensure that this is adhered to. There is also a possibility that this adoption is not recognised by any other country. On the flip side, it is not necessary that an inter-country adoption between Contracting States, i.e., states that have ratified the Hague convention, is not recognised by a State that is not a party to this convention.

Thus, inter-country adoption is a tricky aspect of international law. The Hague Convention cannot be imposed on sovereign states. The JJ Act has given a lot of legislative backing to some of the provisions of the Convention in order to facilitate inter-country adoptions. The primary purpose is that if a child cannot be reinstated in a family in his country of origin, then we should at least try to relocate him in a suitable family abroad.

Both the Contracting States must thoroughly look into the matter and do a background check of all the stakeholders and only allow an inter-country adoption if it is in the paramount welfare of a child. Such conditions as to suitability and consent have been laid down in Articles 15 and 16 of the convention that India has duly incorporated in the JJ Act.

S.59 of the JJ Act<sup>4</sup> particularly talks about the procedure for inter-country adoption of an orphan, abandoned or surrendered child. Overseas Citizens of India, a category that was created by amending the Citizenship Act, 1955 in 2005, have been given equal rights in matters of inter-country adoption although do not enjoy full civil and political rights like Non-Residential Indians. Both NRIs and OCIs are given preference as prospective adoptive parents before adoption. Children with physical and mental disability, siblings and children above five years of age may be given preference over other children.

The prospective adoptive parents living abroad may apply for adoption to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, who shall then prepare a report verifying their eligibility, will transfer their application to the concerned authority for adoption of a child from India.

If the authority finds the applicants suitable, then, it will refer the application to one of the Specialised Adoption Agencies, where children legally free for adoption are available. On the acceptance of the child, this Agency shall file an application before the District Magistrate for obtaining the adoption order. The prospective adoptive parents shall receive the child in person as soon as the passport and visa are issued to the child.

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<sup>4</sup> “The Juvenile Justice (Care and Protection of Children) Act, 2015 | <https://cara.wcd.gov.in/PDF/JJ%20act%202015.pdf>”

One of the major challenges that a receiving State must keep in mind is to ensure a healthy emotional environment to nurture the child. A child of a different racial, ethnic and cultural background needs to be inclusively integrated in the immediate society with care and affection. If he is subjected to bullying or harassment in school or neighbourhood, then the amount of mental trauma that he will go through is unbearable. The law must have adequate provisions and extra protections in place to secure the child's upbringing is in a compatible environment.

It is also because of this reason that countries only resort to inter-country adoption when they are unable to place the child in a suitable adoptive family in the country of origin. In India too, this view has been endorsed by the Supreme Court<sup>5</sup>. This is also mentioned in the CRC of 1989.

It is also important to look at Sections 30 and 31 of the JJ Act that talk about retention and transfer of personal data. With the Government of India now planning to bring into force the Digital Personal Data Protection Act, it is important to understand how cross-border data transfer will be impacted. Since the DPDP does not have extraterritorial application, it also fails to specify how such data will be retained and secured by the receiving countries and in case of a breach, what remedy we have against them. Thus, there is more clarification that is needed in this regard.

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<sup>5</sup> "Karnataka State Council for Child Welfare v. Society of Sisters of Charity, 1995 Supp (4) SCC 529

As per the JJ Act and CARA guidelines, only surrendered, abandoned or orphaned children can be given in adoption.<sup>6</sup> The Indian law does not have any explicit mention regarding adoption of migrant children. A migrant who is separated from his parents or is an orphan cannot be relocated back to his country as he is most likely fleeing persecution. It is therefore important to find a stable home and shelter in India. This is something that the Hague Convention also does not address. There has to be a separate set of laws that is developed keeping in mind how the issues of migrants will pan out.

Under the JJ Act, if an international adoptive couple is found suitable to adopt an Indian child, then the child under special permission will travel abroad and will be adopted according to the laws of the receiving country. The Hague Convention lays down a different method wherein the prospective adoptive parents have to travel to the country of origin and adopt the child as per the law and upon returning to the receiving country, the adoption will take place again as per their laws.

A trans-cultural or trans-religious adoption may also be made intra-country. For example, in India a Hindu heterosexual married couple may adopt a Parsi child or an Anglo-Indian child under the secular law. However, Inter-country adoption

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<sup>6</sup> Regulation\_english.pdf, [https://carings.wcd.gov.in/Login/pdf/Regulation\\_english.pdf](https://carings.wcd.gov.in/Login/pdf/Regulation_english.pdf) (last visited Aug 25, 2024).

specifically refers to a kind of adoption where the nationality of the child and the adoptive parents are not the same.

If we closely follow the trend, it has been seen that adoptive parents usually hail from first world countries, the parents are socially and financially well-off whereas the prospective children come from third world countries, children born to families that have seen years of discrimination and marginalisation.

In a UK case<sup>7</sup>, a British couple brought a Romanian child in the country under the pretext that she was only on a short visit. At that point of time, they falsely denied to the authorities that they had any intention to adopt the child. The authorities did not carry out a thorough background check and the child was allowed a temporary visa and an entry permit. Just before, the visa was about to expire, the couple submitted an application to adopt the child. Following the application, the child became a protected child under the Adoption Act, 1976. The Home Office had to extend the application of her stay pending the determination of the adoption application. Due to lacklustre and apathetic efforts of the authorities, the child was kept in the UK for more than 3 years. When, finally contact was established with her biological family, it was found out that they had never given any consent to give their daughter in adoption and demanded her back immediately.

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<sup>7</sup> "In re R. (A Minor) (Inter-Country Adoptions), [1999] 1 WLR 1324"

Justice Blackwell, who was deciding the case, strongly criticized the authorities and said that procedure and guidelines of law should be effectively implemented so as to deter citizens from embarking on illegal adoption activities. Disregard of law, not only entails criminal offences under the Adoption Act but the child also suffers unimaginable mental trauma and is deprived of legal protection. Some of the guidelines laid down could also be implemented in India as they are based on sound reasoning and prioritize the welfare of the child over everything else.

Whenever a child of another nationality comes to the UK, accompanied by an adult who is not related to the child and the child is not going to stay with a relative in the UK, then:

- (1) The child should be permitted entry into the UK only if the accompanying adult produces the written consent of the biological parents
- (2) If entry is permitted, then it should only be for the minimum necessary time period based on the particular facts and circumstances of each case
- (3) The Home Office should, within 72 hours, inform the Department of Health of the child's presence and address in the UK and, in turn, the Department of Health should within 72 hours inform the fostering and adoption department of the local authority in whose area the child will reside of the child's circumstances

(4) If the Home Office receives notification from the local authority or the Department of Health that the biological parents have not consented to the child remaining in the UK, then the child should be immediately deported back and his temporary entrance clearance visa should not be extended.

India would do well to adopt the reasoning of this sound judgement in its legal system so as to further give primacy to the welfare of the child in matters of inter-country adoption.

In 2017, in a case before the Karnataka High Court<sup>8</sup>, a US couple wished to adopt an abandoned Indian child from a recognized and registered Specialised Adoption Agency. The couple had executed a power of attorney in favour of the Assistant Manager of the Indian Adoption Agency through which they had directed the application, for making an application before the Court for obtaining the necessary adoption orders.

The Additional District and Sessions Judge did not permit the adoption on three grounds namely -

- i) The couple had already previously adopted a female child
- ii) The adoption is not in the best interests of the minor
- iii) The same person cannot act in dual capacity as a giver and taker.

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<sup>8</sup> "Swami Vivekanand Seva Pratisthan in Country Adoption Centre v. Nil, 2017 SCC OnLine Kar 7255"

Justice Sreenivas Harish Kumar heard the appeal in the High Court. For the first issue, he said that while, such a stance is maintained in the HAMA, the Guidelines for the JJ Act only barred couples with more than four children from adopting. Thus, the couple was free to adopt.

For the second issue, he said that it was arbitrary and could be conclusively proven in the court of law. For the third issue, he stated that the Guidelines do not actually provide for the actual giving and taking of the child in adoption and the order passed by the Court itself is sufficient. Schedule 8 shows that whenever foreign residents want to adopt a child from India, they have to execute a power of attorney in favour of the Specialized Adoption Centre to present a petition on their behalf in the Court. Thus, the couple had not done violated the procedure.

Thus, he set aside the previous order, declared the child to be fit for adoption and permitted the couple to adopt her after following the due procedure.

Therefore, India should work towards a robust framework for inter-country adoption that facilitates more and more orphans to find caregivers and permanent homes and at the same time, ensuring that the rights of such orphans are not compromised.

### **ADOPTION RIGHTS OF SAME-SEX COUPLES**

The HAMA drafted way back in 1956 did not provide for adoptions by LGBTQ couples. There is no law yet to recognise

LGBTQ+ marriages in India. Even then an unmarried LGBTQ couple would not be able to adopt a child under the HAMA as the law specifically provides for adoption by a single person or a married couple. A married couple, here, means only the union between a man and a woman. When an adoption is made by either the husband or the wife, the adoption is made to both of them. If, say, a gay couple were to adopt in India, the adoption could be made only by and to one of the men. Even if both of them raise the couple together, the law would not recognize both of them as the parents.

This stance is also maintained in Hindu Marriage Act where a homosexual union is deemed to be an invalid marriage. Recently, in the 2023 judgement of *Supriyo v. Union of India*<sup>9</sup>, the Supreme Court denied the recognition of a fundamental right to marry and held that the judiciary is not competent to give lawful status to homosexual marriages as that decision lies within the jurisdiction of the Parliament.

Interestingly in the same case, Chief Justice DY Chandrachud said that Regulation 5(3) of the Adoption Regulations, 2022 that read “No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship except in the cases of relative or step-parent adoption” was *ultra vires* the JJ Act. He was of the opinion that while the hands of the Supreme Court were tied and it would be a matter of judicial overreach to declare homosexual

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<sup>9</sup> “Supriyo v. Union of India, 2023 SCC OnLine SC 1348”

marriages as lawful, there was nothing in the JJ Act to suggest that the right to adoption could not be extended to unmarried couples, and therefore, the right to adopt could consequently be extended to homosexual couples as it is an integral part of their fundamental right to life under Article 21. However, this view was not accepted by the majority that comprised of Justices Bhat, Hima Kohli and P.S. Narasimha who ruled that homosexual couples cannot be granted the right to jointly adopt a child.

When the secular legislation or the JJ Act was drafted, even then the LGBTQ community was left out of its scope and application. Unlike first world countries like the USA where the laws may be discriminatory in some states but there is still scope under the existing jurisprudence to advocate for reform and change, there is hardly enough jurisprudence in India regarding LGBTQ rights.

Its adoption laws too are very liberal. Let us do a comparative take and look at the conditions for adoption in Netherlands, Greece and South Africa and how India can learn from these progressive ideas and integrate them in its own legal system.

In 2001, the Netherlands became the first state to legalize same-sex marriage. Some general conditions are very similar to the law already existing in India. For instance, while in India the threshold is set at 15 years or less (according to the HAMA) for the child that is to be adopted, in Netherlands it is the age of minority, i.e., 18 years. However, a child who is 12 years or older must agree to the adoption. Again, in India,

according to S.11. of HAMA, the age difference between prospective male parent and girl child should be 21 years. Same is true for prospective female parent and male child. Whereas, in Netherlands, the rule is gender-neutral and prescribes that the adoptive parent must be at least 18 years older than the adopted child.

When we specially talk of rules of adoption by same-sex couples, then the first important point is that marriage is not a prerequisite. This is even true for heterosexual couples. The law prescribes a minimum period of living together for three years. They have to prove this in the court by a cohabitation deed or information from the Personal Records Database. For the adoption to be complete, it also has to be shown that the couple was taking prior care of the child for at least one year and they were taking the responsibility for the child's safe and holistic upbringing.

The law also provides for adoption by a step-parent, or rather, since marriage is not a prescribed condition, the biological parent's new partner. Thus, if the biological parents of a child are separated and the parent who has the custody of the child finds a new life partner, then that partner is eligible to adopt the child to be recognized as a co-parent. This is called 'partner adoption'. The prerequisite is again a minimum period of three years of cohabitation and a minimum period of one year of looking after the child.

It is interesting to note, however, that the conditions regarding cohabitation and caring for the child are waived off

in the case of a female partner of the birth mother, who is called a *duomoeder* in the native language. Such a woman need not even wait till after the child is born. She is allowed to adopt the child even when the child is still in the womb of her partner.<sup>10</sup>

In 2024, Greece has become the latest country to join the bandwagon in support of the rights of LGBTQ+ community. The marriage between same-sex couples is now legally recognized and they can also take children in adoption. The bill needed a simple majority to pass in the 300-member Parliament and on 16<sup>th</sup> February 2024, it became the first Christian Orthodox-majority country to legalize same-sex marriage by a 176-76 vote in the Parliament. Although the dominant New Democracy Party abstained or voted against the bill, it garnered the required support from the unified opposition. This is a culmination of the steps taken by the Government in recent years. In 2015, Greece allowed civil partnership among same-sex couples, and in 2017 it gave legal recognition to gender identity. In 2022, it banned conversion therapy for minors that aimed at suppressing a person's sexual orientation. With this decision, it now hopefully sets precedent for many countries like India, that it

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<sup>10</sup> "Ministerie van Algemene Zaken, *Conditions for Adopting a Dutch Child - Adoption - Government.NL*, (2016), <https://www.government.nl/topics/adoption/adopting-a-dutch-child>

is now high time to step forward and protect the Human Rights of the LGBTQ+ community.<sup>11 12</sup>

Let us now look at jurisprudence in this regard in South Africa. In *Minister of Home Affairs v Fourie*, 2005<sup>13</sup>; the Constitutional Court ruled that it was unconstitutional for the state to deny same-sex couples the ability to marry. In 2006, the Civil Union Act came into force to give legislative backing to the judgement. This made South Africa the first country in Africa to legalize same-sex marriage.

In *Du Toit v. Minister of Welfare and Population Development*; 2002<sup>14</sup>, the Constitutional Court of South Africa ruled that the adoption rights of married couples will now extend to same-sex couples, allowing them to adopt children jointly and “allowing one partner to adopt the other's children from another person as ‘step-children’.” This led to the drafting of the “Children’s Act 2005”, which allows adoption by spouses and by “partners in a permanent domestic life-partnership” regardless of sexual orientation.

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<sup>11</sup> Reuters, *Greece Legalises Same Sex Marriage in Landmark Change*, THE HINDU, Feb. 15, 2024, <https://www.thehindu.com/news/international/greece-legalises-same-sex-marriage-in-landmark-change/article67851163.ece> (last visited Aug 25, 2024).

<sup>12</sup> Greece legalises same-sex marriage, Feb. 15, 2024, <https://www.bbc.com/news/world-europe-68310126> (last visited Aug 25, 2024).

<sup>13</sup> [2005] ZACC 19

<sup>14</sup> [2002] ZACC 20

In *J v Director General, Department of Home Affairs, 2003*<sup>15</sup>; it was held that a child that was born by artificial insemination to a lesbian couple was a legitimate child, and that the non-biological parent was to be regarded as the natural parent.

In 2018, the Labour Laws Amendment Act was passed which allows same-sex couples, as well as adoptive and surrogate parents, to take parental leave. It also allows adoptive parents of a child below two years of age to take an adoption leave.

Thus, India has a long way to tread to ensure that people who identify as a part of the LGBTQ+ community can live a dignified life like other heterosexual people of the society. The right to adopt should be extended to same-sex couples so that those people can take decisions on their family planning without any external interference.

## CONCLUSION

As we near the end of the discussion, I wish to make a small comment on the title of the paper. It is borrowed from the one of the most critically acclaimed books by Nobel Laureate Rabindranath Tagore of the same title called "*Ghare Baire*". It has had classic cinematic adaptations; the most popular one being directed by the great Satyajit Ray. While some readers may find the title misleading as this discussion is not even remotely related to the content of the book, I find it apt because it sums up my ideas in two ways.

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<sup>15</sup> [2003] ZACC 3"

A child's upbringing in his formative years plays a crucial role in determining how his ideas about the world are shaped up and in what way his work and contributions will have an impact on the world. Children are our most important assets and it is our duty to ensure that every child has a home where he is loved for, cared for and has the freedom to happily pursue his own choices in life based on the opportunities that come along.

Therefore, the regulation of adoption becomes critical. It is of utmost importance to ensure that any adoption is in the absolute best interests of the child and people do not take advantage of his innocence and exploit him physically, mentally or sexually. To secure his well-being, it is also important that the State pursues social egalitarianism and does not discriminate between prospective adoptive parents because of some social stigma.

We have discussed here two aspects of adoption laws, namely, LGBTQ+ rights and Inter-Country adoption. We have seen their present status under Indian law and we have also compared it with statutes and precedents of other countries. In India, adoption in both these aspects has not blossomed as it should have. There are many questions and grounds that are still unanswered and there is still a lot of scope to fill these lacunae and enhance the jurisprudence in the subject. This will ensure that more and more children can be relocated in homes that provide comfort and love. Finally, I conclude by saying that the well-being of the children is an

imperative of the state and if India recognizes and implements reforms in adoption laws then it would also be a huge step in realizing the values of social equality and fraternity and it would take us a step closer to the India envisaged by the founding fathers of modern and independent India.

## **IN THE LINE OF LAW: BALANCING THE SCALES BETWEEN COURT-MARTIAL PROCEDURES AND POCSO SAFEGUARDS**

*Kavita Bhandari\* and Kamakshi Bhandari♦*

### **ABSTRACT**

*The detachment of military legal system from its civil counterpart contributes to occasional gaps in the dispensation of justice. A specific gap is identified in the context of the Protection of Children from Sexual Offences (POCSO) Act, effective since November 2012 and amended in August 2019. The Act aims to safeguard children from all kinds of sexual abuse. Adults are duty bearers under this law and they must ensure its implementation in letter and spirit. However, the execution of Court-Martial (CM) in cases falling under the purview of the said Act calls for careful exploration of nuances so that adherence to broader legal norms can be ensured by the military in the sensitive area of child protection.*

*The article herein below focuses on the effective implementation of the POCSO Act and Rules. It is based on the premise that the POCSO Act is a special enactment and its provisions supersede the provisions of any other law to the extent of any prevailing inconsistency between them.*

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\* The author is a resource Person for Govt and Non-Govt agencies and has been a former member of CARA Sub-Committee and Child Welfare Committee, ex-Counsellor, NCW. She can be reached at [kavitashivansh@gmail.com](mailto:kavitashivansh@gmail.com)

♦ The author is a final year law student at Army Institute of Law, Mohali. She can be contacted at [kamakshibhandari181003@gmail.com](mailto:kamakshibhandari181003@gmail.com)

*The article emphasizes the importance of addressing the challenges arising in cases where armed forces personnel face trial by CM. It delves into the pertinent intricacies and seeks collaboration between military and civil authorities in order to successfully navigate through the complexities while dealing with cases of child sexual abuse.*

**KEYWORDS:** *Court-Martial, POCSO, Child Protection, Army Act, Army Rules, Victim Rehabilitation*

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## INTRODUCTION

Military operates in a distinct manner from the normal institutional framework at play within civil society. Military justice is no exception and, to a certain degree, stays detached from the regular justice system. Although military law is not divorced from its civil counterpart, it becomes necessary for it to diverge from the latter due to the peculiarities of its establishments.

Application of military law can be seen either in the form of an administrative action which is purely executive in nature or a disciplinary action which includes summary disposal<sup>1</sup> or trial by court-martial (CM). Confusion hovers over the civil as well as military authorities regarding mutual aspects of law enforcement, thereby occasionally creating a gap in the dispensation of justice. One of such gaps is found in the

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<sup>1</sup> The Army Act, 1950, §§ 80, 83-85.

execution of CM for dealing with cases under the Protection of Children from Sexual Offences (POCSO) Act.<sup>2</sup>

The POCSO Act came into effect on 14 November 2012 and was amended in August 2019. The object of this enactment, as expressed in its preamble, is “to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.” The Rules<sup>3</sup> framed in 2012 for carrying out the provisions of this Act were superseded by those of 2020.<sup>4</sup> Studies and consultations have been conducted to assess the impact and evaluate the implications of this law. Amidst all the voices in respect of the provisions of this legislation, the foremost concern raised by all has invariably been regarding its effective implementation. A perfunctory implementation will not yield the result envisaged by this law. The present article attempts to reflect the same issue in cases where personnels of Armed Forces<sup>5</sup> have been charged of committing offence under this Act and are tried by a CM. This article intends to acquaint the readers with the military justice system vis-à-vis POCSO Act. Army being the predominant branch of the tri-services, the Army Act 1950 (AA), Army Rules 1954 (AR) and Regulations for Army 1987 (RA) are being used as reference herein.

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<sup>2</sup> The Protection of Children from Sexual Offences Act, 2012.

<sup>3</sup> The Protection of Children from Sexual Offences Rules, 2012.

<sup>4</sup> The Protection of Children from Sexual Offences Rules, 2020.

<sup>5</sup> The Army Act, 1950, § 3(xi).

Sexual crimes against children have been classified in the scheme of POCSO Act depending on their severity. Sections 3,4,5,6 deal with “Penetrative Sexual Assault” and “Aggravated Penetrative Sexual Assault”.<sup>6</sup> Sections 7,8,9,10 are about “Sexual assault” and “Aggravated Sexual Assault”.<sup>7</sup> Sections 11,12 deal with “Sexual harassment” and “Aggravated Sexual Harassment”.<sup>8</sup> Sections 13,14,15 are about the offences related to child pornography.<sup>9</sup> Sections 16,17,18 contain provisions on abetment of and attempt to commit any of the aforesaid offences.<sup>10</sup>

All these offences, as enumerated above, fall within the ambit of civil offences under Section 69 of the AA.<sup>11</sup> Owing to the legal position narrated in subsequent paragraphs the offences under the POCSO Act, barring “penetrative sexual assault (Sections 3 and 4)” and “aggravated penetrative sexual assault (Sections 5 and 6)”, allegedly committed by a person who is governed by the AA can be tried by a CM. Nonetheless, a penetrative/ aggravated penetrative sexual assault committed by such person at the place of active service or at a place out of India or at a frontier post may also fall within the jurisdiction of CM.

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<sup>6</sup> The Protection of Children from Sexual Offences Act, 2012, §§ 3-6.

<sup>7</sup> The Protection of Children from Sexual Offences Act, 2012, §§ 7-10.

<sup>8</sup> The Protection of Children from Sexual Offences Act, 2012, §§ 11-12.

<sup>9</sup> The Protection of Children from Sexual Offences Act, 2012, §§ 13-15.

<sup>10</sup> The Protection of Children from Sexual Offences Act, 2012, §§ 16-18.

<sup>11</sup> The Army Act, 1950, § 69.

## **I. LEGAL POSITION**

As per Section 3(ii) of AA, “Civil offence” is an offence which is triable by a Criminal Court.<sup>12</sup> Therefore, any offence under BNS or any other law in force which is triable by a Criminal Court shall be treated as a civil offence in military. The offences set out in Sections 34 to 68 in AA are called military offences which form a separate category from civil offences under this Act.<sup>13</sup>

Pursuant to Section 69 of the Army Act, any person subject to the Act who commits a civil offence in India or abroad is considered guilty under this Act. Such individuals can be tried by a Court Martial (CM) for the offence.<sup>14</sup> However, this provision is subject to Section 70, which outlines specific exceptions.

Section 70 states that certain serious offences, such as murder, culpable homicide not amounting to murder, and rape, committed against individuals who are not subject to military law, cannot be tried by a CM. The only exceptions to this rule apply when the offence occurs while on active service, outside India, or at a frontier post designated by the Central Government. In such cases, the individual remains subject to military jurisdiction.<sup>15</sup>

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<sup>12</sup> The Army Act, 1950, § 3(ii).

<sup>13</sup> The Army Act, 1950, §§ 34-68.

<sup>14</sup> The Army Act, 1950, § 69.

<sup>15</sup> The Army Act, 1950, § 70.

The modus operandi of a CM remains unfamiliar to most people. It is basically a specialized court constituted on ad-hoc basis for adjudicating upon a specific case arising in the Armed Forces. CMs are a kind of service tribunals which are not subject to the superintendence of High Courts.<sup>16</sup> However, trials by them are deemed to be judicial proceedings within the meaning of Sections 229 and 267 of the Bharatiya Nyaya Sanhita, 2023 (BNS)<sup>17</sup> and they are considered to be court within the meaning of Sections 384 and 385 of the Bharatiya Nagarik Suraksha Sanhita, 2023.<sup>18</sup> They follow a well-defined set of rules as given in military law and evidence law as are applicable in their judicial function. The accused is placed under close arrest before the commencement of the CM and remains so during the trial except where convening officer<sup>19</sup> or superior authority<sup>20</sup> directs otherwise.

Vide Army Act Section 3(vii) a “*Court-Martial*” means a Court-martial held under the Army Act.<sup>21</sup> The word “*Martial*” is derived from “*Mars*” which means the planet of war. Therefore, CM signifies a court relating to war or military and thus identifies as distinguished from an ordinary court, underscoring its military character. Section 3(viii)

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<sup>16</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023, § 5; INDIA CONST. art. 227.

<sup>17</sup> The Bharatiya Nyaya Sanhita, 2023, §§ 229, 267.

<sup>18</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023, § 384-385.

<sup>19</sup> The Army Act, 1950, § 109.

<sup>20</sup> Regulations for Army, vol. I, revised ed., 1987, Reg. 392(k).

<sup>21</sup> The Army Act, 1950, § 3(vii).

defines a “*Criminal Court*” as a court of ordinary criminal justice in any part of India.<sup>22</sup> The adjective “ordinary” has been used to encompass those criminal courts which are not martial. Tribunals and quasi-judicial bodies do not come under the scope of criminal courts here. This classification raises significant questions in cases involving POCSO, where civilian protection laws intersect with military discipline, necessitating a closer examination of whether military tribunals provide the same degree of victim-centric justice and procedural fairness as their civilian counterparts.

## **II. JURISDICTIONAL ENIGMA**

After understanding the difference between a Criminal Court and CM, it is significant to refer to Section 125 of the AA which elucidates Army’s choice between criminal court and CM in case of concurrent jurisdiction. It grants military authorities the discretion to determine whether an accused should be tried by a Court-Martial or a Criminal Court. This decision rests with the commanding officer of the relevant military unit, underscoring the autonomy of the armed forces in handling offences committed by their personnel.<sup>23</sup> While this discretion is necessary in maintaining military discipline, it also raises concerns about potential inconsistencies in the application of justice, particularly in cases involving civilian victims or special laws like POCSO.

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<sup>22</sup> The Army Act, 1950, § 3(viii).

<sup>23</sup> The Army Act, 1950, § 125.

On the other hand, Section 126 of the AA introduces a mechanism for judicial oversight by empowering civilian courts to intervene in such decisions. If a criminal court believes that an offence should be tried under its jurisdiction, it can issue a written notice to military authorities, requiring them to either hand over the accused or seek direction from the Central Government.<sup>24</sup>

In view of above, the discretion exercised by the Commanding Officer (CO)<sup>25</sup> is not absolute. It is subject to the control of the Central Government whose order shall be final upon reference. In exercise of the powers conferred under erstwhile CrPC Sections 475(1) and 549(1), the Central Government has formulated “Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules 1978” as amended by SO 4010 dated 24 November, 1986. These provisions have been incorporated in Army Regulations of 1987 describing the procedure in this regard.

When information about commission of an offence is reported to a CO and he decides to take cognizance he shall initiate preliminary investigation through a Court of Inquiry (C of I).<sup>26</sup> If it discloses an offence then a Summary of Evidence (S of E)<sup>27</sup> is recorded based on which he can remand the accused for CM. The formal order for holding a CM is signed by the

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<sup>24</sup> The Army Act, 1950, § 126.

<sup>25</sup> The Army Act, 1950, § 3(v).

<sup>26</sup> Army Rules, 1954, Rule 177(1), as amended by SRO 8E (June 23, 2003).

<sup>27</sup> Army Rules, 1954, Rules 22(3)(c), 23, 24, read with SAO 1/S/2000/DV, paras. 4-8.

convening authority and the related documents are forwarded to the concerned DJAG (Deputy Judge Advocate General) for legal guidance. The decisions of CM face legal scrutiny by JAG Branch and review by competent military authorities. No finding or sentence of a CM shall be valid without confirmation by the appropriate authority.<sup>28</sup>

The four types<sup>29</sup> of CM provided under Section 108 AA are:

1. General Court Martial (GCM)
2. Summary General Court Martial (SGCM)
3. District Court Martial (DCM)
4. Summary Court Martial (SCM)

Only the first two are relevant for discussion in hand.

A GCM is empowered to try any person subject to the AA, for any offence punishable therein, to pass any sentence authorized under the Act.<sup>30</sup> Death sentence cannot be passed by a GCM without the concurrence of at least two third members. GCM should consist of minimum 5 officers forming a bench.<sup>31</sup>

An SGCM is held for offences committed on active service where it is not practicable to constitute a GCM. Powers of SGCM are the same as that of GCM.<sup>32</sup> Death sentence shall

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<sup>28</sup> The Army Act, 1950, § 153-154.

<sup>29</sup> The Army Act, 1950, § 108.

<sup>30</sup> The Army Act, 1950, § 118.

<sup>31</sup> The Army Act, 1950, § 113.

<sup>32</sup> The Army Act, 1950, § 118.

not be passed by it without the concurrence of all the members. It shall consist of minimum 3 officers.<sup>33</sup>

Recently the jurisdiction of SGCM was challenged in *Naik Bibhu Prasad v. Union of India and Ors*<sup>34</sup> before Hon'ble High Court of Jammu, Kashmir & Ladakh. The appellant's contention was that the SGCM had no jurisdiction to try the offences under the POCSO Act as it is not a special court under the said Act. The court ruled that "Section 28 of the POCSO Act does provide for designation of Court of Sessions in each district as Special Court but does not provide for any bar upon the CM to try such offences. There is no head on collision between the Act of 1950 and Act of 2012. The CM, of course, must comply with the provisions meant for purpose of protecting the identity, dignity and psychology of victim child during the course of trial so that it is not inconsistent with the provisions contained under the Act of 2012". This judgement has addressed the conundrum about the jurisdiction of CM to try offences punishable under the POCSO Act. Here it is pertinent to mention that this power had been previously upheld by the Mumbai Armed Forces Tribunal (AFT) in the case, *Col Hardeep Singh Bindra v. Union of India*<sup>35</sup> and subsequently by the Guwahati AFT in *Ex Lnk Mirgane Saudagar Navnath v. Union of India*.<sup>36</sup> The Hon'ble

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<sup>33</sup> The Army Act, 1950, § 115.

<sup>34</sup> *Naik Bibhu Prasad v. Union of India and Ors*, WP (C) No. 947/2022 (O&M): MANU/JK/0548/2022.

<sup>35</sup> *Col Hardeep Singh Bindra v. Union of India*, OA-79/2015.

<sup>36</sup> *Ex Lnk Mirgane Saudagar Navnath v. Union of India*, 2022 SCC OnLine AFT 9683.

Supreme Court had rejected the appeal of Col. Hardeep Singh Bindra, relying upon its own order passed in *Nk Kolekar Dhanagi Hindu v. Union of India and Ors*<sup>37</sup> dismissing the challenge to CM's jurisdiction. AFT Delhi in the Kolekar case had concluded that the competent military officer can exercise his discretion as to whether the trial of the accused is to take place by a CM or an ordinary court in the wake of well-settled guidelines. Consequently, POCSO cases continue to be tried by CM in the Armed Forces.

### **III. CONCERNS AND THE NEED FOR COMPLIANCE WITH POCSO'S PROVISIONS**

POCSO Act is exemplary in its approach of according protection to the rights of the victim. Criminal jurisprudence has originally been more inclined towards protecting the rights of the accused. In this context, a CM may be the most efficient way of dealing with the matter relating to a service personnel who is accused but it cannot be claimed as the ideal forum for handling issues pertaining to the child victim, regardless of whether the child is or is not a ward of a defense personnel, unless the provisions of the POCSO Act are incorporated in its functioning. If any intervening or eventual support from the designated authorities of the child protection system is desirable to accomplish this motive then it must be obtained by approaching them on case-to-case basis

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<sup>37</sup> *Nk Kolekar Dhanagi Hindu v. Union of India and Ors*, 2014 SCC OnLine AFT 605.

because military formations are not always adequately equipped to cater to child specific needs.

### **CHALLENGES OF ADAPTING COURT-MARTIAL TO POCSO STANDARDS:**

An ad hoc CM consisting of multiple officers acting as jury along with a prosecuting officer and a defending officer, all in military uniforms who are not necessarily qualified in legal and child care aspects is not only imperfect rather may turn out to be quite intimidating for the child. Although a judge advocate (JA) is appointed for conducting pre-trial scrutiny to assist the convening authority, for overseeing the trial proceedings to advise the CM and for carrying out post-trial scrutiny for the benefit of the confirming authority but he too is a service officer in uniform acting as impartial integral part of the court whereas the POCSO Act particularly demands a child rights outlook. Moreover, while the presence of a JA is essential in GCM it is not so for SGCM despite the need of supervision for ensuring the legality and propriety of trial by a qualified JA being indispensable.

The process of CM, defined in the AA along with corresponding Rules and Regulations, is characterized by a reasonably balanced approach, but the provisions of a special law like POCSO cannot be diluted or compromised in any situation. Section 42 A of the POCSO Act bestows supremacy to its provisions by stating that they shall have over-riding effect in case of any inconsistency with any other law in

force.<sup>38</sup> Undeniably the POCSO Act shall prevail over anything in the Army Act or Rules which is incongruent with the former. The salient features of the POCSO Act are to be strictly borne in mind by the military functionaries if the lofty aim of this child related legislation is to be realized in letter and spirit.

POCSO Act treats all the implementers as protectors of the child. Stakeholders like Legal Services Authority (LSA), District Child Protection Unit (DCPU), Child Welfare Committee (CWC) at district level, State Commission for Protection of Child Rights (SCPCR) at state level and National Commission for Protection of Child Rights (NCPCR) at national level are key institutions for delivering complete justice to the child. Everyone involved is expected to undergo training and sensitization outlined for this purpose. Similar orientation is required for the military officials who are made to handle a POCSO case.

#### **INVESTIGATION AND REPORTING OBLIGATIONS:**

Section 19 of POCSO Act casts a mandatory duty on every person who has the knowledge that an offence has been committed or has apprehension that an offence is likely to be committed, to lodge report with the Special Juvenile Police Unit (SJPU) or the local police.<sup>39</sup> This is a salutary provision yet not free from legal as well as social complexities. An

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<sup>38</sup> The Protection of Children from Sexual Offences Act, 2012, § 42 A.

<sup>39</sup> The Protection of Children from Sexual Offences Act, 2012, § 19.

effective child-friendly system is needed for the success of this provision the aim of which is to set the law in motion not only for investigation but also for accompanying relief and rehabilitation of the victim. The Act has entrusted SJPU or local police with the duty of informing the complainants about the services available under law. As per POCSO Rules "Form A" listing the entitlements of the child and "Form B" containing preliminary assessment report are to be given to the child/guardian and CWC respectively. The Act emphasizes that when the police thinks that child needs care and protection then immediate appropriate arrangement shall be made. As per Section 19(5 & 6), the police must report the matter within 24 hours to the CWC.<sup>40</sup> As per POCSO Rule 4(4) victim of incest shall be produced before the CWC within 24 hours for detailed assessment leading to a determination as to whether the child needs to be taken out of the custody of child's family or shared household and placed in a child care institution.<sup>41</sup> The military authorities must look into the situation of the victim in light of these provisions and act accordingly.

#### **SAFEGUARDING THE RIGHTS OF CHILD VICTIMS:**

Section 24 mandates that the statement of the child shall be recorded at his/her residence or place of choice and as far as practicable, by a woman police officer not below the rank of

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<sup>40</sup> The Protection of Children from Sexual Offences Act, 2012, § 19.

<sup>41</sup> The Protection of Children from Sexual Offences Rules, 2020, Rule 4(4).

Sub-Inspector.<sup>42</sup> The police shall not be in uniform and the child shall not come in the contact of the accused. Section 25 deals with the verbatim recording of statements in accordance with criminal procedural law, ensuring accuracy and authenticity. During this process, the advocate of the accused is not permitted to be present during recording.<sup>43</sup> Section 26 provides for some additional safeguards like recording to be done in presence of child's parents/guardian/person in whom the child has trust, recording by audio-video electronic means, taking assistance of a translator/interpreter/special educator as and when required.<sup>44</sup> Military authorities must pay heed to these directions during investigation taking place through C of I and S of E in order to prevent the trauma of the child being repeated.

Furthermore, Section 27 requires that the medical examination of the child must be conducted as per the applicable provisions of criminal procedural law, irrespective of whether an FIR has been registered.<sup>45</sup> There is no need for police requisition or a court order for medical attention the purpose of which is treatment of the victim and collection of medical evidence. Medical is to be done with immediate effect and with the consent of the victim. It is emphasized that presence of parent or guardian or nominated woman attendant is compulsory during examination and a girl's

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<sup>42</sup> The Protection of Children from Sexual Offences Act, 2012, § 24.

<sup>43</sup> The Protection of Children from Sexual Offences Act, 2012, § 25.

<sup>44</sup> The Protection of Children from Sexual Offences Act, 2012, § 26.

<sup>45</sup> The Protection of Children from Sexual Offences Act, 2012, § 27.

examination shall be done by a woman doctor. Rule 6 highlights important points about medical aid.<sup>46</sup> Whether the medical is being done in a civil hospital or a military hospital, the medical practitioners accountable for this must be aware of these crucial points.

#### **TRIAL PROCEDURES AND VICTIM PROTECTION MECHANISMS:**

The Act mandates for special courts to follow child-friendly procedures.<sup>47</sup> In the absence of a defined logistical framework, these courts often function within the regular formal judicial structure of courts. Recognizing this gap, the Supreme Court and the Ministry of Women and Child Development (WCD) have issued guidelines for the establishment of vulnerable witness rooms, live video links, among other protective measures to create a conducive environment for child testimony. A Special Public Prosecutor<sup>48</sup> is also required in every court to ensure effective legal representation and procedural safeguards<sup>49</sup> to prevent aggressive cross-examination, character assassination, and direct confrontation between the child and the accused.<sup>50</sup> Provisions for in-camera trials and assistance of translators, interpreters, or special educators<sup>51</sup> reinforce the commitment to a trauma-informed judicial approach. However, the

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<sup>46</sup> The Protection of Children from Sexual Offences Rules, 2020, Rule 6.

<sup>47</sup> The Protection of Children from Sexual Offences Act, 2012, § 28.

<sup>48</sup> The Protection of Children from Sexual Offences Act, 2012, § 32.

<sup>49</sup> The Protection of Children from Sexual Offences Act, 2012, § 33.

<sup>50</sup> The Protection of Children from Sexual Offences Act, 2012, § 36.

<sup>51</sup> The Protection of Children from Sexual Offences Act, 2012, § 37-38.

effectiveness of these protections relies on the training and sensitivity of stakeholders tasked with handling such cases including judicial officers, prosecutors, and military officials.

Additional features to secure victim's interest during the trial have to be given due diligence by the CM. The POCSO Act establishes a strong framework for victim support, care,<sup>52</sup> and rehabilitation, including provisions for counseling,<sup>53</sup> appointment of a support person,<sup>54</sup> and continuous case updates. These measures ensure that the child is not only legally protected but also emotionally and psychologically supported throughout the proceedings. The child and their family are also entitled to the right to engage legal counsel of their choice, with state assistance if required.<sup>55</sup> Active engagement with these victim-centric mechanisms by the military in CM is imperative in upholding the rehabilitative intent of the legislation.

#### **TIMELY JUSTICE AND REHABILITATION:**

Section 35 fixes time limit that the evidence of child shall be recorded within a period of 30 days from the day of cognizance of offence by the court and reasons for delay, if any, shall be recorded.<sup>56</sup> The entire trial must be completed within one year, as far as possible. Speedy trial is indeed the right of the victim as well as the accused. As regards the

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<sup>52</sup> The Protection of Children from Sexual Offences Rules, 2020, Rule 4.

<sup>53</sup> The Protection of Children from Sexual Offences Rules, 2020, Rule 4(3)(e).

<sup>54</sup> The Protection of Children from Sexual Offences Rules, 2020, Rule 4(8).

<sup>55</sup> The Protection of Children from Sexual Offences Act, 2012, § 40.

<sup>56</sup> The Protection of Children from Sexual Offences Act, 2012, § 35.

speedy disposal of cases, the CM holds the reputation of being efficient and effective. Yet, likelihood of delays and adjournments due to unforeseen exigencies in military operations will have to be seen and kept to minimum in the light of the POCSO Act.

In addition to ensuring swift adjudication, the Act provides for monetary compensation to support the victim's rehabilitation. Under Section 33 (8) the Court may direct payment of compensation to the child for the physical and mental trauma.<sup>57</sup> POCSO Rule 9 lists relevant factors which the Court shall take into account for awarding compensation.<sup>58</sup> It can be granted at any stage after the registration of FIR including interim relief for immediate needs such as food, shelter, or medical aid. Rule 8 provides for special relief in case of contingencies such as lack of essentials like food, clothes, transport etc., the recommendation for which is to be made by CWC to DLSA or DCPU. The duty of ascertaining the need of compensation is on the special court whereas the duty of payment is on the State Government. Additionally, the amount of fine, if imposed, on the convict by the court shall be paid to the victim and the CWC shall facilitate the payment. Thus, the Act embodies a rehabilitative approach for the victim so that any loss of education or employment opportunities can be compensated and other consequences such as disease,

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<sup>57</sup>The Protection of Children from Sexual Offences Act, 2012, § 33(8).

<sup>58</sup> The Protection of Children from Sexual Offences Rules, 2020, Rule 9.

disability or pregnancy can be addressed. The CM in its judicial capacity must do the needful and proactively connect the child and the family with the concerned authorities for relief.

**APPELLATE REMEDIES:**

Sections 25 and 27 make BNSS applicable on proceedings before the POCSO special court which is deemed to be a Court of Sessions.<sup>59</sup> Provisions relating to appeal and revision spelt in CrPC shall apply on a POCSO court decision. A person subject to the AA who is aggrieved by Order pronounced by a CM may present a petition before confirmation to the confirming authority and after confirmation to the Central Government, the Chief of Army Staff (COAS) or an authority superior to the confirming authority. Order of CM may be revised, by order of confirming authority, by the same court. Armed Forces Tribunal Act, 2007 confers the powers to AFT in relation to appeal against any order, finding or sentence passed by a CM. Any party may seek justice in the Hon'ble SC and the HCs by filing writ petitions under Article 32 and 226 of the Constitution of India respectively against decisions of CM. An appeal shall lie to the SC from the HC under Article 136. Military law empowers all the ranks to invoke the writ jurisdiction and appellate jurisdiction of SC and HCs for availing remedies but the right of the victim for preferring an

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<sup>59</sup> The Protection of Children from Sexual Offences Act, 2012, §§ 25 and 27.

appeal against acquittal or inadequacy of sentence should also be availed in the interest of justice in such cases.

#### **IV. CONCLUSION**

It is essential that the military authorities understand their roles and responsibilities well in reference to POCSO proceedings and the civil authorities understand the functional aspects of the military. A system of cooperation and coordination should be cultivated which renders these children their lawful dues.

POCSO Act has brought the concept of reverse burden of proof through Sections 29 and 30 which respectively introduce “presumption of guilt” and “presumption of culpable mental state” in prosecution of offence.<sup>60</sup> The Act is indeed a comprehensive piece of law. After over a decade of promulgation of the POCSO Act, ordinary justice system is still falling short in compliance and also facing challenges with certain provisions. The parallel military justice system is undoubtedly more alienated and therefore urgently requires to prepare itself for sincere compliance and can also learn few lessons from the experiences of the regular justice system. Since the CM is held by the officers who are conversant with the military service and their decision is finalized with approval of the confirming authority, this system by and large, can guarantee fair justice, particularly because of its inherent high standards of ethos. Yet, to avoid any possibility

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<sup>60</sup> The Protection of Children from Sexual Offences Act, 2012, §§ 29-30.

of miscarriage of justice, it is incumbent upon officers to attach primacy to the POCSO Act in order to maintain legal sanctity of such trials.

Additionally, the monitoring powers of child rights commissions<sup>61</sup> should be extended to encompass cases adjudicated by Courts-Martial. This would ensure uniform oversight and accountability. An active effort should be made towards the incorporation of specialized training, procedural rules, and data collection methods in order to strengthen institutional credibility and public trust in delivering justice for the most vulnerable.

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<sup>61</sup> The Protection of Children from Sexual Offences Act, 2012, § 44; The Protection of Children from Sexual Offences Rules, 2020, Rule 12.



## BEYOND PUNISHMENT: THE EVOLUTION AND EFFICACY OF INDIA'S JUVENILE JUSTICE SYSTEM

Manish Chaurasiya\* and Praveen Kumar♦

### ABSTRACT

*This paper critically examines the rehabilitative paradigm underpinning the Juvenile Justice (Care and Protection of Children) Act, 2015, evaluating its efficacy in reducing juvenile recidivism while scrutinizing the roles played by diverse stakeholders in promoting social reintegration. It traces the evolution of India's juvenile justice system from early communal and familial care through colonial and post-independence legislative experiments to the current rehabilitative framework, thereby illustrating a gradual shift from punitive measures to restorative approaches.*

*Empirical data sourced from national social audits and Juvenile Justice Committees, affirm that targeted rehabilitative services can effectively diminish reoffending. Nonetheless, the research reveals that while overall juvenile offences have declined, offences under specific statutes such as POCSO and NDPS have surged, indicating*

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\* The author is an advocate currently practising before the Supreme Court, the High Court and trial courts of Delhi. He completed his B.A. LL.B (Hons.) and LL.M in Criminal Law from RGNUL, Patiala and NALSAR, Hyderabad respectively. He can be reached at [adomanishchaurasiya@gmail.com](mailto:adomanishchaurasiya@gmail.com)

♦ The author is an advocate and practices before the Delhi High Court and Supreme Court of India. He completed his B.A. LL.B (Hons.) with a double specialization in IPR and Criminal Law and holds an LL.M in Intellectual Property Law from NALSAR University of Law, Hyderabad. He can be reached at [praveenkumar39903@gmail.com](mailto:praveenkumar39903@gmail.com)

*the need for more nuanced, statute-specific strategies within the broader rehabilitative framework.*

*Further, the study dives into the systemic challenges undermining the Act's effective implementation. These include inconsistent rehabilitation outcomes, shortages of adequately trained personnel and critical resources within Child Care Institutions, and the complexities inherent in post-release monitoring and reintegration. Moreover, the predominant role of non-governmental organisations in managing these institutions raises concerns regarding uniformity in care standards and long-term accountability.*

**Keywords:** *Rehabilitation, Recidivism, Stakeholder, Social Reintegration, Child Welfare*

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## INTRODUCTION

Childhood is a crucial age, as during this phase, children need love, guidance, and support to create the foundation for their future development. Unfortunately, children who do not receive this love, guidance, and support are likely to choose the wrong path and become delinquents. This delinquency is the result of various factors, such as poverty, family environment, peer influence, emotional and psychological issues, substance abuse, media influence, etc. Almost all countries have specific rules and legislation to deal with the delinquency of children. In India, we have the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter

referred to as the JJ Act, 2015).<sup>1</sup> The juvenile justice legal framework in India is primarily governed by the constitutional provision outlined in Article 15,<sup>2</sup> which empowers the government to enact special laws and policies that safeguard the rights of children and emphasize the need for special attention to be given to them.<sup>3</sup> The framework that India has adopted for the protection and well-being of children is equally influenced by several international treaties and conventions related to children, including the UN Convention on the Rights of the Child (UNCRC) of 1989 and the UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) of 1985.<sup>4</sup> According to the JJ Act, 2015, a child<sup>5</sup> or Juvenile<sup>6</sup> is someone who has not yet completed eighteen years of age, which means all children under 18 will be considered juveniles. The objective of the JJ Act, 2015, is to ensure that young offenders are corrected in the best possible manner and should be punished only by non-penal treatment; the reformation of a child should be the focus due to their age, immaturity, potential for reform, and

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<sup>1</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016 (India).

<sup>2</sup> INDIA CONST. art. 15, cl. (3).

<sup>3</sup> G S Bajpai, Making It Work: Juvenile Justice in India, Paper Presented at the National Seminar on Care & Protection of Disadvantaged Children in Urban India at RCUS, 17-18 Nov. 2006, Lucknow, <http://www.forensic.to/webhome/drgsbajpai/lcwseminar.pdf> (last visited Sept. 17, 2024).

<sup>4</sup> *Id.*

<sup>5</sup> JJ Act, 2015, § 2(12) (India), *supra* note 3.

<sup>6</sup> *Id.* § 2(35).

chances of rehabilitating them rather than punishing them.<sup>7</sup> The juvenile justice system aims to rehabilitate rather than punish, recognising that young offenders may be more amenable to reformation through education, counselling, and vocational training.

The present paper is guided by the research question of “How effective is the rehabilitative approach under the JJ Act, 2015, in reducing juvenile recidivism in India, and what role do stakeholders play in promoting the social reintegration of juveniles under the JJ Act, 2015?” This paper addresses the research question through a doctrinal and empirical analysis. It first traces the historical evolution of India’s juvenile justice framework to contextualise the shift towards rehabilitation. It then examines the rehabilitative mechanisms and institutional stakeholders under the JJ Act, 2015. Subsequently, the paper analyses available Indian institutional data and comparative empirical studies to assess the potential impact of rehabilitation on juvenile outcomes. Finally, it identifies systemic limitations and proposes targeted, evidence-informed reforms.

## **EVOLUTION OF THE JUVENILE JUSTICE SYSTEM**

The evolution of the present JJ Act, 2015, in India can be divided into six phases. These six phases are:

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<sup>7</sup> Princy Raavee, *Juvenile Justice System in India*, 2 *Indian J.L. & Legal Rsch.* 1 (2021).

**Before 1773**, the family was responsible for caring for the child; if they were unable to do so, the community would step in to care for the child. At that time in Hindu Law, if a child was seen throwing filth in public and causing harm or nuisance, they had to clean the place. If an adult committed a similar act, they had to pay a fine. There was also a specific prohibition on the execution of children under the Muslim Law. From historical texts and studies conducted so far, we can infer those children were treated differently from adults when they were involved in activities that were punishable.<sup>8</sup>

**Between 1773 and 1849**, as the East India Company gradually transitioned from a commercial enterprise to a governing authority in India, several committees were constituted to examine the conditions of children lodged in jails. During this period, the first ragged school, now known as the David Sassoon Industrial School in Mumbai, was established with the objective of reforming delinquent children through apprenticeship and industrial training.<sup>9</sup>

**From 1850 to 1919**, the first legislation addressing juvenile offenders was introduced in the year 1850 with the Apprentices Act of 1850, which aimed to rehabilitate children by placing them in employment with entrepreneurs and

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<sup>8</sup> Ms. Saumya Uma, EVOLUTION OF JUVENILE JUSTICE SYSTEM IN INDIA - PART 1, [https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp\\_content/S001608/P001809/M027674/LM/1520851573JJMODULE1REFERENCES.pdf](https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S001608/P001809/M027674/LM/1520851573JJMODULE1REFERENCES.pdf) (last visited Sept. 18, 2024).

<sup>9</sup> Mousumi Dey, *Juvenile Justice in India*, 1 *Int'l J. Interdisciplinary & Multidisciplinary Stud.* 65 (2014).

business owners to earn a livelihood in the future. Other various developments took place in this period for the benefit of children, such as the recognition that children below the age of seven were exempt from criminal liability under the Indian Penal Code, children under the age of 15 being confined in separate homes rather than in jails, the Whipping Act was coming into force in 1864 under which children had to face whipping if they commit a crime to create a deterrence. Two other acts were introduced in 1876 and 1897: the Reformatory Schools Act of 1876, which was later amended as the Reformatory Schools Act of 1897; according to this act, children under 15 were kept in reformatory homes to be treated separately from adult offenders.<sup>10</sup> The Criminal Tribes (Amendment) Act of 1897 introduced provisions specifically aimed at addressing the needs of children belonging to notified criminal tribe communities, giving attention to their segregation from adult offenders and promoting reformatory measures tailored to their age and vulnerability.<sup>11</sup>

**From 1919 to 1950**, following the enactment of the Children Act of 1920 by the Madras High Court, several other states also adopted the same law, and juvenile courts were established for the trial of children. The Indian Jail Committee

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<sup>10</sup> Reformatory Schools Act, 1897, § 4 (India).

<sup>11</sup> Ved Kumari, *Juvenile Justice: Securing the Rights of Children During 1998–2008* (2009).

was also established during this period and recommended the establishment of separate institutions for children.<sup>12</sup>

**From 1950 to 2000**, during this period, Indian states had their own acts to deal with children separately, and to comply with the Constitution and the UN Convention on Child Rights, 1959, and to make a uniform law throughout India, the Government had passed the Children Act of 1960, for all the states and union territories of India. They followed this act as a model and made amendments accordingly.<sup>13</sup> Under this act, child imprisonment was prohibited entirely, and providing care, welfare, training, education, and rehabilitation was the focus.<sup>14</sup> This act did not have the provision to have a lawyer before the children's court; however, it was introduced later in 1978.<sup>15</sup> It was in 1986 that the act dealing with juveniles was enacted for the whole of India, except in Jammu & Kashmir, named the JJ Act 1986.<sup>16</sup> The landmark judgement given by the Supreme Court, *Sheela Barse v. Union of India*<sup>17</sup> played a crucial role in the enactment of this act. Supreme Court, in this judgment, noticing the ill-treatment of juveniles and their incarceration in adult prisons, recommended that the central government develop a uniform law that would apply to all

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<sup>12</sup> Sushmita Bharti, Juvenile Justice System in India: A Critical, 3 Indian J.L. & Legal Rsch. 1 (2021).

<sup>13</sup> Vaidehi Joshii, Juvenile Delinquency and Evolution of Juvenile Justice in India, 3 INT'L J.L. MGMT. & HUMAN. 686 (2020).

<sup>14</sup> Children Act, 1960 (India).

<sup>15</sup> Kumari, *supra* note 12.

<sup>16</sup> Juvenile Justice Act, No. 53 of 1986, § 2(h) (India).

<sup>17</sup> *Sheela Barse & Others v. Union of India & Others*, (1983) 3 SCC 596 (India).

parts of India. Central Government, by exercising its power under Article 253, read with Entry 14 of the Union List,<sup>18</sup> introduced this act to come in consonance with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (The Beijing Rules) and make a uniform JJ Act. However, this act was not able to achieve its objective due to various reasons, some of which included a lack of institutions dealing with childcare or rehabilitation and insufficient numbers of judicial officers, as highlighted in the Sheela Barse Case.<sup>19</sup>

**From 2000 to 2015**, as India became the signatory of UNCRC<sup>20</sup> incorporated by the General Assembly of the United Nations on November 20, 1989 and ratified by India in Dec. 11, 1992, the Convention on the Rights of the Child, along with the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985), also known as the *Beijing Rules*,<sup>21</sup> collectively shaped global standards for juvenile justice. In alignment with these international obligations, India repealed the Juvenile Justice Act of 1986 and enacted the Juvenile Justice (Care and Protection of Children) Act, 2000, to introduce a more

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<sup>18</sup> India Const. art. 253.

<sup>19</sup> *Sheela Barse & Others v. Union of India & Others*, supra note 22.

<sup>20</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>21</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), G.A. Res. 40/33, annex, U.N. Doc. A/RES/40/33 (Nov. 29, 1985).

comprehensive and child-centric legal framework.<sup>22</sup> Various amendments were made in this act in 2006 and 2010. In 2007, the Juvenile Justice (Care and Protection of Children) Rules, 2007,<sup>23</sup> were also introduced. The major problem identified in this act was that it merely adapted international conventions, lacking proper implementation of the goals outlined in these conventions. For instance, rules and standards for observation homes, as well as the appointment of committees for inspecting children's homes,<sup>24</sup> were at the discretion of the state government. The trial period can be extended in exceptional circumstances; however, no maximum period has been specified.<sup>25</sup> Another major problem with this act was that it said anyone under 18 would be considered a juvenile or child.<sup>26</sup> This marked a departure from the Juvenile Justice Act of 1986, which had differentiated the age of juvenility, 16 years for boys and 18 years for girls. As a result, individuals aged between 16 and 18, even when involved in heinous offences and alleged to possess sufficient maturity and understanding of their actions, were still treated under the protective framework of the Act. Consequently, the maximum penalty they faced was limited to three years in a correctional facility, raising serious concerns about the

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<sup>22</sup> Kumari, *supra* note 12.

<sup>23</sup> Juvenile Justice (Care and Protection of Children) Rules, 2007, (India).

<sup>24</sup> Juvenile Justice (Care and Protection of Children) Act, No. 56 of 2000, § 29 (India)

<sup>25</sup> *Id.* § 14.

<sup>26</sup> *Id.* § 2(k).

adequacy of the legal response to such offences.<sup>27</sup> Cases in which the age threshold operated to shield offenders from full criminal liability highlighted the limitations of the existing legal framework. The public and judicial response to the 2012 Nirbhaya case<sup>28</sup> further brought these concerns into sharp focus, particularly with respect to the treatment of juvenile offenders, and served as a catalyst for a re-examination of the adequacy of the prevailing juvenile justice law. Following this, Parliament took action and passed a new law. Hence, *THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT of 2015* (JJ ACT, 2015) came into the picture.

### **DEVELOPMENTS UNDER JJ ACT, 2015**

- Juvenile Justice Board (JJB) - The composition of the JJB remains unchanged as per the 2000 Act. However, the qualifications of all members have been changed and are clearly defined. Under the JJ Act, 2015, the magistrate shall have at least three years of experience, while social workers must be actively involved in child welfare and have a minimum of seven years of experience.<sup>29</sup>
- Child Welfare Committees (CWCs) - The Roles and Responsibilities of CWCs are enhanced. The Child

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<sup>27</sup> The Juvenile Justice (Care and Protection) Act, 2000- An Analysis and Critique | Advocate, Divorce Lawyers and Corporate Consultants in Dwarka, <https://ssglawfirm.in/the-juvenile-justice-care-and-protection-act-2000-an-analysis-and-critique/> (last visited Sept. 21, 2024).

<sup>28</sup> *Mukesh v. State (NCT of Delhi)*, (2017) 6 SCC 1 (India).

<sup>29</sup> JJ Act, 2015 § 4 *supra* note 3.

Welfare committees consist of five members, including the chairperson and one woman, and every member shall be capable of handling children in need of care and protection (CNCP).<sup>30</sup>

- Child Care Institutions - Registration of all childcare institutions is now mandatory under the JJ Act, 2015, and their functioning is subject to regular monitoring by the District Magistrate, Inspection Committees, and the State Government, with additional oversight by Child Welfare Committees. These childcare institutions will be accountable for any default, and stringent action will be taken.<sup>31</sup>
- Central Adoption Resource Authority (CARA) - A whole chapter is introduced in the JJ Act, 2015, dealing with the adoption of a child under the supervision of CARA.<sup>32</sup>
- Child Welfare Police Officer and Special Juvenile Police Unit - Every police station is required to designate a Child Welfare Police Officer, who must be at least an Assistant Sub-Inspector and have received specialized training in handling cases involving children. Additionally, Special Juvenile Police Units (SJPU) must be established in each district and city, headed by an officer of the rank of Deputy

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<sup>30</sup> *Id.* § 27.

<sup>31</sup> *Id.* § 41.

<sup>32</sup> *Id.* Chapter 8.

Superintendent of Police (DSP) or above, to ensure effective coordination and child-sensitive policing.<sup>33</sup>

- Report to District Magistrate - Earlier, under the JJ Act, 2015, inspection reports had to be submitted to the District Child Protection Units or the State Government; however, following the 2022 amendment, an inspection committee was appointed to inspect all registered institutions, which were required to submit a report to the district magistrate. Also, District Magistrates have been given oversight powers to ensure the proper functioning of the Board.<sup>34</sup>
- Probation Officers - The probation officer<sup>35</sup> plays a crucial role in assessing the child's social, familial, and personal circumstances. The probation officer conducts a social investigation and prepares a Social Investigation Report, which assists the Juvenile Justice Board or the Child Welfare Committee in determining whether the child may be released under supervision, restored to the family, or requires institutional care. The probation officer is involved at the inquiry and rehabilitation stages and continues to supervise and report on the child's progress to ensure adequate rehabilitation and social reintegration.

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<sup>33</sup> *Id.* § 107.

<sup>34</sup> *Id.* § 54.

<sup>35</sup> *Id.* § 13.

- Children Courts - When passing a final order, the court is mandated to prioritize the best interests of the child, ensuring that all decisions are guided by the principles of child welfare, protection, and rehabilitation.<sup>36</sup>
- Observation Homes, Special Homes, and Children's Homes - During the pendency of proceedings before the Juvenile Justice Board, Children in conflict with the law are housed in observation homes or special homes, with a focus on their social reintegration. In contrast, children in need of care and protection are placed in children's homes, where the emphasis is on their overall development, rehabilitation, and well-being.<sup>37</sup>

### **REHABILITATIVE APPROACH UNDER JJ ACT, 2015**

The JJ Act, 2015, lays down a set of foundational principles to guide the administration and implementation of juvenile justice in India. These principles include the principle of the best interests of the child, positive measures, non-stigmatizing language, institutionalization as a last resort, repatriation and restoration, and the principle of a fresh start, among others. The JJ Act, 2015, classifies children into two distinct categories: Children in Conflict with the Law (CICL) and Children in Need of Care and Protection (CNCP), each requiring tailored interventions under the legal framework. This act addresses the rights and needs of children in both

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<sup>36</sup> *Id.* § 19.

<sup>37</sup> *Id.* § 47- 49.

categories and provides a comprehensive procedure for benefiting and rehabilitating the CICL and CNCP children.<sup>38</sup> Some of them are as follows -

### **CHILD IN CONFLICT WITH LAW (CCL) -**

A child accused of committing an offence is generally entitled to be released on bail, with or without surety, or may be placed under the supervision of a probation officer or in the care of a fit person.<sup>39</sup> In cases involving serious offences, a preliminary assessment is conducted to evaluate the child's capacity to understand the nature and consequences of the unlawful act. Even in such instances, the emphasis remains on rehabilitation rather than punishment. Based on this assessment, the child may be placed in a special home and provided with rehabilitative services under supervision.<sup>40</sup> If the child is found to be in conflict with the law, the Juvenile Justice Board may direct their participation in group counselling sessions, formal education, vocational training, or therapeutic programs.<sup>41</sup> Also, the Children's Court is required to incorporate an individualized care plan in its final order to facilitate the child's holistic rehabilitation.<sup>42</sup>

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<sup>38</sup> Asha Bajpai, *The Juvenile Justice (Care and Protection of Children) Act 2015: An Analysis*, 2 INDIAN L. REV. 191 (2018), <https://www.tandfonline.com/doi/full/10.1080/24730580.2018.1552233> (last visited Sept. 25, 2024).

<sup>39</sup> JJ Act, 2015, §12 (India).

<sup>40</sup> *Id.* § 15.

<sup>41</sup> *Id.* § 18.

<sup>42</sup> *Id.* § 19(3).

## **CHILD WELFARE COMMITTEE (CWC) FOR CNCP**

Child Welfare Committees (CWCs) are constituted under the JJ Act, 2015, to address the needs of children requiring care and protection. To be eligible to become a part of this committee, an individual must hold a degree in disciplines such as child psychology, psychiatry, law, social work, sociology, human health, education, human development, or special education for children with disabilities. Additionally, the individual must have at least seven years of active involvement in child-related health, education, or welfare activities, or be a practicing professional in one of the specified fields.<sup>43</sup> The Committee is responsible for placing children in foster care, ensuring their rehabilitation or restoration, and initiating appropriate measures for the recovery of children who are victims of sexual abuse.<sup>44</sup> Upon completion of the necessary inquiry, the Committee is also empowered to declare a child legally free for adoption.

## **REHABILITATION AND SOCIAL RE-INTEGRATION-**

Chapter VII of the JJ Act, 2015, deals exclusively with the rehabilitation and social reintegration of children. It outlines the procedural framework and institutional mechanisms necessary to achieve this objective. This chapter provides that appropriate facilities, such as Special Homes, Places of Safety, and Children's Homes, must be established to provide care, protection, and rehabilitative services to both children in

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<sup>43</sup> *Id.* § 27.

<sup>44</sup> *Id.* § 30.

conflict with the law and those in need of care and protection. Section 53 of the JJ Act, 2015, outlines the services that shall be provided in these homes, including basic requirements, appropriate education, skill development, and mental health intervention.

## **IMPACT OF REHABILITATIVE APPROACH**

**Juvenile Justice Committees (JJC)**—The Juvenile Justice Committees (JJC)s are constituted by the High Courts under the Juvenile Justice (Care and Protection of Children) Act, 2015, to ensure effective implementation and monitoring of the juvenile justice system.<sup>45</sup> These Committees primarily oversee the functioning of Juvenile Justice Boards, Child Welfare Committees, and Child Care Institutions within the State, and examine issues relating to delays, infrastructure, compliance with statutory safeguards, and protection of children’s rights. Through periodic inspections, reviews, and directions, the Juvenile Justice Committees play a supervisory and corrective role, strengthening accountability and ensuring the uniform application of the Act.<sup>46</sup>

At the All-India Meeting of Juvenile Justice Committees held on November 28–29, 2020 chaired by Hon’ble Mr. Justice S. Ravindra Bhat, Judge of the Supreme Court and Member of the Supreme Court Juvenile Justice Committee,

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<sup>45</sup> Guiding Framework for Juvenile Justice Committees of High Courts, (n.d.) (India), [https://aphc.gov.in/juvenile\\_docs/76.PDF](https://aphc.gov.in/juvenile_docs/76.PDF) (last visited Feb. 3, 2025).

<sup>46</sup> *Id.*

representatives from the Juvenile Justice Committees of various High Courts, as well as officials from Central and State Governments, convened under the aegis of the Supreme Court of India. During the meeting, the following data and observations were presented.<sup>47</sup>

Hon'ble Mr. Justice Biswanath Rath, member of the JJC of the Orissa High Court, presented data showing that 22,000 children were de-institutionalized and restored to family-based care in the last three years from 2020. District Child Protection Unit (DCPU) and the CWC also monitored children after their release based on a Home Study Report (HSR).<sup>48</sup>

Smt. Swati Meena Naik, Director of Women and Child Development from Madhya Pradesh, stated that from April 2020 to the meeting, almost 451 out of 2236 children staying in CCIs were restored; after restoration, weekly follow-ups with the parents were also carried out.<sup>49</sup>

Hon'ble Dr. Justice S.N. Pathak, chairperson of JJC of Jharkhand High Court, mentioned that 2166 children were

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<sup>47</sup> Juvenile Justice Comm., Supreme Court of India, *Minutes of the All-India Meeting of the Chairpersons and Members of Juvenile Justice Committees of High Courts and Representatives of Central and State Governments* (Nov. 28–29, 2020),

[https://mphc.gov.in/PDF/web\\_pdf/JJC/DOWNLOAD/REPORTS%20&%20PUBLICATIONS/8.%20Minutes%20of%20Juvenile%20Justice%20Conference%20Report%20\(28-29%20November%202020\).pdf](https://mphc.gov.in/PDF/web_pdf/JJC/DOWNLOAD/REPORTS%20&%20PUBLICATIONS/8.%20Minutes%20of%20Juvenile%20Justice%20Conference%20Report%20(28-29%20November%202020).pdf). (last visited Feb. 3, 2025).

<sup>48</sup> *Id* at 5.

<sup>49</sup> *Id* at 6.

restored, and 78% follow-up after restoration was done by the authorities.<sup>50</sup>

Hon'ble Mr. Justice Ashwani Kumar Singh, chairperson of JJC of Patna High Court, informed that 1,724 children were reunited with their families, which is more than the number of children admitted to 34 children's homes, i.e., 1645 in the year 2020.<sup>51</sup>

Hon'ble Mr Justice Harish Tandon, judge of Calcutta High Court, stated that to combat mental stress during COVID-19, various therapeutic sessions, viz., Dance Movement Therapy and Integrated Intervention through Music Therapy, were held for 4,500 children at four different CCIs with the help of Samdev, an NGO.<sup>52</sup>

Hon'ble Ms Justice B.V. Nagarathna, Judge, High Court of Karnataka and Chairperson, Juvenile Justice Committee for the High Court, in coordination with Ms Pallavi Akurathi, Director of ICPS, stated that out of 34,507 children, almost 27,079 were effectively de-institutionalized during the lockdown.<sup>53</sup>

The National Commission for Protection of Child Rights (NCPCR), in its National Social Audit Report published in 2018, provided comprehensive data on Child Care Institutions (CCIs) across India involved in the rehabilitation

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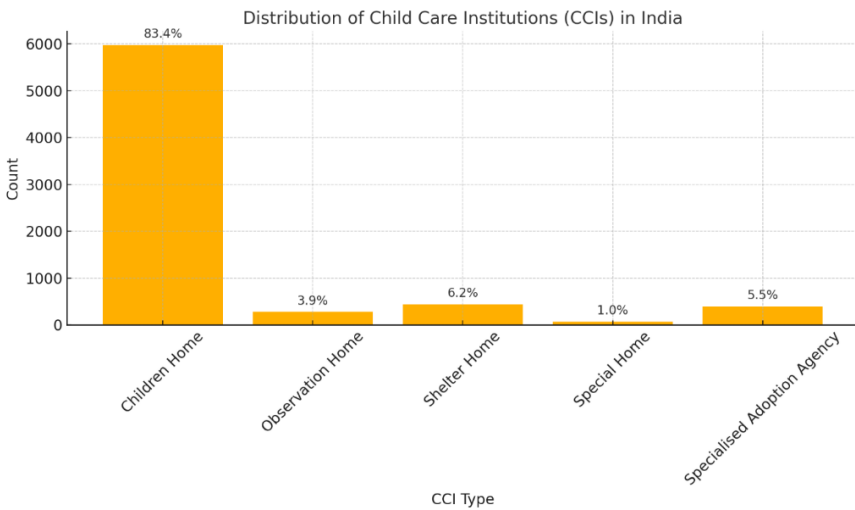
<sup>50</sup> *Id* at 6-7.

<sup>51</sup> *Id* at 7-8.

<sup>52</sup> *Id* at 14-15.

<sup>53</sup> *Id* at 11-12.

and reintegration of both Children in Conflict with the Law (CICL) and Children in Need of Care and Protection (CNCP).<sup>54</sup> The report categorises these CCIs into five types: Children's Homes/Fit Facilities, Shelter Homes/Open Shelters, Specialised Adoption Agencies, Observation Homes, and Special Homes/Places of Safety. As per the audit, there are a total of 7,163 CCIs functioning nationwide, distributed across these categories as detailed below in Figure 1.<sup>55</sup>



**Figure 1**

The graphical representation above illustrates the distribution of Child Care Institutions (CCIs) across India, based on data from the National Social Audit Report (2018) by the National

<sup>54</sup> Nat'l Comm'n for Prot. of Child Rights (NCPCR), National Report: Social Audit of Child Care Institutions (2018), [https://www.ncpcr.gov.in/uploads/167145198563a05551c7b75\\_national-report--social-audit-of-ccis.pdf](https://www.ncpcr.gov.in/uploads/167145198563a05551c7b75_national-report--social-audit-of-ccis.pdf).

<sup>55</sup> *Id* at 1-27.

Commission for Protection of Child Rights (NCPCR). Out of a total of 7,163 CCIs surveyed, an overwhelming majority, 83.4%, are Children's Homes, accounting for 5,977 institutions. Shelter Homes constitute 6.2% (444 institutions), while Specialised Adoption Agencies represent 5.5% (392 institutions). In contrast, Observation Homes, designated for children in conflict with the law, comprise only 3.9% (278 institutions), and Special Homes, reserved for those requiring heightened supervision and rehabilitative care, make up a mere 1.0% (72 institutions). This distribution reflects a disproportionate focus on general shelter and care, with relatively fewer institutions dedicated to specialised rehabilitative services for juveniles in conflict with the law, raising questions about the system's capacity for targeted intervention.<sup>56</sup>

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<sup>56</sup> *Id* at 1-27.

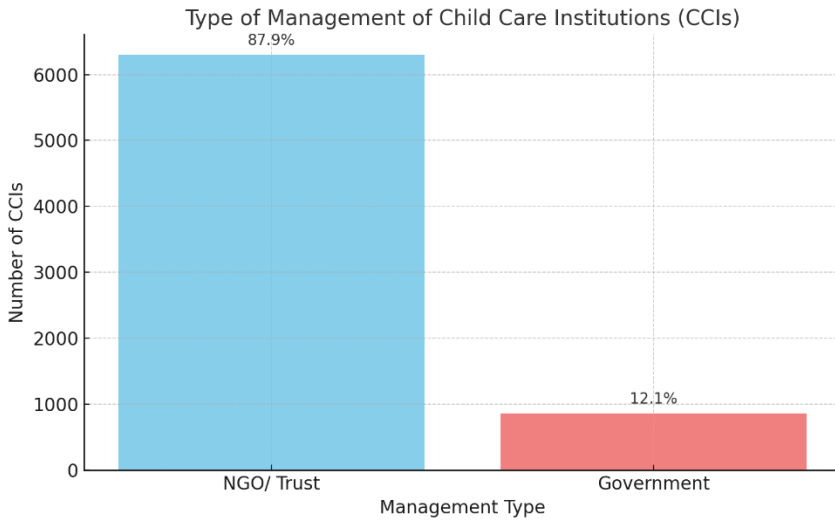


Figure 2

The graph above in Figure 2 depicts the management structure of Child Care Institutions (CCIs) in India, based on data reported by the NCPCR, including findings from the National Social Audit Report (2018) and subsequent institutional assessments. Of the total 7,163 CCIs, an overwhelming 87.9% (6,299) are operated by non-governmental organizations (NGOs) or trusts, while only 12.1% (864) are directly managed by the government. This significant reliance on NGOs and private trusts for managing child welfare infrastructure raises critical concerns about uniformity, accountability, and regulatory oversight. The disproportionate dependence shown in Figure 2 on non-state actors underscores the need for stronger state involvement to ensure consistent standards of care, protection, and rehabilitation across all institutions.

## TATA INSTITUTE OF SOCIAL SCIENCE (TISS) - PRAYAS PROJECT

TISS Prayas is a field action project run by the Tata Institute of Social Sciences (TISS) that focuses on providing socio-legal support to marginalized communities, including undertrials and prisoners. It works with juveniles who are in conflict with the law. Special attention is paid to reintegration, rehabilitation, vocational training, and education in its programs.<sup>57</sup>

According to the annual report of PRAYAS from April 2022 to March 2023<sup>58</sup> regarding children in conflict with the law, 325 children benefited from the Prayas program, which included 62 home visits and 16 NGO visits. The JJB referred 140 cases to Prayas, and 55 were identified through self-referral. When no legal aid was given, even after the DSLA referral, 45 cases were referred to the Prayas panel of lawyers. For the rehabilitation of children, 121 were provided with educational support, while 82 received vocational training. Also, 13 children were offered monthly stipends, and 10 were placed in de-addiction centres, which yielded positive results.<sup>59</sup>

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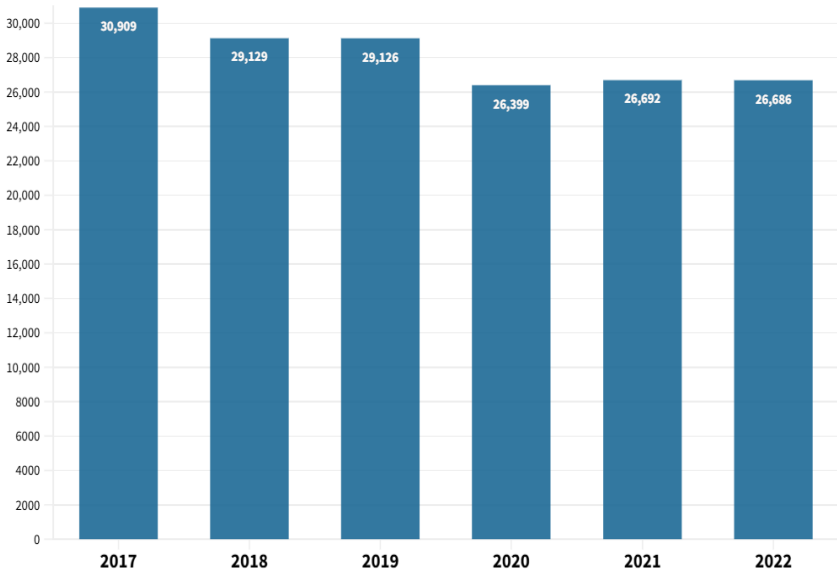
<sup>57</sup> Tata Inst. of Soc. Scis., Prayas: Objectives, TISS, <https://tiss.ac.in/view/6/projects/prayas/objectives-7/> (last visited Oct. 4, 2024).

<sup>58</sup> TISS Prayas, Annual Report April 2022 to March 2023, <https://tiss.edu/view/6/projects/prayas/outcomespublications-5/> (last visited Oct. 4, 2024).

<sup>59</sup> *Id.*

Similar to the TISS Prayas, other NGOs also publish annual reports that highlight data on children in conflict with the law and their rehabilitation. Still, in India, there is a need for more uniform data on children in conflict with the law. The NCRB has some data, but it only pertains to the offences they commit, and there is no data available on their rehabilitation.<sup>60</sup>

### **NCRB DATA ON JUVENILE OFFENDERS-**



**Figure 3**

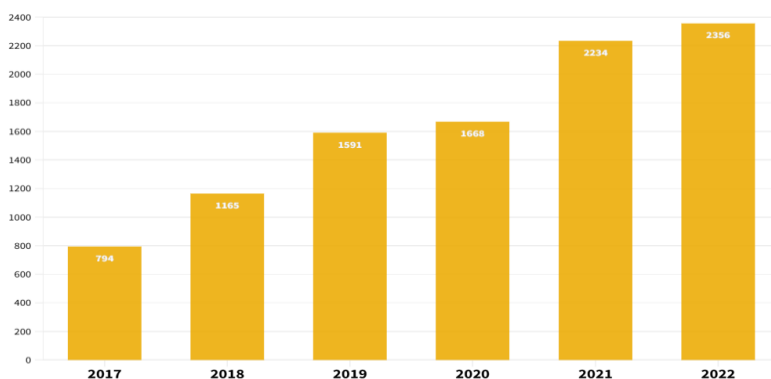
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<sup>60</sup> UNICEF report highlights the lack of uniform Data about 'Children in Conflict with Law,' FACTLY (2021), <https://factly.in/review-unicef-report-highlights-the-lack-of-uniform-data-about-children-in-conflict-with-law/> (last visited Oct. 4, 2024).

According to NCRB data from 2017 to 2022,<sup>61</sup> as shown in Figure 3, the number of juvenile offenders for offences under the IPC declined from 30,909 in 2017 to 26,686 in 2022.<sup>62</sup>

However, the problem with juvenile offenders is that the number of juvenile offenders subject to special or local laws has continued to increase.<sup>63</sup>

For Instance, under POCSO cases, the number of juvenile offenders charged was 794 in 2017,<sup>64</sup> while in 2022,<sup>65</sup> it was 2,356, representing a 298.07% increase in 5 years, as shown below in Figure 4.<sup>66</sup>



**Figure 4**

<sup>61</sup> Nat'l Crime Records Bureau, *Crime in India 2017 & 2022* (Vol. I, 2018 & 2023).

<sup>62</sup> Data: More Than 75% of Juveniles Apprehended for Crimes in 16 to 18 Age Group; 99% Are Boys, FACTLY (last visited Oct. 4, 2024), <https://factly.in/data-more-than-75-of-juveniles-apprehended-for-crimes-in-16-to-18-age-group-99-are-boys/>.

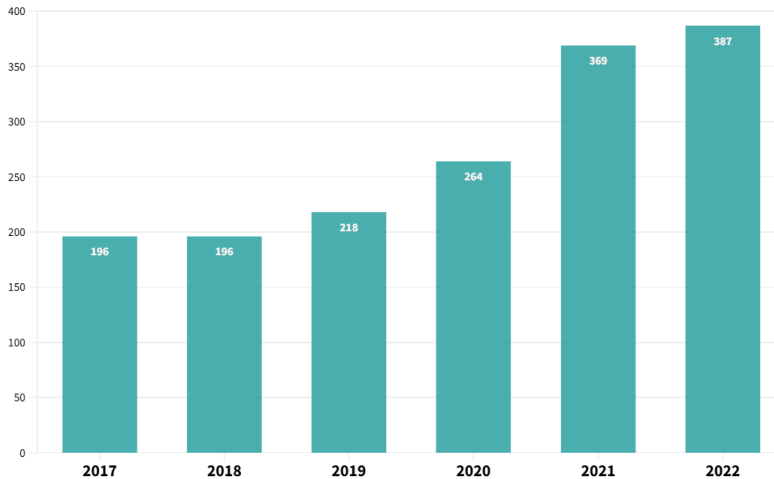
<sup>63</sup> Nat'l Crime Records Bureau, *Crime in India 2017* (Vol. I, 2018).

<sup>64</sup> *Id.*

<sup>65</sup> Nat'l Crime Records Bureau, *Crime in India 2022* (Vol. I, 2022).

<sup>66</sup> FACTLY, Data on Juveniles Aged 16–18, *supra* note 67.

Similarly, in the NDPS cases, the numbers increased from 196 in 2017<sup>67</sup> to 387 in 2022, representing a 96.9% increase in the number of juvenile offenders, as shown in Figure 5 below.<sup>68</sup>



**Figure 5**

The data indicate that while there has been a decline in the number of juveniles apprehended for offences under the IPC, there has been a significant increase in juvenile involvement in offences under special statutes such as the NDPS Act and the POCSO Act. This divergence suggests that existing rehabilitative and preventive mechanisms may not be uniformly effective across offence categories and underscores the need for targeted, context-specific interventions rather than a uniform rehabilitative approach.

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<sup>67</sup> Nat'l Crime Records Bureau, *Crime in India 2017* (Vol. I, 2018).

<sup>68</sup> FACTLY, Data on Juveniles Aged 16-18, *supra* note 67.

## STUDIES OF THE EFFECT OF REHABILITATIVE APPROACH IN REDUCING RECIDIVISM-

Empirical studies from various jurisdictions indicate that the introduction of rehabilitative programmes for children is associated with a reduction in recidivism.

A research study conducted at a youth correctional facility in Wolaita, Ethiopia,<sup>69</sup> to identify the primary causes of juvenile delinquency and to evaluate the effectiveness of Cognitive Behavioural Therapy (CBT)<sup>70</sup> in reducing recidivism rates among juvenile offenders. They studied 150 children in this research, and it was found that the CBT method is effective in reducing recidivism compared to previous methods, which concentrated only on associations, rewards, and penalties to change behaviour.<sup>71</sup>

Another empirical study compared the effectiveness of restorative justice interventions with traditional juvenile court processing among a sample of 551 juvenile offenders.<sup>72</sup> Of these, 284 juveniles participated in restorative justice programmes, while 267 were processed through the

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<sup>69</sup> Asketil Getachew et al., Evaluate the Effectiveness of Cognitive Behavioral Therapy Among Youths (in Case of Wolaita Ethiopia Youth Correction Center), 27 *Afr. J. Biomed. Res.* 4312 (Nov. 30, 2024), <https://doi.org/10.53555/AJBR.v27i4S.4398>.

<sup>70</sup> A type of psychotherapy that helps people manage mental and physical health problems by changing the way they think and behave.

<sup>71</sup> Getachew et al., *supra* note 74.

<sup>72</sup> Jeff Bouffard et al., The Effectiveness of Various Restorative Justice Interventions on Recidivism Outcomes Among Juvenile Offenders, 15 *Youth Violence & Juvenile Justice* 465 (2017).

conventional juvenile justice system.<sup>73</sup> The findings demonstrated that those engaged in the restorative justice process exhibited significantly lower recidivism rates than their counterparts in the traditional court system, and even indirect forms of restorative justice were associated with reduced risk of reoffending.<sup>74</sup>

A study by Donald Nicole<sup>75</sup> examines the outcomes and challenges faced by juveniles in rehabilitation and incarceration. The author highlights the limitations of conventional imprisonment, noting that juveniles who lack education and vocational skills face significant difficulties reintegrating into society after release. In contrast, rehabilitation programmes that emphasise life skills, social skills development, and structured coaching can better prepare juveniles for employment and enable them to become productive, tax-paying members of the community.<sup>76</sup>

While these empirical studies provide valuable insights into the potential effectiveness of rehabilitative and restorative interventions, they are situated in distinct socio-legal contexts. Their direct applicability to the Indian juvenile justice system must therefore be assessed cautiously, given differences in institutional capacity, resource allocation, legal processes, and post-release monitoring mechanisms.

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Donald Nicole, *How Effective Is Rehabilitation Versus Incarceration for Juveniles Involved in Violent and Nonviolent Crime* (2022).

<sup>76</sup> *Id.*

Accordingly, these studies are indicative of potential outcomes rather than conclusive evidence of effectiveness within the Indian context.

Taken together, these studies suggest that restorative approaches and rehabilitative interventions may be more effective than purely punitive measures in reducing juveniles' continued involvement in criminal activity. Rehabilitation programmes that prioritise social skills development, mental health support, and education are associated with improved life outcomes, including higher educational attainment and better employment prospects. In contrast, reliance on traditional punitive responses often exacerbates educational disruption, reinforces existing social inequalities, and adversely affects the psychological well-being of young offenders.

### **CHALLENGES AND LIMITATIONS IN THE EFFECTIVE IMPLEMENTATION OF THE JJ ACT, 2015**

Undoubtedly, various steps are taken to rehabilitate and restore juveniles, with their best interests in mind. However, various challenges hinder this approach and need to be addressed:

#### **EFFECTIVENESS VARIES**

In individual care plans, rehabilitation programs are tailored to the specific needs of each child, and one child may not benefit from a program as another might. Hence, finding the suitable needs of each offender may be resource-intensive and

time-consuming.<sup>77</sup> This trend is reflected in the NCRB data relating to offences under the POCSO Act and the NDPS Act, as discussed earlier in the section on the impact of the rehabilitative approach, which underscores the need for a tailored and context-specific response to such cases in order to address the issue effectively.

### **LACK OF STAFF AND FACILITIES**

In practice, police officers, members of Juvenile Justice Boards, and social workers often lack adequate training to engage with children in the manner envisaged under the Juvenile Justice (Care and Protection of Children) Act, 2015. The limited availability of psychologists and medical professionals further undermines the effectiveness of the rehabilitative framework. The National Commission for Protection of Child Rights (NCPCR), in its Annual Report 2022-23,<sup>78</sup> recommended the appointment of Child Welfare Police Officers by formal orders of the Police Headquarters of the States and Union Territories in accordance with Section 107(1) of the Act. Additionally, the NCPCR's Social Audit Report highlighted acute staff shortages across Child Care Institutions nationwide, noting that only 26% of the required Child Welfare Officers, Probation Officers, and Case Workers

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<sup>77</sup> Sudha Yadav - & Akilesh Ranaut -, *Juvenile Justice Reforms: Evaluating the Effectiveness of Rehabilitation Vs Punishment*, 5 IJFMR 9541 (2023), <https://www.ijfmr.com/research-paper.php?id=9541> (last visited Oct 5, 2024).

<sup>78</sup> Nat'l Comm'n for Prot. of Child Rights, *supra* note 59.

are currently in position relative to institutional capacity.<sup>79</sup> Comparable deficiencies were also observed across other staff categories, as illustrated in Figure 6.

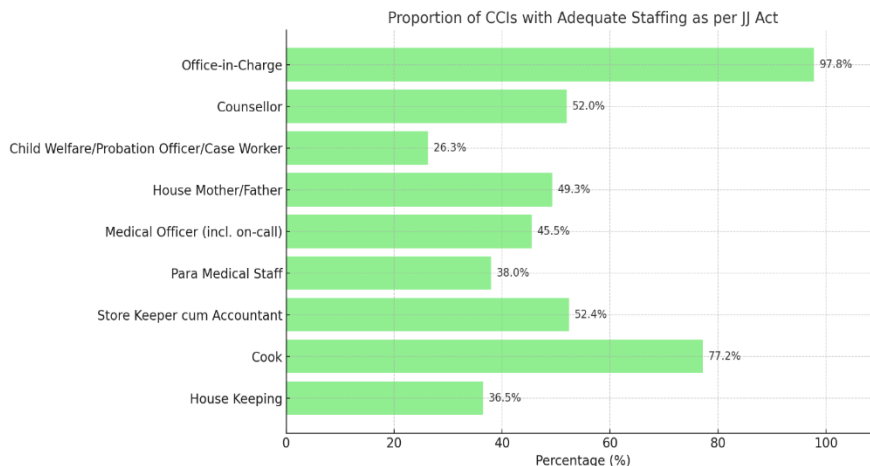


Figure 6:

The horizontal bar graph in Figure 6 illustrates the proportion of Child Care Institutions (CCIs) in India that meet the prescribed staffing norms under the Juvenile Justice Act. The data, sourced from the NCPCR's National Social Audit Report (2022),<sup>80</sup> highlights significant disparities in staff availability across roles. While Office-in-Charge positions are nearly universally filled (97.8%), critical support roles show substantial gaps. Only 26.3% of institutions have a Child Welfare Officer, Probation Officer, or Case Worker, and just 38.0% have para-medical staff. Other essential roles, such as counsellors (52.0%), medical officers (45.5%), and house

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

mothers/fathers (49.3%), are also underrepresented. Though positions like cooks (77.2%) and storekeepers/accountants (52.4%) are better staffed, the overall shortage of specialized personnel reveals systemic weaknesses in delivering comprehensive child care and rehabilitation. This staffing inadequacy hampers the effective implementation of the JJ Act, 2015 and undermines the rehabilitative objectives of the juvenile justice system.

### **REINTEGRATION AND POST-RELEASE MONITORING RISK**

The JJ Act, 2015, emphasises that every child shall be reintegrated into society; however, due to a lack of resources or other factors, the execution of these programs is often poorly administered, which negatively affects the children. They find it difficult to get employment because of poor skill training during rehabilitation, and end up in a similar situation as they were before rehabilitation. Justice Biswanath Rath (Orissa) and Justice A.K. Menon (Bombay) also mentioned that the challenges in follow-ups after child restoration are due to a lack of staff. They also talked about various visits to childcare institutions; many of them were without proper infrastructure, healthcare, and sanitation facilities.<sup>81</sup>

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<sup>81</sup> Juvenile Justice Comm., *supra* note 52.

## NOT SUITABLE FOR ALL

Rehabilitation may not be suitable for all delinquent juveniles, especially in cases where the juvenile engages in violent or heinous crimes and poses a threat to society.<sup>82</sup> Rehabilitative measures might not give the results as expected, as sometimes they require treatment that addresses the deep-seated psychological issues. Determining suitable juveniles for rehabilitation is also one of the challenges in the rehabilitative approach, especially for juveniles who commit heinous crimes between the ages of 16 and 18.

## CRITICAL APPRAISAL

Contemporary neuroscientific and psychological research suggests that adolescent brain development continues into early adulthood, particularly in regions associated with impulse control, risk assessment, and decision-making.<sup>83</sup> These developmental characteristics suggest that juveniles may exhibit a greater susceptibility to peer influence and a reduced capacity for evaluating long-term consequences compared to adults.<sup>84</sup> Courts and policymakers have increasingly relied on such research to support rehabilitative approaches in juvenile justice; however, these findings should be understood as informing policy design rather than conclusively determining individual culpability.

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<sup>82</sup> Nat'l Comm'n for Prot. of Child Rights, *supra* note 59.

<sup>83</sup> Beatriz Luna, *The Relevance of Immaturities in the Juvenile Brain to Culpability and Rehabilitation*, 63 *Hastings L.J.* 1469 (2012).

<sup>84</sup> *Id.*

However, in the Indian context, implementing the JJ Act, 2015 faces critical challenges that undermine its full potential. Despite being in force for ten years, the Act suffers from a lack of uniform, comprehensive data on children in conflict with the law. Existing statistics, primarily drawn from the National Crime Records Bureau (NCRB),<sup>85</sup> provide only fragmented insights, categorising juveniles based on prior apprehensions and convictions without linking this information to the rehabilitative measures under the JJ Act. The data gap in India impedes a robust evaluation of the effectiveness of rehabilitation and the identification of underlying socio-economic or psychological factors influencing juvenile delinquency. The absence of comprehensive longitudinal and publicly accessible data on rehabilitation outcomes under the JJ Act, 2015, constitutes a significant limitation of both this study and the juvenile justice system more broadly.

Complementing these concerns is the analysis of Child Care Institutions (CCIs) across India, as detailed in the National Social Audit Report (2018) by the National Commission for Protection of Child Rights (NCPCR) discussed earlier and the report reveals that over 7,000 CCIs operate nationwide, with a staggering 87.9% managed by non-governmental organisations, which raises questions about the uniformity and quality of rehabilitative services. Furthermore, significant staffing deficits in essential roles such as counsellors, welfare

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<sup>85</sup> Nat' l Crime Records Bureau, *Crime in India*, <https://www.ncrb.gov.in/crime-in-india.html> (last visited Oct. 4, 2024).

officers, and medical personnel indicate that these institutions may be inadequately equipped to address the multifaceted needs of rehabilitating juveniles. Even at present, there is no centralised, unified, publicly accessible platform that provides comprehensive data on the implementation of the JJ Act 2015, including CCI-wise staffing and conditions, Rehabilitation outcomes, post-release tracking, and Real-Time or regularly updated statistics.

Through this paper, the authors aimed to examine the effectiveness of the rehabilitative approach under the Juvenile Justice (Care and Protection of Children) Act, 2015, as well as the role played by institutional stakeholders in facilitating juvenile reintegration. The analysis suggests that while the statutory framework represents a progressive move towards a child-centric model of justice, the extent to which rehabilitation reduces juvenile recidivism in India cannot be conclusively determined at present, owing to fragmented data, the absence of longitudinal studies, and persistent institutional constraints. Accordingly, the available evidence suggests that rehabilitation may be a promising approach, although its outcomes cannot be established with certainty.

The over-reliance on NGOs and trusts for CCI management highlights the need for increased governmental intervention and oversight to ensure that all institutions adhere to uniform standards of care and rehabilitation. Furthermore, the critical staffing shortages in CCIs must be addressed immediately to provide juveniles with essential psychological, legal, and

medical support. Strengthening the implementation of the JJ Act, 2015 and increasing government funding for CCIs are imperative.

Additionally, the sharp increase in POCSO and NDPS-related juvenile offences calls for targeted interventions, including robust educational campaigns, community engagement programs, and specialised rehabilitation initiatives to address the root causes of juvenile delinquency.

In summary, while progress has been made in the juvenile justice landscape, the current gaps in CCI infrastructure, staffing, and emerging crime trends necessitate urgent policy action. A more holistic, government-led approach, with stringent monitoring and a focus on mental health and legal aid, can ensure that the juvenile justice system truly serves its intended purpose: rehabilitation, protection, and reintegration of children into society.

The integration of neuroscientific insights with current trends in juvenile justice highlights the need for a holistic, data-driven approach to rehabilitation in India. The rehabilitative model is theoretically sound given the lower culpability of juveniles; however, its practical application is hindered by significant data deficiencies and institutional shortcomings. Only through such targeted reforms can the full benefits of a neuroscientifically informed rehabilitative approach be realised.

## **SUGGESTIONS**

### **1. Data and Monitoring Reform**

There is an urgent need for a centralised, publicly accessible data platform on juvenile justice implementation, capturing rehabilitation outcomes, institutional capacity, staffing levels, and post-release monitoring, to enable evidence-based policymaking.

### **2. Institutional Capacity and Staffing**

Effective rehabilitation requires immediate addressing of staffing shortages in Child Care Institutions, particularly the appointment of probation officers, psychologists, counsellors, and trained social workers, as consistently highlighted in NCPCR assessments.

### **3. Targeted Rehabilitation for Emerging Offences**

Given the rising incidence of juvenile involvement in offences under the NDPS Act and the POCSO Act, rehabilitation programmes must be tailored to address substance abuse, sexual behaviour counselling, mental health support, and community-based preventive interventions.

## **HARVESTED HOPES: THE EXPLOITATION OF CHILDREN FOR ORGANS**

*Rezan N and Nandhana Anoop<sup>1</sup>*

### **ABSTRACT**

*Child organ trafficking is an inhumane practice that goes against everything we as a society stands for. It is a dire violation of human rights that proliferates due to the immense corruption in the bureaucracy, loopholes in the legal system and inefficient law enforcement. This article deals with how child organ trafficking works, the impact it has on society, and how the existing legal frameworks protect children from it. It emphasizes the need for better legal and other solutions including the need for better law enforcement and the documentation of unregistered children who are in more danger of being trafficked for the purpose of organ removal. The involvement of influential persons such as doctors, lawyers and hospital management further complicate the process of investigation rendering law enforcement inept. Even though there are laws in the international as well as national level concerning organ trafficking, laws that deal with child organ trafficking are almost non-existent. Case studies that are reported throughout India are mentioned to call attention to this prevalent heinous offence. This necessitates the involvement of the government for the making of better policies protecting*

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<sup>1</sup> The authors are Law Students at the School of Legal Studies, Cochin University of Science and Technology, Kerala. They can be reached at [nandanaanoop989@gmail.com](mailto:nandanaanoop989@gmail.com)

*the lives of children, especially from the underprivileged communities.*

**Key Words:** *Child Organ Trafficking, Human Rights Violation, Legal Loopholes, Law Enforcement Challenges, Government Policies*

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## INTRODUCTION

Everything that has life has to face its end. Human beings for ages have been avidly pushing boundaries to unravel ways to live an unending life or prolong it as long as it can be. With the advent of organ transplantation in medical science, the preservation of human life has been significantly increased, thereby ushering a transformative era in healthcare. Organ donation and transplantation is a surgical process to replace a failing organ with a healthy one.<sup>2</sup> Organ donors comprise individuals who have recently passed away and have consented to donate organs prior to their demise, or whose family has given authorization for donation on their behalf. Organs that can be transplanted include the heart, kidney, liver lungs, pancreas, intestine and thymus. It is crucial to acknowledge the global scarcity of transplantable organs. Roughly 5 lakh people die annually in India due to lack of an organ donor but with less than one per million people opting to donate, the organ donation rate in the country is one of the

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<sup>2</sup> Cleveland Clinic, *Organ Donation and Transplantation*, Cleveland Clinic Health Library (Mar. 01, 2025, 10:26 PM), <https://my.clevelandclinic.org/health/treatments/11750-organ-donation-and-transplantation>.

lowest in the world, according to estimates<sup>3</sup>. The higher demand for organs exceeds the legally available supply which thereby leads to long waiting lists and desperate patients. Low organ donation rates, cultural and religious beliefs and bureaucratic inefficiencies further exacerbates this mismatch. Consequently, thousands of patients remain in the waiting lists for years, aggrandizing desperation among recipients and families. This paves the way for illegal markets to exploit the loopholes in the existing legal system and fraudulently find means to procure organs beyond the ambit of ethical and legal frameworks. Organ trafficking is considered to be one of the most heinous crimes in the world. It results in gross human rights violations and also jeopardizes the lives of innocent individuals. Upon observation, there are three ways in which organs are trafficked:

1. Individuals are forced or deceived into donating their organs.
2. Organs are removed by the middlemen without the consent of individuals.
3. Deceased individual's organs are illegally stolen and sold.

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<sup>3</sup> *Organ Donation: In India Less Than One Per Million Population Donate, Lowest Globally*, Business Standard (Mar. 01, 2025, 10:45 PM), [https://www.business-standard.com/article/news-ani/organ-donation-in-india-less-than-one-per-million-population-donate-lowest-globally-119081400101\\_1.html](https://www.business-standard.com/article/news-ani/organ-donation-in-india-less-than-one-per-million-population-donate-lowest-globally-119081400101_1.html).

The advancements in medical science have significantly improved the success rates of paediatric organ transplant, and studies have also revealed that paediatric organs can be successfully transplanted into adult recipients. Organs from children aged 12 and above are viable for transplantation into adult recipients. According to the new data, Children's Hospital Los Angeles (CHLA's) paediatric liver transplant patients had a 100% one-year survival rate, compared with 95.3% nationally<sup>4</sup>. A study by Nord Italia Transplant Program has revealed split-liver transplantation with paediatric donors provides a valid method of limiting the problem of organ shortage for both adults and children, and provides comparable results to those seen with adult donors.<sup>5</sup> The growing global demand for organs, especially in developed countries where there are stringent laws regulating organ availability, has prompted the exploitation of marginalized children in developing countries.<sup>6</sup>

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<sup>4</sup> Wendy Wolfson, *Children's Hospital Los Angeles Has Best Pediatric Liver Transplant Survival Rates in the Country*, Children's Hospital Los Angeles (Mar. 02, 2025, 12.00 PM), <https://www.chla.org/blog/hospital-news/childrens-hospital-los-angeles-has-best-pediatric-liver-transplant-survival>.

<sup>5</sup>*Organ Donation in India Less Than One Per Million Population Donate, Lowest Globally*, Business Standard (Mar. 02, 2025, 1.00 PM), [https://www.business-standard.com/article/news-ani/organ-donation-in-india-less-than-one-per-million-population-donate-lowest-globally-119081400101\\_1.html](https://www.business-standard.com/article/news-ani/organ-donation-in-india-less-than-one-per-million-population-donate-lowest-globally-119081400101_1.html).

<sup>6</sup> Alireza Bagheri, *Child Organ Trafficking: Global Reality and Inadequate International Response*, PubMed (Mar. 02, 2025, 2.00 PM), <https://pubmed.ncbi.nlm.nih.gov/26612382/>.

## **STOLEN INNOCENCE: HOW CHILDREN FALL VICTIM TO ORGAN TRAFFICKING**

Trafficking of children for organ harvesting is considered to be a highly covert operation. It is an organized crime network involving multiple actors, and thrives on the vulnerabilities of the impoverished sections. Children from orphanages, slums or rural areas are either kidnapped or their families are exploited into organ sale due to their financial distress. Traffickers particularly prey on the vulnerable families, defrauding and coercing them to give up their children, or abducting them for illegal trade. In most cases, parents are tricked into believing their children will receive better opportunities, later to find that they have fallen victim to trafficking networks or even worse, they never know. Organ trafficking is not confined to transnational crimes. It has been growing rampantly within developing nations. In India, where the demand for organs exceeds the supply, children from impoverished populations fall victim to the vicious cycle. The organs are then trafficked to wealthier nations where the desperate families are willing to pay exorbitant sums for transplants that may not be lawfully obtained. Children who are trafficked are transported through hidden routes to avoid transit hubs with high security checks. Reports have emerged that they are taken to a 'human farm' where they are given adequate nutrition to ensure physical fitness. Blood samples of these children are collected to classify them as potential donors while waiting for matching

recipients. Multiple such farms when reported have been found to be abandoned when the law enforcement arrives due to inside tip-off.<sup>7</sup>

### **INSIDE THE ILLEGAL ORGAN TRADE: HOSPITALS, TRAFFICKERS, AND VICTIMS**

The role of hospitals in organ trafficking is extremely concerning. Private and unregulated clinics conduct illegal transplants under the guise of legitimate medical procedures. The Apollo Hospital kidney racket revealed how the middleman with the backing of the hospital authorities, has conducted illegal kidney transplant by forging documents of donors.<sup>8</sup> This case primarily concerned kidney trafficking in adults, but similar networks involving child organ trafficking have been exposed. The Railway Protection Force (RPF) officials in September 2019 in Bengaluru had intercepted a woman trafficking three minor girls for illegal organ harvesting. It is reported that there is a growing trade market in city hospitals, with traffickers exploiting vulnerable children.<sup>9</sup> In February 2023, Mohali police rescued two infants

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<sup>7</sup> Fasting U, Christensen J & Glending S, *Children Sold for Transplants: Medical and Legal Aspects*, 5 *Nursing Ethics* 518 (1998), <https://doi.org/10.1177/096973309800500606>.

<sup>8</sup> *India Today*, 5 *Including 2 Staff of Top Delhi Hospital Arrested as Police Bust Kidney Racket*, *India Today* (Mar. 03, 2025, 5.00 PM), <https://www.indiatoday.in/india/story/5-including-2-staff-of-top-delhi-hospital-arrested-as-police-busts-kidney-racket-12235-2016-06-03>.

<sup>9</sup> *Children Could Be Trafficked for Organ Harvesting*, *Deccan Herald* (Mar. 03, 2025, 5.30 PM), <https://www.deccanherald.com/india/karnataka/bengaluru/children-could-be-trafficked-for-organ-harvesting-760584.html>.

from a Patiala based couple suspected of child trafficking and organ trade. The authorities believe that the accused had trafficked two more children who allegedly died under unknown circumstances. It was reported that the accused had sold the organs of these children to recover the financial losses that she had endured from purchasing them.<sup>10</sup> In 2019 the South Western Railway launched Operation Nanhe Farishtey. This operation was instrumental in rescuing trafficked children across Karnataka, Goa and Tamil Nadu. Over 500 children were rescued under this operation in 2019 alone.

The presence of powerful intermediaries, including medical professionals, law enforcement agencies, and international organ trade network has made the efforts to combat child organ trafficking challenging. The increase in involvement of the hospitals in organ trade underscores the importance of stricter regulations and monitoring mechanisms in the medical sector. The surveillance in vulnerable regions needs to be strengthened. Strict regulation of organ donation procedures and prosecution of corrupt medical professionals helps to combat this grave human rights violation.

Traffickers also have been found to pose as adoption agencies or orphanages, manipulating families with false assurance of a better life for children, only to harvest their organs. Reports also suggest children in India are trafficked to neighbouring countries like Nepal, Bangladesh and Sri Lanka where

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<sup>10</sup> See *Children Could Be Trafficked for Organ Harvesting*, supra note [8].

regulations may be weaker. It is difficult to determine the exact statistics due to the hidden nature of organ trafficking. India has emerged as a significant hub where illegal organ trade occurs. According to the reports from governmental and nongovernmental agencies, hundreds of children are trafficked each year. Some of them are allegedly trafficked for organs<sup>11</sup>.

Organ trafficking poses serious psychological and health impacts on the victims. The physical denouement suffered by the children is both immediate and long lasting. Unregulated surgeries lead to severe infections, and these infections can lead to further complications, requiring more surgeries or long-term treatments.<sup>12</sup> The psychological scars left by organ trafficking are as severe as the physical trauma. Most of the victims suffer extreme emotional distress, including Post traumatic stress disorder (PTSD), anxiety or depression. The effect of separation from parents and enduring and invasive life-threatening procedures results in lasting emotional scars that affect the mental health of the child for years. These children may also suffer from educational setbacks. The physical and psychological trauma affects their concentration, learning ability and overall academic performance. The trauma makes it difficult for them to reintegrate into society.

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<sup>11</sup> Debra A. Budiani-Saberi et al., *Human Trafficking for Organ Removal in India: A Victim-Centered, Evidence-Based Report*, PubMed (Mar. 04, 2025, 4.00 PM), <https://pubmed.ncbi.nlm.nih.gov/24398855/>.

<sup>12</sup> Margaret L. Stuber, *Psychiatric Issues in Pediatric Organ Transplantation*, PubMed Central (Mar. 03, 2025, 4.00 PM), <https://pmc.ncbi.nlm.nih.gov/articles/PMC2873967/>.

They are often isolated, struggle to connect with peers and have to deal with long term social exclusion.

## **INTERNATIONAL CONVENTIONS AND LAWS ON CHILD ORGAN TRAFFICKING**

While the majority of trafficking in persons cases involve adults, who have fully developed organs, there are also cases of organ removal from minors, including reported cases from Africa and Eastern Europe.<sup>13</sup> There are no specific conventions or laws in the international level that protects children specifically from organ trafficking. Nevertheless, protection against organ trafficking for children is covered in the general provisions in various conventions. Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime has defined “Trafficking in person” and has included organ removal as a form of exploitation.<sup>14</sup>

The Convention on the Rights of the Child (1989)<sup>15</sup> to which India is a party to, has numerous Articles which indirectly protects the right of a child against organ trafficking. Article 6 states that every child has the inherent right to life and that

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<sup>13</sup> U.N. Office on Drugs & Crime, Toolkit on the Investigation and Prosecution of Trafficking in Persons for Organ Removal [8] (2022).

<sup>14</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 3(a), Nov. 15, 2000, 2237 U.N.T.S. 319.

<sup>15</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

all the State Parties have to ensure to the maximum extent possible, the survival and development of the child.<sup>16</sup> When a child is trafficked for the purpose of organ removal, the child's right to life guaranteed under this Article is violated. If such organ removal does not cause death, then it may lead to severe complications that may hinder the proper development of the child. Moreover, it may lead to several physical and mental ailments in the future. Article 19 of the convention ensures the right of the child to protection from all forms of violence, neglect, abuse and mistreatment.<sup>17</sup> Organ removal is indeed a form of violence against a child. It is very much evident that forced removal of an organ can cause severe bodily injury, mutilation and potentially death. Such violence can have lifelong psychological impacts as it inflicts trauma, fear and extreme emotional distress. Article 35 states that States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.<sup>18</sup> We can include trafficking of children for organ removal under this Article since the term "for any purpose or in any form" has been used in the Article. All of these Articles in the Convention acts as a shield against the trafficking of children for organ transplantation.

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<sup>16</sup> Id. at art. 6.

<sup>17</sup> Id. at art. 19.

<sup>18</sup> Id. at art. 35.

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography specifically addresses the issue of child organ trafficking under Article 3 (1)(a)(i)(b), prohibiting the transfer of the organs of a child for profit.<sup>19</sup> The WHO Guiding Principles on Human Cell, Tissue, and Organ Transplantation (2010) has introduced multiple principles regarding the issue of unethical organ transplantation. The 4<sup>th</sup> principle states that No cells, tissues or organs should be removed from the body of a living minor for the purpose of transplantation other than narrow exceptions allowed under national law.<sup>20</sup> Specific measures should be in place to protect the minor and, wherever possible the minor's assent should be obtained before donation. This Principle strictly prohibits organ removal from a living minor but has provided some exceptions such as familial donation of regenerative cells or kidney transplant between identical twins.

The UN has passed various resolutions to combat trafficking in person for organ removal. In the Resolution adopted by the General Assembly regarding the strengthening and promoting effective measures and international cooperation on organ donation and transplantation to prevent and combat trafficking in persons for the purpose of organ removal and

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<sup>19</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, art. 3(1)(a)(i)(b), May 25, 2000, 2171 U.N.T.S. 227.

<sup>20</sup> World Health Organization, WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation, Guiding Principle 4 (2010).

trafficking in human organs<sup>21</sup> the UN urges the member states to take appropriate measures in relation to organ transplantation in accordance with State's National legislation and the WHO guiding principles<sup>22</sup> as mentioned above.

### **SAFEGUARDING CHILDREN'S RIGHTS: INDIAN LAWS ON ORGAN TRAFFICKING**

When it comes to Indian law, the Indian Constitution has entrusted us with the right to life which includes the right to health under Article 21. It lays down that no person shall be deprived of his life or personal liberty except according to procedure established by law<sup>23</sup>. The right to health has been guaranteed under this Article through a series of judicial proceedings.

In *Bandhua Mukthi Morcha v. UOI*,<sup>24</sup> The Supreme Court has given an expanded interpretation to Article 21 by observing that everyone has the right to live with human dignity free from exploitation and that it also includes the protection of children against abuse and providing opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity. When children are

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<sup>21</sup> G.A. Res. 71/322, Strengthening and Promoting Effective Measures and International Cooperation on Organ Donation and Transplantation to Prevent and Combat Trafficking in Persons for the Purpose of Organ Removal and Trafficking in Human Organs, U.N. Doc. A/RES/71/322 (Sept. 8, 2017).

<sup>22</sup> WHO Guiding Principles, supra note [15].

<sup>23</sup> India Const. art. 21.

<sup>24</sup> *Bandhua Mukthi Morcha v. UOI* 1984 AIR 802.

trafficked for the purpose of organ removal, they are stripped of their fundamental rights guaranteed under the Indian Constitution. Most of the children are kidnapped and forced to organ removal procedures which we can assume that it in most of the cases results in their death which violates their right to life. Even if such forced organ removal does not cause death, it could leave the children with lifelong physical ailments as well as mental trauma hindering their development and depriving them of their childhood which also infringe the child's right to life.

Article 23 of the Constitution ensures the right against exploitation emphasizing individual freedom and ensures that no one is subjected to any kind of exploitation.<sup>25</sup> Trafficking of children for organ removal is most definitely a form of exploitation. Most children who are trafficked and exploited belong to the marginalized sections of the society especially from the slums and streets. Their helplessness leads the perpetrators to lure and take advantage of them.

Transplantation of Human Organs and Tissues Act (THOTA), 1994 (amended in 2011)<sup>26</sup> is a statute introduced by the Indian Government to combat the various issues in relation to transplantations of organs and has made numerous regulations. Section 9 (1B) of the Act deals with restrictions on removal and transplantation of [human organs or tissues or

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<sup>25</sup> India Const. art.23.

<sup>26</sup> Transplantation of Human Organs and Tissues Act, No. 42 of 1994, INDIA CODE (amended 2011).

both]. It states that no human organs or tissues or both shall be removed from the body of a minor before his death for the purpose of transplantation except in the manner as may be prescribed.<sup>27</sup> This Act clearly criminalizes any form of organ removal from a child unless as prescribed under law. Therefore, if any person other than an authorized authority engages in organ removal of a child they are penalized under this Act. The perpetrators can be punished under Section 19 of this Act for commercial dealings in human organs which shall not be less than 5 years and may extend up to 10 years imprisonment and shall also be liable to a fine that shall not be less than 25 lakhs and may extend up to 1 crore rupees.<sup>28</sup>

### **CHALLENGES IN COMBATING CHILD ORGAN TRAFFICKING IN INDIA**

Child organ trafficking is a grave offence that is not being reported as much as it should be especially when it comes to India. The national secretary of Nobel Peace Prize winner Kailash Satyarthi's NGO Bachpan Bachao Andolan has made comments on child organ trafficking. He stated that he had found dead bodies of children without their vital organs while trying to locate missing children.<sup>29</sup> When police find the bodies of children, they do not approach the case by

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<sup>27</sup> Id at. Sec 9(1B)

<sup>28</sup> Id at Sec 19

<sup>29</sup> Rukmini S., Why Organ Trafficking Thrives in India, LIVEMINT (Mar. 03, 2025, 8.00 PM), <https://www.livemint.com/Politics/pxj4YasmivrvAhanv6OOCJ/Why-organ-trafficking-thrives-in-India.html>.

investigating the possibility of organ trafficking and instead file a murder and kidnapping case. Even though there are various laws protecting the rights of the child against organ trafficking, the inefficiency of the police and sometimes their lack of awareness as well as their lethargic and dismissive attitude towards this issue due to them having to conduct a thorough investigation result in these cases being put aside as murder cases. Therefore, this issue does not get highlighted in the mainstream media and the proper reporting of such child organ trafficking cases does not happen. The major obstacle standing in the way of combating this issue is the lack of awareness in the general public as well as the inefficiency in law enforcement. Poverty and oppression of the underprivileged class of the society also plays a huge role in child organ trafficking. The underprivileged children are coaxed and trafficked for organ removal. The state does not have much information regarding these children and they are easily trafficked since there are no records of them. The presence of influential people also can be inferred as organ removal cannot be done without the presence of skillful surgeons and lawyers, hospital staff, hospital management etc may also be involved in this as their presence is required to corrupt the records.

### **FROM AWARENESS TO ACTION: COMBATING CHILD ORGAN TRAFFICKING EFFECTIVELY**

It is imperative to notice that there are laws protecting children against trafficking for organ removal. Core emphasis

should be on the strict implementation of these laws. Proper investigation regarding this offence should be done and for that the law enforcement agencies should be given proper training and awareness regarding this issue. Studies should be conducted by the government dealing with risks and probability of child trafficking for organ removal happening. The authorities should focus on protecting children especially from the underprivileged strata of the society as they are in more risk of being trafficked for organ removal. The government authorities with the collaboration of NGOs working for child rights should engage in keeping records and document unregistered children as they are more likely to fall prey to child trafficking for organ removal. The hospitals in which the transplantation happens should be directed by the government to keep much more transparent records so that any attempt to commit child organ trafficking can be prevented.

## **CONCLUSION**

Exploiting children for organ trade is a gross violation of human rights. It is a harsh reflection of the hardships endured by the marginalized communities in India. Although comprehensive legal frameworks such as the Transplantation of Human Organs and Tissues Act (THOTA), 1994, and anti-trafficking laws exist, enforcement of these laws remains weak, allowing traffickers to exploit the systemic loopholes and avoid accountability. The furtive trade is fuelled by illicit operation of the traffickers, reinforced by poverty, corruption

and escalating organ demand. A well-rounded approach is highly imperative to effectively combat child organ trafficking. Enhancing legal enforcement, establishing stringent measures, monitoring mechanisms, and eradicating corruption in healthcare and law enforcement are vital steps towards achieving the same. Increasing public awareness, particularly among marginalized sections, can protect the vulnerable families from falling prey to traffickers. Our country should highly focus on strengthening its deceased organ donation program to reduce the dependency on illegal organ procurement. Rehabilitation programs need to be provided for the child victims for their reintegration to the society. This fight against organ trafficking demands a unified effort from the government, judiciary, law enforcement, healthcare institutions and civil society. India can hope to dismantle this vicious cycle and safeguard the rights and dignity of its children only through stringent enforcement of law and adopting a proactive approach to victim protection.



**SAFEGUARDING KIDFLUENCERS: INTERSECTION OF CHILD RIGHTS AND PARENTAL RESPONSIBILITY IN THE EMERGING DIGITAL MEDIA WORKPLACE**

Shailesh Kumar Pandey\* & Ansh Parashar♦

**ABSTRACT**

*In the era of digitalisation, the potential of commercial opportunities within social media through influence and social media marketing has grown multi-folded. Due to a lucrative profitability through social media influencing, millions of children are constantly being forced to create social media content by singing, dancing, acting, and even doing abusive acts to seek viewership and engagements to entertain the audience and gain money. The emergence of child influencers in the digital media landscape has introduced complex ethical and legal challenges as regulators and policymakers work to outline essential safeguards that protect children's rights. Henceforth, the present study investigates the intersection of child rights and ethical parenting within the context of the digital media workplace, like YouTube, Instagram, Facebook, etc. By analysing existing legal frameworks and literature, this research aims to analyse the regulatory framework of Kidfluencers and to suggest appropriate legislative*

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\* The author is Assistant Professor of Law and PhD Scholar at Hidayatullah National Law University, Nava Raipur. He can be reached at [shailesh.227@hnlu.ac.in](mailto:shailesh.227@hnlu.ac.in)

♦ The author is a III Year, B. A. LLB. (Hons.) student at Hidayatullah National Law University, Nava Raipur. He can be reached at [ansh.232892@hnlu.ac.in](mailto:ansh.232892@hnlu.ac.in)

*amendments and strategies to mitigate the economic exploitation of children. The study will attempt to strike an equilibrium between commercial opportunities and child rights through upholding the rights and welfare of their children in this ever-evolving social media-influencing market.*

**Keywords:** *Kidfluencers, Parental Responsibility, Child Rights, Digital Media Workplace, Economic Exploitation*

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## **Introduction to Kidfluencers & the Entanglement of Social Media Marketing**

### **Kidfluencers**

Child Influencers or Kidfluencers remain to be one of the most surprising and relevant phenomena of the 21<sup>st</sup> century. Kidfluencers can be regarded as children who create content, mostly for the purpose of generating an *income* out of it. The term captures the unique niche of children in the creator economy, highlighting their involvement in fostering parasocial relationships, crafting personal brands, and pursuing monetization.<sup>1</sup> However, the crux of the issue revolves around the “income” part – as it is not always the child who remains to be the beneficiary out of the income generated from the content. Often, these kids are subjected to exploitation by their parents in the process of content creation and profit making. In most of the cases, the child creators do

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<sup>1</sup> Tom Divon, Taylor Annabell & Catalina Goanta, Children as Concealed Commodities: Ethnographic Nuances and Legal Implications of Kidfluencers’ Monetisation on TikTok, 2025 NEW MEDIA & SOC’Y 1.

not earn any part of the money that is generated by their content.<sup>2</sup> Kidfluencers have no actual rights whatsoever over the money that they earn which poses a significant case of exploitation of such kids, further posing a lasting-effect over their legal rights, as well, causing psychological issues.<sup>3</sup>

A corollary to the plight of kidfluencers can be the age-old struggles of child actors. One such child actor, Jackie Coogan, had brought a change in the form of Coogan Regulations, which direly needs to be adopted in the case of kidfluencers.<sup>4</sup> The regulations which had been enacted in response to the exploitation of the child actor, mandates a portion of the income earned to be set aside in form of a trust for the benefit and well-being of the child.<sup>5</sup>

### **The Trap of Social Media Marketing: Sharp Business Tactics**

The inception of child influencers took place around 2013-2015.<sup>6</sup> It all began when female influencers started sharing their baby bumps and tracking their pregnancy live for content creation, which eventually led to children becoming a pivotal figure of their content.<sup>7</sup> Some influencer agencies even offer educational courses and training for parents of child

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Dana D. Joss, Likes, Camera, Action: Safeguarding "Child Influencers" through Expanded Coogan Protections and Increased Regulation of Social Media, 15 *Wm. & Mary Bus. L. Rev.* 441, 441 (2024).

<sup>5</sup> *Ibid.*

<sup>6</sup> Crystal Abidin, Child Influencers, 94 *AQ: AUSTL. Q.* 3 (2023).

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

influencers, under which topics like business registration, tax management, and content creation are tutored.<sup>8</sup> Not merely children but teenagers with large social media followings are becoming powerful figures in digital advertising.<sup>9</sup> They are often enlisted as “brand ambassadors” to promote products and services through their personal social media accounts.<sup>10</sup> Brands employ subtle marketing strategies, embedding promotional messages in social media feeds to connect with young audiences.<sup>11</sup> Their goal is to foster trust and engagement through authentic and personalized content.<sup>12</sup>

Social media marketing is a comparatively new dimension of digital marketing that attracts a lot of social media influences to do promotional work through their contents and personalised accounts to reach end users who are mostly youth. This emerging form of digital marketing has made digital content creation a profitable *ad-lucrative* business model where the parents are inducing their children to gain more and more followers for brand collaborations and paid promotions to ultimately gain profit from that celebrity status of social media. However, this glamour has a very impactful negative side to it.<sup>13</sup> Taking the case of *Myka Stauffer*, a once-

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<sup>8</sup> *Ibid.*

<sup>9</sup> John Lorinc, *Your Kids, The Influencers*, 14 CORP. KNIGHTS 50 (2015).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

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

<sup>13</sup> Nila McGinnis, “They’re Just Playing”: Why Child Social Media Stars Need Enhanced Coogan Protections to Save Them from Their Parents, 87 MO. L. REV. 247 (2022).

popular social media influencer with nearly one million followers, adopted an autistic boy, Huxley, from China. They monetized numerous posts and videos featuring him on social media.<sup>14</sup> This situation underscores the lack of legal safeguards for child influencers, highlighting the necessity for improved Coogan laws against exploitation.<sup>15</sup> Another instance can be of *Alex Lee*, a 16-year-old from Texas, who achieved overnight fame when a photo of him bagging groceries at Target went viral, gaining immense traction on social media.<sup>16</sup> This led to his transformation from an ordinary teen to a prominent social media influencer with a substantial online following.<sup>17</sup>

## **Facets of Kidfluencers: Psychological Factors and Exploitation**

### **Exploitation of Kidfluencers**

The concept of “kidfluencers” highlights the unique role that children play within the creator economy, focusing on their contributions to cultivating parasocial relationships, establishing personal brands, and engaging in monetization strategies. A recent study examined 215 videos from 23 kidfluencers across Israel, New Zealand, and the United States, investigating the ways in which children are portrayed, utilized, and commodified in their parents’ TikTok

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<sup>14</sup> *Ibid.*

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

<sup>16</sup> *Supra* note-6.

<sup>17</sup> *Ibid.*

content.<sup>18</sup> Key findings revealed that children often serve as props in branded content, enhancing commercial narratives and adding value to influencer brands while also transitioning into active participants in the monetization process.<sup>19</sup> The research further emphasizes the complexities of “transactional childhood,” showcasing the uncertainties surrounding content monetization and illustrating the tensions that arise when childhood experiences become commercialized.<sup>20</sup>

Child influencers on platforms like YouTube and TikTok create diverse content that includes video games, storytelling, product reviews, unboxing, challenges, and tutorials. While YouTube often features in-depth explorations of content, TikTok emphasizes quick video selfies, choreography, and general entertainment. As these children engage with digital marketing tactics, they become especially vulnerable due to their limited understanding of advertising practices.<sup>21</sup>

A central issue for child influencers is authenticity management. Influencers must create digital personas that resonate with their audience as genuine.<sup>22</sup> This authenticity

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<sup>18</sup> *Supra* note-1.

<sup>19</sup> *Ibid.*

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

<sup>21</sup> Elisabeth Van den Abeele, Liselot Hudders & Ini Vanwesenbeeck, *Managing Authenticity in a Kidfluencers' World: A Qualitative Study with Kidfluencers and Their Parents*, 2024 *NEW MEDIA & SOC'Y* 1.

<sup>22</sup> Balaban, D., & Szabolics, J. A Proposed Model of Self-Perceived Authenticity of Social Media Influencers. *Media and Communication*, 10, 235–46 (2022).

labour is shaped by the expectations of parents, followers, and commercial partners, creating a complex landscape that these young creators must navigate.<sup>23</sup>

Parental oversight plays a critical role in shaping the online presence of child influencers. Parents largely determine which content is shared and how their children are portrayed, which often leads to a parental authenticity paradox.<sup>24</sup> In this scenario, the online persona crafted for the child can significantly diverge from their true identity.<sup>25</sup>

Control by parents is a common theme, as they predominantly manage their child's influencer profiles – handling collaborations, content creation, posting, and audience interaction. Many child influencers opt for private accounts, allowing them to express themselves more genuinely while limiting public exposure. This leads to a significant issue: the authenticity paradox, where children's desires for expression often conflict with their parents' goals of curating a refined and appealing online presence.<sup>26</sup>

Mothers frequently take on the responsibility of managing their child's influencer profile, embodying a “mumpreneur”

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<sup>23</sup> *Ibid.*

<sup>24</sup> Jorge, A., Marôpo, L., & Neto, F. “When You Realise Your Dad Is Cristiano Ronaldo”: Celebrity Sharenting and Children's Digital Identities. *Information, Communication & Society*, 25: 516–35 (2022a).

<sup>25</sup> *Ibid.*

<sup>26</sup> Van Driel, L., and Dumitrica, D. "Selling Brands While Staying 'Authentic': The Professionalization of Instagram Influencers." *Convergence: The International Journal of Research into New Media Technologies*, 27, no. 1 (2020): 66–84.

identity that merges professional ambitions with parenting duties.<sup>27</sup> This blending of roles can complicate the influencer dynamic, as parents navigate their ambitions while safeguarding their children's interests.

In the face of a privacy dilemma, parents strive to balance their child's right to privacy with the potential benefits of sharing openly online.<sup>28</sup> Many develop anti-sharenting strategies to protect their children's privacy and well-being in the digital space.<sup>29</sup> It becomes essential for parents to foster a greater awareness of these dynamics and develop interventions and tools that help them navigate the legal and ethical challenges of raising a child influencer, ensuring the protection of their children's privacy in an increasingly complex digital landscape.

Additionally, the study introduces the notion of "aspirational child-ification," focusing on the commodification of religious, cultural, and traditional values propagated through kidfluencer content.<sup>30</sup> This form of aspirational labour is leveraged through TikTok's engaging trends and atmosphere, allowing kidfluencers to attract attention, build playful and emotional connections, and ultimately strengthen their brand identity.

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<sup>27</sup> Archer, C. "How Influencer 'Mumpreneur' Bloggers and 'Everyday' Mums Frame Presenting Their Children Online." *Media International Australia*, 170, no. 1 (2019a): 47–56.

<sup>28</sup> Steinberg, S. "Sharenting: Children's Privacy in the Age of Social Media." *Emory Law Journal*, 66 (2016): 839–84.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Supra* note-25.

## **The Curious Case of TikTok**

In the arena of branded content, children often serve as props that enhance commercial storytelling, creating added value for influencer brands.<sup>31</sup> This dynamic transform child from mere background figures to active participants who directly interact with branded products.<sup>32</sup> Their engagement shifts the focus from just being props to becoming significant vehicles for monetization, indicating a deeper involvement in the commercial world.<sup>33</sup>

The concept of a transactional childhood raises important questions about the monetization of children's experiences in media.<sup>34</sup> There exists a notable ambiguity regarding the extent to which this content is monetized, which leads to tensions and uncertainties surrounding the nature of exchange in these scenarios.<sup>35</sup> This ambiguity also encompasses the commercialization of childhood itself, as content aimed at younger audiences often blurs the lines between genuine interaction and branded strategy.<sup>36</sup>

Aspirational labour within kidfluencer content commodifies religious, cultural, and traditional values, presenting these as

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<sup>31</sup> Abidin, C. Child Influencers: How Children Have Become Entangled with Social Media Commerce. *Austl. Q.* 94, no. 3, 3–13 (2023).

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

<sup>33</sup> *Ibid.*

<sup>34</sup> Altheide, David L. & Schneider, Cynthia J. *Qualitative Media Analysis*. Thousand Oaks, CA: SAGE, 2012.

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

<sup>36</sup> *Ibid.*

aspirational markers for children and their audiences.<sup>37</sup> This process utilizes the specific language and cultural ethos of platforms like TikTok to capture attention and bolster brand identity through playful interactions and emotional resonance, creating both authenticity and aspiration.<sup>38</sup>

*Regulative parenthood* refers to the strategies parents employ to govern their children's involvement in influencer activities on social media platforms, ensuring adherence to platform guidelines while navigating regulatory gaps. This responsibility is crucial as parents oversee the creation of accounts, the visibility of their children, and the monetization features available on platforms like TikTok.<sup>39</sup>

TikTok imposes strict age restrictions, mandating that users be at least 13 years old. Moreover, content from users aged 13 to 15 cannot appear on the For You Page, which limits the reach of kidfluencer content.<sup>40</sup> Additionally, users under 18 are barred from accessing certain monetization features,

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<sup>37</sup> Fishbein, Rachel. "Growing Up Viral: 'Kidfluencers' as the New Face of Child Labor and the Need for Protective Legislation in the United Kingdom." *The George Washington International Law Review*, 54, no. 1 (2022): 127-156.

<sup>38</sup> *Ibid.*

<sup>39</sup> Buckingham, David. "Kids for Sale? Childhood and Consumer Culture." In *Thatcher's Grandchildren? Politics and Childhood in the Twenty-First Century*, edited by Jenny Pilcher and Sue Wagg, 242-257. London: Palgrave Macmillan, 2014.

<sup>40</sup> TikTok. "Community Guidelines." Last modified 2025. Available at: <https://www.tiktok.com/community-guidelines/en/>.

although the platform's policies are vague regarding the monetization of content featuring children.<sup>41</sup>

Parents play an essential role in managing their children's accounts to adhere to these age regulations. As parents navigate TikTok's regulatory environment, they encounter systemic challenges that underline the need for platforms to assess risks to children's well-being arising from commodification and monetization practices. This regulation underscores the multifaceted approaches parents take to secure their children's visibility and identity on social media while conforming to existing regulatory frameworks.

### **Psycho-Social Harm Posed on Kidfluencers**

Kidfluencers face significant psychological and reputational risks. Their privacy is compromised as personal details about their home lives, affiliations, and locations are publicly accessible.<sup>42</sup> They often encounter online hate, including trolling and negative comments, which can adversely affect their mental well-being. Additionally, many are too young to provide informed consent regarding their online presence and may not fully grasp the repercussions.<sup>43</sup> This exposure can lead to feelings of embarrassment, anxiety, and dissatisfaction with parental decisions. Furthermore, the content shared online can harm their reputation, potentially

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

<sup>42</sup> Rachel Fishbein, *Growing up Viral: "Kidfluencers" as the New Face of Child Labor and the Need for Protective Legislation in the United Kingdom*, 54 GEO. WASH. INT'L L. REV. 127 (2022).

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

jeopardizing future career prospects and employment opportunities. Another major factor that attributes a negative impact on the children is excessive *sharenting*.<sup>44</sup> Sharenting is a practice where the practice of parents sharing information about their children on social networks without their consent, which encroaches on the child's privacy and informational self-determination.<sup>45</sup>

This highlights the need for urgent normative actions to eliminate the dangers of ill effects of kidfluencers and to ensure their protection in the rapidly growing influencer industry.

### **The Need for a Solution and a Possible Roadmap**

One solution can be the establishment of Oversight Boards akin to Meta's Oversight Board. This independent board reviews controversial decisions regarding content removal and enforces adherence to Meta's policies, including a stringent stance against child exploitation and endangerment.<sup>46</sup>

While social media companies currently have measures to prevent physical and sexual abuse, it would be a logical progression to extend these protections to address financial

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<sup>44</sup> Maja Colakovic & Marko Bevanda, Legal Protection of Children in the Digital Environment: Children Influencers (Kidfluencers), 2023 COLLECTION PAPERS FROM CONF. ORG. ON OCCASION DAY FAC. L. 205 (2023).

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

<sup>46</sup> Andrea Y. Lim, Child's Play... or Is It? Why Child Influencers Need Financial Protection Laws, 20 Ohio St. Tech. L. J. 405, 420-427 (2024).

exploitation of child influencers.<sup>47</sup> A combined approach that leverages both state legislation and self-regulatory efforts by social media platforms could effectively shield these young creators from potential exploitation.<sup>48</sup>

It is vital to ensure that child influencers receive appropriate compensation for their contributions while safeguarding them against financial abuse by their guardians. A holistic framework would not only elevate standards of accountability within social media but also foster a safer and more equitable environment for child influencers.

### **Legislative framework for regulating kid-fluencing in India Rule 2C (2) of the Child Labour (Prohibition and Regulation) Amendment Rules, 2017**

Under Rule 2C (2)<sup>49</sup>, the scope of other activities contained in Section 3 of the Child Labour Prohibition Act<sup>50</sup> has been elaborated. Thereafter, any activity, including activities of an audiovisual nature, will not constitute child labour, except for circus or street performance for monetary gains. The restrictive interpretation given to this rule will overrule the possibility of child influencers' governance under present labour welfare legislation. Thereafter, a liberal interpretation needs to be given to activities contained in the above rules so

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

<sup>48</sup> *Ibid.*

<sup>49</sup> Child Labour (Prohibition and Regulation) Amendment Rules, 2017, Gazette of India, pt. II, Rule 2C(2) (June 2, 2017).

<sup>50</sup> Child Labour (Prohibition and Regulation) Act, No. 61 of 1986, S.3 India Code (1986).

that unregulated and unethical practices inherent in child influencing shall not go unpunished.

### **Potential Legislative Safeguards**

India does not have any direct legislation for regulating child influencers under labour law, but certain safeguards available under the rules contained in the *Child Labour Prevention and Regulation Amendment Rules 2017*<sup>51</sup> do cover aspects and dimensions relating to child influencers.

**Economic Benefits and Family Enterprise** : The child influencers are working on social media platforms, and the economic benefit and monetary gain are being enjoyed by the entire family, making it look like a family enterprise where the social media celebrity status of the children is being economically employed and utilized by the parents or the guardians who, on behalf of the child, manage the social media presence of the child and contract with social media marketing units to produce content for specific brands and for paid collaborations, and ultimately the task is executed by the child influencers.

**Relevance of Rule 2** : Rule 2 of the *Child Labour Prevention and Regulation Amendment Rules 2017* becomes particularly relevant for regulating the conduct of parents of these child influencers.<sup>52</sup> As per Rule 2<sup>53</sup>, children are allowed to work alongside their parents in a parental enterprise or business to

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

<sup>52</sup> *Id* at Rule 2(2)

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

help their family, with certain restrictions contained under the rule, and Section 3 includes that to support the family, such child shall not work in any hazardous occupation as identified by *the Child Labour Prohibition Act 1986*. Although the schedules of the Act do not specifically mention child influencers, it can be constructively interpreted to extend the ambit and protection of the Act to the child influencers, preventing them from working in any form of occupation under a contract with third parties to generate revenue from child influencing in contravention of provisions contained in the Act.<sup>54</sup>

## **Parental Obligations and Legislative Protections under Rule 2**

Child influencers, if covered under rule 2, will not be allowed to undertake any social media-related activity between 7 PM and 8 AM, as the same has been specifically restricted under the rules, and the child influencers shall not create, produce, edit, or share content during school timings. Another legislative safeguard has been provided to ensure that the right to education is properly availed by the child, and no such activity that hampers children's education or participation in extracurricular activities is permissible in the form of child influencing.<sup>55</sup> Thereafter, it is not just the moral obligation of the parents to keep the interest of the child as a priority, but also a legislative protection extended by the

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<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

Rules of 2017. Lastly, the rule contains limitations regarding the engagement of children in various activities, including social media influencing, and it stipulates that children shall not be engaged continuously, and the ceiling limit for influencers is that they shall not devote more than three hours daily for such activities.<sup>56</sup>

**Rule 2B and Family Economic Activities:** Part B of Rule 2B stipulates that a child can assist his family in any commercial engagement or economic occupation, provided that such engagement shall not prevent the advancement, education, and development of the child. This part can also be construed in such a way as to include kid influencing as a family economic activity.<sup>57</sup>

**Rule 2C and Child Artists:** As per Rule 2C, a child is permitted to work as an artist for not more than five hours and not more than three hours without taking rest.<sup>58</sup> The procedure for the engagement of child artists is technical, where a specific undertaking needs to be submitted to the District Magistrate before commencing the activity of the production of content or commercial ads, and all the interests and safeguards of the child shall be protected by the individuals who engage child artists, and the undertaking shall be valid for six months.<sup>59</sup> The rules stipulate that schooling shall be regular for child

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<sup>56</sup> *Ibid.*

<sup>57</sup> *Id* at Part B of Rule B.

<sup>58</sup> *Id* at Rule 2C

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

artists, and it shall not be compromised for the interest of the production management team.<sup>60</sup>

### **Remuneration and Savings for Child Artists**

To ensure that the child artist gets sufficient remuneration for the work done in the future, it has been stipulated in the rules that at least 20% of the total income that is being generated by the child artist shall be directly deposited into any nationalized bank's FD account and shall only be credited in the child's savings account after they attain majority.<sup>61</sup> This rule has been brought in to ensure that the earnings of the child artist shall be proportionately given to him, and the remaining 80% of the earnings of the child artist can be utilized for his development and overall welfare activities, including maintenance, etc. Lastly, this rule clearly prohibits the engagement of a child against his will or consent.

### **Need for Regulation of Child Influencers**

The legislative safeguards for protecting the interests of child artists need to be appropriately extended to the child influencers so that their conditions can be improved, and they shall not be subjected to harassment and exploitation at the hands of their parents or social media managers. India still lacks appropriate regulation that could formally extend the protection contained in the 2017 Amendment to kid influencers. Due to the lack of recognition of child-

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<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

influencing-oriented issues in India, most of the child-influence-related activities are highly unregulated and are posing serious threats to the development and welfare of the child engaged in hours of hard work for the creation of content and are ultimately pressurized for seeking more and more social media engagement and reach to serve the interest of the brand and the conditions of the contract of paid collaborations.

### **Case Law References**

#### ***Raj Rani v. Prem Adib, (1949)***

In the landmark judgement of *Raj Rani v. Prem Adib*, the honourable court stated that although parents of the child can enter into a contract on behalf of a minor child if in any case the contract or any terms contained therein can harm or affect the interest of the minor, the minor shall not be liable or bound and has the right to set aside the contract.<sup>62</sup> This judgement, which was initially relevant for child artists, is now becoming equally important for child influencers who are being subjected to several brand collaborations and contracts for paid promotions because as a part of digital marketing, these big brands are exploiting minor child influencers and are forcing them to deliver more engagement and reach over their social media posts as a part of brand engagement, which is eventually frustrating the child influencers and is giving undue pressure and harassment;

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<sup>62</sup> *Raj Rani v. Prem Adib, (1949)* 51 Bom. L.R. 256.

thereafter, by going with the principle laid down in the judgement, a child influencer can refrain from performing the stipulations of a brand collaboration contract under a social media promotion contract.

In the landmark case of *Bapu Bawaria*<sup>63</sup> instituted criminal proceedings against the parents of a seven-year-old child where the child was involved in selling minor articles. However, it listed reasons such as the inability and poverty of the parents to maintain the child. Thereafter, to a limited extent, a child can help in a family enterprise provided that the family is responsible for ensuring education, healthcare, and other facilities for the child.

In the landmark judgment of *Sahitya Academy*<sup>64</sup>, it was held that if any engagement of a child leads to contravention of the provision contained in Rule 2B<sup>65</sup>, it shall be void. Hence, in the case of child influencers collaborating with third parties for brand engagement and paid promotions, if in any manner it contravenes the provisions contained in the four rules, the contract can be repudiated and shall remain unenforceable against the child influencers.

## **Regulatory Accountability of Social Media Platforms in Kidfluencing**

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<sup>63</sup> *Bapu Bawaria & Ors. v. District Collector*, (2023) 1 K.L.T. 123 (Ker.).

<sup>64</sup> *Vivek Hebbale v. Sahitya Akademi & Anr.*, W.P. No. 202397 of 2022, 2023 LiveLaw (Kar) 389.

<sup>65</sup> Child Labour (Prohibition and Regulation) Amendment Rules, 2017, Rule 2B, Gazette of India, pt. II, sec. 3(i) (June 2, 2017).

The social media platforms enjoy immunity in the name of intermediaries, having no control over the sharing of content by third parties using their platforms, and this is becoming a major challenge for regulating the liability of these large social media intermediaries for effective regulation of child influencers' presence and parental code of conduct compliance for these influencers.<sup>66</sup> The fundamental idea behind extending intermediary immunity was to promote technological innovations to facilitate free speech and open communication of ideas and information amongst the masses; however, certain grey areas have recently developed in the domain of social media regulations that shall be addressed by necessary regulatory changes to address the situation of child influencers.<sup>67</sup>

In India, *Section 79 of the Information Technology Act 2000* provides protection to the intermediaries from liability in case of third-party usage. That means that even if a child is being exploited in the name of social media influence under those platforms, they cannot be held legally liable, and it is the significant reason why the majority of the social media platforms are ignorant about the regulation of child influencers.<sup>68</sup>

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<sup>66</sup> Dana D. Joss, Likes, Camera, Action: Safeguarding "Child Influencers" through Expanded Coogan Protections and Increased Regulation of Social Media, 15 Wm. & Mary Bus. L. Rev. 441, 441 (2024).

<sup>67</sup> *Ibid.*

<sup>68</sup> Information Technology Act, No. 21 of 2000, S 79, India Code (2000).

A similar kind of protection has been granted by *Section 230 of the Telecommunications Act 1996*<sup>69</sup>, which has extended the immunity to online platforms for content that is being posted by third-party users, provided that the platforms are not having any control over the flow of information.

The intermediary liability needs to be restructured in such a way that the intermediaries shall be held accountable for the online content produced by child influencers if the rights of the child are being jeopardised for production, circulation, or maintenance of children's online presence for monetization purposes.

## **Conclusion**

After an in-depth analysis of the legal safeguards available for regulating and protecting the interest of the child influencer in India, it can be stated that presently India lacks effective legal safeguards for directly extending the provisions contained in *the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986* to the child influencers, and the absence of appropriate guidelines for governing the presence of children as influencers on social media platforms is a major problem. Thereafter, large social media intermediaries who are acting as platforms for posting content and hosting third-party-produced audio-visual materials must be brought within the ambit of labour laws so that they shall be held liable for complying with essential procedural safeguards and

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<sup>69</sup> Telecommunications Act of 1996, 47 U.S.C. § 230 (U.S.A.) (1996).

rules contained in *The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986*, and *the Child Labour Amendment Rules 2017* and other relevant legal provisions. These giant social media intermediaries like *Meta* and *Google Inc.* need to be compelled to establish effective oversight committees to regulate content flowing on their social media platforms. These Platforms shall also ensure effective compliance mechanisms for the rules contained in various child labour prevention and protection legislation of the country and *the Information Technology Act 2000*<sup>70</sup>. If an intermediary fails to comply with the aforementioned rules, there shall be an amendment in the provisions of *Section 79*<sup>71</sup> to revoke the immunity available to social media intermediaries. In today's era, with the mushrooming of child influencers in India, it is inherently important to regulate the conduct of parents who are utilising their child's online presence for monetary gains, and appropriate penalties need to be introduced if parents contravene the provisions and legislative safeguards contained in different legislations. The safeguard available under Rule 2C to 'child artists' shall be appropriately extended to child influencers, and protection shall be granted against inhuman behaviour and over-restrictive terms of service, including harassment at the hands of brand advertisement agencies so that they cannot harass and exploit child influencers against their interest.

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<sup>70</sup> Information Technology Act, No. 21 of 2000, India Code (2000).

<sup>71</sup> Information Technology Act, No. 21 of 2000, India Code S. 79 (2000).

## **DARK PATTERNS AND DIGITAL MANIPULATION – HOW ONLINE PLATFORMS EXPLOIT CHILDREN IN CYBERSPACES**

*Sombuddha Paul and Vanshika Bansal\**

### **ABSTRACT**

*This paper discusses the emerging issue of dark patterns online, specifically how they affect children's content consumption and social media interaction. Dark patterns refer to deceptive design methods that take advantage of psychological weak points, most likely resulting in excessive screen usage, impulsive buying, and viewing of objectionable content for children. The research discusses the methods through which social media uses features such as infinite scrolling, auto-play, and algorithm-based content to prolong use.*

*It is one of the most growing concerns which is prevalent in both the spheres of technology and personal data protection, especially when it comes to the online data monitoring for children. The usage of deceptive tactics was first recorded through e-commerce platforms, when they were using specific patterns to manipulate consumer purchase choices. The Indian Government in association with the CCPA, CPA, DPDPA, and ASCI, identified 13 such patterns, such are now found being excessively used throughout all applications in the surface of the internet. This article*

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\* The authors are law students at School of Law, BML Munjal University. They can be reached at [sombuddha.paul.23bbl@bmu.edu.in](mailto:sombuddha.paul.23bbl@bmu.edu.in) & [vanshika.bansal.23bbl@bmu.edu.in](mailto:vanshika.bansal.23bbl@bmu.edu.in)

*focuses on two such areas – gaming industry and social media networks, which use such patterns, and how it ultimately affects the children largely. With growing cases of internet addiction, it has been found that children, are the new victims of this internet addiction, which imbalances the neurodevelopment of several parts of the brain which are responsible for cognitive thinking abilities. Such tendencies end up being worse, when exposed for a large period of time, in worst cases leading to increased mental health issues and rapid rise of social isolation amongst children.*

*Despite measures like the Consumer Protection Act (2019) and the Digital Personal Data Protection Act (2023), enforcement is still weak. This article emphasizes the need for stronger oversight, ethical design practices, and greater awareness to prevent the unintentional exploitation of children and parents in the digital space. It particularly focuses on safeguarding child development while promoting sustainable digital regulations*

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## **Introduction**

Dark patterns and manipulation online are a quiet but growing issue in the digital landscape, but they somehow always fall short of the spotlight they deserve. Unlike other forms of cybersecurity threats, which include hacking or data loss, dark design patterns work quietly in the background, influencing people's behaviour without them even realizing it. Children are particularly vulnerable because they lack the

digital literacy necessary to realize that they are being manipulated.

As kids play for hours on Fortnite and Roblox, they are flooded with loot boxes, fake deadlines, and bottomless scrolling, all designed to keep them on the hook and spending money. The \$520 million 2022 Fortnite fine demonstrated the speed with which corporations can take advantage of child players with deceptive in-game transactions. Social media worsens the problem by employing push notifications and algorithmic suggestions to keep children scrolling endlessly, frequently leading to addiction, stress, and diminished attention spans.

### **Defining Dark Patterns and Digital Manipulation**

Dark patterns are misleading design techniques in UI/UX that trick users into performing actions that they never initially wanted or meant to do. The core idea behind dark patterns is to exploit cognitive biases, making it difficult for users to opt out, cancel subscriptions, or make informed choices. These techniques often trick users into taking actions they might not have intended, such as making purchases or sharing personal information. This term was first coined by Dr. Harry Brignull in 2010<sup>1</sup>. Some common examples of dark patterns used for children are<sup>2</sup> –

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<sup>1</sup>Harry Brignull, Dark Patterns (2010), <https://hdl.handle.net/1721.1/151423>.

<sup>2</sup> Guidelines for prevention and regulation of Dark Patterns, Central Consumer Protection Authority, <https://consumeraffairs.nic.in/sites/default/files/file->

1. *'False urgency'* produces an artificial scarcity or time urgency, compelling users to make rash choices. For children, it lies in the games like Roblox, Fortnite and so on, where limited time skins or loot boxes urge them to purchase hastily. That manipulates the children's feeling, resulting in wasteful expenditure and screen dependence, which poses potential consumer protection issues.
2. *'Confirm-shaming'* shames users into making decisions that they would not make otherwise. It is usually found in pop ups where saying no to an offer is presented negatively, and guilt trip the user. For kids, it is found in game apps and websites with statements such as *"Only losers play for free!"* or *"Don't you want to be smarter?"* This manipulates the immature minds of children, which leads them to make impulsive decisions and get stuck in the dark pattern loop.
3. *'Subscription Trap'*, it makes hard for a user to cancel the subscription, but easy to sign up. A child signs up for a game service free trial, but the Cancel button is hard to find, which results in unwanted changes.
4. *'Nagging'* is a strategy where platforms continuously urge the users to do something and breaking their

experience in between. Suppose a kid who is learning from an app keeps getting interrupted by pop-ups such as "Upgrade now for the best experience!", making them unnecessarily interact with the dark patterns.

Digital manipulation refers to the broader strategy of using technology, AI and algorithmic biases to influence, deceive or control user behaviour for profit or power. Some of the noticeable patterns for digital manipulation are as follows-

1. ***Algorithmic Manipulation*** - Social media platforms promoting harmful and addictive contents. For example- YouTube Kids keep on auto recommending the content, which keep them hooked for hours.
2. ***Psychological Persuasion*** - Using AI driven advertisements and notifications to trigger dopamine responses. Infinite scrolling is an example for the same and makes children addicted to screens.
3. ***Data Exploitation*** - Platforms analyse personal data to predict and manipulate purchasing behaviour. Sites, apps, internet secretly tracks children's behaviour to target them with personalised ads, influencing purchases.
4. ***Exploiting Vulnerabilities*** - Targeting children

or psychologically vulnerable users. For example  
- Some games use gambling like loot boxes, pushing kids to spend money impulsively.

Dark patterns are a specific type of digital manipulation founded on UI/UX design tricks, but digital manipulation is a more comprehensive class that incorporates algorithmic and AI-based methods used to influence user behaviour.

### **Dark Patterns in Gaming: Exploiting Children Through Manipulative Design**

The identification of dark patterns necessitates a high degree of vigilance, particularly in the case of children, who are inherently more vulnerable due to their ongoing cognitive development. This susceptibility often leads to heightened emotional responsiveness, making them prime targets for deceptive online practices. The absence of comprehensive digital literacy further exacerbates this issue, as children may lack the awareness and understanding necessary to critically assess and consent to the terms and conditions they encounter.

A primary motivation behind the implementation of dark patterns in digital applications is the maximization of user engagement. The gaming industry, in particular, has witnessed a surge in popularity among children, who frequently turn to digital entertainment during their leisure time. To optimize user experience and interface, many applications increasingly incorporate dark patterns and

digital manipulation, strategically designed to attract and retain the highest possible number of users.

During adolescence, children undergo significant development of their prefrontal cortex, a region of the brain responsible for cognitive reasoning and sound decision-making<sup>3</sup>. However, this crucial developmental process can be disrupted due to excessive exposure to gaming and the constant pursuit of social media validation. Many gaming applications strategically employ dark patterns to enhance user engagement by encouraging prolonged interaction. These manipulative design tactics not only increase the number of active users but also make it significantly harder for individuals to disengage from the platform. Consequently, children may end up spending excessive time on such applications, heightening the risk of gaming addiction. This overexposure can severely impact a child's cognitive abilities<sup>4</sup>, impairing their decision-making skills, increasing hyperactivity, and diminishing their ability to

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<sup>3</sup> Casey, B.J., Giedd, J.N. and Thomas, K.M. (2000) 'Structural and functional brain development and its relation to cognitive development', *Biological Psychology*, 54(1-3), p. 244.

<sup>4</sup> Shuttleworth, Frank K. "The Physical and Mental Growth of Girls and Boys Age Six to Nineteen in Relation to Age at Maximum Growth." *Monographs of the Society for Research in Child Development*, vol. 4, no. 3, 1939, pp. i-291. *JSTOR*, <https://doi.org/10.2307/1165457>. Accessed 8 Mar. 2025.

concentrate. Such behavioural changes pose long-term risks to their mental well-being and academic performance<sup>5</sup>.

Dark Patterns are used in the way of 'Loot Boxes' which often have a gambling -like mechanics. 'Loot boxes'<sup>6</sup> Mimic slot machines, offering randomized rewards to encourage a repeated pattern of spending. Children and adolescent do not know the odds of winning, which leads to impulse spending patterns, the essence 'near-miss'<sup>7</sup> Visuals and tactics, tricks the brain into trying again. While at the surface it seems normal harmless it encourages gambling-like behaviour in minors, while creating a pattern of financial exploitation, which ultimately maybe their family savings<sup>8</sup>. Children have also been spending money to progress faster. Fast graphics and a

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<sup>5</sup> Bader Chaarani et al., *Association of Video Gaming with Cognitive Performance Among Children*, 5 JAMA Net. Open e2235721 (2022), <https://doi.org/10.1001/jamanetworkopen.2022.35721>.

<sup>6</sup> A loot box is a digital product in video games that provides random rewards, including skins, weapons, or power-ups. They are either awarded to players as rewards or bought, usually with real money without knowing what they will get. Loot boxes are an issue because they simulate gambling mechanics, taking advantage of players' psychology using bright colours, sounds, and "just one more try" strategies. This makes children especially susceptible, raising issues of addiction, overspending, and manipulation. Loot boxes have been banned in some nations, deeming them as illegal gambling operations.

<sup>7</sup> The near-miss effect in loot boxes entices children to believe they're 'almost winning' something exotic and thus will keep playing. By showing them products they nearly unlocked or having desirable rewards teasingly within reach, games create a false sense of progress. This takes advantage of a child's developing impulse control, making them believe they're one more try away from winning, like the psychological allure of slot machines, to engage in addictive spending behaviour.

<sup>8</sup> Surbhi Kaul, *Boy 'Accidentally' Spends Huge Amount Of Family's Life Savings On A Game; Internet Reacts*, Times Now (Feb. 9, 2025)

sense of achievements makes them want to ‘invest’ and ‘collect’ rewards Games also increase difficulty artificially, making it frustrating for *free players* to compete with players who pay for special items and perks. Much of this purchase ‘*Limited-time offers*’ pressures players into making urgent purchases. Free trials automatically convert into paid subscriptions, making it hard to cancel, to add onto this subscription renewal buttons are hidden deep inside settings.

Dark patterns like *infinite gameplay*<sup>9</sup>, *loot boxes*, and *unpredictable rewards* create *dopamine driven engagement loops*<sup>10</sup> through which children struggle to self-regulate, and play for excessive hours, often neglecting physical social interaction. The conditionality which most games put these kids into by creating an artificial scarcity, triggers the factor of ‘*FOMO*<sup>11</sup>’. Children feel pressured to spend either time or spend on the game to maintain their status in front of their friends. This leads to higher levels of stress and anxiety due to social comparison and whenever they cannot meet such standards, they must deal with emotional distress.

Fast paced games and constantly moving graphics, makes the brain force to monitor multiple things all the time, this forces

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<sup>9</sup> A game design cycle in which ends are not as defined and without any mentioned stopping point, with players desiring to play indefinitely

<sup>10</sup> A cycle of psychology through which rewards such as points or accomplishments release the neurotransmitter dopamine, encouraging repeat use and dependency.

<sup>11</sup> Anxiety caused by the belief that others are experiencing something better or exclusive, often exploited by social media to increase user engagement.

the brain into hyperactivity and makes it hard for the child later to focus on a single task thereafter. The withdrawal symptoms from such games, often have found that children get restless, emotionally unavailable, reduced thinking capacity, slow development of the prefrontal cortex, overstimulation of dopamine and excessive utilisation of the hypothalamus. Children have been observed to be aggressive in their generic behaviour, after being away from such games for a period, and they tricked into thinking that they would find solace by resuming that digital activity<sup>12</sup>.

### **Usage Of Dark Patterns in Social Media and its Impact on Children.**

How often has it happened to you, that you have spent hours scrolling on social media apps and have forgotten about the time spent. This has been one of the most common phenomena that most adults face in recent times. A data revealed around 58.34% of adults having faced *Internet Addiction*<sup>13</sup>, that number is similar for children and adolescent teens as well<sup>14</sup>. Dark patterns are inscribed into social media

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<sup>12</sup> Willoughby T, Adachi PJ, Good M. A longitudinal study of the association between violent video game play and aggression among adolescents. *Dev Psychol.* 2012 Jul;48(4):1044-57. doi: 10.1037/a0026046. Epub 2011 Oct 31. PMID: 22040315.

<sup>13</sup> Ashwini Tadpatrikar et al., *The prevalence and correlates of internet addiction in India as assessed by Young's Internet Addiction Test: A systematic review and meta-analysis*, 46 *Indian Journal of Psychological Medicine*, p.518 (2024).

<sup>14</sup> PTI, 60% children at risk of Digital Addiction: Survey The Hindu (2024), <https://www.thehindu.com/sci-tech/technology/60-children-at-risk-of-digital-addiction->

platforms to increase both the screen time and engagement and content reach. Digital Manipulation, in such cases has an upper hand, due to the usage of Artificial Intelligence (AI) and bypassing tools such as *SEO*<sup>15</sup>. Some of the most noticeable *dark patterns*, which is used in social media, are ‘*Infinite Scrolling*<sup>16</sup>’ which is used in all social media platforms, children due to this constant supply of content, and with the algorithm constantly suggesting content, which is of similar nature, are easily drawn to such apps into hours for mindless scrolling. Apps always ensure that the option of ‘*push notifications*<sup>17</sup>’ is enabled, whenever granting permission for accessing the notification option. Constant alerts, for liked posts, what their friends have shared in their post, create a sense of urgency, to keep up with this virtual world. This compels children to repeatedly check their devices, creating this sense of *FOMO*, which exclusively makes social media breaks difficult for a growing child. This, in recent times, has led to poor concentration patterns in children, reducing academic performance, and sleep disturbances.

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survey/article67989890.ece#:~:text=Photo%20Credit%3A%20REUTERS-,A%20new%20survey%20has%20revealed%20that%20about%2060%25%20of%20children,to%20mitigate%20these%20negative%20effects.  
(accessed on Feb 20, 2025).

<sup>15</sup> Search Engine Optimisation, A digital marketing strategy that optimizes website content to improve its visibility in search engine results, driving more organic traffic.

<sup>16</sup> A design feature that continuously loads new content as users scroll, eliminating natural stopping points and encouraging prolonged engagement.

<sup>17</sup> Pop-up alerts from apps or websites designed to grab attention, often creating urgency and encouraging users to return frequently.

With the application of AI, algorithms are tuned to surface and promote a similar pattern of emotionally charged content to hold the attention span of children longer. In modern times, there have been numerous reports, which suggest that negative emotions have been amplified in children, and in the worst cases, children lacked any kind of social interaction. Features like, *like, comment, share, followers, reach, etc*, always manipulate children into seeking constant digital validation. The social comparison and curated content leave a mark in the mental capacity of a child, which often causes low self-esteem, anxiety, and depression. The most common and harsher threat which exists in the digital media, is '*identity theft*<sup>18</sup>', while impersonating a person in real life, might be held accountable as an offence, it is not the same when done in the digital sphere. Children brains are still in their developing phase, exposure to events of *identity theft exposure*<sup>19</sup> to violence or inappropriate content, makes them prone to impulsive behaviour, which triggers withdrawal syndrome. Dopamine-driven loops condition children to seek constant engagement, fostering the compulsive habit of checking social media in a span of a few hours.

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<sup>18</sup> A form of fraud where someone's personal information is stolen to impersonate them, often for financial gain or malicious intent.

<sup>19</sup> Another fear which might not be penned much, but exists is viewing the social media content, using someone else's identity. In cases where the person is a major, it potentially leaves the threat of exposing, unwanted, adulterated, and age-inappropriate content for children. This leaves them at an unmonitored risk to which there is only little solution.

Children fail to understand the working of the algorithm, and don't understand the manipulative designs or hidden privacy risks<sup>20</sup>. It is least expected that a child would read through the terms and conditions of the apps, when seeking permissions such as access through contacts, notification, running in background etc. Young users feel much more conformed and pressurised to keep up with the virtual trends, making them much easier to influence. Dark patterns hide privacy control features, leave the risk of exposing these children to data tracking, targeted ads, and online predators.

### **How is Dark Pattern and Digital Manipulation Regulated Under Indian Laws**

*The Advertising Standard Council of India (herein referred as ASCI) had first mentioned about the usage of Dark Patterns during their annual report for the year 2022 – 2023<sup>21</sup> and subsequently documented these dark patterns<sup>22</sup>. The Consumer Protection Act (herein referred as CPA), 2019, addressed the practice of unfair trade practices, which can 'manipulate' consumers which can also be children into altering and influencing their e-commerce practices and experiences. The first relevant section happens to be Section 2(47) of the*

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<sup>20</sup> Sylvia Liu et al., *The use of digital technologies to develop young children's language and literacy skills: A systematic review*, 14 Sage Open, p.5 (2024).

<sup>21</sup> 37th annual report, [https://www.ascionline.in/wp-content/uploads/2023/09/ASCI-Annual-Report-2022-2023\\_Webready.pdf](https://www.ascionline.in/wp-content/uploads/2023/09/ASCI-Annual-Report-2022-2023_Webready.pdf), p 27.(last visited Feb 27, 2025).

<sup>22</sup> Dark patterns document, <https://www.ascionline.in/wp-content/uploads/2022/11/dark-patterns.pdf> (last visited Mar 1, 2025).

*Consumer Protection Act (CPA), 2019*<sup>23</sup> – which covers the ambit of unfair trade practices. Later the *Central Consumer Protection Authority (herein referred as CCPA)*, was established under *Section 17(2) & 18 of the CPA*<sup>24</sup>. The ambit of *dark patterns* was covered by the guidelines given the CCPA<sup>25</sup>.

The *IT Rules, 2021*, introduces and governs the user protection available for digital platforms. This ambit covers social-media platforms, gaming and e-commerce websites. *Section 4(4) of The IT Rules, 2021*<sup>26</sup> require social media intermediaries to ensure content moderation mechanisms are transparent, with users informed about automated algorithms. The rules also provide guidelines for curated content to protect children from inappropriate material and mitigate exposure risks.

*The Digital Personal Data Protection Act (herein referred as DPDPA), 2023*<sup>27</sup>, attacks the area of *dark patterns* and aims at creating a fair, transparent, and an accountable user

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<sup>23</sup> Consumer Protection Act, 2019, s. 2(47), s. 17(2), Ministry of Consumer Affairs, Food and Public Distribution, Government of India. Available at: <https://consumeraffairs.nic.in/acts-and-rules/consumer-protection>.

<sup>24</sup> Ibid.

<sup>25</sup> Guidelines for prevention and regulation of Dark Patterns, Central Consumer Protection Authority, Available at: [https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Draft Guidelines for Prevention and Regulation of Dark Patterns 2023.pdf](https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Draft%20Guidelines%20for%20Prevention%20and%20Regulation%20of%20Dark%20Patterns%202023.pdf) (last visited Mar 1, 2025).

<sup>26</sup>The Information Technology (intermediary guidelines and ...), <https://www.meity.gov.in/static/uploads/2024/02/Information-Technology-Intermediary-Guidelines-and-Digital-Media-Ethics-Code-Rules-2021-updated-06.04.2023-.pdf> (last visited Feb 26, 2025).

<sup>27</sup>The Digital Personal Data Protection Act, 2023, Available at: <https://www.meity.gov.in/static/uploads/2024/06/2bf1f0e9f04e6fb4f8fef35e82c42aa5.pdf> (last visited Mar 1, 2025).

experience, while ensuring to follow the norms of its global corporate governance for these apps<sup>28</sup>. The *DPDPA, 2023* mitigates both dark patterns for consumers and speaks about child regulation provisions such as verifiable parental consent before any sort of exchange in data. It also lists penalties which the companies might face if the laws are violated. The Data minimization principles which are laid down in the provision, somewhat safeguard the children from targeted ads, and data extortion.

Lately after this, *CCPA* issued the '*Draft Guidelines for Prevention and Regulation of Dark Patterns, 2023* [*"Draft Guidelines"*]<sup>29</sup>. It recognises the 13 different types of *dark patterns* which are identified by both the *ASCI and CCPA* and frames a guideline for them to set a robust framework for regulating such *dark patterns*. The *ASCI* guidelines for promoting ethical advertising patterns, does speak about content targeting children, which include the advertisement, which is directed towards the child, must be in exclusion of emotional manipulation, deceptive urgency, or unrealistic product claims. Games too have been directed to have announced their endorsements through their commercial

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<sup>28</sup>Lavanya Agarwal, Manupatra Articles, <https://articles.manupatra.com/article-details/Manipulation-Under-The-Click-Unravelling-Dark-Patterns-In-Digital-Consumerism-And-Legal-Countermeasures-In-India> (last visited Feb 28, 2025).

<sup>29</sup> Guidelines for prevention and regulation of Dark Patterns, Central Consumer Protection Authority, Available at: [https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Draft Guidelines for Prevention and Regulation of Dark Patterns 2023.pdf](https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Draft%20Guidelines%20for%20Prevention%20and%20Regulation%20of%20Dark%20Patterns%202023.pdf) (last visited Mar 1, 2025)

intent. If the violation is found or reported to the ASCI, the body can flag it as misleading, unfortunately ASCI is only a governing body and hence, it can only work as an advisor, thus, cannot impose fines or levy a financial penalty on the companies who are found to commit to such tactics<sup>30</sup>.

Some may find that *Protection of Children from Sexual Offences Act, 2012* (herein referred as POCSO) and *Juvenile Justice (Care and Protection of Children) Act, 2015* (herein referred as JJ Act) are excluded in the digital space. It is not true that these two acts just deal with the physical violences which takes place in the territory of the country towards children. While any specific amendments have not been made or implemented to both of these Acts, it can still act as an advisory authority and can be applicable to digital platforms that use and utilise *dark patterns* which manipulate and exploit children. It is possible to add amendments to the sections in *POCSO Act*, related to *online grooming, manipulative content, or exposure to harmful material*, which can be invoked, when came in contact through dark patterns to necessarily exploit and manipulate children. For *JJ act*, it can be interpreted for digital exploitation or can be used against digital manipulation of any sort, to emphasize the digital safety and security and mental well-being of the child.

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<sup>30</sup> Centre issues “guidelines on prevention of misleading advertisements and endorsements for misleading advertisements, 2022,” Press Information Bureau, <https://pib.gov.in/PressReleasePage.aspx?PRID=1832906> (last visited Mar 1, 2025).

## **Evolving Legal Framework: Protecting Children in India**

Deceptive design techniques, commonly known as dark patterns, increase the challenge that people encounter in making informed choices, hence leading to financial losses, increased screen time, and mismanagement of personal data. Children's limited awareness of digital literacy and deceptive practices makes it essential for the law to take responsibility for ensuring their protection in the digital space.

*The CPA of 2019 & CCPA*, with advisory power vetoed to *ASCI*, does identify unfair advertisement practices, but enforcement must be tighter, as most brands argue against the principle of '*intent to mislead*<sup>31</sup>'. It is much subjective in nature and difficult to prove this practice and makes it challenging to move into further legal proceedings<sup>32</sup>.

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<sup>31</sup> The intent to mislead principle describes a business's intentional effort to trick consumers using manipulative strategies. Under dark patterns, this principle identifies how corporations can create interfaces or marketing campaigns that quietly take advantage of user psychology to get what they want, usually without the full knowledge or consent of the user. For instance, a subscription service that makes the 'Cancel Subscription' button difficult to access while presenting 'Continue' in bold and bright colours demonstrates an intention to push users towards unwanted actions. While corporations might say this is user experience design, the underlying purpose of hiding options shows a distinct abuse of dark patterns.

<sup>32</sup> Companies usually justify manipulative design strategies by asserting the absence of ill intent, saying that these features are meant to enhance user experience and not mislead. They might rationalize features such as infinite scrolling, pre-checked checkboxes, or obscured cancellation links as means to facilitate convenience or interaction. But when these strategies are designed to hide user options or trigger psychological levers, the intent to mislead is clear, particularly when vulnerable populations such as children are targeted.

Under *The IT Rules, 2021*, it should require apps and platforms to provide clear disclosures about their data collection patterns and how that is used to prevent targeted ads towards children, with a particular focus on using child-friendly language for better understanding. Social media websites are no exception. The law should be strict to make recommendation algorithms function in an open way, to monitor that these apps don't bamboozle users (*herein 'users' having emphasis on teen users or children*) into doomscrolling and spending more time online than they must.

AI-facilitated manipulation is even more insidious. In the modern era of booming technology, businesses, websites, apps, social networks, games, employ AI to make their sites more addictive. Corporates should provide a simple guideline under their governance, through which AI, does not feed data to any user interacting with a pattern of content or visuals. AI can be fed with necessary information during the time of registering in the app, so that it can curate and display content, suitable for towards the user than the content interaction pattern. AI can be also used to understand and block targeted ads which are provoked towards children. It can also be used towards a healthier *Digital Parental Wellbeing*<sup>33</sup>, and used for monitoring the screen time activities, especially in growing adolescents.

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<sup>33</sup> Digital Parental Wellbeing within the Context of Dark Patterns and Children's Consumption of Content: Digital parental well-being is essential in safeguarding children against manipulative online behaviours. Dark patterns (misleading design practices employed by

*The DPDPA, 2023* is a significant law designed to protect children from targeted ads, data tracking, and exploitation by companies profiting from their online activities. To enhance its effectiveness, measures such as implementing robust parental consent mechanisms, requiring explicit consent for data collection, enforcing stricter penalties like fines or bans on platforms using dark patterns, and promoting educational programs to help children and parents recognize and avoid manipulative practices should be considered.

The *ASCI* acts as an advisory body to the governing bodies. While it lacks executionary powers, it should emphasize on routine inspection into regulation dark patterns. Stakeholders often have risen concerns over overlapping guidelines which lack clarity of understanding. These issues could prevent confusions in front of executionary authorities, while providing loopholes to the corporates to defend their activities. The lack of a clear enforcement system or dedicated

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social media and content platforms) frequently take advantage of children's susceptibility. Infinite scrolling, auto-play, and push notifications trap children for hours, affecting their mental and emotional health. Social media platforms, especially, use algorithmic content that invites compulsive behaviour and subjects' children to age-inappropriate content. To encourage digital well-being, parents need to make use of content filters, turn screen time limits on, and teach children about manipulative online strategies. Platforms also need to implement child-friendly designs, for example, turning auto-play off by default and using cool-down features to deter over-viewing. Promoting open dialogue on healthy digital habits and setting limits can go a long way in enhancing children's digital security and responsible content consumption.

platform for addressing violations makes it harder to hold offenders accountable.

Equally, the Juvenile Justice (JJ) Act, 2015, must identify dark patterns and manipulative online behaviour as psychological exploitation. Research has indicated that prolonged exposure to digital manipulation impacts children's cognition and emotional development, and hence stricter control is essential. Child-friendly website certifications and prohibiting predatory design elements in children's apps would make the internet a safer place.

Gaming platforms have a significant role in protecting young users. Features like *infinite scrolling*, *autoplay*, and *loot boxes* are designed to keep players engaged, often drawing in children. Since loot boxes rely on chance, they expose kids to gambling-like behaviour. To reduce this risk, these features should either be banned or include clear disclaimers explaining that rewards are determined by algorithms. Additionally, introducing simple yet impactful changes, like disabling autoplay for kids, limiting screen time, and adding cool-down periods to prevent impulsive spending can go a long way in creating a safer gaming environment. Despite the above concerns, India lacks a specific regulatory body to deal with dark patterns yet. A separate technology watchdog agency could be set up to oversee digital companies, levy fines, and work with foreign regulators to fight cross-border manipulation. The agency should have proponents of consumer rights, technologists, psychologists, and child

safety specialists to ensure balanced policies are made. A dedicated complaint centre should be established where users can report false advertising, deceptive interfaces, and hidden fees, with options to track their complaint status in real-time. The platform should also provide educational resources to help prevent digital fraud. Companies found violating digital ethics should be required to issue a public apology and take corrective measures. Digital literacy education must be incorporated into educational curricula so that youth will be equipped with the ability to identify and counter online manipulation.

Finally, the key ingredients to protect users from digital exploitation are transparency, ethical design, and stronger penalties. Coupled with government, technology industries, and civil society cooperation, it is possible to build a digital culture whose top priority is the welfare of human beings, not profit-based manipulation.

## **Conclusion**

Dark patterns and digital manipulation shapes online experiences, often prioritizing profits at the expense of users, especially children. From sneaky subscription traps to endless scrolling, which makes it harder for the young users to make the informed choices, leading to addiction, financial loss and privacy risks. While laws like *The Consumer Protection Act* and *Digital Personal Data Protection Act, 2023* and *Draft Guidelines for Dark Patterns* attempt to regulate these practices, a lot of

regulatory and policy work needs to be done in this field to make it a much more habitable cyberspace for children.

It's just not about stronger laws but about awareness within the society. Parents, educators, and even tech companies need to step up and ensure digital spaces are safer. Simple changes like clearer cancel options, age-appropriate designs, and better digital literacy can make a huge difference. If we want a future where technology empowers rather than exploits, we need to start demanding transparency, ethics and accountability from the platforms we use on a daily basis.

**SECTION 16 OF THE HINDU MARRIAGE ACT, 1955 – A WELFARE SECTION WHICH NEEDS TO BE REVISITED AND REFORMED**

Sowmya Tadimalla\*

**ABSTRACT**

*The welfare of a child should always be determined by the amount of legal and social protection the child is receiving. In our country, the law has always given paramount importance to the welfare of a child. The preamble to our Constitution undertakes to provide to all its citizens socio-economic and political justice, equality of status and opportunity and assures dignity of the individual<sup>1</sup>. Therefore, while discussing about the welfare of a child one should give importance to its economic security, status, and dignity. Under the Hindu law, the status and the property rights of a child are based on the validity or the legal recognition of the marriage or relationship of its parents. Children born out of a valid marriage are treated differently from the children born otherwise. Section 16 of the Hindu Marriage Act, 1955 which was introduced to eliminate this discrimination confers 'legitimacy' on the children born out of void and voidable marriages and provides that a child born out of such marriages can inherit to the properties of its parents and not to any other person. The intention of the Section is to treat children born out of void or voidable*

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\* The author is a Senior Associate (Disputes Resolution) at a law firm based out of Hyderabad. She can be reached at [sowmyatrn@gmail.com](mailto:sowmyatrn@gmail.com)

*marriages equally at par with children born out of a valid marriage. However, the said Section 16 does not eliminate the discrimination entirely and confers only limited rights on the children and is also limited in its scope which are discussed in this paper. Therefore, this paper attempts to analyse the rights of a child falling under Section 16 and offers a critical perspective and in the conclusion suggests that Section 16 should be reconsidered and reformed to serve better.*

**Keywords:** *Section 16 of Hindu Marriage Act, 1955, Void Marriage, Voidable Marriage, Legitimacy, Succession.*

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## **Introduction**

The Hindu Succession Act, 1956 [hereinafter the Act] under Section 2 (1) lays down to who the Act applies and the explanation to the said Section says that the Act applies to any child, *legitimate or illegitimate*,<sup>2</sup> where both or one of the parents is either a Hindu, Buddhist, Jaina or Sikh by religion.<sup>3</sup> Section 3(1)(j) of the same Act restricts the kinship of children who are treated as *illegitimate* to their mothers and to one another, and their legitimate descendants shall be deemed to be related to them and to one another.<sup>4</sup> This means that they cannot inherit the same way as the children considered

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<sup>2</sup> The author is using the words legitimate and illegitimate as the same are the terminology used under Hindu Succession Act, 1956 and the Hindu Marriage Act, 1955.

<sup>3</sup> Hindu Succession Act, 1956, § 2 (1), No.30, Acts of Parliament, 1956 (India).

<sup>4</sup> *Id.* § 3 (1) (j).

legitimate. This restriction has been done away with the amendment of Section 16 of the Hindu Marriage Act, 1955 [hereinafter HMA] which extends the kinship to both the parents as long as their marriage is void or voidable. The Section restricts its application to those children born out of void or voidable marriages only and the property to which they can inherit is restricted to the property of their parents only. They cannot inherit to the property of those other than their parents.

Section 16 of the HMA reads as follows:<sup>5</sup>

*16. Legitimacy of children of void and voidable marriages. – (1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.*

*(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled,*

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<sup>5</sup> The Hindu Marriage Act, 1955, § 16, No. 25, Acts of Parliament, 1955 (India) (hereinafter HMA).

*shall be deemed to be their legitimate child notwithstanding the decree of nullity.*

*(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.*

The original Section 16 as existed at the time of the commencement of HMA conferred legitimacy on a child born out of void marriages only when a decree of nullity is obtained and only when such void marriages are solemnised after the passing of the HMA. However, the Marriage Laws (Amendment) Act, 1976 [hereinafter the 1976 amendment] made certain changes to original Section 16 rectifying the said problems. The said 1976 amendment conferred legitimacy on a child born out of void marriages irrespective of whether a decree of nullity has been obtained or not and extended the application of Section 16 to void marriages whether those marriages are solemnized before the passing of HMA or not.

The author opines that the amended Section 16 is also not adequate and falls short to address various issues surrounding the children falling under the said Section. The Section confers only limited rights in terms of the property that such children are entitled to and is also limited in its

scope as the Section applies only to void or voidable marriages as defined under the HMA and does not extend to those marriages which are otherwise void, voidable, or invalid. Further, the applicability of the Section is also dependent upon the requirement of existence or performance of marriage between the parties which is either void or voidable. This paper analyses such issues associated with Section 16 with the help of legislations, judicial pronouncements, and other relevant sources and at the end suggests that the Section needs to be reformed and revisited to serve better addressing the issues at hand.

## **I. Section 16 and its Analysis**

As mentioned above, Section 16 of the HMA, confers legitimacy on children born out of void or voidable marriages. Section 16(1) deals with children born out of void marriages and Section 16(2) deals with children born out of voidable marriages. The HMA deals with void marriages under Section 11 and with voidable marriages under Section 12.

As per Section 11, a marriage is void if it contravenes with any one of the conditions specified in clauses (i), (iv) and (v) of Section 5 of HMA.<sup>6</sup> As per the said clauses, a marriage is void if the following conditions are satisfied:

- 1.) If, at the time of marriage, either party has a living spouse;<sup>7</sup>

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<sup>6</sup> Id. §11.

<sup>7</sup> Id. §5 (i).

- 2.) The parties are within the prohibited degree of relationship unless the custom or usage governing each of them permits of a marriage between the two;<sup>8</sup>
- 3.) The parties are sapindas to each other, unless the custom or usage governing each of them permits of a marriage between the two.<sup>9</sup>

As per Section 12 (1), a marriage is voidable, if the following grounds are satisfied:<sup>10</sup>

- 1.) If the marriage has not been consummated owing to the impotency of the respondent;<sup>11</sup>
- 2.) If the marriage is in contravention of the conditions specified in clause (ii) of section 5;<sup>12</sup>
- 3.) If the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner [was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978)], the consent of such guardian was obtained by force [or by fraud as to

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<sup>8</sup> Id. §5 (iv).

<sup>9</sup> Id. §5 (v).

<sup>10</sup> Id. §12 (1).

<sup>11</sup> Id. §12 (1) (a).

<sup>12</sup> Id. §12 (1) (b). The said § 5 (ii) of HMA reads as follows:

*(ii) at the time of the marriage, neither party –*

- (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or*
- (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or*
- (c) has been subject to recurrent attacks of insanity*

the nature of the ceremony or as to any material fact or circumstances concerning the respondent];<sup>13</sup>

- 4.) If the respondent was, at the time of the marriage pregnant by some person other than the petitioner.<sup>14</sup>

Therefore, Section 16 confers legitimacy on children born out of void or voidable marriages as per Section 11 and Section 12 alone and on no other grounds which are not covered under the said Sections.

## **II. The Issues Surrounding Section 16 of the HMA**

### **➤ The Issue with 'Legitimization' in the case of Voidable Marriages**

As per Section 16 (1), a child born out of a void marriage is legitimate irrespective of whether a decree of nullity is obtained or not. A void marriage is a marriage which is not considered valid or in other words, is null right from its solemnization as if no marriage existed between the parties to such marriage. Such a marriage cannot be enforced by either of the parties. However, the case with voidable marriages is different. A voidable marriage is a marriage which is valid until annulled by either party to the marriage by obtaining a decree of nullity. In case of a voidable marriage, obtaining a decree is essential for the conferment of legitimacy on a child unlike in the case of void marriages. Therefore, voidable marriages are valid unless annulled by either of the parties to

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<sup>13</sup> Id. §12 (1) (c).

<sup>14</sup> Id. §12 (1) (d).

the marriage. Section 16 (2), confers legitimacy on children born out of such voidable marriages. The problem with the said Section 16(2) is that a child will be considered legitimate until the marriage is nullified by either of the parties to the marriage and upon obtaining a decree of nullity the child is now “conferred” legitimacy under Section 16(2). The effect is that such a child will no more be treated at par with a child in a valid marriage and is restricted to the rights as conferred under Section 16. This is unfair on part of the children born out of voidable marriages who are treated like any other children until a decree of nullity is obtained and thereafter, they are subjected to Section 16 of HMA. This is an issue which needs consideration and rights of the children born out of voidable marriages cannot be affected upon obtention of a decree of nullity.

➤ **Limited Scope of Section 16**

Another issue with Section 16 is that it only applies to those marriages which are void or voidable under Section 11 or Section 12 under HMA. As has been mentioned above, a marriage is void or voidable if the conditions under the said Sections are satisfied. Section 16 does not extend to cases, where a marriage has been rendered invalid, void, or voidable otherwise than under any other law. The effect of the Section is that children born out of invalid marriages that are not covered under Section 16 are being discriminated for the simple reason that they are not falling within the ambit of the said Section. For example, as per Section 7 of the HMA, a

marriage may be performed as per the customary rites and ceremonies of either party<sup>15</sup>. A marriage performed without requisite ceremonies is not a valid marriage. The Nagpur Bench of Bombay High Court in the case *Nitin s/o. Om Prakash Agrawal v. Rekha w/o. Nitin Agrawal*, SCC OnLine Bom 112 (2017) dated 31-01-2027 noted that a marriage must be performed as per the ceremonies, rites and rituals recognized by either of the parties as per the HMA and having observed no such ceremonies were performed between the parties<sup>16</sup> held that no valid marriage existed between the parties as per HMA.<sup>17</sup>

This is not a ground covered under either Section 11 or 12 of the HMA. If proper ceremonies are not performed at the time of marriage as per Section 7 of the HMA, the marriage is not a valid marriage. Children born out of such a marriage will not be conferred legitimacy as they are not covered by Section 16.

This limiting scope of the Section is unfair and is defeating the object of the Section which is to confer legitimacy on a group of innocent children. Therefore, the scope of the Section should be extended to cover children born out of a marriage

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<sup>15</sup> HMA, § 7(1). The said Section reads as follows: ***Ceremonies for a Hindu marriage.*** – (1) *A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.*

<sup>16</sup> *Nitin s/o. Om Prakash Agrawal v. Rekha w/o. Nitin Agrawal*, SCC OnLine Bom 112 (2017). ¶ 16.

<sup>17</sup> *Id.* ¶ 18.

which is not valid or which is void or voidable under other provisions of law as well to truly achieve its purpose.

➤ **The Problem with Requirement of Existence/ Performance of Marriage which is either Void or Voidable between the Parties for Conferring Legitimacy:**

It is understood from the discussion above that Section 16 confers legitimacy only on those children born out of marriages which are either void or voidable. Therefore, the conferment of legitimacy is dependent upon the factor “performance of marriage” which should have been either void or voidable. The Supreme Court in the case *Revanasiddappa and another v. Mallikarjun and ors.*, 11 Supreme Court Cases 1 (2011) dated 31-03-2011 [hereinafter *Revanasiddappa*] and the Bombay High Court in the case *Indubai Jaydeo Pawar and Another v. Draupada @ Draupadi Jaydeo Pawar and Others*, SCC OnLine Bom 2413 (2017) dated 07-06-2017 [hereinafter *Indubai Jaydeo Pawar*] have held that the benefit of Section 16 (3) will be extended to only those cases, where there has been a marriage between the parties which is either void or voidable.

In *Revanasiddappa*, the Supreme Court, observed that “However, one thing must be made clear that benefit given under the amended Section 16 is available only in cases where there is a marriage but such marriage is void or voidable in view of the provisions of the Act.”

The Bombay High Court, in the case, *Indubai Jaydeo Pawar*, mentioned above, relying upon *Revanasiddappa* observed that

*I, rely on the decision in Revanasiddappa & anr. vs. Mallikarjun & Ors. (supra), where it is held that "however one thing must be made clear that benefit given under....". In converse, if there is no marriage may be void or voidable, then, this benefit of 'deeming legitimacy' is not available for the children, who are begotten out of any physical relationship of a man and a woman. Thus, the meaning of marriage and the benefit of legitimacy as contemplated under section 16 is not wide but is restricted to and controlled by the word 'marriage'.*

Therefore, there must be performance of marriage between the parties for application of Section 16 (3). This Section therefore, does not cover cases where children are born outside of marriage. It may be noted that there is presumption of marriage between the parties if there is a continuous and long cohabitation between them as has been recognized by various courts including the Supreme Court. The Supreme Court has, in a catena of cases upheld in favour of presumption of marriage between the parties if a man and a woman lived together for a long period. The Supreme Court in the case *Badri Prasad v. Dy. Director of Consolidation and Others.*, 3 Supreme Court Cases 527 (1978) dated 01-08-1978 [hereinafter *Badri Prasad*] observed that:

*A strong presumption arises in favour of wed-lock where the partners have lived together for a long spell as husband and*

*wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of legal origin. Law leans in favour of legitimacy and frowns upon bastardy*

The Supreme Court in another case *S.P.S. Balasubramanyam v. Suruttayan alias Andalin Padayachi and others*, 1 Supreme Court Cases 460 (1993) dated 13-10-1993 observed that it is a settled principle that if a man and woman continuously live together then a presumption of marriage arises. In the words of the Apex Court *"What has been settled by this Court is that if a man and woman live together for long years as husband and wife then a presumption arises in law of legality of marriage existing between the two."*

Such a presumption is made by virtue of Section 114 of the Indian Evidence Act, 1872 [hereinafter IEA] which provides for presumption of existence of certain facts.

The said Section 114 of IEA reads as follows:<sup>18</sup>

***114. Court may presume existence of certain facts. --***  
*The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*

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<sup>18</sup> The Indian Evidence Act, 1872, § 114, No. 1, Acts of Parliament, 1872 (India).

But such presumption of marriage is not available to relations which are not long enough to attract presumption under Section 114 of the IEA. Therefore, the treatment of children born of such relations is still a question as they are not covered under Section 16 (3). While dealing with the legitimacy of children not born out of a marriage it is important to refer to the Kerala High Court's observations in the case law *Jane Antony v. Siyath*, SCC OnLine Ker 503 (2008) dated 25-09-2008. One of the questions that the Court discussed was "*whether children born to parents living as husband and wife during the subsistence of the father's first marriage are legitimate or illegitimate in the eye of law.*" The Hon'ble Court in its discussions said that "*A son born out of such wedlock is also accepted and not totally thrown out but he had been given an inferior status and thus compassion along with discrimination exists.*"

It is pertinent to note the observation of the Hon'ble Court made in paragraph 15. It is as follows:

*Section 125(1) Cr.P.C gives statutory recognition for right of maintenance of children both legitimate and illegitimate from their father. Since children have no role in their birth, illegitimate children are like any other children born to their parents..... The legitimate status of the children which depend very much upon the marriage between their parents being valid or void, thus turned on the act of parents over which the innocent child had no hold or control. But, for no fault of it, the innocent baby has to suffer a permanent set*

*back in life and in the eyes of society by being treated as illegitimate. In other words, for the act of the parent, the innocent children should not be made to suffer. There are several cases in our country where man and woman live together as husband and wife, children are begotten to them and are taken care of by them. When the question arises as to whether such children can succeed to the estate of their deceased parents, there is no statute in this country enabling them to inherit the property of their parents.*

In the context of its observations, the Court also suggested the Central Government to enact a legislation to confer right of succession on all *illegitimate* children irrespective of their religion in tune with Section 125 of the Code of Criminal Procedure, 1973 (now Section 144 of The Bharatiya Nagarik Suraksha Sanhita, 2023) which is for all purposes a secular legislation.<sup>19</sup> Such lack of law in place and the requirement of existence of marriage which is either void or voidable is depriving the innocent children of legitimacy who do not fall within the ambit of Section 16 (3). Therefore, it is required that necessary changes are brought about to extend the application of Section 16 to such cases where no solemnization of marriage exists.

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<sup>19</sup> Jane Antony v. Siyath, SCC OnLine Ker 503 (2008), ¶ 35.

➤ **Section 16(3) Confers Only Limited Rights on the Child:**

Children born out of void or voidable marriages have limited rights and are permitted to inherit only the properties of their parents. This means that the children will not be entitled to any rights over the properties other than the properties of their parents. There have been many cases which discussed the inheritance rights of such children.

The Andhra Pradesh High Court in the case *Rasala Surya Prakasarao and others v. Rasala Venkateswara Rao and others*, SCC OnLine AP 46 (1992) dated 21-02-1992 observed as follows:

*A child of void marriage is related to its parents within the meaning of S. 3(1)(j) of the Hindu Succession Act by virtue of S. 16 of the Hindu Marriage Act. Proviso to Section 3(1)(j) must be confined to those children who are not clothed with legitimacy under S. 16 of the Hindu Marriage Act. In conclusion, we hold that by virtue of S. 16(1) of the Hindu Marriage Act, as amended in 1976, the illegitimate son can be equated with his natural sons and treated as coparceners for the properties held by the father whether the property be originally joint family property or not. The only limitation is that during the lifetime of the father, the illegitimate son of a void marriage is not entitled to seek a partition. He can seek a partition only after the death of the father.*

The Karnataka High Court in the case *Sri Kenchegowda v. K.B. Krishnappa and Others*, SCC OnLine Kar 78 (2008) observed that:

*....the illegitimate son is not a coparcener. He has no right in coparcenary property. However, he has a right in the share of the father in coparcenary property. That right he can exercise only on his father dying intestate. He has no right by birth in the separate or self-acquired property of his parents. His right accrues only after his parents die intestate....*

However, the Supreme Court in the cases *Jinia Keotin and Others v. Kumar Sitaram Manjhi and Others*, 1 Supreme Court Cases 730 (2003) dated 20-12-2002;<sup>20</sup> *Neelamma and Others v. Sarojamma and Others*, 9 Supreme Court Cases 612 (2006) dated 28-01-2006;<sup>21</sup> *Bharatha Matha and Another v. R.Vijaya Renganathan and Others*, 11 Supreme Court Cases 483 (2010) dated 17-05-2010<sup>22</sup> held that the children falling under Section 16(3) will have rights only in respect of the self-acquired property of its parents.

However, the Supreme Court in the case *Revanasiddappa*, differed with its earlier judgments in interpreting Section 16 (3) of the HMA. The Apex court observed as follows:

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<sup>20</sup> *Jinia Keotin and Others v. Kumar Sitaram Manjhi and Others*, 1 Supreme Court Cases 730 (2003), ¶ 4,5.

<sup>21</sup> *Neelamma and Others v. Sarojamma and Others*, 9 Supreme Court Cases 612 (2006), ¶ 3.

<sup>22</sup> *Bharatha Matha and Another v. R.Vijaya Renganathan and Others*, 11 Supreme Court Cases 483 (2010), ¶ 29.

*If they have been declared legitimate, then they cannot be discriminated against and they will be at par with other legitimate children and be entitled to all the rights in the property of their parents, both self-acquired and ancestral. The prohibition contained in Section 16(3) will apply to such children with respect to property of any person other than their parents.*

As per the above, a child falling under Section 16 (3) will be entitled to a share both in the self-acquired and ancestral properties of *its parents*. This means that a child will be entitled to a share in the share of its parents in the ancestral properties. However, such a right accrues only upon partition or upon the parents' dying intestate. It is to be understood that upon partition, a property falling into the hands of the parent's becomes the self-acquired property of the parents itself. In the judgment itself it was given that:

*In our view, in the case of joint family property such children will be entitled only to a share in their parents' property but they cannot claim it on their own right. Logically, on the partition of an ancestral property, the property falling in the share of the parents of such children is regarded as their self-acquired and absolute property. In view of the amendment, we see no reason why such children will have no share in such property since such children are equated under the amended law with legitimate offspring of valid marriage. The only limitation even after the amendment seems to be that during the life time of their parents such children cannot*

*ask for partition but they can exercise this right only after the death of their parents.*

However, it must be noted that the Hon'ble Court after making its observations opined that the issue be referred to a larger bench.<sup>23</sup> The above judgement provides a clarity with respect to the rights of children falling under Section 16 (3) in respect of the share of the parents in ancestral property. But the Hon'ble Court did not change the position of the child to exercise such right only upon the parents' dying intestate. When the child is entitled to a share, restricting the same from being exercised during the lifetime of its parents shows the limitations imposed and read into Section 16 (3) upon the rights of such children. This shows us that even though courts are being progressive, the discrimination is not eliminated. Further this puts the argument of making such children full time coparceners far from any discussion. Further, the Law Commission of India in its Consultation Paper on Reform of family law<sup>24</sup> opined that "*equating all illegitimate children with that of the legitimate children may tantamount undermining the institution of marriage.*"<sup>25</sup> The counter argument is that a child is innocent and is being treated as *illegitimate* only because the

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<sup>23</sup> Revanasiddappa, ¶ 47.

<sup>24</sup> LAW COMMISSION OF INDIA, *Consultation paper on reform of family law*, (2018), <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/09/2022092674.pdf> (last visited Aug 3, 2023) [hereinafter Consultation Paper]

<sup>25</sup>Id at ¶ 184.

*marriage* is void, voidable or invalid and this is a factor that the child does not have control upon.

Therefore, this shows that the child falling under Section 16 still has limited rights and its rights over inheritance of properties are not equally placed with that of the other children.

### **III. Conclusion**

One can understand from the above discussion that law has been progressive and kept changing to keep children born out of void or voidable marriages in a better position. This is also evident from the Supreme Court's view in *Revanasiddappa* recognising the right of the child even in the ancestral property of parents which adopted a different course from its previous judgments.

Despite the reforms through legislative amendments and judicial interpretations there are still certain issues unaddressed which can be understood from the discussions made in this paper. The issues discussed above surrounding Section 16 with regard to its scope, applicability and rights of a child over the property call for reformation of Section 16 of the HMA. It is necessary to make required and suitable changes to Section 16 beginning from extending the application of Section 16 to all marriages which are not only void or voidable under HMA and which are invalid and to all other relationships where the man and the woman lived as husband and wife and that which are not recognized under

the law as a valid relationship. Further, the property rights of a child should also not be restricted. This way the child's status and dignity will be protected and assures them with economic security. A child is innocent and should not be left to suffer from the societal stigma and the legal inadequacy. Further, a property is an asset which is cherished by the holder until the lifetime and is eventually disposed of to others as per their will or is passed to their heirs by way of inheritance. Such a right of a person should not be restricted or be deprived from the person unfairly or by any other social implications. The change should be coordinated both by the law and the society. The law should be open to changes and the society should appreciate the changes so as to protect the rights of the innocent children.

## **SOCIO-ECONOMIC BARRIERS TO THE RIGHT TO EDUCATION: A CASE STUDY**

*Teesha Shrivastava\**

### **ABSTRACT**

*The Right to Education (RTE) Act, enacted in India in 2009 and effective from 2010, mandates free and compulsory education for children aged between 6 to 14 years. Despite its comprehensive provisions aimed at eliminating socio-economic barriers, many children, particularly from marginalized communities still face significant socio-economic obstacles in accessing education. These hurdles indicate that the RTE has failed in fulfilling its objectives in certain aspects. This research investigates these persistent barriers through an empirical study conducted in three slums of Bhopal, Madhya Pradesh - Ishwar Nagar, Shyam Nagar, and Kolar. Data collected was collected from 56 children, their parents, and community development workers associated with the NGO Vikas Samwad Samiti, Bhopal. The data revealed that factors such as poverty, child labour, peer pressure, lack of documentation, caste discrimination, transportation issues etc. largely impede educational access. The study highlights the effectiveness of community education centres and NGOs in mitigating these challenges.*

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\* Teesha Shrivastava is a 3<sup>rd</sup> year BA.LL. B Student at National Law University, Nagpur, she can be contacted at [teeshashrivastava25@gmail.com](mailto:teeshashrivastava25@gmail.com).

**Keywords:** *accessing, community, education, marginalized, socio-economic.*

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## **Introduction**

The Right to Education (RTE) Act, enacted in India in 2009, was designed with the noble objective of eliminating socio-economic barriers to education and ensuring that every child aged 6 to 14 years receives free and compulsory education. Coming into effect with Article 21(A) in the Indian Constitution in 2010, the RTE Act aims to promote inclusivity and educational accessibility, promising to address disparities and promote equity in education.

However, even after 15 years of this act being passed, there still exists socio-economic barriers to access to education. It is an irony in itself that the barriers which the act aimed to overcome 15 years ago, still exists, and are a challenge to access to education. To identify these factors, research was conducted in three slums of Bhopal, namely, Ishwar Nagar, Kolar and Shyam Nagar. Through the research, various socio-economic factors such as child labour, lack of documentation, poverty etc. were identified due to which accessing education is becoming a challenge.

These slums also had community education centres run by the NGO Vikas Samvad Samiti, these centres worked for the right to education of the children living in those slums. The centres shows that despite having many challenges the situation can be improved. Due to the centre's intervention,

access to education became easy for many children. Lastly, the recommendations given by the centre leads are also incorporated in the research paper.

By addressing questions such as the prevailing socio-economic barriers and potential solutions for improving educational access, this research aims to offer actionable insights for policymakers, educators, and community workers. The ultimate goal is to create a more inclusive and effective educational environment, ensuring that the promises of the RTE Act translate into tangible educational opportunities for every child.

#### **RIGHT TO EDUCATION IN INDIA**

Education is a fundamental right of Indian citizens which is given under article 21 (A) of the Indian Constitution. Article 21 (A) was inserted in the constitution through the 86<sup>th</sup> amendment act in 2002, it came as a supplement to article 45 of the Indian constitution.

Article 45 states that “The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.”<sup>1</sup>

Article 21 (A) states that “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law,

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<sup>1</sup> The Constitution of India, Article 45.

determine.”<sup>2</sup> Article 45, a directive principle of state policy turned into a fundamental right as article 21 (A) of the constitution.

The Right to Education Act was passed by the Parliament in 2009. It specifies the methods and various provisions that aim to achieve free and compulsory education for children aged between 6-14 years in India given under Article 21 (A) of the Constitution. This act was made so that education could be accessible to children.

The right to education act and article 21 (A) came into effect in 2010 to ensure “free and compulsory education” for children within the age of 6-14 years<sup>3</sup>. Free education signifies that “no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education.”<sup>4</sup> And Compulsory education means that “there is an obligation on the appropriate Government and local authorities to provide and ensure admission, attendance and completion of elementary education by all children in the 6-14 age group.”<sup>5</sup>

The act also mandates that private schools reserve 25% of their seats for children from economically disadvantaged

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<sup>2</sup> The Constitution of India, Article 21(A).

<sup>3</sup> Right of Children to Free and Compulsory Education Act 2009, s 3.

<sup>4</sup> Department of School and Education and Literacy, Right to Education, <https://dse.education.gov.in/rte> (visited on 6.5.2024).

<sup>5</sup> *Id.*

backgrounds or based on caste-based reservations, with the state reimbursing these costs as part of a public-private partnership.<sup>6</sup> Additionally, the Act prohibits the operation of unrecognized schools and bans donation or capitation fees, as well as interviews for child or parent admission.<sup>7</sup> It also stipulates that no child can be held back, expelled, or required to pass a board examination until they have completed elementary education.<sup>8</sup> Special training provisions are included to help school drop-outs catch up with their peers.<sup>9,10</sup> These provisions along with several others reflect the Indian government's commitment to ensure that every child receives a quality education, regardless of gender, caste, creed, family income, or other socio-economic factors.<sup>11</sup>

Despite the act being passed, even after 15 years, a number of socio-economic factors could be identified, which are making access to educations a challenge for hundreds and thousands of students.<sup>12</sup>

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<sup>6</sup> Right of Children to Free and Compulsory Education Act 2009, s 12.

<sup>7</sup> Right of Children to Free and Compulsory Education Act 2009, s 13.

<sup>8</sup> Right of Children to Free and Compulsory Education Act 2009, s 30.

<sup>9</sup> *Supra* n. 4.

<sup>10</sup> <https://righttoeducation.in/know-your-rte/about> (visited on 29.05.2024).

<sup>11</sup> Kaushal, Mona. "Implementation of Right to Education in India: Issues and Concerns." *Journal of Management & Public Policy* 4.1 (2012).

<sup>12</sup> Bhan, Sujata, and Suzanne Rodricks. "Indian perspective on child's right to education." *Procedia-Social and Behavioral Sciences* 69 (2012): 367-376.

## **ACCESSIBILITY TO EDUCATION**

As discussed earlier, the objective of the RTE act is to provide 'free and compulsory education' to children between 6-14 years of age. To achieve this goal, education needs to be accessible to these children. But now after 15 years of the act being passed, a question still arises, 'is education really accessible to them?' The answer in many cases would be no. While there are many provisions in the RTE act which aim to achieve access to quality education, inclusivity, and free and compulsory learning, there still exists several barriers to the same. For example, poverty and begging, if the child is indulged into practices such as begging, how would he/she be able to attain proper education? Another example could be parental pressure and child labour, in many cases due to poverty and low-income backgrounds, parents force their children into child labour, thus preventing them from getting proper education. Like these, we have several other examples where socio-economic factors becomes a barrier to access to education.

A survey was conducted to properly find out and analyse such socio-economic factors which serve as hurdle to access to education.

## **RESEARCH METHODOLOGY**

The research conducted is a mixed-method descriptive case study, involving the elements of both qualitative as well as quantitative research. The survey was conducted in 3 slums

of Bhopal, Madhya Pradesh; Ishwar Nagar, Shyam Nagar, and Kolar. These slums were chosen because the NGO Vikas Samvad Samiti, Bhopal, runs Community Education Centres here, which works for the right to education of the children living in those slums. Thus, the research also included a visit to these centres so that the overall situation can be understood in a better way. Even beyond the presence of the centres, the slums were chosen because of the demography of these areas, majority of the people living here are from marginalised socio-economic backgrounds and are from the underprivileged class. Consequently, data collected from these areas provides insight into the broader barriers to the implementation of the Right to Education Act in similarly situated contexts.

During the survey, 56 children, 3 community centre heads and 6 parents were interviewed. The study employed a purposive sampling method to select respondents from three slums of Bhopal where community education centres were operational.

Data was collected using primarily a semi-structured questionnaire, informal interviews, and field observations. The questionnaire was designed separately for three categories of respondents, namely children, parents, and community development workers. For children, the questionnaire consisted of approximately 8 open-ended questions focusing on socio-economic background, reasons for non-attendance or dropout, family conditions, and future

educational aspirations. The parent's questionnaire included 5 open-ended questions examining their perception of education and the barriers preventing their children from attending school. The community development workers were asked 6 open-ended questions related to their field experience, assessment of the RTE Act, identified barriers to education, interventions undertaken, and recommendations for improvement. In addition to the questionnaire, informal interviews were conducted with selected respondents to gain deeper insights into lived experiences, and direct observations were made during visits to the slums and community education centres to better understand the social and economic conditions affecting access to education.

Ethical considerations were followed in the study, with consent obtained from parents or guardians, assent taken from the children, confidentiality of all respondents ensured, and personal identities anonymised to protect privacy and prevent any potential harm.

#### **DEMOGRAPHIC AND SOCIO-ECONOMIC CONTEXT OF THE SLUMS**

Community education centres are centres which work for the right to education of the children. They helped the children by motivating them along with their parents and making them realise the importance of education. They made the children develop an interest in education by teaching them through fun activities, games etc. They also helped the students by getting their documents properly made so that

they could be enrolled in school. Likewise, various steps were taken by these centres to overcome the socio-economic barriers to right to education.

A short background of the slums is given below so that the situation can be understood in a better way.

### **SHYAM NAGAR SLUM**

There are 1420 houses which have a population of about 6000. These people mainly came from Ujjain, Betul, Chindwada, Lalitpur, Jhansi, Sehore, in search of livelihood and eventually settled here. Most people in this slum are from Gond community, the parents often face challenging economic and social circumstances. The father typically works as a daily wage labourer and are mostly drug addicts while the mother contributes by working as a house help or labourer and even goes to beg. Their children also take part in begging and petty works such as participating in weddings, carrying lights and matkas, which involves leaving at 4:00 PM and returning around 1:00 to 2:00 AM for a meagre earning of 200 rupees.

### **KOLAR SLUM**

There are 500 houses with a population of approximately 2300. In this slum, Kumhar caste, Harijans, backward class, and general class people lived. People of this slum sell pots, work as daily wage labours, and also work as maids in hospitals and homes. Out of all the 3 slums visited, the physical characteristics and the overall understanding of

education in this slum was the poorest. Sewage water flowed in between the houses with litter lying all around. Many children from this slum never went to school. Many of them were engaged in petty work and child labour such as cutting fruits and vegetables in restaurants, working as house helps etc. The family and children were not concerned with education.

### **ISHWAR NAGAR SLUM**

There are 170 houses with a population of approximately 900. Most of the people here were the tribals of Jhabua. The men usually work as daily wage laborers and the women of the colony work as house helps and are engaged in domestic work. Children are engaged in petty works such as plucking and selling fruits in different seasons. Many children from this slum were drop outs or never went to school.

### **FINDINGS - SOCIO-ECONOMIC BARRIERS TO THE RIGHT TO EDUCATION**

While conducting the survey, a lot of social and economic factors could be identified which are still a barrier to right and access to education.

In most cases, these factors are inter-related and inter-dependent on each other. These socio-economic factors together serve as a barrier to a children's right and access to education.

As already mentioned, while it is rare that only a social or economic factor independently become a barrier to access to

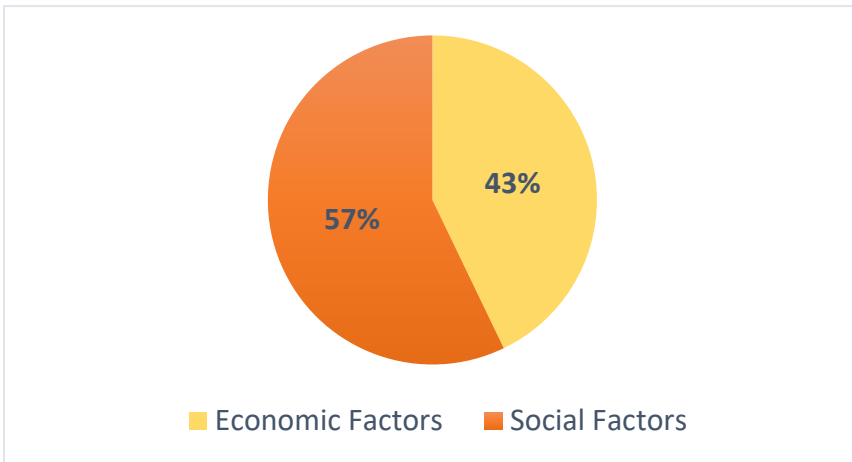
education, let us try and broadly divide the reasons affecting the survey sample's access to education into the categories of social reasons and economic reasons.

<b>SOCIAL FACTORS</b>	<b>ECONOMIC FACTORS</b>
Family and children not concerned with education, very careless and negligent.	Poverty and family condition
Peer pressure	Covid, and loss of livelihood
Issues with documentation	Petty works such as begging and rag picking and selling etc.
Childcare and household work	Transportation issues
Caste discrimination	Less earning members in the household
Poor living conditions (lack of hygiene) which become reasons for discrimination.	Parents going out of the city to earn
Distractions (makeup, love marriages, mobile phones)	Child labour (children going to work).
Greed, children resort to practices such as rag picking and dealing for meagre amounts of money.	
Drug addiction	
RTE and NON RTE students' discrimination.	

**Table 1**

*Survey observations of the social and economic factors affecting right to education*

Now, on the basis of this division, we attempt to categorise the 56 children surveyed through a strict bifurcation of social and economic factors serving as a barrier to their Right to Education.



**Figure 1**

*Bifurcation of Social and Economic Factors Affecting the Surveyed Children*

As seen in the pie chart above, out of the 56 Children, 32 children were majorly affected by the social factors and 24 children were affected by the economic factors. However, as discussed earlier, these factors rarely operate in isolation and, in most cases, coexist and intersect with one another.

Now, let us further discuss the factors mentioned above in detail:

## 1. Careless Approach

One of the most prominent barriers to access to education was a careless approach, this could be seen in children as well as in parents. They had no realisation of the importance of education and thus did not pay much concern to it. In many cases the parents were illiterate and their upbringing was in such a way that they had no realisation of how important school and education is, and thus their kids are also following the same trend.

Among the 56 children surveyed, parental disinterest or negligence emerged as a recurring factor, particularly in Kolar and Shyam Nagar bastis. In Kolar basti, several families displayed a sustained pattern of disengagement, where parents either actively discouraged school attendance or failed to prioritise education due to work-related migration or economic pressures. In Shyam Nagar, parental neglect often coexisted with poverty, addiction, and begging-related livelihoods.

In a few cases, the parents were willing to send their children to school, but the children were careless and were not interested in attaining education, this was because of various reasons such as peer pressure, distractions, greed etc. which would be discussed further. For example, a 30-year-old woman shared her wish to send her 13-year-old son back to school, but the child, who had dropped out, was reluctant to return and showed little commitment towards his education.

## 2. Poverty and Poor Living Conditions

Poverty is one of the biggest barriers to access to education. Due to poverty and shortage of money children had to quit to school to support their family financially by doing petty jobs such as working as house help. For instance, the case study of a 15-year-old girl, who left her education in class 5<sup>th</sup>. She could not attend school due to a series of consecutive family tragedies and financial hardships. These losses left her mother as the sole breadwinner for a family of seven, including five children, and their grandmother. To support the family, she had to start working as a house help while also handling the household chores. In addition to this, she took on the responsibility of caring for her younger siblings and managing the household work. The family's dire poverty further compounded her inability to continue her education. Due to poverty, her other siblings are also currently not going to school.

## 3. Covid And Loss of Livelihood

Many children dropped out of school due to covid. As many of their parents worked as daily wage labourers and house help, due to loss of livelihood in covid, the children attending private school could not afford its fees and had to leave the school, for instance the case of 13-year-old boy, who used to attend a private school, but had to leave it because of covid. Everyone is aware of the conditions during covid, at during such hard times many children had to leave their education. When covid ended, while some children started going back to

school for instance, 14-year-old girl, who left her school in class 5<sup>th</sup> due to covid, joined back by the centre's intervention and is currently in class 9<sup>th</sup>, but some did not join back.

#### 4. Improper Documentation

Basic documents like SAMAGR-ID etc. are mandatory for securing admission in a school. But many children did not have these documents, this is because of the parent's carelessness or the document maker's carelessness. A 25-year-old-woman, said that the workers at the government office are careless and hence the documents of her 6-year-old daughter, are not yet ready. While on the other hand Kolar community education centre's lead said that the parents are careless and dependent on the centre for documents, due to their busy schedule they are not able to take out time and get the documents made, and are totally dependent on the community education centres. This issue was particularly prevalent in Kolar basti, where frequent migration and parental dependence on community workers delayed documentation processes.

#### 5. Child Labour and Petty Work

Economic engagement of children in petty work and child labour was reported in all three slums and affected both school attendance and retention. This could be due to various reasons. Poverty is one of the reasons due to which children goes to work and leaves school, for instance 15-year-old girl had to start working as a house help due to family's financial

condition. Greed is also one of the reasons why children engage in petty works, for instance many children are engaged in rag picking and dealing so that they could earn meagre amounts of money and spend it. (Buying Rajshri tobacco and snacks like Kurkure). Begging was also seen as a major barrier.

#### 6. Household Work and Childcare

It was observed that the families in the slum were not financially strong, both the parents were working, most families had 4-5 children. Due to this, the older sibling used to manage the household work and take care of the younger ones. This responsibility of taking care of the household work and childcare in many cases became a barrier to access to education.

#### 7. Peer Pressure

During the research, it was observed that peer pressure both by parents or friends became a reason for the children to leave school. Peer pressure emerged as a significant social barrier affecting school attendance, particularly among children aged 10-15 years. It was very common to find children who left school because their friends and peers were also not going to school. And there were also some instances where the children wanted to go to school but due to the parent's pressure, they could not go to school. For instance, an 11-year-old boy wanted to go to school, but due to their own reasons his parents did not support his decision. He said that his mom

and dad forbid him from going to school, and that they scold him when he talks about this.

#### 8. Caste Discrimination

Caste discrimination was also one of the reasons why some of the children were hesitant to go to school. For instance, 13-year-old boy said that he left school because he had no company at school, he said that the other kids were 'people from other communities' and he could not mingle up with them.

Apart from that, Shyam Nagar's community education centre's head said that due to poor living and hygiene conditions also, children from the Gond community were discriminated. However, by giving the children basic knowledge about good hygiene, the community education centre solved this issue to some extent. But still, discrimination on the basis of caste is present.

#### 9. Distractions

It was observed that the children were indulged in some activities due to which they were getting distracted from education.

For instance, attraction among peers and love marriages: many children in the slum wanted to get married even before turning a major, if their parents opposed, the girl start living in the boy's house, these marriages were mostly within the same slum and neighbourhood.

Apart from this there are various other distractions, for instance, some girls were really interested in makeup, tattoos, children excessively using mobile phones etc.

#### 10. Drug Addiction

Substance abuse at an early age was observed among several children in the surveyed slums, early exposure to drugs among children constituted an additional social barrier to education, often coinciding with weak parental supervision and peer influence, thereby disrupting school attendance and learning continuity.

#### 11. Transportation Issues

It was observed that transportation was also becoming an issue for the kids to attend school. Some kids going to private school could arrange a bus or van but many kids did not have a proper mode of transportation. As the financial and economic status of the family is weak, it is difficult for the children to arrange transportation rent daily due to which they could not go to school.

#### 12. RTE and Non RTE Students Reservation

It was observed that there was some sort of discrimination with the students who came in the school through the 25% RTE reservation criteria. For instance, the school timings or the classes for RTE and non RTE students are different in many private schools.

A comparative reading of the three slums reveals distinct patterns. Shyam Nagar exhibited higher instances of begging, addiction-related neglect, and peer-driven dropouts. Kolar basti showed the strongest correlation between parental disengagement, child labour, and complete non-enrolment. Ishwar Nagar, while relatively smaller, demonstrated how distance, caste-based exclusion, and lack of transportation influenced dropout rates. These variations underline the need for context-specific interventions rather than uniform policy implementation.

#### **IMPROVING THE SITUATION**

Even after 15 years of the act being passed, several socio-economic barriers exist which the act failed to remove. But, despite having various challenges, the situation can be improved, this could be seen by the work of the community education centres. During the survey, it was observed that some children were dropouts but started going back to school due to the centre's intervention. All these children were from low socio-economic background. Several reasons could be identified which led to their dropout. Prominent among them was begging, the children used to beg with their parents. The family and parents were also not concerned with their education. Moreover, similar reasons as discussed above, such as poverty, household work, peer pressure, lack of documentation etc. could be identified which contributed to their dropout.

Due to community education centre's help the children started going to school again. Despite hardships, the Community Education Centre has proven to be remarkably effective, with 54 out of 60 dropout children enrolled back in school. The centre workers along with others motivated these children and their parents, and made them realise the importance of education. The centre also helped in preparing their documents and enrolled them in school. The centre conducted regular classes where the children were taught using fun activities. Children were engaged in learning but not through the conventional ways, but through fun activities such as dance, poster making, social events etc. The main key was to make learning fun and make them realise the value of education in their life. By taking these steps, many children started going to school again.

This shows that how there is a scope for improvement even after having so many challenges.

### **RECOMMENDATIONS**

While there are several socio-economic barriers that are making access to education challenging, these issues can be solved. After talking to the centre leads, these are the recommendations and steps that can be taken to overcome these barriers:

- The Right to Education (RTE) Act is useful, and its provisions are beneficial; however, increasing awareness about the Act is essential.

- It is crucial to measure the dropout ratio on a regional basis and implement targeted interventions in areas with high dropout rates.
- Teachers should be adequately trained to handle students and prevent discrimination, a matter that the centre addressed to some extent.
- Increase the frequency of parent-teacher meetings and emphasize the importance of parental involvement and support.
- Ensure effective use of funds and money in the household to improve transportation management.
- Promote learning through engaging activities ultimately encouraging and motivating students to attend school regularly.
- In addition, collaboration between government agencies, NGOs, and local stakeholders will be crucial in sustaining these efforts.

By focusing on these actionable steps, a more supportive and inclusive educational environment can be created. Long-term commitment and consistent evaluation of implemented strategies will ensure that improvements are not only made but maintained. Ultimately, investing in education and addressing these socio-economic barriers will empower the next generation, fostering a more equitable and prosperous society for all.

### **LIMITATIONS OF THE STUDY**

The study is limited by its relatively small sample size and its geographic focus on three slum areas in Bhopal, which restricts the generalizability of the findings. The research relies largely on self-reported responses from children, parents, and community workers, which may be influenced by individual perceptions. In addition, the absence of a longitudinal follow-up limits the ability to assess the long-term impact of educational interventions. Future studies with broader regional coverage and longitudinal designs would help strengthen understanding of implementation challenges under the Right to Education Act.

### **CONCLUSION**

Fifteen years after the implementation of the Right to Education Act, this study reflects the everyday realities of children and families living in socio-economically disadvantaged slum communities in Bhopal. The findings from Ishwar Nagar, Shyam Nagar, and Kolar slums reveal that despite the legal promise of free and compulsory education, many children continue to face practical socio-economic barriers.

The findings of this localised study suggest gaps in awareness, outreach, and on-ground enforcement of the provisions of the Right to Education Act. At the same time, the work of community education centres demonstrates that

targeted interventions can significantly improve educational access.

Although this study is limited in scope and location, it offers a glimpse into how implementation challenges affect real lives. Strengthening local outreach, improving awareness, and supporting community-based initiatives can help ensure that the spirit of the RTE Act reaches children who need it the most.



## **UNSEEN SCARS: THE HIDDEN BATTLE OVER INTERSEX CHILDREN'S BODILY INTEGRITY**

*Vishrut Srivastav and Anay Mehrotra\**

### **ABSTRACT**

*This paper examines the issue of gender-normalizing surgeries on intersex children, critically analysing the medical, legal, and social frameworks that perpetuate these practices. Beginning with an exploration of intersex identity, it emphasizes the need to recognize intersex children as a distinct group with unique rights and protections. The paper delves into the historical development of Intersex Genital Mutilation, tracing its Victorian origins and the adoption of surgical interventions, particularly the "optimum gender of rearing" model from John Hopkins University, which shaped subsequent medical practices. International human rights law and the Yogyakarta Principles provide foundational protections, including the right to life, privacy, health, and freedom from torture. These frameworks are evaluated alongside the tension between children's rights and parental authority, especially regarding informed consent and autonomy. International organizations such as the World Health Organization and the United Nations have advocated against IGM, while several states have implemented policies aimed at prohibiting these non-consensual surgeries. The paper also*

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\* The authors are final year law students at West Bengal National University of Juridical Sciences (WBNUJS), Kolkata. They can be reached at [anay221121@nujs.edu](mailto:anay221121@nujs.edu)

*examines the Indian perspective, analysing legal limitations in the landmark NALSA judgment on gender recognition, the Transgender Persons Act, and practices within the judiciary and government. Through a child-centric lens, it explores how intersex children's best interests and consent could be better protected within India's legal system. Finally, the paper presents policy recommendations, including an absolute ban on non-life-saving surgeries, changes in legal recognition of intersex individuals, mandatory training for medical professionals, and criminalization of IGM. These recommendations advocate for a humane, rights-based approach that supports intersex children's development and respects their autonomy.*

## I. INTRODUCTION

The biological reality of human sex characteristics is far more nuanced than most people realize. While society's first response to a newborn typically involves categorizing them into one of two boxes - male or female - this oversimplified approach fails to acknowledge a significant portion of our population. Scientific evidence shows that approximately 1.7% of infants are born with sex characteristics that naturally vary from what we traditionally classify as exclusively male or female.<sup>1</sup> Such children, characterised using the umbrella term "intersex", have natural physical characteristics and

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<sup>1</sup> Amnesty International, *First, Do No Harm: ensuring the rights of children born intersex*, May 10, 2017, available at <https://www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/> (last visited Nov. 9, 2024).

anatomy that exist along a spectrum that extends beyond conventional male-female classifications.<sup>2</sup> There are over 30 defined different intersex variations.<sup>3</sup>

Due to societal beliefs in binary sex and the desire for clear gender markers, a notion reinforced by medical professionals, intersex children continue to face non-consensual, unnecessary surgeries, termed as Intersex Genital Mutilation ('IGM').<sup>4</sup> This practice, rooted in the late 1800s, raises significant bioethical, legal, and moral concerns.

In India particularly, rigid societal norms enforcing a binary view of gender, alongside inadequate legal protections and the lack of a specific policy direction in this regard, enable the continuation of non-consensual surgeries on intersex children. Multiple treaty bodies and international organisations have recognised IGM as being violative of the Right to Life, Liberty, and Security of Person, the Right to Health, the Right Against Discrimination and the Prohibition of Torture and Inhuman or Degrading Treatment.<sup>5</sup> In spite of this, India lacks any comprehensive nationwide policy *vis-à-*

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Intersex Genital Mutilation*, OII Europe, <https://www.oiiurope.org/igm/> (last visited Nov. 9, 2024).

<sup>5</sup> Office of the High Commissioner for Human Rights [hereinafter 'OHCHR'], *OHCHR and the Rights of Intersex People*, <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/intersex-people#:~:text=Intersex%20people%20are%20born%20with,are%20born%20with%20intersex%20traits.> (last visited on Nov. 8, 2024).

*vis* child and infant IGM, making intersex children vulnerable to such violations.

The objective of this paper, thus, is to engage with, discuss, and analyse the practise of IGM. We discuss the history of the practise, how it became so prevalent, whether there exists any safeguards against it in international treaties, and conventions, and if so, what lessons can India take from such instruments. We then delve specifically into the practise of IGM in India, legal and constitutional safeguards against the same, and discuss possible policy recommendations to address the widespread issue. We undertake this exercise using a mixed-method approach for the purposes of the paper, relying heavily on doctrinal analysis, examining legislation, case law, international conventions, and medical ethics concerning IGM.

Through this paper, we aim and attempt to address the severe lack of any data with regard to prevalence of the practise of child IGM, and the number of such operations in India. However, we will not focus on the psychological or medical perspectives of post-surgery outcomes in intersex individuals.

*Part II* contextualizes and discusses the distinct intersex identity. *Part III* delves into the historical understanding of IGM. *Part IV* discusses the approach of international law towards safeguarding rights of intersex children. *Part V* discusses international policy and approach towards IGM *Part VI* discusses the Indian approach and perspective. *Part*

VII makes certain policy recommendations. *Part VIII* concludes.

## II. THE DISTINCT IDENTITY OF INTERSEX CHILDREN: IMPORTANCE OF SETTING THE CONTEXT

The protection of intersex children's bodily integrity and rights mandates a careful consideration of their unique social, medical, and cultural contexts, and their identity as being distinct and separate from the groups under the LGBTQIA+ umbrella.

The persistence of harmful misconceptions surrounding intersex individuals can be attributed to several key factors. Fundamentally, a general lack of awareness and understanding within society serves to perpetuate problematic assumptions and attitudes. Additionally, certain third-party organizations have been observed to instrumentalize intersex issues as a means to advance their own agendas, rather than prioritizing the genuine needs and interests of the intersex community.<sup>6</sup> Furthermore, governmental authorities have at times attempted to deflect criticism of involuntary medical interventions on intersex persons by obscuring the issue or reframing the discourse.<sup>7</sup>

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<sup>6</sup> StopIGM.org, *Submission for OHCHR Study on Youth and Human Rights (HRC39)*, Off. of the High Comm'r for Human Rts. (Mar. 2017), <https://www.ohchr.org/sites/default/files/Documents/Issues/Youth/StopIGM.pdf> (last visited on Nov. 8, 2024).

<sup>7</sup> *Id.*

Intersex individuals and their representative organizations have strongly objected to the misappropriation or mischaracterization of intersex issues.<sup>8</sup> They have made it clear that the practice of IGM represents a distinct set of infractions of human rights, which are fundamentally distinct from the challenges fronted by the broader LGBT or SOGI communities.<sup>9</sup> As such, they have emphasized the critical need for IGM and other intersex-specific concerns to be addressed through dedicated, tailored measures, rather than being subsumed within a broader LGBT or SOGI framework. Unfortunately, these damaging misrepresentations appear to be increasing within the UN as well, as seen in recently released UN documents that inaccurately portray IGM as “*sex alignment surgeries*” (which are inherently voluntary in nature),<sup>10</sup> survivors of IGM as “*transsexual children*”<sup>11</sup> and “*transsexual children who underwent difficult treatments and surgeries*”,<sup>12</sup> and groups working for intersex interests as “*a*

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<sup>8</sup> NGO Report to the 7th and 8th Report of France on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), StopIGM.org (Jun. 2016), <https://intersex.shadowreport.org/public/2016-CEDAW-France-NGO-Zwischengeschlecht-Intersex-IGM.pdf> (last visited on Nov. 8, 2024).

<sup>9</sup> *Id.*

<sup>10</sup> Committee Against Torture [hereinafter ‘CAT’], *Committee against Torture reviews report of Argentina*, Apr. 27, 2017, <https://www.ohchr.org/en/press-releases/2017/04/committee-against-torture-reviews-report-argentina?LangID=E&NewsID=21548> (last visited on Nov. 8, 2024).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

group of lesbians, gays, bisexuals, transgender and intersex victims of discrimination".<sup>13</sup> Additionally, the practise of IGM itself has been described as as a form of "discrimination against transgender and intersex children".<sup>14</sup> Furthermore, when enquired about the measures taken to address IGM by UN treaty bodies, State parties continuously referring to transgender guidelines or "Gender Identity Law".<sup>15</sup>

Additionally, LGBT organizations are exploiting the widespread misconception that intersex is equivalent to LGBT, diverting funds intended for intersex causes.<sup>16</sup> This practice deprives actual intersex organizations—many of which have little to no substantial funding—of critical resources.

The issues of conflation of intersex with LGBT and SOGI, and the lack of dedicated attention and resources to properly and effectively address the issue of child IGM get further

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<sup>13</sup> United Nations Committee on the Rights of the Child [hereinafter 'CRC'], *Committee on the Rights of the Child examines the situation of children in Denmark*, Sep. 15, 2017, <https://www.ohchr.org/en/press-releases/2017/09/committee-rights-child-examines-situation-children-denmark?LangID=E&NewsID=22086> (last visited on Nov. 8, 2024).

<sup>14</sup> *Id.*

<sup>15</sup> CRC, *Committee against Torture considers report of Austria*, Nov. 13, 2015, <https://www.ohchr.org/en/press-releases/2015/11/committee-against-torture-considers-report-austria?LangID=E&NewsID=16753> (last visited on Nov. 8, 2024).

<sup>16</sup> *NGO Report for Session to the Initial Report of the United Kingdom on the Convention on the Rights of Persons with Disabilities (CRPD)*, StopIGM.org (Jul. 2017), <https://intersex.shadowreport.org/public/2017-CRPD-UK-NGO-Coalition-Intersex-IGM.pdf> (last visited on Nov. 8, 2024).

exacerbated owing to the fact that children are not given proper representation or a platform for advocating for their own interests. Furthermore, there is a fundamental lack of international treaties and instruments directly addressing the IGM specifically, and intersex issues in general. The most prominent and well known document focusing on intersex rights, i.e., the Yogyakarta Principles and Yogyakarta Principles Plus 10, are adult-centric, and do not specifically address the issues of intersex children.<sup>17</sup>

Thus, it is of infinite importance that specific attention must be paid to the language of any policy *vis-à-vis* child IGM, to ensure that intersex children are properly contextualised and specifically identified and covered by the law, and are not counterfactually included within the LGBT or SOGI umbrella.

Next, we delve into the historical origins of IGM, and how the medical understanding of the same has been informed by misguided and incorrect assumptions.

### III. HISTORICAL ORIGINS OF IGM & EVOLUTION OF MEDICAL PRACTICE

This section delves into a detailed discussion on the origins of the practise of IGM, and how medical understanding of the same has evolved with the passage of time.

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<sup>17</sup> Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity, International Commission of Jurists (2007).

## A. REALIZATION OF THE EXTENT OF INTERSEX INDIVIDUALS & THE VICTORIAN APPROACH

Medicine took over as the main treatment for intersex starting in the late nineteenth century.<sup>18</sup> Prior to that time, only a small number of instances were brought to the attention of authorities annually, and most individuals with intersex characteristics were ignored.<sup>19</sup>

Close to the latter half of 1800s, however, countless military fitness tests throughout the drafting during wars had given doctors a far greater understanding of how frequent "abnormal" sex anatomies were.<sup>20</sup> Intersex created significant stress to medical professionals, who were largely politically conservative and sought to maintain clearly defined sex boundaries in order to counteract open homosexuality and the emergence of feminism.<sup>21</sup> Therefore, irrespective of degree and inherent truth of sexual blending, biological experts developed a framework that designated everyone as either "truly male" or "truly female."

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<sup>18</sup> Julie A. Greenberg, *The History and Development of the Intersex Movement* in INTERSEXUALITY AND THE LAW (2020, New York University Press).

<sup>19</sup> *Id.*

<sup>20</sup> "I Want to be Like Nature Made Me": Medically Unnecessary Surgeries on Intersex Children in the US, Hum. Rts. Watch (Jul. 25, 2017), <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us#9965> (last visited on Nov. 8, 2024).

<sup>21</sup> *Intersex Genital Mutilation*, OII Europe, <https://www.oiiurope.org/igm/> (last visited Nov. 9, 2024).

Due to the technological limitations of the era, Victorian doctors preferred this particular system because they lacked the ability to accurately diagnose "true hermaphroditism" in living individuals.<sup>22</sup> As a result, the majority of "true hermaphrodites" were only identified after death, when their bodies could be dissected and examined.<sup>23</sup> Consequently, the medical understanding of intersex conditions during that time period was largely derived from posthumous investigations.

The labels "truly male" and "truly female" were applied to all other individuals believed to be intersex, including pseudo-hermaphrodites, and they were instructed to behave in their ascribed gender in a way that was socially and sexually acceptable.<sup>24</sup>

Furthermore, there was no straightforward social classification for people with "*true hermaphroditism*" in a bipolar gender paradigm. Thus, by the 1920s, professionals who worked with intersex created a concept of gender (*social role*) that was distinct from biological sex.<sup>25</sup> Additionally, they

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<sup>22</sup> *History of Intersex Activism*, Intersex Soc’y of N. Am., <https://isna.org/faq/history/> (last visited Nov. 9, 2024).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *History of Intersex Activism and Evolution of Medical Protocol*, Hum. Rts. Watch (July 25, 2017), <https://www.hrw.org/video-photos/interactive/2017/07/25/history-intersex-activism-and-evolution-medical-protocol>.

started to actively provide surgical "corrections" to align the assigned gender with the biological sex.<sup>26</sup>

## **B. THE INITIATION OF SURGICAL INTERVENTIONS**

Towards the latter half of the 19th century, a small number of patients with intersex conditions began requesting, and some surgeons began offering, surgical procedures to alter their genitalia.<sup>27</sup> Aside from rare instances of clitorectomies performed on children with large clitorises, most of these cosmetic genital surgeries in the 19th century were carried out on adult patients at their own request.<sup>28</sup>

In fact, psychologist John Money's studies of adults with intersex, prior to the era of standardized cosmetic surgical interventions, found that they experienced lower rates of psychopathology compared to the general population.<sup>29</sup>

Nevertheless, intersex increasingly became a medical concern, just as many other aspects of biology, sexuality, and psychology did. The majority of intersex treatments were motivated not by medical health concerns, but by psychosocial factors; by the 1950s, intersex was primarily

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<sup>26</sup> *Id.*

<sup>27</sup> *Supra* note 18.

<sup>28</sup> *Id.*

<sup>29</sup> *David Reimer and John Money Gender Reassignment Controversy: The John/Joan Case*, Embryo Project Encyclopedia (2017), <https://embryo.asu.edu/pages/david-reimer-and-john-money-gender-reassignment-controversy-johnjoan-case>.

viewed as a psychosocial problem that challenged societal norms.<sup>30</sup>

### C. JOHN HOPKINS UNIVERSITY & THE OPTIMUM GENDER OF REARING MODEL

In an effort to virtually eradicate intersex in early childhood, Johns Hopkins University formulated the "optimum gender of rearing" model.<sup>31</sup> The primary goal was to align every child's body, environment, and intellect, with their assigned gender in order to maximise their chances for a "normal" gender identity.<sup>32</sup>

The majority of medical choices were made on behalf of patients by doctors.<sup>33</sup> The concepts of informed consent and systematic outcome research received little attention.<sup>34</sup>

The theoretical foundation for the Hopkins protocol was established by psychologist John Money, who gained academic repute for his claim that an individual's gender identity was highly flexible during young age, and

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> David Reimer and John Money Gender Reassignment Controversy: The John/Joan Case, Einstein J. Biol. Med., <https://einsteinmed.edu/uploadedFiles/Publications/EJBM/Article2.pdf> (last visited Nov. 9, 2024); *Concealment-Centered Model*, Intersex Soc'y of N. Am., <https://isna.org/faq/concealment/> (last visited Nov. 9, 2024).

<sup>33</sup> Sophy Baird, *The silence of the 'I': Legal and social implications of intersex genital mutilation of children*, SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS, Vol.37, pgs.372-391 (2021).

<sup>34</sup> *Id.*

consequently, infants having "*ambiguous genitalia*" can safely undergo reassignment surgery as newborns without detrimental results.<sup>35</sup>

The case of David Reimer, widely known in medical literature as the "*John/Joan case*", significantly influenced the proliferation of early genital surgery on intersex children.<sup>36</sup> David, who was born in 1965 as one of two identical male twins, with no intersex condition.<sup>37</sup> At eight months of age, Reimer experienced a devastating surgical accident during a routine circumcision procedure, resulting in the loss of his penis.<sup>38</sup> Following this incident, Reimer's parents sought consultation at Hopkins, where Money convinced them to consent to a sex reassignment surgery, and have their child grow up as a woman, named "Brenda Reimer".<sup>39</sup>

Over the following decade, Money published numerous papers, incorrectly reporting this case as a successful intervention.<sup>40</sup> However, subsequent revelations demonstrated that Reimer had never fully identified as

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<sup>35</sup> Gray Babbs, *Why X and Y?*, Pub. Health Post (Feb. 6, 2018), <https://publichealthpost.org/health-equity/why-x-and-y/#:~:text=In%20the%201950s%2C%20physicians%20and,upbringing%20as%20consistent%20as%20possible> (last visited Nov. 9, 2024).

<sup>36</sup> Jemima Repo, *The Birth of Gender: Social Control, Hermaphroditism, and the New Postwar Sexual Apparatus* in *THE BIOPOLITICS OF GENDER*, pgs. 24-48 (2015, Oxford Academic).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

female throughout development.<sup>41</sup> By the age of fifteen, Reimer had assumed the identity of a man.<sup>42</sup>

Reimer publicly denounced genital surgeries on infants, in 1997.<sup>43</sup> Tragically, at the age of 38 in 2004, Reimer took his own life.<sup>44</sup>

It remains unclear why psychologist John Money, who had previously found relatively low rates of psychopathology among adults with intersex conditions, as mentioned above, came to believe that individuals with intersex required surgical and social engineering of their sex and gender in order to achieve psychological well-being.<sup>45</sup>

However, the reasons behind the limited questioning of Money's controversial "nurture over nature" theoretical approach are more readily understood. Surgeons and psychologists found the theory appealing, as it justified their provision of what they considered necessary and beneficial care for "abnormal" children.<sup>46</sup> Feminists were drawn to the idea that gender, and consequently gender norms, were socially constructed and malleable.<sup>47</sup> Parents were likely

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> TERRY GOLDIE, *THE MAN WHO INVENTED GENDER: ENGAGING THE IDEAS OF JOHN MONEY*, pgs. 174-193 (2014, UBC Press).

<sup>44</sup> *Id.*

<sup>45</sup> *Supra* note 32.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

reassured by the notion that their children with atypical bodies could be moulded into straight-acting adults.<sup>48</sup>

Psychologist John Money's work significantly influenced the widespread medical practice of performing surgeries on intersex children, shaping the view that such interventions were necessary for "normalization", and medical protocols *vis-à-vis* intersex infants are still informed by his works to this day.

Having discussed the historical origins of the practise and the current medical approach with regard to the same, we now shift focus to the position of IGM *vis-à-vis* international law, and the protections afforded to the children. This discussion informs the critique of the Indian government and the Indian judiciary undertaken later, and also forms the basis of the policy recommendations we seek to make.

#### **IV. INTERNATIONAL LAW & INTERSEX CHILDREN**

Although India is formally a dualist nation, the notion that international and domestic law operate in isolation is increasingly outdated. The Indian Supreme Court ('SC') has shifted from a strictly dualist "*transformation*" to a more monist "*incorporation*" approach. This allows international law ('IL') to fill gaps within the Indian jurisprudence. In the specific framework of intersex children, IL provides essential guidelines and has, driven positive global change.

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<sup>48</sup> *Id.*

In this section, we examine how so-called "normalizing" surgeries on intersex children infringe upon several fundamental rights established in international law. We present a threefold argument: *first*, establishing a framework for rights of intersex children, derived from the Yogyakarta Principles ('YP') and international treaties; *second*, parental rights and family integrity; and *third*, addressing the balance between parents and children's right to consent for "normalisation surgeries."

#### A. CHILD RIGHTS IN INTERNATIONAL LAW: FRAMEWORK AND PROTECTIONS UNDER THE YOGYAKARTA PRINCIPLES

We believe that every individual has a right to self-identification and self-determination of gender identity. This rooted in four HR principles: **personal autonomy**,<sup>49</sup> **privacy**,<sup>50</sup> **access to healthcare**,<sup>51</sup> and **bodily integrity**.<sup>52</sup> These

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<sup>49</sup> Art. 22, UN General Assembly, *Universal Declaration of Human Rights*, 217 A (III), 10 December 1948. [hereinafter 'UDHR']

<sup>50</sup> Art. 17, UN General Assembly, *International Covenant on Civil and Political Rights*, United Nations Treaty Series, vol. 999, p. 171, 16 December 1966. [hereinafter 'ICCPR']; HRC, *General Comment No. 16: Article 17 (Right to Privacy)*, *The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (1988); Art. 12 UDHR.

<sup>51</sup> Art. 2, 12, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, United Nations Treaty Series, vol. 993, p. 3, 16 December 1966. [hereinafter 'ICESCR'].

<sup>52</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations Treaty Series, vol. 1465, p. 85, 10 December 1984. [hereinafter 'CAT']; Art. 7 of the ICCPR.

principles are incorporated into international treaties that India has ratified. The YP are the backbone for this framework by declaring that **gender identity** and **self-determined sexual orientation** are intrinsic facets of livelihood, deeply connected to **dignity, freedom, and self-determination**.<sup>53</sup> They explicitly forbid any requirement for **medical interventions**—whether surgical, hormonal, or sterilization procedures—as conditions for legal gender recognition.<sup>54</sup> YP also states that marital status or parenthood cannot be grounds for denying gender recognition. The YP's core objectives are to also protect individuals from being pressured to hide or deny their true identity.<sup>55</sup> The expanded **Yogyakarta Principles Plus 10** builds upon this foundation by introducing further rights.<sup>56</sup>

Building on such principles under the YP, we analyse how cosmetic “*normalizing*” surgeries on intersex children infringe four fundamental HR:

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<sup>53</sup> International Commission of Jurists, *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, Mar. 2007, ¶ 11-12. [hereinafter ‘YP,]

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> International Commission of Jurists, *Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, Nov. 2017, ¶ 10.

### **1. The Right to Life, Liberty, and Security of Person**

The right to personal liberty and security is affirmed in Art. 9 of the International Covenant on Civil and Political Rights ('ICCPR').<sup>57</sup> The UNHRC interprets Art. 9 as encompassing protection from both physical and psychological harm.<sup>58</sup> The Committee further emphasized that states must address patterns of violence, especially when directed at children based on their **sexual orientation** or **gender identity**. This obligation applies regardless of whether the violence is committed by state authorities or individuals.<sup>59</sup>

Apart from ICCPR, life and liberty and security of an individual is mentioned in the Universal Declaration of Human Rights ('UDHR'). India is obligated to safeguard these rights to all individuals as a signatory to the UDHR.<sup>60</sup> This responsibility, is mentioned in Art. 3 of the UDHR.<sup>61</sup> In *Maneka Gandhi*,<sup>62</sup> the SC also noted that the UDHR's has had a significant impact on the Constituent Assembly. The SC acknowledged that the framers incorporated the principles of the UDHR into Part III of the Constitution.

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<sup>57</sup> Art. 9, ICCPR.

<sup>58</sup> United Nations Human Rights Committee [hereinafter 'UNHRC'], *General comment no. 35, Article 9 (Liberty and security of person)*, U.N. Doc. No. CCPR/C/GC/35.

<sup>59</sup> *Id.*

<sup>60</sup> UDHR, GA Res. 217 (III) A, 1948, UN Doc. A/810.

<sup>61</sup> Art. 3, UDHR.

<sup>62</sup> *Maneka Gandhi v. Union of India*, 1 SCC 248 (1978).

Therefore, permitting unrestricted genital "normalizing" surgeries on intersex children risks violating this right to liberty and security, as such procedures often result in lasting **psychological and physical harm**.<sup>63</sup> Frequently driven by unfounded concerns about future gender identity or sexual orientation,<sup>64</sup> such surgeries are carried out across the healthcare sector in India.

Indian law has traditionally supported bodily integrity but lacks specific protections for mental integrity. While the Indian Constitution protects mental autonomy (such as religious and speech freedoms),<sup>65</sup> these rights focus more on intellectual choices than on shielding against mental harm. In contrast, IHRL explicitly includes mental integrity under liberty, life, and security rights, supporting protections for intersex individuals against psychologically harmful surgeries. Furthermore, IHRL upholds bodily integrity for both children and adults, even limiting parental authority in some cases, whereas Indian law remains inconsistent in safeguarding children's bodily integrity outside of government-controlled settings. Consequently, India should regulate these practices in order to safeguard intersex children from coerced interventions.

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<sup>63</sup> Stephens S.M., *A Child's Expertise: Establishing Statutory Protection for Intersexed Children Who Reject Their Gender of Assignment*, 81 NYUL Rev 530 (2007).

<sup>64</sup> WHO, *Gender and Health*, in *Gender and Health: Policy and Practice* (2021).

<sup>65</sup> The Constitution of India, 1950, Arts. 19, 25.

## 2. *The Right to Privacy*

Obligations under Art.17 of ICCPR and Art. 12 of UDHR include protecting individuals from arbitrary or unlawful invasions of privacy.<sup>66</sup> The UNHRC has embraced a broad interpretation of privacy, extending to *"the aspects of an individual's life where they may freely express their identity."*<sup>67</sup> This broad definition protects **personal autonomy**, which includes the right to self-determine one's sexual identity.<sup>68</sup> The Committee also advocates for a flexible understanding of *"family"* to include diverse cultural differences.<sup>69</sup>

Privacy is also reinforced in Principles 3 and 6 of the YP, which protect individuals' decisions regarding their bodies.<sup>70</sup> The YP +10 also recognize the right to bodily integrity and mental health. According to Principle 32, which addresses coerced medical interventions, *"everyone has the right to mental and bodily integrity, regardless of their sexual orientation."*<sup>71</sup> For intersex children, this right has been recognized in institutional and individual responses to testimonies by survivors of *"normalization" practices.*<sup>72</sup>

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<sup>66</sup> Art. 17, ICCPR.

<sup>67</sup> Coeriel v. The Netherland, Comm. No.453/1991, ¶ 10(2).

<sup>68</sup> Toonen v. Australia, Comm. No.488/1992, ¶ 8(2).

<sup>69</sup> UNHRC, CCPR General Comment No. 16 on Article 17 (Right to Privacy), ¶ 5.

<sup>70</sup> YP, ¶3, 6.

<sup>71</sup> YP +10, ¶32.

<sup>72</sup> CRC, *Concluding Observations on the Combined 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Periodic Representation*, UN Doc. No. CRC/C/CHE/CO/2-4 (Switzerland) ; RPD,

The case of *Puttaswamy*,<sup>73</sup> the SC established that privacy rights fundamentally incorporate **personal autonomy** and **bodily self-determination**.<sup>74</sup> In *Lillu*<sup>75</sup> the Court established principles ensuring that medical interventions prioritize health and safety for victims of sexual assault while avoiding any form of degrading treatment.<sup>76</sup>

The unfettered system of genital “normalizing” procedures on intersex children breaches their right to privacy, by removing the fundamental ability to make personal decisions about their identity and its expression. Such procedures deeply impact sexual identity, practices, gender identity, and anticipated gender roles. Furthermore, these surgeries interfere with functioning of a family life, as many victims report altered family dynamics and, in cases of sterilization, the loss of the opportunity to establish a biological family.<sup>77</sup>

### ***3. The Right to Health***

Art. 12 of the ICESCR mentions the right to health.<sup>78</sup> This has to be read with Art. 2 of ICESCR which mandates progressive

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*Concluding Observations on the Initial Rep. of Germany*, UN Doc. No. CRPD/C/DEU/CO/1 (2015)

<sup>73</sup> *Justice K.S. Puttaswamy (Retd.) v. Union of India*, 2018 12 SCALE.

<sup>74</sup> *Id.*

<sup>75</sup> *Lillu @ Rajesh v. State of Haryana*, 2013 2 SCR 774.

<sup>76</sup> *Id.*

<sup>77</sup> Bansal A, Dwivedi LK, Ali B. *The trends of female sterilization in India: an age period cohort analysis approach*, BMC WOMEN HEALTH, Vol. 22(1) (2022).

<sup>78</sup> Art. 12, ICESCR.

realisation of this obligation.<sup>79</sup> The UNHRC on ESC Rights has expanded this right to encompass individuals' autonomy over their sexual and reproductive health. This includes safeguards against medical interventions conducted without consent.<sup>80</sup> This right to health is also supported by Art. 12 of CEDAW,<sup>81</sup> Art. 25 of the CRPD,<sup>82</sup> and Arts 17, 23, and 24 of the United Nations Convention on the Rights of the Child ('UNCRC')<sup>83</sup> to guarantee the best possible standard of physical health.

For those born with intersex traits, this right encompasses two critical protections: the right to avoid procedures that could harm their present health and the right to receive any form of future healthcare needs. UNCRC bolsters this protection through Art 3,<sup>84</sup> by requiring that all decisions which affect a child should be taken after considering their "*best interests.*" Art. 3 has to be read with Art. 12 of UNCRC which affirms a

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<sup>79</sup> Art. 2, ICESCR.

<sup>80</sup> Committee on Economic, Social and Cultural Rights [hereinafter 'ESCR'], *General Comment Number 14, Art. 12 (Right to the Highest Attainable Standard of Health)*, UN Doc No. W/C.12/2000/4 (2000).

<sup>81</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations Treaty Series, vol. 1249, p. 13 [hereinafter 'CEDAW']

<sup>82</sup> Art. 25, UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, A/RES/61/106*, 24 January 2007, [hereinafter 'RPD'].

<sup>83</sup> Art. 17, 23, 24, UN General Assembly, *United Nations Convention on the Rights of the Child*, United Nations Treaty Series, vol. 1577, p. 3, 20 November 1989. [hereinafter 'UNCRC'].

<sup>84</sup> Art. 3, UNCRC.

child's right to participate in decisions which impact their wellbeing.<sup>85</sup> Taken together, these provisions imply that surgeries permanently altering a child's body should only proceed with the child's explicit consent, aligned with their best interests.

Multiple UN committees have advocated for the safeguarding health of intersex children. In its Concluding Observations on Costa Rica, the CEDAW emphasised that intersex individuals frequently encounter obstacles to healthcare access and are subjected to cruelty by medical professionals.<sup>86</sup> In Austria, CEDAW recommended a rights-based healthcare approach for intersex individuals, emphasizing that medical interventions should be performed only with the child's full and informed consent.<sup>87</sup> RPD's Committee has also expressed concerns regarding "sex-normalizing" surgeries on intersex children in India, advising that India adopt measures to safeguard the bodily and psychological integrity of these children.<sup>88</sup>

Principle 18 of the YP puts a positive obligation on states to uphold the right of sexual minorities to be protection from

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<sup>85</sup> Art. 12, UNCRC.

<sup>86</sup> CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Costa Rica*, UN Doc.CEDAW/C/CRI/CO/5-6.

<sup>87</sup> Committee CEDAW, *Concluding Observations on the Ninth Periodic Report of Austria*, U.N. Doc. CEDAW/C/AUT/CO/9 (2019).

<sup>88</sup> PRD, *Concluding Observations on the Initial Report*, UN Doc. CRPD/C/IND/CO/1 (India).

medical abuse.<sup>89</sup> It specifies that no person should be forced to undergo medical or psychological treatment, procedures, or testing, nor be confined to medical facilities based solely on their sexual orientation or gender identity.<sup>90</sup>

A comprehensive interpretation of international provisions confirms that all individuals have the right to the “highest standards” of physical and mental health. States are therefore obligated to uphold core health rights and work progressively toward fully realizing this right. In India, the SC has acknowledged health as a fundamental human right.<sup>91</sup> As a result, intersex individuals, especially children, possess an implicit right to be protected from non-consensual genital “normalizing” surgeries.

#### ***4. The Prohibition of Torture and Inhuman or Degrading Treatment***

Art. 7 of the ICCPR guarantee’s individuals freedom from torture and any cruel, inhuman, or degrading treatment, which includes protection from actions that inflict mental suffering.<sup>92</sup> UN’s Special Rapporteur has highlighted that invasive, non-therapeutic medical operations of a permanent nature constitute torture if conducted without informed

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<sup>89</sup> YP, Principle 18.

<sup>90</sup> *Id.*

<sup>91</sup> Calcutta Elec. Supply Corp. (CESC) Ltd. v. Subhash Chandra Bose, AIR 1992 SC 573.

<sup>92</sup> Art. 7, ICCPR.

consent.<sup>93</sup> **J. E. Méndez** has also raised concerns over widespread reports of involuntary medical procedures, including genital surgeries which are often mislabelled as "*reparative therapies*." He stated that intersex children are subjected to non-consensual sex assignments and genital modifications, leading to irreversible infertility.<sup>94</sup>

The CAT Committee has formally condemned several countries—including **Germany**,<sup>95</sup> **Switzerland**,<sup>96</sup> **Austria**,<sup>97</sup> **Hong Kong**,<sup>98</sup> **Denmark**,<sup>99</sup> and **France**<sup>100</sup>—for failing to end these practices. The Committee urged these nations to implement comprehensive methods to safeguard the **integrity and autonomy** of intersex individuals.<sup>101</sup> **The**

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<sup>93</sup> Mr Manfred Nowak, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development : report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/HRC/7/3, UN Human Rights Council, ¶¶ 40, 47.

<sup>94</sup> *Id.*, ¶ 50.

<sup>95</sup> CAT, Concluding Observations on the 5<sup>th</sup> Periodic Report, UN Doc. No. CAT/C/DEU/CO/5 (2011) (Germany).

<sup>96</sup> CAT, Concluding observations on the 7<sup>th</sup> periodic report, ¶ 20-21, UN Doc. No. CAT/C/CHE/CO/7 (Switzerland).

<sup>97</sup> CAT, Concluding observations on the 6<sup>th</sup> periodic report, ¶ 43-44, UN Doc. No. CAT/C/AUT/CO/6 (Austria).

<sup>98</sup> CAT, Concluding observations on the 5<sup>th</sup> periodic report, ¶ 28, UN Doc. No. CAT/C/CHN-HKG/CO/5 (Hong Kong).

<sup>99</sup> CAT, Concluding observations on the combined 6<sup>th</sup> & 7<sup>th</sup> periodic reports, ¶¶ 41-42, UN Doc. No. CAT/C/DNK/CO/6-7 (Denmark).

<sup>100</sup> CAT, Concluding observations on the 7<sup>th</sup> periodic report, ¶¶ 33-34, UN Doc. No. CAT/C/FRA/CO/7 (France).

<sup>101</sup> *Id.*

OCHR echoed this stance.<sup>102</sup> CAT also mandates states to have a duty to prevent torturous treatment, whether in public or private settings, including procedures conducted by private medical practitioners.<sup>103</sup>

In India most procedures are performed on intersex children, regardless of any purported medical necessity or well-meaning intent. These procedures are highly invasive, irreversible, and generally medically unnecessary.<sup>104</sup> They are often done without real informed consent from the affected children.<sup>105</sup> Consequently, if such surgeries continue then they would be considered as torture against the intersex children as they are performed without their consent.

## **B. NAVIGATING THE BALANCE BETWEEN CHILDREN'S RIGHTS AND PARENTAL AUTHORITY: INSIGHTS FROM IHRL**

IL allows parents to consent on behalf of their children, particularly when children are too young to make informed decisions. This creates tension within IHRL due to varied cultural family dynamics.<sup>106</sup> Family integrity, part of the right

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<sup>102</sup> OHCHR, *Background Note on Human Rights Violations against Intersex People* (2015), available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf>.

<sup>103</sup> *Id.*

<sup>104</sup> Payal K. Sahni & Katrina A. Karkazis, *Legal and Ethical Considerations in Medical Interventions on Intersex Children in India*, 50 *J. Med. Ethics* 226 (2024).

<sup>105</sup> *Id.*

<sup>106</sup> Art 17, 23, ICCPR; Art. 12, 16, UDHR.

to private life,<sup>107</sup> sometimes conflicts with children's rights, and IL uses "arbitrariness" as a standard for assessing legitimate interference, guided by Article 17 of the ICCPR.<sup>108</sup> Additionally, the UDHR allows limiting parental rights to protect others' fundamental rights.<sup>109</sup> Although IL respects both parental and children's rights, determining which should prevail remains challenging. This section will examine two cases:

*First*, in the context of **FGM**—a practice often carried out on young girls at the request of their parents<sup>110</sup>—the HRC has placed clear limitations on parental authority.<sup>111</sup> The right of a girl to be free from non-consensual medical operations is affirmed in Arts.7 and 24 of the ICCPR, which urge states to take preventative measures to eliminate FGM.<sup>112</sup> UN Committees like the Committee on the Rights of the Child ('CRC'),<sup>113</sup> the Committee on Elimination of all forms of Discrimination Against Women ('CEDAW'),<sup>114</sup> and the

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<sup>107</sup> Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 Harv. C.R.-C.L. L. Rev. 353 (2021).

<sup>108</sup> Art. 17, ICCPR.

<sup>109</sup> Art. 29, UDHR.

<sup>110</sup> WHO, *Female Genital Mutilation*, (Feb. 3, 2023), available at <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

<sup>111</sup> *Id.*

<sup>112</sup> Arts. 7, 24, ICCPR.

<sup>113</sup> CRC, GC No. 4 (2003): *Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, UN Doc. No. CRC/GC/2003/4, ¶¶ 20, 35.

<sup>114</sup> CEDAW, *General Recommendation No. 24*, ¶ 12, UN Doc. A/54/38/Rev.

Committee on Economic, Social and Cultural Rights ('ESC Committee'),<sup>115</sup> uphold similar views. They prioritize girls' rights to health by mandating protections against this "harmful traditional practice" through legislative action. These bodies suggest that only if **severe medical consequences** are involved, then parent's right should supersede children's rights.

Second, IHRL restricts parental rights in cases of child marriage<sup>116</sup>—a practice often rooted in traditional views on gender roles.<sup>117</sup> The Human Rights Committee ('HRC') requires that the minimum legal age for marriage allows for free and full consent from individuals, even if guardians, typically male, attempt to consent on behalf of young women.<sup>118</sup> Bodies such as CAT,<sup>119</sup> CRC<sup>120</sup> and CEDAW<sup>121</sup> advocate for a minimum legal age for marriage. They view

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<sup>115</sup> ESCR, GC No. 14: *The Right to the Highest Attainable Standard of Health*, ¶¶ 22, 34, UN Doc. No. E/C.12/2000/4 (2000).

<sup>116</sup> *Girls Not Brides, International and Regional Standards for Protection from Child Marriage* (2013), available at <https://www.girlsnotbrides.org/documents/1198/International-and-Regional-Standards-for-Protection-from-Child-Marriage-June-2013.pdf>.

<sup>117</sup> *Id.*

<sup>118</sup> HRC, *General Comment No. 28: Article 3 (The equality of rights between men and women)*, ¶ 22, UN Doc. No. HRI/GEN/1/Rev.9.

<sup>119</sup> CAT, *Concluding observations of the Committee against Torture, Yemen*, ¶ 31, UN Doc. No. CAT/C/YEM/CO/2/Rev.1.

<sup>120</sup> *Coming of Age: The Establishment of 18 as the Legal Minimum Age for Marriage*, Oxford Human Rights Hub (July 9, 2021), available at <https://ohrh.law.ox.ac.uk/coming-of-age-the-establishment-of-18-as-the-legal-minimum-age-for-marriage>.

<sup>121</sup> *Id.*

child marriages as cruel. These bodies consistently emphasize that in cases where a guardian's consent replaces a child's own, child rights should take precedence over parental authority.

These examples illustrate how IHRL balances children's and parents' rights, often prioritizing children's rights. International bodies mandate that states implement legislative, protective, and remedial measures to eliminate—rather than merely restrict—harmful practices. IL does not entirely disregard parental roles, acknowledging that practices like FGM and child marriage often arise from “*cultural relativism*.”<sup>122</sup> Therefore, a rights-based approach<sup>123</sup> to genital “*normalizing*” surgeries could involve a statutory ban on performing, assisting, or promoting these procedures.

We now delve into how international organizations have characterised and attempted to address child and infant IGM.

## V. INTERNATIONAL POLICY & APPROACH TOWARDS IGM

In this section, we analyse and discuss *first*, the approach of international organisations such as the WHO and the UN Treat Bodies towards IGM; and *second*, policies of foreign States with respect to IGM.

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<sup>122</sup> *Id.*, ¶¶ 12–14.

<sup>123</sup> CEDAW & CRC, *Joint General Recommendation No. 31/General Comment No. 18 on Harmful Practices*, U.N. Doc. No. CEDAW/C/GC/31-CRC/C/GC/18 (2014).

## A. APPROACH OF INTERNATIONAL ORGANIZATIONS & TREATY BODIES

Member States of the United Nations have been urged to put a stop to the violations of the rights of intersex people by the treaty bodies operating under the aegis of United Nations. In 2015, a joint statement was released by 12 United Nations agencies, including the International Federation of Red Cross and Red Crescent Societies, condemning "*unnecessary surgery and treatment on intersex children without their consent*".<sup>124</sup>

### 1. World Health Organization

The World Health Organization ('WHO'), in 2013, expressed its opposition to early "corrective" sex reassignment surgeries on infants and young-age adults in its report entitled "*Eliminating forced, coercive and otherwise involuntary sterilization*".<sup>125</sup> In spite of this declaration, the WHO does not seem to have undertaken any concrete steps towards

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<sup>124</sup> OHCHR, *Twelve UN agencies issue unprecedented joint statement on rights of lesbian, gay, bisexual, transgender & intersex people* (Sep. 29, 2015), <https://www.ohchr.org/en/press-releases/2015/09/twelve-un-agencies-issue-unprecedented-joint-statement-rights-lesbian-gay> (last visited Nov. 9, 2024).

<sup>125</sup> WHO, *Eliminating forced, coercive and otherwise involuntary sterilization An interagency statement*, pgs.2-3 (2013), available at [https://iris.who.int/bitstream/handle/10665/112848/9789241507325\\_eng.pdf?sequence=1](https://iris.who.int/bitstream/handle/10665/112848/9789241507325_eng.pdf?sequence=1).

eliminating the issue of child and adolescent IGM, as it has done, for instance, in the case of female genital mutilation.<sup>126</sup>

In fact, quite to the contrary, in its latest edition of the International Classification of Diseases ('ICD-11'), which became effective on January 01, 2022, the WHO maintains the pathologization of individuals with variations in sex characteristics, continuing to categorize them as having a "disorder of sex development".<sup>127</sup>

## **2. The United Nations & Associated Agencies**

To date, United Nations treaty bodies have issued 28 Concluding Observations that condemn intersex genital mutilation practices as a severe violation of non-derogable human rights.<sup>128</sup> This feedback has been provided to 17 State parties, spanning countries in Europe (9 nations), South Africa (2 instances), Asia (2 countries), and Oceania.<sup>129</sup>

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<sup>126</sup> *Female Genital Mutilation*, WHO (Feb. 3, 2023), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> (last visited Nov. 9, 2024).

<sup>127</sup> WHO, *International Classification of Diseases 11<sup>th</sup> Revision*, available at <https://icd.who.int/browse/2024-01/mms/en> (2022).

<sup>128</sup> *UN Reprimands for Intersex Genital Mutilations*, Stop Intersex Genital Mutilation, <https://stopigm.org/IAD-2016-Soon-20-UN-Reprimands-for-Intersex-Genital-Mutilations/> (last visited Nov. 9, 2024).

<sup>129</sup> OHCHR, *OHCHR Technical Note on The Human Rights of Intersex People: Human Rights Standards and Good Practices*, available at <https://www.ohchr.org/sites/default/files/2023-11/ohchr-technical-note-rights-intersex-people.pdf>.

- The Committee on the Elimination of Discrimination against Women has characterised IGM as “genital mutilation” and a “harmful practise”.<sup>130</sup>
- The Committee against Torture has characterised IGM as being constitutive of “cruel, inhuman or degrading treatment”, referring to Articles 2, 12, 14 and 16 of the Convention against Torture.<sup>131</sup> General Comment No. 2 of the Committee has explicitly confirmed that protections against inhuman treatment, as well as protection from genital mutilation, constitute non-derogable rights.<sup>132</sup>
- The Committee on the Rights of Persons with Disabilities identifies IGM as “exploitation, violence and abuse and as a violation of personal integrity”, pursuant to Articles 16 and 17 of the Convention on the Rights of Persons with Disabilities, respectively. <sup>133</sup>
- The Human Rights Committee has identified IGM as constituting “*cruel, inhuman or degrading treatment*”, “*a harmful practise and non-consensual medical or scientific experimentation*”, in reference to Articles 3, 7, 24 and 26 of the International Covenant on Civil and Political Rights.<sup>134</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

### **3. The United Nations Committee on the Rights of the Child**

The CRC has acknowledged "intersex genital mutilation"<sup>135</sup> and "medically unnecessary surgeries and other procedures on intersex children before they are able to provide their informed consent"<sup>136</sup> as constituting a "harmful practice" in a total of 16 Concluding Observations to date.<sup>137</sup>

In some instances, the Committee has additionally referenced Target 5.3 of the Sustainable Development Goals.<sup>138</sup> Typically, CRC recommends that parties "[e]nact legislation explicitly prohibiting IGM practices",<sup>139</sup> "adopt legal provisions in order to provide redress to the victims of such treatment, including adequate compensation",<sup>140</sup> including "including by lifting the statute of limitations"<sup>141</sup>, "provide families with intersex children with adequate counselling and support"<sup>142</sup>, "[e]ducate and train medical

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<sup>135</sup> CRC, *Concluding observations on the second periodic report of South Africa*, UN Doc. No. CRC/C/ZAF/CO/2 (Oct. 27, 2016).

<sup>136</sup> CRC, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland\**, UN Doc. No. CRC/C/GBR/CO/5 (Jul. 12, 2016).

<sup>137</sup> *Supra* note 124.

<sup>138</sup> CRC, *Committee on the Rights of the Child - Concluding observations on the combined third to sixth periodic reports of Malta*, UN Doc. No. CRC/C/MLT/CO/3-6 (Jun. 26, 2019).

<sup>139</sup> *Id.*

<sup>140</sup> CRC, *Concluding observations on the combined third and fourth periodic reports of Ireland*, UN Doc. No. CRC/C/IRL/CO/3-4 (Mar. 1, 2016).

<sup>141</sup> CRC, *Concluding observations on the combined fifth and sixth periodic reports of Belgium*, UN Doc. No. CRC/C/BEL/CO/5-6 (Feb. 28, 2019).

<sup>142</sup> CRC, *Concluding observations on the combined second to fourth periodic reports of Switzerland\**, UN Doc. No. CRC/C/CHE/CO/2-4 (Feb 26, 2015).

*and psychological professionals [...] on the consequences of unnecessary surgical and other medical interventions for intersex children*"<sup>143</sup>, and "to systematically collect disaggregated data on IGM practices."<sup>144</sup> Furthermore, the CRC has recognized "high levels of stigma and discrimination preventing intersex children from attending school and lack of access to adequate identity documents" as constituting a "harmful practice".<sup>145</sup>

In sum, despite growing awareness and strong condemnations from international organizations and treaty bodies, IGM remains pervasive, underscoring an urgent need for further action, enforcement, and support to protect and uphold the fundamental rights of intersex children globally.

## **B. STATE PRACTISE VIS-À-VIS PROHIBITION OF IGM**

Most countries do not have legislation in place to ban non-consensual, medically unnecessary intersex child sex reassignment surgeries. In countries where IGM is allowed under public healthcare coverage, there is often significant pressure to have these irreversible surgeries performed at a young age due to the very early age limits imposed by many

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<sup>143</sup> CRC, *Committee on the Rights of the Child: Concluding observations on the fifth periodic report of Denmark*, UN Doc. No. CRC/C/DNK/CO/5 (Oct. 26, 2017).

<sup>144</sup> CRC, *Concluding observations on the fifth periodic report of France*, UN Doc. No. CRC/C/FRA/CO/5 (Feb. 23, 2016).

<sup>145</sup> *Id.*; CRC, *Concluding observations on the combined 3rd to 5th periodic reports of Nepal: Committee on the Rights of the Child*, UN Doc. No. CRC/C/NPL/CO/3-5 (Jul. 8, 2016).

universal healthcare schemes for completing these procedures.<sup>146</sup>

Out of 193 United Nations Member States, 182 States have not imposed on restrictions on infant and child IGM.<sup>147</sup> Only 9 Member States have some form of nationwide restrictions, and another 2 Member States have restrictions at the sub-national level.<sup>148</sup>

The Maltese lawmakers in 2015 established a landmark legislation, known as the “*Gender Identity, Gender Expression and Sex Characteristics Act*”.<sup>149</sup> This Act was the first of its kind to explicitly prohibit sex-‘normalizing’ surgeries and grant progressive rights to intersex individuals.<sup>150</sup>

The Greek Parliament on July 19, 2022, closely followed the pioneering example set by Malta by introducing a law that prohibits medical interventions, including hormonal treatments and surgeries, intended to alter the sex

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<sup>146</sup> *Supra* note 6.

<sup>147</sup> *Interventions on Intersex Minors*, Int’l Lesbian, Gay, Bisexual, Trans, and Intersex Ass’n, <https://database.ilga.org/interventions-intersex-minors> (last visited Nov. 9, 2024).

<sup>148</sup> *Id.*

<sup>149</sup> *Malta’s Pioneering Law on Intersex Children*, *Le Monde* (Jun. 12, 2022), [https://www.lemonde.fr/en/science/article/2022/06/12/malta-s-pioneering-law-on-intersex-children\\_5986507\\_10.html](https://www.lemonde.fr/en/science/article/2022/06/12/malta-s-pioneering-law-on-intersex-children_5986507_10.html) (last visited Nov. 9, 2024).

<sup>150</sup> Tanya Ní Mhúirthile, *Malta*, in *THE LEGAL STATUS OF INTERSEX PERSONS*, pgs.357-368 (2019, Cambridge University Press).

characteristics of intersex minors under the age of 15, without their voluntary and informed consent.<sup>151</sup>

France,<sup>152</sup> Germany,<sup>153</sup> Iceland,<sup>154</sup> Portugal,<sup>155</sup> and Spain<sup>156</sup> have introduced similar restrictions on child and infant IGM, however, these laws have been heavily criticised by intersex activists for containing loopholes which give doctors and parents the opportunity to continue with the abhorrent practise.<sup>157</sup>

Having discussed international approaches and policies with respect to IGM, we now shift our focus specifically towards India in the next section.

## VI. THE INDIAN PERSPECTIVE

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<sup>151</sup> Greece Bans 'Sex-Normalizing' Surgeries on Intersex Babies, Reuters (July 20, 2022), <https://www.reuters.com/world/europe/greece-bans-sex-normalising-surgeries-intersex-babies-2022-07-20/> (last visited Nov. 9, 2024).

<sup>152</sup> Filip Rak, *Intersex rights emerging across Europe*, International Bar Association (Jul. 20, 2022), <https://www.reuters.com/world/europe/greece-bans-sex-normalising-surgeries-intersex-babies-2022-07-20/> (last visited Nov. 9, 2024).

<sup>153</sup> *In the making: Put an end to IGM*, OII Europe, <https://www.oiiurope.org/igm-legal/> (last visited Nov. 9, 2024).

<sup>154</sup> *Id.*

<sup>155</sup> Verein Intergeschlechtlicher Menschen Österreich, *NGO report to the 8th periodic report of Austria on the Convention against torture and other cruel, inhuman or degrading treatment or punishment (CAT)*, pg.36 (Mar. 2024), available at [file:///Users/User/Downloads/INT\\_CAT\\_CSS\\_AUT\\_57897\\_E.pdf](file:///Users/User/Downloads/INT_CAT_CSS_AUT_57897_E.pdf).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

In this section, we discuss *first*, the development of the Indian understanding, or the lack thereof, of the intersex identity. *Second*, we discuss the lack of any nationwide ban on IGM, and delve into the Tamil Nadu Government's order in this regard. *Third*, we analyse Indian and foreign jurisprudence to discuss how best interest of the child has been understood by the courts, as well as delve into what constitutes informed consent *vis-à-vis* a child.

## **A. ADVENT OF INDIAN LAW VIS-À-VIS INTERSEX**

In this section, we explore the development of Indian legal understanding *vis-à-vis* intersex rights. Indian jurisprudence falls short in directly addressing the rights of intersex children; therefore, we examine the general discussion of intersex individuals in Indian legal framework by focusing *first* on the inherent *limitations and contradictions in the NALSA Judgment*, which forms the basis of LGBTQIA+ rights in India, *second* the *practice of Indian courts after NALSA with regard to intersex individuals*, and *third*, a *critique of the Transgender Act and related Bills*.

### **1. *Limitations and Contradictions in the NALSA Judgment on Gender Recognition***

*National Legal Services Authority v. Union of India* ('NALSA')<sup>158</sup> is a landmark case in India that establishes gender recognition based on ascriptive standards. The SC recognized gender

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<sup>158</sup> *National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 [hereinafter 'NALSA'].

identity a right grounded in principles of autonomy,<sup>159</sup> equality,<sup>160</sup> dignity,<sup>161</sup> and expression.<sup>162</sup> It issued a set of directives designed to promote substantive equality for gender minorities.<sup>163</sup> However, in recognizing a "third gender," the Court appeared to draw heavily on the specific identity of the hijra community.<sup>164</sup> While groundbreaking, this focus on the hijra community does not encompass the full spectrum of gender diversity.<sup>165</sup>

The case was initiated by the NALSA, seeking formal gender recognition to ensure full social participation of "transgender" individuals.<sup>166</sup> This inclusion meant that transgender individual would now be eligible for benefits and entitlements stemming from positive discrimination.<sup>167</sup> Though the outcome of the NALSA judgment can be seen as successful, it contains notable contradictions.<sup>168</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> Art 14,15,16, Indian Constitution.

<sup>161</sup> Art. 21, Indian Constitution.

<sup>162</sup> Art. 19(1)(a) Indian Constitution.

<sup>163</sup> Art 14,15, Indian Constitution.

<sup>164</sup> Priya, *Hijras and the Legacy of British Colonial Rule in India*, LSE Gender (Jun. 17, 2019), <https://blogs.lse.ac.uk/gender/2019/06/17/hijras-and-the-legacy-of-british-colonial-rule-in-india/> (last visited on Nov. 8, 2024).

<sup>165</sup> NALSA, ¶ 129(1).

<sup>166</sup> *Id.*, ¶ 3.

<sup>167</sup> *Id.*, ¶ 45.

<sup>168</sup> Aniruddha Dutta, *Contradictory Tendencies: The Supreme Court's NALSA Judgement on Transgender. Recognition and Rights*, 5 J. Indian L. & Soc'y 225 (2014).

**On one hand**, the decision highlights the principle of gender self-determination.<sup>169</sup> It affirms individuals' rights to choose a binary or nonbinary gender identity, characterising this choice as an essential component of self-determination and dignity, by relying specifically to principle 3 of the YP.<sup>170</sup> The justices explicitly stated that medical procedures—such as **gender confirmation surgery** are not prerequisites for gender recognition<sup>171</sup> and “*sexual reassignment surgery*” for gender recognition is “*immoral and illegal.*”<sup>172</sup> Instead, self-identification should guide the recognition process.<sup>173</sup> This principle was reaffirmed in the directives, granting “transgender” individuals the right to identify as male, female, or third gender.<sup>174</sup>

**Certain aspects of the NALSA decision suggest a more restrictive view**, potentially treating nonbinary recognition as an ascriptive right. The other reading of the judgment suggests that gender recognition may be contingent upon undergoing sex reassignment surgery,<sup>175</sup> revealing a misunderstanding between intersex identity and hijra identity.<sup>176</sup> NALSA did not address intersex identities as a

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<sup>169</sup> NALSA, ¶ 62.

<sup>170</sup> *Id.*, ¶ 99.

<sup>171</sup> *Id.*, ¶ 20.

<sup>172</sup> *Id.*, ¶ 47.

<sup>173</sup> *Id.*, ¶ 20-21.

<sup>174</sup> *Id.*, ¶129(2).

<sup>175</sup> NALSA, ¶ 106.

<sup>176</sup> *Id.*

standalone category, overlooking the specific forms of oppression experienced by intersex persons.<sup>177</sup> Intersex identity primarily relates to how certain physical traits are perceived as “*deviating*” from normative physical standards,<sup>178</sup> whereas transgender identity is based on one’s internal perception of gender.<sup>179</sup> While related, intersex issues are not simply a subset of transgender concerns. Therefore, NALSA failed to address the intersex community’s primary concern—the unnecessary medical pathologization of their bodies.

## 2. *Practice after NALSA and the Treatment of Intersex People by the Courts*

In *Nangai*,<sup>180</sup> a *pre*-NALSA case, the High Court ruled in favour of an intersex individual named, who identified as a female, ordering her reinstatement in her position as a police constable. This judgment upheld her right to self-identify her gender.<sup>181</sup> Court held that requiring a medical examination for gender determination, in the absence of a legal mandate, infringed upon Art. 21.<sup>182</sup> In this case *Nangai* was categorized as “*transgender*,” and the court did not clarify the difference between intersex and transgender identities.

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<sup>177</sup> Jens Scherpe, *Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons*, LSIP 201(J. Scherpe et al. eds., 2018).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Nangai v. Superintendent of Police*, 2014 SCC OnLine Mad 988.

<sup>181</sup> *Id.*, ¶ 37

<sup>182</sup> *Id.*, ¶

Even after *NALSA*, subsequent cases, like *Jackuline Mary*,<sup>183</sup> have interpreted *NALSA* narrowly. In *Jackuline Mary*, an intersex person raised as a woman faced dismissal from a government job designated for women after medical tests revealed a 46 XY with under virilization chromosomal pattern. Thereafter she was labelled “*transgender by birth*.”<sup>184</sup> The court cited *NALSA* to affirm her right to be recognized as a woman based on her self-identification. However, it interpreted *NALSA*'s “*third gender*” recognition as applicable only to transgender women, implying that all other gender identities must conform to a male-female binary under Indian law.<sup>185</sup> This case highlights three key issues:

*First*, the court assumed *NALSA* only applies to transgender women, categorizing them as “*third gender*.”<sup>186</sup> *Second*, it ignored the petitioner's intersex identity by labelling her as transgender, demonstrating a persistent conflation of intersex and transgender identities.<sup>187</sup> *Last*, because the Jackuline identified as female, the court did not consider her intersex status.<sup>188</sup> Therefore, while *NALSA* aimed to create legal space for gender self-determination, the case's interpretation has led to selective applications, limiting self-identification rights.

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<sup>183</sup> *Jackuline Mary v. Superintendent of Police*, 2014 SCC OnLine Mad 987 [hereinafter ‘*Jackuline Mary*’].

<sup>184</sup> *Id.* ¶ 3.

<sup>185</sup> *Id.*

<sup>186</sup> *Jackuline Mary* ¶ 37.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

Similarly, the High Courts of Madras and Rajasthan affirmed the right to self-determination of gender in *Thanusu*<sup>189</sup> and *Ganga Kumari*.<sup>190</sup> In both cases, the petitioners, who were intersex, had either been selected as or applied for the position of woman police constable. However, they were also mischaracterised as transgender.

The case of *Pinki Pramanik*, a national-level player alleged of sexual assault, further highlights the legal treatment of intersex individuals.<sup>191</sup> While incarcerated, she was subjected to numerous invasive medical examinations to determine her gender identity, ultimately being diagnosed with “*male pseudohermaphroditism*.”<sup>192</sup> The court labelled her as “*incapable*” of engaging in sexual intercourse “*like an ordinary male*,” reflecting stereotypes about the assumed sexual limitations of intersex individuals.<sup>193</sup> In *Faizan Siddiqui*, the petitioner identified as female, but the court did not consider her rights as an intersex person.<sup>194</sup>

These cases highlight how legal perspectives often reinforce medical narratives that view intersex bodies as incomplete, perpetuating biases. Indian courts frequently conflate intersex and transgender identities, mistakenly categorizing

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<sup>189</sup> *T. Thanusu v. Sec’y to Gov’t of Tamil Nadu*, W.P. No. 16539 of 2014, decided on July 3, 2014, ¶4.

<sup>190</sup> *Ganga Kumari vs State & Ors*, S.B. Civil Writ Petition No. 14006 / 2016.

<sup>191</sup> *Pinki Pramanik v. State of W. Bengal*, CRR 2848 of 2013.

<sup>192</sup> *Id.*, ¶4.

<sup>193</sup> *Id.*, ¶5.

<sup>194</sup> *Faizan Siddiqui v. Sashastra Seema Bal*, W.P.(C) No. 7208 of 2008.

individuals with non-binary traits as “transgender.” While intersex individuals may identify outside their assigned gender, intersex and transgender identities are distinct and should not be seen as interchangeable.

### ***3. Critique of the Transgender Act and Bills***

Following the *NALSA* judgment, the Indian Parliament attempted to legislate protections for transgender individuals through several bills. The first Transgender Persons Bill in 2014<sup>195</sup> aimed to create an inclusive framework, defining a “*transgender person*”<sup>196</sup> as anyone whose gender identity differs from their birth-assigned gender. However, this definition included transgender men, transgender women, and genderqueer individuals, excluding intersex persons.<sup>197</sup>

In 2016, a revised Transgender Persons Bill<sup>198</sup> was introduced, which expanded the definition to encompass individuals with intersex traits. Yet, it failed to define “intersex” explicitly.<sup>199</sup> The Bill was sent to the Standing Committee for review, where the Committee expressed solidarity with the transgender community and highlighted that transgender identities are a part of human diversity.<sup>200</sup> However, it ambiguously grouped intersex individuals with “eunuchs,”

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<sup>195</sup> *The Rights of Transgender Persons Bill*, Bill No. XLIX-C of 2014.

<sup>196</sup> Clause 2(t), *Transgender Bill*, 2014.

<sup>197</sup> *Id.*

<sup>198</sup> *The Transgender Persons (Protection of Rights) Bill*, 2016.

<sup>199</sup> *The Transgender Persons (Protection of Rights) Bill*, Clause 2(i).

<sup>200</sup> *The Transgender Persons (Protection of Rights) Bill*, 2016, referred to the Standing Comm. on Soc. Just. & Emp., 2016.

differentiating them from intersex individuals who might live conventional lives.<sup>201</sup> Acknowledging gaps in the Bill, the Committee recommended including intersex individuals explicitly in the title, proposing separate definitions for “persons with intersex variations” and suggesting penalties for harmful practices like forced infant surgeries.<sup>202</sup> The Ministry, however, declined these recommendations, viewing “transgender” as an umbrella term inclusive of intersex identities.

The issues present in the earlier versions of the bills remain unaddressed in the final Transgender Persons (Protection of Rights) Act, leaving critical gaps in protections for intersex individuals. The Act, defining a “*person with intersex variations*” as someone whose primary sexual traits, such as external genitalia, chromosomes, or hormones, differ from what is considered a “*normative*” male or female body.<sup>203</sup> The definition is inherently biased against intersex individuals, as it fails to clarify what constitutes a normative male or female body. Additionally, by labelling intersex traits as “*variations*,” it implies a deviation from an undefined standard. It subtly implies that intersex bodies are not “*normal*.”<sup>204</sup> This

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<sup>201</sup> The Transgender Persons (Protection of Rights) Bill, 2016, Preface.

<sup>202</sup> Id.

<sup>203</sup> The Transgender Persons (Protection of Rights) Act, 2019, §2(i).

<sup>204</sup> Jayna Kothari, *Beyond the Binary: Advancing Legal Recognition for Intersex Persons in India*, Ctr. for L. & Pol’y Rsch. (2020), available at <https://clpr.org.in/publications/beyond-the-binary-advancing-legal-recognition-for-intersex-persons-in-india/>.

superficial acknowledgment leans more toward legal misrecognition, framing intersex traits as deviations from a supposed normative standard. By failing to differentiate “intersex” from “transgender,” the Act subsumes intersex identity within a broader transgender category. Specific legal protections addressing the unique issues and unwarranted medical pathologization faced by intersex individuals are absent from both the Transgender Act and judicial discourse.<sup>205</sup>

These concerns emphasize the neglect of intersex issues, while Indian courts have frequently used insensitive language toward intersex individuals, disregarding the stigma and trauma associated with such terminology.

## **B. ANALYSING NATIONAL & STATE GOVERNMENTS' APPROACH & PRACTICE**

India does not have any comprehensive nation-wide policy or legislation in place imposing a ban on child IGM. Even though India does not keep a count of the number of intersex children born and intersex adults, just by virtue of being most populous country, India is home to the highest number of intersex children in the world.<sup>206</sup> Taking the estimate of

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<sup>205</sup> The Transgender Persons (Protection of Rights) Act, 2019, §§ 3, 4, 7, 9, 11, 12, 15.

<sup>206</sup> Meenakshi Ganguly & Kyle Knight, *Momentum Builds Around Intersex Protection in India*, Hum. Rts. Watch (Jan. 14, 2021), <https://www.hrw.org/news/2021/01/14/momentum-builds-around-intersex-protection-india> (last visited on Nov. 8, 2024).

intersex births forming up to 1.7% of the general population, India's is home to around 2.5 crore people born with intersex characteristics,<sup>207</sup> with around 1,150 children being born with intersex characteristics every single day.<sup>208</sup> There is, thus, a need for a comprehensive policy addressing the issue of IGM in India nationwide.

If we look to the Indian States, only Tamil Nadu has implemented a complete ban on IGM in 2019, pursuant to the judgement of the Madras High Court in *Arun Kumar v. Inspector General of Registration*.<sup>209</sup> This ban was notably strongly opposed by the India Association of Paediatric Surgeons.<sup>210</sup> The Order released by the Tamil Nadu Government bans sex reassignment surgeries ('SRS') on infants and children, except in "life-threatening" situations.<sup>211</sup> The determination on whether a situation is "life threatening" will be determined by a State-level Multidisciplinary Committee, which will consist of a "Paediatric Surgeon / Urologist, Endocrinologist, Social Worker / Psychology Worker / Intersex Activist, and a Government Official at or above the rank of

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Arun Kumar v. Inspector General of Registration*, AIR 2019 Madras 265.

<sup>210</sup> *Tamil Nadu Government Order Banning Surgeries on Intersex Infants*, S. Asian Translaw Database (Aug. 13, 2019), <https://translaw.clpr.org.in/legislation/tamil-nadu-government-order-banning-surgeries-on-intersex-infants-2019/> (last visited on Nov. 8, 2024).

<sup>211</sup> Health and Family Welfare Department, *Order G.O. (Ms) No. 355*, Government of Tamil Nadu (Aug.13, 2019).

an Under Secretary", and an order will have to be delivered within two months.<sup>212</sup>

In 2021, the Delhi Child Rights Commission, with the support of Delhi Medical Council, had in an order suggested that the Delhi Government prohibit clinically unnecessary SRS on children and infants, however, the Delhi Government has still not taken any concrete steps in this regard.<sup>213</sup>

Another significant development *vis-à-vis* child and infant IGM has come in month of April this year, wherein the Supreme Court, pursuant to a Public Interest Litigation ('PIL') (*Gopi Shankar M v. Union of India*) which sought recommendation for imposition of a ban on child and infant

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<sup>212</sup> *Id.*; Tamil Nadu Government Order Banning Surgeries on Intersex Infants, <https://translaw.clpr.org.in/wp-content/uploads/2020/10/Tamil-Nadu-GO-Intersex-Surgery.pdf> (last visited on Nov. 8, 2019); S. Asian Translaw Database (Aug. 13, 2019), <https://translaw.clpr.org.in/legislation/tamil-nadu-government-order-banning-surgeries-on-intersex-infants-2019/> (last visited on Nov. 8, 2024).

<sup>213</sup> Satendra Singh, Koushumi Chakraborti & Aqsa Shaikh, *Intersex/Differences of Sex Development: Human Rights at the Intersection of Cure and Care*, Comment, *Indian J. Med. Ethics* (2023), [https://ijme.in/articles/intersexdifferences-of-sex-development-human-rights-at-the-intersection-of-cure-and-](https://ijme.in/articles/intersexdifferences-of-sex-development-human-rights-at-the-intersection-of-cure-and-care/?galley=print#:~:text=The%20DCPCR%20in%20its%20final,%20threatening%20circumstances%20%5B19%5D)

[care/?galley=print#:~:text=The%20DCPCR%20in%20its%20final,%20threatening%20circumstances%20%5B19%5D](https://ijme.in/articles/intersexdifferences-of-sex-development-human-rights-at-the-intersection-of-cure-and-care/?galley=print#:~:text=The%20DCPCR%20in%20its%20final,%20threatening%20circumstances%20%5B19%5D) (last visited on Nov. 8, 2024); Meenakshi Ganguly & Kyle Knight, *Momentum Builds Around Intersex Protection in India*, *Hum. Rts. Watch* (Jan. 14, 2021), <https://www.hrw.org/news/2021/01/14/momentum-builds-around-intersex-protection-india> (last visited on Nov. 8, 2024).

SRS, has issued a notice to the Central Government seeking its reply.<sup>214</sup>

### C. BEST INTEREST OF THE CHILD & INFORMED CONSENT

#### 1. *Assessing Child Consent and Autonomy in Medical Decisions: An Indian Perspective*

India has varied standards for consent. Consent for medical treatment requires both capacity and competence. The Indian Majority Act, sets the age of majority at 18.<sup>215</sup> Under §§10 and 11 of the Contracts Act, individuals over 18 are deemed competent to consent to medical treatment.<sup>216</sup> For children, however, competence is presumed differently across contexts. Criminal law presumes absolute incompetence for children under 7, while for those aged 7 to 12,<sup>217</sup> the presumption is qualified, allowing competence if the child demonstrates sufficient maturity. Additionally, under the JJ Act, 2015, minors aged 16 to 18 may face adult penalties for certain offenses.<sup>218</sup> This acknowledgment of developmental differences in criminal law is notably absent in civil and contractual contexts.

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<sup>214</sup> Anmol Kaur Bawa, *Supreme Court Issues Notice on PIL Seeking to Recognize Rights of Inter-Sex Children, Curb Sex Reassignment Surgeries*, Live Law (Apr. 8, 2024), <https://www.livelaw.in/top-stories/supreme-court-issues-notice-on-pil-seeking-to-recognize-rights-of-inter-sex-children-curb-sex-reassignment-surgeries-254598> (last visited on Nov. 8, 2024).

<sup>215</sup> The Indian Majority Act, 1875.

<sup>216</sup> The Indian Contract Act, 1872, §§ 10, 11.

<sup>217</sup> *Bharatiya Nagarik Suraksha Sanhita*, 2023, §§ 82, 83.

<sup>218</sup> *Juvenile Justice (Care and Protection of Children) Act*, 2016, § 15.

Indian courts have taken a progressive stance on minors' capacity and competence, recognizing that decisional autonomy is integral to the right to privacy and identity expression. In *Suchita Srivastava*,<sup>219</sup> the SC examined the right of minors to consent to medical treatment. The case concerned an orphaned minor who was pregnant due to rape. The High Court mandated that she undergo an abortion under §3 of the Medical Termination of Pregnancy Act, referencing her lack of a guardian and her presumed inability to raise a child.<sup>220</sup> However, the SC overturned this decision, declaring that reproductive choice is a fundamental right and denying a woman control over her own body infringes her right to privacy.<sup>221</sup> Although the case did not directly address intersex adolescents, it strongly supports bodily autonomy and minors' rights to make informed decisions.

In India, these principles lack statutory recognition, and guardians are primarily responsible for their wards' healthcare decisions. Guardians must act in the child's best interests and provide support throughout treatment. The test for parental consent traces back to *Gillick and Wisbech Area Health Authority* where the House of Lords ruled that adolescents under the age of sixteen are capable of giving consent for medical treatment if they have "*sufficient*

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<sup>219</sup> *Suchita Srivastava & Anr. v. Chandigarh Administration*, (2009) 9 SCC 1.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

*understanding and intelligence.*" This ruling is the origin of the parental consent test."<sup>222</sup> However, conflicts can arise when a minor's wishes differ from parental views. Therefore, how do we balance these interests.

## ***2. Upholding the Best Interests of Intersex Children: A Child-Centric Approach in International and Indian Jurisprudence***

Intersex children have an intrinsic right to have their best interests safeguarded, as outlined in the CRC. The CRC's committee held that non-consensual surgeries on intersex children infringe upon their right to physical integrity.<sup>223</sup> Arts 3, 9, 18, and 21 of the UNCRC<sup>224</sup> mandate that a child's best interests must be the foremost consideration in all matters that impact them. It is the responsibility of state parties to guarantee this right.<sup>225</sup> While the UNCRC does not directly grant children the right to self-determine their gender it implicitly supports their participation in these decisions, particularly under Art 16.<sup>226</sup> GC 14,<sup>227</sup> also emphasizes the importance of individualized assessments, advocating for the

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<sup>222</sup> *Id.*

<sup>223</sup> CRC, *Concluding Observations on the Combined 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Periodic Reports*, ¶¶41-42, UN Doc. No. CRC/C/CHE/CO/2-4 (Switzerland).

<sup>224</sup> Art. 3, 9, 18, 21, UNCRC.

<sup>225</sup> *Id.*

<sup>226</sup> Art. 16, CRC.

<sup>227</sup> CRC, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), U.N. DOC CRC/C/GC/14(May 29, 2013).

inclusion of children in decisions that impact them, irrespective of their age or vulnerability.<sup>228</sup>

Indian jurisprudence aligns with this child-centric approach of *best interests*. In *Bachpan Bachao Andolan*,<sup>229</sup> the SC acknowledged the vulnerabilities of Indian children, mandating their protection under both domestic and international norms. The Delhi High Court in *Rama Pandey*.<sup>230</sup> reaffirmed the primacy of the child's best interests. Extending this approach to education, in *Sobha George*<sup>231</sup> the court utilized the RTE Act to ensure educational welfare and personal development in line with the UNCRC. In *Re: Ganesh Das*,<sup>232</sup> the court emphasized a child-friendly approach under the JJ Act. More recently, cases like *Shivani Singh*<sup>233</sup> and *Eric Thind*<sup>234</sup> highlighted a child-centric perspective in custody matters and other decisions impacting children's welfare. Notably, in *Just Rights for Children Alliance*,<sup>235</sup> the SC reiterated that in cases of child abuse, the child's well-being takes precedence over any other interest, with strict confidentiality

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<sup>228</sup> *Id.*

<sup>229</sup> *Bachpan Bachao Andolan v. Union of India (UOI) and Ors*, MANU/SC/0431/2011.

<sup>230</sup> *Rama Pandey v. Union of India and Ors*, MANU/DE/2054/2015.

<sup>231</sup> *Sobha George Adolfus v. State of Kerala and Ors*, MANU/KE/0715/2016.

<sup>232</sup> *In Re: Ganesh Das and Ors*, MANU/WB/0260/2021.

<sup>233</sup> *Shivani Singh v. State of U.P. and Ors* MANU/UP/1293/2023.

<sup>234</sup> *Eric Thind and Ors. v. Union of India and Ors*, MANU/PH/3012/2023

<sup>235</sup> *Just Rights for Children Alliance and Ors. v. S. Harish and Ors*, MANU/SC/1041/2024.

for victims and accountability for perpetrators, especially within families.

The case of *Arunkumar*<sup>236</sup> holds significant relevance in the context of normalization surgeries, as it addresses the primary form of oppression faced by individuals with intersex traits: the medicalization and surgical correction of intersex bodies during childhood. Although the case does not directly discuss the “*best interests of the child*” standard, it serves as a practical example of Indian courts moving towards prohibiting these surgeries, thus shifting the focus to a child-centred approach.

In the best interest of the child, non-consensual normalization surgeries on intersex children should be banned, as they violate core rights to bodily integrity and autonomy. Both the state and guardians have a duty to protect children’s self-determination rights, with a child-centred approach ensuring that interventions do not infringe upon these fundamental rights.

### ***3. Balancing Parental Rights and State Duty: A Child-Centric Approach to Intersex Children's Welfare***

Indian courts have embraced a child-focused approach to the “*best interests*” principle, emphasizing that parental consent cannot legitimize medical interventions on intersex children

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<sup>236</sup> *Arunkumar v. The Inspector General Of Registration*, AIR 2019 MADRAS 265.

that violate their bodily autonomy and integrity.<sup>237</sup> The State of Tamil Nadu has exemplified this stance by banning normalization surgeries on intersex children, thereby removing parental authority to make irreversible decisions about a child's gender identity.<sup>238</sup> This approach aligns with the doctrine of *parens patriae*,<sup>239</sup> empowering the state to act as a guardian for individuals unable to safeguard their own interests and reinforcing the state's duty to protect children's welfare.

Parents of intersex children may seek "corrective" surgeries due to societal stigma around raising a child who doesn't conform to traditional gender norms.<sup>240</sup> However, the Tamil Nadu Government Order prohibits these surgeries, asserting the state's obligation to prioritize bodily integrity and long-term welfare over parental preferences. While Indian courts have not fully examined the tension between parental rights and the state's protective role under *parens patriae*, this approach indicates a shift towards protecting intersex children's autonomy. In contrast, U.S. courts have addressed similar issues, as seen in cases like *Pickup v. Brown*<sup>241</sup> and *Doe*

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<sup>237</sup> *Id.*

<sup>238</sup> Health and Family Welfare Department, *Order G.O. (Ms) No. 355*, Government of Tamil Nadu (Aug.13, 2019).

<sup>239</sup> The Doctrine of Parens Patriae, Law Column (2020), <https://www.lawcolumn.in/the-doctrine-of-parens-patriae/>.

<sup>240</sup> OHCHR, Fact Sheet: Intersex (2015), [https://www.ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/UNFE\\_FactSheet\\_Intersex\\_EN.pdf](https://www.ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/UNFE_FactSheet_Intersex_EN.pdf).

<sup>241</sup> *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014).

*v. Christie*,<sup>242</sup> where laws restricting parental rights to seek conversion therapy for their children were upheld. These rulings support that parental rights can be limited if a particular treatment is deemed contrary to a child's best interests.

Invasive, irreversible, and unnecessary procedures, such as sex normalisation surgeries, infringe upon intersex children's rights, particularly their right to privacy. Gender identity is deeply personal, and performing these surgeries in infancy deprives intersex children of the choice to determine their identity, emphasizing the state's role in safeguarding their rights, health, and well-being.

Having discussed the policies and approaches of international organizations and States, and having established an understanding of the best interest of the child and the concept of informed consent, we now make certain policy recommendations to address the lack of safeguards of Indian intersex children.

## **VII. POLICY RECOMMENDATIONS**

### **A. AN ABSOLUTE BAN ON NON-LIFE SAVING SURGERIES ON INTERSEX CHILDREN AND INFANTS.**

We recommend that there must be an absolute ban imposed on sex reassignment surgeries on intersex children, up until the age of twelve years, in line with the Spanish law and the

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<sup>242</sup> *Doe v. Christie*, 33 F. Supp. 3d 518 (D.N.J. 2014).

principle of *parens patriae* (as discussed earlier) in this regard. As has been discussed earlier, the determination of competency (or age of majority) in India *vis-à-vis* the law is a context specific determination.

On the basis of our analysis of legal jurisprudence, as well as the policies of other States in this regard, we believe children who are 12 years of age and older, are well equipped to take an informed decision and provide informed consent for such surgery. This is also the average age of the starting of puberty in both boys as well as girls,<sup>243</sup> and would thus be a practical time to also initiate treatment with puberty and beta blockers, in case the child identifies with a different sex. Doctors must, however, take a decision in this regard, in line with the best interests of the child by following the standard of care as has been laid down in the third policy proposal below.

For children under twelve, exceptions with respect to life threatening circumstances must be made, with specific provision for mental health conditions. Decisions in this regard must be made by State-level Multidisciplinary Committees, as have been laid out in the Tamil Nadu Government's Order which we discussed earlier, which must necessarily have representation of an intersex activist on them.

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<sup>243</sup> *Early or Delayed Puberty*, NHS, <https://www.nhs.uk/conditions/early-or-delayed-puberty/#:~:text=The%20average%20age%20for%20girls,9%20and%2014%20in%20boys> (last visited Nov. 9, 2024).

**B. ALLOWING REGISTRATION OF INTERSEX IN BIRTH CERTIFICATES & MAKING THE PROCESS OF CHANGING ONE'S SEX/GENDER IN THE OFFICIAL RECORDS EASIER.**

The Indian Government must allow the registration of intersex as a temporary sex marker on birth certificates for children born with intersex characteristics, till a time that such child decides to conform with a particular gender identity.

Legal processes for amending gender markers on official documentation, including birth certificates, should be made accessible and straightforward, in case where intersex has been reflected as the sex-marker on their birth certificate; or if an intersex individual identifies with a gender other than the one assigned at birth and decides to undergo sex reassignment surgery to conform with the same. A standardized protocol needs to be implemented within the framework of The Birth and Death Registration Act of 1969, enabling any person to update their gender designation. This procedure should extend beyond just correcting clerical errors or fraudulent entries. India can follow the lead taken by other countries such as Argentina, Denmark, Ireland, Malta, Belgium, Norway, Spain and Portugal, most of which allow a change in the officially recorded gender / sex of

citizens by making a simple declaration or application to their respective local authorities.<sup>244</sup>

The simplified amendment process would serve both intersex and transgender individuals, acknowledging that gender marker modifications may be necessary for reasons beyond administrative mistakes.

### **C. IMPLEMENTING MANDATORY SENSITISATION AND TRAINING PROGRAMS FOR MEDICAL PROFESSIONALS AND ALLIED PROFESSIONS.**

As has been mentioned previously, the existing medical practises and literature on intersex individuals is still informed by an outdated understanding of intersex, perpetuated by John Money and the “optimum gender of rearing model”. This issue gets exacerbated in the case of India, as an incessantly conservative and patriarchal society, a phenomenon which informs and affects the outlook of medical professionals and allied professionals such as midwives towards the birth of intersex children, and the want of “normalising” them to conform to the existing gender-binary. There must, thus, be mandatory sensitisation sessions that healthcare professionals are required to undertake, for them to be provided with a comprehensive understanding of

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<sup>244</sup> Aman Singh, *How Nations Allow or Restrict Legal Gender Change*, *Times of India* (Apr. 19, 2024), <https://timesofindia.indiatimes.com/world/europe/how-nations-allow-or-restrict-legal-gender-change/articleshow/104695683.cms> (last visited on Nov. 8, 2024).

intersex characteristics as something which do not need to be medically “treated”. Such training will also enable them to provide ample information and support to the parents of infants born with intersex characteristics.;

There is also a need to update the existing practises *vis-à-vis* sex reassignment surgeries for intersex children, to bring them in conformity with international standards, such that they align with the best interests of the children under the care of such healthcare professionals. In this regard, due to the absence of any recognised standard on intersex surgeries, guidance can be taken from the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* issued by the World Professional Association for Transgender Health.<sup>245</sup> Following an analysis of the same, we suggest that the medical professionals, prior to conducting sex reassignment surgeries, must ensure the following:

- The child must be able to give fully informed decision and consent.
- The child has lived in the gender role that matches their gender identity for at least 12 months.

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<sup>245</sup> The World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 7<sup>th</sup> Edition, available at [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf).

- The child must have stable mental health, must be sufficiently self-aware, and must be successfully managing identified issues with depression, if any.
- The child must be show that they fully understand the implications of the surgery and its permanent nature.

#### **D. PROVIDING DEVELOPMENTAL SUPPORT FOR INTERSEX CHILDREN AND THEIR PARENTS.**

Intersex children often experience significant trauma, stigma, and discrimination as they grow up. This issue requires active engagement and support. Beyond standard sensitization and training for medical professionals, comprehensive psychological assistance should be made available to both intersex youth and their families. This support framework needs to go deeper than just building acceptance of non-binary identities and understanding intersex variations - it should offer guidance through various life stages and developmental milestones. These support services deserve official government recognition and backing to ensure their sustainability and accessibility.

#### **E. CRIMINALISATION OF CHILD AND INFANT IGM.**

Unauthorised sex reassignment surgeries on infants and children, must be criminally outlawed, as has been done in the case of Malta<sup>246</sup> and Greece<sup>247</sup>. Guidance in this regard, we suggest, can be taken from the success of the Pre-natal

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<sup>246</sup> *Supra* note 149, 150.

<sup>247</sup> *Supra* note 151

Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, which imposes severe penalties for both the doctors as well as parents seeking such information, which includes monetary penalty, imprisonment, as well as suspension of medical licenses of the doctors and hospitals implicated in such cases.<sup>248</sup>

## **VIII. CONCLUSION**

In addressing the pervasive issue of child and infant IGM, this paper underscores the pressing need for comprehensive legal protections to preserve the bodily integrity and autonomy of intersex children. Despite increasing global awareness and condemnation of IGM as a human rights violation, India lacks a nationwide policy to curb these non-consensual, irreversible procedures. The Tamil Nadu government's ban on IGM serves as a pioneering model within India, yet the absence of a unified national approach leaves intersex children elsewhere vulnerable to violations under the guise of medical normalization.

The paper highlights how outdated social constructs, medical practices, and legal frameworks have converged to perpetuate the marginalization of intersex individuals. Drawing on principles from international treaties, such as the Yogyakarta Principles, and rights enshrined in the Indian Constitution, it is evident that a policy shift is crucial.

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<sup>248</sup> The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

Implementing a nationwide ban on non-life-saving surgeries, enhancing consent standards, and mandating training for medical professionals on intersex issues would significantly contribute to safeguarding intersex rights in India.

Ultimately, the state has a duty, rooted in both domestic and international law, to protect the welfare and autonomy of its most vulnerable populations, including intersex children. This duty extends beyond prohibition; it includes fostering a healthcare environment that respects bodily integrity and empowers individuals to make informed decisions regarding their gender identity. Enacting these changes would affirm India's commitment to upholding human rights and could pave the way for other countries facing similar challenges.

We also point out that this paper is constrained by the scarcity of reliable data on the prevalence of intersex individuals in India and the limited legal framework addressing intersex rights, in addition to the paucity of time due to which it is difficult to engage with the lived experiences of intersex children and individuals. We suggest that future research should investigate the practical implementation of Tamil Nadu's ban on intersex surgeries, analyse gaps in national policy, and explore the socio-cultural impacts of IGM on intersex children in various Indian regions.



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