Access to justice and sexual violence against children in India: an empirical study of the reforms under the POCSO (Protection of Children from Sexual Offences) Act 2012

Access to justice and Sexual Violence against Children in India:

An Empirical Study of the Reforms under the POCSO (Protection of Children from Sexual Offences) Act 2012

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I hereby declare that the work presented in this thesis is my own, except where explicit reference is made to the work of others.

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ABSTRACT

This thesis is an empirical socio-legal work examining the experiences and perceptions of key stakeholders of the reforms under the POCSO (Protection of Children from Sexual Offences) Act 2012 in India. It is special legislation dealing with the cases of sexual offences against children, i.e., people under 18 years of age. The goals of the law are speedy trial of the POCSO cases and providing child friendly procedures and spaces to child victims during the criminal process. This law is unique for being gender neutral. Any person can be a victim or perpetrator under this legislation irrespective of their gender, unlike in the rape provisions of the Indian Penal Code 1860. There is scant academic literature on the operation of the POCSO reforms from an access to justice approach, a void which this project aspires to fill. The thesis investigates the implications of the POCSO reforms on the access to justice for both child victims and accused.

The project has employed qualitative methods of interview and observation. It is based on a 6-months fieldwork conducted in 2019-20 at Bihar (a north Indian state) and Delhi (India's capital city). In-depth semi-structured interviews of 49 stakeholders and observations of the special courts and trials of the POCSO cases were conducted. These key stakeholders consist of: special judges, judicial magistrates, special public prosecutors, defence counsels, NGO lawyers, police personnel, and court staff members. The two sites and the interviewees were selected and recruited respectively using the purposive and opportunistic sampling techniques. The data was analysed by a thematic approach. The analysis produced important and interesting findings on stakeholder perceptions of the aims of the POCSO reforms and access to justice, implementation of the POCSO law, and the implications of the socio-legal culture and institutions on the operation of the POCSO reforms.

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Chapter 1

Access to Justice and Reform Initiatives in the district-level Indian Criminal Courts: Conceptions, Histories, and Meanings

1.1 Introduction

This thesis is an empirical study of the reforms introduced in the area of child sexual violence[1] in India by the enactment of the POCSO (Protection of Children from Sexual Offences) Act 2012 (hereafter POCSO) and the POCSO Rules 2012[2]. These reforms have transformed the legal position of child victims[3] and of those accused in child sexual violence cases within the Indian criminal justice system. They have created a dedicated court with special procedures and rules of evidence about reporting and recording a child victim's testimony in the pre-trial and trial stages respectively. There are provisions for special courts, special judges, special public prosecutors, experts like translators or interpreters, special educators or any person familiar with the manner of communication of the child, and support persons. There is a presumption of guilt rather than of innocence. The burden of proof has been reversed from the prosecution to the accused person. There are also harsher punishments, including death, for certain child sexual offences.

The POCSO reforms seek to ensure that all the actors in the criminal process give priority to child victims' needs and rights. The Act introduced a provision to employ digital means to record a child's statement by a police officer and judicial magistrate in the pre-trial stage, and a videoconferencing system or any other physical device to support a child witness in testifying before a special court during the trial. The latter changes in the infrastructure are aimed at preventing the child victim from being exposed to the accused in the courtroom and enables them offer their testimony without compromising the accused's rights during the trial.

[1] Social and behavioral scientists often use the term "sexual violence," as this term is far more broad than sexual assault and sexual abuse. See, What's the difference between sexual abuse, sexual assault, sexual harassment and rape? The Conversation (2018). 7 February. At: https://theconversation.com/whats-the-difference-between-sexual-abuse-sexual-assault-sexual-harassment-and-rape-88218 (accessed 12 November 2020).

[2] The POCSO Rules 2020 has repealed the earlier POCSO Rules 2012 vide Rule 13 of the new enactment.

[3] This thesis uses the term 'child victim(s)' and 'rape victim(s)' to encompass children and female adults who are victims or alleged victims, of sexual offence(s) either prior to the passage of, or under, the POCSO and the Indian Penal Code (hereafter IPC) 1860 respectively. It should be noted that in some contexts this term is deemed problematic; for example, where the offence has not been proven, the term 'complainant' may be preferred from a legal perspective; while some commentators and campaigners on sexual violence opt for 'survivor' rather than 'victim' as a more positive designation. However, the general term 'child victim' is applied as a shorthand here and includes 'child witnesses' as well. Also, because child victims in POCSO cases are predominantly girls, and the accused are usually men, my pronouns usage will reflect that.

The POCSO reforms target the district criminal courts because these are the highest courts at district level where criminal trials take place in India. These courts have also been identified as a major contributor to inordinate delays and arrears that affect the delivery of criminal justice in India (Sekhri, 2019). So, this also raises the question of their contribution to speedy justice.

I chose to study this topic for two reasons. One, while there is a vast literature on sexual violence in India as gender, caste, and state violence,[4] and some empirical research on the way the criminal justice system deals with sexual violence,[5] to date most of these have focused on adult victims. Little attention has been paid to the way the criminal justice system deals with victims of different age-groups and gender, especially child victims, other than in a very small number of studies.[6]

Two, there is to date little research on whether and how the POCSO reforms have been undertaken, and on how the reforms have affected different court participants and professionals, particularly those who have the responsibility for delivering justice.[7] These reforms have the potential to affect and alter the experience of accessing justice of various court users, particularly the child victims and accused, through procedural specialisation and physical modifications to the courtroom including the use of technology. These complex reforms invoke speedy trial and procedural fairness as important objectives.

One study by P. Baxi (2014) entailed ethnographic research in a rural district and sessions court in Ahmedabad city of the state of Gujarat and an analysis of higher courts' judgments. Its specific focus was the treatment of and participation by child victims during rape trials. But the fieldwork conducted from 1996 to 1998 was conducted more than a decade before the POCSO reforms. At the time of research, only female child victims could be rape victims. They were legally treated the same as the adult victims, except under certain judicial guidelines discussed in the next chapter.

Other research, conducted in early 2015, examined the structural and procedural compliance with the POCSO Act and Rules by the POCSO special courts situated in Delhi (Centre for Child and the Law, 2016). It is based on structured interviews with 22 stakeholders[8]

[4] See, Abdulali, 2018; Batool et al., 2016; Bhattacheryya, 2021; Chakravarti et al., 2007; Diwakar, 2020; Mandal, 2013, 2014; Patil, 2016.
[5] See, Barn & Kumari, 2015; Barn & Powers, 2018; P. Baxi, 2014, 2016b, 2016a; Kumari & Barn, 2017.
[6] Majority of these are published in the form of non-fiction novels and do not primarily deal with the operation of laws related to child sexual violence cases in India (P. Baxi, 2014; Chaudhary, 2021; Gangoli, 1996; Kaushal, 2020; Puri, 2020; Virani, 2000).
[7] See, Ali et al., 2017; Bhawnani, 2021; Centre for Child and the Law, 2016, 2018; Kothari & Ravi, 2015; Partners for Law in Development, 2017; Patkar & Kandula, 2016; Wilson, 2020.
[8] The stakeholders do not include professionals like special judges, special public prosecutors, and private defence lawyers of accused working in the POCSO special courts.

and the textual analysis of POCSO judgments. This study does not include any observation and analysis of POCSO trial proceedings.

Much remains unknown about the operation and implications of the POCSO reforms. To address some of the gaps in knowledge the thesis seeks to answer the following research questions:

1. To what extent, and in what ways, do the POCSO reforms have the explicit policy aim of improving access to justice?
2. To what extent are the POCSO reforms, as envisaged by the POSCO Act and Rules, being implemented?
3. In what ways have the POCSO reforms had the effect of improving access to justice for victims and defendants?

To address the first research question, it is pertinent to situate the POCSO reforms within the longer history of access to justice reform initiatives in India. Only upon looking at the past reform initiatives and examining their gaps, can we arrive at the reasons behind the development of the current set of initiatives.

In answering the questions about the operation of the POCSO reforms the research will focus on their operation in two locations: Delhi and Bihar. I will deal with how I go about answering the research questions in detail in the chapter on methodology.

Before entering the discussion of past access to justice reforms, it is essential to discuss the conceptions and meanings of access to justice. The rest of this chapter provides a brief introduction to the conceptual frameworks that inform access to justice debates in India, and how are these debates relevant in a POCSO context. Using themes and categories developed by Cappelletti and Garth (1978), I critically examine the past access to justice debates and reform policies of India to situate the POCSO reforms in a broader context.

1.2 Exploring Access to Justice: Theoretical Conceptions and Key Themes

1.2.1 Key-themes within Access to Justice

The definition of access to justice depends on the multiple meanings that ‘access’ and ‘justice’ are given independently and in relation to each other. These meanings act as important

frameworks to understand not only how reform discourses represent, sustain and constitute specific regimes of exclusion (P. Baxi, 2007), but also how court and procedural reforms discourses create, reinforce and shape powerlessness and justice. To understand access to justice, it is important to examine those meanings. Looking at the historical development of the concept of access to justice, one factor shaping its meaning is the nature of a jurisdiction's legal system. Access to justice debates have regard to an ability to access dispute resolution institutions, legally, economically, and physically.

Cappelletti and Garth (1978) categorize access to justice reform developments into three distinctive waves that fall under the two themes of lawyer-centric and forum-centric. The first wave of reforms concentrated on 'legal aid to poor', which Cappelletti & Garth (1978) contend was to remedy the access barrier of litigation costs, i.e., litigants' attorneys' fees and court costs. The second wave of access to justice reforms tackled the issue of 'representation of diffuse interests' (Cappelletti and Garth 1978). These two waves, they argue, have a lawyer-centric theme. The third wave points towards a broader conception of access to justice by envisioning new approaches to meaningful access to justice (Cappelletti and Garth 1978). So, the third wave of access to justice reform:

> includes but goes beyond advocacy, whether inside or outside of the courts, or whether through governmental or private advocates. Its focus is on the full panoply of institutions and devices, personnel, and procedures, used to process, and even prevent, disputes in modem societies. We call it the "access-to-justice approach" because of its over- all scope; its method is not to abandon the techniques of the first two waves of reform, but rather to treat those reforms as only several of a number of possibilities for improving access. (Cappelletti and Garth 1978: 222-223).

The third wave, thus, takes access to justice beyond the lawyer-centric model. It suggests an access to justice approach with a focus on a range of institutional, procedural, and personnel mechanisms. One major cause for the rise of the third wave, it has been argued, is the failure of lawyer-centric access reform initiatives to deliver improved access to justice (Cappelletti & Garth, 1978; Galanter, 1974). Another factor underlying the non-lawyer-centric approach was the recognition of the limitations of legalistic and formalist approaches to tackle the access to justice problem (Galanter & Krishnan, 2004; Trubek, 1984). This was born out of a critique of depending solely on the formal legal system, i.e., courts. It has been argued that

there is an underlying assumption that disputes require 'access' to a forum external to the original social setting of the dispute (Galanter, 1981).

With regard to Western countries, Cappelletti & Garth argue that "it seems clear that the idea of making regular courts very simple and inexpensive is unrealistic" and "a more or less parallel dispute resolution system appears necessary as a complement if we are to attack, especially at the individual level, such barriers as those of costs, party capability, and small claims." (1978: 231). Therefore, access to effective dispute resolution mechanisms that might not necessarily be traditional courts became a part of the access to justice agenda. Along with this understanding, the formality of legal procedures was also recognised as an access barrier. So, alternative methods like having informal procedures to resolve legal disputes were developed as an access to justice tool.

From a lawyer-centric approach, the conception of access to justice, thus, shifted to include a forum-centric approach in the second half of the 20th century. This resulted in the access to justice agenda, inextricably woven into the concept of the rule of law, acquiring new and broader meaning, i.e., access to various institutions, governmental and non-governmental, judicial and non-judicial, to pursue justice.[9]

As it appears from these 'access to justice' debates, there has been a lack of focus on criminal justice. However, access to justice is significant in the context of criminal justice too and impacts both victims and those accused of a crime. If we look at the first wave of access reforms, i.e., state legal aid to the poor, this is especially significant in tackling the power asymmetry between prosecution and defence in criminal cases. Historically, the prosecution of crime was a private individual's duty- one of trial by 'altercation'[10] (Langbein, 2003), which later became the state's function. During the eighteenth century in England, this form of trial was transformed in a piecemeal manner into an adversarial trial dominated by lawyers with an increasingly diminished role for the defendant.

The institution of defence lawyers developed as a step to even up the scales of power for the defence during trial. This institution, argues Langbein (2003), developed to protect defendants from ill-informed judges, and strong and biased prosecution. This partisanship on the part of the prosecution was matched with the partisanship on the part of the defendant by allowing lawyers to represent the defence. So, defence lawyers gradually acquired a leading role in criminal trials (Langbein, 2003). But defence lawyers could not be hired by indigent

[9] See, U. Baxi & Galanter, 1979; Galanter, 1981b, 2010; Garth, 2001; Garth et al., 1985; Jensen & Heller, 2003.
[10] In this kind of trial, the accused was required to participate in order to advance their case. This has also been termed as 'accused speaks' trial (Langbein, 2003).

defendants thereby making justice inaccessible to them. Thus, free state legal aid came in as an access to justice tool whereby the state provided lawyers to represent indigent accused.

Moreover, the rules of criminal evidence associated with adversarial trials were also developed in a piecemeal manner to even up the scales for defence (Langbein, 2003). Concepts such as the 'burden of production' and 'proof beyond reasonable doubt', Langbein (2003) argues, were developed, and served to transform the trial into a process for testing the prosecution case rather than one focused on calling the accused to account. This was done to further reduce the power asymmetry in the criminal trial and tilt the scales of justice more towards the defence.

Further, the issue of access to effective dispute resolution mechanisms beyond the formal legal system, i.e., access to a forum internal to the original social setting of the dispute, also has a role to play for access to justice in a criminal justice context. Reliance on the formal legal system has led to overburdened criminal courts, which act as an access barrier in the criminal justice system, because of the undue delay it causes in the trials of old criminal cases and pre-trial processing of fresh criminal cases.

It is also important to note here that Cappelletti and Garth's model has been devised to cater to the access to justice reform initiatives in the West, where they emerged chronologically (Cappelletti and Garth 1978). I have used this framework as it is a systematic study of how access to justice reforms have developed with regard to the justice system. Cappelletti & Garth (1978) argue that because of the enactment of new substantive rights, especially social rights, there occurred a shift from access to justice to 'effective' access to justice. By 'effective' they meant complete 'equality of arms,' which began with the identification of the access barriers.

1.2.2 Applying the access to justice reforms agenda to the Indian criminal justice system

Access to justice literature in the Indian context has focused on access to rights granted by the state. Little attention has been paid to access issues specifically in a criminal justice context (P. Baxi, 2007; Muralidhar, 2005). This section applies the general access issues to the Indian criminal justice context. In a rule of law democracy like India, people have a range of legal rights and there are provisions[11] for their enforcement. There are mechanisms for redress in response to a violation of rights in the Indian criminal justice context.[12] However, the

[11] Article 32 of the Indian Constitution prescribes remedies for enforcement of fundamental rights by approaching the SC. Article 226 confers powers on High Courts to issue writs in case of violation of fundamental rights.
[12] There are different provisions in the Code of Criminal Procedure, 1973 related to informing the police of a crime or filing a complaint before a judicial magistrate.

presence of such mechanisms has not been sufficient, considering the inability of many people to access justice because of their social-economic disabilities and geographical locations. Beyond these, courtroom language- considering the linguistic diversity of India and its implications in criminal trials, and formal trial procedure, have also acted as barriers to access to justice in India due to the transplantation of the English legal system (Daniels et al., 2011).[13]

This led to criticism of the formal system of courts and to calls for community dispute resolution mechanisms to improve access to justice in independent India. International treaties signed by successive Indian governments also stressed the importance of access to justice as an invaluable human right.[14] Galanter (1981) has argued that access to justice in India, hence, should be addressed through different and alternative institutional models of justice such as indigenous institutions and practices. This approach relates to the third wave of Cappelletti and Garth that takes access to justice beyond the lawyer-centric model, with a focus on a range of institutional, procedural, and personnel mechanisms.

The objective of such an access to justice approach was to move some cases out of the formal court system and to treat criminal disputes in the familiar social settings where they arise. Related to this was a consideration of the impact of procedures, for example, the formality in the court procedure, upon access to criminal justice, and consideration of alternative and special procedures and processes to enhance engagement of parties. This alternative forum-centric approach led to the addition of indigenous and alternative dispute resolution (ADR) methods to the access to justice agenda.

In the context of criminal justice, at stake are people's lives, safety, property, and liberty. India already suffers with the problem of the poor ratio of lawyers per head of population. With a common legal system and adversarial criminal trial, this problem is further aggravated by the unequal access to defence lawyers, as poor accused cannot afford them. Hence, free state legal aid acts as a tool for access to criminal justice for these poor accused persons.

The slow pace of the pre-trial and trial processes in India has also been identified as one of the major factors for a huge backlog of cases in the district-level criminal courts. In criminal cases, detained accused do not get their cases tried in time and experience loss of liberty for prolonged periods. Being imprisoned without access to the outside world also

[13] The Anglo-Saxon adversarial model of British criminal justice system was introduced in India in the 18th century. And there were already indigenous justice systems in place since pre-colonial times (Singha, 1998).
[14] Articles 8 and 10, Universal Declaration of Human Rights, 1948. Article 2(3), International Covenant on Civil and Political Rights, 1966.

hinders their chances of preparing and presenting a strong defence during the trial by laying evidence before the court fully, freely, and fairly. Delays also result in witnesses being unable to testify correctly to events which may have faded in their memory. It hampers the victims as they are denied justice as long as the perpetrator is not being held to account. The longer the delay, the more are the chances of bribing attempts by either of the two sides depending on the power one party has over the other. Hence, undue delay severely impedes access to justice for both accused and victim of a crime. So overall, access to justice in the Indian criminal justice system has focused on access to defence lawyers and to different institutional and procedural mechanisms of holding offenders accountable and speeding up the criminal process (U. Baxi & Galanter, 1979; Galanter, 1978; Galanter & Krishnan, 2004; Higgins, 2014).

As part of the institutional and procedural mechanisms, it was also realised that there may arise a situation when there is a mismatch between forum, complaint, and the complainant. Perhaps not all kinds of criminal matters are suitable to be heard by one judge, decided by following the same procedure or resolved by one kind of court. The nature of the parties involved in crime, like their age and socio-political-economic status indeed influence crimes. Galanter, in this regard, argues that "where agencies and complaints are mismatched, it extends to changing the character of the forum" (1981: 1). Thus, there occurred further extension of a forum-centric approach to access to justice in the Indian criminal justice system. Changing the forum's character by specialization of criminal courts, criminal procedures and personnel was the result.

Further, with regard to the rules of criminal evidence associated with the adversarial trial, the reversal in the 'burden of proof' from the prosecution to the accused was brought in for certain criminal offences to even up the scales for prosecution to either support the State or the victims of those offences.[15] For victims, this approach seems to be influenced by the victims' rights movement in the West during the late twentieth century (Bandes, 2009b).

In the following two sections I elaborate on the following access to justice reform initiatives in the Indian criminal justice context that come within either lawyer-centric or forum-centric reforms:

[15] There are presumptions in the Indian law for various criminal offences. See, section 111A, the Indian Evidence Act 1872 (IEA)- Presumption as to offences under sections 121, 121A, 122 or section 123, IPC (offences against the State); section 113 A, IEA- Presumption as to abetment of suicide by a married woman; section 113 B, IEA - Presumption as to dowry death; section 114 A, IEA- Presumption as to absence of consent in certain prosecutions for rape. These provisions were inserted in the IEA in the 1980s.

- Access to justice reforms I: Indigenous institutions as community dispute resolution mechanism in independent India and the lawyer-centric access agenda.
- Access to justice reforms II: Proportionate number of State courts and personnel, the parallel legal system in the form of ADR mechanism, and specialisation/informalisation of courts, personnel, and procedures.

1.3 Access to Justice Reforms I: Indigenous Justice Institutions and the Lawyer-centric Access Agenda in India

The indigenous institutional access initiatives like *Nyaya Panchayats* (Judicial Councils) and *Gram Nyayalayas* (Village Courts) in the independent India are forum-centric access reforms born out of the critique of formal courts and advocacy of community dispute resolution mechanisms. The Nyaya Panchayats originated from *Gram Panchayats* (or Village Councils), a pre-colonial set-up for the resolution of disputes. Free State legal aid and Public Interest Litigation (PIL) come under the lawyer-centric access reforms.

1.3.1 *Gram Panchayats, Nyaya Panchayats* and *Gram Nyayalayas*: Indigenous Institutions and the Criminal Justice system

Since pre-colonial times, Gram Panchayats have been conciliation-based indigenous justice-delivery institutions located in Indian villages. In the past, they applied customs of caste and locality and enjoyed autonomy by such application (U. Baxi & Galanter, 1979), settling petty civil and criminal disputes, mostly by conciliation and compromise. Five elderly males (*Panchas*) of the village, headed by a *Sarpanch*, used to decide the disputes between the villagers. This continued in the colonial period (Baxi & Galanter 1979). They have no special physical infrastructure (see Figure 1.1 below).

Figure 1.1: Organisation of Gram Panchayats in India

In the first half of the 20th century, the British government proceeded to establish Gram Panchayats as units of rural local government, so as to make them part of a formal adjudication system (U. Baxi, 1976), to deal with criminal matters without strict adversarial procedural norms or any statutes. From an access to justice perspective, they provided informal space for justice delivery to rural communities, and the parties in dispute did not need lawyers to represent themselves. Statutory Gram Panchayats' purpose was to let the criminal matters be resolved in informal social settings, amongst the locals and by the village elders.

With the complete replacement of indigenous by English law through codification and transplantation of the court system on the British model, the Gram Panchayats had a slow death by 1970s (Cohn, 1989; Galanter, 1968; Pillai, 1977; Wiener, 2009). The argument for establishing Gram Panchayats in independent India was based on renewed investment in indigenous conceptions of justice delivery in Indian villages (Baxi, 1976), and advocacy for community dispute resolution mechanisms. Most Indians resided in villages living far away from formal courts and were not well versed with the foreign criminal justice system, because of its procedural complexity and language. These acted as barriers to access to criminal justice. They were thus inclined to solve criminal disputes within the informal social settings where the disputes occurred. Therefore, to improve access for the rural Indians, a provision was enacted to give constitutional recognition and powers to Gram Panchayats[16].

Further, as they were dealing with both executive and judicial functions, separate judicial bodies were carved out of them, namely Nyaya Panchayats. Nyaya Panchayats' criminal jurisdiction is extensive, covering a substantial range of offences under the Indian Penal Code (hereafter IPC) 1860 but not sexual offences (Pillai, 1977). They can levy fines in criminal matters, but are not authorized to sentence offenders to imprisonment, substantively or in default of fine (U. Baxi & Galanter, 1979). From complainants' perspective they are a

[16] Article 40, Constitution of India, 1950: 'The State shall take steps to reorganize *village panchayats* and endow them with such powers and functions as may be necessary to enable them to function as units of self-government.'

solution to the physical, economic, and procedural inaccessibility to courts for the rural masses, as they are local, retain simplicity of procedures, function flexibly with lay adjudication (Baxi & Galanter, 1979), and deliver low-cost and quicker justice.

Hence, there are instances of even the sexual violence victim's family approaching the *Sarpanch* of their village to organize a *Panchayat* to secure criminal justice locally.[17] However, these instances have also led to compromises between two parties showcasing existence of legal pluralism as compromise is not allowed in sexual violence cases under the Indian law. Nyaya Panchayats encountered severe problems of establishing their independence from personal ties with the parties, enforcing their decrees, and acting expeditiously (Galanter & Krishnan, 2004).

Gradually, by 1970s, the caseloads of Nyaya Panchayats declined, while those of the district courts rose (U. Baxi & Galanter, 1979; Galanter & Krishnan, 2004).[18] As the caseloads of district courts rose, the poor adjudication infrastructure- low number of subordinate courts and of judges, could not sustain the pressure. Ultimately, this took the shape of delay and arrears in the subordinate criminal courts.[19] The collapse of the Nyaya Panchayat initiative did not stop the Indian government from reintroducing a similar forum at village-level, through the Gram Nyayalayas (GN) Act, 2008, to tackle the arrears and improve access to justice for villagers in criminal cases.[20] There is involvement of advocates, and thus, free state legal aid provisions are applicable to parties approaching Gram Nyayalayas.

Critiquing the Act, Bail (2015) has argued that the government's attempt was to reduce the strict procedural formality of the adversarial system for the rural population, which had made their participation in trial ineffective, leading to inaccessibility to justice. But as the Gram Nyayalayas have procedures closer to regular courts, this objective appears unfulfilled (Bail, 2015), suggesting state's failure to employ this forum-centric access to justice reform.

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[17] See, *State of Punjab v. Gurmit Singh and Ors.* (1996) 2 SCC 384. In this case, the girl child victim's father, before approaching the police, straightaway contacted the *Sarpanch* of his village to convene a *panchayat.* A *panchayat* was convened. Matter was brought to the notice of the *Sarpanch* of accused's village also. Both the *Sarpanches* tried to affect a compromise on 1st April 1984 (two days after the alleged incident took place) but since the *panchayat* could not give any justice of relief to the prosecutrix, she along with her father proceeded to the police station to lodge a report about the occurrence with the police.

[18] In 1971 and 1973, the government of Maharashtra and Rajasthan went on to suggest their abolition, which was done later, and by 1976, only nine states were left with NPs (Baxi & Galanter, 1979).

[19] The 77th Law Commission of India (hereafter LCI) report on 'Delay and Arrears in Trial Courts', 1978.

[20] The responsibility to establish GNs lies on state governments. It is based on the recommendations of the LCI, which in its 114th report of 1986 suggested the establishment of courts in order to provide speedy, inexpensive and substantial justice to the common man for resolution of disputes at grass-roots level in the form of *Gram Nyayalayas*.

1.3.2 'Free Legal Aid by State' and 'PIL': lawyer-centric access to justice reforms

With rising cases in regular courts, and lack of sufficient number of judges and lawyers, delay became one of the hurdles impeding access to justice of parties in criminal cases. Further, with the adversarial system in place, defence lawyers were the most important actors for the accused in those cases. Thus, providing indigent defendants with free access to lawyers became a critical dimension of access to justice. This was the inception of the free state legal aid as a lawyer-centric access to justice reform (Cappelletti and Garth, 1978). Later on, institutional frameworks for free state legal aid were suggested but not operationalised in India.[21] In the pre-1975 Emergency era, the implementation of legal aid was desultory (Koppell, 1968). There were many incidents of indigent criminal defendants going undefended in criminal trials in Delhi and Calcutta (Koppell, 1968). In 1973, section 304 of the Criminal Procedure Code (hereafter CrPC) introduced a right to counsel for indigent defendants in criminal cases, funded by the State. This was applicable for district-level criminal courts. However, without any implementation structure in place in most states, it failed to have any impact.

In 1973, the Indian government set up a National Expert Committee (NEC)[22] to give recommendations for both legal aid and legal advice, which it did. Baxi (1975) highlighted a number of problems with the Committee's suggestions: the committee did not pay visits to the target groups and sites to understand the practical difficulties, problems of underestimated cost and lack of resources, socio-legal cultural problems like caste prejudices (Koppell, 1968), lack of pro-bono culture among the legal fraternity, and professional isolation of academic lawyers (U. Baxi, 1975; Galanter, 1983). In 1976, article 39-A was added to the Indian Constitution to introduce 'free state legal aid' as a non-justiciable right [23]:

> The State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity and shall, in particular, *provide free legal aid* by suitable legislation or schemes or in any other way, to ensure that opportunities

[21] In early 1960s, the central government had proposed to the states the creation of 'state, state capital, district and taluka or tehsil-level' legal aid network (Baxi 1975).

[22] It was a National Expert Committee on Legal Aid, led by Justice Iyer, and appointed by Ministry of Law, Justice and Legal Affairs, which produced a report titled 'Processual Justice to the People'. Its objective was to consider the question of making available legal advice and legal aid 'to the weaker sections of the community' and to 'persons of limited means in general and citizens belonging to the socially and educationally backward classes in particular' (NEC 1973: 1073).

[23] The 42nd Constitutional Amendment Act, 1976. Therefore, one cannot go to a court even if this right has been violated.

for securing justice are not denied to any citizen by reason of economic or other disabilities.

In 1978, the Supreme Court declared free state legal aid to the needy as an access to justice initiative.[24] However, Higgins (2014) contends that despite the legislative framework and organisational structure to provide legal aid, practically very little legal aid is provided by either the bar or the state in India especially in the lower courts. He argued that lawyers on legal aid panels are paid very small sums for each case, and that successive governments have failed to provide the necessary facilities and incentives to improve the quality and skills of these advocates which has resulted in inequality of representation in court between the contesting parties.

The issue of delay and non-access to lawyers led to pre-trial incarceration and many incarcerated defendants losing their personal liberty for long periods. In 1979, the Supreme Court of India (hereafter SCI) accepted a petition to release 40,000 under-trial prisoners in *Hussainara Khatoon* case.[25] This was the first case where a person brought a fundamental right's violation claim in the public interest on behalf of a group of detainees, i.e., represented diffused interests. This is known as Public Interest Litigation (hereafter PIL), where *locus standi* requirements are liberalized, and which, as Bhuwania (2014) argues, is not simply pro-bono lawyering.

The Court looked at both issues of legal representation and delay in criminal cases and released the under-trial prisoners from various jails nationwide. It observed that the guarantee under Article 21 to a 'reasonable, fair and just' procedure when a person's liberty or life is at stake included a right to legal assistance and non-delay in court proceedings by linking it to the conception of access to justice in India.[26] It declared not only the 'free state legal aid' but also 'speedy trial', which very often has been cited as an enabler to access justice in sexual violence cases, as part of the article 21 to make them fundamental rights, i.e., justiciable rights. The Court also said that any procedure prescribed by law for depriving a person of his liberty cannot be reasonable, fair or just unless that procedure ensures a speedy trial for determination of the guilt of such person. Though it began its journey highlighting the access to justice issue of delay in trial and the plight of undertrial prisoners, PIL as a judicial creation (Cassels 1989)

[24] *Madhav Hayawadanrao Hoskot v. State of Maharashtra* (1978) 3 SCC 544.
[25] *Hussainara Khatoon v. Home Secretary, State of Bihar* AIR 1979 SC 1369. It resulted from a petition to release undertrial prisoners in the state of Bihar. The SC held that "Free legal services to the poor and the needy are an essential element of any 'reasonable, fair, and just' procedure."
[26] Ibid.

remained a tool limited to raise public interest issues only in the higher courts owing to its top-down model (Lokaneeta, 2017; Noorani, 1984; Sathe, 1997). PIL, therefore, was the second lawyer-centric access to justice reform in India.

Hence, practically, none of the two lawyer-centric reforms had significant positive impact in the district-level criminal courts dealing with the trial of sexual violence cases, as it failed to tackle either the issue of undue delay or representation in those courts. Another big gap is that none of these deals with the victims' experiences. The prosecutors are acting for the state rather than for the victims. In the following sub-section, I discuss the access to justice reform initiatives taken under, what Cappelletti and Garth (1978) call, the emerging access to justice approach.

1.3.3 Emerging access to justice approach to further improve access to justice

The severity of the problem of delay, as an impediment to justice, can be adjudged from the fact that even now the percentage of under-trial prisoners in India is 67%.[27] Also, to reflect on the backlog, there are 19.5 million pending criminal cases, including sexual violence cases, in India in the district-level criminal courts. Such a backlog does not give courts ample time for timely trial and disposal of newly instituted sexual violence cases. These are the result of delays at different stages of the criminal processes. The indigenous institutional initiatives, and lawyer-centric access reform initiatives of free state legal aid and PIL could not manage to address these problems. The next approach to tackle the access barriers was, thus, to further explore the non-lawyer-centric access reform initiatives. A new access to justice approach that goes beyond advocacy was suggested, encompassing a wide variety of reforms, including changes in the form of procedure, in the structure of courts or the creation of new courts (Cappelletti & Garth, 1978: 225). I have grouped such initiatives in the Indian context under the third wave reforms in the following Figure 1.2:

[27] Prison Statistics India 2015, National Crime Records Bureau, Ministry of Home Affairs. The Statistics have been published since the year 1998, when the undertrial prisoners' population was 70.5% of the total jail inmates.

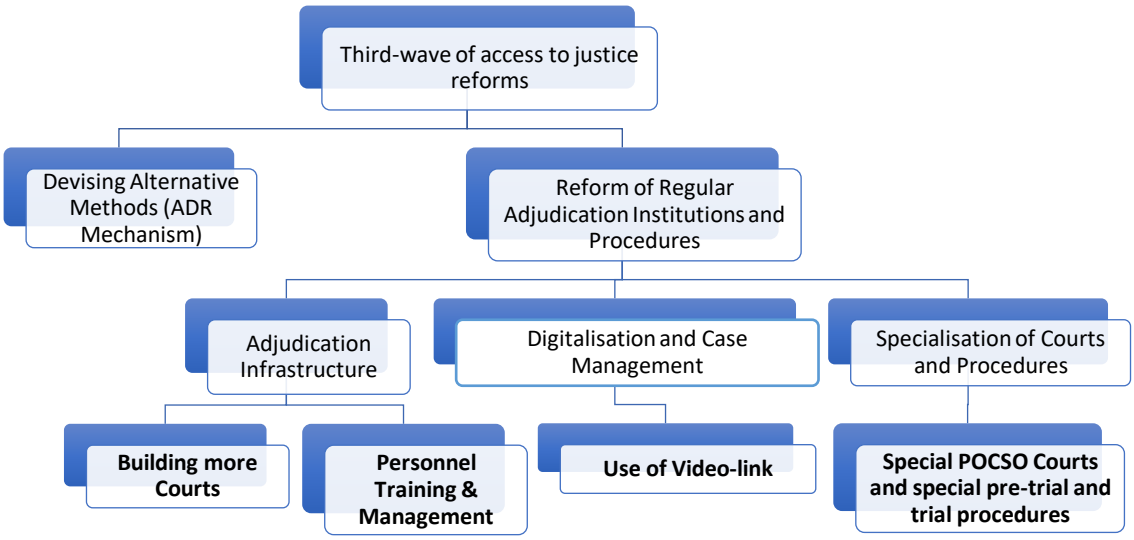

Figure 1.2: Access to Justice Reform Initiatives in India (under the Third Wave)

The POCSO reforms seem to bring many of these developments together. Along with designating existing trial courts as POCSO special courts, there is an attempt to build new POCSO special courts. The POCSO Act also creates special personnel- judges, prosecutors, support persons, to handle only POCSO cases. It further mandates special training for such personnel to implement the POCSO reforms. The Act also has provisions to use audio-video electronic means to record child statement by the police and judicial magistrate and to use video conferencing to record child testimony by the special court. More details in this regard have been given in chapter 2.

1.4 Access to Justice Reforms II: Third Wave of Access to Justice Reforms

In this section I will discuss two strands of the third wave of the access to justice approach, which is the ADR mechanism, and reform of regular adjudication institutions and procedures.

1.4.1 Employment of ADR Mechanisms: *Lok Adalats* & their limitations

One of the methods to relieve the criminal courts of a heavy load of cases is the adoption of ADR mechanism. It saves the court's time by keeping particular types of criminal cases outside the formal court system so as to speed up the system's processing of cases. However, it was

only in 1995 that LAs were established in a nationwide uniform network with jurisdiction in respect of only compoundable offence, i.e., less serious criminal offences.[28] As sexual offences are not compoundable this reform initiative did not help in improving access to justice in the sexual violence cases.

1.4.2 Reform of Regular Adjudication Institutions and Procedures for Criminal Offences

1.4.2.1 Infrastructural Initiatives: District-level courts, judicial and other court staff

It was argued that the delay, being the product of too much court business for too few judges, was creating an imbalance between judicial workload and time (LCI report, 1978). There had been few attempts[29] even in the past to tackle delay at a national level, but to no avail, because of their non-implementation. In light of all this, the vociferous argument by various Law Commissions was to improve adjudication infrastructure, use case management, and employ certain special institutional and procedural measures (LCI reports, 1978, 1987, 1988).

Proximity to courts of first instance being a facet of improving access to justice (Centre for Research & Planning, 2016), building more criminal courts at district-level became one of the access to justice initiatives to reduce backlog.[30] Further, as the facilities at the district courts were poor – without even basic amenities like drinking water, regular electricity, toilets, file maintenance, public seating arrangements, and Internet connections (Krishnan et al. 2014), another step was to improve the facilities of existing courts. It needs to be understood that the proximity to courts of first instance should be assessed given the geographical dispersion of population in India, especially in hilly areas and large states where rural and semi-rural populations take day long journeys to reach the nearest courts. In criminal cases, where surety is to be given, and applications for bail are to be moved, this too becomes a barrier to access to justice for accused (Centre for Research & Planning, 2016).

It has been argued that having a healthy Judge-Population ratio is a necessary precondition for access to justice and speedy justice (Centre for Research & Planning, 2016).

[28] S. 320, CrPC: Compoundable offences are less serious criminal offences and are of two different types- first, where Court permission is not required before compounding, and second, where it is required.

[29] In 1949, the Indian government set up the High Court Arrears Committee. In 1958, the LCI in its 14th report also dealt with the question of delay in disposal of cases in different courts. In 1969, another national committee headed by Justice Hidayatullah looked into the problem of arrears and suggested remedial measures.

[30] As against the total sanctioned strength of 20,558 judicial officers, only 15,540 courtrooms are available (Centre for Research & Planning, 2016).

In 2002, the Supreme Court directed the government that the Judge-Population ratio in India must be at least 50 Judges per million of population by 2012.[31] Even in 2016, the ratio was only 19- very poor in comparison to other jurisdictions[32] (Centre for Research & Planning, 2016). Even the strength of non-judicial staff in courts is 172,641, a shortfall of 19% (Centre for Research & Planning, 2016). Such poor state of affairs was also discussed in 2017 by the Delay and Arrears Committee of the Supreme Court, which resolved that the subordinate courts Judge strength might be revised for effective disposal of cases and for clearance of backlog.[33]

1.4.2.2 Case Management Techniques

Case management is another reform initiative linked to reducing the backlog of cases in criminal courts. It includes amendments to the criminal procedural laws as well as certain other statutory techniques by which a dispute is solved before it reaches the court. These are procedural amendments for adjournments and grouping of cases and appeals. Various Law Commissions have made recommendations for revision of criminal procedure code to reduce delay at various stages of the criminal process.[34] These are to expedite the service of summons, provisions relating to bail, restrict the time for filing statements, curtailment of adjournments during the trial, and to provide copies of judgment immediately to the parties.

1.4.2.3 Specialisation of Courts and Procedures

Specialisation of courts and procedures is another tool to reform adjudication institutions and criminal processes to improve access to justice. The special courts have often been the products of policy responses to certain incidents which fell in the areas of economic and regulatory offences, law and order, social justice, and national security, along with the objective of providing speedier justice. So, such specialisation is based on socio-economically important subject matters, a particular category of offences, or the nature of parties to the case.

This line of thought has led to the establishment of a plethora of statutory specialized district-level courts. A study suggests while there were only three statutes providing for special courts between 1950 and 1981, there were 26 statutes that mandated the establishment of

[31] *All India Judges Association v. Union of India* (2002) 4 SCC 247.
[32] Judges per million populations (year 2016): China-147, USA-102, England & Wales-56, and Australia-48.
[33] *Imtiyaz Ahmad v. State of U.P.* 2017 (3) SCC 658.
[34] 102nd LCI report on 'imprisonment for breach of bond for keeping the peace with sureties', 142nd LCI report on 'Plea Bargaining', 154th LCI report on 'the Code of Criminal Procedure, 1973', 200th LCI report on 'fair trial', 203rd on 'Anticipatory bail', 239th LCI report on 'Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities', 268th LCI report on 'provisions relating to bail'.

special courts, including the POCSO Act between 1982 and 2015.[35] Moreover, 1982-87 and 2012-15 were particularly prolific periods, with ten and eight laws respectively providing for special courts (Vidhi Centre for Legal Policy, 2016). However, there is no categorical rationale for these developments, i.e., the sudden spikes in legislations in those two periods or in the last four decades generally.[36]

These special courts, which were established to ensure effective trial and quick disposal of cases, include children's courts, women's courts, family courts, and POCSO courts. They are established by either setting up a new court or by designating an older court by giving it additional responsibilities. Although the purpose of establishing these courts was to improve access to justice by delivering quick and effective justice, research suggests that they have been unsuccessful in fulfilling those objectives as the pendency rates even in these special courts are high.[37] One of the reasons behind it seems to be the nature of implementation of these laws, which does not necessarily follow the distinction between 'setting up' and 'designation'. Despite the statutes demanding 'setting up' of special courts, State governments have 'designated' courts under most of the legislations thereby further adding to the existing burdens of courts without adding any new court infrastructure (Vidhi Centre for Legal Policy, 2016).

Further, the functioning of special courts has also been poor. The 230th LCI report (2009) claims that 190 Family Courts established in various parts of the country have speedily settled matrimonial disputes through reconciliation. But this quantity of justice was shown to conflict with quality of justice by Basu in her study of the family courts (2012: 489).

1.5 Conclusion

I began this chapter by briefly introducing the subject of study for my research, i.e., the operation of reforms introduced by the POCSO law. I have explained the purpose of this research by highlighting the gaps in scholarship in the area of child sexual violence in India and the research questions I seek to answer through this project. Noting the implications of the POCSO law for access to justice, I have explored various conceptions of access to justice. These suggest that access to justice is not a thing but a relationship that is multidimensional and shaped by a plethora of factors.

[35] Sakshi, The Hindu (2017) 'What is special about special courts?'. 5 January. At: https://www.thehindu.com/opinion/op-ed/What-is-special-about-special-courts/article16978952.ece (accessed 10 March 2019)
[36] Ibid.
[37] Ibid.

Thereafter, with reference to Cappelletti & Garth's (1978) 'three waves' criteria, I have discussed contrasting reform initiatives aimed at improving access to justice in different jurisdictions and legal systems of the West. Cappelletti & Garth had classified lawyer-centric initiatives under the first two waves of reform. In the wake of the failure of these initiatives to improve access to justice as intended, the third wave, being forum-centric in nature, encompassed a range of institutional, procedural, and personnel mechanisms.

I have then demonstrated how access to justice reform initiatives have developed over the years in India by formulating my own three-waves categorisation. It differed to some extent from Cappelletti & Garth's (1978) model because of India's British colonial past. Independent India attempted to improve access to justice for its citizens at the district level through forum-centric, i.e., indigenous institutions, and lawyer-centric, reform initiatives. Yet, the power imbalances between the parties because of their socio-economic status and the existing socio-legal cultures, along with very poor court and personnel infrastructures and the penality inherent in the adversarial criminal process remained constant hurdles to access to justice at the district level. The reform initiatives kept on failing to solve the problems of delay in trial and disposal of cases in district criminal courts for various reasons. The result was additional delay caused by the backlog of cases in district criminal courts, thus further impeding access to justice.

The third wave of access to justice initiatives was then born in India. While free state legal aid and formalized indigenous institutions remained a part of the access to justice agenda at the district level, alternative adjudication forums like *Lok Adalats* emerged, and so did the growth in court and personnel infrastructure. Moreover, case management techniques and specialisation of courts and procedures were employed not only to speed up case disposal at the district level but also to improve court users' experiences of justice. However, even these policy developments did not remove the barriers to justice encountered by certain groups of court users.

The next chapter will explore the implications of these policy and implementation failures, along with other factors, for child victims in sexual violence cases heard in the district criminal courts. The chapter will also look at how, India's adoption of the POCSO law is a part of the third wave reforms involving specialisation of courts and procedures. I explore the POCSO reforms in detail by setting out their socio-political and historical background and formal objectives, and their relevance to the concepts of speedy justice, procedural justice, and therapeutic jurisprudence. In so doing, I review the literature from various jurisdictions on the

socio-legal issues surrounding the problem of child sexual violence and the use of video conferencing during the criminal trial.

The third chapter will discuss the research methodology I employ to address my research questions and its rationale.

Chapter four is a descriptive chapter, which combines a short account of the Indian court and judicial system with the presentation of quantitative data on POCSO special courts and cases and an outline of stakeholder perceptions of training and status of courtroom personnel dealing with child sexual violence cases.

The next six chapters report my empirical findings on the implementation and impacts of POCSO reforms in Bihar and Delhi. These empirical findings are presented thematically.

Chapter five examines the perceptions and experiences of the implementors of the POCSO law in relation to access to justice and the POCSO law's objectives. Chapter six is concerned with how the implementors perceive the impact of POCSO reforms on child victims' access to justice in the pre-trial stage of POCSO cases. The seventh chapter focuses on the access to justice of the accused at the pre-trial stage, by looking at the implementors' understanding of the impact of the reforms on the bail decisions in POCSO cases. Chapter eight is concerned with the access to justice for both victims and accused during POCSO trials – as perceived by the implementors- particularly in relation to adversarial trial procedures and child victims' examination. The final empirical chapters, Chapter Nine and ten, are then concerned with the stakeholder perceptions and experiences of the impact of the POCSO Reforms on speedy trial and architectural innovations in the trial space in relation to the access to justice for both victims and accused.

The concluding chapter draws out the key findings of the research in regard to the implication of the POCSO reforms for access to justice.

Chapter 2

Speedy Justice, Procedural Justice, and Therapeutic Jurisprudence as the 'Third wave' of Access to Justice: POCSO Special Procedures, Special Courts, and the Use of Video-Link

2.1 Introduction

This chapter introduces the reform initiatives brought by the POCSO Act 2012 and POCSO Rules 2012. The Act established a new set of courts, with newly designated court personnel. The law introduced new pre-trial and trial procedures, and the use of live video-links during the POCSO trial. These are at the heart of this project. The chapter begins with the investigation of the factors behind these initiatives. I identify the policy goals of the POCSO reforms, the specific problems they highlight, and the mechanisms they introduced to achieve the stated goals. Relevant literature from India and other jurisdictions has been drawn on to provide context.

I explore to what extent, and in what ways, the policy goals point towards improving access to justice of the child victim and the accused. I employ the conceptual tools of speedy justice, procedural justice, and therapeutic jurisprudence and consider the tension between them. I consider the implications of the reforms for the legal rights of the accused and improving child victims' experience with the criminal process. Lastly, I reflect on the three research questions to discuss why I raised them and to form a link to the next chapter on methodology that deals with how I intend to answer them.

2.2 Historical background to the legal reforms in child sexual violence cases: The factors behind the POCSO Reforms

The complexity of the issue of child abuse in India is heightened by factors like caste, class, gender, indigeneity, race, religion, sexuality, and their intersectionality (Kaushal, 2020; Virani, 2000). It is masked in secrecy with a conspiracy of silence around it and is among the most discussed yet 'unknown' parts of Indian social and legal life (Gangoli, 1996). In fact, there has been a near-established belief among most Indians that there is no child abuse in India and certainly there is no child sexual abuse. Existing structural inequalities in India also render some children more vulnerable and at risk of abuse, exploitation, and neglect, than others. The

POCSO law, which deals with child sexual violence cases, is the product of socio-political and legal developments over the last five decades. To understand those factors is a prerequisite in understanding the birth of this policy.

India is laden with stories of police violence during the pre-trial stage in sexual violence cases in the form of police custodial rapes,[38] where the social power of men over women and girls meets the state power of policemen over the female citizenry. Sexual violence victims further suffer secondary violence during the courtroom trials. In the child sexual violence cases, the consequences of these forms of violence are supposedly much higher as the victims are children. "Patriarchy, power, penetration- these are all the factors that assist greatly in allowing a child to be sexually, and physically, abused," argues Virani (2000: xx). She further adds, "perpetrators are first in the child's home and among its known family and friends' circle" (Virani, 2000: xxi-xxii).

It has been argued, in the West's context, that "feminists have been central to virtually every era of activism around child sexual abuse, from moral reformers in the 1800s and early 1900s, to the 1980s survivors' movement" (Whittier, 2016: 95). During the 1970s-80s, in India too, there was a rise of feminist activism and growing awareness of the problems of sexual violence centered around victims, including female child victims. The debates on the implications of the criminal process and the criminal justice system in adding to the experience of victimisation of those who are the objects of sexual violence also surfaced.

2.2.1 1970s-80s: Feminist movements, Law Commission Report, and the 1983 amendments

Gangoli and Rew (2018) argue that three cases[39] in the late 1970s and early 1980s created a public debate around rape. The debate fed into the emerging feminist movement in India and led to a nationwide anti-rape campaign. Finally, this culminated in amendments to the rape laws under the Indian Penal Code, 1860 (IPC) in 1983. While in all the three cases the rape was committed by policemen, the most prominent was the one where the victim was a minor girl aged 14 to16 years- an orphan tribal agricultural labourer named *Mathura*. She was raped by two policemen inside the police station.

While the sessions court acquitted the accused, the Bombay High Court reversed and convicted them arguing that she would not invite them to satisfy her sexual desires as they were

[38] See, PUDR reports on Custodial Rapes and sexual assaults in India from year 1989 to 2017. At: https://pudr.org/sections/custodial-rape?q=sections/custodial-rape&page=0 (accessed 13 September 2021).
[39] *Rameeza Bee* case, *Mathura* case (*Tukaram v. State of Maharashtra* AIR 1979 SC 185), and *Maya Tyagi* case.

'strangers' to her. Though in favour of the child victim, the High Court employed the stranger danger model of sexual violence in its decision. It might not have convicted the accused had they either been known to her, or had they belonged to her family, which is very often the scenario in child sexual violence cases. The Supreme Court then reversed the High Court's decision and acquitted them on the grounds that no injuries were found in the medical report, the intercourse was a 'peaceful affair', and no alarm was raised by the child victim.

These cases and the then feminist movement raised the following issues that required reforms in the substantive law, the rules of evidence, and the procedural criminal laws as well as the criminal justice institutions and their personnel's behaviours:

Substantive laws:

- Expansion of rape beyond peno-vaginal penetration.
- Declaring custodial rape as a specific form of male power over women.
- Legal recognition of marital rape, particularly rape in child marriages.

Procedural and evidence laws:

- Prohibition of stigmatisation and use of victims' past sexual habits.
- Stopping re-victimisation of victims by filing false cases against them.
- Interview and interrogation of molested women by women police.
- *In-camera* trial of rape cases.
- Reversing the burden of proof to the accused.

Institutional and Personnel:

- Illegality of holding the victims as criminals by the police.
- Representation and protection of victims within the criminal justice system.
- Prohibition of courts' treatment of socio-economically disadvantaged victims as 'liars'.
- Preventing molestation of women in villages and of Harijan[40] women.

All these issues were relevant to female child sexual violence as much as they were to sexual violence against adult women. The underlying issues had acted as barriers to justice for these sexual violence victims.

[40] Women belonging to the Scheduled Castes, former 'untouchable' category, and politically referred to as Dalits.

Upon being requested by the government to carry out a special study of rape laws, the Law Commission of India (1980) (LCI) in its 84th report[41] discussed the impact of sexual offences on female victims, including children, surrounding the abovementioned issues. Acknowledging that the whole of the criminal justice process has the potential for further victimization, the LCI noted that the rape victims undergo two crises- one of rape and second of the trial. With a special emphasis on the trial, it argued that the trial forces her to re-live through the traumatic experience in the glare of publicity in a totally alien atmosphere, with the whole apparatus and paraphernalia of the criminal justice system focused upon her.

There was, thus, a rise of concern about the potential damaging effects of the trial process for rape victims, including children. In sexual offences cases, an overriding consideration justified an exception to be made to the general rule of public trial. In response to the feminist campaign in the 1970s-80s and the recommendation of the LCI,[42] the Criminal Procedure Code was amended in 1983. It mandated the inquiry into, and trial of, sexual offences to be conducted *in-camera*.[43] The report further added that the victims need empathy, safety, and public sensitivity to these needs for them to report such offences without experiencing fear. The report also noted that problems begin with women's treatment by police, referring to the pre-trial stage, and continue through a male-dominated criminal justice system, highlighting the lack of representation of women in it.

The 1980 LCI report reform recommendations reflected feminist understanding of rape and incorporated multiple feminist demands (Gangoli & Rew, 2018) to amend substantive, procedural and evidence laws.[44] The feminist demand that marital rape be criminalised was partially accepted by LCI. It proposed that sexual intercourse only with a child wife, i.e., below 18 years- the marriageable age, be criminalised. The parliamentary joint committee suggested that minors' rape should be given exclusive legal recognition by including it in section 376 of

[41] 84th LCI Report on "Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence," 1980, New Delhi.
[42] Ibid, pp. 28-29.
[43] S. 327(2), CrPC. The parliamentary joint committee supported publicity of trial if it was necessary for proper investigation or if the victim so desired or if it was in the case's interest. See, Joint Committee, Report on the Bill to Amend the IPC, CrPC, and IEA (1982). The provision of in-camera trial is incorporated in the POCSO Act. See, section 37, POCSO.
[44] Concept of 'custodial rape' to be introduced; greater custodial sentence was recommended for such perpetrators; concepts of 'full and free consent' and 'silence does not mean consent' to be introduced; victim's past sexual history was not to be used by prosecution in rape trials as a way of discrediting the woman's testimony; S. 228A of the IPC, i.e., prohibiting press coverage or disclosure of accused or victim's identity, to be inserted; S. 327(2) of the CrPC, i.e., rape cases' trials shall be conducted *in-camera* except in certain situations, to be inserted; Amendment of section 375 (criminalisation of marital rape if wife is below 18 years) and introduction of section 376 (inclusion of custodial rape, gang rape, and more punishment, and the burden of proof to be shifted to accused) of the IPC.

the IPC. It argued that rape of minor girl within marriage be considered a less serious offense than other forms of child rape. The feminist demand, however, was that sexual abuse of children within marriage should be punished more severely than other forms of child sexual abuse. On the other hand, criminalisation of rape of a minor wife by her husband was opposed during the parliamentary debates under the garb of Indian culture. The relationship in law between the age of consent, marriageable age, and legality of marriages involving minor children has played a significant role in the criminalisation of sexual offences against children.[45]

At the end, the LCI recommendations were variously interpreted, translated and partially accepted by the Indian Parliament.[46] These issues reflect the conflict between child's bodily & sexual autonomy, and state and patriarchal control over child's sexuality, and relate to wider questions about the age of consent and under-age marriage. "The history of the rape legislation in India", Baxi argues, "testifies to the suppression of the rights of female children in order to maintain the adult normativity of kinship and marriage" (2014: 117).

It can be argued that there are many ways of understanding the distinctions between sexual violence against children and sexual violence against adults. It could be the nature and reasons of causation, applicability of law of consent, and the potential harm caused. Children are compliant and trustworthy to people they know, who often constitute the highest risk to them. Child's consent is legally irrelevant in sexual activities. Although, many substantive and evidence laws were amended, and most of them did overlap for sexual violence against both adult women and girls, there was no discussion around changes in substantive laws for male victims bringing them on par with girls. There was also little deliberation on procedural laws to deliver quicker and child-friendly justice in child sexual violence cases. We will see in the following section how the reforms took a turn towards these changes through judicial and parliamentary recommendations.

2.2.2 1990s-2000s: Judicial Recommendations, Law Commission Reports, and the Government's steps

This period saw the emergence of child victims, irrespective of their gender, as the focus of reform debates. There were various forms of intervention in the area of child sexual

[45] Annex II explores this relation from the time of the enactment of the IPC. It also sheds light on the legislative reservation on criminalising marital rape and the state's desire to control and criminalise sexuality of its subjects by enhancing the age of consent from 16 to 18 years.

[46] The new law continued to treat the sexual history of women as relevant; marital rape remained legal except when the wife is below 15 years; rape continued to be defined as peno-vaginal penetration; sections 228A, IPC, and 327 (2), CrPC, were inserted.

violence. India's ratification of the UN Convention on the Rights of the Child, 1989 (CRC), in 1992, was one of the primary drivers behind these interventions. Article 34 of the CRC ordains the Member States to protect the child from all forms of sexual exploitation and sexual abuse. Another driver was the continuous activism by women's and children's rights organisations, such as 'Sakshi'. The key themes were the gender-neutral substantive and procedural reforms in the area of child sexual violence, with particular emphasis on making the trial of child sexual violence cases child-friendly.

2.2.2.1 Failure of the 1983 Legal Reforms

Gangoli notes that "feminists soon realised that the 1983 IPC amendment did not yield positive results at the level of women's lives, nor did it lead to any substantial improvement in judicial and police procedures" (2012: 114). She contends that some of the key issues women face while accessing justice in rape trials relate to social perceptions that influence the criminal justice system as their bodies are seen as repositories of community or familial shame and honour.

In 1996, the Supreme Court,[47] highlighting the 1983 amendments, said that despite the amendment that mandates trial courts to conduct rape trials *in camera,* it is seen that the trial courts either are not conscious of the amendment or do not realise its importance. It added that hardly does one come across a case where the enquiry and trial of a rape case has been conducted by the court in camera. Further, male children did not even form the legal subject of non-penetrative sexual assault under the law[48] until the enactment of the POCSO Act 2012. Sexual offences against children were not adequately addressed by the extant laws and a large number of sexual acts against children did not find place in IPC or any other law (Virani, 2000).

2.2.2.2 Judicial Recommendations

The late 1990s and early 2000s saw judicial interventions on making the trial of child sexual violence cases child-friendly. The experiences of child victims in the prosecution of sexual violence cases, during courtroom trial in particular, have been demanding procedural

[47] *State of Punjab v. Gurmit Singh & Ors.* AIR 1996 SC 1393.

[48] Only a woman could be a victim and only a man could be a perpetrator of rape under section 375, IPC. Under section 377, IPC, which deals with 'unnatural offences', only voluntary carnal intercourse was punished. India legalized homosexual sex in 2018. See, BBC News (2021) '377: The British colonial law that left an anti-LGBTQ legacy in Asia'. 29 June. At: https://www.bbc.co.uk/news/world-asia-57606847 (accessed 15 September 2021).

reforms for decades. The Indian higher courts made various observations in their decisions.[49] One, traditional adversarial trial in an open court is unsatisfactory and problematic in child sexual violence cases for various reasons. It takes place a long time after the incident, and the child might forget its details, which could be relevant to the defence in proving a case but may be peripheral to the child. Second, child victims cannot understand and do not possess knowledge of the courtroom language. Third, the Trial Courts look for corroboration to adjudge the credibility of the complainant's statement. Fourth, the Trial Court judges indulge in character assassination of child victims and their appreciation of evidence is unreasonable and perverse. Fifth, the leading questions during the trial tend to produce inaccurate information and children are more susceptible to their effect than adults. And finally, the questions asked during traditional cross-examination have the potential to cause emotional stress to child witnesses.

Various recommendations were given in a series of decisions by the Indian higher courts for courtroom best practices vis-à-vis the role of judges and lawyers during trial in child sexual violence cases.[50] Such practices were primarily aimed at safeguarding the interests of the child rape victims without harming the defence during trial. They pertained to trial procedural reforms, courtroom architecture and courtroom linguistics during the trial:

- Corroboration is not necessary in all rape trials. This meant that a child testimony alone could be strong evidence against the accused in child sexual violence cases.
- It is the duty of the court to prevent the harassment of child rape victims and other witnesses during cross-examination.
- The questions put in cross-examination on behalf of the accused by the defence lawyers to child witnesses, relating to the incidence of crime, should be given in writing to the presiding judge, who may put them to the child victims in language that is clear and would not cause distress or trauma to such child victims.
- A screen or some such arrangements may be made where a child victim does not see the body or face of the accused while the judge can see the child victim since it is important to observe the witness's demeanour.
- The victim of child abuse or rape should be given sufficient breaks as and when required.

[49] *Bharwad Bhoginbhai Harjibhai v. the State of Gujarat* AIR 1983 SC 753, *State of Punjab v. Gurmit Singh & Ors.* AIR 1996 SC 1393, *Sudesh Jhaku v. K.C.J. and Others* (1996) 62 DLT 563, *Sheeba Abidi v. State & Anr.* WP (Crl) No. 356 of 2003, *Sakshi v. UOI & Ors.* AIR 2004 SC 3566, *The Director, Tamil Nadu State Judicial Academy v. State of Tamil Nadu* WP No. 36807 of 2006.
[50] Ibid.

- The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the complainant, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.
- *In-camera* trial of rape cases, including taking evidence of child victims, should be the rule and an open trial in such cases an exception.
- Arrangements should be made for translators if the child victim is from another State and does not speak the local language.
- Special Courts must have a child friendly and supportive atmosphere while taking the child victim's evidence, and preferably, a 'neutral' adult and supportive woman who inspires the confidence of the child may be present as a support person.
- The anonymity of the victim of the crime must be maintained as far as possible throughout the case.
- If possible, women judges should try cases of sexual assault on females to help put the victims at ease and support an improved quality of evidence and proper trial.
- The Parliament shall give serious attention to the recommendations and make appropriate legislation with all the promptness which it deserves.

2.2.2.3 Law Commission of India Reports

In 1997, 'Sakshi' filed a writ petition before the Indian Supreme Court for inclusion of all forms[51] of penetration within the definition of "sexual intercourse" in section 375, IPC. The Court directed the Law Commissions of India to respond to the issues raised in the petition. Further, during the 1990s-2000s, findings of empirical research on child sexual abuse (Segal, 1992; Virani, 2000), highlighted the urgent need for more effective action by the state.

The 172nd LCI Report, 2000, focused on both substantive and procedural reforms of rape laws in the area of child sexual violence, and considered the above judicial recommendations. The Report argued that the crime of sexual assault on a child causes lasting psychological damage to the child, and as such, must be prevented through stringent provisions. This report argued for a feminist view of 'sexual penetration', i.e., expanding it much beyond peno-vaginal penetration to include several forms of child abuse. It added that, a child of tender years cannot discern the degree of difference in terms of which orifice of hers is penetrated, and child sexual abuse is mostly committed by persons known to children.

[51] Penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina, finger/anal penetration, object/vaginal, and object/anal penetration.

Building on the 84th LCI report's recommendations and some of the judicial guidelines that were present by now, the 172nd report made recommendations on substantive and evidentiary[52] legal changes, as well as pre-trial procedural[53] changes. However, despite most of the judicial guidelines in place during her fieldwork conducted from 1996 to 1998, Baxi (2014) did not find them being implemented effectively. Except the trial being *in-camera*, she mentions in her research the trial of a child rape victim in which none of the guidelines were followed by the court- judges, prosecution and defence lawyers alike.

2.2.2.4 Steps by the Government:

The urgency of dealing with child sexual violence was revealed through the 2001 census, which said India was home to one-fifth of the world's children. More than a third of the country's population, around 440 million, was under 18 years. According to one assumption 40 percent of Indian children needed care and protection. In April 2001, as an institutional reform mechanism, India started a scheme for fast-track courts to try to clear the backlog of criminal cases of all kinds clogging up the subordinate Indian criminal justice system.[54] In alignment with such scheme, in 2005, Commission for Protection of Child Rights (CPCR) Act was passed.

This Act was the first legislation focused on child victims of criminal offences as a separate legal subject, though it did not specifically focus on child sexual violence victims.[55] There were two provisions[56] regarding children's courts in the entire legislation, which were poorly implemented. Moreover, this legislation did not incorporate those judicial guidelines,

[52] Impermissible to adduce evidence or to put questions in cross-examination of the person assaulted with respect to his/her previous sexual history, character or conduct whether to establish consent or otherwise; rape to be defined in much broader way than just a peno-vaginal penetration; presumption of absence of consent on part of the victim in aggravated sexual assault cases.

[53] No male person under the age of sixteen years or a woman shall be required by the investigating officer to attend at any place other than his or her home or place of his or her choice; the statement of a male person under the age of sixteen years or a female, during the course of investigation, should be recorded only in the presence of a relative, a friend or a social worker of the person's choice; as soon as a case of sexual assault is reported to a Police person, he shall have the person (allegedly assaulted sexually) examined medically by a registered medical practitioner; the testimony of a child who is subjected to sexual assault should be recorded at the earliest opportunity by a judge/magistrate in the presence of a friend, relative or social worker whom the minor trusts, and for its proper implementation, videotape/CCTV should be provided; the investigation and trial of sexual offences should be time-bound and should be concluded within six months.

[54] https://www.bbc.co.uk/news/world-asia-india-21320104

[55] Preamble, the CPCR Act: The purpose was to provide speedy trial of offences against children or of violation of child rights.

[56] Section 25, CPCR Act: It directed each state government to specify at least one court in the state or specify, for each district, a Court of Session to be a Children's Court to try offences against children, and to appoint special public prosecutor for each of these courts.

nor did it recognise any specific sexual offences against children despite the limited scope of the IPC. In 2005, certain consultations took place, and the then Department of Women and Child Development prepared a draft Offences against Children Bill, 2005, which was discussed through inter-ministerial consultations in 2006-07. The Department of Legal Affairs returned the Bill with the observation that most of the offences in the Bill were already covered under the existing laws, and the purpose of bringing a new law was not clear.[57]

In 2007, the Ministry of Women & Child Development (MWCD) initiated a National Study[58] on Child Abuse, including sexual abuse (Kacker et al., 2007). The study aimed at understanding the extent, dimensions, and intensity, and developing a comprehensive understanding of child abuse, including child sexual abuse. The goal was to facilitate the formulation of appropriate policies and programmes to effectively curb and control it. The major findings were very disturbing.[59]

The study examined two aspects: strategies to address the problem of child abuse, and identification of areas for further research, based on the findings of the study. In furtherance of the strategy, the National Commission for Protection of Child Rights (NCPCR), a statutory body, was set up in March 2007, under the Commissions for Protection of Child Rights (CPCR) Act, 2005. Moreover, the National Crime Records Bureau[60] (NCRB) data showed that there had been a significant increase in incidence of crime against children in the last decade, i.e., from the year 2001 (10,814 cases) to the year 2011 (33,098 cases). The cases of sexual offences against children exponentially grew from 2,265 in the year 2001 to 5,749 in the year 2008.

However, it is not possible to say to what extent these figures reveal an actual increase in offending, since most of such offences are hidden, by their very nature – and changes in reporting are more likely to reflect policy, procedural & cultural changes than trends in offending behaviour. In the parliamentary debates preceding the passage of the POCSO Act, there was discussion of the low rate of convictions in crimes against children, which was said

[57] 240th Report on the Protection of Children from Sexual Offences Bill, 2011, Department-Related Parliamentary Standing Committee on Human Resource Development, 2011.

[58] This study, meant to complement the UN Secretary General's Global Study on Violence against Children, 2006, was the largest of its kind globally, and covered 13 states with a sample size of 12447 children, 2324 young adults and 2449 stakeholders.

[59] Young children, in the 5-12 years group, were most at risk of abuse and exploitation. 53.22% children reported having faced one or more forms of sexual abuse. 21.90% child respondents reported facing severe forms of sexual abuse, 50.76% reported other forms of sexual abuse, and 5.69% reported being sexually assaulted. Further, 50% of the abusers were persons known to the child or were in a position of trust and responsibility. The Report also mentioned that most child victims did not report the incident to anyone.

[60] It is an Indian government agency headquartered in New Delhi and responsible for collecting and analysing crime data as defined by the Indian Penal Code (IPC) and Special and Local Laws (SLL).

to be the result of ineffective participation of child victims in the criminal process, and in criminal trials in particular.

The male-dominated Indian legal and judicial profession seemed to have further exacerbated the problem a sexual offence child victim faced in narrating their story during the trial. In 2009, another amendment to the CrPC provided the *in-camera* trial to be conducted, as far as practical, by a female judge or magistrate.[61] Further, in view of the findings of the 2007 Study and the specific advice given by Ministry of Home Affairs on the need for a separate law, the draft Bill was further discussed and revised by NCPCR in 2009.

2.3 Reforms addressing child victims of sexual violence and reducing delay: the National Mission 2011 and the POCSO Act 2012

In 2009, a 'Vision document' of the Ministry of Law and Justice envisaged a National Mission for institutional reform with the goal to reduce delay. In response, the government set up a 'National Mission for Justice Delivery and Legal Reforms' in 2011 with certain initiatives that included improvements to the court infrastructure, greater computerisation, increase in strength of subordinate judiciary, policy, and legislative measures in the areas prone to excessive litigation, re-engineering of court procedure for quick disposal of cases and emphasis on human resource development.

As the momentum for change was gradually building, the perceived need to have special legislation was growing. Rather than amending the existing criminal laws, the government introduced a new set of courts with new designated court personnel, new pre-trial and trial procedures, and the use of live video-links during child sexual violence cases. This was done through the Parliament's enactment of the POCSO Bill in 2011. It brought together the substantive, procedural, and evidence laws related to child sexual violence cases in one place.

[61] S. 327(2), second proviso, CrPC. In Bihar, among the 577 district judicial officers appointed till 2012, there were only 46 women (8%). There is currently no woman district judge in Bihar, which also performs poorly on caste diversity, as most judicial officers belong to the upper castes, dominated by Brahmins. From 2017 onwards, the Bihar government made 33% women reservation in district judiciary. As of November 2019, Delhi had 37.4% female district judicial officers out of the total number, which put Delhi on 11th rank from the top among the 29 states and 7 Union Territories of India, while Bihar ranked 2nd from the bottom with 14.5%. See, Nupur et al. (2021), p. 63. As on 1st July 2021, the numbers improved, and there are 319 female district judicial officers out of 1399 (22.8%) (Data retrieved from the Patna High Court's website).

The issue of child victims facing an accused during the trial pushed the boundaries of reform during trial stage of child sexual violence cases past the exception of *in camera* trial. In 2011, NCPCR argued before a Parliamentary Standing Committee while discussing the POCSO Bill that the present judicial system was adult-centric. The system was meant to adjudicate the cases of adults and was silent on the issue of children when they encountered the law.[62] Such realisation by NCPCR seeks to bring changes to the way the child witnesses reporting and testifying to sexual violence register their presence in the juridical space.

NCPCR strongly emphasized that 'the judicial process of adjudication in the case of child victim (of sexual offences) should be the process of healing and not that of re-victimization.'[63] This was a very large shift from conventional understandings of the criminal justice process as being, in essence, about determining guilt and holding offenders to account. This was much more ambitious goal of making the process itself a 'healing' one. Conceptions of the criminal trial as 'the process of healing' are associated with what can be broadly described as the therapeutic jurisprudence movement (Winick, 2002; Winick & Wexler, 2015).

After parliamentary deliberations, the POCSO Bill 2011 became the POCSO Act 2012. The Act recognises India's obligations to its children under various national and international statutes and demands the state to secure the best interests of the child. As an incidental aspect to this demand, it requires the state to protect and respect the right to privacy and confidentiality of children by all means and through all stages of a judicial process involving them. Therefore, special provisions for 'Procedures for recording statement of the child', 'Special Courts', and 'Procedure and Powers of Special Courts and Recording of Evidence' have been put in place.[64] Such development is also significant, as the former children's courts,[65] both for child defendants under various juvenile justice legislations and child victims under the CPCR, never saw such expressed architectural and procedural interventions. Such changes may be based on

[62] See note 57, para 2.7.
[63] Ibid.
[64] Chapters VI, VII, and VIII, POCSO.
[65] Children's courts were established for the first time in India under the Children Act 1960 for delinquent children. Thereafter, Juvenile Courts were set up, replacing the Children's courts, under the Juvenile Justice Act 1986 to deal with the juveniles suspected of offending. The sittings of the Juvenile Courts were mandated, as far as practicable, to be held in a building or room different from that in which the ordinary sittings of Civil and Criminal Courts are held, or on different days or at times different from those at which the ordinary sittings of such courts are held. See, section 27(2), Juvenile Justice Act 1986. The Juvenile Courts were later abolished by the Juvenile Justice Act 2000. The Commission for Protection of Child Rights Act 2005 (CPCR) brought back the 'Children's Courts' to provide speedy trial of offences against children, though neither it mentioned its sitting/organization like earlier legislations, nor it specified any architectural changes to experiment with in order to make the children's courts child-friendly.

the notion that architecture shapes environment, and its design serves the physical manifestation of someone's demands and needs (Rosenbloom, 1998).

Further, while for female child victims, both POCSO and IPC are applicable in sexual offences cases, and the guilty person is given punishment under the law whose punishment is greater in degree, this is not the case for male child victims because their victimisation is not recognised by the rape provisions under the IPC.

The POCSO Act mandates certain trial procedure and spatial arrangements which are intended to create an informal, non-adversarial, and child-friendly courtroom space with its focus on the trial.[66] It is a comprehensive piece of legislation that, for the first time, incorporated into law the earlier discussed judicial guidelines on making trial of child sexual violence cases child-friendly. It also deals with reforms of the pre-trial criminal procedures.

2.4 Reforms under the POCSO Act 2012

2.4.1 Reforms in substantive law and sentencing

a. Age-specific gender-neutral law

It recognises child victim as a separate age-specific gender-neutral legal category, i.e., applicable to all children below 18 years irrespective of gender. The POCSO offences cover all kinds of sexual activities with children; consensual sex by children between 16-18 years of age is now a crime. Any person, irrespective of their gender, can be accused. Previously, under the rape provisions, sexual violence could only be committed by a man and that too only against a woman of any age, and the 'unnatural sex' provision, which applied to male children, only covered penile-anal penetration.[67]

b. Wider definition and gradation of sexual offences against children

The Act criminalises all sexual acts against children and expands them into five categories depending on their severity - sexual harassment (SH), sexual assault (SA), aggravated sexual assault (ASA), penetrative sexual assault (PSA), and aggravated penetrative sexual assault (APSA). Aggravated forms of offences have been categorised into 21 types based on age, nature of custody, and the physical and mental condition of child victims.[68]

c. Definition of child's custody

[66] Sections 33, 36, 37, POCSO.
[67] Sections 375 to 376E, IPC. See also, section 377, IPC, which criminalised consensual and non-consensual 'Unnatural Sex' between two individuals of same gender irrespective of their age. In 2018, the Supreme Court, in *Navtej Singh Johar* case, declared that consensual sex between two adults of the same sex is not a criminal offence (AIR 2018 SC 4321).
[68] Sections 5 & 9, POCSO.

Custody has been interpreted beyond police, prison, and hospital to include the home of the child or anywhere else and includes people in a position of trust or authority. The core characteristic of 'custody' under these changes is that it recognises the relationship of trust and power authority between child victims and perpetrators of sexual violence irrespective of the place where it is committed.

d. Proportionate and more punitive sentencing

Punishments are graded based on the severity of the offence and the age of a child victim; the younger the child victim, the more the punishment. Punishments for some of these offences have been enhanced by the 2019 amendments.[69]

2.4.2 Reforms in procedural and evidence law

2.4.2.1 Procedural time limits

One characteristic of the procedural reforms is the imposition of time limits on procedural stages.

a. Recording of child's testimony by the special court

It must be completed within 30 days of taking cognisance of offence by the court. If not then the reasons for delay shall be recorded by the special court.

b. Completion of trial

The trial of all sexual offences under the POCSO Act must be completed by the special court, as far as possible, within one year of taking cognisance of the offence.[70]

2.4.2.2 New procedures

The POCSO Act and Rules outline the following special procedures that relate to the entire criminal justice process.

a. Presence of support person:

A support person has to be assigned by the Child Welfare Committee to render assistance to the child in the pre-trial or trial stage in respect of an offence under the Act.

b. Presence of a translator, interpreter, sign language interpreter, and special educator

The Act asks the police officer, the Magistrate, and the special court to take the assistance of a translator or an interpreter, wherever necessary, during reporting of the offence and recording

[69] The Protection of Children from Sexual Offences (Amendment) Act, 2019.
[70] There are amendments with regard to adjournment of proceedings and completion of trial in the general criminal procedure too but only for rape of female child victims. See, section 309 (1), CrPC.

child's statement and testimony during the pre-trial and trial stages.[71] However, the Act is silent on extending such support to the accused. The Rules talk about appointing a sign language interpreter, and special educator to communicate with children with disabilities.

c. Non-disclosure of the identity of the child during investigation or trial

No reports in any media shall disclose the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars. The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child. The Special Court shall ensure that the identity of the child is not disclosed at any time during investigation or trial.

2.4.2.3 Recording the child's statement

The POCSO Act and Rules outline the following special procedures for recording the child's statement in the pre-trial stage.

a. Procedures for recording statement of the child by police

It shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector. It shall be in the presence of the parents of the child or any other person in whom the child has trust or confidence. During the investigation, the child shall not in contact with the accused.

b. Procedures for recording statement of the child by Judicial Magistrate

The Magistrate shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.

c. Mode of recording child's statement

Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means.

2.4.2.4 Medical examination of the child victim

The medical examination shall be conducted irrespective of whether a First Information Report (FIR) or complaint has been registered and in the presence of the parent of the child or any other person in whom the child reposes trust or confidence. In case the victim is a female child, the medical examination shall be conducted by a woman doctor.

[71] Sections 19 (4), 26 (2), 38 (1), POCSO.

2.4.2.5 The trial reforms

The POCSO Act and Rules outline the following special procedures to record a child's testimony during the trial stage.

a. Mode of questioning and the nature of questions during the trial

The Special Public Prosecutor and the defence lawyer need to communicate the question to the child witness through the special judge. So, the onus lies with the judge to frame the question in a simple and understandable form for the child. The Act prohibits aggressive questioning and character assassination of children during the trial.

b. Breaks during the trial and no multiple court visits for child victims

It also directs that the court shall ensure that the child is not called repeatedly to testify in court and is given frequent breaks during the trial.

2.4.2.6 Evidentiary interventions

The POCSO Act made the following changes to the evidentiary aspect of child sexual violence cases.

a. Presumption of guilt and reversal of the burden of proof

The Act says that where a person is prosecuted for committing or abetting or attempting to commit sexual assault, aggravated sexual assault, penetrative sexual assault, or aggravated penetrative sexual assault under this Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved. Further, the Act mandates the Special Court to presume the existence of culpable mental state of the accused.

b. Penalisation of false allegations

There are also associated provisions that are intended to mitigate the risk of wrongful convictions in the form of punishment for false complaint or false information except when given by a child.[72]

2.4.3 Specialisation of courts and personnel, and semiotic modifications

The legislature realised that the children's courts specified under the CPCR Act were general district criminal courts, which are inappropriate to try child sexual violence cases, because of children's inability to effectively participate in trial in such courts. The POCSO Act mandates one special court in each district with special features to try only the offences under

[72] Section 22, POCSO. The punishment is imprisonment for a term which may extend to six months or with fine or with both.

the POCSO Act 2012.[73] It also asks for appointment of a special judge and a special public prosecutor for every special court to conduct only POCSO cases. In a first, the statute has vested the special court with the responsibility of ensuring the court atmosphere to be 'child-friendly'. The Act asks this to be done by allowing a person in whom the child has trust to be in the courtroom. This is recognition of the fact that child victims need special care and attention and emotional support in courtroom to help them participate effectively in trials.

The Act demands the police officers to not be in uniform while recording the child's statement.[74] However, it does not say anything about doing away with the robes, gowns, and uniforms worn by judges and lawyers while recording a child's testimony during the trial. Further, the requirement by Judicial Magistrate or the Police Officer to record child's statement also by audio-visual electronic means demands digitisation even at the police stations and Magistrate's courts. There is no provision for the prior introduction of the child witness to the special judge and the special public prosecutor or an advance visit to the special court. The Act does not prescribe anything to do away with the usual hierarchical seating arrangements for judges in the court.

It says that the court shall make arrangements so that the child is not exposed in any way to the accused at the time of testifying. For this purpose, the Act stipulates that the recording of the child's testimony may be through video conferencing or by utilising single visibility mirrors or curtains or any other device. The Act says the trials shall be *in-camera.* There is no provision for separate court entrances for the child victim and accused, nor anything about the special court having a waiting room with essential amenities or a playing area for the child victims.

2.4.4 Digitisation of the district criminal courts & the use of videoconferencing during POCSO trials

Since 2005, the Indian government has made ambitious and comprehensive attempts to modernize the justice infrastructure and digitalise the district-level justice system through the eCourts project. As per the Law Ministry, by August 2018, the project had already provided videoconferencing facilities to 929 district criminal court complexes and 342 jails

[73] Section 28 (1), POCSO. The Act commands each state government to designate a Sessions Court to be a Special Court for each district, in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, to try offences under the POCSO Act to facilitate speedy trial. However, it further says, if a Sessions Court has been notified as a Children's Court under the CPCR Act, 2005, or if any other Special Court has been designated for similar purposes under any other law, it will be regarded as a Special Court under the POCSO Act.
[74] Section 24 (2), POCSO.

(eCommittee, 2019), i.e., 30% of total court complexes and 24% of total jails respectively. The Law Commission of India (LCI) has stressed in the past that "videoconferencing by dispensing with physical appearance saves precious time and resources and makes justice more easily accessible and a less expensive option" (LCI report, 2009: 30).

The higher judiciary has taken a proactive role in the use of videoconferencing in criminal trials. It was in 2001 that the issue of its use in a criminal case came for the first time before a High Court.[75] By law, all the evidence of the prosecution witnesses is to be recorded in the 'presence' of the accused.[76] The court interpreted the term 'presence' as the physical presence of defendant in the courtroom and said that there was no law to allow deposition by witnesses through videoconferencing. The court, thus, did not allow it, by arguing for a legislative amendment. In appeal, the Supreme Court in 2003, set aside the impugned judgment thereby allowing the use of videoconferencing in the case.[77]

The issue of use of videoconferencing in the trial of child sexual violence cases was raised in *Sheeba Abidi*[78] case. The petitioner- the mother of the child victim- asked that the trial be conducted in a child friendly environment outside the courtroom so that the child can give evidence without fear, apprehension, or intimidation. She also asked that the child's testimony be recorded with the help of a CCTV live link to avoid confrontation and eye contact with the accused as the victim was suffering from post-traumatic stress disorder. She sought permission for the use of testimonial aids so that the child may freely express herself in ways other than oral testimony. The State did not object to these demands nor did the defence counsel. The child victim was allowed by the Delhi high court to appear via videoconferencing.

However, the defence counsel had two reservations. First was that the support person should not be a prosecution witness. He agreed to the presence of the victim's father as a support person at the time of the child's examination. His second objection was about the mode and method of the cross examination, and he insisted that the Court must ensure that the valuable right of the accused to cross-examine the child witness is not frustrated or defeated. The court agreed with and accepted his objections. Again, in the *Sakshi*[79] case, the request to record child's evidence by way of videoconferencing was raised and the Supreme Court granted permission. Referring to its 2003 decision in *Dr. Praful B. Desai* case, it said, "the whole inquiry before a Court being to elicit the truth, it is necessary that the victim or the

[75] *Dr. P.B. Desai and Ors. v. The State of Maharashtra*, Bombay High Court, decided on 23 April 2001.
[76] Section 273, CrPC.
[77] *The State of Maharashtra v. Dr. Praful B. Desai*, Appeal (criminal) No. 476 of 2003, decided on 1 April 2003.
[78] *Sheeba Abidi v. State & Anr.* Writ Petition (crl.) No. 356 of 2003.
[79] *Sakshi v. Union of India* Writ Petition (crl.) No. 33 of 1997, decided on 26 May, 2004.

witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 CrPC merely requires the evidence to be taken in the presence of the accused. The Section, however, does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the witnesses."

However, the use of videoconferencing raises various potential concerns such as perception of legitimacy of trial, judicial authority and control, and limitations of technology (Poulin, 2004). It has been argued that the party appearing via videoconferencing may remain unaffected by the influence of court, and thus it may adversely affect the legitimacy of the trial as an authentic legal and public ritual (Mulcahy, 2008). Through her empirical work on the use of video links in Australian courts, Rowden (2018) argues that virtual courts ignore the important symbolic function of the court as the site of justice where people as a community can sense law's presence and operationalization.

Talking of the judicial engagement in the trial process, Gibbs (2017) mentions that judges in England and Wales expressed concerns that defendants' effective access to counsel before, during and after sentencing hearings was reduced over videoconferencing. Then, there arises a cohort of issues of procedural fairness as there are chances of committal of offences like tutoring,[80] disrespect to the court, and committal of perjury while virtually appearing through videoconferencing. So, it needs to be seen how the special judges deal with such situations. The use of videoconferencing further raises the issue of observing parties' emotions and demeanour in the distributed courtroom space, as lawyers and judges read these emotions and the demeanour to assess the truthfulness of the statements by witnesses (Taslitz, 1999).

2.5 POCSO reforms: Extending the "Third Wave" of Access to Justice Approach via the conceptual tools of Speedy Justice, Procedural Justice, and Therapeutic Jurisprudence

In this part, I want to take a closer look at the underlying policy aims of the POCSO reforms and put them in the context of the themes associated with access to justice identified in the previous chapter. I will explore those themes through the conceptual tools of speedy justice, procedural justice theory and therapeutic jurisprudence principles. I will begin doing this by defining these conceptual tools. I will then examine their relation to the POCSO reforms. An

[80] Tutoring a witness to give false evidence amounts to an offence under sections 192 and 194 of IPC.

important test of a theory of justice is how well it introduces order and system into our considered judgments over a wide range of questions (Rawls, 1971).

2.5.1 Speedy trial, speedy justice and the two models of the criminal process

The phrase 'Justice delayed is justice denied' highlights that even if legal redress is available, but is not delivered in a timely manner, it is effectively the same as having no remedy at all. This is a good point to begin understanding delay as an 'access to justice' issue. As discussed in the previous chapter, there is a perennial problem of delayed trial and pendency of criminal cases, particularly in the district criminal courts, which adversely affects both the victims and accused. Despite various reform initiatives taken under the different waves of access to justice, there has not been much improvement in this regard for child sexual violence cases.

This relation also echoes an argument made by Packer (1964) in the context of his characterization of the Due Process Model and its application in pretrial detention. He argues that under this model, 'the sharpest distinction must be observed between the status of the defendant and of the person who has been duly convicted of committing a crime' (Packer, 1964: 41). This distinction, he tells, lies in the issue of physical restraint. Physical restraint, which the Crime Control Method supports by arguing for non-availability of pretrial liberty as a matter of right, as the primary attention under this Model is on the efficiency of the criminal process. The Due Process Model, on the other hand, advocates individual rights and argues for pre-trial liberty as a norm, and its availability as a matter of right. It is in this distinction that a criminal defendant's perception of the institution of the criminal justice system and perceived fairness will depend, which then will act as a determinant of their satisfaction with legal authorities (Tyler, 1984). So, if pre-trial liberty is curtailed, then in the absence of speedy trial, unconvicted defendants can find themselves held in custody for extended periods, hence denying them their right to liberty and access to justice in the starkest of ways.

Interestingly, the issue of delay in the trial came before the Supreme Court in a 1986 case[81] in relation to child criminal defendants languishing in the jails awaiting their trial. The Court ordered the state governments to release all pretrial detainee children from jails, who were incarcerated because of either absence of legislation or its enforcement (Kumari, 1993). Emphasising the fundamental right to speedy trial and children as national assets, the Court said that the State has a duty to look after the child with a view to ensuring full development

[81] *Sheela Barse & Ors. v. Union of India & Ors.* 1986 SCR (3) 443, 1986 SCALE (2) 230.

of its personality. It further stated that incarceration would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from society. We must understand that this is true also for adult accused.

I bring this case here to reflect on the legislative understanding and will to enact separate legislation, i.e., the 1986 Juvenile Justice Act, to recognise a child defendant as a unique legal subject and their right to be treated differently than adult criminal defendants. There were provisions for separate trials of juveniles and establishing Juvenile courts with judges specially trained in child rights and child psychology. This suggests that it was not only speedy trial that mattered, but also the way children were experiencing the criminal process, particularly the trial, and the understanding of the court personnel interacting with the child defendants.

However, in the POCSO context, the child is the victim, and the law remained ignorant of the distinction between adult and child victims of sexual offences till the POCSO Act 2012 came up. So, one can link the court comments and reasonings about the damaging impact of the adult-centric criminal process and pre-trial detention on child defendants to understand the distinct procedural requirements of the child victims of sexual offences. Similarly, the legislative step of creating special courts and special personnel trained in child rights and child psychology to deal with child defendants can inform similar institutional and personnel training initiatives to handle the child victims of sexual offences.

2.5.2 Procedural justice, therapeutic jurisprudence and the POCSO reforms

I have earlier discussed the practice of child victims' deposition in regular courts while facing the adversarial trial. I also highlighted their experiences while interacting with legal actors like police, lawyers, and judges both outside and inside the courtrooms throughout the criminal process, where they had to bear their harshness and insensitivity, even to an extent of being sexually violated. These phenomena point to procedural fairness and the personal experiences of child victims with the police and courts.

Tyler (1988) has examined procedural justice as a criterion used by citizens to assess the fairness of legal procedures and of their personal experiences with the police and courts. The procedural justice theory focuses on the way in which criminal justice actors interact with people who come into contact with the law, and argues that procedurally just processes – understood to encompass such things as voice, neutrality, respectful treatment – are associated

with trust, compliance, and ultimately perceived legitimacy of the system.[82] Tyler found that procedural justice has a major influence on citizens' satisfaction with, and evaluation of, the legal authorities and institutions responsible for settling disputes. So, the problems in child sexual violence cases in the form of delayed trial and insensitive institutional interactions could be said to act as barriers to not only the reporting of offence but also to both speedy justice and procedural justice. The understanding of access to justice, particularly in relation to procedural justice, has been put succinctly in the following words:

> Access to justice doesn't stop at entry to the courtroom but requires that lay people really understand and effectively participate in proceedings. Some of our recommendations require Government investment to support and empower users, but most require small adjustment in the attitude and approach of lawyers and judges to put the needs of users at the centre of the process. We all know that courts are confusing and intimidating places for non-lawyers – it's time we did something about it (Blake, 2019).

Accordingly, I see the concept of access to justice as encompassing not just the capacity to exercise legal rights and the fairness, effectiveness, and timeliness of the criminal process but also the quality of treatment of individuals within the criminal process. Putting both the child victims and adult victims of sexual violence on the same footing denied the very difference inherent in the tender age of children that informs their knowledge, understanding and vocabulary of essential elements of experiencing sexual violence as a social act and of the legal offence of rape. Rape cases where so much depends on the memory of, and narration by, the complainant of their horrifying experiences, one could imagine how big a blunder it is to place both child victims and adult victims on the same pedestal. Gammon argues in the English context, that "for the story of a child to be given any credibility in a courtroom she was expected to undergo the same treatment as an adult victim on the witness stand. Yet it is evident from the difficulty in obtaining a child's testimony upon oath that it was recognized that her very young age did create a problem in understanding legal concepts applicable to adults" (1999: 82).

The Supreme Court, in the year 1996, while giving certain guidelines with regard to the treatment of child victims during rape trials said that the court must ensure that cross-

[82] See, Olson & Huth, 1998; Sunshine & Tyler, 2003; Tyler, 1984, 1988, 2004, 2007.

examination is not made a means of harassment or causing humiliation to the victim of crime.[83] It said, if she is made to repeat again and again, in unfamiliar surroundings, what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence. However, Baxi (2014) has shown in her work how even the court contributes to child victim's harassment. She mentions the lack of patience of the judge while asking questions to the child rape victim. This also raises points of judicial sympathy and trust-building between the judge and the child victim.

The POCSO reforms thus not only recognised a child victim as a distinct legal subject but a unique human subject and thus have the policy goal of contributing to trust-building between the victim and the legal authorities. They also reinforce the judges as neutral and sensitive adjudicators and hence have made them responsible to take the charge of framing and asking questions to child victims. Building trust and institutional neutrality and legitimacy in this manner do seem to play a vital role in delivering procedural justice (Baird, 2001). This transformation in the judicial role also points to its significance in problem-solving specialised courts in the context of therapeutic jurisprudence (Winick, 2002).

Although in these courts, the judges seek to actively and holistically resolve both the judicial case and the problem that produced it and thus try to engage with the criminal defendants, therapeutic jurisprudence can also be employed to examine laws that attempt to engage therapeutically with child victims. Special POCSO courts, hence, speak of a paradigm shift in the Indian justice delivery system and can be studied from a therapeutic jurisprudential perspective. They remind me of Australia's first-instance criminal courts, which, as Wallace (2017) has argued, are moving from an outdated paradigm – an operational environment focused on the convenience of the court and the professional participants – to one that is user-centric and places greater value on engagement with court users. She has mentioned the development of therapeutic and problem-solving approaches, and methods of taking evidence to reduce trauma for children and victim-witnesses (Wallace, 2017).

Similarly, the prohibition of 'aggressive' tone during the trial as one of the POCSO reforms also reflects a therapeutic approach of law towards reducing the trauma of child victims. This is a response to the concern Baxi had when she says that "while…the court advocates the use of words that are not confusing for the child, it ignores the question of the tone in which such questions may be posed to the child witness" (2014: 139). It is also a

[83] *State of Punjab* v. *Gurmit Singh and Ors.* (1996) 2 SCC 384.

significant change in looking at how the lawyers exploit and try to break the child victim in the witness box. This is apparent in Baxi's description of the lawyer's manner of questioning a child victim: "…raised voices, anger, and jocularity that she did not fully comprehend, and was often reprimanded for not understanding questions during the testimony." (2014: 170). It has also been argued that "Communication, being a good listener, courtesy, and patience are all highly valued, and these interactional skills may also be associated with more engaged forms of judging and a different understanding of legitimacy, most explicitly articulated by procedural justice and therapeutic jurisprudence" (Roach Anleu & Mack, 2017: 86).

The emphasis of POCSO reforms on making the court environment 'child-friendly' and record the child's testimony through video conferencing or by utilising single visibility mirrors or curtains or any other device also suggests the law's therapeutic potential. However, this provision has been criticised for narrowly defining the term 'child-friendly' (Centre for Child and the Law, 2016). It has been argued that the definition of child-friendly "bears no reference to the physical dimension of the courtroom or the behavioural modifications required to ensure that the child's interaction with the criminal justice system is child-friendly" (Centre for Child and the Law, 2016: 31). These reform initiatives are thus a further extension of the third wave of access to justice approach. At this juncture, Galanter's argument- "access is a spatial metaphor" (1981: 1), seems crucial.

These POCSO reforms intend to improve access to justice by bringing institutional change and are intimately related to criminal procedures. The special pre-trial and trial procedures and POCSO special courts initiatives are based on the notions of bringing child-friendliness into the criminal process, effective participation by the child victim, and speeding up the disposal of POCSO cases. The provision of videoconferencing is informed by speedy justice and therapeutic jurisprudence. Their relationship with the issue of access to justice looks at access through a balancing act of procedural fairness and speedier trial. Thus, the issue of parties' perception of voice, neutrality and trust is also involved, which are different dimensions of the procedural justice theory.

These POCSO reform initiatives have implications for the role of legal actors- police, judges, lawyers, and court staff, and affect the rights of parties in different ways (Rowden & Wallace, 2018; Tyler, 1994). As the proper implementation of these initiatives relies on the understanding and practice of the police and court professionals, their authority and the legitimacy of the criminal justice system is at stake (Rowden, 2018; Tyler, 2003). Such authority and legitimacy also form a part of procedural justice. Therefore, these POCSO reforms, which are an extension of the third wave of the access to justice approach, have an

underlying aim of espousing speedy justice, procedural justice, and employment of therapeutic jurisprudence.

2.6 Concluding Remarks

The policy aim of the wide-ranging and multi-faceted POCSO reforms seems to make the criminal process a process of healing for child victims. Another aim appears to be of doing away with what Spaulding (2012) has called the 'irreducible feature of adversarial legalism' that breeds power imbalances in the courtroom and hampers access to justice of the party lower on the power balance. In this chapter, I have traced the socio-political and legal history behind the POCSO reforms. I have then discussed the reforms in detail and have explained the changes they have brought to substantive, procedural, and evidentiary aspects of child sexual violence cases. I have demonstrated how these reforms are an extension of the third wave of access to justice reforms and have the goal of improving access to justice of the parties, child victims in particular. I have also analysed these reforms through the conceptual tools of speedy justice, procedural justice, and therapeutic jurisprudence.

I have also discussed the use of videoconferencing in criminal cases and in child sexual violence cases and the potential concerns it has regarding judicial authority and impact on the two parties, particularly the accused. It seems obvious that the ideology of 'speedy justice', based more on the Crime Control Model, to improve access to justice might not necessarily lead to justice delivery and rather conflict with procedural justice.

Also, the motive of cost-cutting by the State, the desire to dispose of criminal cases at a quicker rate, and the seemingly away shift from adversarialism to revive the State power in controlling the trial proceedings threaten the procedural due process for the accused (Roth, 2000; Ward, 2015). With the ideology of new public management, public administration is considered fair when it is efficient, does not waste its financial and human resources, and is low-cost and speedy (McEwan, 2011). Tomkins argues that "such an understanding of fairness is clearly at odds with that preferred by the rules of natural justice," as giving fair hearings and reasons for decisions is time-consuming (2003: 173), which would usually be the situation in POCSO cases.

The POCSO special courts and procedures, including the use of videoconferencing, contain new ways of delivering justice that did not exist earlier. Hence, they throw up newer challenges in the form of varying effects on different court users, their rights, their duties, and their experiences. Having implications for access to justice, especially at the district level of

the Indian criminal justice system, these sites will interact with the very diverse Indian population, for the large majority of whom justice and its access remain elusive most of the time. Moreover, the changes being brought through newer actions and processes of modernisation are not accomplished in a cultural vacuum. When the court users encounter these sites, the existing socio-legal culture has its definite role to play.

While presenting the vision document of the National Mission of Justice Delivery and Legal Reforms, the then Union Minister for Law and Justice, Dr. M. Veerappa Moily said:

> It is the duty of the State to secure social order in which the legal system of the nation promotes justice, on a basis of equal opportunity and shall, in particular ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. *Access to Justice* is the key for realising this vision. *Access to quick and quality justice* must be the focal point.

There are competing interests of the political rhetoric of speedy justice on one hand, and fair trial and procedural justice for the litigants on the other. So, there needs to be a fine balance between efficiency and quality of justice. Even the Supreme Court of India supported such access to justice approach when it noted that:

> It may not be out of place to highlight that access to justice must not be understood in a purely quantitative dimension. Access to justice in an egalitarian democracy must be understood to mean qualitative access to justice as well.[84]

Hence, it would be important to investigate how the judges and lawyers seek to balance the scales of speedy justice and procedural justice and maintain the child-friendliness of the courtroom environment in the effort to realise therapeutic potential of the POCSO reforms. A key concern is not only how the diverse masses are dealing with these changes, but also what is lost — if anything — in the turn towards visual and digital technologies in these POCSO special courtrooms, and the effects of modernisation on judges, lawyers, child witnesses, defendants, and the public. With so much at stake, it is important to assess the nature of implementation of the POCSO reforms in India, and if and how do these reforms help improve access to justice of the two parties. The next chapter, thus, talks in detail about the methodology I employed to do this and its rationale.

[84] *Imtiyaz Ahmad v. State of Uttar Pradesh & Ors.* (2012) 2 SCC 688.

Chapter 3

Research Methodology

3.1 Introduction

This methodology has been developed with the goal of filling the existing large gap in knowledge about how the POCSO reforms are working. This chapter discusses the field and the fieldwork design for this project, describes the methods and strategies adopted, and the ethics approval secured. I also introduce the two field sites in India. The rationales for the qualitative approach are also set out. The chapter reflects on the strengths of the proposed approach and its potential weaknesses. It identifies the challenges born out of the inherent limitations of the proposed methodology, like accessibility to participants and generalisation of findings, and of the 'mud in the field'. By 'mud in the field' I mean both the natural and human-induced circumstances I faced during my fieldwork that acted as barriers to accessing my field and participants. I describe how I tackled them and how my different identities played a key role in that process.

At the core of this research project is the empirical data that I gathered by conducting one-to-one interviews of 49 participants with experience of implementing the POCSO law in the state of Bihar and the capital city of Delhi.[85] These participants belonged to the following professional groups- special POCSO court judges, judicial magistrates, special public prosecutors, private defence lawyers, NGO lawyers, police officers, and other court and support staff members. Being responsible for the implementation of POCSO reforms, their viewpoint is critical in understanding the operation of the reforms. I supplemented these interviews with observations at the ten POCSO special courts: one each in the four districts of Bihar, and six situated in the three districts of Delhi.[86] For this ethnographic element of my project, I visited various court premises and POCSO special courts. Through these interviews and observations, I sought to gather data to answer my research questions relating to the implementation and operation of the POCSO reforms and to consider their significance in improving access to justice.

[85] Detailed reasons for field selection are discussed later in this chapter.

[86] I explain the rationale behind selecting these districts later in the chapter. Their names have been anonymised to maintain participants' confidentiality. As Jauregui (2013) argues in her work on Indian police, these are crucial factors in the constitution of personal, professional, and political interactions in India.

In the next section of this chapter, I discuss the factors that informed the decision to use a qualitative approach. I do this by assessing the limitations of using a purely quantitative approach in understanding the operation of the POCSO reforms. I highlight the benefits of using statistical data and doctrinal methods as supplements and the advantages of employing qualitative methodology and methods. The third, fourth, and fifth sections describe the empirical approach and the two methods- interviews and observations respectively, including the research sites, research design and methods, sampling methods, and research participants. In the sixth section, I explain the data collection methods, data translation, transcription, coding, and analysis methods. The seventh section discusses the challenges, limitations, and constraints of this project. The final section concludes the chapter and links it to the next chapter.

3.2 Use of Secondary Data

3.2.1 Available Quantitative Data and their Limitations

It is important to explore the existing statistics, both official as well as non-governmental, on POCSO cases, special courts, and court personnel, to see the nature of parties involved and the outcomes in those cases, and whether the POCSO law has led to creation of special courts and court personnel. This includes exploring data on the number of special courts, special judges, special prosecutors, and support persons, status of use of videoconferencing during POCSO trials, and disposal and conviction rates. This is to identify what is known about the implementation of the POCSO reforms, and to identify gaps in existing knowledge. As Flick notes, "the limitations of quantitative approaches have always been taken as a starting point to give reasons why qualitative research should be used" (2009: 13).

A quantitative approach could have helped me generate more statistical data on POCSO reforms by analysing POCSO courts' decisions and by examining NCRB data on POCSO cases. That would give some idea about the reforms' implementation, including the use of videoconferencing in POCSO trials, the disposal rates and conviction rates in POCSO cases, reasons for acquittal and conviction, and age and gender demography of the child victims and accused. However, a mere analysis of conviction and disposal rates would not offer any knowledge on the nature of participation by the parties and the challenges they face in the criminal process, including during the use of videoconferencing in trials. Quantitative data is

further limited in understanding the perceptions and behaviors of the parties involved in POCSO cases.

Therefore, this data has little to say about the detail of the ways POCSO reforms are being implemented on a day-to-day basis. Another limitation of quantitative data would be its silence about the ways in which POCSO reforms have changed the procedural and spatial dynamics of courtrooms and the entire criminal process, and their implications on the parties and court personnel. The POCSO judgments contain little data on the subjective experiences of court personnel working at different stages of POCSO cases and differently positioned in POCSO courts who play a key role in operating the POCSO reforms. The judgments also do not offer knowledge about different access to justice implications for different parties.

It is also important to analyse the power imbalances that are at play in the social world (Rock, 1993) of these POCSO special courts, which a purely quantitative approach fails to offer. Quantitative methodology is thus too linear (Marschan-Hayes, 2015) to fulfill the research aims of my project. It fails to present an overall picture of how and through what strategies the goals of speedier justice and improvement in access to justice are being achieved without compromising procedural fairness in the POCSO special courts. A quantitative approach would also fail to realize the study of law and legal processes as social phenomena (Cownie & Bradney, 2013), and the impact of social facts on the law's operation, which shape the social reality of the POCSO courts.

These factors are invaluable in responding to my research questions and cannot be ignored. It is thus clear that other methods may help to generate data about these aspects of reforms. Therefore, the more suitable way to answer my research questions is to employ a qualitative approach. This means tapping into the qualitative data that can be generated by knowing the lived experiences of people who implement the POCSO reforms. One legitimate method to carry this out is via interviews (Julian, 2011). I have further supported it by observations of the proceedings of special POCSO courts. Having established that a qualitative approach is more suitable for this project, I also take the support of secondary data, the benefits of which have been elaborated on in the following section.

3.2.2 The benefits of using secondary data

Qualitative methodology informed by secondary data like statistical data was adopted as research design by many scholars in the past.[87] A similar research design is helpful to the project because of its flexibility and volume and richness of data. To further deliberate on the doctrinal dimension of reform initiatives, Maher (2013) has stressed the importance of understanding the politics of law reforms. So, the doctrinal method of policy analysis has been employed where I study relevant statutes, i.e., the POCSO Act and Rules, history of socio-economic and political factors that led to their enactment, and relevant parliamentary debates. The available government reports and newsletters, judicial decisions, textbooks, journal articles, and assessment reports by private institutions, that offered a window into the field of law and legal interpretation of the access to justice reform initiatives and the POCSO reforms are used.

3.3. The Empirical Study

3.3.1 The advantages of employing Qualitative Methodology and Methods

Qualitative research explores the variety of perspectives on the object and starts from the subjective and social meanings related to it (Flick, 2009). The qualitative approach gives more scope for the interviewee to set their own agenda and typically provides a more in-depth response to questions posed (Wincup, 2017). To explore, and formulate statements related to subjects and situations, which are empirically well-founded, one needs to take recourse to qualitative methodology. Qualitative research takes into account the different viewpoints and practices in the field because of the different subjective perspectives and social backgrounds related to them (Flick, 2009). The scholars who sought to capture subjective experiences have employed this kind of methodological approach successfully.[88] Hence, to harness and collect qualitative data necessary to answer my research questions suitably, the in-depth semi-structured personal interview and observation methods are used.

Aberbach & Rockman (2002) argue that interview is important if one needs to know what a set of people think of and interpret an event and what they have done or planning to do in that regard. The main purpose of qualitative interviewing is not to elicit 'facts' but to construct knowledge about the social world interviewees inhabit with an emphasis on interpretive understanding (Wincup, 2017). A narration of personal experiences can also shed

[87] See, Chandrachud, 2014; Dhavan & Jacob, 1978; Gadbois Jr., 1970; Marschan-Hayes, 2015.
[88] See, Jacobson et al., 2016; McKay, 2018; Rowden, 2018; Rowden & Jones, 2018; Ward, 2015.

light on how the same changes in the legal processes mean different things for different court users based on their socio-economic-educational backgrounds and their institutional relationships with a court. Seidman (2006) in this regard argues that interviewing provides access to the context of people's behavior and a way for researchers to understand the meaning of that behavior and helps to know the experience of the participants through their stories.

Nevertheless, interviews also have their shortcomings. Pollock critiques single interviews by arguing that "studying the attitudes, opinions and practices of human beings in artificial isolation from the contexts in which they occur should be avoided" (Pollock 1955, cited in Flick 2009: 197). Flick (2009) says that opinions, which are presented to the interviewer in interviews, are detached from everyday forms of communication and relations. Here I must make it clear that my intention is not to present the reality of the operation of POCSO reforms, but rather to report my respondents' *perspectives* on the operation.

Observation is a methodologically systemized everyday skill applied in qualitative research (Flick 2009). I used the observation method for three purposes. First, as McKay (2018) has argued while adopting this method in her work, because most people never enter the carceral world, it is important to observe and personally experience it to present 'the sounds, textures and ambience of incarceration'. Similarly, there is a kind of stigma attached generally with courts in India, and district courts in particular, which are considered to be an unwelcoming space.

Further, the district courts are primarily for socio-economically marginalized people, who either cannot access private lawyers to represent them in those courts or cannot approach the higher courts. Thus, most people in India do not interact with district criminal courts in their entire life, and thus it is important to personally experience the social and spatial aspects of special POCSO courts and district courts' premises through observation so as to paint its picture for the readers. Second, observation aids in offering descriptions of the settings of special courts and court premises, which are essential for a study that seeks to reveal qualitative aspects of those settings (McKay, 2018). Third, to help interrogate the interview data, bearing in mind the risk that some respondents may have indulged in what Mulcahy (2021) has called "deliberate lying or strategic misrepresentation of experiences".

Jacobson, Hunter and Kirby (2016) employed observation as a method, along with interviews, to study the English Crown Courts, with the belief that it could greatly help to inform their understanding of victims', witnesses', and defendants' experiences of the Crown Court. And they eventually found out that;

> …the observational work enabled [them] to appreciate many aspects of the courtroom experience that interviews alone would not have adequately conveyed: such as the complex, chaotic and often confusing nature of court proceedings and the frequency with which they were interrupted for a wide array of reasons; and the juxtaposition of elaborate formality with informality (Jacobson, Hunter and Kirby, 2016: 18).

Adopting the observation method also seemed useful for informing the interviews and directly accessing practices in POCSO courts. It has been argued that "practices are only accessible through observation; interviews and narratives merely make the accounts of practices accessible instead of the practices themselves" (Flick 2009: 222). It enables the researcher to explore and find out how something factually works. Also, this fills the gap in scholarship in India on whether appearing remotely affects the behavior of remote participants- in this case the child witnesses, and their ability to understand, communicate, and participate. Inspiration for this can be taken from adoption of such methodological approach in research works from other countries like the USA, the UK, and Australia.[89]

There have been concerns that witnesses may find it more difficult to understand gestures and other important nonverbal cues over audiovisual links (Poulin, 2004). Findings from some research also suggest that awareness of the important civic function of the court may be diminished when evidence is given by video conferencing (Mulcahy, 2008; Rowden, 2018). Hence, observation of the use of video conferencing appeared necessary for my project. Therefore, I observed the remote court environments, the remote child witness testimony and video-linked court proceedings. Courtroom observations are, as Ward (2017) puts it, a rich method and provide opportunities to see court justice in action. It has been noted that "[S]imple observers follow the flow of events. Behavior and interaction continue as they would without the presence of a researcher, uninterrupted by intrusion" (Adler and Adler, 1998: 81). My attempt, therefore, was to act as a simple observer and observe the pre-trial and trial processes as well as the courtroom interaction without making any sort of interventions in the field.

It has been argued that "in organizations not all of those interviewed should come from the same level in the hierarchy or belong to a single department if the culture of an organization is being investigated" (Flick, Kardoff, & Steinke, 2004: 167). In qualitative investigations, it must be guaranteed that the case is represented with as many facets as possible (Flick et al.,

[89] See, Grube, 1992; Jacobson et al., 2016; Mack et al., 2013; Rowden, 2018; Rowden et al., 2010; Wallace, 2017.

2004). So, I finalized different groups of legal actors, who are at different levels in the Indian judicial hierarchy, belong to different departments, and play an important role at different stages of the POCSO cases.

Moreover, as feminism has made many contributions to methodological discussions, including questioning the 'value-free' nature of research methods and methodologies in the academy (Scott, 1988), I reflect on and have employed the two recurrent methodological and ethical questions for feminist researchers. First, how to write about 'experience', particularly of violence, and second, speaking for others (Alcoff, 1992). Though this study did not focus on participants' sexual violence experiences, they did share experiences of interacting with people who experienced sexual violence and violence in the criminal process (Feeley, 1979). And listening to these participants and watching the court proceedings, I had to rethink my position and situation with respect to the child victims, accused persons, their families, the secondary trauma I suffered, and how I would write about the experiences all these produced for me.[90] This 'rethinking' involved writing my findings without getting emotionally carried away and drawing conclusions from my data as objectively as possible.

Thus, the overall methodology I use is a qualitative empirical approach supported by statistical data, combined with doctrinal library-based research of existing literature. The research sites, the sampling and recruitment process of participants, the design of interview schedules, the location and duration of interviews, and the coding and demographics of participants are discussed in detail in the subsequent sections.

3.3.2 The rationale for selection of the two research sites

India is a federal union with 28 states and 8 union territories, which are further subdivided into districts and smaller administrative divisions. India has, thus, a total of 748 districts, and as per the POCSO Act, the State Government has to designate for each district, at least one Court of Session to be a Special POCSO Court to try the offences under the Act. When the fieldwork was being planned, many of these districts did not have POCSO courts. Given the size and complexity of India, its criminal justice system, and the complex structure of the field of POCSO courts, it was necessary for me to select research sites in a manner that

[90] Some sights have been engraved in my mind permanently: of very young alleged child victims roaming clueless in court complexes; an adolescent alleged girl child victim crying and shouting in anger in the courtroom at a defence lawyer, alleging that he was lying; a girl child victim fainting in the witness box while testifying; a prosecutor shouting at a child victim inside a courtroom. I also remember the caution email sent by Les to me with regard to the publication of my 'prejudice' via Twitter. It was a product of my anger and helplessness produced by what I believed to be the sheer violation of law I observed that day in the name of delivery of justice in a special POCSO court in Bihar.

would keep the research work manageable. So, I selected two locations for my fieldwork- Bihar and Delhi. Let us look at the reasons, the nature of the two jurisdictions, and their district-level criminal justice systems to understand why I chose Bihar and Delhi as my two research sites.

The findings of the MWCD 2007 Report (Kacker et al., 2007), discussed in the previous chapter stated that two of the four states with the highest percentage of sexual abuse among both boys and girls are Bihar (68%) and Delhi (72%). For sexual assault cases too, Bihar and Delhi reported the highest incidence. Such figures provide only a very limited view on the size of the problem, since the very large majority of such offences are likely to go unreported; further, reporting trends may have little relationship to trends in offending. Moreover, as research subjects and sites are often based on interests, availability of resources and contacts, and carry emotional quotient, I have chosen Bihar, as it is my home state and I had comparatively easier access to its locations, participants, language, and dialects which certainly are important factors for this project.

Bihar has been chosen for several other reasons too. First, there are very few, and mostly old, studies on law and society of Bihar (Bastedo, 1968; Cohn, 1959; Robb, 1988), with few recent empirical studies on its criminal justice system (Banerjee, 2005; P. Kumar & Raghavan, 2020), and none on the operation of POCSO reforms. Second, it is one of the poorest and worst performing Indian states on various human development indices. And access to justice and rule of law being significant in human development, Bihar seems very important for a case study. The third is the state's low funding of its criminal justice system as it is one of the poorest Indian states in terms of tax collection and due to lacunae in the judiciary's internal administrative mechanisms (Datta & Rai, 2021). Bihar is an interesting site for research as the impact of lower funding to its criminal justice system on the status of implementation of POCSO reforms can also be evaluated. Bihar has also occupied one of the lowest positions in terms of the usage of video conferencing in courts (eCommittee, 2019). Further, its lowest literacy rate among all Indian states is another reason to consider Bihar. This might have a role to play in Bihar having one of the poorest conviction rates in India in POCSO cases.

Regarding Delhi, it is the Indian capital and center of political and commercial activities, and the criminal justice system here is distinct and unique in respect of quality and quantum of criminal matters' litigation compared to other states. Even the funding provided to the Delhi subordinate criminal justice system is one of the highest in the country. So, despite Delhi being an exception in lots of ways, it is important to study it as the POCSO reform

initiatives were first taken in Delhi, and adopted later by other Indian states.[91] Further, there is only one empirical study of the working of the Delhi's POCSO special courts, which was carried out in 2015 (Centre for Child and the Law, 2016), while other available studies on Delhi are based on analysis of POCSO cases from Delhi (Ali et al., 2017; Partners for Law in Development, 2017).

It is essential to reiterate here that the special POCSO courts are meant to deal only with the POCSO matters.[92] The 2015 study on the Delhi POCSO courts says that these courts were found to be handling non-POCSO cases too, such as those under the Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS), Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA), and Prevention of Terrorism Act, 2002 (POTA) (Centre for Child and the Law, 2016). The study found that most courts hear POCSO cases daily. Some judges hear POCSO cases on specific days to prevent the exposure of the child to other accused persons and to also devote the time required to examine a child witness.

The study further argues that it can be observed that not much has been prescribed in terms of making the courtroom child-friendly. Whatever were prescribed in terms of architectural modifications, even those requirements were not being fulfilled in the Sessions Court designated as a POCSO court (Centre for Child and the Law, 2016). This legislative shortcoming has been corrected by the the Delhi High Court when it took the initiative to create a 'Vulnerable Witness Deposition Courtroom (VWDC)' even before the enactment of the POCSO Act through administrative orders. It was inaugurated on 10 February 2012 in the Karkardooma court complex in Delhi. The second VWDC was inaugurated in Saket court complex on 17 September 2014.[93] By the year 2017, of the six district court complexes in Delhi, which has 11 districts in total, four had VWDCs and the other two- Rohini and Patiala House court complexes- would have them eventually.[94] The first VWDC of Bihar on other hand was established in Patna as late as on 13 December 2018.[95] Bihar has 38 districts and as

[91] See, McKay (2018), for a project that adopted a similar approach.

[92] Section 28 (2), POCSO: The POCSO courts can deal with other matters only when the accused in those matters may also be charged at the POCSO trial. Section 28 (3), the POCSO Act 2012: The POCSO courts shall have jurisdiction to try offences under Information Technology Act if it relates to publication or transmission of sexually explicit material depicting children.

[93] The Hindu (2014) 'Complex for vulnerable witnesses inaugurated in Delhi'. 18 September. At: http://www.thehindu.com/news/cities/Delhi/complex-for-vulnerable-witnesses-inaugurated-in-delhi/article6421870.ece (accessed 10 July 2019)

[94] The Hindu Business Line (2017) 'Our Honour, Your Honour'. 26 May. At: https://www.thehindubusinessline.com/blink/cover/our-honour-your-honour/article9712559.ece (accessed 12 July 2019)

[95] The first child-friendly court was established at Patna on 13 December 2018, which functions as a POCSO court. See, Times of India, https://timesofindia.indiatimes.com/city/patna/first-child-friendly-court-in-bihar-to-work-from-tomorrow/articleshow/67049068.cms (accessed 10 July 2020)

many district court complexes. There is no scholarship yet on the nature and implementation of the POCSO reforms in the state of Bihar.

The VWDCs in Delhi have waiting rooms for children and their families. These rooms are stocked with toys, games, carom board, coloring books, and a computer (Centre for Child and the Law, 2016: 31). The literature on Delhi's POCSO courts says that there is a toilet in the vicinity of the room in which the child's testimony is recorded, to enable easy access to this facility for the child. The victim's courtroom entrance is different from that of the accused. The child approaches the building through the judge's entrance thus avoiding the crowd that throngs the court complex. They also have audio-visual facilities that make it possible for the child to testify from a different room. The child does not appear in the courtroom and thus is not confronted by the accused, the prosecutor or the defence lawyer. The child is accompanied into the VWDC by a Legal Aid Lawyer appointed by the Delhi Legal Services Authority to serve as a support person in the case. The accused is placed in a separate room from which the child witness can be seen and heard but they cannot be seen or heard by the child witness.

It has been argued that the procedural requirements are being flouted routinely in the Delhi POCSO courts, and there is no attitudinal change in lawyers and judges sitting in the courts (Centre for Child and the Law, 2016). This appears to have led to the continued ineffective participation of the child complainants. Also, as these special courts are designated courts, they function in the regular district courts[96] if there is no VWDC available in a district. Such regular courts are then transformed into special POCSO courts through a kind of make-shift arrangement. This arrangement has been criticised (Centre for Child and the Law, 2016).

Further, the special Judges who preside POCSO courts are fixed based on seniority and have been found to be promoted as a principal judge and hence transferred very frequently. This has repercussions on the handling of the POCSO matters as the judges avoid taking new cases when they believe that those cases cannot be concluded by them.

So, while the implementation in Delhi seemed to be poor, there is no available study on the operation of the POCSO reforms in Bihar. Research on these two substantially contrasting jurisdictions within India could give insight into the relationship between development, governance, and the criminal justice systems. This may, further, permit consideration of the implications of political economy and social culture on the implementation of the POCSO reforms. The fieldwork was conducted in 4 out of 38 Bihar districts, and in 3 Delhi district

[96] As a matter of practice, Additional Sessions Court 1 have been designated as the POCSO courts in each district across the country. Indian court and judicial hierarchies have been explained in detail in Chapter 4.

court complexes representing 6 out of 11 districts. Pragmatic considerations informed the selection of courts and districts.[97]

3.4 Interviews

3.4.1 Sampling and Recruitment

Before entering the field, I prepared myself for the fieldwork through various phases. The first phase involved sampling design- finalizing participants' groups and their sizes. The selection of an appropriate sample design, it has been argued, is a key decision that affects the type of conclusions that one can draw later during data analysis (Rivera et al., 2002). I adopted a mix of purposive & opportunistic sampling – reflecting pragmatic constraints as well as the focus of the investigation. Participants were recruited through invitations and the snowballing method.[98]

Sampling methods where personal contacts are involved have certain disadvantages. Snowballing means that "those who have been interviewed are asked, who else they could recommend for an interview, this procedure leads to clustered samples, because nominations take place, as a rule, within a circle of acquaintances" (Flick, Kardoff, & Steinke, 2004: 167). Thus, such a sample achieved by this method may be biased and fail to reflect the diversity of the professional respondents. But it has been said:

> In qualitative studies, the stimulus for empirical data collection often consists of guaranteeing accessibility to a particular case or a particular group or institution. Then it is not particular selection procedures that are in the foreground, but rather that the selection is constituted by accessibility (Flick, Kardoff, & Steinke, 2004: 166).

So, accessibility plays an important role in the choice of interview subjects. This approach was considered by Krishnan et al. (2014) in their ethnographic work on access to justice in the district-level courts of the three Indian states. I had no prior contact with any of my participants. The biggest accessibility challenge was to access the judiciary, as elites

[97] Bihar has a population of 128.5 million while Delhi has a population of 30.4 million. See, Bihar Population Sex Ratio in Bihar Literacy rate data 2011-2020. At: census2011.co.in. Delhi Population 2020 (Demographics, Maps, Graphs). At: worldpopulationreview.com (accessed 23 December 2020).
[98] See, Rowden (2018), for a project that adopted a similar approach.

(Denitch, 1972). Further, as there is no defined formal institutional process in India to access judicial officers for the purpose of research, nor there has been enough empirical legal research, particularly by legal scholars to drive that process, access became more arduous.

Baxi (2014) mentions that she could not access the judge's notes[99] on witnesses' demeanour in rape trials as neither are they made public nor was it possible for her to interview the judge on the specific case. She argues that "by and large, judges are forbidden to speak on matters before them and refuse to give interviews" (Baxi, 2014: 170). The Centre for Child and the Law, which conducted research on POCSO special courts in Delhi in 2015, mentions that "though a request was made for permission to interview judges of the Special Courts, this was not granted by the Delhi High Court. Formal interviews with judges of Special Courts, therefore, could not be carried out" (Centre for Child and the Law, 2016: 11).

On the other hand, Chandrachud (2014), son of the then High Court Chief Justice and grandson of a former Chief Justice of India, while discussing his experience of collecting qualitative data, mentions that from amongst the 49 Indian Supreme Court judges he spoke or corresponded with, he was able to conduct lengthier, semi-structured interviews with only 29 judges. Accessibility difficulties have also been pointed out by Ward (2017) on conducting research on members of the judiciary in England & Wales, such as lengthy permission process and institutional resistance. While there was no formal permission process involved in my project,[100] I faced institutional resistance even while securing permissions informally. It was not necessary that every participant, especially the elite interviewees such as the judges, despite being accessible, would be willing to be interviewed. These accounts show that there is a mixed possibility of accessing such elites for interviews, and researchers' social capital and strong professional connections might or might not work in gaining such access. This also suggests that in the Indian context the higher judiciary is more willing to share opinions publicly than the lower judiciary.

During the fieldwork, police officers were added upon the suggestion from most of the special judges. A female judge from Delhi talking about the knowledge of police officers and their utility for my project said:

[99] Section 280 of the CrPC provides that the sessions judge or the magistrate records remarks that they think material regarding the demeanour of the witness who is being examined.

[100] As I was aware of the past request to interview special judges being denied by the Delhi High Court, I made an application to interview POCSO special judges only after finishing my fieldwork in Delhi. As expected, it was declined by the Delhi High Court without giving any reason.

> We get cooked *khichdi* (A soupy Indian dish made up of rice and lentil). So, where does the lentil come from, where does the rice come from, where does the water come from, you ask about these from them. We are blind, no. Law is blind.[101] (DPJ 2)

She, thus, suggested I interview police officers too. Such a statement reflects the embeddedness of the police as a powerful state institution in the Indian society and an intricate power relation they have with social control and social culture. As Nader has fittingly argued that "ideas about culture are interwoven with notions of control and the dynamics of power" (1997: 711).

Further, the number of participants has been fixed by keeping in mind the time and resource constraints and the importance of their knowledge and experience to address research questions.[102] So, in the sample of 17 judicial officers, the number of POCSO special judges (11) is more than that of judicial magistrates (6) for the reason that the special judges preside over special courts and decide POCSO cases, while judicial magistrates just record a child's statement during the pre-trial stage.

My initial plan was to access the participants through the Bihar Judicial Academy and the Delhi Judicial Academy with the permission of the Registrar of the Patna and Delhi High Courts respectively. However, this did not work out as I did not receive any response to my emails sent to them. This reflects the challenge for a researcher to access state institutions and participants who are state officers, particularly the judiciary. As a supportive mode, I had planned to use my personal contacts to access some of the participants, say, those who are not state employees, like defence lawyers. However, I had to depend solely on my personal contacts and then their contacts and so on to access all my participants.

So, the participants for this project were accessed by approaching friends and acquaintances in the legal and judicial fraternity in Bihar and Delhi. I contacted my former students and my friends and colleagues from my alma maters who became practicing lawyers, lecturers in law schools, and judicial magistrates in Bihar and Delhi. They put me in touch with more experienced lawyers and judges working at the POCSO courts. I interviewed the judiciary (special POCSO judges and judicial magistrates), the lawyers (special public prosecutors, defence lawyers, and NGO lawyers) and members of the special (POCSO) court staff and other

[101] Translated from Hindi: *humko to paki-pakayi khichdi milti hai. To daal kahan se ati hai, chawal kahan se ate hain, paani kahan se ata hai. Unko poochho. Hum to andhe hain na, andha kanoon hai*.
[102] The numbers of participants changed once I was in the field because of the issue of accessibility.

support staff. Below I discuss the total number of each category of participants combining both locations, and the rationales behind choosing them.

3.4.1.1 Judicial Officers

A total of 17 judicial officers were interviewed. Judicial officers exercise a great amount of power over the life and liberty of the people. While the special POCSO judges deal with the functioning of the POCSO courts, conduct of trials, bail, and final decisions, and sentencing in POCSO cases, the judicial magistrates record statements of child victims in the pre-trial stage. Thus, I recruited 11 POCSO judges – 4 from Bihar and 7 from Delhi, and 6 judicial magistrates – 4 from Bihar and 2 from Delhi. I include judicial officers who have at least a couple of months of experience working on POCSO cases. The objective was also to assess how senior judicial officers, who have spent a substantial part of their career away from digital tools, are using video conferencing during trial.

3.4.1.2 Lawyers

A total of 19 lawyers were interviewed. These included 8 Defense counsels (DCs) – 4 each from Bihar and Delhi, 9 Special public prosecutors (PPs) – 5 from Bihar and 4 from Delhi, and 2 Lawyers working with NGOs supporting Child Victims – 1 each from Bihar and Delhi. The objective of recruiting them was to have people who play important roles in bail hearings and trial and can discuss POCSO reforms' impact on the rights of the accused persons and child victims, and on the issue of fair and speedy trial. I identified lawyers based on their experience of handling POCSO cases, including the use of video conferencing during the trial. Further, as there were discussions about the role of NGO lawyers by these lawyers, and I was also suggested by some of them to talk to NGO lawyers working on POCSO cases, I interviewed two NGO lawyers dealing with the POCSO matters, identified using a snowball technique.

3.4.1.3 Other Court staff, support staff, and police personnel

A total of 13 members of court staff, support staff, and police were interviewed – 5 from Bihar and 8 from Delhi. These included 3 Readers, 2 Stenographers, 3 Police Officers, 1 Court Clerk, and 1 Naib Court working at different POCSO Courts and 3 members of the Delhi Commission of Women. They play pivotal roles in POCSO courts and POCSO cases. The objective behind interviewing these different categories of participants is to gain knowledge of POCSO reforms' implementation from various positionalities within a special POCSO courtroom. While the Readers assist the special judges in managing dates and hearings and getting the documents signed, the court clerks are there to look after and manage the case files, calling out the names

of the witnesses for their presence before the court, and for helping witnesses take oath whenever needed.[103] Stenographers record the statements given by the witnesses, and to some extent the lawyers, in writing, as per the guidance and direction of the special judges.[104]

A naib court is a police officer who acts as the link between the local police station, jail authorities and the concerned court. They maintain a register of summons issued or directions given to police officials connected to a case and ensure compliance of the orders by the police. They are attached to the prosecution branch in each court complex where criminal cases are heard.[105] With regard to a POCSO special court, they were also found to be helping court clerks in witnesses' entry into and exit from the special court. The members of the Delhi Commission of Women were present to help and support the child witnesses during the pre-trial and trial process, both outside and inside the special courts. Police officers are put in this category for convenience.

3.4.2 Design of interview schedules

In the second phase, I designed the schedules for participants' semi-structured interviews. They were tailored based on pre-determined themes, were broken into five thematic sections, and were dialogic. The schedules (annex-I) were mostly similar except for a few questions which were modified as per the nature and the role of the participant in the POCSO criminal process. The rationale for this common framework of questions was to generate responses from different participants on similar pre-determined broad themes, like, their background, understanding of the POCSO reforms and implications for access to justice, and experiences and training. To give an example of one of the differences in schedules, the question on the manner of recording a child victim's statement in the pre-trial stage was asked only of judicial magistrates. It is so because other participants do not have anything to do with this process. The issues covered in the schedules were directed as much by the interviewee as the interviewer (Rowden, 2018). To work this out along with my common question structure, I used open questions with follow on questions in an order that would enable the participant to respond both coherently and openly. If I found a participant discussing something valuable for

[103] In some of the Bihar districts, they were also responsible for looking after the vulnerable witness deposition room and remote witness locations, and for managing the remote participants.
[104] Ibid.
[105] They function in close coordination with the prosecution and under supervision of the local DSP (Deputy Superintendent of Police), and are mostly of the rank of constable or head constable. See, Times of India (2017) 'HC tells police to reshuffle naib courts every 3 years'. 10 July. At: https://timesofindia.indiatimes.com/city/delhi/hc-tells-police-to-reshuffle-naib-courts-every-3-yrs/articleshow/59518705.cms (accessed 20 November 2019).

my research which is not directly linked to the question I asked, I would continue asking follow-up questions in that direction.

I was aware of not taking the contexts out of the equation and hence I used open-ended questions in the interview schedule. It helped give freedom to the participants to narrate their experiences and perceptions of the operation of POCSO reforms as broadly as possible and to seek spontaneous narrative that helps gain descriptive responses from the participants (McKay, 2018). Aberbach & Rockman (2002) suggest the use of open-ended questions if one needs to probe for information and to give participants maximum flexibility in structuring their responses. The questions were formulated in a way to reveal the understanding and practice of the POCSO reform initiatives by the participants. I took utmost caution to not have any leading questions.

The in-depth face-to-face and one-to-one semi-structured format with open-ended questions also helped the interviewees identify other issues they believed to be pertinent to the question or context, which I had not considered asking and any unanticipated responses. It has been an important consideration for a researcher conducting their first research project at a particular research site engaging certain participants (McKay, 2021). This is my first project on POCSO special courts and their personnel.

After introducing myself, I shared a printout of the information sheet with my participants. I either asked them to go through it or would read it to them myself. The sheet gave them an overview of me, my institutional and funding details, the project and its ethical approval, the interview, the information (data) generated through the interview and its usage, and my contacts. I, then, went through the Informed Consent form made available to the participants both in Hindi and English languages to secure their consent.[106] Then, I proceeded with the interview in the manner the participant had consented to.

I began with an open question asking each participant to describe their role, their background and professional journey. Then I sought their opinion on and perceptions about POSCO court reforms and their implications for access to justice. The next part focused on the factors influencing (supporting or undermining) access to justice during different stages of the POCSO cases. I asked this to gather information on their perceptions and understandings of, and experiences during, those stages. These included legal and procedural issues, their

[106] A couple of participants were reluctant and aggressive about not signing any document whatsoever, and hence, did not sign the consent form. However, they did give oral consent for the interview. For example, BDC 4, when asked to read and sign the Consent Form said, 'I will not fill this thing. Also, do not ask for signature or undertaking or any such thing.'

everyday work experience, professional issues, and the role of other courtroom participants. The fourth part of the interview dealt with their training. Finally, as conclusive remarks, I asked them what can be done to enhance access to justice in the POCSO courts in future in terms of both policy and practice and if they have additional comments.

As the interviews went ahead, I also fed into the interview schedules new questions that emerged from the previous interviews, which I found apt for addition. Being aware of Felstiner, Abel and Sarat's (1980) suggestion to resist the temptation to impose the self on the people one studies, I attempted to learn how they themselves define their experiences, which has an important consequence in the study of the operation of the POCSO reforms. These interviews gave me information not only of what they think about access to justice and the POCSO reforms but how and why they construct their accounts of experiences of implementing those reforms in the ways they do. The interviews provided me with qualitative data on how significant these individual participants consider these reforms to improve access to justice, what they do to put these into practice, and reasons for failing to do so.

3.4.3 Locations and duration of interviews, and participants' coding

Interviews were conducted between August 2019 and January 2020. I interviewed the participants either inside the courtroom during breaks, or in their respective chambers attached to the courtroom, or in their residential office. The interview room was private and comfortable to the interviewer and the interviewee except in some cases where the interviewee themselves said they are comfortable speaking in front of other people like their junior lawyers or clients. To maintain the confidentiality of the participants, the interview data has been used in this thesis with the help of the following codes:

Participant's designation	**Code**
POCSO Special Judge in Bihar	BPJ#
POCSO Special Judge in Delhi	DPJ#
Judicial Magistrate in Bihar	BJM#
Judicial Magistrate in Delhi	DJM#
Special Public Prosecutor in Bihar	BPP#
Special Public Prosecutor in Delhi	DPP#
NGO lawyer supporting the prosecution in Bihar	BNGO[107]

[107] Only one NGO lawyer was interviewed at each location, hence, no numbering for NGO lawyers.

NGO lawyer supporting the prosecution in Delhi	DNGO
Defence counsel in Bihar	BDC#
Defence counsel in Delhi	DDC#
Court Staff in Bihar	BCS#
Court Staff in Delhi	DCS#

Table 3.1 Code system for participants

In the codes above, B and D represent the states of Bihar and Delhi respectively. PJ, JM, PP, NGO, DC, and CS identify a POCSO special Judge, a Judicial Magistrate, a Special Public Prosecutor, an NGO lawyer, a Defence Counsel, and a member of the Court Staff (includes Police) respectively. The number sign at the end of all codes refers to the individual interviewee according to the order of the interviews.

3.4.4 Participants' demographics[108]

I interviewed a total of 49 participants at the two research sites- 23 in Bihar and 26 in Delhi. I collected three types of demographic information from them. There were 35 men and 14 women (there was no one who identified as intersex or transgender). In Bihar, the gender diversity of participants is poor as there are 20 men and 3 women, which reflects Bihar's poor gender diversity in the judiciary, the court staff, and the legal profession generally.[109] Delhi's participants have greater gender diversity- 15 men and 11 women, which represents the greater gender diversity in Delhi's judiciary, court staff, and the legal profession, than that of Bihar.

I also asked participants their age and work experience in terms of the time they worked on POCSO cases.[110] The average age of the participants in Bihar was 48 years, much higher than those in Delhi where the average age of participants was 37.5 years. The 5 special public prosecutors and 4 special judges in Bihar averaged 58 years, which is quite high, suggesting that the special prosecutor positions in Bihar are given to a person with very high experience in litigation, and thus mostly to elderlies.[111] Further, Bihar participants on average had 39

[108] Detailed demographics have been provided as Annex III of the thesis.
[109] In the last decade, Bihar has emerged as the best performing state in India in terms of gender diversity in district judiciary and police by providing 33% reservation to women. More on this has been discussed in the next chapter.
[110] On being asked 'Since when are you handling the POCSO cases?', one participant (BDC 4) became aggressive, and said, 'I would not discuss these things.' Though, he then added, 'yes, I am conducting cases registered under the provisions of the IPC as well as the POCSO Act.' When I asked a participant (DPJ 5) about his professional journey, he said in Hindi, "Oh! what professional journey? I have got a Court. I am a Judge, so I am sitting here. That's it (*Arey kya professional journey? Ek court mil gaya hai. Judge hun, baitha hun. Bas*)." On the question of professional journey, another participant (BPJ 2) kept mum.
[111] One Bihar respondent said, "the legal requirement to become a special public prosecutor for POCSO cases is ten years of experience of practicing criminal law" (BNGO). Section 32(2), POCSO: A person shall be eligible to

months of work experience at the time they were interviewed, while the Delhi participants had an average of 29 months of work experience in their current roles.

3.4.5 Interview data collection methods

The interview data was collected in two ways. One, through audio-recording of the in-depth semi-structured interviews with the help of a portable small tape-recorder,[112] where I had the permission of audio-recording from the participants. If not, then I made hand-written interview notes of my conversation with the participant. 27 of the 49 respondents agreed to audio-recording of the interview. The judicial interviewees were the most cautious about recording, with only 2 out of 11 POCSO judges agreeing to this. The average length of interviews was around 40 minutes. The interview data was then translated, if necessary, and then transcribed.

It was particularly challenging to take notes of the non-recorded interviews, as I had to ask questions, interact, listen to, and write down the responses, simultaneously. I used acronyms and shorthand phrases and quotations to not miss many points. However, it was not humanly possible to record everything that the participant said, in writing during such interviews. I made full field notes as soon as possible after coming out of their offices or residences either by standing or leaning on a wall or sitting outside on a chair or table. Mostly, as this was not possible, I used to do it soon after returning to my accommodation at the end of each day in the field to not lose sight and memory of what was spoken during the interview. In case of time constraint, I gave preference to the finalization of interview notes of these interviews over transcription of audio-recorded interviews.

3.5 Observations

Interviewing only the mentioned categories of participants, all of which are 'insiders', has drawbacks. I was unable to capture the perceptions, personal narratives and experiences of the 'outsiders'- the child victims, the accused persons, and their families, who are perhaps affected the most, either directly or indirectly.[113] However, to support my interview data, I

be appointed as a Special Public Prosecutor only if he had been in practice for not less than seven years as an advocate.

[112] One participant (BPP 3), though permitted the use of tape-recorder after I gave him assurance with the help of information sheet and consent form, showed his concern about audio-recording by telling me, "Please do not make it viral."

[113] See, Sabah Gurmat, The Leaflet (2021) 'As Rajasthan Court convicts all the accused, how justice was fought for after the rape and killing of Dalit minor Delta Meghwal'. 13 October. At: https://theleaflet.in/as-rajasthan-

observed POCSO special courts and their proceedings, vulnerable witness deposition rooms (VWDRs), the courthouses and their environments, and the recording of child witnesses' testimonies by special courts during the trial, including through videoconferencing.

The observation sites were the district court complexes in New Delhi and Bihar, depending on their physical accessibility and informal permissions. I made 18 observations in Bihar and 13 observations in Delhi. These observations lasted from 2 hours to 5 hours depending on whether I observed a court in the morning session or the afternoon session or both the sessions. A total of around 90 hours of observations were made.

I visited the POCSO special courts and the remote sites, i.e., vulnerable witness deposition rooms, which use the videoconferencing facility. These rooms were either on the same floor as the POCSO special courtroom or in the same building on a different floor. I sat in the public gallery when in the courtroom, or, in the seating area reserved for lawyers when asked to do so by the judges or lawyers. I was also asked to come in a 'lawyer's dress' to not be stopped by the police at the gates of court buildings and courtrooms and to make my entry easier. I followed the directions of the court staff when I was in the vulnerable witness deposition rooms, like sitting in the back row and not wearing my black coat during the proceedings.

Although the special POCSO courts had restrictions as the trials are *in-camera* as per the law, I was allowed by the judges, albeit orally and informally, to observe trial proceedings for research. As a socio-legal scholar, I took the methodological visual turn in socio-legal studies, often considered as 'esoteric, trivial, 'not law'' (Moran, 2012), to engage with and produce self-drawn images of the POCSO special courtrooms and VWDRs. Mulcahy (2017) talks about the significance of engaging with the image and the opportunity it might provide us with to see what law looks like from the perspective of law's subjects.

I also observed the way the Undertrial prisoners are produced before a judicial magistrate via videoconferencing. This helped me understand the difficulties being faced by the parties, their lawyers, and the magistrates during such production. It also helped in assessing the experiences of magistrates on its implications on access to justice of accused in custody. Observation helped me interact better with my participants during interviews.

The Observational data were recorded with the help of mental notes, jotted notes and full field notes depending on the circumstances I was in. I made mental notes where it was

court-convicts-all-the-accused-how-justice-was-fought-for-after-the-rape-and-killing-of-dalit-minor-delta-meghwal/ (accessed 20 October 2021).

inappropriate to be seen taking notes. I did manual sketching to draw the courtroom layouts and map the physical positioning of the court users. Subsequently, the full field notes, which became my main observational data source, were transcribed. The corpus of the interview data generated was around four hundred thousand words.

3.6 Data translation, transcription, coding, analysis, and management

3.6.1 Translation and transcription

Except in a very few cases, participants generally spoke with me in a mixture of both Hindi and English languages, alongside Bhojpuri and Magahi- the two local dialects spoken in some regions of Bihar. This is because they were the court personnel working at the district level in Delhi and Bihar, where the language used is mostly mixed. So, a substantive amount of interview recordings was in Hindi and in those two dialects. For analysis, I translated any responses[114] made in Hindi, Bhojpuri and Magahi into English while making interview hand notes and later when transcribing.

This amplifies the challenges a researcher has to undergo while conducting empirical research in different regions of a linguistically rich and diverse country like India. While Magahi and Hindi are my mother tongues, I also understand Bhojpuri, because of being born and brought up in Bihar. Nevertheless, translation was a very demanding task both in terms of time and patience. There was the potential of loss of essence in meanings sometimes when I interpreted and translated what the participants spoke in a non-English language, i.e., in their mother tongues. Seidman notes that "If interviewers are fluent in the participants' mother tongue and interview in that language, they will subsequently face the complexity of translation" (2006: 104). It has also been argued that finding the right word in English to represent the full sense of the word the participants spoke in their native language is demanding and requires a great deal of care (Vygotsky 1987, cited in Seidman 2006). However, I have tried my best to produce as close meaning as possible in English of what my participants had said in their interviews or during court proceedings in non-English languages or dialects. I have

[114] It is difficult to find the same or even similar English translation for some words in Hindi, Bhojpuri, and Magahi, particularly when recording the interview in writing through hand notes. In such challenging situations, I have used the closest possible English words or phrases, or sometimes I even kept the original words and phrases and translated them later on.

also included non-English words when presenting some of the findings, where this lends the material a particular nuance that cannot be conveyed in English alone.

3.6.2 Coding and data analysis

Qualitative data analysis involves reading the data repeatedly and developing themes, which go on to multiply as we read and identify different themes and sub-themes. Theme identification, as Ryan and Bernard (2003) argue, is one of the most fundamental tasks in qualitative research while also being one of the most mysterious. For this research work, I employed the thematic analysis method recommended by Braun and Clarke (2006). They argue that;

> …thematic analysis can be an essentialist or realist method, which reports experiences, meanings and the reality of participants, or it can be a constructionist method, which examines the ways in which events, realities, meanings, experiences and so on are the effects of a range of discourses operating within society (Braun and Clarke, 2006: 81).

I employed inductive thematic analysis, i.e., data-driven analysis, which meant that themes identified were strongly linked to the data themselves, and they had little relation to the specific questions that were asked of the participants (Braun & Clarke, 2006). So, I did not try to fit the data into a pre-existing coding frame, or my analytic preconceptions. I used the software programme MAXQDA to carry out the coding and analysis work (Kuckartz & Rädiker, 2019).

To begin, I uploaded all the interview transcripts and observational data on this software interface. I organized them location and participant-group wise. As I transcribed the entire data corpus myself, I had to spend less time familiarizing myself with the data than had I not done it myself. In the next phase, I began generating initial codes and then searched for themes across the data set. I named, defined, and kept reviewing those themes. What counted as a theme was based on "prevalence, in terms both of space within each data item and of prevalence across the entire data set" (Braun and Clarke, 2006: 82). Then, I fixed colour codes for the commonly recurring themes and sub-themes that emerged from my multiple readings of the interview and observation data. So, an organisation of data into certain categories was carried out. The data put under different themes and sub-themes were not mutually exclusive. While doing these exercises I kept reflecting on my research questions and my prior assumptions (Rädiker & Kuckartz, 2020).

The coding process is not merely technical but an analytical process. Important to bear in mind for me was the function and interpretation of each code and sub-code. Once I had a sufficient thematic map before me, I began asking myself the questions, "'What does this theme mean?' 'What are the assumptions underpinning it?' 'What are the implications of this theme?' 'What conditions are likely to have given rise to it?' 'Why do people talk about this thing in this particular way (as opposed to other ways)?' and 'What is the overall story the different themes reveal about the topic?' (Braun and Clarke, 2006: 94)."

3.6.3 Data Management Plan

I made a physical and an electronic copy of the consent forms and kept them safe. I labelled the qualitative data generated in the form of audiotapes of the interviews accurately with a coding system to be clear about the responses of the different respondents. The observational data was captured by hand notes and was recorded in separate fieldwork diaries. The transcriptions of the audiotapes were also coded. The digital version of data was then stored on encrypted and password-protected personal computers, personal external hard drives, and cloud servers. The recordings were to be securely deleted at the conclusion of the study.

3.7 Challenges, limitations, and constraints

3.7.1 Mud in the Field: Practical challenges encountered during fieldwork

There were many practical, methodological, and other challenges I faced during the fieldwork. Some of the problems related specifically to the interviewing of elite. It has been suggested that the elite interview should be conversational rather than following a formal interview protocol (Kezar, 2003). I approached them with a semi-structured interview schedule. Kezar, while mentioning the work by Aldridge on Clergymen, says:

> Aldridge noted that 'if I had presented myself with a highly structured interview schedule, I am sure it would have endangered rapport. Clergymen are used to being in a position of authority, leading discussion rather than following it', yet he acknowledged the importance of the unstructured format for asserting his own voice as well (2003: 407).

Kezar (2003) also talks about the issues of trust, power relations and assumption of positionality. She argues that there needs to be mutual trust and an attempt to understand the

interviewee's perspective while interviewing, and interviewees are more likely to disclose to someone who believes them (Kezar, 2003). As it was not possible to keep in contact with the interviewees for long to build very deep trust, I attempted to appear trustworthy by being a good listener and by introducing myself and my project to their satisfaction.

Regarding power relation and positionality, it has been argued that equalizing power in interviews is important to gain access to information from elites (Kezar, 2003). This perhaps could be the reason why Chandrachud (2014), with both his father and grandfather being the then High Court Judge and former Chief Justice of India respectively, was able to secure interviews with 29 Indian Supreme Court's judges. As I did not have such privilege, the prior disclosure of my academic institutional background acted somewhat as a tool in equalizing power, as Indian elites very often consider people studying in the West, especially at the University of London, in high esteem.

As this was an individual[115] project, and I did not have any social capital or family connection in Indian academia or the legal and judicial fraternity, I could not gain the support of high-level officials in the government to help me easily access my participants and field sites. However, my legal academic background and links with students, friends, and teachers at my alma mater in Bihar and the University of Delhi's law faculty, which I formed while studying and teaching there, acted as an enabler in this process. Being a male and a researcher from the University of London further reduced the access barriers to some extent. I carried a visiting card, both in Hindi and English, which I used to distribute to court staff members, which was important considering the very short span of time one gets in courtrooms to talk to a staff member. I also had to develop relationships with some participants in courtrooms for access purposes (Kezar, 2003).

Whenever I met a potential participant, not only did I try to convince the person for the interview, but I also asked for recommendations of people who would be willing to get interviewed for my project, thereby accessing more participants through snowballing. I contacted my potential participants via a call or text message. I met most of my participants in the court premises- either in the courtroom or in their respective offices, and the rest at their residential offices. If a person was suggested by my contact, fit my requirement to obtain a variety of participants, and was willing to get interviewed, I interviewed the person. A couple

[115] National Law University, Delhi gained incredible support by associating with NALSA and with Hon'ble Mr. Justice P. Sathasivam who was then its Executive Chairperson and Mrs. Asha Menon (Former Member Secretary of NALSA) for its Death Penalty project to access prisons and the incarcerated people on death row in India (Surendranath, 2016).

of times, I had to return unsuccessfully after visiting a potential participants' courtroom or residence for an interview, sometimes despite having confirmation from them as they changed their mind later and decided to not give the interview.

The challenges confronted by me were bigger and wider as I entered the field and navigated through different roads and court spaces of both rural and urban India to access my participants. In Bihar, my mobile phone was stolen while I was travelling in a shared auto-rickshaw to one of the field sites.[116] Further, September 2019 witnessed one of the worst floods in Bihar, leading to an outbreak of dengue, and unfortunately, I became one of its victims and underwent bed rest for two weeks.[117]

In Delhi, when I was about to access the courts and participants in November 2019, there were violent clashes between police and lawyers inside the court complex, which led to strikes by lawyers for a couple of days.[118] All these events acted as 'mud in the field' resulting from both natural and human-induced problems. These obstacles adversely impacted access to the field and the participants, thereby consuming a substantial time and energy out of what was available to me for my fieldwork. A researcher perhaps can never prepare for some of these encounters in the field in advance.

Initially, I planned to interview 6 special POCSO Judges and 10 Judicial Magistrates- 3 and 5 each at the two locations. It changed as I began understanding their role in POCSO reforms' implementation. Initially, I planned to interview 8 DCs and 8 PPs dealing with POCSO cases- 4 each at the two locations. It changed after I entered the field because of accessibility and relevance. Initially, I planned to interview 4 court managers and 4 video technicians (2-2 each at the two locations) as I was not aware of the kinds of personnel working in a POCSO special court. Only upon reaching the field sites, I met them and understood their pivotal roles in special POCSO courts. So, I changed the sample design based on their accessibility.

[116] Although I never got my phone back, the experience of merely registering a FIR (First Information Report) for theft and getting a copy of the same, from the police station, which is a legal right, and how the events unfolded during and after this incident gave me a glimpse- a valuable first-hand experience, of the criminal justice system, particularly the institution of police.

[117] The Guardian (2019) 'India: scores dead as late monsoon rains inundate northern states'. 30 September. At: https://www.theguardian.com/world/2019/sep/30/india-monsoon-rains-flood-bihar-and-uttar-pradesh-states (accessed 20 February 2020).

[118] India Today (2019) 'Police, lawyers fight outside Delhi court, 20 cops injured, advocates to go on strike'. 2 November. At: https://www.indiatoday.in/india/story/gunshots-scuffle-delhi-police-lawyers-tis-hazari-court-1615106-2019-11-02 (accessed 20 February 2020)

3.7.2 Ethical considerations

Ethical considerations include considerations of how we analyse, present, and relate to the subjects and objects of our research, with consideration given to the questions of agency, constraint, marginality, and victimisation. Considering these aspects, the process of negotiation of access, emotions and ethics marks an important intersection. As there were human participants involved in this project, all of them were promised confidentiality and anonymity before each interview through an information sheet. A written, or oral, if the participant did not want to sign, informed consent was taken once they confirmed their participation as an interviewee. The participants are anonymised by assigning a code. The use of anonymous interviews is not unknown in the social science literature (Chandrachud, 2014; Potter, 1986). Further, by promising anonymity and confidentiality, it was safer for them to have conversation with me and talk freely about the issues and challenges of implementing POCSO reforms, which otherwise would not have been possible.

The permissions to make observations of pre-trial proceedings and in-camera trials, though not formally taken, was always secured informally from the respective judge of the POCSO court. During the observations of the POCSO special courtrooms and trials, utmost care was taken by me to neither interfere in the legal proceedings in any manner nor to let my emotions come out in any verbal or non-verbal form during the stressful courtroom scenes, dialogues, and conversations or any anxious moments. Even when I interacted with someone in a courtroom or vice-versa, I had a neutral disposition. It was important so that I could continue holding the informal permissions to make these observations.

3.7.3 Limitations of study

There are few limitations to this study. One, the nature of responses from the participants, especially the elite ones, might be vulnerable to self-justification. The responses also might be in sanitized form to conceal what they think is illicit to disclose. The elite participants might have answered the questions in the manner they believed was expected of them. They also might have become conscious of the potential future audience of this work while responding to my questions, which then makes their voice an outer or public voice that is guarded (Seidman, 2006). The second limitation is the generalisation of findings for the whole country. However, despite my study being very small scale in as vast and diverse a jurisdiction as India, the nature of the two research sites being at the two ends of a political economy and cultural spectrum provides valuable insight into the operation of reforms in two

contrasting settings. The third limitation of this study is that it did not capture the experiences of child victims or defendants or their family members. Lastly, the interviews are the main source of data for this project and thus my observations are limited to the extent of supporting my interview data.

3.8 Conclusion

This chapter outlined the research methodology I have adopted to answer my research questions. Beginning with the identification of the limitations of use of secondary sources, I explained the decision to carry out an empirical study. Then I explained what statistical sources and library-based research I used and why. This was followed by describing why I opted for qualitative methods and, more specifically, for semi-structured interviews and observations, and the rationale for selection of the two fieldwork sites. A detailed discussion of the two qualitative methods, including the sampling and recruitment process, design of interview schedules, location & duration of interviews, the interviewees' demographics, and the location and nature of observations was carried out. Lastly, I talked about the analysis of both the interview and observational data, and the challenges of the fieldwork and limitations of the study.

The next chapter will introduce the structure of the Indian courts and judiciary, and the nature of cases over which these courts exercise jurisdiction. I particularly discuss the structure of the Indian criminal courts and the nature of cases triable by them, and where the POCSO special court and the POCSO special judge are located within that hierarchy. I explain the roles of the lower judiciary in POCSO cases to highlight the significance of their training in performing their functions efficiently. The statistical data on POCSO courts, and the nature, number, and disposal of POCSO cases are also presented. I also examine the stakeholder perceptions of their training, and associated challenges.

Chapter 4

POCSO Courts and their Personnel: Structure, Cases, and Training

4.1 Introduction

This chapter introduces the structure of the Indian courts and judiciary, and the nature of cases over which these courts exercise jurisdiction. The goal is to explain where the POCSO courts and POCSO cases sit in the bigger legal landscape. I particularly discuss, in the first two sections, the structure of the criminal courts in India and the nature of cases triable by them. The third section locates the POCSO special court and the POCSO special judge within the respective court and judicial hierarchies. I explain the roles of the lower judiciary in POCSO cases in the fourth section to highlight the significance of personnel training in efficient performance of their functions outlined under the POCSO law. One of the themes I will follow through is an exploration about the link between the education of the key stakeholders in the operation of the POCSO courts and the day-to-day perceptions of the problems with those courts.

The fifth section presents quantitative data on POCSO courts, and the nature, number, and disposal of POCSO cases to highlight the role of gender and workload on POCSO courts. The data also helps in understanding the potential tension between the pressure on POCSO courts to dispose of cases quickly and to deliver justice with a fair procedure. In the sixth section, I analyse the training given to the court personnel by the state to implement the POCSO law and their perceptions and experiences of it. I examine the factors behind the kind of training given to these personnel, the challenges they produce, the way these personnel tackle those challenges, and the impacts of their geographical location, if any, on the nature of their training.

4.2 POCSO special courts and special judges within the hierarchy of the Indian criminal courts and judges

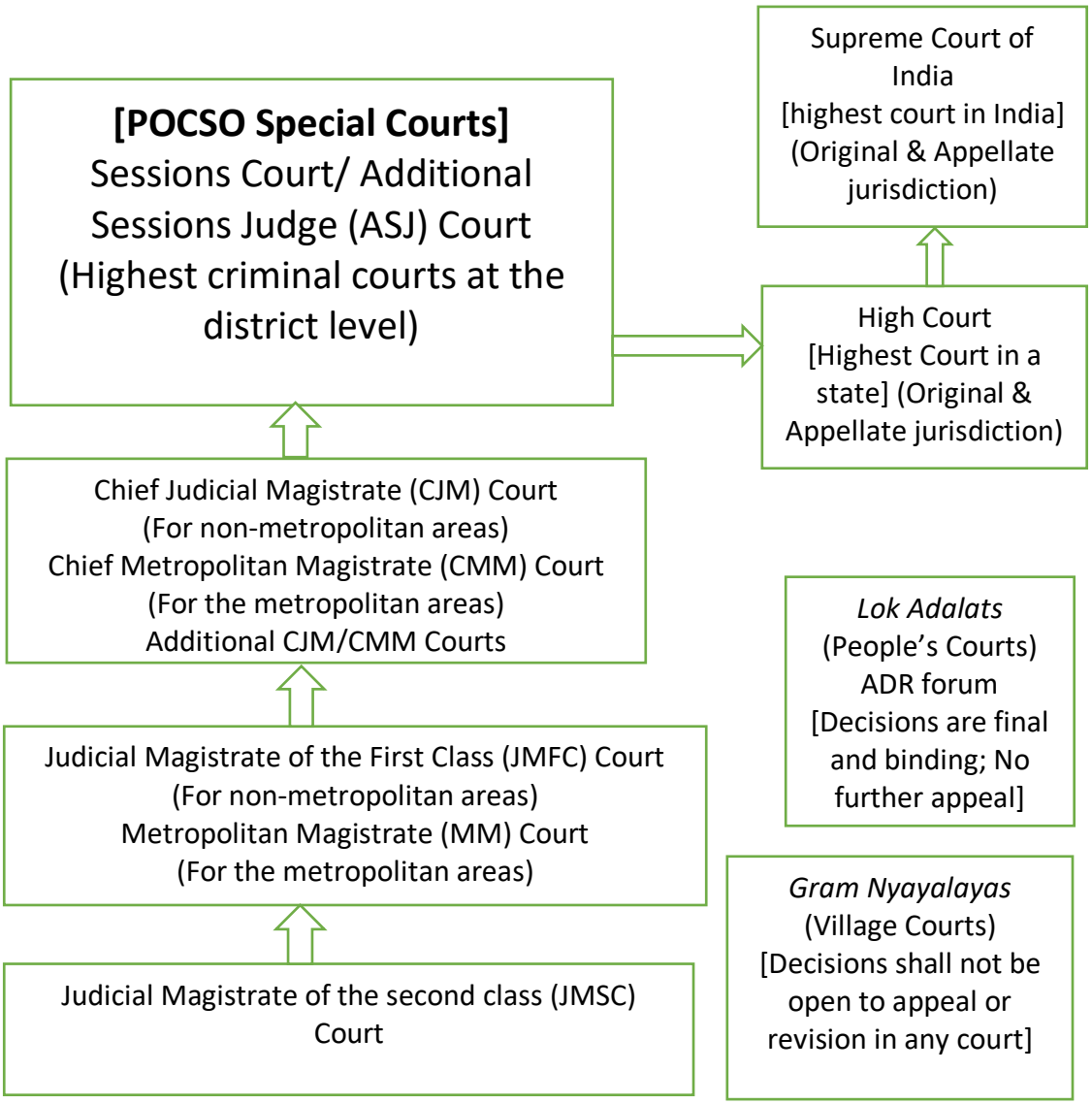

Figure 4.1: POCSO special courts within the hierarchy of the Indian criminal courts

It is important to locate the POCSO special courts and POCSO special judges in the abovementioned hierarchy. The POCSO Act has stipulated that for the purposes of providing a speedy trial, the State Government shall designate for each district a Court of Session to be a Special Court to try POCSO offences. Thus, the law demands designation of either existing Sessions Courts as POCSO special courts or establishment of new courts. It also demands that such courts exclusively try only POCSO cases.

The law also stipulates that while trying an offence under this Act, a POCSO Special Court shall also try any other offence, with which the accused may, under CrPC, be charged at the same trial. Moreover, the POCSO Special Court shall also have jurisdiction to try offences under section 67B of the Information Technology Act 2000 in so far as they relate to publication or transmission of sexually explicit material depicting children in any act or conduct or manner or facilitates abuse of children online.

The POCSO special courts sit at the highest position among the district level criminal courts (see Figure 4.1). Each district has its own Sessions Court, which is the highest criminal court in the district,[119] along with multiple Additional Sessions Courts.[120] These Additional Sessions Courts have the same jurisdiction and power as the Sessions Court. However, as there is only one Sessions Court in a district,[121] it is administratively superior to Additional Sessions Courts. It is one or more of these Additional Sessions Courts that are designated as POCSO special courts in a district, as there could be more than one POCSO court in a district, depending on the volume of POCSO cases in that district.

A Sessions Court and the Additional Sessions Courts are presided over by a Sessions Judge (SJ) and Additional Sessions Judges (ASJs) respectively.[122] Although the Sessions judge is the administrative head of the district, they are the first amongst equals with the ASJs in the same district. The word 'additional' in the title given to the ASJs, thus, does not suggest a lower rank than the SJ (Robinson, 2016).[123] Further, to have the most experienced judge as a POCSO judge, all the state High Courts passed the rule to designate the court of ASJ-1 – the senior most judicial member among all the ASJs in the district – as the POCSO court. Thus, ASJ-1 Court acts as the POCSO special Court.[124] So, POCSO judges are usually the senior judicial

[119] At the state level, each Indian state is constituted of several administrative districts. Each district may on an average contain about 2 million people. These districts could further be divided into subdivisions and blocks.
[120] S. 9, CrPC 1973: It is established by the state government for every Sessions division.
[121] Delhi has 11 Sessions Courts to deal with its 11 districts, which come under 7 district court complexes. Similarly, for the 38 Bihar districts, there are 38 Sessions courts.
[122] Every Sessions court is presided over by a Judge appointed by the High Court, called a Sessions Judge (SJ), who is the senior-most Judge in the district. The High Court may also appoint Additional Sessions Judges (ASJs) to exercise jurisdiction in a Court of Session. The Sessions Judge of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division, and in such case, they may sit for the disposal of cases in the other division as the High Court may direct. In this way, the High Court exercises a substantial control over the district judiciary.
[123] This was the reason why a Sessions Judge, when I asked for his permission to interview the POCSO judges, who are of the ASJ rank, said to me that he does not have the capacity to grant such a permission as they all are equal to him and he is merely an administrative head.
[124] In the August 2020 Bihar government's announcement, the courts of ASJ-6 and ASJ-7 were notified as the new POCSO special courts in the eleven Bihar districts. See, Times of India (2020) 'Bihar: 22 exclusive POCSO courts in 11 districts for decreasing case pendency, delivering justice to minors quickly'. 8 August. At: https://timesofindia.indiatimes.com/city/patna/bihar-22-exclusive-pocso-courts-in-11-districts-for-decreasing-

members of the district who might have entered subordinate judiciary either through regular judicial service exam or the higher judicial service (HJS) exam.

In Delhi, for example, there were 19 POCSO special courts exclusively dealing with POCSO cases from the 11 Delhi districts. In Bihar, on the other hand, only ASJ-1 in each district was designated as a POCSO Court at the time of the fieldwork, giving a total of 38 POCSO special courts for the 38 Bihar districts. None of the Bihar POCSO courts I observed was exclusively dealing with POCSO cases. There was a consensus among the Bihar respondents that this situation contributed to the overburdening of these designated POCSO courts.[125]

Below these courts comes the Chief Judicial Magistrate (CJM) Court. The CJM courts in metropolitan areas, like Delhi, are called Chief Metropolitan Magistrate (CMM) courts. Some districts also have additional CJM/CMM courts. The JMFC Court and the JMSC Court occupy the bottom of the criminal court hierarchy and the judicial magistrates in these courts are the lowest ranking judges. In metropolitan areas, like Delhi, the distinction between JMFC court and JMSC court is absent and they are called Metropolitan Magistrate (MM) courts (Robinson, 2016).

All POCSO cases come directly to the POCSO courts, bypassing the usual route of committal of cases by the Judicial Magistrates.[126] For this reason, an appeal from the decisions of these courts lies to the High Courts of the respective state. High courts are the highest courts in a state or a union territory with appellate criminal jurisdiction from the Sessions courts.[127] Appeals from the High courts can be made to the highest court in the hierarchy of the Indian courts, i.e., the Supreme Court of India, which does not have original criminal jurisdiction.[128]

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case-pendency-and-delivering-justice-to-minors-quickly/articleshow/77435307.cms (accessed 23 December 2020).

[125] Ibid. The Bihar government announced that 11 of the 38 districts would have 2 exclusive POCSO courts each, because of the increase in pendency of POCSO cases in those 11 districts.

[126] S. 193, CrPC: Cognizance of offences by Courts of Session—Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

[127] These courts may have jurisdiction over one or more state or over a combination of one state and one or more union territories. They may also have one or more than one benches within the same state. Presently, there are 25 High Courts and 39 High Court Complexes in India. The High courts also enjoy original jurisdiction in the form of writ petitions under Articles 226 and 227 of the Indian constitution. See, High Courts - eCourt India Services (ecourts.gov.in) and Home - eCourt India Services (ecourts.gov.in) (accessed 23 December 2020).

[128] It is the highest constitutional court, which also has original jurisdiction under Article 32 of the Indian constitution. It has only one seat, i.e., in Delhi, the Indian capital city.

The courts and judiciary at the district level, including the Sessions Courts, are referred to as lower or subordinate courts and lower or subordinate judiciary.[129] The subordinate judiciary in a state are appointed through two ways (Stewart, 2010). One is a career judiciary route, in which the regular state judicial services exam, usually with affirmative action policies, appoints JMSCs with a promotion pathway, which acts as a distinct legal career. Two, the higher judicial services (HJS) exam directly appoints ASJs from the Bar. HJS recruits the members of the district bar directly to the senior cadre if they have practiced as advocates for seven or more years.[130] SJs/ASJs will be in the senior cadre while judicial magistrates will be in the lower cadre.

In India, the upper judiciary (judges in the Supreme Court and High Courts), who are appointed through recommendations by a collegium system rather than by an entrance exam with affirmative action policies, are usually from high socioeconomic status families with distinguished legal practice careers before joining the bench. It is traditionally viewed not so much as an extension of the subordinate judiciary, but as categorically distinct— more capable, less corrupt (Robinson, 2016). Very few Sessions Judges are promoted to join the High Court as opportunities for elevation to the High Court for the career judiciary are limited because of a quota (usually 25%) and a 'cut off' age of (usually) 58 (Stewart, 2010). So, consequently, most of them retire by the time they reach the senior-most judicial rank at the district level. Unlike upper judicial members, members of the subordinate judiciary are often very young, and usually join the judiciary soon after finishing their law school. This tends to make the subordinate judiciary less assertive and more likely to follow the arguments of more seasoned lawyers or the government in their respective magistrate and Sessions courts (Galanter, 1984; Robinson, 2016).

4.3 Criminal cases and POCSO offences

Regarding the kinds of cases tried in the different criminal courts, it is pertinent to refer to the first schedule of the CrPC. This deals with the classification of offences under the IPC. The offences have been divided into cognizable and non-cognizable offences, and bailable and non-bailable offences. CrPC defines "cognizable offence or case" as an offence or case for

[129] See, Chapter VI, Constitution of India. 'Subordinate' does not mean that these courts are inferior or any way less important than the Supreme Court or High Courts. Similarly, 'lower' is used to merely reflect the position in the hierarchy of courts and judiciary.
[130] Article 233(2), Constitution of India.

which a police officer may arrest without warrant in accordance with the First Schedule of CrPC or under any other law for the time being in force. "Non-cognizable offence or case" has been defined as an offence or case for which a police officer has no authority to arrest without warrant. This distinction also has implications for registration of FIRs (First Information Report): these can only be registered for cognizable offences like murder, sexual offences, theft, sedition. The non-cognizable offences are less serious, like voluntarily causing hurt, dishonest misappropriation of movable property, and cheating.

Cognizable offences, therefore, are generally triable by the Sessions Court except in some cases. Non-cognizable offences are always triable by Judicial Magistrate of the first-class or a Metropolitan Magistrate. POCSO offences are cognizable and are triable exclusively by an (Additional) Sessions Court. Further, less serious POCSO offences, which are punishable with imprisonment for less than 3 years or with a fine only, are bailable. So, only the offences of sexual harassment upon a child and storage of pornographic material involving child,[131] are bailable, while all other POCSO offences are non-bailable.[132] Cognizable offences, therefore, are non-bailable, and non-cognizable offences are bailable in nature, with some exceptions.[133]

4.4 Subordinate judiciary and their roles under the POCSO Act

In POCSO cases, like in other criminal cases, the two parties interact with courts primarily at two levels. The child sexual violence survivor's first level of interaction is with the JMFC court or MM court for recording of their statement. Here, the Judicial Magistrate has a statutory duty to record the child's statement verbatim. The second level when such a child interacts with a court is for the recording of their evidence during trial before a POCSO special court, which is a Sessions court. Here, it is the special POCSO judge's duty to create a child-friendly atmosphere in the courtroom and ensure that the entire trial is carried out in a child-friendly manner.[134]

The accused's first level of interaction with a court is if the police arrest them without warrant and intend to detain them for more than the statutory limit of 24 hours.[135] For detention of more than 24 hours in police custody, the police need to produce the accused in person

[131] See, sections 12 and 15, POCSO.
[132] See, Annex IV, Table 1.
[133] S. 437, CrPC.
[134] S. 33 (4), POCSO: The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.
[135] S. 57, CrPC.

before a JMFC court or MM court to seek the Magistrate's permission.[136] As this is an exceptional situation limiting personal liberty, it is the duty of the Magistrate to oversee the reasonableness of the detention.

The Magistrate may authorize longer detention but not for more than fifteen days in total. This is possible only if it appears to the Magistrate that the investigation cannot be completed within the period of twenty-four hours and there are grounds for believing that the accusation or information is well founded. Such an accused may further be detained for more[137] than fifteen days but only in judicial custody and only after the Magistrate is satisfied that adequate grounds exist for doing so.[138] In such a scenario, the accused must be produced before a Magistrate every fifteen days that they remain in police custody, either in person or through the medium of electronic video linkage.[139] The second level of accused's interaction takes place with a POCSO court during the trial before a POCSO judge.

4.5 Nature, Number, and Disposal of POCSO Cases

This section presents data on numbers and disposal of POCSO cases and the workload of the courts and their personnel. The data in the tables below has been broken down between the Bihar and Delhi jurisdictions, wherever the National Crime Records Bureau (NCRB) data is sufficiently detailed.

[136] S. 167, CrPC.
[137] Ibid. Where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years, the accused can be in judicial custody maximum for a total period of ninety days. Where the investigation relates to any other offence, the detention period is restricted to sixty days. On the expiry of the said period of ninety days, or sixty days, the accused person shall be released on bail if he is prepared to and does furnish bail.
[138] Ibid.
[139] Ibid.

4.5.1 Number and percentage of POCSO cases

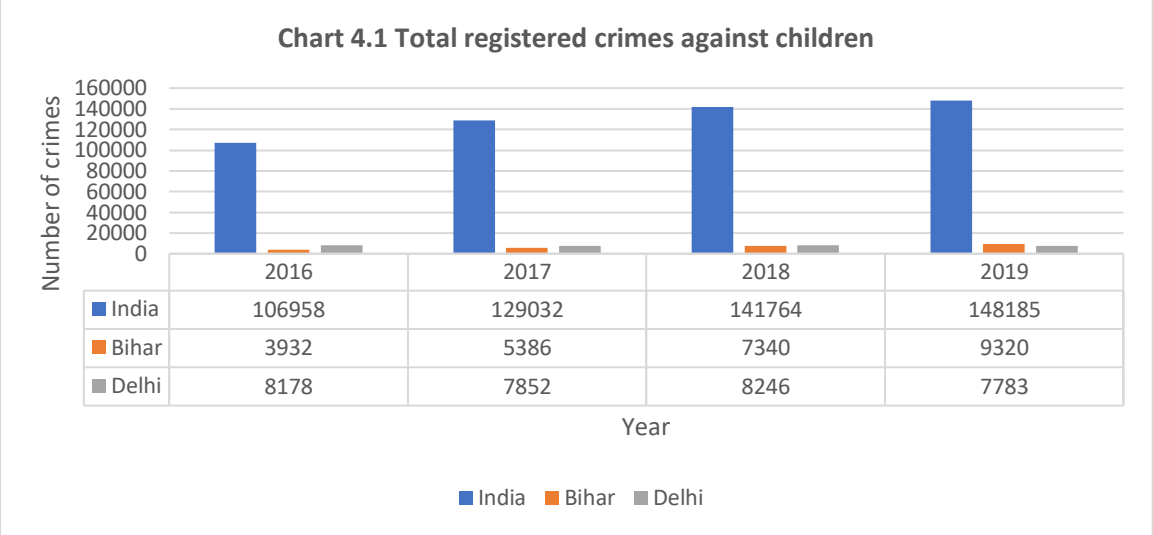


Chart 4.1 shows that total registered crimes against children in India are on the rise since 2016. Particularly, such cases from Bihar have been rising continuously since 2016 in comparison to those from Delhi, surpassing the latter in 2019. This is likely to reflect, rather than changes in offending levels, increased public awareness of such crimes, the greater willingness to report them, and improved police registration in Bihar.

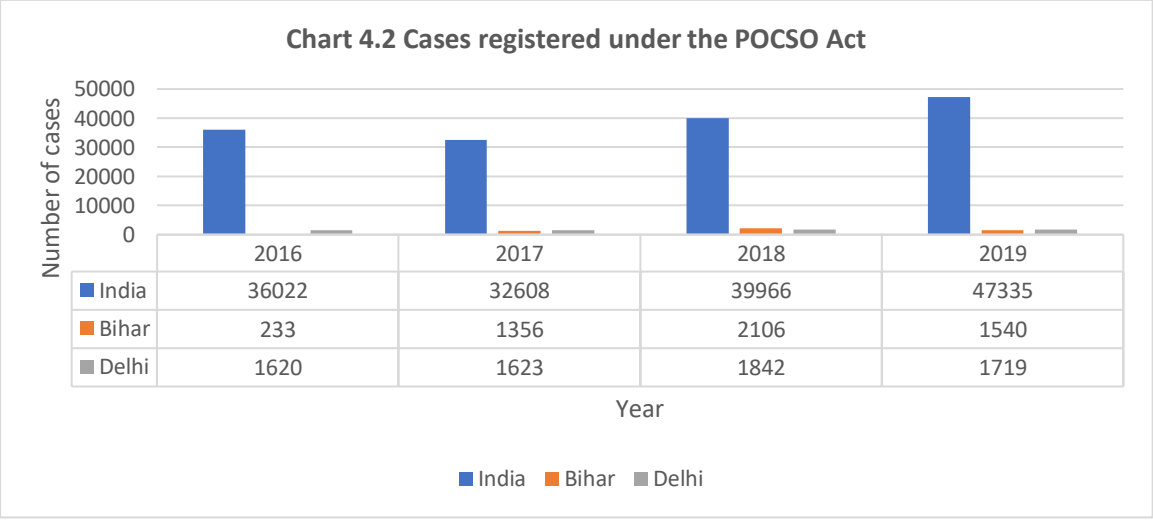


Chart 4.2[140] shows that the POCSO cases in India are on the rise since 2017, while the numbers have been fluctuating for Bihar and Delhi.

[140] The 2016 NCRB report corrects the ambiguity issue of the previous year but with an exception. It still misses to incorporate offences u/s 377 against minors as POCSO offences. The 2016 Report mentions total Incidence under the POCSO Act as 36022 and total Incidence under section 377 of the IPC as 1247. So, again there are possibility of an overlap between the Incidence of POCSO cases and Incidence of section 377 cases.

Charts 4.1 and 4.2 (POCSO Incidence[141]) suggest that one in three or four registered cases of offences against children in India are of a sexual nature. The percentages in India (25% & 28%) are similar to Bihar (25% & 29%) in 2017 and 2018 respectively. However, in 2019, while the percentage in India increases (31%), it gets reduced for Bihar (16%). So, the percentage of POCSO cases to total registered crimes against children in India is on a rise since 2017. For Delhi, this percentage has risen from 2016 (20%) to 2019 (22%).

4.5.2 Police and court disposals of POCSO cases

The NCRB data show that the rate of police disposal of POCSO cases, i.e., percentage of total cases disposed[142] of by police to total cases available for police investigation, has hovered at around 70% over the period 2017 to 2019 (with a slight improvement in the last of these years), leading to a year-on-year increase in police caseload.[143] The cases under police investigation rose from 44,924 in the year 2017 to 65,382 in 2019.

Further, the NCRB data suggests that if the rate of police disposal of POCSO cases is slow, the rate of court disposal of POCSO cases is even slower.[144] The rate of court disposal of POCSO cases, i.e., percentage of total cases in which trial has been completed, is around 10%. This rate has decreased from 2016 to 2018 but improved slightly in 2019. This has resulted in a substantial increment in the number of POCSO cases pending trial at the end of each year- from 84,143 in 2017 to 133,492 in 2019. The conviction rate in POCSO cases, i.e., conviction in cases whose trial was completed, increased from 30% in 2016 to 35% in 2019.

4.5.3 Guilty pleas and the compounded or compromised cases under the POCSO Act

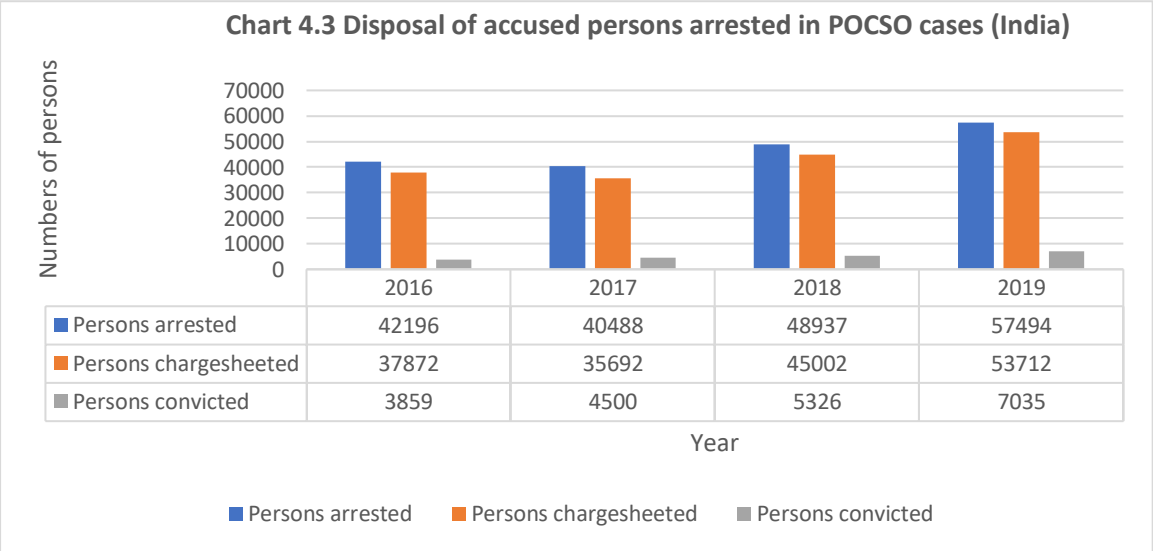
In terms of the numbers of guilty pleas and the compounded or compromised cases[145] under the POCSO Act, the numbers are very low and fluctuating as per the NCRB data.[146] While the

[141] Based on the number of FIRs (First Information Reports) registered under the POCSO Act. Further, the 2018 CII report included the section 377 cases against minors within the POCSO cases. But it mentions the numbers of murder with rape of children separately. See, p. 298, CII 2018. I have added these numbers here.
[142] 'Disposed' means either the police have filed the charge sheet or has closed the case.
[143] See, Annex IV, Table 2.
[144] See, Annex IV, Table 3.
[145] Compounded cases are the cases settled by the victims, or any person competent to contract on their behalf, or their legal representative, under section 320 of the CrPC, either without or with the permission of the Court before which any prosecution for such case is pending. This has the effect of an accused's acquittal. Sexual offences against children are not compoundable under the law, yet the data say such cases are compounded. Similarly, compromised cases are where the two parties to a case have settled the matter between themselves. Again, compromise is not permitted by the law in POCSO cases.
[146] See, Annex IV, Table 4.

POCSO cases disposed-off by plea-bargaining[147] in a year ranged from 6 in the year 2016 to 36 in 2019, the POCSO cases that were compounded or compromised in a year ranged from 102 in the year 2017 to 371 in 2019. It is because plea bargaining has been permitted by the Indian law only for offences with punishment of imprisonment for a term not exceeding seven years, and which has not been committed against a woman, or a child below the age of fourteen years.[148] So, for the POCSO offences, the plea-bargaining option is available only for certain offences and when the victim is a boy of fourteen years or above age.

4.5.4 Disposal of accused persons arrested in POCSO cases

Chart 4.3 (below) shows that around 40,000 to 60,000 people are arrested each year in POCSO cases. There has been around an 20% increment in this number from 2017 to 2019. This chart also shows that while the charge sheets are filed against around 90% of the people arrested in the POCSO cases (with the chargesheeting rate increased from 90% in 2016 to 93% in 2019), the conviction rates for those arrested range from only 9% in 2016 to 12% in 2019. Overall, there has been an increasing trend in conviction rate in the POCSO cases in India.



4.5.5 Conviction rates in POCSO cases in Bihar and Delhi[149]

The conviction rate in terms of registered POCSO cases in Bihar from year 2012 to 2016 was only 3%. In Delhi, on the other hand, the conviction rate in terms of registered POCSO cases from year 2014 to 2016 was 18%. However, when we look at the conviction rate in terms of

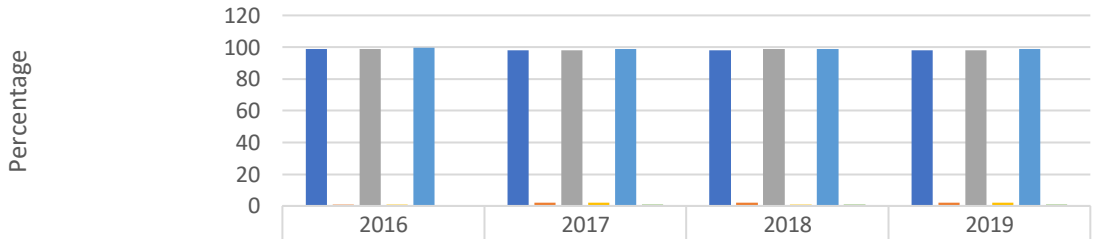
[147] Plea-bargaining means where the accused has pleaded guilty. The POCSO reforms have not introduced any change in relation to guilty pleas.
[148] Section 265A, CrPC.
[149] See, Annex IV, Table 5.

POCSO cases whose trial was completed, then the percentages obviously go up. From year 2017 to 2019, while Bihar had 63% conviction rate, Delhi had 58%. Given the conviction rate in cases with completed trial is very much higher than in the cases registered, and the Chargesheeting rate is around 90%, the main attrition must occur between the point of charge and trial. Also, the conviction rate at trial is much higher in Bihar and Delhi than in the country (30%-35%, cited in section 4.5.2). It is difficult to comment on why this is.

4.5.6 Gender and age of accused and child victims in POCSO cases

Chart 4.4 (below) shows how accused persons are predominantly male, with the proportion increasing further when it comes to persons convicted in POCSO cases. Chart 4.5 (below) shows that except in the year 2016,[150] for which year the national data are inconsistent, approximately 99% of the child victims were female both at national level as well as in Bihar and Delhi. In Delhi, the numbers of male child victims, from year 2016 to 2019 were 28, 11, 12, and 18 respectively, in Bihar it was 1, 0, 0, and 2 respectively.

Chart 4.4 Gender demography (in Percentage) of persons arrested, chargesheeted and convicted in POCSO cases

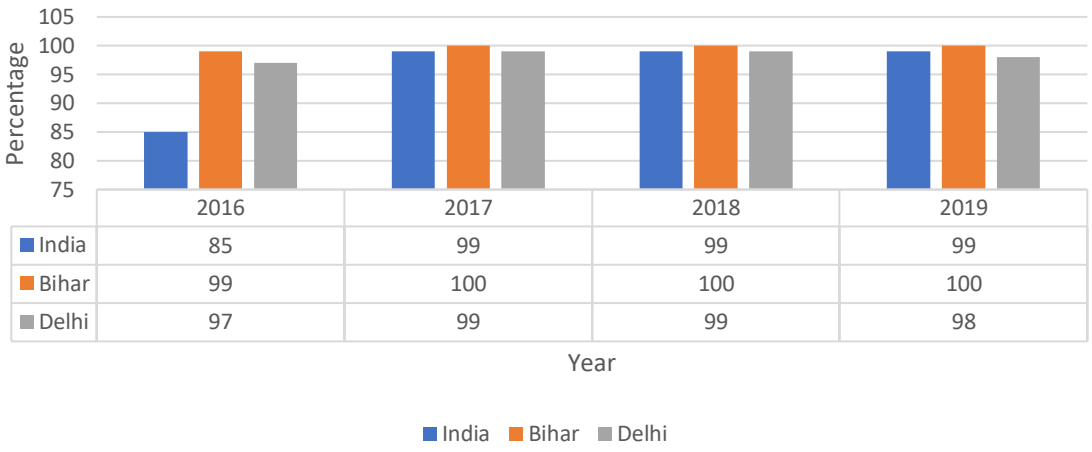


	2016	2017	2018	2019
Male (arrested)	99	98	98	98
Female (arrested)	1	2	2	2
Male (chargesheeted)	99	98	99	98
Female (chargesheeted)	1	2	1	2
Male (convicted)	99.5	99	99	99
Female (convicted)	0.5	1	1	1

Year

[150] Number of girl child victims of rape and total victims of child rape (Section 4 & 6 of POCSO read/with 376 of IPC). See, Table 3A.3, p. 145, and 4A.2(ii), p. 192 respectively, CII 2016, NCRB, New Delhi.

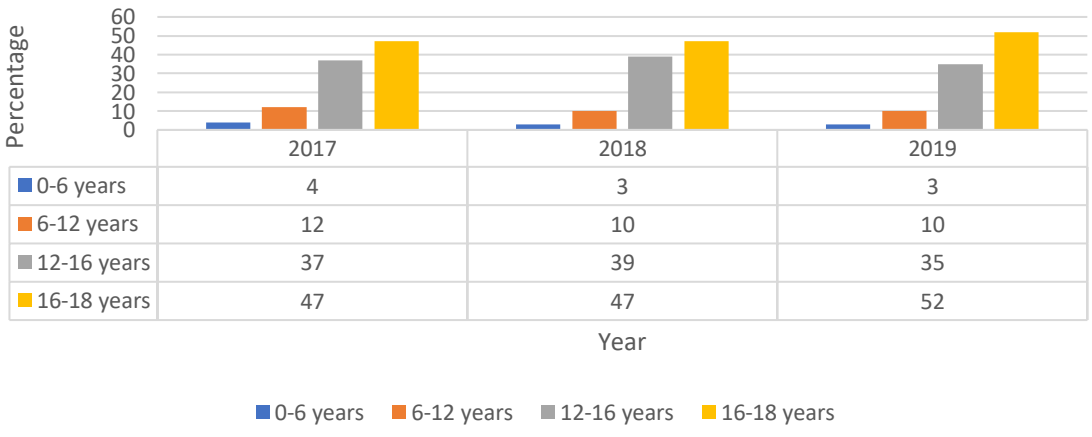
Chart 4.5 Percentage of girls in the total child victims of POCSO cases [(only rape- Sections 4/6 POCSO, 376 IPC) - Years 2016-19 (based on registered cases)]



	2016	2017	2018	2019
India	85	99	99	99
Bihar	99	100	100	100
Delhi	97	99	99	98

The data in the above charts raise some interesting questions about how the gender of the accused and child victims may inform access to justice debates, policies, and practices about the POCSO law. With respect to victims' age, the POCSO Act has increased the age of consent to 18 from the previous 16 years. Chart 4.6 (below) tells us that from the year 2017 to 2019, around fifty percent of the victims in penetrative and aggravated penetrative sexual assault POCSO cases belonged to 16-18 years age group. This aspect too raises some interesting questions about how age of the child victims might inform access to justice debates in the context of 'consensual' sexual offences against children, particularly adolescents, and practices about the POCSO law.

Chart 4.6 Age profile of child victims in POCSO cases in India [(only rape- Sections 4/6 POCSO, 376 IPC) - Years 2016-19 (based on registered cases)]

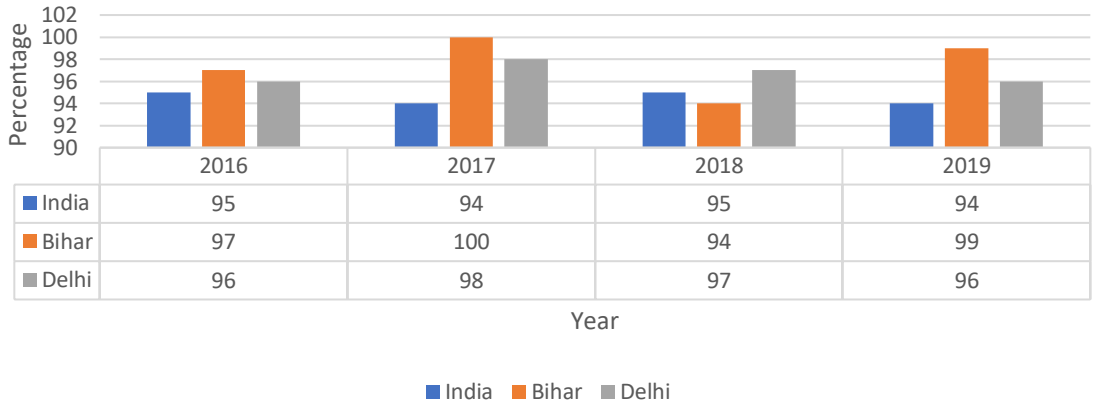


	2017	2018	2019
0-6 years	4	3	3
6-12 years	12	10	10
12-16 years	37	39	35
16-18 years	47	47	52

4.5.7 Relationship between accused and child victims in registered POCSO cases

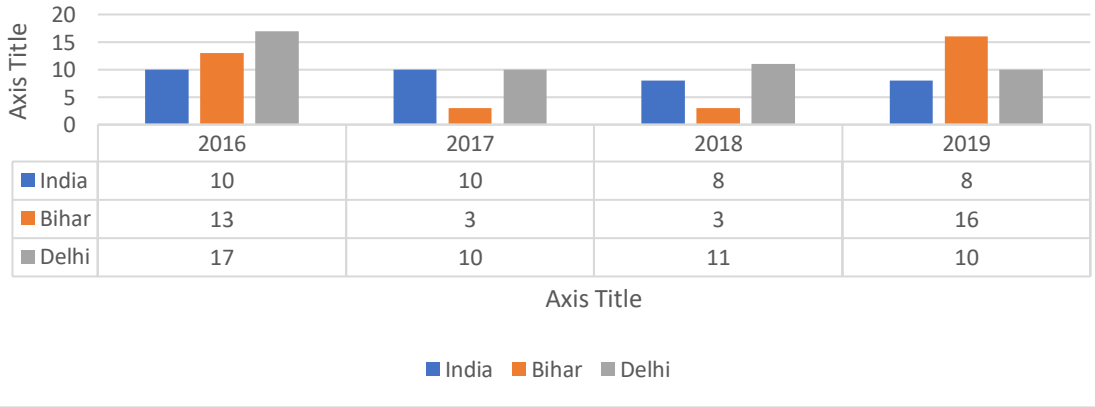
Charts[151] 4.7 and 4.8 (below) deal with the relationship between the victim and offender, in relation to cases involving offences of penetrative and aggravated penetrative sexual assault. They reveal that most offenders are known to the victim, and in around one in ten cases the offender is a family member. The percentages fluctuate to some extent at the national level, and to a greater extent in the two field locations. This too has critical implications for POCSO reforms at all stages of the criminal process.

Chart 4.7 Percentage of POCSO cases in which offenders were known to child victims [only for cases under sections 4 (penetrative sexual assault) and 6 (aggravated penetrative sexual assault) of the POCSO Act]



	2016	2017	2018	2019
India	95	94	95	94
Bihar	97	100	94	99
Delhi	96	98	97	96

Chart 4.8 Percentage of POCSO cases in which offenders were family members of child victims [only for cases under sections 4 (penetrative sexual assault) and 6 (aggravated penetrative sexual assault) of the POCSO Act]



	2016	2017	2018	2019
India	10	10	8	8
Bihar	13	3	3	16
Delhi	17	10	11	10

[151] 2016 NCRB report mentions the data on the 'Offenders Relation to Victims of Rape' and not specifically for POCSO cases only. So, the data is about the cases under section 376 IPC (adult victims) and section 376 IPC r/w sections 4 & 6 of POCSO Act (child victims). This would thus be a rough estimate of the offenders' relation to the minor victims of rape. See, Table 3A.4, p. 146, CII 2016, NCRB, New Delhi. From the year 2017 onwards, the 'Cases in which offenders were known to victims' criteria has been subdivided into three categories- 1. family members, 2. Family friends/ Neighbours/ Other known persons 3. Friends/ Online-Friends on Pretext of Marriage.

4.6 Training of POCSO court personnel

One of key themes to be addressed over the course of this dissertation is the factors determining stakeholders' day-to-day implementation of the POCSO reforms and the problems they encounter in so doing. It is therefore pertinent to first explore the nature of professional training these stakeholders have received.

Being a statute with special provisions, the Act demands special attention from its implementors in terms of their training as it sets out special procedures for reporting of cases, for recording the statement of the child, and for recording of evidence. Therefore, the Act mandates the central and every state government to take measures to ensure that their officers and other connected persons (including police officers) receive periodic training on implementation.[152] This includes training for the special judges, special prosecutors,[153] police personnel, and members of the POCSO court staff.

The provision clearly states that for the Act's implementation, 'other connected persons' shall also be given periodic training. This could include the defence counsels in POCSO matters, who are not the 'officers' of the state but play a significant role, particularly at the trial stage and in relation to how they cooperate with the courts. The Act mandates that like prosecutors, the defence counsels shall communicate the questions to be put to the child to the judge, who shall in turn put those questions to the child while examining the child witnesses.[154]

This section explores different aspects of personnel training, as well as respondents' perceptions and experiences of their training. I also outline their views on others from their own or other professional groups. But prior to that, it is important to briefly know the institutions responsible for providing training to court personnel in Bihar and Delhi. It is also pertinent to know what kind of training those institutions claim they have given to the POCSO court personnel.

[152] Section 43(b), POCSO.
[153] Section 24(8), CrPC: The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor. A proviso was inserted in 2009, which provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.
[154] Section 33(2), POCSO.

4.6.1 **Training of court personnel: Nature, Methodology, and Trainers**

This sub-section explores the people and institutions responsible for training personnel in the subordinate criminal courts and the nature of their training.

4.6.1.1 Judiciary, public prosecutors, and ministerial staff of the lower courts

The institutions responsible for providing induction and in-service judicial training across all areas of law to the subordinate judiciary are the state-level judicial academies. They also train the administrative staff of lower courts such as court managers, system officers, office clerks, Bench clerks, Naib Nazirs and so on. The academies organise refresher course, core competence building and sensitisation programmes, orientation and collaborative programmes, stress management retreats, and village immersion programme. Alongside the computer training and management skill development, the academies also organise seminars and workshops for different stakeholders under the guidance of the Judges of the High Courts. The High Court judges, senior judicial officers, eminent lawyers, and subject experts preside over the training sessions of the officers on selected topics of law followed by a discussion and interaction.

The district judiciary and the prosecutors in Bihar and Delhi are trained by the Bihar Judicial Academy (BJA) and the Delhi Judicial Academy (DJA), respectively.[155] There are academic calendars published on the two academies' website which include information on training.[156] DJA's website had voluminous academic calendars of the last six years, with details of the training programs of different stakeholders with names and designations of contributors and resource persons.[157] On the other hand, the only academic calendar I found on the BJA's website was for the year 2019, which was a brief eight-page document with no details of the courses or contributors. There was also no archive of previous years' academic calendars.

A glance at the DJA's academic calendars of the years 2015 to 2019 suggest that there have been annual training of different stakeholders on child rights, gender justice, and the

[155] Bihar Judicial Academy has been established in 2003 on the recommendations of the Shetty Commission with the aim and to impart training to inter alia the Judicial Officer of State to improve Judicial Administration and other incidental matters. See, http://patnahighcourt.gov.in/bja/AboutUs.aspx. The Delhi Judicial Academy has started functioning formally since 2002, though it started imparting judicial education since 1992. See, Academic Calendar 2019, p. 5.

[156] The DJA website is well maintained and updated while that of the BJA is poorly maintained and not updated. See, Academic Calendar, BJA, http://patnahighcourt.gov.in/bja/PDF/Academic_Calendar_2019.pdf. See also, Academic Calendar, DJA, http://www.judicialacademy.nic.in/activities-and-calendar/academic-calendar. This website had the academic calendars of the years 2019 and 2020 alongside the archive of previous years' (2015-18) calendars.

[157] All academic calendars were of around or over 100 pages (accessed 11 January 2021).

POCSO law. There have also been programmes for POCSO judges on court procedure, attitude building, skill, and personality development. The training is described as adopting an inter-disciplinary approach to understanding the social context in which laws/systems exist and operate.

There have also been conferences by the DJA on 'strengthening justice delivery system through integration of knowledge, skill and attitude in adjudication', 'towards excellence in qualitative & quantitative justice', and 'substantive and procedural challenges in trial related to sexual offences' for ASJs and special Public Prosecutors of the POCSO courts.[158] Participation is variously mandatory (jurisdiction-wise), or on a voluntary basis, or by nomination by the concerned District & Sessions Judge or the Director of Prosecution. In 2017, the DJA also conducted six on-site programmes at the six district court complexes in Delhi on issues relating to repatriation, restoration, rehabilitation, age inquiry, adoption and minimizing bias for children.[159] Training of POCSO judges has also been provided by the National Judicial Academy (NJA).[160] The materials cover different aspects and stages of the POCSO cases, POCSO special courts, and their stakeholders, including handling of child witnesses. On an average, there were 37 participants in each event, with one to five participants from different districts of Delhi and Bihar.[161]

4.6.1.2 Defence counsels of the lower courts

The defence counsels, on the other hand, are not state officials, and are admitted to the Bar by their respective State Bar Councils to independently practice law. These Bar Councils, such as the Bihar State Bar Council and the Bar Council of Delhi, are autonomous statutory bodies constituted under the Advocates Act 1961.[162] The State Bar Councils are responsible to admit the advocates of respective states. They also perform certain functions mandated by the Act that includes promoting and supporting law reform, conducting seminars, and organizing

[158] See, DJA Academic Calendar 2015, p. 37; DJA Academic Calendar 2016, p. 36; DJA Academic Calendar 2017, p. 33; DJA Academic Calendar 2018, pp. 30, 55; DJA Academic Calendar 2019, p. 14, 65-66; DJA Training Calendar, 2020, pp. 48-49. The details of sessions are available only in the 2019 and 2020 academic calendars of the DJA.

[159] DJA Training Calendar, 2018, p. 11. This was in compliance with the Delhi High Court's directions in *Chanderjeet Kumar @ Kishan v. State* (Criminal Appeal No. 371/2015).

[160] There has been a workshop on assessing the difficulties faced by POCSO courts in 2015, an annual national seminar on working of the POCSO courts in India in 2017, and three refresher training workshops in 2017, 2018, and 2020. All these five events were for the POCSO special court judges and were of two to four days with seven to fifteen sessions. See, National Judicial Academy 'Concluded Programmes'. At: http://www.nja.nic.in/Concluded_Programmes.html (accessed 11 January 2021).

[161] Overall, in these five years, the NJA could train 7 POCSO special judges from Delhi and 8 from Bihar.

[162] S. 3, Advocates Act 1961.

talks on legal topics by eminent jurists.[163] The Act is silent on training of the advocates by the State Bar Councils, although it does ask the Councils to do all other things necessary for discharging the aforesaid functions, which includes promoting and supporting law reform.

There is no legal mandate for institutional training for defence lawyers. There is no legal obligation to undertake on-going training even when new courts or new laws come into operation. Defence lawyers work on a self-training basis. However, the DJA (but not BJA) undertook capacity-building of defence lawyers. General practice is that lawyers will work as juniors under the supervision of senior lawyers for a couple of years, before beginning an independent practice. The only legal mandate to practice law in India is to clear an All India Bar Examination (AIBE) and register with the relevant Bar Council.

4.6.1.3 Police personnel and others

The police personnel in Bihar and Delhi are trained by the Bihar Police Academy and the Delhi Police Training Division, respectively. In Delhi in 2014, teams of legal experts comprising an assistant public prosecutor and a police inspector went to all police stations as it was not possible for everyone to come to the police training college. They led evening classes for the SHOs (Station House Officers), sub-inspectors, and beat constables on how to handle cases under the POCSO Act.[164] Both the BJA and the DJA gave special training to the police officers of Deputy Superintendent of Police (DSP) and Station House Officer (SHO) ranks. The DJA also had orientation programs, symposiums, and training workshops for the executive magistrates, doctors, legal aid lawyers, NGOs, and mental health professionals.

4.6.2 **Mapping the training provision in the two locations**

In this sub-section, I explore the experiences and perceptions of my respondents about training. Overall, around two-thirds of the respondents, across the two field sites, gave a negative response when asked about their training, i.e., stating that they had not received POCSO-related training. The other one-third of the respondents, who said that they had training, were not a homogenous group. Some, for example, argued that the training was not sufficient to handle POCSO matters. There was also a certain resistance towards training – particularly, among the Bihar judiciary.

[163] S. 6, Advocates Act 1961.
[164] See, Times of India (2014) 'Police get trained in handling POCSO cases'. 7 January. At: https://timesofindia.indiatimes.com/city/delhi/Police-get-trained-in-handling-POCSO-cases/articleshow/28484628.cms (accessed 5 January 2021).

The data and analysis in this section have been organised based on their relevancy and stakeholders' prominence in the POCSO regime – starting with the responses of the POCSO judges (PJs), followed by the lawyers (PPs & DCs), judicial magistrates (JMs), and members of the court staff including police personnel (CSs). Responses of Bihar stakeholders are followed by those of Delhi stakeholders. Attention has been paid to the potential role of gender and geographical location of the respondents in their responses.

4.6.2.1 Training provision in Bihar

Talking about his training, a male Judge from Bihar said there was no specific training given to him to deal with POCSO cases (BPJ 1). Upon being asked if he needs such training, he argued, "I do not think there is any need of special training for such matters." He claimed that working for so many years in the judiciary has given him "enough experience to deal with such cases." Another male Bihar Judge received "general training" but spoke in the same disinterested tone about the importance of training for POCSO matters: "I think training is not that much important" (BPJ 3). Another male respondent, working as a Judge in Bihar, also talked about absence of training after his appointment as a POCSO Judge and said that the training in the past was "only interaction" (BPJ 4). One male Judge of Bihar who had received "general bookish training in relation to POCSO," however, differed from these respondents and said that "more training should be given" (BPJ 2).

The lawyers were more positive about training. As one male Bihar public prosecutor (PP) who had "received some POCSO-related training" said:

> Whichever special Act is there…special PP…and special Judge should also get training. And I would like to have the training of both…together. Both should understand what needs to be done in the Act and what are the lacuna in that. (BPP 1)

This PP also complained that whenever a new judge arrives, "I have to teach him everything as he does not know anything." On being asked if the current judge is trained, he further vented his frustration:

> No, nothing. Straight away the promotion takes place...it has been four months for the present judge. This is a big defect. Means there is no training given to them at

> all. What happens is that ADJ 1 has been given the charge of POCSO judge with the concurrence of the Patna High Court[165]. (BPP 1)

Above, he pointed out how the practice of seniority-based appointments of POCSO judges without giving them training in advance leads to 'a big defect' in the justice system, which he said has the potential to delay case proceedings. He also stressed that lack of training hampers the judicial knowledge of both substantive and procedural law and understanding of the significance of friendly behaviour for child witnesses. Prosecutors spoke more positively about training. Most of the Bihar prosecutors responded in affirmative when asked if they had training to deal with POCSO matters. Two of them (BPP 2 and 3) talked me through the details of multiple training they were given by the Bihar Judicial Academy (BJA), Patna, and the Bihar Institute of Correctional Administration (BICA), in the city of Hajipur near Patna. One male PP, though, said that the training was given after his appointment (BPP 5), which is a problem.

In contrast, none of the defence counsels, judicial magistrates, members of the court staff, or police officers in Bihar said they had received training on implementation of the POCSO provisions. However, a substantial majority among them expressed willingness to receive such training.

A judicial magistrate is the first point of contact between a child witness and the judiciary. They are responsible for recording the child's statement, and because of the independence of judicial magistrates, such a statement has high value as evidence during the trial. The magistrates also look after the safety and security of the accused, being the first line of defence against the state and thus able to check on state excesses. I observed that while the magistrates go to a special videoconferencing (VC) room to attend accused persons being produced virtually from jail, this facility is unavailable for recording child witnesses' statements. It is carried out in person in a magistrate's office. There is no special room in any of the court complexes I observed to record a child witness's statement. One young female judicial magistrate believed she did not need training on the usage of videoconferencing when an accused person is produced virtually, as for her,

> It is a very normal thing. There is nothing much to know about it, because the questions that you are supposed to ask are almost the same, that how you are…are you getting correct treatment…whether or not you are being beaten up. So, that

[165] The lower courts in a State function under the direction of the High Court in that State. It can be said to be a mixture of a High Court and the Court of Appeal present in the UK.

> does not require much training. That comes from handling the court anyways. (BJM 1)

One young male judicial magistrate from Bihar differed and highlighted the need for technological knowledge among judges: "there is still training gaps between Judicial Officers' work and their technological knowledge" (BJM 3). The Magistrates also said that they are not institutionally trained on the procedure for recording child witnesses' statements in POCSO cases.

Further, the defence counsels argued that their training in Bihar is lacking – primarily because they are not government officers. Yet, as shown above, there is enough scope within the law to train defence counsels too. One male Bihar defence counsel, while agreeing to a proposal for training for the defence counsels through seminars, said that they never had a seminar on POCSO in Bihar (BDC 2). He further added that it does happen in the lower courts in Delhi, but such legal awareness is absent in Bihar. Shifting his attention to the training of the Bihar police officers of lower ranks, he contended that they lack even basic literacy. As, at his insistence, I interviewed him in his residential office in the presence of a client, both laughed when he argued that:

> Under the proper mandate of the law, police are also untrained…he has become ASI (Assistant Sub-Inspector) from a *Sipahi* (Constable) or [he] has got two stars[166]. So, when he does not even know how to read and write, how will he do the investigation in POCSO cases. (BDC 2)

Above, the defence counsel has singled out lower-ranked police officers as poorly educated in general. Particularly for POCSO cases, where they are made investigating officers after becoming ASI on promotion, he said that the condition is exacerbated by the appalling condition of general and POCSO-specific police training in Bihar. It is important to note here that the educational qualification for a police constable is passing the high school twelfth class, and the minimum age is 18 years. And as Jauregui (2013) argues, the widespread decadence of the Indian police and its structural disempowerment by cultural-political and legal-institutional claims to multiple and conflicting forms of authority has led to its poor image and performance. So, combining such conditions in the Indian police with Bihar's poorest literacy rate among all

[166] 'Two stars' is an insignia for an ASI in the Indian police department.

the Indian states, and the problem of impersonation fraud in the recruitment procedure,[167] suggests that the opinion of the defence counsel holds weight.

This was also revealed in my conversation with a female police officer in Bihar (BCS 5), in service for the last ten years and dealing with POCSO matters for the last seven. She said, "she gradually got promoted and became ASI," and added, "Training goes on, but I have not got through any training. We get departmental training." When I asked how she handles the POCSO cases, her responses showed that she is dependent on senior police officers. As I observed, and as other Bihar respondents also said, such a situation runs the risk of poor evidence collection and investigation by the POCSO Investigating Officers, thereby delaying the POCSO case proceedings with the potential to adversely affect the case outcomes.

A member of the court staff – a male deposition writer, responsible for recording in writing the witnesses' statements during trial – said the training was lacking. He described his training as what he called an "on-job training" and the courtroom as the training ground:

> The work was given directly. The Judge briefed once or twice. Meanwhile, we also made mistakes, obviously. The court was very much new for us. Some mistakes were committed by us. The Judge explained it to us. While doing this, we became trained. You can call it like an on-job training. (BCS 1)

Citing a real-life example, where the POCSO judge (Presiding Officer or PO) trained him informally in the courtroom, he clarified:

> Whenever a guideline comes then the PO goes for training. And he comes back with lessons on it and then briefs me about it. Like, there was one briefing that a child's identity shall not be disclosed. So, he asked what can be done if we have to prevent disclosure of child's identity. So, [he] said that you fill up a separate format and seal it in an envelope and then I will see it during the time of judgment. (BCS 1)

4.6.2.2 Training provision in Delhi

Training provision was not very different in Delhi. Only one out of the seven judges I interviewed said that he was trained specifically for POCSO's implementation. One male Delhi

[167] See, Hindustan Times (2020) 'CSBC Bihar Constable Recruitment: 200 job aspirants held for impersonation'. 11 December. At: https://www.hindustantimes.com/education/csbc-bihar-constable-recruitment-200-job-aspirants-held-for-impersonation/story-0NFt3xBaa5fHscUTTwrCyH.html (accessed 10 January 2021).

respondent, who had worked for around two years as a POCSO judge without any specific training, said: "there was no such formal training. Some one-day seminar type event was organised, and I attended that" (DPJ 3). On further questioning about how then he dealt with POCSO matters, he responded: "I am a Judge. I am trained. I have trained myself in that manner." Upon being asked how he formulated his approach towards a child witness, the judge said, "These were through hit and trial. This is how it goes." He stated that it continues to be the case that specific training is not given to the judges.

Similarly, another male judge said he did not receive any special training (DPJ 7). But he asserted that recording statements while in office over the last ten years has provided him with sufficient experience of recording testimonies of victims of any age-group. Defending the non-requirement of training, he further replied, "you know there is not much difference. You just have to treat the child as your own." How a judge treats a child witness as 'their own child' will be further discussed in chapters that follow. The only exception to the generally negative judicial attitudes to training was the comment of a Delhi male judge that: "A good amount of training is given to the POCSO judges. One training was given to me as well, which was on child psychology." (DPJ 6). His positive response might be because he became a POCSO judge recently: in March 2019.

One female judge from Delhi, who said she did not receive any training after her direct appointment to the Delhi HJS (higher judicial services)[168], described how she, along with two other newly appointed judges, trained themselves to handle POCSO matters:

> We quickly trained ourselves with the help of our neighbours, by asking them, they gave their judgments. All three of us came together, and we collected whatever materials was possible for us to collect and shared amongst ourselves. (DPJ 2)

The 'neighbours' here were not her judicial peers but her former students who had become judges. She revealed that there is a lack of interface for peer-level interaction in the lower judiciary. Stressing the importance of interpersonal relations in lower courts, she said she had learnt more than half of work from her stenographer who was far more experienced than her. She believed that special judicial training is a must for sensitisation and to know the roles of NGOs and the Delhi Commission of Women (DCW) in POCSO proceedings, and how judges can manage them or seek their assistance.

[168] Other than the route of promotion of judicial magistrates, lawyers with a minimum of seven years of practice experience (with or without teaching experience) can also be directly appointed as the Additional District Judges through the state HJS examination.

Another notable comment about self-training was made by a Delhi male judge, who said he had routine training but no specific training to deal with POCSO matters. He said that he had sensitised himself to work in a better manner in this Court (DPJ 1); when I asked how, he replied, by watching movies on sexual violence against children. He gave a brief description of a Bollywood movie, titled 'That Girl in Yellow Boots',[169] which he had watched and did not appear to question whether this was an appropriate and an adequate learning method to train oneself to deal with POCSO cases.

The data also suggests a lack of any formal training for Delhi Public prosecutors on the handling of POCSO matters. A male Delhi prosecutor said he did not receive any training and had self-acquired this expertise by watching Bollywood movies to understand the emotions that a child may go through in incest relationships (DPP 1). He had also watched the same movie which DPJ 1 had mentioned. And he too did not seem to question if this was an adequate approach to training. Reflecting on the state's failure, he stated that "you do get promotions, but no requisite training as you move up on the seniority ladder. It is neither for the Judges nor for the PPs, not even during the joining." The problem, he believed, is the state asking one person to handle multiple matters: "today you are dealing with a POCSO case, tomorrow with a murder case, and then a NDPS[170] case."

Similar opinions were echoed by other Delhi prosecutors, none of whom were trained for POCSO. One Delhi male prosecutor said, "it took me time to learn how to frame and ask questions to a child witness" (DPP 2). Being of career-defining value, he added, the questions of Public Prosecutors and Defence Counsels go on record, and if the POCSO case reaches the Supreme Court, then the Court also looks at the nature of questions put forth by the Public Prosecutor during the trial.

None of the four defence counsels reported having received formal POCSO training, but all supported the proposal of institutional training. One male defence counsel mentioned the issue of legal-aid counsels' training. Arguing that many accused persons in POCSO cases are poor and cannot afford lawyer by themselves, he said,

> These are high-stake matters. Even if you make a slight mistake, the guy will be convicted. Anyway, the Judges sit with preconceived notion. Legal aid counsel

[169] A 2011 fictional thriller movie of a British woman coming to India in search of her father. It is based on the theme of child sexual abuse, drug addiction, and incest with lead actress Kalki Koechlin and director Anurag Kashyap.
[170] Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985.

> should also be trained. It should not be given to anyone without any expertise…[but] to those who are experienced. (DDC 1)

Another male defence counsel from Delhi highlighted that there are classes and orientation from the side of the Bar, and those are voluntary, but helpful (DDC 2). He agreed that defence counsels, being a part of the entire system, should be trained by the Bar Councils. Flagging judicial training as important for the equal implementation of the law across metro and non-metro Indian cities, he said that judicial officers should be trained to exercise some caution in those cases where the minor girl's consent is present. He added that although the law cannot be diluted, its implementation could be taken care of, because it is a part of judges' discretionary power. He believed that such things can be taught during judicial training but presently they are being trained to be strict and prejudiced in favour of the police, investigating and prosecution agencies.

In contrast to most of the other stakeholders, the three DCW members I interviewed said they were properly trained on a regular basis by the DCW. A female member said that she was given medico-legal and counselling training to handle child witnesses before the 164[171] statement (given by a child before a magistrate) and during the trial (DCS 3). She further added that judges and psychiatrists come to train DCW members by sharing their experiences. A male lawyer working for an NGO claimed that Delhi POCSO judges are sensitised through training by the Delhi Judicial Academy, but this might not be the case with judges in other parts of India, particularly in the non-metro cities (DNGO).

While talking about what exactly should they be trained in, the Delhi respondents referred to four aspects: sensitisation, questioning the child witness during trial, use of the special procedures, and the role of NGO and DCW members in POCSO cases. They also underlined the difference between theoretical and practical training, arguing that the latter is more important but missing. To rectify this problem, they suggested that future judges should be made to sit in POCSO courts for a couple of weeks. Similarly, a new prosecutor should assist a senior one. But the barrier to such initiatives, they alleged, is the severe shortage of personnel.

[171] Section 164, CrPC: It talks about recording of a child witness's statement by a judicial magistrate first class in the pre-trial stage.

4.7 Conclusion

This chapter has introduced the readers to the hierarchy of the Indian courts and judiciary, particularly at the district level. I have discussed the kinds of cases triable by the lower criminal courts. Then, I explained the nature of special courts and judges responsible for handling POCSO cases. I have also considered the role of the lower judiciary in the POCSO cases. The chapter has presented quantitative data on the nature, number, and disposal of the POCSO cases as well as on the child victims and accused persons, with special emphasis on Bihar and Delhi.

The quantitative data suggest that a third of POCSO cases are not investigated by police in the year they are reported, thereby increasing the police caseload for the following year. The court disposal rate was found to be lower, as the POCSO courts completed the trial in only 10% of available cases, leading to an increased court caseload for the following year. Further, the data also show that while virtually all child victims are girls, the large majority of the accused are male. Around fifty percent of the victims in POCSO cases belong to the 16-18 years age group. In the majority of penetrative sexual assault cases across India as well as in Bihar and Delhi, the accused is a known person. In one out of ten such cases, the accused is a family member of the child victim. This data suggest that the POCSO courts are not operating effectively – the root causes of which I have sought to explore through my qualitative interviews with stakeholders, as will be reported upon over the chapters that follow.

The chapter has also talked about the status and nature of training given to the personnel responsible for implementation of the POCSO reforms, and my respondents' experiences of and perspectives on training. There was a clear difference between Bihar and Delhi in terms of information on training that was publicly accessible from their websites, where the former performed poorly, and the latter was well ahead.

Regarding the experiences of receiving training, the respondents can be divided into three groups. One group of respondents said that they received POCSO-related training and thought it to be sufficient. A second group claimed to have received the specific training but did not think it to be sufficient. And the third group comprised those did not receive any training on POCSO matters. The impact of the training or lack of it will be considered in the following empirical chapters.

Further, the data revealed that some judges have a firm belief in their intrinsic abilities and knowledge of court procedures. The findings also revealed the significance of courtroom interaction among different groups of court personnel as a learning tool. This chapter has also highlighted that two respondents believed watching a fictional Bollywood movie provided

adequate insight and knowledge for handling real-life issues in POCSO cases. There appears to have been little improvement in the provision of the stakeholders' POCSO-related special training over the years. Last year, the Patna High Court recommended special training for a special judge while setting aside his judgment awarding 10 years' rigorous imprisonment to an accused in a POCSO case.[172] It observed:

> A trial Judge especially a Judge having power to award death sentence must have correct knowledge of legal principles and zeal to its proper application while exercising the most onerous responsibility of taking decision on the life and liberty of person before him. Lack of knowledge of legal principles leads to miscarriage of justice and unnecessary harassment to the parties to the litigation. Bias and prejudices, conjectures and surmises and personal views contrary to the material on the record have no place in the court of law.[173]

The following chapter will discuss respondents' perceptions of the aims of the POCSO reforms and their understanding of access to justice.

[172] *Deepak Mahto v. State of Bihar* (2021) 3 BLJ 328, decided on 12-04-2021. The court further directed forwarding its judgment and the judgment of the POCSO special Judge to the director of the Bihar Judicial Academy to ensure proper academic training to the judicial officers to make them conversant with the correct legal proposition.
[173] Ibid, para 17.

Chapter 5

Understanding the Perceptions of the Implementors: Access to Justice and its Relation to the Aims of the POCSO Act

5.1 Introduction

The goal of this chapter is to examine perceptions of the POCSO Act (hereafter, the Act) among those who have responsibility for delivering the reforms. Of particular interest is how, if at all, these perceptions reflect concerns with access to justice. The influence of their professional background and location within criminal justice institutional structure on their responses will also be investigated. I discuss how respondents perceive the built environment of the POCSO courts as an important aspect of POCSO reforms. This chapter lays a foundation for an analysis of the respondents' perceptions of the operation of the Act in the forthcoming chapters.

There are two main sections in this chapter. It begins with a discussion of stakeholder perceptions of the aims of the POCSO reforms. This part is further divided to focus on the different aims articulated by the respondents. The second section assesses respondent understandings of access to justice. It has been structured to reflect the range of views on access to justice. The chapter concludes by reflecting on its significance for the following chapters.

I use both interview and observation data. The data and analysis in the chapter have been organised based on two aspects- their substantive content and the centrality of the role of stakeholders in the criminal justice system. So, usually I begin with the responses of the special POCSO judges, i.e., most senior district judiciary (hereinafter judge), followed by public prosecutors (hereinafter prosecutor), defence lawyers, judicial magistrates (hereinafter magistrate),[174] and then members of the court and police staff. This hierarchy of stakeholder groups reflects the traditional understanding of power and control they have over the outcomes in POCSO cases. However, in certain places the substantive content of the stakeholder responses supersedes the stakeholders' hierarchy as the organising principle. The analysis is also organised to reflect the two sites of study: Bihar and Delhi.

[174] This group of judges follow lawyers because in POCSO cases JMs have a significant but a comparatively smaller role to play. They record a child victim's statement in the pre-trial stage, which I discuss in the next chapter.

5.2 Stakeholder perceptions of the aims of the POCSO Act reforms: three themes

The overarching objectives of the Act, as perceived by the respondents, cluster around three themes.

The first theme is the expansion of criminal law to include various forms of child-adult and child-child sexual contacts, and the mechanisms of presumption of guilt, shift in the burden of proof, and enhancement of punishment.

The focus of the second theme is the capacity of the reforms to better protect child victims and their welfare within the criminal justice process through the introduction of child-friendly procedures and courtrooms. This includes the introduction of video links to facilitate child testimony during the trial.

The third theme is the goal of speedy trial and speedy justice.

5.2.1 Theme 1: Criminalisation and Punishment

The expansion of criminal law and the new punishments introduced by the POCSO reforms were the subject of many comments.

5.2.1.1 Criminalisation of child sexual violence and increase in age of consent

A male judge in Bihar explained the goal of criminalisation as follows:

> I think the reason behind the POCSO Act is the absence of law related to various kinds of sexual assaults and sexual enjoyment with malafide intent. These things were not covered in sections 376[175] or 354[176] [of IPC]. Also, those provisions were only for female [victims]. Even section 377 was inapplicable in such circumstances because it requires penetration. (BPJ 1)

Here, in addition to noting the expansion of the criminal law, the judge draws attention to the gender-centered nature of the IPC provisions. He argued that not only the rape law was restricted to peno-vaginal penetration, but even section 377 was restricted to penile-anal penetration. He also highlights the legal vacuum to penalise sexual acts against male child

[175] Section 376, IPC: Punishment for rape of a woman by a man under general criminal law.
[176] Section 354, IPC: Assault or criminal force to woman with intent to outrage her modesty.

victims, and went on to discuss how certain sexual acts were not recognised earlier as punishable by law:

> If someone has done fingering in the backside, then none of the earlier provisions [in the IPC] would have been applicable. Such acts could not be punished as there was no law. Likewise, when someone holds a child's penis or asks a child to hold his penis with bad intention, these things would now be covered under the POCSO Act. (BPJ 1)

He explained that the expansion of the criminal law was designed to address a related problem; the reluctance of state agencies like the police, to comprehend certain acts as criminal, "When people used to approach the police with such incidents then the police used to say, get lost from here, settle it amongst yourselves" (BPJ 1).

Another explanation for the reforms can be illustrated by a comment made by a male prosecutor from Bihar. He believed that the reforms were a response to a perceived rise in the sexual abuse of children (BPP 1). He said, "as the sex abuse of children were on a rise, this Act was brought to tackle that" (BPP 1). The enduring nature of this problem, he explained, was evidenced by the "many changes [that] were brought to the Act and to other criminal laws." This included reforms to the criminal law in 2013, 2018 and 2019.

A similar explanation came from another male prosecutor based in Bihar, who blamed the increase in lust among men, prompting them to rape their daughters and other children in the extended family, for rise in child sexual abuse (BPP 2). So, there is a distinction between the views that the Act was needed to address an existing problem that the law had previously failed to recognise, and that the Act was needed to address a new or growing problem.

Pointing out the expansion in the scope of criminal law to include various types of sexual acts, a male Bihar defence counsel said, "under the IPC the scope of such offences is limited. And this Act is vast in scope; it has many kinds of offences" (BDC 3). Stressing the Act's goal of encompassing child sexual violence victims of all gender, a male defence counsel in Bihar said that the Act defines all under the age of 18 years irrespective of being male, female, or transgender as a child (BDC 1). He said that increase in the age of consent from 16 to 18 is also one of the mechanisms to achieve the Act's aim of criminalisation of child sexual violence more effectively- a view also supported by a male court staff member in Bihar (BCS 2).

There was, however, ambivalence among Delhi respondents about the increase in the age of consent. Discussing the impact of age of consent, one male Delhi-based judge said, "There are sixteen-seventeen years old girls who are made victims despite being in consensual relations because of being minor and because their parents do not agree to the relationship" (DPJ 5).[177] Another male judge in Delhi pointed out that how this law has actually become a site of torture and violence for a group of children. He said it works against its very objective of protection of children from sexual offences. Highlighting the redrawing of legal boundary of consent from 16 to 18, he responded:

> A girl…just short of majority consensually goes away with a guy. She falls in the category of a child under the law. So, POCSO has taken away the concept of consent for such girls. (DPJ 6)

There was another problem flagged by a male judge in Delhi (DPJ 6). He discussed the impact of the increased age of consent on married couples where one or both partners are a minor. He referred to the Supreme Court's 2017 judgment[178] in which Justice Lokur removed the legal exemption given to men to have sexual intercourse with their minor wives who are above 15 years of age. The judge argued that now, in the case of marriage also, the POCSO Act would be applicable, as the 15 years age limit has been increased to 18 years. Such a criminalisation of sexual activity between husband and wife has been considered an excessive interference with marital relations by governments in the past. This judge further explained the problem:

> POCSO is gender-neutral and religion-neutral legislation. But child marriage is still rampant in the Indian society. It is not that much there within the Hindus, but among Muslims when female children attain puberty, they are made to get married. Under Muslim personal law, puberty is a criterion for marriage. (DPJ 6)

So, he argued that there is a conflict between the Act, which is a secular law, and personal law and social customary practices. He said this has not been taken care of by the legislature. It is also important to note that since 2012, when POCSO came into force, till the 2017 judicial decision, there was a clear conflict between IPC and POCSO provisions. Moreover, he said, "discretion has been taken away from courts," on this issue, as the boy who

[177] This is a reminder of Baxi's (2014) discussion of how law is used as a site of violence by parents in collusion with the state, when a girl chooses partner for herself outside her caste or religion.
[178] *Independent Thought v. Union of India*, 2017.

had a 'consensual' sexual relationship with, say, a 17-year-old girl must be punished. Actually, "the POCSO Act came out of knee-jerk reactions," he said, and again, "when there were more knee-jerk reactions, the punishment was enhanced" (DPJ 6).

5.2.1.2 Enhancement and Gradation of Punishment

On enhancement of punishment, one male Bihar judge said,

> …there is more penality, as punishment for sexual offences [against] below 12 years child has doubled. Earlier, IPC had minimum of seven years imprisonment and maximum of life imprisonment. Under POCSO Act, the minimum punishment now is twenty years. (BPJ 4)

One male prosecutor in Bihar highlighted the statutory gap within the IPC that treats child sexual violence victims on a par with adult victims, and said, "for all of them there was only one provision, which is 376, and punishment was the same" (BPP 2). A Bihar-based male defence counsel explained the gradation in punishment. He said, "for offences committed against girls less than 12 years,[179] less than 16 years,[180] less than 18 years,[181]…there are different punishments prescribed for these offences" (BDC 4). The lower the age of the child victim, the more the punishment.

These responses suggested a concern about the legal vacuum prior to POCSO and non-gradation of punishment based on age of sexual violence victims. Further, some respondents from Bihar and Delhi talked about the Act's gradation of punishment, which reflected the proximity between the accused and child victim.[182] A male prosecutor in Bihar discussed the element of trust and relation between the alleged accused and the child victim and connected it with state's response in terms of gradation of punishment:

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[179] Sections 376 AB and 376 DB have been inserted in the IPC through the Criminal Law (Amendment) Act 2018 prescribing *death* as one of the sentencing options for rape and gang rape respectively on children under 12 years of age.

[180] S. 4(2) has been inserted in the POCSO Act 2012 through the POCSO (Amendment) Act 2019. It prescribes a minimum of twenty years imprisonment term extended to imprisonment for life, which shall mean imprisonment for the remainder of natural life of the person who commits penetrative sexual assault on a child below 16 years of age.

[181] For committing penetrative sexual assault on a child between 16 and below 18 years of age, the minimum punishment has been enhanced from 7 years to 10 years of imprisonment through the POCSO (Amendment) Act 2019. See, S. 4(1), POCSO.

[182] The notion of home as a safe space has been challenged by feminists. Such a notion had led to the Indian societal norms of denial of child abuse within safe spaces and in the custody of parents and close relatives. Segal, talking about the late 20th century India, argues: "Parental child abuse that occurs within the boundaries of the family has failed to elicit a similar response from proponents of child welfare. It appears that this may well be because, in addition to the general acceptance of parental supremacy, little is known about the magnitude of the problem and the causes of parental child abuse" (Segal, 1992: 889).

> Earlier, whether it be the uncle, nephew, father, or any enemy, whosoever used to commit offence under 376, the punishment used to be the same…After the amendment of 376 IPC, if it is committed by a guardian, father, relative, master, police, doctor…then these people have been divided under a, b, c, d. (BPP 2)

Thus, the prosecutor highlighted the issue of gradation of punishment based on victim-perpetrator relationship, which includes a family member and a non-family member with a child victim's custody.

Generally, the penal expansion was perceived positively by the respondents. However, as a counterview, one male defence counsel in Bihar expressed concern about the insertion[183] of capital punishment in the Act (BDC 1). He argued, "Now capital punishment has been brought…in the POCSO Act. This is a very appreciable step. But with this the aim of POCSO Act cannot be achieved." This defence counsel believed death sentence is not the answer, and only a collective working of the prosecution, the defence, and the judiciary in a balanced manner can help achieve the aims of the Act.

In Delhi, a male judge, linking the age of the victim with the heinousness of offence and enhancement of punishment, said that as these offences are against children, they are heinous offences,[184] and hence, "severity of punishment was also required" (DPJ 1).

5.2.1.3 Presumption of Guilt and burden of proof

Some respondents also voiced presumption of guilt and shift in burden of proof as the mechanisms to achieve the Act's aims. There was no consensus among them with regard to these mechanisms being the Act's strengths in achieving its goals. A minority view was that the presumption of guilt puts the accused in a disadvantageous position. This view was held more by the Delhi respondents, defence counsels in particular.

A male judge from Bihar said, "It is fine that burden of proof has been shifted" (BPJ 2). Another Bihar male judge however said the shift in the burden of proof is the least successful aspect of the POCSO reforms (BPJ 4). A male Bihar defence counsel said that the shift in burden of proof should be done away with (BDC 3).

[183] S. 6(1) has been inserted in the POCSO Act 2012 through the POCSO (Amendment) Act 2019. It prescribes *death* as one of the sentencing options for aggravated penetrative sexual assault against a child. The minimum punishment has been enhanced from 10 years to 20 years of imprisonment.

[184] The POCSO Act has mentioned in its preamble that 'sexual exploitation and sexual abuse of children are heinous crimes.'

Talking about the relation between POCSO reforms and access to justice in the context of the provision of presumption of guilt, one Delhi male judge said: "Take him (the accused) straight to the butcher then"[185] (DPJ 5). He said that the right of the accused has been curtailed here as the usual principle of presumption of innocence and proving beyond reasonable doubt is not followed in POCSO cases.

A Delhi male prosecutor also underlined the accused's rights by contending, "there is curtailment of natural rights of accused person as formal witnesses are not called and there is summary procedure. However, an accused person also gets proper support" (DPP 4). One male defence counsel in Delhi came across as a rare voice to talk about the Act from the perspective of the rights of the accused. He shed light on the law's capacity and care towards accused persons:

> We are not saying that…it is not in the interest of an innocent accused who has been accused of this thing. The law also takes care of that innocent person who has been roped in as accused. But it is by and large made to be children-friendly, who has been victim of these unfortunate…sexual offences. (DDC 3)

Above, the respondent did hint at the superior objective of the Act being child friendly. But he also emphasised the Act's ability to protect the interests of an innocent accused.

A male lawyer who worked for a Delhi NGO also highlighted the issue of presumption of guilt and court practices for bail. He said, "There has been a changing of onus which has now been shifted to an accused. There are stringent bail conditions for the accused in POCSO cases" (DNGO). He further explained the socio-economic conditions of parties in POCSO cases and how they might influence the case. According to him the presumption of guilt and non-granting of bail are very important as in most POCSO cases the two parties are known to each other.

5.2.1.4 Insights into the Motivations behind the Act

While some respondents in Bihar considered the role of *Nithari* and *Nirbhaya* behind the passage and strengthening of the Act, some respondents of Delhi highlighted something else. They invoked the Indian Constitution and International Convention to be the push factors behind the Act's objectives of criminalisation and punishment. Discussing the aims of the Act, a male Bihar prosecutor said:

[185] Translated from Hindi: *Kasai ke paas le jao fir seedha*.

> You might remember the *Nithari*[186] scandal…around year 2006. It involved human skeleton…in which minor girls were made victims of lust, and their bodies were cut into pieces. So…it was a loathsome incident which shook the entire nation. (BPP 3)

This respondent suggested the *Nithari* incident as the push factor behind the passage of the Act. He argued that the Act was enacted by the government for the safety and security of the female children. He also shed light on the reason behind the second wave of change within the Act:

> At different time intervals, this law was amended as per the requirements. The second main change that took place…in the Criminal Act as well as the POCSO, was when the *Nirbhaya* [gangrape and homicide] incident [of 2012] occurred. After that incident, it was strengthened further. (BPP 3)

Showing his apprehension about the government's willingness to bring in death penalty even for the rape of children below 16 years, he hinted at the punitive approach employed by the Indian state to curb sexual violence against children. While discussing the factors behind enactment of the Act, a few respondents said that the Act is a product of the *Nirbhaya* case. However, the Act came prior to that incident. This shows their lack of their knowledge about the factors behind the Act's passage. That is why another male prosecutor from Bihar also said that it is not *Nirbhaya*, but the *Nithari* massacre, in which minor girls were killed and eaten up by perpetrators, was the case that accelerated the process of passage of the Act (BPP 5).

As discussed in the second chapter, it is important to mention here that the Indian Government conducted the survey on child abuse, including child sexual abuse, between 2005-2007. So, while the *Nithari* incident might not have laid the foundation of legislative change that culminated into the POCSO Act, it might have played a role in accelerating it. The respondents' comments also suggest a perception that the legal reform was informed by gender. Their understanding was that the enactment of the POCSO Act was motivated by the state's attempt to criminalise sexual acts primarily with female children.

A similar claim was made by one male defence counsel from Delhi. He noted, "POCSO took care of the child side of a female, or any child for that matter, majorly focusing on the

[186] The Noida serial murders (aka Nithari serial murders or *Nithari Kand*) occurred in the house of businessman Moninder Singh Pandher in Nithari village (state of Uttar Pradesh) in 2005 and 2006. Moninder Singh and his servant Surinder Koli, who aided him, were sentenced to death. Koli was awarded his tenth death sentence in the murder of a 14-year-old girl. See, https://timesofindia.indiatimes.com/city/ghaziabad/nithari-case-ghaziabad-cbi-court-awards-death-sentence-to-surinder-koli-his-tenth-conviction-so-far/articleshow/68235457.cms

female child" (DDC 4). Indeed, the vast majority of offences prosecuted under the Act involve female victims. However, the Act was given a gender-neutral character, likely reflecting the survey finding that children of both genders are victims of sexual violence.

A male judge in Delhi viewed the legal vacuum through the lens of age of the victim arguing that those who are below 18 years are a class apart (DPJ 1). Invoking the Indian Constitution that grants the Parliament the right to enact special laws for children, he argued that there was a need to have a different law for children. Also, "the offences against children could not be dealt in general like offences against adults," he said. He further argued, there is article 14 of the Indian Constitution that provides for reasonable classification based on age. So, this law for children, as a separate special statute, has been framed as per the Indian Constitution. The preamble to the Act also talks of state's power to make special provisions for children referring to article 15(3)[187] of the Indian Constitution.

A male defence lawyer in Delhi argued that the concern for children in the 21st century is due to international pressure (DDC 3). He contended that an international obligation of India to protect its children as a signatory to the UNCRC[188] was translated into its domestic legal reform:

> Child victim or the child accused, they were treated as the same as any ordinary accused or an ordinary victim of any age. But at some point, the United Nations Convention [UNCRC] came in when they wanted something to be exclusive for the child. The purpose was surely, the India's obligations, and India's concern about the child. (DDC 3)

The preamble to the Act corroborates his argument. It mentions that the Government of India has acceded on the 11th of December, 1992 to the UNCRC, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child. This defence counsel further argued that as the children in need of protection and in conflict with law were covered by the Juvenile Justice Act, the legal vacuum was for child victims, especially of sexual offences.

[187] It says, "nothing in this article shall prevent the State from making any special provision for women and children."
[188] United Nations Convention on the Rights of the Child, 1992.

5.2.2. Theme 2: Protection of Child Victims by Child-friendly Procedures and Courtrooms

The second theme around which the perceptions of the aims of the Act clustered is the protection of child victims' rights and welfare within the criminal justice process. This theme was less prominent in respondents' comments than that of criminalisation and punishment – emerging in comments of a little over half of Bihar respondents and around three-quarters of Delhi respondents. The respondents perceived this goal in two ways: first, to have child-friendly procedures, and second, to have child-friendly special courtrooms.

5.2.2.1 Child-friendly procedures

A male judge in Bihar said:

> The main aim of POCSO reforms is to respect the privacy and confidentiality of a…child and to give priority to the child's best interest and welfare during all the measures and processes of a judicial process in order to ensure the child's physical health and intellectual and social development. (BPJ 2)

It is important to note that this judge thought this was the 'main aim'. Evoking similar sentiments, a male defence counsel from Bihar said that the respect and dignity of child victims is protected under POCSO Act (BDC 4). One of the features he identified was the non-disclosure of the name and identity of the victim and their family in POCSO proceedings. He also added that the entire trial is held in camera, and that the child witness does not see the accused.

Another Bihar male defence counsel offered a more detailed account of child-friendly procedures highlighting their impact on submission of evidence and their impact at different stages of investigation and trial (BDC 1). A Bihar male prosecutor also discussed the amendment brought in to give more voice to a child victim in POCSO cases (BPP 1). Now, the POCSO court shall send a notice to a child victim to secure their presence at the time of hearing bail of a POCSO case accused, he added.[189]

[189] Such a child, however, must be below sixteen years of age. The law has given child victims some power to contribute to the bail decision of the accused to showcase that the child victim is not a 'mere' public witness in the case. A glance at the relevant provisions of the IPC and the Code of Criminal Procedure (CrPC), introduced in the year 2018, clearly supports his statements. S. 439 (1A), CrPC, says: The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of section 376 or section 376AB or section 376DA or section DB of IPC. S. 376 (3) and S. 376AB

A clerk of a Bihar POCSO court highlighted the aspect of non-disclosure of child victim's identity and said the onus is on the court to carry out the deposition of a child witness in correct manner (BCS 1). A male respondent working as a lawyer with an NGO in Bihar, which supports child victims of sexual abuse, explained the procedural reforms as focusing more attention on the child victims (BNGO). He said that the Act's main objective is to prevent the child victim's further victimisation. Because the victims are minors, he argued, their mind is not developed and so they should not be traumatised further.

A female member of the judiciary in Delhi – a newly appointed judge – referred to the importance of institutional custody, i.e., keeping child victims in care homes if the accused is from the family, as an important POCSO reform. She connected it with her experience of adjudicating POCSO cases, in which children became hostile, in the following manner:

> [Children] should be kept in seclusion from their families, so that they are not under the pressure. Whatever little experience I have, my feeling is that initially when a person reports a matter, be it of four years or fourteen years, they state the correct version. Then under the influence of the family, they turn hostile. So, it is better to keep them away from the accused as well as the family most of the time. (DPJ 2)

She talked about the safety and security of the child witnesses during the trial. She explained, "I have so far come across three cases where the witness has been supporting the case of prosecution in her examination-in-chief, but in her cross-examination she turned hostile." (DPJ 2). She also said that such incidents are more common in the incest cases. So, it appears that procedural reform was informed by the practice of child victims not being shielded from the influence of their families in cases where someone within the family is alleged to have committed the offence. Such procedural reform of care and protection of child victims, thus, has been mandated by the POCSO Rules.[190]

One male Delhi judge argued that both the parties in most POCSO cases belong to the poor strata and are usually from *Jhuggis*[191] in Delhi (DPJ 6). He emphasised the requirement to have child-friendly procedures as the child victims are already victimised because of this proximity with the accused. The aim of child-friendliness in criminal procedure could also be traced from the problems exposed by a female judge from Delhi. She recalled the story of a

deal respectively with the punishments for committal of rape on woman under 16 and under 12 years of age. S. 376DA and 376DB deal with punishments for gang rape on woman under 16 and under 12 years of age.

[190] Rule 4, 'Care and Protection', the POCSO Rules, 2012.

[191] A slum dwelling typically made of mud and corrugated iron shared by the members of a family.

female child victim. She described the child's pain and discomfort of narrating the incident of sexual violence in a regular courtroom:

> I remember one rape victim telling me this- "Ma'am, that offence was for five minutes, but I see it everywhere. When I stand in front of a mirror, I see it in the mirror. You know, it is very difficult to express." (DPJ 4)

Then she went further to recount the spectacle of a rape victim's deposition in a courtroom:

> When rape victims generally have to depose in…a general court, then they have to use the very words and also explain the actions. Everyone enjoys that as everyone finds it entertaining. All the staff members leave their work and listen to her. (DPJ 4)

Above, she explored the psychological dimensions of, and the sociological factors at play during, the rape trials of child victims. Underlining that the court staff members are usually male, her statements about what happens in a general courtroom during a child testimony reveal the intimate relation between law, gender, emotion, and trial experience of child rape victims.

One respondent – a male judge based in Delhi – however, seemed to have a different perception of the child-friendly procedures as an aim of the reforms (DPJ 5). He said in a disgruntled tone: "*Ye POCSO sab dikhawa hai*. This is all misuse of funds." He uses the Hindi term 'dikhawa' to convey that for him the reforms are a façade. He explained, "*Dukaandaari chala raha hai sab apna apna*." 'Dukaandari', i.e., running a shop, becomes the metaphor for trade. He critiqued the child-friendliness of the reforms by saying that different stakeholders are gaining personal benefits rather than helping the child victims:

> Four members have been kept in each POCSO court. There is one member from DCW, one from DLSA [District Legal Services Authority], one from a private NGO, and there is already a Public Prosecutor. I do not understand why there are so many stars. A child [witness] will be scared like this if eight people have surrounded him. But people are like, 'let's enjoy, after all this is a government facility.' (DPJ 5)

Emphasising child-friendliness in trial procedure as one of the objectives of the Act, one Delhi prosecutor said:

> It shows that child witnesses are different from adult witnesses. There should not be a court-like environment for them during their deposition. Rights of a child shall be protected. (DPP 4)

Another male Delhi defence counsel said, "India enacted this Act to make…a court, the officers involved in Court, the questions asked in Court, and the entire trial to be in the interest of the child" (DDC 3). This respondent perceived the nature of questions and manner of questioning a child witness during trial as having potential to impact child's interest and well-being. The Act, as per him, protects such interest.

The issue of proximity was also raised by a Delhi based female magistrate. She however seemed to be blaming the internet for both the child's awareness and the rise in sexual violence against children (DJM 1). She reinforced the need for protection of children in cases of incest. Speaking of the significance of procedural reforms in law to protect secondary victimisation of children in "every manner," she said, "it sends a message to the society that we are for children. This is one of the biggest laws that protects the children in every manner." She, thus, emphasised role of child-friendly procedures in protecting child's welfare, and also hinted at better engagement with children, giving prominence to procedural justice.

5.2.2.2 Child-friendly special courtrooms

Another focus of respondents' comments about child-friendliness was the Act's provision for child-friendly special courtrooms. Since plea-bargaining is not a significant part of the criminal justice process in India,[192] trials play a central role. As POCSO trial is conducted in special courts and a large amount of public money is being invested in their establishment across India, it is important to explore stakeholder perceptions about the built environment of these courts.

It is interesting to note that the Act mentions just one way of making the special courtroom child-friendly, which is by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court. The Act is silent in terms of changes to courtroom design. However, it does say that the Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the

[192] Plea bargaining is available only in those POCSO offences where the child victim is a boy of fourteen years or above. And even in these cases, plea bargaining would not be available if it is an offence of Penetrative Sexual Assault or Aggravated Penetrative Sexual Assault. See, section 265A, CrPC, 1973, and the POCSO Act. See also, Chapter 4.

evidence, while simultaneously ensuring that the accused is able to hear the statement of the child and communicate with his advocate.

For recording child testimony, the Act stipulates that the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.[193] Therefore, going by the understanding that legal architecture might tell an alternative story of trial (Mulcahy, 2011), it is pertinent to explore respondents' perceptions of the design and its implications for justice and complainants' experiences. Talking of the special POCSO court, one Bihar male judge said:

> Special court has to provide a home environment as a friendly court. Considering the young age of a child we have to create such an environment that he feels like home.[194] (BPJ 2)

A male Bihar based lawyer working for an NGO suggested that child-friendly courts have been built to ensure the courtroom avoids features that promote awe and fear in children interacting with the justice process (BNGO). The specialisation of court was also linked to the sensitive nature of evidence being given by child witnesses. A male *Peshkaar* (Reader) of one of the POCSO special courts in Bihar contended that such sensitive courts are needed in POCSO cases as the victims are children (BCS 2).

5.2.3 Theme 3: Speedy Trial and Speedy Justice

Speedy trial and justice were another recurring theme in stakeholder comments about the goals of POCSO reforms. However, it was less prominent than the other two themes. Around half of the respondents across the two states perceived this as one of the goals.

5.2.3.1 Specialisation of court and increase in their numbers

A male judge and a defence counsel in Bihar explained the legislative aim as to give quick relief to child victims (BPJ 4, BDC 4). Even the lawyer working with the NGO in Bihar contended that speedy trial is the main purpose of the Act (BNGO). The notion of speedy trial was articulated in various ways by respondents. Some respondents claimed that the

[193] S. 36 (2), POCSO Act.

[194] His understanding of equating child-friendliness to "home environment", though, seems to reinforce the traditional view that home is always a safe environment. The statistics of POCSO cases suggest that most of the POCSO offences are committed by known persons, including by family members.

specialisation of courts is a step towards speedy trial and speedy justice. They discussed this in the context of the problem of case backlogs within the criminal justice system.

One male Delhi judge said that with this Act, Additional Sessions Judges' (ASJ) Courts, i.e., POCSO special courts, have been made the first court of cognisance for POCSO matters (DPJ 6). It means that unlike in other criminal cases, where the first court is a Judicial Magistrate's court, a POCSO case would directly come to a POCSO special court. The aim of this reform is to cut the time taken in committal of a case by a magistrate's court to a special court. Another male judge in Delhi however was critical of this prioritisation of POCSO cases, and argued:

> This is like undue influence of just one offence. There are many other offences that are being committed in India, why should we ignore their importance. With this Act, we have been made the first court of cognisance for these matters. This court in a way is a Magistrate court. I believe this is not good because it becomes monotonous for any Judge. He will be stuck in a single Act. This should be distributed among all the [Additional Sessions] Judges. If all judges deal with POCSO matters, that would be beneficial for the judges. You will have more courts. Or else just imagine if I am just dealing with POCSO matters for couple of years, I surely won't be updated with what the new laws are [with regard to other criminal matters]. (DPJ 5)

The Act has assumed that bringing such cases directly before an ASJ, who is more experienced than a Judicial Magistrate, would help the court handle a child victim, and sensitive POCSO matters, more efficiently. One female Delhi respondent – a newly appointed judge – explained her understanding of the POCSO reforms in the context of speedy trial in the following manner: "it was to do with…those victims who are of tender age, they should get relief earlier…promptly (DPJ 2)." Here, she linked the goal of speedy trial to the tender age of the child victims of sexual violence. She also had an understanding of children as a special social class who need quicker justice. These comments suggest a connection between the theme of speedy justice to the preceding theme of protection of child victims' welfare. Moreover, the mandate of one special court in each Indian district by the Act was also linked to speedy trial. One male prosecutor in Delhi argued that because the special court has been established, there would be faster trials (DPP 1) – a view also held by another male Delhi based Defence Counsel (DDC 1).

5.2.3.2 Stringent bail provisions

Another dimension of speedy trial, as perceived by respondents, is related to the stricter bail provisions for a POCSO Accused, despite the 'bail a norm, jail an exception' principle. A prosecutor plays a vital role in bail decisions. One respondent – a male prosecutor in Bihar – talked about the changes to the bail provisions. Praising the law, he explained:

> There has been an amendment that in the case of rape, 376 (3) [of IPC] has been added…if the girl is less than 16 years, then there is an amendment in section 438 [of CrPC] that anticipatory bail would not be maintainable. The second thing is that if the accused is in custody, and if he files a regular bail, then a notice should be sent to the victim and the informant. And the Order will be made after hearing her. This is applicable in POCSO. (BPP 1)

Talking about these provisions, a male lawyer working with a Delhi-based NGO said, there is a clear attempt by the law to put a blanket restriction on the opportunities for the accused to delay the proceedings by fleeing (DNGO). It is to prevent the delay in trial and to stop an accused from influencing a child and other witnesses in a POCSO case, he further added. However, he did claim that judicial officers are sensitive to bail matters while having stringent bail conditions and that is why they always try to expedite the trial in POCSO cases. So, stringent bail provisions relate to the overarching aim of speedy justice by speeding up the trial process in two ways- one, by not giving any chance to the accused to flee, and two, by pressurizing the judicial officers to speed up the trial to avoid keeping an undertrial accused person in jail for a long time.

5.3 Stakeholder Understandings of Access to Justice

While deliberating on these goals of the Act the respondents also discussed how this Act and the reforms it envisions help improve accessibility to justice, particularly for children. Though some respondents developed this line of argument on their own, most of them were prompted by questions related to the meaning of access to justice and its relation to POCSO reforms. It is imperative to note here that the responses in this regard revolved around access to justice for child victims. The accused's accessibility to justice was not reflected upon in those responses. The reason could be perhaps the socio-political-historical background and design of the Act.

Stakeholder understandings of access to justice in relation to POCSO reforms can be grouped around the following three themes. First, access to general and special institutions, personnel, and procedures, including free and competent state legal aid. Second, speedy trial[195] and use of videoconferencing. And third, the attitude and behaviour of court personnel and their interpersonal relations in the courtroom.

5.3.1 Theme 1: Criminalisation and access to general and special adjudication institutions, personnel, and procedures

Suggesting a processual concept of access to justice, a male Bihar prosecutor said that access to justice means to improve the process to reach justice (BPP 5). Understanding access to justice generally as access to free state legal aid, one male Defence Counsel in Bihar linked the POCSO reforms and access to justice through filling of legal vacuum and specialisation of court and procedures:

> Access to Justice generally means you should have access to a lawyer if you are poor. In regard to POCSO, access to justice may be thought of in a way that earlier those kinds of acts which were not punishable by law have become punishable now. And you also have a special court to deal with such offences. (BDC 3)

Reflecting on the complexity and significance of the term access to justice one male magistrate from Bihar argued, "it is a small phrase, yet it has a big meaning" (BJM 3). Unpacking the term, he said:

> In order to understand it with respect to a Criminal Justice System, we need to understand that the judicial system is not the only part of it. There are advocates, Police, Victims, so all these parts need to work properly. Access to justice is possible only through a combination of infrastructure, resources, and technology. (BJM 3)

So, for him access to justice is not only about access to courts, but a harmonious functioning of all legal institutions involved in the criminal justice system. Moreover, he understands access to justice in terms of infrastructure, resources, and use of technology as well.

[195] It is pertinent to recall here that timely disposal of cases has already been held to be a part of the conception of access to justice by the Indian Supreme Court. See, *Hussainara Khatoon v. Home Secretary, State of Bihar* AIR 1979 SC 1369.

A female magistrate in Bihar thought of access to justice as having manifold dimensions. She articulated access to justice as free state legal aid to an accused in all conditions, "like every person who is under detention, or who is apprehending arrest…he should be given a legal representative" (BJM 1).

One male judge from Delhi, discussed problems for access to justice for the accused by talking about poor status of free state legal aid lawyers and economic status of accused:

> Most of the accused persons are poorly represented. Again, another issue is the poor legal aid lawyers- so this amounts to weak representation for the accused people. And in POCSO cases, the accused people are mostly labourers, truck or car drivers, daily wage earners and so on. (DPJ 6)

This judge's statement about the POCSO accused being from lower working class might be factually correct, but it also reflects the urban middle class bias about working class men being the primary suspects of crimes in urban societies. A male Delhi-based Defence Counsel also emphasised access to free State legal aid as access to justice. He was much concerned about the accused's right and said: "Accused also has its own right and should be defended by the best possible lawyer, and the best Defence should come from his side" (DDC 3).

While these respondents talked of free state legal aid for an accused, a female member of court staff in Delhi invoked the Indian Constitution to argue for free state legal aid for all. She said, "access to justice means everybody who is in need of legal assistance or lawyer or filing any complaint…should be provided a lawyer. That should reach them free of cost. That is as per Article 39" (DCS 2). She further emphasised that one may not be able to access a lawyer because of not only financial but social reasons too. She added that such legal aid means providing a competent lawyer to every Indian citizen.

This makes one think that when there is already a public prosecutor from the prosecution side, what is the need for free state legal aid for a child victim. This was answered by a male judge from Delhi, that this Act provides free lawyer to a child victim, unlike in other statutes (DPJ 3). So, there is a provision to offer a separate lawyer, other than a public prosecutor, who will represent the victim at the state's cost. This was also the view of a female Delhi-based magistrate who said that every woman in this country is entitled to free state legal aid irrespective of her financial status (DJM 1). She further added, "that gives an access to come and go to the court and give their grievances" (DJM 1).

A Delhi-based male defence counsel stressed the need for free state legal aid for accused in the higher courts (DDC 1). He contended that senior advocates in higher courts charge a very hefty amount of fees. Referring to POCSO cases, he said that if a poor person gets convicted from a trial court, then he must have the option to appeal to higher courts if he so desires.

Access to justice was also understood in terms of accessing courts physically. A Delhi-based male defence counsel argued that access to justice would be that justice is available to all at their doorsteps, at the nearest possible places (DDC 2). He looked at access to justice as reducing the distance between the parties' residence and the court complexes. Explaining his argument further in relation to the situation of accessibility to POCSO courts in Delhi, he explained:

> We had a situation wherein in Delhi, we had just one Tis Hazari court [complex] and a Patiala House court [complex] taking care of five crores [50 million] people. Now the number of courts has been increased to seven district courts [complexes], with two-three districts in each of them, so it becomes…some 14 to 15 district judges. Right! So, what helps is, people of North-West Delhi do not have to come to Tis Hazari to take justice. Justice is available in the Rohini court itself. People from Dwarka do not have to go to Tis Hazari, there is Dwarka court for that. So, justice has been provided at the door-steps. (DDC 2)

Two things come out of this response. One is the fluid population of Delhi, i.e., of migrants, when the respondent said 50 million. The static population of Delhi in 2019 has been estimated to be around 30 million. Second is the insufficient number of courts, i.e., only two district courts-complexes in the entire Delhi, to deal with eleven districts. The number was increased to seven district courts-complexes, with each taking care of one to three districts.[196] Each of these districts has POCSO courts ranging from one to four. So, by the end of 2019, there were 19 POCSO courts in Delhi. This problem was found in Patna too. Patna, despite being a big district and the capital city, had just one POCSO court for the 2.5 million population and even that one special court was not dealing exclusively with POCSO cases.

Understanding access to justice as access to general criminal justice institutions, one male defence counsel in Bihar perceived the establishment of police stations by the government

[196] Following are the seven courts-complexes in Delhi: Patiala House (New Delhi district), Tis Hazari (Central and West districts), Karkardooma (East, North-east, Shahdara districts), Rohini (North and North-west districts), Saket (South and South-east districts), Dwarka (South West district), Rouse Avenue (Central).

as a tool to give access to justice (BDC 4). He further said, "in *Lalita Kumari v. State of UP*,[197] the Supreme Court has categorically held that if at all any cognisable offence is reported to the Police, or to a Judge, they are duty bound to reduce it in writing, and that is what a FIR is known as." Another male defence counsel from Delhi also constructed access to justice as how easily a person can approach the police and judge (DDC 4). Here access to justice is construed as reducing the gap between occurrence of incident and reporting the incident. Access to justice was also looked at from the perspective of an increase in reporting that has led to a rise in numbers of POCSO cases (DPP 1).

While these responses are about a victim's ability to access police and court, a male Delhi-based judge was more focused on state's support for child witnesses to physically access courts. He said that access to justice can be understood as a complete arrangement by the state to bring a witness to court (DPJ 3). This Judge was particularly referring to child witnesses who have been provided with the facility of state vehicles when they have to come to the court for deposition in Delhi. There is provision for reimbursement if a child has travelled to the POCSO court on their own, he added. He further identified special POCSO procedure such as giving the entire copy of the Police Report free of cost to child victims, which earlier was only given to the accused, and provision for a support person for child victims, as access to justice. The availability of sufficient judicial personnel was also looked at as a dimension of access to justice (DCS 7).

5.3.2 Theme 2: Speedy trial and use of videoconferencing as access to justice

Speedy justice was termed as "correct justice" by a male Bihar prosecutor who said that quick delivery of justice is important for better access to justice (BPP 4). He connected 'speed' with memory and undue influence. He argued:

> As soon as an incident occurs, after that whosoever is a witness, everyone's memory is fresh. And whatever is there in the mind, if they put that forth here [in court] as soon as possible, then under those circumstances the person is delivered correct justice. (BPP 4)

This reminds me of the argument 'justice delayed is justice denied'. He further argued that if delay creeps in then the accused is able to influence the child victim and their family by

[197] Writ Petition (Criminal) No. 68 of 2008. Decided on 12 November, 2013.

temptation of money or bodily threat and due to this the child victim cannot secure justice correctly (BPP 4). Connecting speedy trial and public expectation to secure justice to access to justice, this prosecutor further argued that "if it is taking too long to conduct the trial…then the expectation to secure justice gets gradually reduced," which is most important when you think of access to justice.

He also argued that the use of videoconferencing in POCSO cases helps in accessing justice, even though his court did not have video-link infrastructure (BPP 4). He said, as child witnesses recognise the accused without any fear because of not physically facing them, it leads to higher conviction:

> Many child courts that have come up have video graphing facilities. Through videography, the accused is shown to the victim, so that the girl – the victim in the case – cannot see him. Because of that, more and more people are being punished. (BPP 4)

One young Bihar male magistrate, linked videoconferencing with speeding up the trial process as well as convenience and security of witnesses:

> If videoconferencing is available in all police stations, IO [Investigating Officer] can give evidence through videoconferencing. A lot of time for the IO and court would be saved. Also, if any victim is at any distant location for study purposes, videoconferencing can help in mitigating this problem. There are threats to witnesses in public transport systems, so that can also be taken care of through videoconferencing. (BJM 3)

Speedy trial was linked to access to justice even by Delhi respondents. One male defence counsel from Delhi said that access to justice means justice should be available quickly (DDC 2). A female member of court staff in Delhi also argued that access to justice is hampered when there is delay in sending summons or the trial or conclusion of a case (DCS 7). Another female Delhi court staff was critical of speedy justice and said, "it is not that I should get justice today itself, it takes time" (DCS 2).

Some respondents believed the specialisation of adjudication institutions and personnel under the Act with the goal of reducing the burdens on the court personnel and the courts as an aspect of speedy justice that would lead to access to justice. They also noted that increasing the number of such exclusive courts as per the Act's mandate, i.e., having at least one such court

in each district also helps speedy justice. Further, when the special judges and special prosecutors deal with only POCSO cases, they can devote more time and work efficiently. This, respondents argued, would help the parties access justice and the courts deliver justice in a better manner, both qualitatively and quantitatively.

Some respondents also focused on speedy trial from an infrastructural perspective. They argued that the availability of sufficient number of Forensic Science Laboratories helps in having medical reports before the courts in quick time. Others stressed the timely appearance of prosecution witnesses, in particular the doctors. These were other factors connected by them to speedy justice.

Though the respondents majorly focused on speedy trial, they also underlined the speeding up of the pre-trial stages. The removal of the legal requirement of committal of cases by a judicial magistrate to an additional sessions judge, and to have a POCSO court take a direct cognisance of a POCSO case, was considered an important element of speedy justice. Some respondents also argued that stricter law regarding restrictions on granting adjournments to the lawyers and fixation of time periods for different stages of a POCSO case also play a vital role in speeding up the justice delivery process in POCSO cases.

5.3.3 Theme 3: Gender, attitude & behaviour of court personnel, and their interpersonal relations as access to justice

Many respondents construed access to justice in terms of attitudinal and behavioural dimensions. They also argued that accessibility should be understood from the viewpoints of gender and interpersonal relations of court personnel. Suggesting the significance of the sensitivity of court personnel and its relation to access to justice, one male lawyer working for a Bihar-based NGO said:

> There should be sensitisation of Judge and Public Prosecutor every two-three month. And they should be made highly sensitive. Alright! Then, everything will be fine, or else nothing will remain fine. Normal or regular Judges who are there, and who oversee all cases, if they are posted and made POCSO Judges, then nothing [good] will happen. (BNGO)

A male Delhi-based judge also said that sensitivity issues are a major socio-legal problem (DPJ 6). Highlighting the role of interpersonal relations between court personnel in improving access to justice, one male prosecutor in Bihar said that “if all the channels work together then any

work will have pace. And even if one hand out of these becomes dormant, then it affects the case" (BPP 3).

One Delhi male defence counsel stressed reforming judicial attitude to improve access to justice for both the victims and accused (DDC 4). A female respondent, working as a member of Delhi Commission of Women (DCW) to support the child victims in POCSO cases, passionately linked her role and role of gender of special court personnel to access to justice (DCS 3). Talking of the Rape Crisis Cell (RCC) of the DCW, she argued, "you once remove the RCC from the picture. Do you think this is access to justice? To do these processes in such an emotional manner, this is access to justice" (DCS 3). She also said that the presiding officers sitting in all POCSO courts are generally females and so are the RCC members. Contending that there is a reason behind this, she claimed:

> A male may not be able to feel that. We…ladies go through that pain. So, she can understand what may have happened to her. And how much pain she must have been in. When the Hymen of a small child is broken, you just think how much pain she will have. A male cannot do the qualitative and quantitative analysis of that. He can think emotionally. But he cannot feel that thing. (DCS 3)

Highlighting the ambivalent relation between performing judicial authority, emotion, and depersonalisation, she said:

> Now, I understand that justice is not based on emotion. But it is based on evidence, and many other things. And emotion does not even influence. But it is also wrong to say that emotion does not influence. Zero emotion can never deliver justice. To deliver justice, you will have to understand how much pain the other person has suffered, and how much truth he is telling related to that suffering and how much he is fabricating. You will need to know this purification. You should have the ability to filter this out. (DCS 3)

These arguments about access to justice raise the issue of depersonalisation as part of conventional understanding of the adversarial judicial role (Bandes, 2009a). From this perspective, a judge in an adversarial justice system is expected to adjudicate a matter as an emotionless being who has divested oneself of human characteristics, and also the notion of empathy in judging appears to conflict with the ideal of the rule of law. But the above comments suggest that depersonalisation by court personnel, particularly a Judge, might not be the best

way to judge POCSO cases. This in turn may lead to inaccessibility to justice for both parties. And as there are more female child victims in POCSO cases, the emphasis has been to have more females as court personnel.

One female judge in Delhi pointed out an interesting relation between gender and compensation and how a gender-biased judicial attitude might have been a barrier for equal treatment of male child victims to female ones. She claimed, "there is a gender bias in granting compensation. Male children are given fifty thousand rupees while the females are given in lakhs [hundreds of thousands]" (DPJ 2). She considered the attitude of court personnel as the main problem with respect to access to justice. The value of interpersonal relation was revealed by a female member of the DCW (DCS 3). She described how she and the public prosecutor, in the court assigned to her, work together and this takes off much of the burden on the public prosecutor.

This section has given an idea of how different understandings of access to justice exist among different groups of stakeholders. The responses of respondents suggested the wide-ranging and complex understanding access to justice can have. This variety of perceptions of access to justice by respondents corroborates the various ways in which access to justice has been interpreted by scholars and policy-makers around the world. The analyses of responses suggest that there are overlaps between the respondent's perceptions of goals of the Act and their understandings of access to justice. It further suggests that the respondents could relate the reforms' objectives with access to justice. On explicitly asking whether there is any connection between the POCSO reforms and access to justice, one male judge from Bihar persuasively said: "There is a complete relation between POCSO reforms and access to justice. Justice can be achieved with ease only by POCSO reforms" (BPJ 2).

Tracing the stakeholder understandings of access to justice is important at this stage and before entering the analyses of operation of the POCSO reforms in the following chapters. It has helped me in assessing whether and how the perceptions of respondents of the Act's aims, discussed in the previous section, are shaped by factors associated with access to justice.

5.4 Conclusion

This chapter has explored the respondents' perceptions of the aims of the POCSO reforms, their understandings of access to justice, and the relation between them. It has further explored if and how those perceptions are shaped by the factors associated with access to justice. The key findings are that the substantive legal reforms of criminalisation and

punishment by the Act are given more weight than the procedural reforms by the respondents across the whole sample. However, there appears to be a contrast between them. On one hand, some respondents assume that the problem of sexual offences against children is much worse than it was in the past. They meant that the law has to catch up with this reality. On the other hand, there are some respondents who feel that the law had always failed to grapple with the existing reality of sexual violence against children.

Another important finding is that the weight given to the procedural reforms by the Delhi respondents is higher than those by the Bihar respondents. These findings raise the question as to why is there such a difference between locations. The findings on training in the previous chapter suggest that there is a correlation between the way respondents perceive procedural changes as significant aspect of POCSO reforms and their location. We will find out if this is the case in detail in the following chapters.

Moreover, I found that female respondents emphasised more the psychological and emotional dimensions of child victims, particularly female children. However, given the small size of my sample, I cannot reach any firm conclusion about gender difference in attitudes. There was also an instance of a female judge stressing on male child's biased treatment in terms of compensation. There has been considerable discussion regarding whether women approach the judicial role and perform authority differently to their male counterparts (Roach Anleu & Mack, 2017). If so, might women value certain skills more than men and might the policy of having more women court personnel lead to further improvement in access to justice. Whether these factors influence the process and outcome in POCSO cases would also be studied in the following chapters dealing with respondents' perceptions of implementation of the POCSO reforms.

The respondents highlighted the procedural changes with regard to the support system offered to child victims. The language, tone, and behaviour of court personnel with child witnesses was also considered to be vital to the participation of child victims. Child-friendly procedures and courtrooms were believed to bring parity between the child victim and adult accused. Special emphasis was placed on the use of video conferencing and the questioning procedure during trial. The respondents emphasised that the nature of questions and the manner of questioning has contributed to a great extent in helping children depose freely.

They claimed that even the presumption of guilt provision is to improve access to justice. However, there were conflicts of opinions, i.e., whether the access to justice of one party – child victim – is being improved at the risk of having a detrimental effect on access to justice for the other party- the accused.

As shown in the first section, nearly all respondents believed that the substantive law reform, i.e., criminalisation, was very much needed and has helped the child victims access justice. Most respondents also seemed to believe that the enhancement and gradation of punishment was also needed to have a deterrent effect on perpetrators of such crime and to give a strong message to society that the state cares for its children. With regard to the procedural reforms, the respondents could draw the relation between perceptions of aims of the Act and their understanding of access to justice.

The following chapters, building on this chapter, will examine the respondents' perception of the operation of the POCSO reforms in Bihar and Delhi and analyse the predicaments created by the perceptions explored in this chapter of the Act's objectives, understandings of access to justice, and their relationship with each other. I will examine the operation of the reforms through the analytical tools of procedural justice and therapeutic jurisprudence.

Chapter 6

Stakeholder experiences and perceptions of the operation of the POCSO Reforms during the Pre-trial stage of POCSO Cases: From the perspective of Victims' Access to Justice

6.1 Introduction

The previous chapter presented stakeholders' perceptions of the POCSO reforms, their understanding of access to justice, and the relationship between the two. This chapter explores experiences and perceptions of the operation of the reforms in the pre-trial stage of the POCSO cases from the victim's perspective. The pre-trial stage includes the reporting of complaint of sexual offence against a child, registration of the complaint in the form of an FIR (First Information Report) by the Police under the POCSO Act, the medical examination of the child victim (and the accused if need be), the arrest and bail of the accused, the S. 164 statement of the child victim to the Judicial Magistrate, and cognizance of the POCSO case by a special POCSO court.

Felstiner et al. argue that "the sociology of law should pay more attention to the early stages of disputes and to the factors that determine whether naming, blaming, and claiming will occur" (1980: 636). They further contend that "attention to naming, blaming, and claiming permits a more critical look at…efforts to improve 'access to justice'" (Felstiner et al., 1980: 636). In this context, I identify five elements in the pre-trial stage, which generally, but not necessarily, occur in a chronological manner in the criminal process of POCSO cases. The objective behind this is to explain different elements of the pre-trial stage that my stakeholders commented on and to explore their perceptions of the POCSO reforms' efforts to improve access to justice with regard to those elements.

The first element is 'naming and blaming,' i.e., the processes by which injurious experiences are – or are not – perceived (naming), do or do not become grievances (blaming) (Felstiner et al., 1980), and subsequently transform into sexual offences against children. In other words, it means if, and how, a child would understand an act against themselves as a sexual offence,[198] and includes how an adult would treat that act after a child discloses the same

[198] Green (2020) divides statutory rape against a child into two separate offenses: "sexual assault involving exploitative sex with a juvenile" (a serious *malum in se* felony), and "sexual misconduct involving (non-exploitative) sex with a juvenile" (a less serious *malum prohibitum* offense). Such a scheme, he argues, 'would

to them. The second element is 'claiming,' i.e., how the grievances transform ultimately into disputes, which occurs "when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy" (Felstiner et al., 1980: 635). This implies reporting an alleged child sexual violence incident to the state agencies, particularly the police, which then sets the criminal process into motion. The third element is the recording of the complaint by the police at Police Stations or other juridical sites.

The fourth element is the medical examination of the child victim after the recording of complaint. The medical examination of the child victim is conducted by a doctor and the samples are sent to the Forensic Science Laboratory (FSL) for expert opinion. In this part, I discuss stakeholder perceptions of the medico-legal procedures, their significance, and their relationship with socio-economic-cultural forces. I also talk about their perceptions about the state of public infrastructures such as doctors, hospitals, and Forensic Science Laboratories (FSLs) and their respective roles in pre-trial stage. The fifth element is the recording of the child victim's statement by a Judicial Magistrate. This section will be based on stakeholder perceptions of the linguistic procedures adopted by Judicial Magistrates in the wake of POCSO reforms to record the statement of child victims.

The chapter will also consider the barriers to justice identified by respondents in relation to each of the five elements of pre-trial stage; and their perceptions of the impact of support services and child-friendly public infrastructure. This includes, for instance, government vehicles to facilitate child victims' journey to and from the POCSO court, and the special room dedicated to record the child's statement.

6.2 1st element: Perceiving an act as a sexual offence under the POCSO Act and the associated barriers

Several respondents from both locations identified two problems associated with improving access to justice for child victims at this initial stage. The first problem, especially regarding small children, they said, is their inability to perceive an act as an illegal sexual act. They talked about educating children about inappropriate sexual acts and the inhibition that exists at familial level to impart sex education to girls. Once a child understands an act as a wrongful one, the second problem they acknowledged is disclosure of that incident to someone,

preserve the instrumental benefits of broad offense definitions, satisfy the requirements of (negative) legal moralism, and at the same time maintain respect for the values of fair labeling and proportionality in punishment' (Green, 2020: 418).

specifically an adult, who also needs to see it as a wrongful sexual act and thus a criminal offence.

One Bihar male defence counsel talked about different roles that gender plays with regard to male and female children in the context of sex education generally and within a family in particular:

> Unfortunately, in our educational system…even male children should be taught good touch - bad touch, good eyes - bad eyes, but male children are not taught, and the parents keep far more distance from their female children in this regard. (BDC 1)

He further said, parents, even literate ones, are still very reluctant to talk to their children about these matters. To overcome these problems, he said that children are being taught good touch - bad touch, good eyes - bad eyes, good activity - bad activity in schools. He believed that such education should begin from home, and that "the parents need to be more vigilant in the house itself".[199] He also emphasised the importance of parents keeping an eye on children and their company and on regularly interacting with them.[200] Further, two Bihar male judges (BPJs 2 & 3) and two male prosecutors (BPPs 3 & 4) also talked about the need to have more public and societal awareness about POCSO offences as a breach of trust and technique of power, so that a child who has been sexually violated could complaint to their guardian.

Bihar respondents suggested that such awareness is not extending far, particularly to the remote areas. Echoing concern about children's awareness, another Bihar female magistrate said that children of certain age groups in remote areas can be educated about good touch- bad touch through videoconferencing (BJM 1). It was not clear from their responses if such education was imparted in all Bihar schools or not.[201]

In Delhi, the problem of awareness was highlighted by one female judge, "accessibility to justice would mean legal awareness of children and I do not think there is awareness" (DPJ 2). However, the respondents' accounts suggested that the response to such problem was better in Delhi than in Bihar. Talking about how such an awareness has been brought to some children

[199] Baxi (2021) talks about a 2014 case of a 17-year-old girl from Bihar being raped by her uncle in the name of curing her when she fell ill, which she did not disclose to her mother as her family trusted him. Only when he attempted to rape her again, she cut his penis off and reported the matter to the village council and the police.
[200] In 2017, a case of a minor girl being sexually abused by a godman for seven years came up, showing exploitation by his position of authority (P. Baxi, 2021).
[201] Bihar does not have a sex education programmes in schools. The Bihar government schools follow textbooks published by the Bihar State Textbook Publishing Corporation Ltd., which neither have a chapter on sex education nor on the POCSO law, but only on sexual body parts for class 7 and above, i.e., children above 12 years.

by the state, a female judge from Delhi said that the DSLSA (Delhi State Legal Services Authority) asked the POCSO special judges to visit schools and teach for one hour on a particular theme pre-fixed by the DSLSA (DPJ 2). Highlighting that people from poor strata send their children to schools for food and uniform, she argued that if the judges visit more often, they would be able to educate those poor small children more about POCSO. Reflecting on an incident, she explained how such education helped a girl child share a sexual violence incident with her school principal:

> There was a girl, and I asked her how she knew that there was some wrong committed against her. She said that it was written on the first page of her NCERT Maths book. That is how she got educated and talked about the incident to the principal. (DPJ 2)

But she also pointed out the structural problem of illiteracy that plagues the poor strata of the Indian society and thus impedes such awareness:

> the parents of female children who are usually the victims in POCSO cases are mostly uneducated. How much a small child would read her book? In the Maths book, she will read Maths if she reads. So, if we can educate them and if we can reach out to poor people, hold some awareness camps, that would be beneficial. (DPJ 2)

This female judge said that it is written in the [NCERT] book that "if something like this is happening with you then let your principal know. And then the principal must report about the incident. NCERT[202] books have it [the message] on the top of their first page."[203]

So, although the POCSO Act is silent about how to educate children to comprehend a sexually violent act and then to talk about the incident further, there are tools in practice to do so. The state has taken initiatives to tackle these problems, but it is not in place in Bihar as much as in Delhi. Upon investigation, I found the following illustrative page in a NCERT book.

[202] The NCERT (National Council of Educational Research & Training) is an autonomous organisation set up in 1961 by the Government of India to assist and advise the Central and State Governments on policies and programmes for qualitative improvement in school education.

[203] My research suggested that Delhi began using the NCERT books for its government schools since 2009, which have information on unsafe touch for children. NCERT books are primarily used by private schools. Different states in India have different books for their government schools based on the guidelines of their state education board. See, Indian Express (2009) 'From next session, NCERT books to be used in Delhi govt schools'. 23 February. At: https://indianexpress.com/article/cities/delhi/from-next-session-ncert-books-to-be-used-in-delhi-govt-schools/ (accessed 22 December 2020).

Being entirely in English, one wonders how could this help children who are not well versed in English language.

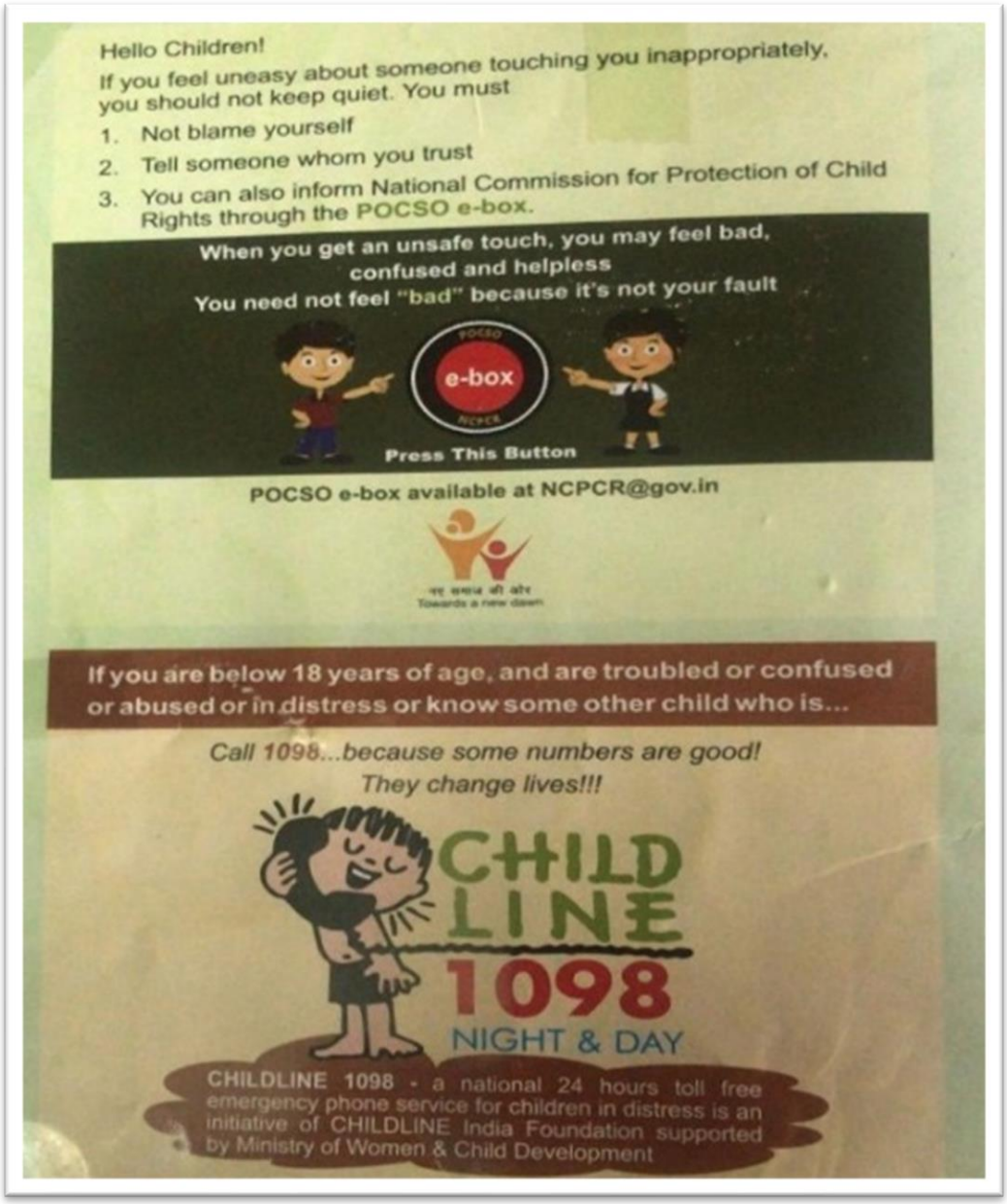

Figure 6.1: POCSO information page in a NCERT Book

The issue of educating children and the notion of stigma and shame attached to sexual violence was brought up by another female Delhi judge (DPJ 4). She said that now children are taught good touch and bad touch in schools and are told to report if such an incident happens. However, she mentioned that there is an attitudinal problem in reporting an alleged POCSO incident: "the principals of schools do not come forward because they think why they would get into this mess". But, she added, now all these people are held liable and punished

under the Act because of a mandatory reporting provision. She further contended that in incest cases where the victim's family is poor, there are survival issues to contest with, and hence the mother will not speak about such incidents thinking that her husband will go to jail and there would be no one to run the house afterwards.

One Delhi female magistrate said that the problem of awareness has also been tackled through parental interaction with children (DJM 1). She cited a real incident where a mother, while changing her child's clothes, asked, "what did you do in school today?" The child responded, "the driver *bhaiya* forcefully held me and kissed despite my resistance," and the mother then got a complaint recorded. She further said that there have been cases when mothers got to know about sexually wrongful incidents after finding blood in the stool or semen in pant or around genitals.

A female Delhi prosecutor also affirmed that children are being taught about 'good touch bad touch' with the help of educational videos[204] under a government scheme that demands schools to mandatorily teach it (DPP 2). Another male Delhi prosecutor said that there are classes and cultural programs on good touch and bad touch for children in schools by NGOs, which has helped child victims in sharing sexual violence incidents with their teachers (DPP 1). A female Delhi respondent working as a DCW member corroborated such practice (DCS 5). Another female DCW staff member looked at the limited avenues for children to share their trauma from a gender perspective (DCS 3). She said that the patriarchal social construct of an act of sexual violence as a social taboo and as a wrong committed by the victim leads female child victims to not share it with a male when in pain.

The data suggests that the social-cultural perceptions continue to be such that the familial notions of honour and dignity reside in the feminine body, including that of a child. For female child victims, such notions also inhere in the ideal of pre-marital virginity, and its loss, irrespective of being consensual or not, is seen as familial shame and dishonour. Educating children about sexual acts thus seems to pose a dilemma of striking a balance between innocence and adultification[205]. It is also important to highlight if teaching good touch-bad touch is sufficient in a caste society like India, where one fifth of children belong to the Scheduled Castes (Dalits) – former 'untouchable' community, and Scheduled Tribes

[204] There are short films on 'good touch-bad touch' and CSV, and their myths uploaded on YouTube by various private schools and NGOs of the Delhi region as well as by the nodal agency of the Union Ministry of Women and Child Development- CHILDLINEIndia.

[205] Erika Christakis, The Atlantic (2016) 'How the Reversal of Adult and Child Roles Is Hurting Kids'. 10 March. At: https://www.theatlantic.com/education/archive/2016/03/how-the-reversal-of-adult-and-child-roles-is-hurting-kids/473076/ (accessed 12 October 2021).

(Adivasis), and where Dalit girls are more vulnerable to sexual assault by upper caste men.[206]

Thus, it is pertinent to note that for a child victim, in comparison to an adult one, the process to speak out and report is an exercise to confront adult normativity of language, kinship, and social relations, including caste relations. The challenges for a child victim, hence, multiply. One challenge is their inability to perceive that the act committed was sexually violent in nature rather than an act of love and care, as especially young children lack the adult vocabulary of actions of sexual violation. Even the law itself struggles to define a wrongful sexual act. And once they understand, the problem may be further compounded because of their inability to process the resultant trauma (Hesford, 1999; Jain et al., 1992).

The data also suggests that being minors, children, particularly of very young age, rely more on their smaller social circle of parents, mainly mothers, and school teachers, to share their anxieties and everyday experiences. So, if the act has been committed by someone from that social circle, especially by parents, the avenues to speak out are severely reduced. They are further restricted if this perpetrator is the sole breadwinner of the family. These aspects are reflected in Felstiner et al.'s arguments that "transformations reflect social structural variables, as well as personality traits. People do-or do not- perceive an experience as an injury, blame someone else…because of their social position as well as their individual characteristics" (1980: 636).

6.3 2nd element: Reporting the incident to police and the associated barriers

6.3.1 POCSO reforms and the special procedures for reporting child sexual offences

Child victims are largely dependent on their parents or guardians for support to report an incident. This requires a legal support system, which can tackle social barriers to reporting. As one male Bihar judge, talking about how members of family and public usually react when a child victim's parents or guardians think of reporting, said, "People scare them that if they report the offence in Police Station then they will be defamed within the family and society and there will be difficulty in marrying the [girl] child victim" (BPJ 2).

[206] Human Rights Watch Report (1999) 'The Context of Caste Violence - Broken People: Caste Violence Against India's "Untouchables"'. At: https://www.hrw.org/reports/1999/india/India994-04.htm (accessed 20 November 2020).

Reporting may be encouraged by a congenial juridical environment and presence of empathetic personnel, and the Act has prescribed special procedures for reporting offences, thus setting up the requirement to assist.[207] It says that any person (including the child) who has an apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed shall provide such information to the Special Juvenile Police Unit (SJPU) or the local police.[208] Such report shall be ascribed an entry number and recorded in writing, be read over to the informant, and shall be entered in a book kept by the Police Unit.[209]

The Act states that if the police are satisfied that the child against whom an offence has been committed is in need of care and protection, then, after recording the reasons in writing, they shall make immediate arrangement to provide such care and protection. This includes admitting the child into shelter home[210] or to the nearest hospital within twenty-four hours of the report.[211] Further, the police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee (CWC) and the Special Court, or where no Special Court has been designated, to the Court of Session, including an evaluation of the needs of the child for care and protection and the steps they took in this regard.[212]

The Act also says that if the report is given by a child, it should be recorded in simple language so that the child understands the contents. Any person who fails to report an offence or to record such offence, the Act mandates, shall be punished with imprisonment which may extend to six months or with a fine or with both.[213] A child however has been exempted from this provision of punishment. The Act further says, any person who makes false complaint or provides false information against any person solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment which may extend to six months or with fine or with both.[214] Again, a child has been exempted from this provision.[215] Further, any adult person who makes a false complaint or provides false information against a child, knowing it to be false, thereby victimising such child, shall be punished with imprisonment

[207] Chapter 5, sections 19-23, POCSO.
[208] Section 19(1), POCSO.
[209] Section 19(2), POCSO.
[210] It comes within the definition of a "child care institution", which means Children Home, open shelter, observation home, special home, place of safety, Specialised Adoption Agency and a fit facility recognised under the Act for providing care and protection to children, who are in need of such services. See, section 2(21), The Juvenile Justice (Care and Protection of Children) Act, 2015.
[211] Section 19(5), POCSO.
[212] Section 19(6), POCSO.
[213] Section 21, POCSO.
[214] Section 22(1), POCSO.
[215] Section 22(2), POCSO.

which may extend to one year or with fine or with both.[216] In the sub-sections below, I explore how these POCSO reforms are operating on ground.

6.3.2 Operation of reforms brought in the reporting procedures

Although there is a 24-hours toll free mobile number mentioned in children's books to report a complaint, research participants identified multiple obstacles to its use. In Bihar, there was a consensus among respondents that the state government has failed to put such information in the State Board's books to create awareness, as the government schools here do not use NCERT books. They further said that young children lack access to phones, particularly those from poor backgrounds. So, the most natural option for such a child is to tell someone they trust about the incident. That person is under a legal obligation to report it and a failure to do so is itself a criminal offence. Thus, the Act has criminalised non-reporting. This sub-section analyses interviewee perceptions and experiences of how these reforms operate and the reasons why they may fail.

A Bihar male judge talked about proximity between a child victim and accused as one of the main reasons for not reporting,

> I think it is because the offenders in most cases are relatives and there is fear of insult or defamation in the family and society. There is also fear of not getting married. There is a threat from offenders. The parties also compromise[217] many times. (BPJ 2)

A Bihar male prosecutor said, "whatever cases are filed under POCSO, they are of near relatives. Be it paternal cousin, maternal cousin, brother-in-law, maternal uncle, father, grandfather, the cases involve these people" (BPP 1). Another Bihar male prosecutor also said, "we were told in the training that more than 75% incidents of sexual assault take place within one's own family… so there are more than 75% incidents where girls, female children, have to face such incidents" (BPP 3).

[216] Section 22(3), POCSO.

[217] It is an extra-legal settlement between parties, which involves the lawyers and even the judges, where a victim or complainant is either coerced or convinced through various means to either not report the incident to the police, or withdraw the case, or become hostile during the trial. This usually happens due to the power imbalance between the parties produced by caste, class, gender, sexuality or fear of the social stigma around rape. See also, Baxi (2014), 327-328, where she, quoting Philips (1998), equates compromise to 'spoken law' that is separate from and cannot be found in 'written law'.

In Bihar, the impediment to reporting seemed to be the social and familial fear produced by the mere thought of disclosure and reporting of such incidents. As one male defence counsel from Bihar said:

> Because of the fear from the people and society […] when these kinds of cases occur, then I feel that hundreds of cases are not even reported. Either the parents of the victim hide it, or the victim who has been assaulted hides it. Only that person comes forward, who has got some backing. (BDC 2)

The 'backing' issue raised by the Bihar defence counsel was also raised by a female Delhi judge when she argued that reporting such incidents depend on "how much a family resists, or how much a family supports" (DPJ 2). Another Delhi female judge highlighted the homemaker women's concern of her and her family's survival. She talked about the situation where the husband is both sole bread-winner and the perpetrator of sexual violence against his child (DPJ 4):

> A father is raping his daughter since many years. But no one is complaining about it. Now, children are taught good touch and bad touch in schools. But still, you have many problems. Mother will not speak about such incidents, thinking that my husband will go to jail, and who will run the house afterwards if he goes to jail. (DPJ 4)

Many Delhi respondents narrated cases where relatives and other authorities were prosecuted for sexual violence. In these cases, they said, the police heard about the allegations either through the child victim's mother or through the hospital[218] who are legally bound to inform police about the incident.

Further, one Delhi court's male member staff said that sometimes girls in courts accuse their mothers of not taking action against their fathers who sexually violated them, which amounts to non-reporting and a POCSO offence (DCS 4). There were some cases referred to by the Delhi respondents in which a mother was made co-accused in incest cases. They were critical of this provision and argued that such instances discount the fear of familial abuse,

[218] An amendment through Criminal Law Amendment 2013 & 2018 added and amended section 357C. It talks about 'Treatment of victims.' It says, all hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under sections 326A, 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or section 376E of the Indian Penal Code (45 of 1860), and *shall immediately inform the police of such incident*.

bodily harm, and such mothers' very question of survival that inhibits them from doing so. A female Delhi judge raised her concern that rather than employing penality, the criminal process needs to facilitate women who muster courage to report to police through speedy trial and speedy disposal (DPJ 2). She underscored the issue of penalisation of moral responsibility and showed her disapproval of punishing non-reporting of sexual offence against children by their mothers.

She also identified delay in processing POCSO cases leading to child victim's discontent and a barrier to reporting:

> If a girl, who actually reports her matter to the court, to the police, or to the principal, and when she realises that it's been five-six years and nothing has happened and these goons are roaming around me, and they have made my life hell, then how much trust they [girls] would repose in the court, or judicial machinery, or in police machinery. (DPJ 2)

This statement reveals the delay as a reporting barrier despite the legislation specifying the time within which a POCSO matter should be addressed. It further highlights that delay in disposal of a case and lack of relief can impact a child's confidence and trust in the legal institutions and might put them off reporting.

One male Delhi staff member also added that there are POCSO cases in which school Principals and vice-chairman are implicated as they did not take any action upon being informed by a child victim (DCS 4). On the question of how a court gets to know about whether a child shared an incident with an adult who failed to report the same, he explained that:

> She [child victim] will say this [that she shared the incident with school Principal] in 164 [statement before a judicial magistrate][219] and in 161 [statement before the investigating officer][220]. So, the IO [investigating officer] would be compelled to make that person [the Principal] a party [co-accused]. And if the IO does not make him a party, then the Court will ask the IO 'Why did not you do this work? Make him accused.' So, the IO has to do it. (DCS 4)

[219] See, note 171.
[220] S. 161, CrPC, talks about recording of a child witness's statement by a police officer in the pre-trial stage.

It is important to note here that there is sanction even for the police if they fail to register a POCSO case.[221] This policy reform is informed by the fact that the police refuse to register cases without attracting any penal sanction.

Talking about the modes of reporting, a female police officer from Delhi explained to me that there are multiple ways for a child victim's statement to reach the [Delhi] Police:

> First is a call on 100. Second is if a complainant comes walking to a Police Station after the incident and then files a complaint. Third is if someone comes after a few days or months of the incident and files a complaint. And another one is when someone directly reaches a hospital after the incident for a medical test and a call to Police is made from the hospital.[222] (DCS 6)

One Delhi male prosecutor contended that there is an indirect compulsion on the police to register all POCSO cases as they are "not supposed to go in depth, whether it's a false complaint or a genuine complaint" (DPP 3). "Even if they [police] are aware that it is a false case, they register it and they file a Charge-sheet," he further added. The data from the NCRB suggests that in Bihar and Delhi the number of cases brought against people for non-reporting is negligible.[223]

Further, a female member of the DCW pointed out how a lack of trust in, and fear of, police is being offset through a Victim Protection Program initiated by the Delhi Government in which DCW plays a very important role (DCS 3). The members of the Crisis-Intervention-Centre (CIC) wing of DCW, she said, promptly form a link as soon as they receive information of child sexual violence from the police station or the hospital through a mobile helpline number for women – 181. Their job is to provide trauma counselling and other support services to child victims during reporting and medical examination.[224] Thus, the reforms regarding reporting have played out on the ground in multiple ways.

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[221] Section 21, POCSO.

[222] See, Press Trust of India (2014) 'Fresh guidelines outlined on medical care to rape victims'. March 4. At: https://indianexpress.com/article/india/india-others/fresh-guidelines-outlined-on-medical-care-to-rape-victims/ (accessed 12 September 2020). "In the past, rape survivor examination was done only after receiving police requisition. Now this is not mandatory for a rape survivor seeking medical examination and care. The doctors should examine such cases without a FIR if the survivor reports to the hospital first."

[223] There is no data specifically of registered cases under section 21. But a section of CII reports mentions numbers of registered cases under sections 17 to 22. These provisions cover punishments for abetment of offence under this Act (Section 17), for attempt to commit an offence under the Act (Section 18), for failure to record or report a case (Section 21), and for false complaint or false information (Section 22). Even this number for the two locations, Bihar and Delhi, from year 2017 to 2019, was only 6 and 3 respectively. The national figure on the other hand was 2457. See, CII 2017, p. 312; CII 2018, p. 312; CII 2019, p. 312.

[224] See, Crisis Intervention Centres (CICs), Delhi Commission for Women. At: http://dcw.delhigovt.nic.in/crisis-intervention-centrescics (accessed on 25 January 2021).

6.4 3rd element: Recording of complaint by Police and the associated barriers

The Act has outlined special procedures for recording the statement of a child victim.[225] It requires the child's statement to be recorded as far as practicable by a woman police officer, not below the rank of sub-inspector.[226] Here, the law has linked professional experience to understanding a child's demands, assuming that a senior officer would be more able to fulfil such demands. The Act says that the statement shall be recorded at the residence of the child victim or at a place where the victim usually resides or at the place chosen by the victim.[227]

The recorded statement has to be as spoken by the child in the presence of their parents or any other person in whom the child has trust or confidence.[228] The Act further demands that a police officer while recording the statement of the child shall not be in uniform and shall ensure that the child does not come in contact in any way with the accused.[229] It also strictly prohibits detention of a child in the police station in the night for any reason.[230] The identity of the child must be protected from the public media by the police, unless otherwise directed by the Special POCSO Court in the interest of the child.[231] The Act also states that wherever possible, the police officer shall ensure that the child's statement is also recorded by audio-video electronic means.[232]

What perceptions and experiences of the operation of these reforms are to be found in the data? A male judge from Bihar agreed that the use of civil dress by the police in POCSO cases is important, but they do not follow it (BPJ 1). He blamed the senior Police authority for non-compliance with the law: "the SP [Superintendent of Police] is responsible for this. I was thinking of writing to the SP about it but could not." No further details were given as to why he did not write to the SP, as he quickly moved on to praise the use of videoconferencing in POCSO cases, and I was wary of making him angry by pressing the point.

A male Bihar defence counsel had a wider understanding of this provision:

[225] Chapter 6, sections 24-27, POCSO.
[226] Section 24 (1), POCSO.
[227] Ibid.
[228] Section 26 (1), POCSO.
[229] Sections 24 (2) and 24 (3), POCSO.
[230] Section 24 (4), POCSO.
[231] Section 24 (5), POCSO.
[232] Section 26 (4), POCSO: Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means.

> The police person should not be in uniform. He should not keep a revolver with him. When you [police] will carry out investigation in POCSO [Act], I think it is section 24, that child should not be fearful. Generally, children are afraid of police. Generally, the victim is ladies. So, to take her statement, only ladies [officer] will go. Ladies should be the IO, the officer-in-charge. But she [child victim] should feel that this [police officer] is our family member. There should not be any kind of fear. The police officer should talk in her local language. Her [child victim's] statement should be recorded. And if the victim is even in slightest of fear, then the police officer must not talk to her. (BDC 2)

Respondents in Bihar suggested that most of these provisions were not being followed. They said that the child's statement is recorded in the police station and the police have no idea about not wearing uniform while dealing with a child in POCSO cases. Even the Bihar female police officer I interviewed said that "the victim comes to the Police Station either with family and complaints about the incident or gives an independent complaint, and then the SHO [Station House Officer] notes down the FIR [First Information Report] based on the complaint" (BCS 5). On further inquiry, she revealed that the FIR is noted down by the accountant (*Munshi*) and just signed by the SHO. As the recording of the statement takes place inside the police station, the police uniform is always on. Further, there is no audio-video recording of a child's statement by the police. One Bihar male defence counsel had similar concerns:

> A child has been sexually abused, guidelines have been put in place to get her videography done, then record video-audio statements, record in the presence of parents. This is not done. (BDC 1)

Respondents in Delhi suggested that the operation of these POCSO reforms were being followed and much improved. However, the audio-video recording of the child's statement was not carried out by police even here. The Delhi respondents said that only women police officers were investigating the POCSO cases. They were always in civil dress and not in uniform, be it during the recording of a child's statement or in the POCSO courts. The child's statement was recorded in a place as per the convenience of the child and if the child was too young then as per their parent's choice. One Delhi female police officer said:

> She is a child, so the first thing for us is to look for a comfort zone for the victim. It could be her home. It could be a shop as well. Or it can also be the hospital where

she has been admitted. I mean wherever she feels better by herself, in talking to us, and in telling us. That is our first preference. (DCS 7)

She further stated that in case a child victim approaches her either on her own or with her mother in the police station, "then the Ladies Room that we have there, firstly we prefer to be in that room. Ladies Room is like a home to us." She shared that she had recorded a child's statement outside a restaurant with the help of a friendly conversation while drinking tea. Sometimes, the place is some NGO's shelter home, she added. Another Delhi female police officer confirmed that these practices were taking place (DCS 6). She also said, "the statement by a complainant is recorded as it is, verbatim. Parents are present during recording of the statement as we cannot talk to a child alone."

In Delhi, respondents unanimously said that assistance of a DCW member was immediately available for child victim's counselling, prior to the recording of the statement by police. Nearly all Delhi respondents agreed that these practices were happening during the pre-trial stages. However, the data also suggests that the police are susceptible to financial inducements and to intimidation by dominant groups. As one Delhi male defence counsel said, "the lapses on the part of implementation has allowed the investigating officers to indulge into lot of corruption. They take in a lot of money to weaken the cases; to try to change the statement of the prosecutrix" (DDC 2). Mendelsohn has also found this in his fieldwork, alongside the factors of poor pay and low status, which he argues "did little to instill in them a resolute commitment to enforce the law without fear or favour" (Mendelsohn, 1981: 854).

As discussed earlier, the patriarchal understanding of shame and dignity and the secondary harassment that follows at the hands of male police personnel against female victims of sexual offences has been a major hurdle to reporting by the victims. Some scholars have stressed the need for all-women police stations to help achieve effectiveness and efficiency, while others in different contexts have called for general overall improvements in policing to prevent re-trauma and re-abuse of the victim and strive for a more gender-sensitive police service (Barn & Kumari, 2015; Natarajan, 2012).

Further, the law has also emphasised the symbolism attached to the police and the police station as a fear-generating juridical institution and space, respectively, which can act as barriers to reporting. Thus, the law has attempted to become accommodating to child victims' requirements through the reforms in the language, behaviour, uniform, and space related to police to foster children's dignity which was absent earlier due to adult normativity. The purpose is to improve access to justice of child victims through convenience and child-

friendliness during the recording of complaints by police so that they can express themselves freely.

6.5 4th element: Medical examination of the child complainant and the associated barriers

Once an allegation is registered, the next step in the criminal process is the appointment of an Investigating Officer (IO) for the case. In the POCSO context, the IO is responsible for the quick and appropriate medical examination of the child victim. The POCSO Act requires a woman police officer, as far as practicable, to be the IO in POCSO cases. Both Bihar and Delhi respondents said that it has been made a practice that an IO in a POCSO case would always be a woman. After recording the complaint, the most important stage is the medical examination of the child victim.[233] Due to this, a new provision[234] 164-A was added to the Criminal Procedure Code 1973 (CrPC) in the year 2005 to tackle the problem of delay in medical examination of rape victims. It mandates that such examination shall be conducted, after her consent or consent of someone competent on her behalf, within twenty-four hours from the time of receiving the information relating to the commission of such offence.

The POCSO Act says that the medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A.[235] It also states where the victim is a girl, the medical examination shall be conducted by a woman doctor, in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.[236] In case the parent of the child or such other person cannot be present, then any woman nominated by the head of the medical institution shall be present.[237]

A female police officer from Bihar said that first she takes the child for medical examination as soon as possible, as a delay in this process lessens the possibility of getting evidence (BCS 5). A medical examination primarily serves two purposes- age determination of child victim and to check the presence of signs of sexual infringement of the child's body.

[233] Research shows that medical records are crucial in rape cases and reliability of medical evidence has been said to be one of the five important dimensions of complainant credibility (Barn & Kumari, 2015; P. Baxi, 2014).
[234] Section 164A was inserted by Act 25 of 2005. It talks of 'Medical examination of the victim of rape'.
[235] Section 27(1), POCSO.
[236] Sections 27(2) & 27(3), POCSO.
[237] Section 27(4), POCSO.

Claiming that "the age thing is also misused," below, a male Bihar judge talks about the first goal:

> It is the Doctor's responsibility to correctly determine the age of the child victim, as the entire case depends on it. Such age determination is done usually when a child does not have the tenth class passing certificate [where the date of birth is mentioned] or the birth certificate from *Nagar Palika* [Municipality]. (BPJ 3)

The malpractice of securing fake age-certificate was also shared by one Bihar male prosecutor (BPP 5). Another male Bihar judge stressed the second purpose of timely medical examination "to find the signs of sexual acts" (BPJ 4). He also highlighted the issue of delay in this process, "there are many instances when the IO did not get the medical examination conducted or if he did then was late in doing so. And because of that, the sign of sexual act is no more." He said that "they are unable to get the medical [examination] done on the spot." A male prosecutor from Bihar also reflected on the failure of timely conducting medical examination of child victims and its significance for the entire case:

> In POCSO [cases], not a single report comes up. The life of spermatozoa is 24 hours. So, if its life is only 24 hours, and the medical examination is being conducted only after 24 hours, what kind of report will you get. So, the doctor straightaway writes, "it cannot be said rape has been committed or not." (BPP 1)

This prosecutor seemed to have an incorrect knowledge about the life of a sperm as research says it can survive for 3-5 days inside the body of a female victim. He further discussed section 164-A and said that things have not changed, and the provision remains a dead letter of the law.

However, a minority opinion was expressed by a male private lawyer working for an NGO in Bihar. He contended that "the Police tries to get the medical conducted and also the 164 [statement] recorded within twenty-four hours" (BNGO). However, he quickly added, "but what is their quality, the quality is very bad." He further revealed a concerning practice. He said that the quality of medical examination is linked to the socio-economic status of the child victim:

> If the Victim is not from an influential home, if she does not have any parents looking out for her, then their medical that is conducted is of third-grade quality. Because there is no one to ask about their whereabouts or to worry about their

> problems. And whosoever is the medical officer […] they are not sensitive enough in many matters. (BNGO)

Moreover, nearly all respondents affirmed the painful reality that actors involved in the medical examination were susceptible to bribery and succumbed to undue pressure by dominant social groups or even individuals. The NGO's lawyer said that "the accused, who is a local, because the medical is conducted in district health society or hospital only, so he influences. Now what happens […] is that the minor girl is made major or such age that it becomes disputed" (BNGO). One male Bihar judge also argued that "it would not be wrong to say that Doctors are involved in making minor girls [into] major and major girls [into] minor. Sometimes, they even avoid assessing the age of the child victim as it is a source of money for them" (BPJ 3).

This is entirely within the discretionary power of a doctor as the test for age-determination still adopted in Bihar, as per the male NGO lawyer, is an archaic method of forming a medico-legal opinion by seeing the growth of teeth, breast, and pubic hair of the girl, and whatever is the demeanour and body language (BNGO). He further added:

> The proper way is ossification. But it is not conducted in every case. Alright! Ossification does not take place at all. So, normally a medical examination is important and crucial in investigation, which the local level goons can manage easily, and it has been managed too. (BNGO)

A revelation in Bihar in the context of medical examination for rape was the flouting of a law passed by the Supreme Court of India on the use of the two-finger test to test the virginity of a victim by inserting two fingers in the vagina. There was a convergence among Bihar respondents that the two-finger test which had been declared unconstitutional by the Court for being against the bodily dignity and privacy of a sexual violence victim is still in practice. Because of all this, a male Bihar prosecutor said "Medical test is not that important. Medical [test] has no value in it" (BPP 1). He further alleged that medical reports come only in those cases where child victim has died after sexual intercourse. In such cases, he added, "spermatozoa are immaterial, and in post-mortem, the character of private parts will be seen which will form the basis for the doctor to say if intercourse took place or not and the rape had been committed or not."

Another male prosecutor from Bihar though said that the medical report is not significant now (BPP 4). Under the POCSO Act, there is a presumption of guilt and if the

sexual offence is non-penetrative in nature, then the child victim's statement would be sufficient for conviction. Another male Bihar prosecutor took this argument further and claimed that even in penetration cases he had secured conviction as the absence of medical evidence does not mean that the victim was not raped (BPP 5).

Amidst all these provisions and practices, although the Act prescribes punishment for any careless and negligent behaviour on the part of police or doctor, a male Bihar prosecutor claimed that there was not a single case in Bihar that was initiated against a non-complying police officer or doctor (BPP 1). In terms of infrastructure in Bihar to conduct medical examinations of child victims, the respondents reported the conditions to be very poor. One male prosecutor from Bihar said that he was told in the training that there is a costly kit provided by the government, which has various small tools to determine if the penetrative sexual assault has been committed or not (BPP 3). But, he argued, in small places like his, these things are not there, and the same routine medical check-up, including the two-fingers test, takes place. Further, even Forensic Science Laboratories (FSL) were in insufficient number in Bihar as one male Bihar judge said, "there is a shortage of FSL because of which the test report is unable to reach the court on time, which delays access to justice" (BPJ 2).

In Delhi, accounts of the operation of these reforms differed starkly from those provided by the Bihar respondents. There was consensus among Delhi respondents that medical tests are conducted properly and within the stipulated time in Delhi, and for offences with penetration, the consent of the child victim is always taken. The most important role in Delhi at this stage seemed to be of a CIC member. In cases where a child victim has not reached the hospital directly, a member of the CIC wing of DCW remains with them from the time of reporting and recording of an offence till medical examination. So, they basically assist children outside the court.

It is difficult to convince a child for a medical examination, especially if it is a small child below twelve years. And while the police can work away from the police station, the same does not apply to the hospital staff who conduct the examinations. So, children need convincing by someone to make them comfortable in a hospital with a doctor. Explaining how a CIC member counsels a child victim, one female DCW member explained by quoting a CIC member:

> My Child! You will go to Doctor Aunty, so whatever [she] will say to you, you will support them in that. They will not give you a big injection. They will handle you properly. You do not get scared. That aunty is very good. Will you become a doctor

in the future? They will also give you chocolate. You cooperate with them. (DCS 3)

So, what happens with it, she further added, is that the internal examination of the child's body, which is very essential for the Prosecution, is successfully conducted with the help of CIC's counselling. Moreover, the CIC member's work is to ensure that the instruments, clothes, and gloves being used by the doctor are packed and they are opened at that very time. Once this stage is completed, the next stop of the pre-trial journey of a POCSO case is taking the child victim to the court of judicial magistrate. The following section deals with this pre-trial stage.

6.6 5th element: Recording of a child's statement by a judicial magistrate and associated barriers

After the medical examination, the recording of a child's statement by a judicial magistrate under section 164 of CrPC is expected to take place as soon as possible. The POCSO Act says that if the statement of the child is being recorded under section 164, the magistrate shall record it as spoken by the child.[238] The Act also states that the provisions contained in the first proviso to section 164(1) of CrPC, which permits the presence of the advocate of the accused, shall not apply in this case.[239] The Act further mandates, the magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of CrPC, upon the final report being filed by the police under section 173 of CrPC.[240]

The Act then mentions the same requirements as required during the recording of statement by a police officer, i.e., the statement shall be recorded as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.[241] Wherever possible, the magistrate shall ensure that the statement of the child is also recorded by audio-video electronic means.[242] There are also POCSO Rules 2012, which talk about a "Support person", who is a person assigned by a Child Welfare Committee (CWC) to render assistance to the child through the process of investigation and trial, or in the pre-trial or trial process in respect of an offence under the POCSO Act.[243] At this stage, the child

[238] Section 25(1), POCSO.
[239] Ibid.
[240] Section 25(2), POCSO.
[241] Section 26(1), POCSO.
[242] Section 26(4), POCSO.
[243] Rule 2(1)(f), the POCSO Rules 2012.

witness's statement is reduced in writing by a magistrate. Earlier the statement was recorded by the police. This is common for all cases in the Indian criminal justice system. This is the very first time in their life that a child victim has an interaction with a court by visiting the courts complex and is therefore of critical importance.

Respondents in Bihar suggested that there was no support system for the child victim in terms of a support person to counsel and prepare them for court interaction. They said that children come to courts with their parents, mostly mothers. As most of the children and their parents come from poor socio-economic backgrounds and are illiterate, they are solely dependent on the directions of the public prosecutors. As the prosecutors sit in the court, they are left first to reach and then to navigate the overcrowded courts complex and find the exact magistrate's courtroom mostly by themselves with some help from the IO of the case. The physical inaccessibility of courts was raised as a barrier to access justice by a female magistrate from Bihar (BJM 2). She argued:

> For many POCSO victims, commuting to Patna is a big problem. There are various peripheral cities of Patna […] which are very far from Patna and yet victims from all these places have to come to Patna by themselves. To take care of it, an audio-visual system would be beneficial. But there is no audio-visual recording support system. (BJM 2)

The law mandates that whatever the child speaks shall be recorded as it is. Considering that children of different ages have different requirements and levels of understanding and vocabulary, it is a tough task to facilitate them interacting with an unknown person like a magistrate for the first time and sharing their story. However, considering the gender at play, a practice was being developed where only female Magistrates record a child's statement. But because the Bihar judiciary is dominated by males, it was not possible to have female magistrates in all districts. I found that only one district had female magistrates recording a child's statement while the other three districts had male magistrates. One female magistrate from Bihar explained the recording process to me:

> We just have to jot down the points of whatever she is saying. It is not a confession that you have to ask pointwise, or you have to frame a questionnaire or anything. The 164 statement is a plain statement of a victim. Whatever she narrates, you have to write it down in the first person only. (BJM 1)

Thus, the 164 statement is a verbatim account of whatever a child victim narrates about the alleged incident. This magistrate pointed out that a different kind of judicial performance is at play here, which demands a specific type of judicial linguistics and behaviour like using one-liner small sentences with utmost politeness (BJM 1). There is also a high level of emotional engagement in this process of hearing a child victim: "the victims in POCSO are basically small girls, so it is very emotional kind of a thing to hear their painful stories and, you know, how such things can happen to such small children."

This respondent said that when a child is very small, much greater efforts are needed, first to adjudge child's competency as a witness, and second, to bring the child to that space and time from their own imaginary world, and to make them travel back in time to recollect the incident and suffering (BJM 1). She further explained the efforts she has to put in while dealing with child witnesses:

> If they are very young, then you cannot simply write down their narrative. First you must ask certain questions to assess their mental ability, whatever they are stating is true, and whatever they are stating is not tutored. Or whatever they are stating, they are in that free mindset to narrate the entire correct incident. (BJM 1)

All Bihar respondents agreed that a child's mental age and mental stability is assessed through one-line questions like mother's name, father's name, school's name, school principal's name, which class they study in, where have they come, who brought them to court. They also agreed that as the magistrates' courts are not child-friendly courts, an exception is made by recording the statements in magistrates' chambers. Another male magistrate said that "it is compulsory to have a guardian, be it father or mother or anyone else" during this process (BJM 4). He further stated:

> I also take extra care with my appearance. The victim should feel comfortable, not only by asking questions but through gestures as well. I treat them like our own children as they should be. If I find them uncomfortable, then I give them water or biscuits. (BJM 4)

Using toffees and biscuits appeared to be a common tool employed by the magistrates to make child witnesses comfortable. There was consensus among respondents that it becomes difficult for Police to bring the child and take her back in the absence of a special task force. The POCSO Act mandates the constitution of a special juvenile police unit (SJPU) for each state, which was

absent in Bihar. Once the testimony is recorded, then either the magistrate asks the child victim to read it or they read it to the child victim, after which it is sealed in an envelope to be sent to the POCSO court (BJM 3).

In Delhi, respondents' accounts suggested that the processes worked much better than in Bihar. From this stage onwards, the Rape Crisis Cell (RCC)[244] of the DCW consisting of women members begins functioning. Its work is to facilitate recording of a child's statement under section 164. As a woman member from the RCC explained:

> The 164 statement is very important evidence for us. So, it is important to counsel the female victim because whether this incident has occurred in the past also, or is it the first time, or has there been small incident continuously taking place in the past. Or many times female children who come in POCSO cases are sexually assaulted by their fathers. (DCS 5)

In Delhi, only the female metropolitan magistrates were recording the child's statement under 164. The importance of 164 statement was emphasised by one female Delhi magistrate:

> It's giving validity to the [child's] statement. As a magistrate, you are not part of the investigation. You only record the victim's statement. We say that the statement given to a Police Officer is not admissible evidence. So, when you say something to a Judicial Officer, the validity, and the operative value of it increases. (DMM 1)

She further highlighted the facilities for treatment of child victims for the recording of statements under 164, which were much better than in Bihar. She contended that "the child stays in the Vulnerable Witness Deposition Room. It is the IO who does all the running. The child is never made to run from pillar to post" (DMM 1). So, there is one fixed vulnerable witness room where the magistrate goes to record the child's statement rather than the child going to MM's chamber as was the practice in Bihar. The respondents agreed that the magistrates note down the child's statement verbatim. However, one female Delhi magistrate talked about the difficulty in recording it verbatim by hand, as there is no video recording of this process (DMM 2). She recommended that the 164 statement should be video recorded:

[244] It is a program started by the Delhi commission for women in September 2005 to provide assistance to rape victims. Rape Crisis Cell, Delhi Commission for Women. At: http://dcw.delhigovt.nic.in/rape-crisis-cell (accessed on 25 January 2021).

> We jot down…we keep asking questions. Because sometimes it goes on to seven pages. I have recorded the 164 [statement] of seven pages-eight pages by hand. So, it's a human error. I cannot remember one thing at one go. We have to keep asking the things so that it's recorded properly. So, if it is video recorded then it will save time, […] the witness also will not have to repeat the things again and again. (DMM 2)

Another important development in Delhi was the facility of a government vehicle for the commute of child victims to and from court without any cost. After the conclusion of this stage of the prosecution process, another set of actions that take place in pre-trial stage are police investigation, arrest and framing of charges against the accused, after which the trial commences. I will be examining the operation of the pre-trial stage of the POCSO reforms for the accused in the next chapter.

6.7 False allegations and institutional suspicion of children in the pre-trial stage

While the findings above suggest that the main problem for children in the pre-trial stage seems to be accessing complaint mechanisms in the first place, another problem that emerged as a strong theme from the data was false allegations and institutional suspicion of children. As earlier mentioned, the Act punishes adults making false complaints or providing false information against any person with the intention to humiliate, extort or threaten or defame them. Children are not subject to these responsibilities and penalties. The significance of this provision is that it exempts a child even if they make a false complaint or provide false information, as it would be highly problematic if the law encouraged the prosecution of the children in such cases. False allegations by children may frequently arise when they are pressured or coerced into making such allegations. Considering the chronic problem of lack of complainant credibility in sexual offences cases, there are certain interesting findings on the 'misuse' of the law from my study.

A Bihar male judge, while discussing the operation of the law, said: "POCSO Act must be there. It is a very good law for children. But yes, it is misused too." Talking about the two ways a criminal case in India gets initiated- complaint case and police case, he blamed people's individual immorality as a factor behind false cases and court's helplessness:

> In a complaint case, the court may take cognizance of the evidence. The problem is not in law but in morality. You are telling lies on oath. So, cognizance is taken even on false grounds. There is no defect in law but defect in morals. (BPJ 1)

Drawing an analogy with sections 304A (death by negligence), 304B (dowry death) and 498A (domestic violence), he argued that another factor behind false POCSO cases is either revengeful attitude as in 498A cases or economic vulnerability of people as in 304 A cases. He added that such people are used as pawns, and their thinking is that "by getting falsely implicated and then punished is okay as I got my life settled," and affluent people take more advantage of such poor people.

A Bihar male defence counsel said, "original offence…shall be presented with that originality, it shall not be adulterated, nothing should be mixed into it, then the rate of conviction would be higher" (BDC 1). He contended that child's parents or family members add the names of family members and associates of the offender in the case despite their non-involvement because of personal enmity. Moreover, in light of the Act's provision[245] that requires presence of the parents of the child or any other person in whom the child has trust or confidence during the recording of statement by the magistrate or the police officer, he said:

> When the videography and audio graphic statement take place, then during the statement such a situation is made that one can realise that the statement is not being given by the victim, but rather she is made to give a statement through prompts by her father or mother. This is unfair. Statement needs to be of that [child] victim. (BDC 1)

As noted in chapter 4, official data suggests that in most[246] of the cases of girls who are child victim and at the boundary age of majority, like 15-18 years, the respondents said the law is (mis)used to, what Baxi (2014) has termed, 'recover' a girl child by her family from a consensual sexual relationship. The change from 16 to 18 years as the age of consent under the Act is a defining shift in state control over the sexuality of its citizens, particularly adolescent girls. Many times, such cases are withdrawn later due to stigma and shame. One male defence counsel from Bihar narrated a story of a consensual sexual relation where rape allegation was

[245] Section 26(1), POCSO.

[246] As the age profile of victims of POCSO cases during years 2017-19 suggests, 48.6% of the victims were in the age group of 16 to 18 years, while 37.4% of the victims were in 12 to 16 years age group. So, if we calculate the percentage of cases where victims are in the age group of 12 to 18 years, it comes to be a substantive 86%. Only 10.8% of victims belong to the 6-12 years age group, and only 3.2% are below 6 years. See, chapter 4.

made by the minor adolescent girl's father after the young major boy sent their sex videos to her father's mobile phone after discovering that she has moved on into another relationship (BDC 1). He further suggested that in today's time the age of consent should be fourteen years and where the victim is above fourteen the case should be under section 376 to make consent material.

There were other reasons behind non-genuine cases too, though there is always a doubt if such reasons are forced upon the victim by the defence during the pre-trial stages. A female Delhi judge narrated a story in which a daughter filed a false case against her father "to make the father learn a lesson and to get rid of his addiction to alcohol" (DPJ 4). She argued that later the daughter became hostile and got her father released. A similar incident was shared by a male Delhi judge. He narrated the dilemma of a battered-woman and his own dilemma when criminal law is adopted as a rescue tool by such women:

> A woman having a drunkard husband beating her or her children at home would approach the NGO people, and there have been instances when they would suggest filing a dowry case under 498A against her husband to get him arrested and make him learn a lesson. Now the Supreme Court has said that arrest cannot be made per se under 498A. So, now POCSO has become a tool. Women would approach local NGO people saying, please help me get rid of my husband's alcohol habit. Now assume that there is her daughter in the home. And usually, such cases come from areas where you have small *Jhuggis*, and rooms of ten-by-ten feet. Now, say if the father one day in a drunkard state started beating up his daughter and in the process her clothes were torn a bit. This incident then will be given the colour of POCSO alleging that it was done with sexual intent. So, the very moment a case of such a nature is filed under POCSO, he will surely go to jail for three to four months. The child may be given an interim compensation of around one to one and a half lakh rupees. So, in a way there is more misuse of POCSO now. This further creates doubts in our mind even for genuine cases. (DPJ 7)

A male Delhi court staff member said, false reporting by alleged child victims, who later turn hostile during trial, is one of the reasons for low conviction rate (DCS 4). He argued that "girls are more into it"- implying that false incest cases are more likely to be filed by the girls than boys, and added:

> Conviction rate is not even five percent. Parents are under pressure. This is also a major problem that is taking place, that children are falsely implicating their parents. And look, this thing is known to the Court, or to that person who is doing this wrong. Later, they [children] become hostile. (DCS 4)

Such an opinion reflects his perception of why cases are reported but do not lead to convictions, which may be informed by the near absence of male victims in POCSO cases.[247]

Thus, there were various factors behind filing false cases as perceived by the respondents across the entire sample. The above example, the respondent suggested, is a blurring of line between a strict physical violence action and a sexual violence action in certain cases. There was a convergence among respondents' views that such cases are sometimes products of intelligent calculation by perfectly rational actors. Schooled by their lawyers and NGOs, they argued that people indulge in criminalisation of civil disputes. They use the POCSO law and special courts in an aggressive capacity to pursue interpersonal conflict, taking revenge by harassing someone through a criminal process which is monetarily, mentally, and physically damaging. Other motives for instigating prosecution have been extorting money or the settlement of property or land or house rent disputes. Particularly the new and emerging forms of tenancy relationships in the cities like Delhi, they argued, seems to have motivated false cases. POCSO law has also been an attractive tool deployed to settle petty physical fights inside the courtroom as this law is associated with the court's strict approach to granting of bail and attracts severe punishment after conviction.

However, despite such occurrences, it was rare for a POCSO court to initiate a case when an adult person makes a false complaint. There was consensus among both Bihar and Delhi respondents that the POCSO courts have the power to initiate prosecution in such a situation but by exercising their discretion they avoid it so as not to produce more cases and burden themselves further. This suggests that courts are alert to what Mendelsohn's (1981: 838) finding said that "many of the allegations are deliberately false, and there is a steady flow of prosecutions for laying false information to the police".

Another aspect of POCSO cases was the high percentage of the 'elopement' cases involving girls. This points to the findings of Barn and Kumari (2015) who mention that the High Court judges reported that the rape conviction rate would be a lot higher if the elopement cases were taken out of the equation. They further argue that such 'love case' examples of

[247] In the year 2018, as per National Crimes Records Bureau (NCRB), out of 22077 POCSO cases, 21848, i.e., 98.96% cases had female victims. Only 229 cases had male victims. See, chapter 4.

‘withdrawing rape allegations’ or ‘making rape allegations’ demonstrate the complexity and the subjective reality of shame and stigma (Barn & Kumari, 2015). These socio-cultural-familial understandings and regressive values are somewhere shared by the lawyers and their clients in addition to the lawyer’s sole motive to make money rather than to solve the conflict by unpaid legal advice. No doubt the reporting of these cases therefore forms a substantial part of the cause-lists and gives rise to much of the work for the POCSO courts.

6.8 Conclusion

Thus far I have been preoccupied with the operation of reforms in the pre-trial stages of POCSO cases from a child victim’s access to justice perspective. The object has been to assess the experiences and perceptions of respondents and identify the challenges they and the child victims face, to supply the context for the scrutiny of investigation and trial stages to be taken up in the following chapter. The findings in this chapter suggest two things. First, there are multiple socio-economic-legal factors at play that shape and determine the nature of implementation of the reforms. Second, the very nature of the state, like Delhi- being the capital city, governs how effectively the reforms would be executed on the ground. Respondents’ accounts, which is based on a small sample size, thereby providing only a limited view of practice in both locations, suggest that Bihar and Delhi are two different life-worlds residing in the same universe.

I have also sketched the relations between law, behaviour, language, emotion, trust and access to justice that govern the pre-trial stage of POCSO cases. The implications of feelings and notions such as fear, pressure, threat, honour, shame, morality on the pre-trial stages have also been studied. These might be acting as external social-psychological producers and the invisible stage managers during the pre-trial stages. The POCSO reforms are intended to build trust of people about authorities- police in this case, and to improve their experience while directly encountering them during reporting of an offence. However, as Barn and Kumari (2015) argue, the delay in disposal of cases and low rate of conviction after women have gone through the ordeal of adversarial proceedings does not reflect women-friendly procedures and outcomes. It needs to be kept in mind that many times a delay in reporting has been a common line of defence to discredit the victim by police (Barn and Kumari, 2015).

The framing of the sexually violated body as a symbol of family dishonour rather than an infringement of individual bodily integrity has led child victims to either maintain silence

or have their voices muzzled before speaking out within their families. The interconnection between children, family and state also becomes more visible while scanning the different pre-trial stages. Very often it appears that family and state mirror each other in the context of enforcing patriarchal norms thereby acting as a part of the problem rather than its solution. This seems to indicate "a benevolence on the part of custodians of law and order towards perpetrators, analogous to that displayed by the patriarch of a family towards a straying prodigal son" (Gangoli, 2012: 109). I have demonstrated how the vehicle of POCSO reforms is running with a punctured tyre of poor personnel training by the state. The challenges the judges face due to such a state's failure has also been magnified.

What seemed to be certain though is that the POCSO reforms have brought some changes to tackle the dilatoriness of proceedings and the technicalities of adversarial procedures. But again, this has been very limited in Bihar. The reforms are clearly multi-dimensional, targeting not only court personnel's behaviours and language but also the juridical spaces of police stations and courts and the child's dignity. However, as the narrative accounts of operation of reforms by Bihar respondents suggest, the pain of sexual violence of child survivors has failed to find healing avenues in the poor implementation of POCSO reforms. Moreover, pain may be inflicted on children through the application of the law, and we can think of needless medical examinations of children where adults make false allegations involving children to pursue their own conflicts. In Bihar, the pre-trial stages themselves seem to make justice elusive for the child victims even before the commencement of an investigation by police and trial by a special court.

It ought to be noted here that this is the first time a child's statement is reduced in writing by a state agency, i.e., a police officer. The child victim must appear again twice for giving their statement- one before a judicial magistrate and second before a POCSO court judge. Overall, the process of recording a child's statement by police becomes a very complex terrain in the wake of the POCSO reforms. The new age for consensual sex is increased from 16 to 18. And the dominant ideologies surrounding gender and sexuality are likely to lead to an increase in the reporting of cases under POCSO, as more 'love cases' are reported by families (Barn and Kumari, 2015).

Further, the belief of law that only a woman could render justice to children's effective participation in the criminal processes to find truth and secure justice seems ambivalent. On one hand, it does confront the problem of gender and the criminal process that a child, mostly female, must be allowed to share her trauma with a woman at each stage in the criminal process. On the other, it reproduces the same problem that a child cannot feel comfortable in sharing

their trauma with men. No doubt the oppressive patriarchal social culture and a similar courtroom trial space had informed such a reform. But can it not be argued that such gendered focus without attempting to reform the legal institutional patriarchy cannot be useful in the long run.

I have demonstrated how various barriers to access to justice are at play from the time a sexual offence is committed till the time a child's statement is secured by a judicial magistrate. And how POCSO reforms are attempting to overcome those barriers to improve access to justice for the parties involved. Crossing each barrier, talking from the standpoint of the violated child, appears to be a challenge to fight childhood. Moreover, the perception of the respondents about 'false' cases does seem to be symptomatic of the depth of institutionalised misogyny. Nevertheless, the misuse of the POCSO law cannot be overlooked, and tools of social justice beyond courtrooms are required to plug these holes. The district level judiciary being the first line of defence against the state excesses, their members need sufficient training to perform their duties well. If not, the repercussions could be lethal for both the accused persons and the child victims.

The objective of this analysis is not to adjudge whether POCSO reforms produce more convictions as the state generally tries to highlight as its success, but rather to represent the trauma of the child victims in the criminal process and if this is being reduced and healed. Also important is the goal of seeking truth by these reforms through a child's statement to provide justice to both parties. This chapter shows that procedural justice is necessary to build the confidence of child victims and their parents and family members in the legal authorities and institutions. Fair and dignified treatment since the very beginning of the POCSO process, and during the direct encounters with police and courts, helps dilute the stigma and shame in opening-up about and reporting such incidents to legal authorities.

If parties to a case have been fairly treated by the legal authorities thereby complying with the demands of procedural fairness, then the parties might feel satisfied with the criminal process. If child victims have been given voice and respect by the police personnel and the judicial magistrates, or alternatively by the DCW members, while directly encountering them, then the delivery of such procedural justice would enhance their trust and confidence in the institutions of police and judiciary. In the next chapter, I will be examining the operation of POCSO reforms in the pre-trial stage from the accused person's access to justice perspective.

Chapter 7

Stakeholder experiences and perceptions of the implications of POCSO Reforms and their operation on the accused in Pre-trial stages

7.1 Introduction

Respondent experiences and perceptions of the operation of the pre-trial stage of the POCSO reforms for the accused is the focus of this chapter. Pre-trial means the criminal processes before the commencement of trial. For this chapter, pre-trial stage includes police arrest of accused based on a reasonable complaint, or credible information, or a reasonable suspicion during investigation,[248] arrest of accused after the conclusion of police investigation, and framing charges against the accused under the POCSO Act.

As Packer argued, "there is no moment in the criminal process when the disparity in resources between the state and the accused is greater than at the moment of arrest" (1968: 203). Being free from detention helps an accused interact with the lawyer and prepare their defense (Roach, 1999). The pre-trial stage, therefore, contains several provisions to protect the rights of the accused. Under India's general rules of criminal procedure, these include a right to anticipatory[249] and regular bail, and the right to be presumed innocent by the authorities till proven guilty. To facilitate all these, the accused also has the right to free state legal aid where they cannot afford a private lawyer. How if at all does the POCSO reforms impact on these rules?

The POCSO Act says the provisions of the CrPC including the provisions of bail and bonds shall apply to the proceedings before a POCSO special court.[250] There are various changes that have been brought by the Criminal Law (Amendment) Act in 2018[251] to the bail provisions with regard to certain forms of sexual offences against women. The legal right to anticipatory bail has been taken away by the state in cases of rape and gang rape of female

[248] Section 41, CrPC: When police may arrest without warrant.
[249] Section 438(1), CrPC: It allows a person having reason to believe that they may be arrested on an accusation of having committed a non-bailable offence, to apply to the High Court or the Court of Session for a direction for grant of anticipatory bail. The Court may then, if it thinks fit, direct the person's release on bail in the event of such arrest.
[250] Section 31, POCSO.
[251] These amendments came in the light of the two child sexual violence cases, namely 2017 *Unnao* rape case and 2018 *Kathua* gang rape case. These cases received national attention, were widely reported in the national media, and led to public protests seeking justice for the child victims.

children below 16 years.[252] So, these changes made in the bail provisions in CrPC would be applicable to bail applications in the four serious POCSO offences, i.e., penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, and aggravated sexual assault, having a female child victim below 16 years. Such changes are not applicable to these four POCSO offences where the victim is a female child in the age group 16-18 or a male child of any age. These changes are also not applicable to other less serious POCSO offences like sexual harassment and storage of pornographic material involving child. POCSO reforms do not impact the provisions of regular bail. With regard to the right to be presumed innocent till proven guilty by the authorities, the POCSO Act has reversed this into presumption of guilt.[253]

This chapter is based on both the interview and observational data. I examine the data to reflect on the ways in which the operation of POCSO reforms in pre-trial processes impede access to justice for the accused. I organise the data by reference to the factors that influence the bail decisions and how access to justice informs or does not inform the stakeholder reactions. The second section explains the two kinds of bails and discusses stakeholder perceptions of anticipatory bail. The third section examines various stakeholders' perceptions of the free state legal aid & legal representation of accused in pre-trial stage. Fourth and fifth sections talk about the stakeholder perceptions of the factors that inform bail decisions in POCSO cases. What stakeholders say about the impact of misuse of the POCSO law and false allegations on POCSO bail petitions is covered in the sixth section. The journey of the accused in the pre-trial stage invariably impacts the journey of the child victim who is alleged to have experienced the act of violence at the centre of the accusation. The seventh section analyses the data on limitations to bail due to various factors informed by access to justice for child victims.

[252] Section 438(4), CrPC: Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sections 376 (3) or 376AB or 376DA or 376DB of IPC. Sections 376 (3) and 376AB deal with rape of a woman under 16 and 12 years, respectively, while 376DA and 376DB deal with gang rape on woman under 16 and 12 years, respectively. The punishment under 376 (3) and 376DA range from 20 years imprisonment to imprisonment for the remainder of convict's natural life, along with fine, while under 376AB and 376DB it also includes death. These IPC provisions correspond to sections 4, 6, 8 and 10 of the POCSO Act, and hence would be applicable to POCSO cases involving one or more of the POCSO provisions where the child victim is a female and below 16 years old.

[253] Section 29, POCSO. However, the higher courts have held conflicting views on the operation of presumption of guilt under this provision during the pre-trial stage when a bail plea is being considered. The Delhi high court held that it operates only during the trial stage after the charges have been framed against the accused by the police. See, *Dharmander Singh v. State (Government of NCT of Delhi)*, 2020 SCC Online Del 1267). The Jammu & Kashmir high court, on the other hand, held that it is applicable even at the pre-trial stage and before the framing of charges. See, *Badri Nath v. Union Territory of J&K through Police Station Bari Brahamana*, 2020 (6) JKJ (HC) 255; *Mubarak Ali Wani v. Union Territory of J&K through Police Station Pantha Chowk*, Bail App No.152/2021, J&K High Court.

7.2 Bail[254]

Less than half of Bihar respondents, and a majority of Delhi respondents raised concerns about the impact of POCSO reforms on bail. They raised it themselves without any prompt from my side. The questions about bail did not feature in the interview schedules as they contained questions on broad themes of POCSO reforms, the factors influencing access to justice of the two parties in the wake of those reforms, and the training given (or not) to implement the reforms. Only two respondents, a male Delhi judge (DPJ 3) and a male Bihar prosecutor (BPP 1), discussed anticipatory bail. The rest of them were concerned about the impact of POCSO reforms on regular bail. I will analyse below the data on perceptions and experiences of these respondents on how the POCSO reforms impact accused's right to secure bails, the factors they said influence the bail decisions, and how the access to justice informs or does not inform their reactions.

7.2.1 Anticipatory bail and pre-arrest liberty

Anticipatory bail comes into picture before an accused has been arrested by police, based on a reasonable complaint, or credible information, or a reasonable suspicion during investigation, i.e., it is a bail in anticipation of an arrest following an accusation of having committed a non-bailable offence.[255] All serious sexual offences against children, which form a majority, i.e., 99%, of total registered POCSO cases, are non-bailable, and thus fall within the anticipatory bail regime. The NCRB data suggest that around half of total alleged child victims are below 16 years, and out of those male children are negligible (see, chapter 4). So, this 2018 amendment has taken away the accused's right to anticipatory bail in a majority of POCSO cases, where punishments are the harshest.[256]

There are certain factors that frame a right to anticipatory bail. First, to keep a check on the gross misuse of police power to arrest in the wake of cases of false accusations. Second, this provision does not prohibit the authorities from investigating the matter, but merely

[254] There is no data available on the frequency of bail in criminal cases, including in the POCSO cases, in the public domain either by a governmental or a private organisation.
[255] The serious sexual offences under sections 4, 6, 8, 10, and 14 of the POCSO Act are non-bailable. Other less serious POCSO offences, i.e., sections 12 and 15, are bailable. A POCSO offence is bailable if it is punishable with imprisonment for less than 3 years or with fine only. Otherwise, it is non-bailable. See, Schedule 1, part II, CrPC, 'Classification of offences against other laws.' Sexual offences under IPC Ss. 354, 354B, 354C, 354D, 376, 376A, 376AB, 376C, 376D, 376DA, 376DB, 376E, and 377 are non-bailable, while sexual offences under IPC Ss. 354A, 354D, and 376B are bailable. While the POCSO Act 2012 and the IPC 1860 are distinct criminal laws, they are used in conjunction in the cases of sexual offences with female child victims. See, chapter 4.
[256] See, NCRB, CII 2017-2019, Table 4A.2(ii), p. 307.

prevents the accused from being arrested upon the receipt of the complaint he had anticipated. The accused can be arrested later after police investigation, provided there are reasonable grounds to believe the allegations.

Bail decisions in the context of POCSO reforms have to take into account different factors, such as accused's liberty, their socio-economic condition, and medical examination. On the other hand, there could be various reasons for putting limitations on bail, such as risk of accused's flight, speeding up the pre-trial process, securing accused's presence in POCSO court during trial, preventing tampering with evidence by accused, and the safety of child victim and their family.

A female Bihar police officer, briefly explaining the pre-trial process, told me that after a First Information Report (FIR) in a POCSO case is registered by the police, an Investigating Officer (IO) is appointed, who, subject to availability, should be female (BCS 5). She explained that the IO, after taking actions related to the child victim discussed in the previous chapter, also identifies, and arrests the accused during the investigation. This arrest, she said, takes place only when either the accused cannot apply for the right to anticipatory bail or where he applied but failed to secure it.

A male judge from Delhi discussed certain factors involved in making anticipatory bail decisions (DPJ 3). He discussed two sexual offences cases, which he dealt with before the 2018 Amendment Act came into force. One was a POCSO case, and another was a case involving an adult victim. In the first case, a mother was accused by her father-in-law of committing a sexual offence against her son, aged 10 years.[257] And the second, where this mother alleged sexual violence being committed with her by the father-in-law. The Judge highlighted the issue of being cautious of wider socio-familial context while making bail decisions in such cases. He said because the same woman's husband ran away and married someone else, and she got into a relationship with her brother-in-law afterwards, it discomforted her father-in-law, leading the grandfather to make false allegation against the woman through his grandson. Further, there were other factors which made the allegations appear implausible, and despite agreeing that such incidents are not completely impossible, he gave anticipatory bail in both the cases.

Mendelsohn (1981) suggests that Indian courts concerned only with the issue at the moment ignore the variety of relationships that bind people in the multiplex social world. Here, the judge seemed to be aware of such relationships during his decision-making. The judge also

[257] Section 6, POCSO- Aggravated penetrative sexual assault. The male child victim was below 12 years and had blood relation with the female accused.

highlighted how changes in bail provisions could make people victimise children and produce false accused as in the above case. A similar issue came to light in a 55 years old poor Dalit man's case where he was falsely implicated as a "serial sexual" offender because of his caste identity and had to spend 6 years in prison.[258] The Judge, along with another respondent (BPP 1), argued that the POCSO reforms have severely affected an accused's ability to secure their fundamental right to pre-arrest personal liberty, with their social and familial reputation and financial condition at stake.

No other respondent talked about this amendment, and if and how it affects accused's rights. In the absence of anticipatory bail, a person is arrested by the police and is taken into custody. The accused in police custody can then apply for bail, known as a regular bail. The following section examines the data on the implication of the reforms on the issue of regular bail that relates to post-arrest liberty of a POCSO accused.

7.2.2 Regular bail and post-arrest liberty

The issue of regular bail arises after accused's arrest by the police either during or after the investigation.[259] An accused can be arrested[260] by the IO for either an alleged bailable or non-bailable offence as per the FIR. Once an accused is arrested by the police for an alleged bailable offence, they can be freed if the police do not find sufficient material to detain the

[258] See, Indian Express (2021) 'I was framed for being a Dalit, 6 years of my life were taken away from me'. 8 September. At: https://indianexpress.com/article/cities/delhi/dalit-identity-false-case-pocso-7495353/ (accessed 12 December 2021). A case of a 55 years old poor Dalit man who was acquitted after spending 6 years in jail. He was falsely implicated as a "serial sexual" offender for allegedly committing aggravated penetrative assault on four minor girls. The complainant belonged to the 'upper' caste. They had quarreled over the complainant's dog repeatedly defecating outside accused's home. The court agreed that he was falsely accused because of being a Dalit and resenting defecation by the complainant's dogs, and said, "Parents of the victim girls indulged in sinister act of tutoring their daughters in a most brazen and shameless manner and merely because accusations or charges against the accused are grave, severe or despicable". In a rare instance, it granted a compensation of Rs 100,000 (approx. £1000) to the accused.

[259] After the investigation, the police file the charge-sheet before the POCSO special court and the court takes cognizance of the offence. The trial stage commences after the court's cognizance.

[260] If the alleged offence is without an option of anticipatory bail, the accused would be arrested and taken into police custody. Similar would be the situation if it is an offence with the option of anticipatory bail but the accused has failed to secure it. If it is available and accused secured it, they would not be arrested. *After arrest, accused is taken by the IO for the medical examination if the allegations demand so.* If not, then the accused is kept in police custody. As discussed in chapter 4, and under Article 22 (2) of the Indian Constitution, the arrested accused has the fundamental right of not being detained for more than twenty-four hours (also, section 57, CrPC) and to be produced in person before the nearest magistrate within a period of twenty-four hours of such arrest for permission to be detained longer (also, section 167, CrPC). Where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years, the accused can be in judicial custody maximum for a total period of ninety days. Where the investigation relates to any other offence, the detention period is restricted to sixty days. On the expiry of the said period of ninety days, or sixty days, the accused person shall be released on bail if he is prepared to and does furnish bail. In such a scenario, the accused must be produced before a magistrate every fifteen days till the accused remains in police custody, either in person or through the medium of electronic video linkage.

accused. The accused may also apply to a court to be released on a regular bail in such cases.[261] The accused can also be released by the police officer or court if they furnish a surety. If the accused is indigent and is unable to furnish surety, then the police officer or court shall discharge him on his executing a bond without sureties for his appearance.

If it is a non-bailable offence[262] under the POCSO Act, the police cannot grant regular bail, but the accused can apply for the regular bail before either a POCSO Court or a High Court.[263] When such accused is charged with POCSO offences with a punishment of seven years or more, the court may then direct their release from police custody by releasing them on bail with the following mandatory conditions[264]:

1. accused shall attend in accordance with the conditions of the bail bond executed.
2. accused shall not commit an offence similar to the offence of which he is accused, or suspected, of committing.
3. accused shall not directly or indirectly make any inducement, threat, or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

The court may also impose any other condition as it considers necessary in the interests of justice. As there was consensus among the Bihar & Delhi respondents that most of the accused persons are poor, the availability or otherwise of good quality free state legal aid to the accused has far-reaching repercussions.

When respondents across the two locations talked about bail, the main theme to emerge was that it is very difficult to secure regular bail in POCSO cases. This concern was mainly raised by the defence lawyers. In Bihar, a small minority of respondents- two defence counsels and one judge, said it is hard for accused to secure regular bail. However, nearly half of the Delhi respondents highlighted the difficulty for the accused in getting regular bail. Among different groups of Delhi respondents, the defence counsels and court staff showed more concern than the judicial officers and prosecutors. Before diving into their perceptions about the bail decisions in POCSO cases, let us first examine what the data say about free state legal aid and legal representation of accused, who are mostly socio-economically marginalised.

[261] See, section 436, CrPC.
[262] See, chapter 4, section 4.3 of the thesis. Offences under the POCSO Act, which are punishable with imprisonment for less than 3 years or with fine only are bailable offences.
[263] See, section 439(1), CrPC.
[264] See, section 437(3), CrPC.

7.3 Free state legal aid & legal representation (or lack thereof) of accused

The Indian Constitution provides the fundamental right of legal advice to the accused in police custody.[265] A male Bihar magistrate told me that an accused is asked if they want to have free legal aid during their first production before a court (BJM 3). One Bihar male prosecutor talked about how the entire criminal process, including that of securing bail, depends on the quality of defence lawyers (BPP 5). He said that in lawyering, quality is everything, which is built by knowledge, and is often reflected in the different amount of fees that different lawyers charge to argue the same case. He added, an indigent accused who would not be able to hire a costly lawyer, would have less chance of securing bail in cases where it might have been granted.

The observation of a POCSO court in Bihar provided an example of the poor status and practice of legal aid in the state (BCR 1).[266] The judge asked handcuffed accused persons about their capacity to have a lawyer to defend. After a negative response from the accused, the judge said, "Kindly make GT *ji* the public defender." Mr. GT was not present in the court. It seemed that he had done the work of public defending in the past. There was a female lawyer in her thirties sitting in the courtroom. The Judge then asked her, "Y *Ji,* will you take this case?" She remained silent. Then the Judge told her, "Of course, you will not work without money," by which he meant she would not be paid remuneration on time. After some time, the judge said to his court staff, "call [G] *Tiwari ji.*" He still could not be found. There was another female lawyer sitting in the courtroom. The Judge asked her, "you take this case. You will not receive money now, but you will get to learn a lot." She silently nodded. The judge then added, "work hard and learn." She was appointed the public defender for those accused persons.

These findings reflect the problems in Bihar's publicly funded legal aid system. It seems to be difficult to get a legal aid lawyer. The process of such an on-the-spot appointment of a legal aid lawyer shows that both the District Legal Services Authority (DLSA), responsible for providing legal aid, and its panel lawyers, are not working effectively in practice. Further, the judge's comments make it clear that the legal aid lawyers are not paid in a timely manner, which might impact the quality of legal aid, and increase the difficulty the judges face in appointing legal aid lawyers for an accused in POCSO cases. Kumar & Raghavan (2020) also

[265] Article 22 (1), the Constitution of India, 1950: No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
[266] Observation notes, Day 16, Bihar.

found in their study of the undertrial Prisoners in Bihar arrested under the liquor ban law that a majority of the undertrial prisoners were poor, having no means to arrange for legal aid and bail bonds. They argue that they were not in a position to avail themselves of private lawyers, and their families were not informed, nor were they provided with legal aid. They suggest that the honorarium paid to legal aid lawyers in Bihar needs to be substantially increased and that it should be reimbursed on a timely basis by the DLSA.[267]

The respondents in Delhi also acknowledged the poor provision of free state legal aid – both in terms of availability and quality of representation. A male Delhi judge said, "most of the accused persons go poorly represented. Again, another issue is the poor legal aid lawyers- so this amounts to weak representation for the accused people. And in POCSO cases, the accused people are mostly labourers, truck or car drivers, daily wage earners and so on" (DPJ 6). Another male judge from Delhi said that there is access to legal aid for the accused, and legal aid counsel is provided where an accused cannot afford a lawyer (DPJ 7). But from his experience, he said that he has serious reservations about the quality of such lawyers, "They hardly even read the files. They just become part of the legal aid panel for the sake of money." However, he also shared the reason behind this:

> You will also have to think of the nature of compensation the state gives them for acting as public defenders. They get four thousand to seven thousand [rupees] for an entire case. Now, you can imagine if a case carries on for two-three years, how little money they would be able to earn. So, why would they put in so much hard work. They also have to survive. Then, in each case there are around twenty-five to thirty hearings. For each appearance, they get just two hundred rupees. (DPJ 7)

Providing a legal aid lawyer was also identified as a time-taking procedure. One male Delhi judge told me that many accused in Delhi cannot afford a lawyer, after which he arranges a lawyer:

> I will direct him that brother, [you] do one thing, there is an office we have here, you go to that office. I sent him there. Then there are certain formalities. What are the formalities? What is your age? What resources do you have? Because if she is a woman or a child, then they do not need to do much or to show, but he [accused]

[267] However, one report claims that in terms of utilisation of available central and state funds for legal aid, Bihar has moved to the 2nd rank in 2020 from the 16th rank in 2019 among 25 ranked states. See, Nupur et al. (2021), p. 75.

> will have to tell everything here. Then, they will arrange a lawyer for him at their convenience. So, in this around seven days will be gone. (DPJ 3)

One Delhi based male defence counsel, talking specifically in the context of POCSO cases, said, "suppose there is an accused here, he is very poor, he cannot afford a decent counsel. What happens in that situation is that the court appoints a legal aid counsel. Now, these legal aid counsels are not experienced guys. Because of their inexperience, accused gets convicted" (DDC 1). He also told me about a judgment of the Supreme Court in which it acquitted the accused only on the ground that the legal aid counsel was not experienced. He further said:

> The court gives legal aid work to any lawyer. There should be a thorough interview [of the lawyer]. His experience should be checked. Then only he should be inducted into legal aid. So, the accused…gets into a problem because of legal aid counsels…those who have one- year, two years' experience, they cannot deal with this kind of hardcore criminal matters…which should change. (DDC 1)

He also suggested that before appointing any person as a public defender in a POCSO case, "he should be well trained. [For] 4 years-5 years, he should work as a junior counsel with a good defence counsel, then he should deal with these matters."

A male Delhi based private NGO lawyer shared a similar experience. He said that the DLSA does have competent lawyers on its pay roll. So, if an accused cannot afford a lawyer, then they are given counsel through DLSA, because the only problem is the accused getting representation. So, the infrastructure exists. But he also added:

> However, every counsel would not be the best counsel. Also, a large number of matters do play their role in such a situation, as do the income demographics of the party. Accused in POCSO cases are mostly poor. Moreover, the accused may go for private counsel if they wish and can afford. Many times, one cannot hire a lawyer by being in jail. (DNGO)

This points to the significance of what Langbein (2003) calls 'the wealth effect': a striking defect in adversarial criminal processes more generally. He argues that the system advantages those who could afford to hire skilled lawyers at the expense of those who could not afford to do so. To offset this disadvantage of the wealth effect, there has to be a competent lawyer as a public defender providing free state legal aid to the accused.

Along with the constraints on legal aid, there are a plethora of other factors, which the respondents reported as influencing the accused's pre-trial experience in general and decisions relating to their bail in particular. In the sections that follow, I analyse those factors and discuss whether and how concerns with access to justice inform the stakeholder reactions.

7.4 Factors reported to be informed by the speed of the pre-trial criminal process

7.4.1 Judicial workload

High judicial workloads were identified as one of the barriers to the quick disposal of POCSO bail petitions. One male judge from Delhi who worked as a POCSO judge in the past talked about the bail roster and non-POCSO cases:

> What used to happen is that if you are dealing with the bail [applications in all cases] of the whole district, then it consumes a lot of your time. This is one thing. Other than this, POCSO Court has its own bail matters, miscellaneous work, and all. So, that time I had said that these [non-POCSO] bail matters should not be there [in POCSO courts]. So, those were removed later. Right now, I got to know that in POCSO Courts, only POCSO cases are there. (DPJ 3)

This suggests that there have been some changes taking place to speed up the pre-trial criminal process and decision-making by keeping the special courts free of any non-POCSO cases.[268]

7.4.2 Medical report from the Forensic Science Laboratory (FSL)

The FSL report was also said to play an important role in bail decisions. One male judge from Bihar said that it is important for the FSL report to be positive, i.e., that the child victim was sexually violated, among other things, to determine culpability of the accused (BPJ 2). He said that "there is shortage of FSL because of which the test report is unable to reach the court on time, which delays access to justice. If FSL report comes on time, then there will be no delay in access to justice" (BPJ 2). He argued that because FSL reports do not come on time,

[268] This also reflects that time demands in lower courts are particularly acute in the criminal list because of high case volume (Roach Anleu & Mack, 2017).

there is delay in decision making. He also highlighted the issue of the lack of sufficient number of FSLs.

Explaining the role of FSL report during the pre-trial stage, one male Delhi court staff described that the IO takes the clothes of the accused and/or child victim to the Doctor, and there they are kept in a sealed envelope with the Doctor's seal, and then it goes to FSL (DCS 1). "In FSL, there are biological experts who check those clothes whether there is anything of the victim on the clothes of the accused or vice-versa, to determine whether there was any contact between them," said the court staff (DCS 1). One female police officer from Delhi added that the medico-legal reports from hospital are also sent to the FSL for DNA profiling (DCS 6). The FSL gives its report.

A female judge in Delhi explained the role a FSL report plays in deciding whether bail should be given in a case or not, arguing that the delay in production of the FSL report acts as a barrier to granting bail to the accused. She said:

> The FSL result speaks more about how much truth and how much false the person [victim] is saying. The Act provides that the evidence of the [child] witness should be recorded within a month of filing of charge-sheet [by police].[269] The fact is that it takes more than three-four months to at least…to even frame the charge. Because FSL results are not given properly. (DPJ 2)

She further said, "even after filing of the Charge-sheet, the FSL result is kept pending. Many a time FSL result is very important to determine whether at all any such incident took place or not. But we get FSL result by three months-four months, at times more than that." The issue of delay in FSL report was also reported by a male court staff (DCS 4) and a female police officer (DCS 7) in Delhi.

7.4.3 Absence of special judge and/ or special prosecutor

Another factor reported to affect bail applications and delay the pre-trial process was the shortage of special court personnel. A male prosecutor from Bihar, talking of his power as a special prosecutor and that of a special judge and POCSO court, said:

[269] She was referring to section 35 (1), POCSO: 'The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.' Cognizance is taken by a POCSO special court only after the police, upon investigation, files a charge-sheet as part of the police report before the court.

> Everything, be it trial, bail matter, in my absence no other lawyer or PP [Public Prosecutor] can represent the state in bail hearing. If our special Judge is not there for a month, then no Judge can hear the bail matter. Because special power has been vested, it is a special court. (BPP 2)

Thus, it is pertinent to note that only a special POCSO court (rather than any Sessions court), i.e., the special judge, can deal with bail applications in POCSO matters.[270] Similarly, only a special prosecutor can deal with POCSO hearings, including bail hearings. Although not mentioned specifically by the prosecutor, there are implications for the accused's rights where one or both officers are absent for any reason, as this would delay the bail hearing of the accused without any fault on their part. Along with these factors affecting bail decisions, judicial attitudes towards regular bail applications were also said to play a vital role.

7.5 Stakeholder perceptions of the judicial factors influencing bail decisions

7.5.1 Judicial attitudes

A male Bihar judge, whose court I observed, argued that a court would not blindly follow a child's allegations against an accused person (BPJ 1). And then he quickly added, "but you have also seen that I reject all bail petitions in the POCSO cases." Two Bihar male defence counsels showed concern about the difficulties in securing bail in POCSO cases. One said that the POCSO Act is tough on the point of bail matters (BDC 3). The other narrated facts of a case he recently got:

> There is an allegation by a fourteen year old girl that she was going to her home from her school, and on the way, two [minor] boys from her village… "held my

[270] It was held by the Madras high court that a Sessions Court cannot entertain anticipatory bail pleas in POCSO cases. Only POCSO courts can do that. See, B. Tilak Chandar, The Hindu (2020) 'Only Pocso courts can hear anticipatory bail pleas, says HC'. 4 October. At: https://www.thehindu.com/news/national/tamil-nadu/only-pocso-courts-can-hear-anticipatory-bail-pleas-says-hc/article32763419.ece (accessed 5 February 2021). Section 31 of the POCSO Act says that 'Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 including the provisions as to bail and bonds shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.'

> hands and indulged in vulgar conversation. When I shouted then the teachers came out and they ran away". (BDC 2)

He then said, "Should POCSO be applicable in this? POCSO has been used. It should not be applicable." He further said that "the appropriate charges would be 376, 511 [of IPC], but POCSO was made applicable because merely the girl's age was written as fourteen years." He seemed to suggest that POCSO law should not be applied when two minors are indulged in sexual activity. As per him, POCSO charges were used as police were bribed by the complainant's father, so that "the accused persons would not get bail, and they will rot in the jail." He was of the opinion that in POCSO cases, the accused rarely gets bail, and where both parties are minors, POCSO Act should not be invoked.

In Delhi, three judges clearly said that they do not give bail in aggravated POCSO cases (DPJ 2, DPJ 5 & DPJ 6). A male Delhi judge said, when it comes to bail, "in serious cases where charges are serious, then of course, we do not give bail, but why will I not give bail to anyone. What is the purpose of me sitting here [as a judge] then? My decisions in this regard will be appealed too. (DPJ 5)"

A Delhi male defence counsel said, "it is very difficult to get bail in POCSO matters. You don't get bail. Only in 10-20% matters you get bail" (DDC 1). Another male defence counsel from Delhi argued that judges are very strict in granting bails, and "the bail is almost not granted" (DDC 2). Another Delhi male defence counsel told me that "Judges are not even inclined to open the file and…consider bail. What do you do in such a case? You can only expedite the case and get him acquittal" (DDC 4). Talking about the judicial attitude on bail petitions he further said:

> Judges do not indulge if…a charge-sheet has been brought against you. No matter what is written. No matter howsoever the intensity of it is. Means, it hardly matters. Once you have been indicted in POCSO, the Judges will take a look as if you have actually done it. Not the other way around. (DDC 4)

One female DCW member said, "first of all, there is no bail in POCSO. If the bail is granted on some ground, then we can also file for bail cancellation" (DCS 5). Another female DCW member told me that it is their duty to contest bail petitions of accused persons and not letting it get approved by the court (DCS 2). Similarly, a Delhi male prosecutor said that prosecutor's role is to oppose bail of accused (DPP 4). These respondents report the existence of a judicial

tendency of not granting regular bail in POCSO cases, and that there are no fixed criteria to either grant or deny regular bail to a POCSO accused.

On being asked if the Court usually grants bail, a Delhi male court staff, working as a *Naib* court[271] since last one year, said, "No. If it seems initially to the Court by having a look at the FIR [first information report] or that there is something in 164 [child's statement recorded by magistrate] or the allegations are very serious, then bail is very difficult" (DCS 1). When I asked about the frequency of granting bail, he responded, "there are certain sections in the POCSO Act in which…like if they are [sections] 8 and 10 [POCSO offences], means [section] 354 [of the IPC] ones, in those cases normally one would get bail .[272] But if it is [a section] 6 POCSO [offence][273], then one would not get bail in it." He further added that "till the child victim's testimony is recorded here [in POCSO court], the Judge *Saahab* is not at all in the mood." As per him, the judge wants to know what she [child victim] is saying in her testimony [during trial], and if she speaks of the incident in a clear manner, then the chances of bail are too less. If she contradicts or retracts, then, he said, the chances of securing bail are there. Because of this practice, he said, the accused remains in custody sometimes even for four months, or till the time child's testimony has been recorded by the POCSO court.[274] A male lawyer from an NGO in Delhi identified this problem in the context of 'speedy justice':

> Adopting to the need of the complainant, the law and courts put stringent requirements on POCSO accused. But at the same time, POCSO matters travel at a faster pace, as the POCSO special judges are sensitive to the fact that they are declining bails. They make sure that a person is not in jail for long time because of so much burden put on the accused by the law. But of course, bail is a rare occurrence in a POCSO case. (DNGO)

[271] A naib court is a policeman who acts as the link between the local police station, jail authorities and the court concerned having the jurisdiction of a particular area. They function in close coordination with the prosecution and under supervision of the local DCP (Deputy Commissioner of Police). They are mostly of the rank of constable or head constable. See, Times of India (2017) 'HC tells police to reshuffle naib courts every 3 years'. 10 July. At: https://timesofindia.indiatimes.com/city/delhi/hc-tells-police-to-reshuffle-naib-courts-every-3-yrs/articleshow/59518705.cms (accessed 06 February 2021).

[272] Sections 8 and 10 of POCSO Act deal with sexual assault and aggravated sexual assault respectively. Similarly, section 354 IPC also deals with sexual assault. These offences involve only sexual touching and no penetration.

[273] Section 6 of POCSO Act prescribes punishment for the offence of aggravated penetrative sexual assault, the most severe POCSO offence with harshest punishment, including death penalty.

[274] Section 35(1), POCSO: 'The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.' Cognizance is taken by a court only after the police, upon investigation, files a charge-sheet as part of its report before the special POCSO court.

One male defence counsel from Delhi talked about the implication of the shift in the burden of proof under the POCSO reforms and slightly differed on the point of delay in the criminal process, "The burden of proof is on the accused. Because of not getting bail, the accused suffers. So, two years-three years-four years…speedy trial does not happen…it keeps on going. The accused remains in jail. Thereafter, he is acquitted" (DDC 1).

The data also suggests that the judges think of allowing pre-trial detention as an informal form of punishment, which is concerning. Packer argues that "the presumption of innocence is really a direction to the authorities to ignore the presumption of guilt in their treatment of the suspect. It tells them, in effect, to close their eyes to what will frequently seem to be factual probabilities" (1964: 12). There is no clear evidence whether this judicial treatment to allow pre-trial detention of the suspect is in the wake of the shift to the presumption of guilt in the POCSO law or if this judicial approach exists in other criminal cases too where the law mandates presumption of innocence.

There was a judicial perception that if the medical report supports the occurrence of sexual violence and so does the child victim, then the accused should not be granted bail to make them learn a lesson and to send a message in society. A female judge from Delhi pointed this out while giving her justification:

> When I read the charge-sheet, that these are the charges, this is the evidence of the girl, the girl has fully supported it, and disgusting…like she is a five-year-old girl, and she has been kissed lip to lip. Still, he [accused] got bail despite the girl's evidence. So, means at least let him get some sort of hard lessons. (DPJ 2)

She, arguing that the girl victim had stated that the incident had occurred, and that the medical report also supported the allegation that something has been done to her lips, raised questions about the social message and potential threat to child victims:

> Why are you giving him bail so easily and early? What message would go [to society]? Within two months, the girl's evidence was secured while the accused boy was roaming free. Won't he influence her parents? Won't he buy them after being released on bail? (DPJ 2)

7.5.2 Judicial corruption

Following on from her questions, the female Delhi judge (DPJ 2) also hinted at judicial corruption as one of the reasons to grant bail in cases where it should not have been granted:

> There must have been some sort of consideration. Because on one side you don't give bail to an accused who has been charged with a minor act of misbehaving while on the other hand, you are giving bail in such cases. So, it is then that the story becomes clearer. I have seen the mindset of the judges. If the Judge's mindset is that he wants to do acquittal, then…there are extra-judicial factors as well to grant bail. Money is given. On the same ground of allegations, bail is given and on the same ground of allegations, people are acquitted. (DPJ 2)

Such practices speak of misuse of discretion that could work against the interests of child victims. Further, the judge was mindful of cautioning me not to report this: "But you don't write these things. Someone may sue you for this, that how can you give such an input" (DPJ 2). These statements reflect the cynical behaviour of elite respondents, in this case, a judge, where she has disclosed judicial corruption but does not want it to get out in the public to perhaps safeguard what Roach (1999) has called 'common organisational interests.'

The above responses suggest how the formal shift in the burden of proof in the law combined with a punitive judicial approach towards POCSO bail applications might lead to what Feeley (1979) has called 'the process is the punishment' for a POCSO accused. This approach also runs directly counter to the right to a fair trial for an accused. Such an approach of pre-trial detention as punishment also defies Roach's argument that, "an accused should be detained awaiting trial only when absolutely necessary to ensure attendance at trial" (1999: 682). The rigid stance of the courts in denying bail in POCSO cases was said to encourage misuse of the POCSO law – both in the sense of the law being deployed to avenge personal enmity and property disputes, and by way of police corruption. There was one more factor identified by respondents as affecting the bail decisions in POCSO cases – the age and parental status of POCSO judges.

7.5.3 Judge's personal life stage and parental status

One male defence counsel from Delhi highlighted a social and familial angle to the non-granting of bail even in 'false' cases (DDC 4). When asked about the least successful aspect of the POCSO reforms, he referred to bail. Sharing his experience, he said that "see, taking out grudges and using children to take out their grudges, it is not a new thing in India. It is as simple as getting an FIR registered against a person. Accused is behind bar." He gave two reasons as to why getting bail is very difficult in POCSO cases:

> Judges all are human beings, and people have their natural affection toward children. Right! So, anybody sitting over there [in court], [is] at least above thirty-five years of age, and normally has a child. So, their natural inclination is towards the child, toward the right of the child. They close their eyes on the part whether this is true or false. Be it animosity prevailing between the houses or say families or anything. You are bound to go behind bars, whether or not you are innocent. (DDC 4)

He further added,

> I told you the psychology playing out of a parent, right, then and there. Then again, the reiteration of importance of child protection or their protection against sexual offences. Judges do not tend to go behind the intention of the complaint. They take it as gospel truth. And the best part about it, you cannot even initiate a defamation or what you say, perjury case against a person if a person comes with a false complaint. So, there is no protection per se. (DDC 4)

This response resonates with a study on judicial empathy from the USA, which found that male judges with daughters tended to rule in favour of women issues more often than justices without daughters (Glynn & Sen, 2015). The findings from this study suggest that personal and familial experiences influence how judges make decisions, and those judges had greater ability to see things from a woman's perspective. Although Glynn & Sen's research appreciated judicial empathy, which does raise concerns as it suggests a lack of equal treatment in the courts, here the defence counsel highlights judicial empathy as a negative component of judicial decision making.

7.6 Misuse of the POCSO law, false allegations, and bail petitions

7.6.1 Giving non-sexual incidents the colour of POCSO

A male defence counsel from Bihar talked about how the rigid bail regime in POCSO cases has made the POCSO law a site of criminalisation of civil disputes. Such criminalisation, he argued, is actually an attempt to further civil or other disputes by making allegations of entirely unrelated, extremely serious criminal offences under the POCSO law. This itself entails significant exploitation and victimisation of the children at the centre of the allegations- thus

completely undermining the entire process of POCSO, that is, to protect children. The defence counsel gave one such example, where the informant apparently made false POCSO allegations against the accused to unjustifiably gain some property:

> When cases were being filed, false cases also began to be filed. If someone has some enmity, then he will put up a girl under 18 years, and will make the other person accused in a POCSO case. Then he [accused] is unable to secure bail; he is in jail. And if there is some property dispute with him [accused], then he [informant] will bargain the property outside the Court. He [informant] is bargaining for the property by sending him [accused] to jail. (BDC 3)

A Delhi male judge said that "you should also understand that POCSO has become a new kind of 498-A[275]" (DPJ 5). Section 498-A of the Indian Penal Code deals with the criminal offence of a wife subjected to cruelty by husband or his relative – a provision many court and police personnel perceive as being mostly misused. This perception has been criticised by feminist scholars for leading to scepticism towards women complainants and being based on an adverse propaganda and misuse by the media (Agnes, 2015; Brereton, 2016). Another male Delhi judge shared his challenge arguing that there are cases where non-sexual incidents are given the color of POCSO, which makes it difficult to understand even the genuine cases and to decide the bail petitions (DPJ 7). He cited an instance where a woman filed a POCSO case through her daughter in an attempt to tackle her husband's alcohol habit. He argued that people do so on NGOs' suggestion. He shared another instance:

> There are also cases where you will hear things like my father used to beat my mother, that is why I did this. So, unless there is some solid evidence, it becomes difficult and time-consuming for us to decide a case on the basis of word of mouth (DPJ 7).

7.6.2 Cases of 'Non-exploitative' sex[276] with adolescents

One Bihar male prosecutor talked about a recent change to the regular bail provision:

[275] See, Section 498A, IPC: Husband or relative of husband of a woman subjecting her to cruelty.
[276] The legal actors involved in dealing with the POCSO cases use the terms 'love-affairs' cases or 'consensual' sex cases for the cases of non-exploitative sex with a child.

> If the accused is in custody, and if he files a regular bail, then…informant should be sent a notice.[277] And the Order will be made after hearing her [the child victim]. This is applicable in POCSO. But if the child is between 16 and 18 then it would not be applicable. The age [of child victim] should be below 16. (BPP 1)

Respondents argued that the adult accused was not able to secure bail even where the child victim is an adolescent of below 16 years, who agreed to his release on bail during the hearing of regular bail application in the cases of non-exploitative sexual relationship. A male defence counsel from Bihar showed concern about cases of non-exploitative sexual activity with an adolescent and said:

> The children between 14-18 years should be put into the category of rape. Keep them with section 376 (IPC), because punishment would be even there. If there is smell of consensual then it would be acquittal. And here despite the smell of consent, and not only smell but even if it has been conclusively proved, you do not give any advantage, as the victim is a minor and her consent is immaterial. (BDC 1)

He was of the opinion that 14-18 years old adolescent victims should be separated from below 14 years old children and should be placed within the adult category under the Indian Penal Code, rather than the POCSO Act. Another Bihar male defence counsel showed concern about age proximity and argued that the POCSO Act should not be applicable in cases where both the accused and the victim are children (BDC 2). A male member of court staff in Delhi discussed a case where a girl filed the bail petition for her boyfriend who was accused of raping her (DCS 4). Similarly, a Delhi male defence counsel said that there is no way out for an accused even in 'consensual' cases (DDC 2). He suggested, "I think judicial officers should be trained in, to exercise some caution during the hearing of bail application, wherein they feel, that yes, the girl is minor, but then yes there is a 'consent' part to it." Here, the defence counsel is suggesting that there should be a distinct judicial approach to deal with bail applications in the cases of non-exploitative sex with children. One Delhi male court staff member also discussed the operation of the provision for obligatory presence of the informant. He, however,

[277] Section 439 (1A), CrPC (Inserted by Act 22 of 2018): The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the bail application of accused charged under sections 376(3) or 376AB or 376DA or 376DB of the IPC. These provisions are applicable when the child sexual violence victim is a female below 16 years of age.

said that there have been rare instances of a court being considerate sometimes during the bail hearing in 'consensual' sex cases:

> In one-two cases, Judge *Saahab* asked the victim, 'Okay! What do you want?' So, many times, the victim said that, 'No, we did not have anything.' So, then the Court becomes liberal at that time, that when the complainant herself is denying then… (DCS 1)

A child victim, he added, agrees to the grant of bail in such situation by saying, 'nothing happened with me,' or 'Whatever happened is with agreement'. These arguments suggest complexity of the problem around the definition of consent in the cases of 'non-exploitative' sex with a child.

7.6.3 Police corruption, law's pressure on police, and severity of punishment

One male defence counsel from Delhi said that "the fault lies in the base that Police does not need anything to arrest you in this case. Mere suspicion is enough because it is punishable more than seven years" (DDC 4). Quoting a decision,[278] where the Supreme Court said that if an alleged offence is punishable with less than or up to seven years, a Police officer has to firstly give a notice to the suspect under section 41(a),[279] and he has to record his reason if he is making any arrest, he told me:

> But in POCSO, there is nothing as such. Mere suspicion, you are arrested, since it is punishable with more than seven years. Police mint money in this. People use this as a threat. 80 percent [cases] result in acquittal. If 80 percent is resulting in acquittal, then 80 percent are false cases or unproven cases. (DDC 4)

The respondent was pointing to the 'penetration' cases which have minimum sentence of ten years imprisonment. He further said:

> Provisions are there to take actions for implicating somebody to extort money in a false or frivolous case, but then again it is another proceeding in itself. There is another trial. I was the accused first, then I am now prosecuting, but again I am coming to Court. So, my relief is lost in the way. Standing on this side or that side,

[278] *Arnesh Kumar v. State of Bihar* 2014 (8) SCC 273.
[279] Section 41(a), CrPC: Notice of appearance before police officer. The notice, which earlier was optional, has been made mandatory.

> I am still coming to Court. So, that relief is not there, and Judges are not willing to see behind the actual bill. (DDC 4)

This respondent further added that the judges' rigid approach to bail applications is also because of the severity of punishment, which he argued is not a ground while considering bail:

> There are only three grounds [to grant or deny bail]. You [i.e., accused's] fleeing away from justice. You are coercing witnesses. And your tampering of evidence. It does not entail anything which is known as severity of punishment. But that is the foremost thing which is seen by a Judge. Obviously POCSO is a serious thing. (DDC 4)

One male Delhi prosecutor in this regard said:

> If somebody has lodged a false case, he is not afraid. He is very well free, okay tomorrow the case will fail, I should not be worried. But the moment you have lodged a complaint against a person, it is a non-bailable offence. That person becomes a victim. And then we have stringent conditions of bail that bail has not to be given to the accused unless until prosecutor has been given an opportunity of hearing. So, if we come across a false case and the person suffers rigour of trial, and then at the end of the day he is acquitted, then it's a very sad state of affair. (DPP 3)

He further argued that "we are not able to curb and control this thing at the registration [of First Information Report] level, because in the [POCSO] Act, it has been specifically stated if the police will not register the case, then he will also be liable."

7.7 The balancing game: Denial of bail, reasonability of grounds, and child victims' access to justice

Although the respondents raised concerns that the accused were sometimes unfairly denied their legal rights including the right to bail, they also identified factors that could necessitate denial of bail for the sake of ensuring child victims' access to justice.

7.7.1 Risk of flight and different causes and motivations of delay

A prominent factor identified by respondents was the risk of flight of accused with the potential to delay the case proceedings, which would not just hamper speedy justice, but could prevent the delivery of justice altogether. A female judge from Delhi said, "when the accused is granted bail, at times, he disappears" (DPJ 2). She further spoke about the difficulty of securing the presence of accused after they are granted bail:

> They don't have any permanent residence or postal address. So…when we have to ensure their presence, even the surety disappears. Both [the accused and surety] will sell the house and go away or will change their residence. (DPJ 2)

She also discussed the motivation informing the defence's desire to delay the trial:

> Look, those accused who are released on bail, their lawyers keep dragging the case, because they know that more the time will pass more will be the chances of the complainant becoming hostile. (DPJ 2)

One male NGO lawyer also identified the risk of flight. He said that "in POCSO matters, if an accused does have a family or a base in the city or locality, then it is fine, but if the accused does not have a family, or a significant base in the locality or significant footing in the society, then there is flight risk involved there" (DNGO). He added that the accused may run away, and these things go through judicial officers' minds at the stage of charge and bail. One male member of court staff from Bihar said, "once an accused gets bail, they do not turn up again for the case. This way the case remains pending, and delay occurs" (BCS 4).

7.7.2 Threat to child victims and their family

Another ground perceived as reasonable by respondents to deny regular bail was the released accused acting as a threat to child victims and their family members. A female judge from Delhi raised this issue while talking about securing the evidence of a mother of a child victim: "She told me that she is scared of the accused person, as he is on bail, and he may cause problems to me at my home" (DPJ 2). One male defence counsel from Delhi argued that the predominant judicial perception working behind non-granting of bail that child victims would be threatened if the accused is let out on bail is true and has happened (DDC 1).

A DCW member explained the implications for child victims when an accused gets bail:

> Many times, a female child approached for protection. Like, if there is some acid attack or other offences, or there is a habitual offender, he tells her that 'okay, I am going now. Let me return after securing the bail. Then I will make you understand.' Her relatives are there, or her marriage has been fixed, so in such a situation, to go nearby in order to defame her. Assume, there is a sixteen-seventeen years old girl, and her case is going on. Her marriage has been finalised. (DCS 3)

She then discussed the ongoing case of a 16-17 years old girl child whose marriage was finalised. She said that the accused reached there and caused trouble, after which she brought this to the notice of the Court and moved a 'protection' application. POCSO Courts might reject bail to accused on the ground of threatening the victim, which happened in Delhi, as described by a male Delhi court staff working as a *Naib* court:

> Yes. Many times, such issues have come here. Complaints have also come. And, the Courts have also spoken about it. Such cases have come even before me, that the victim was spoken to in this manner or was threatened in this manner. These things are told by the victims that 'I was threatened.' Then Judge *Saahab* says 'Okay, give me an application.' Or 'file an application in the concerned Police Station.' So, a separate proceeding begins. Or the Court many times rejects bail to the accused on these grounds. (DCS 1)

7.7.3 Living in the same house or slum-cluster and lack of income and/or family

There was also a perception of denial of bail as a potential means of protecting both the welfare of the victim and the rights of the accused. A male lawyer working for a Delhi-based NGO said that speedy trials, setting up of POCSO courts, and stringent bail conditions are to protect the rights of both parties. But he further argued:

> Many times, the accused and complainant come from the same home. Complainant, therefore, maybe in the direct line of harm. So, at least in these cases, it is good to have stringent bail conditions. The accused are often father, uncle, neighbour, so they are too close for harming the complainant. So, the complainant is extremely vulnerable and literally unprotected sometimes. (DNGO)

7.7.4 Compromise between the parties

Another factor was raised by a male prosecutor from Bihar (BPP 4). He discussed his experience of a case he dealt with, where a father who was accused of raping his daughter had put the case for compromise[280]. He said that the father argued for compromise in the case during the time of bail, but bail was rejected on this very ground that there was a compromise between the two parties.

7.8 Conclusion and reform proposals

In this chapter, I have demonstrated how the POCSO reforms have been working on the ground with regard to the issue of the two bails in the pre-trial stage. Although the possible objective behind the reforms is to help improve access to justice of child victims, it does seem from the respondents' experiences and perceptions that the reforms are creating impediments for the accused's access to justice with regard to securing bail and thereby also hampering the fair trial. It is safe to say that with respect to POCSO matters the principle of 'bail is the rule, jail is exception' seems to have been reversed, particularly in cases where penetrative sexual assault has been alleged. It is also noteworthy that far more respondents from Delhi than Bihar talked about the issue of bail and how reforms impact the accused's rights.

There are multiple factors highlighted by the respondents that act as barriers for the accused in POCSO cases when it comes to the protection of their right to liberty. Firstly, a poor legal aid system comes into light, which adversely affects the POCSO accused's rights in the pre-trial stage. Secondly, there seemed to be a rigid judicial approach in granting bail, particularly in offences that were perceived by the judges as more serious. However, there was also a perception that judicial discretion is not utilised properly in weighing the legal reasons that ought to be considered for denying bail. The majority of respondents from Delhi emphasised the predominant judicial practice of not giving regular bail to the accused till the charge-sheet is filed by the police and the child victim's testimony is recorded by the court irrespective of the nature of the complaint. This certainly leads to unnecessary prolongation of the suspension of the personal liberty of the accused.

Ineffective legal representation for the accused, who are mostly poor, as highlighted by respondents, further disadvantages the accused, towards whom the law has shifted the burden

[280] See, note 217.

of proof. This reflects the state's neglect of the rights of the accused in providing effective publicly funded legal representation, thereby making the balance of power further uneven between the state and the individual accused.

Respondents' accounts make it clear that the POCSO reforms do not work in isolation, and their operation in the contexts of family and community disputes mean that they are frequently misused as a means of attack, in the course of which children are further exploited and victimised rather than protected. Poor infrastructure will expose people, particularly those who are socially and economically marginalised, to injustice and the POCSO reforms provide new opportunities for this to happen. A male Bihar judge, for example, asked for increasing the number of FSLs (BPJ 2). He also argued that they need to be active as the POCSO courts have to send them reminders to secure their reports. A Bihar male prosecutor argued that there should be DNA testing by the FSL so that neither an innocent man is trapped nor a guilty one is acquitted, but this is being ignored (BPP 4).

Another reform proposal regarding police practice to curb false POCSO cases was given by a male Delhi prosecutor (DPP 3). He said, "the police can very well come out with the honest investigation and say, no, this complaint was false, we have investigated, and we don't want to file it in the Court, let this be cancelled. This, police are not doing even in a single case." Nevertheless, the respondents also cited their experiences of cases where denial of bail was justified both to protect the rights of child victims and to avoid delay. The next chapter will deal with the operation of the reforms in the trial stage of POCSO cases.

Chapter 8

Stakeholder experiences and perceptions of the impact of POCSO Reforms on the adversarial trial procedures

8.1 Introduction

In the previous two chapters, I presented the experiences and perceptions of court personnel of pre-trial POCSO reforms and their impact on the child victims and the accused. In this chapter the focus is the impact of the POCSO reforms on the trial, particularly the examination of the child victims.

One of the primary objectives of the POCSO Act is to protect the welfare of child witnesses, including in terms of their 'physical, emotional, intellectual, and social development.'[281] The law attempts to safeguard this by demanding that their privacy and confidentiality be protected and respected by every person by all means and through all stages of the judicial process[282] involving the child. The law also mandates ensuring the best interests and well-being of child witnesses are treated as of paramount importance at every stage of the criminal process.

The goal of protecting the welfare and well-being of the child during the trial stage raises particular challenges. While there is an assumption in the adversarial process that witnesses will not be unduly affected by delays or overly intimidated by the court process, there is acceptance that certain witnesses, due to age, incapacity, the nature of the offence, might be unable to give their best evidence under conventional conditions (Ellison, 2001). As the principle of orality is a foundation of the adversarial trial (Ellison, 2001), child victims are called before the court to give live oral testimony on disputed questions of fact within their knowledge usually at a single continuous hearing.

The victims in child sexual violence cases might have already undergone traumatic experience of sexual violence, and are in the court to 'testify' to such experience in unfamiliar surroundings. This poses particular challenges, which I discuss in this chapter, for the aforementioned POCSO goal of securing the best interests and well-being of child victims. While exploring the effects of the failure to identify child sexual abuse as a distinct category

[281] The POCSO Act 2012, the Preamble.
[282] Ibid.

of rape in the pre-POCSO era, P. Baxi (2014) has shown how the presumption in law of the incapacity of children to consent to sexual intercourse played out during the trial. She argues, where the law made the courtroom habitable for female child victims, it did so at the cost of inscribing on their bodies the same conditions of testimony that applied to adult women. Such testimonial conditions, she claims, presumed that the child victim must learn to gaze at her body as that of an adult, while at the same time, testifying to rape in childlike categories, retaining suggestions of innocence.

A female judge from Delhi talked about the trauma a girl child rape victim experienced and shared with her, of speaking during a trial before a general court from before the POCSO reforms came into effect:

> You know, it is very difficult to express. When rape victims generally have to depose in a court, in a general court, then they have to use the very words and also explain the actions. Members of the court staff enjoy hearing that a lot. They leave their work and listen.[283] (DPJ 4)

The reference to 'enjoyment' speaks to the secondary victimisation the child complainant suffers – not only because giving evidence in itself causes anxiety and distress, but also because court staff derive their own perverse pleasure from this. The child complainant, as the judge noted above, faced difficulty in sharing those experiences in detail in such an environment. Therefore, the support available to such children and the courtroom atmosphere during testimony before the open court may have profound consequences for access to justice of child victims. Not only did they affect the fairness of the trial but also adversely affected the well-being of the child facing the trial. This led to the efforts to change the courtroom process to limit the opportunities for this further victimisation.

However, the female Delhi judge (DPJ 4) also explained that even where rape proceedings are *in-camera*, still "when the accused is in the dock, and if he is staring at the victim, then she feels as if she is being raped again, but now through his eyes." She told me that "particularly in gang rape cases, when a child victim looks at their faces for the second time, then it becomes very difficult situation for her to handle." This response seems to contain the answer as to why a shift to *in camera* trials to tackle the problem of publicity seemed insufficient to the legislature for the trial of sexual offences against children, which also legislated to prevent child victims from facing the accused during the trial.

[283] Translated from Hindi: *Maza bada ata hai sunne mein. Staff sara sunta hai, kaam chhodkar.*

Accordingly, in this chapter, the emphasis is on the part of the POCSO trial that entails the examination of child victims. The chapter also discusses the impact on the accused of the reversal of the burden of proof during trial. As the stakeholders identified, the examination of child victims has significant implications for access to justice of the two parties during the trial. I employ procedural justice and therapeutic jurisprudence as theoretical and conceptual tools to analyse and interpret the data I have organised in this chapter. I will explore if, and how, these tools provide insight into the relationship between the reforms and the parties' access to justice during the trial. I also engage the lenses of gender, caste, and class power to scrutinise the data.

The POCSO law introduces several unique features into the trial process relating to the examination of child victims and nature and mode of questioning of children. The law mandates that during the child's testimony, both the prosecution and defence lawyers shall communicate the questions to be put to the child to the special court and not directly to the child.[284] The special court, which in practice is the special POCSO judge, then shall put those questions to the child.[285] If necessary, the special court may permit frequent breaks for the child during the trial.[286] The child must not be called repeatedly to the court for deposition, and when they depose, the court shall create a 'child-friendly' atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.[287] The special court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.[288] The special court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial.[289] And the special court shall presume culpable mental state and guilt of the accused person unless the contrary is proved.[290]

The purpose of these reforms is to create a different kind of communicative process within the trial (A. Duff et al., 2006) than that of the traditional adversarial criminal trial, to protect child victims from the traumas of the trial process, and to secure more successful prosecutions. The aim of this chapter is to examine what the stakeholders had to say about the impact of these reforms on the trial, and their roles during the trial. I further explore whether these reforms deliver the outcomes legislators hoped for. I analyse if, and how, the reported

[284] Section 33(2), POCSO.
[285] Ibid.
[286] Section 33(3), POCSO.
[287] Sections 33(4) & 33(5), POCSO.
[288] Section 33(6), POCSO.
[289] Section 33(7), POCSO.
[290] Sections 29 & 31(1), POCSO.

practices and operation of these reforms during the trial stage impact the access to justice for child victims and accused persons. The following section examines the stakeholder perceptions of the first aspect of the POCSO trial, i.e., the mode of examination and nature of questioning of child victims.

8.2 Examination in POCSO trials: the nature and mode of questioning child victims

Examination of child victims during a POCSO trial is the process by which their testimony is heard and also challenged by the defence. In this section, I assess the various stakeholders' experiences and perceptions of the operation of the POCSO procedures that now regulate the examination of child victims' testimonies. Particular attention is paid to the nature and effect of the language used by the child victim and other legal actors involved in the process.

The operation of these procedures was found to vary between locations. In Bihar, all respondents argued that these reforms were not being implemented for various reasons, with most attributing non-compliance with the special trial procedure as enacted in the law to lack of training and infrastructure. My observations of the four POCSO courts in the four different Bihar districts supported the accounts of some respondents while contradicting those of others.

In Delhi, on the other hand, a clear majority of respondents were of the opinion that there is compliance with the special trial procedure in POCSO cases. They also argued that the experiences of parties, particularly child victims, are better in Delhi in comparison to other parts of India, because of trained court personnel and court infrastructure. However, the Delhi respondents still identified some non-compliance and cited certain reasons for this. My observation of the POCSO courts in the three Delhi districts offered similar findings.

8.2.1 Child victims' examination in Bihar

Talking about his experience of implementing the trial procedural reforms, a male judge from Bihar said:

> See, my court, along with being a special court, is also a court dealing with SC/ST [cases under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989], Civil, and other criminal cases where all these kinds of cases are present for hearing. In such a circumstance, whatever is possible, effort is made

> to provide a child-friendly atmosphere. Child's mother or father or relative is asked to be present during evidence and the hearing is done in-camera. Further, I try not to allow derogatory remarks by the Defence Counsel in the court. (BPJ 2)

Another male judge from Bihar talking about the mode of examination of child victims explained:

> A questionnaire is a must. There should be a questionnaire submitted by the prosecutor and by the defence counsel that such and such questions will be asked from the child witness. I will peruse it and then if I permit, only then the lawyers will ask those questions. (BPJ 3)

He added:

> There needs to be more sensitivity on the part of the lawyers. You cannot misbehave with a seven-eight years old child. You cannot ask her about the size of penis or mode of sexual intercourse. This is impermissible. (BPJ 3)

These statements suggest a struggle on the part of this judge to get the lawyers to follow special trial procedural changes. He suggested 'self-teaching' as a necessary step to enhance sensitivity of such lawyers towards child victims. On being asked about the most important aspect of the POCSO reforms in relation to what happens in the courtroom, another male judge from Bihar said:

> There is now a different method of questioning. Defence counsel puts the question to a judge, and then the judge puts it to the victim. As a judge, I ask the questions in implicit words and in an elaborate manner. (BPJ 4)

The judge did not explain what he meant by his questioning approach, which seems to me to make a child-friendly approach more confusing. Surely 'implicit' and 'elaborated' should be avoided in posing questions to child witnesses – the questions should rather be simple, direct, and short. My observation of their special courts in Bihar showed a complete absence of the practice of submission of a questionnaire in advance by the lawyers to the court, which goes against the claims made by these judges.

This was reinforced by comments from a male lawyer working for an NGO in Bihar and assisting the prosecution, who spoke of aggressive cross examination of child witnesses, in cases of child sexual violence that intersect with prostitution:

> When the cross [examination] takes place…normally the defence counsel attempts to assassinate [child victims] on the grounds of age and character- That she is habitual by herself, and she came to the brothel by herself, and she is hiding here by herself to earn money. They try to prove this. And they try to prove that she is an adult. (BNGO)

However, he added that senior advocates who are elderly and experienced, "their decorum is not to assassinate the character of the girl" as they know that she is a minor, and they respect it.

Recording a child's testimony in writing by the deposition writer, I observed, is an important part of the trial process and examination of child victims. The role of the judges does seem to have changed where more judicial engagement is required. A male member of court staff from Bihar, working as a deposition writer, raised the issue of judicial engagement in the following context. Talking about the vital role deposition writers play during the trial process, the role of the judge, and his experience of judicial interaction, he said:

> Whatever he [the victim] will say, the PO [Presiding Officer][291] will explain exactly what I have to record in writing. If something [it] is confusing, and if it feels that the lawyer is unable to explain that to a witness, then the PO will interfere, and clarify the matter. And sometimes, while typing, I also get confused about what a [child] witness wants to say, so we want the PO's intervention there as well. Even if we just look at the PO, he understands that I may be confused at this particular moment. So, then he asks it again and understands it himself, and then he dictates this accordingly to me. (BCS 1)

Upon being asked who questions the child witnesses, this respondent said that first the public prosecutor and then the defence lawyer asks questions. The judge, he said, intervenes or asks questions only when either a witness is unable to understand something, or if the judge needs some clarification or explanation as it is important and in the interest of the case.

[291] PO, i.e., Presiding Officer, is the term used for the judge of a particular court by the court staff members.

Shedding light on this breach of the procedural reform regarding mode and nature of questioning, he said:

> Sometimes, I mean, not sometimes, it is always the case that defence [lawyers] cross their boundary. A child witness or a victim is asked such questions which I do not feel is appropriate to ask. Here, the role of a PO becomes very important. Here, I see that advocates dominate a lot, and the PO goes on the back-foot. Such questions should not be allowed. And as you have seen [these proceedings], they [often] ask [inappropriate] questions very openly. (BCS 1)

The same Bihar deposition writer went on to discuss the type of questions defence lawyers ask child witnesses in POCSO trials:

> If they had sex, then, "in what manner did they have sex?" If he inserted a finger, then, "where did he insert it?" If the [girl] victim is saying that, "I had been raped," then it means that she was raped. Now, "where did he insert finger, where did he insert X thing, what did he unbutton first, what did he unbutton afterwards," these questions are not required. Even the rule says this. Alright! So, I feel that there should be some control in this regard. Defence, sometimes…usually I see defence crosses its boundary. And they ask more questions than are necessary.[292] (BCS 1)

He added that "They do not ask question to-the-point. Though, it has been said that victims should be asked to-the-point questions, and limited questions. This does not happen." Reflecting on the lack of legal awareness and training on the part of defence lawyers, he argued that the judge's role in such a situation becomes vital. He suggested that the judges are also failing to intervene to enforce the POCSO approach. However, he added, "the lawyers should be served guidelines in POCSO cases as many people do not even know about POCSO. People do lawyering, but what is there in POCSO, and whatnot, what question needs to be asked, they do not know this." Narrating one of his experiences of the revictimization of a child witness through cross-examination, he said:

[292] Translated from Hindi: *Agar usne sex kiya, to kis tarah kiya. Usne ungli dala, kahan pe dala. Agar victim bol rahi hai ki mere saath dushkarm hua; dushkarm matlab dushkarm hua. Ab usko kahan ungli dala, kahan kya dala, pehle kya khola, baad me kya khola, iski koi jarurat nahi hai. Jaisa ki niyam bhi…rule bhi yehi kahta hai. Thik hai. To yahan pe thora sa mujhe lagta hai ki control hona chahiye. Defence kabhi kabhi…usually main dekhta hun ki defence apni seema ko paar kar jata hai. Aur jarurat se jyada question poochhta hai wo log*. The respondent uses the Hindi term 'Dushkarm' which, when translated in English, means bad or wrong act. Child witnesses, respondents said, use this term instead of 'rape'.

> Recently I was observing a case, where the girl child underwent an abortion. She was twelve or thirteen years old. She was raped by her school principal. She has passed through such a torturous stage, and in such cases, on top of that, the lawyer is asking her obscene[293] questions, which were not required at all. (BCS 1)

He said that "in such a situation the PO must be absolutely strict. But generally, I see, they do not become strict." Another court staff member from Bihar slightly differed and contended that "some defence lawyers want to ask more questions, but then the court shows resistance" (BCS 2). However, he argued, sometimes the situation becomes awkward when the Presiding Officer also does not know things properly. A Bihar male defence counsel also agreed that "although the Act is necessary, we are unable to achieve its aims and objects. We are taking it as a general trial" (BDC 1). This defence counsel also noted that courtroom tussles can arise in the wake of the changed judicial role during the cross-examination of child witnesses:

> You do not question the child directly; convey your questions to the court, and the court will ask them. These rules are there, but yet he [defence counsel] interferes. Because he is watching what the court is asking, and he starts fighting with the court that "I did not ask this question" and "you have asked this question…this question was your own." Though he [the Judge] has the right to mould the question to the level of the child and ask it. But still the cross-examiner interferes; that, "no, this was not my question, you have changed my question." (BDC 1)

So, this respondent suggested that sometimes the judges do practice the POCSO approach, but face interference by the defence counsels who accuse judges of changing the questions. The clash being described here is not between an adversarial and more inquisitorial procedure, as the judge is not driving the process in a search for 'truth'. It is rather a strange hybrid approach that involves an interplay between lawyers and the judge in questioning child victims. He further stressed the impact of this courtroom tussle on child witnesses' psychology, "the child is hearing all of this. So, she thinks that if this person [defence counsel] is scolding the judge, then what will happen to me?" This respondent suggested there should be training in child psychology for the judges, defence counsels and prosecutors, saying that:

[293] The stakeholder used the Hindi phrase, '*gandey-gandey sawaal*', which in English translates into 'obscene questions.'

> You cannot come to the level of a child by your knowledge…by your intelligence. To come to the level of the child what is important is how much capacity you have to act like a child, then you can come to the level of the child. You have knowledge and intelligence which is stopping you from going below a certain level. So, it is important that they [defence counsels] also interact [with the child]. Prosecutors should also have interaction. (BDC 1)

When I asked another male defence counsel from Bihar if he had faced any difficulty while conducting cross-examination of child witnesses in POCSO cases, he responded in negative, and shared his experiences and perceptions as follows:

> I have to ask questions to the victim. It is not necessary that I have to see the victim. It is up to the learned court to justify that, yes, the victim is appearing. Her parents are appearing. I appreciate this move of the law. Because the identity of the victims should be protected. (BDC 4)

According to the majority of the respondents, putting the questions directly to the child witnesses – in contravention of the POCSO Act – was common in Bihar. My observations of the POCSO trial proceedings in Bihar suggested the same. Even the lack of concern and empathy on the part of the defence counsel and prosecutor for the child victims was on display during one POCSO trial in Bihar.[294] The child being examined was appearing from within the courtroom through a cabin-shaped box, which I discuss in chapter 10, rather than via the videoconferencing system from the vulnerable witness deposition room, as the system was not working. I have translated the following excerpt from Hindi:

> PP (Public Prosecutor) to CW (child witness): Did the doctor check you?
> CW to PP: No.
> PP began dictating the DW (deposition writer) and meanwhile the CW began speaking further.
> PP to CW: (at a high pitch with anger) Wait! I have not finished yet.
> PJ (POCSO Judge) to CW: (looking towards her and with a calmed voice) Let him finish, then answer.

This judge accorded a positive value to language and judicial engagement with the child

[294] Observation Notes, Day 3, Bihar.

witness during the trial by supporting her in negotiating the strange examination process. However, being a one-off incident, this is a difficult claim to make as my observations were very limited. Further, the judge failed to follow the trial procedure prescribed by the POCSO law by letting the prosecutor directly question the child victim.

Child witnesses may face the anger of a prosecutor as well as the hostility of the court environment not only during the trial, but right before the trial too. I observed that the prosecutors prepare the child witnesses for examination-in-chief in courtrooms or in the court complex in the open public area. Although the POCSO Act mandates that the Special Court shall ensure the child victim is not exposed in any way to the accused at the time of recording of the evidence during the trial, it is silent on preventing a child victim's face-off with accused while entering the Court or in open public areas within a court complex before or after the trial. This prosecutorial practice and the situation, according to some of my respondents, causes trauma to the child witnesses who ought to be shielded from such an experience.

Thus far, the chapter has examined the operation of reforms relating to the examination of child witnesses in Bihar. What does the data suggest about their operation in Delhi?

8.2.2 Child victims' examination in Delhi

Describing the mode of questioning child victims during the trial, a Delhi female judge said,

> There is an audio-video linkage set-up between the vulnerable witness courtroom and the POCSO courtroom.[295] Further, the PP [public prosecutor] or the Defence lawyer asks the questions to me and then I say this into the ears of the Support Person[296]. She then puts the question to the child victim. Then the child victim responds and we all in the [POCSO] courtroom hear it, but for the child victim it seems as if the child victim is narrating a story only to the support person. The accused is made to stand behind a one-way view glass, so we cannot see him, but he can see us.[297] (DPJ 4)

[295] The architectural-spatial set-up of POCSO special courts in Delhi has been dealt with in chapter 10.
[296] Rule 2(1)(f), POCSO Rules, 2020, defines 'Support Person' as "a person assigned by the Child Welfare Committee (CWC), to render assistance to the child through the process of investigation and trial, or any other person assisting the child in the pre-trial or trial process in respect of an offence under the [POCSO] Act."
[297] The objective behind this kind of visibility set-up has been explained in chapter 10.

This suggests very different procedural and spatial arrangements for examination of child victims in Delhi compared to Bihar. The judge here is acting as a mediator between the child witness and the lawyers with the help of a support person and audio-visual technology.

Talking about her challenging experience of dealing with a very young girl child witness of below six years of age during the trial, another female judge in Delhi talked about the process of identification of the accused by the child witness. She said that sometimes such a child gets scared by seeing the accused even on the computer screen. Upon being asked what she does in such a situation, her response was:

> We ask [the support person] to let her have a break. "Don't make her see the accused [even on the computer screen]." We ask the support person to take the victim outside the [vulnerable witness deposition] room, make her eat something, let her play [in the play area], and then bring her back to the room only if she agrees to it. Then we wait for the child to relax. Then we say, "what kind of toy have you got? What is this? How many hands does it have? How many legs does it have?" (DPJ 2)

When I inquired how she asks these questions to the child, she said, "I ask the support person and the support person asks the [child] victim." She then said, "everything is recorded in writing so that they [next POCSO judge or higher courts] can see if the child needed a break or was scared. Recording in writing every act of the child witness is the biggest difference from the usual recording of witness testimony," she added, as it means that there is a record that she had made the child victim comfortable before examination. This testimony recording process – a common practice in Delhi – has neither been mentioned in the POCSO Act nor in the POCSO Rules. The Delhi judges said that it is a judicial practice developed through higher courts' directions. Talking more about the significance of recording in writing, she also said:

> We just write a brief that the child victim got frightened and that is why we gave a half-an-hour break and after that break when the victim returned, she looked relaxed. She has toys in her hands. We asked her the colour of the toy. Where are the eyes of the toy? So, we just write a short gist to tell the other court. It may be that tomorrow, I will be transferred. So, if the new person or any other court wants to appreciate the evidence that whether the child victim was in normal condition and how normal? (DPJ 2)

Explaining the procedural arrangements and the mode of questioning child witnesses, one male judge from Delhi said:

> The system is that the [child] witness is made to sit in the room. There will be a support person sitting with them in that room. Now for the accused, we have made a screen. He always sits behind that screen. And in front of them their lawyers sit. Question is asked by him [defence counsel] to me, and through me that question goes to the support person, in whose ears the ear plug is placed. Then…we tell them that you do not tweak the question and repeat it as it is. But many times, they are not that trained, and start applying their mind. So, from there the question travels in that manner. (DPJ 3)

So, this suggests that all the three Delhi judges cited above – one former POCSO judge (DPJ 3), and the two POCSO judges (DPJs 2 & 4) who were still working in different Delhi districts – adopted the same mode of questioning and examination of child witnesses conforming to the POCSO procedure. Further, this judge (DPJ 3) highlighted the challenge he faced in passing on the defence lawyer's question to the child witness without changing it, in the absence of a properly trained support person.[298] Although the POCSO Rules make it optional to have a support person subject to certain conditions,[299] the stakeholders said that each of the POCSO courts in Delhi had one support person to support the child. However, the majority of respondents were not satisfied with their work, which they attributed to a lack of training. This judge also discussed the difficulty he had to face during examination of child victims because of poorly trained prosecutors:

[298] While the POCSO Rules, 2012 was silent on the training of support persons, Rule 3(6) of the POCSO Rules, 2020, states the following: "The Central Government and every State Government shall provide periodic trainings including orientation programmes, sensitization workshops and refresher courses to all persons, whether regular or contractual, coming in contact with the children, to sensitize them about child safety and protection and educate them regarding their responsibility under the Act." Further, both the 2012 and 2020 POCSO Rules mention the qualifications of a support person: "Support person may be a person or organisation working in the field of child rights or child protection, or an official of a children's home or shelter home having custody of the child, or a person employed by the District Child Protection Unit (DCPU)." See, Rule 4(7) of the POCSO Rules, 2012; Rule 5(6) of the POCSO Rules, 2020.

[299] Rules 4(3) to 4(7), POCSO Rules, 2012: The rules say that "where the offence has been committed or attempted or is likely to be committed by a person living in the same or shared household with the child," then the CWC may provide a support person to render assistance to the child through the process of investigation and trial. For this purpose, the CWC needs to determine whether the child needs to be taken out of the custody of his family or shared household and placed in a children's home or a shelter home by taking into account any preference or opinion expressed by the child together with their best interests. The decision has to be taken with the consent of the child and his parent or guardian or other person in whom the child has trust and confidence.

> Firstly, the PP would start asking. Because they do not know how to begin their evidence. Now assume that there is a child of twelve or thirteen years whose testimony is to be recorded…as is the usual standard system we have…they call witness and straightaway ask, "yes, what happened?" This is their question. This is the kind of stupid question they ask. (DPJ 3)

The judge then said, "in a child's life, many things are going on. How can you begin the examination of a child victim with the first question like "What happened?"." Explaining further his role and the role of emotion in such a situation, the judge said that "to bring a child witness in that particular time and space considering their age and maturity is the most difficult task." He argued, "Our PP is untrained; they do not know, mostly they do not know. Then they look at us." He cited two problems with the prosecutor expecting his intervention. Such interventionist judicial engagement, he argued, is like the judge conducting the examination of child witnesses in the place of the prosecutor, which according to him would violate many rights of the accused. Another problem with this kind of judicial engagement, he suggested, is that "many times allegations also start pouring in, that Judge Sir asked this kind of question in this manner." So, he argued that he is just the medium for questions from the lawyers to the child victims, and he cannot ask questions by himself.

Another male judge shared his experience and the challenges of presiding over the examination of child victims and the manner in which it takes place:

> Younger the child, the more difficult it is to get good evidence or response from them. They will say that "he touched my urinal spot." Then, I will ask, "What exactly did he do? Did he just touch you or did he insert?"[300] Because touching and penetrative sexual assault have big difference in terms of punishment. Also, you cannot put leading questions to the [child] victim. (DPJ 6)

He further showed an awareness of the potential – positive or negative - impact of language and behaviour on the child's welfare: "We use confidence building measures. You would not touch the topic directly, there should be general conversation to begin with. And then you can put some introductory questions to begin with." General conversation and introductory questions could include: what the child did in the morning, the child's name, their friends'

[300] Translated from Hindi: *Wo kahenge ki meri shushu wali jagah kiya tha. Fir hum poochenge kya kiya tha, touch kiya tha kewal, ya andar dala tha.*

names, their parents' names, school's name, which class the child is in, and so on. He argued that "such an approach is quite helpful, particularly for a child below twelve years of age. Child is also in a position to respond in a better way." The judge further stated, "don't expect that they would give narratives to you. In this way you can better extract the response from a child victim."

Another male judge from Delhi emphasised the use of a particular type of supportive language and a personalised approach while talking to child witnesses. He discussed the complexity involved in this approach, which does not fall within the traditional cultural understanding of the judicial role, in the following words:

> I try to ask questions in a very informal manner with a joking outlook, like you usually talk to a child in your daily life. I tell the child, "You know I also have a son of your age." "Was this the uncle who did wrong act with you?" Then, if the child has been tutored by parents or mother or father to not say anything in the court, then the child will say, "nothing happened to me." Still, you ask her repeatedly and then she tells you. She is trying to open up gradually. So, you cannot rush with her. Then I ask, "But the uncle did touch you, right?". Then, "Where did the uncle touch you?". Then if she does not respond, I prompt, "Okay, he touched your cheek." Then, she will say, "no, not cheek. He touched my chest." (DPJ 7)

Other Delhi stakeholders also discussed this judicial approach being followed in Delhi, which suggests a higher level of judicial engagement with the child victims than what is typical of judicial engagement in lower criminal courts. In contrast, the Bihar respondents reported its absence as being due to lack of training of both the judges and lawyers, and of infrastructure. The approach in Delhi hints at the departure of the trial procedure from a conventional adversarial process, where the judge is a neutral arbiter, to one in which the judge has an active managerialist role with the child at its centre. Although the law requires judges to act as a mere medium – a communication link between lawyers and a child witness – the way it is being operationalised, appears to be a more interventionist judicial role. In light of this, the next sub-section examines the encounter of accused persons with POCSO trials in the wake of the child-centric reforms.

8.2.3 Accused persons in the POCSO trials

8.2.3.1 Accused's right to cross-examine the child witnesses

An essential right of the accused person is to cross-examine the prosecution witnesses during the trial, with the ability to observe their demeanour often seen as integral to this. In an adversarial criminal trial, a heavy reliance is placed on the cross-examination to expose the dishonest, mistaken, or unreliable witness, and to uncover inconsistency and inaccuracy in oral testimony (Allan, 1991; Ellison, 2001). Physical observation of the child witnesses, however, has been disallowed under the POCSO Act, as the child witnesses are shielded from the accused person. They are either asked to testify from a video-linkage room that is separate from the courtroom where the accused is present, or a single visibility mirror or curtain is used to shield child victims from accused during the trial. When using the audio-video system, the accused and their lawyer can see the child only virtually on the computer screen, and thus they cannot physically observe the demeanour and emotional state of the child during the cross-examination. However, since they can still virtually see the child on screen, they will get some insight into their emotional state and demeanour.

One male judge from Bihar said, "Now, we do not allow cross examination of victims as it is in the cases of [adult] rape. The defence counsel has to follow this" (BPJ 4). If such a change led to any objection from the accused's side, one male judge from Delhi said, "there are vulnerable witness deposition room rules. There is a ready-made proforma, in which it has been written that the other party would not raise any objections" (DPJ 6). Further, on being asked about whether there has been any objection from the defence on the ground of bias in the wake of the interventionist role that judges play in POCSO trials, another male Delhi judge argued, "no, no. Hardly. Because we are sitting absolutely unbiased there. They all know that. So, that is why the Defence counsel hardly objects to this" (DPJ 7).

8.2.3.2 Presumption of guilt

There has also been a reversal of the burden of proof from the state to the accused in the wake of the POCSO reforms. The law now presumes guilt rather than innocence of the accused in the POCSO cases. However, the majority of the respondents argued that it did not make any significant impact on the accused's rights in the trial. A Bihar male judge, when asked about the least successful aspect of the POCSO reforms, said:

> I think the shift in the burden of proof. It has led to the filing of false cases. Although it is not that the entire burden of proof has been shifted to the accused. Prosecution has the onus to prove age of the victim. They need to show the documentary proof of the minor victim. (BPJ 4)

One male judge from Delhi said, "the Act is a good Act, even the punishments are good. One provision could be a little debatable, which is of presumption of guilt. That is a separate issue" (DPJ 3). He clarified that such presumption is in all POCSO offences except in the cases of sexual harassment of children. This judge said he faced a question related to this legal change during his training, i.e., why despite such significant legal change in the shift of burden of proof to the defence there are so many acquittals.

He explained the reason in detail, that the presumption under the POCSO Act is only for POCSO offences. Whereas the Act's mandate is that if offences under the POCSO Act are also offences under the IPC, then you will try those charges together. For example, there is penetrative sexual assault; it will also go under sections 376 and 377 of the Indian Penal Code (IPC). Or if sexual harassment is there, it will cover section 354 of IPC too. There is no such presumption under the IPC provisions. And then if conviction occurs, then whichever law has higher punishment, i.e., POCSO or IPC, you have to employ that. Now because of this, he further argued, many times acquittal takes place:

> Because appreciation of both offences would be together, both are similar types of acts…we of course could not say that look for section 6, when I am appreciating the evidence, I am raising the presumption, and I convict under this provision, but in 376, when I appreciated the evidence, then under this nothing is made out, or it could not be proved, therefore, I acquit in this. (DPJ 3)

So, this judge contended that this is a big reason for acquittal in this Act. Because there are hardly one or two cases where simply POCSO is applicable. Otherwise, in all offences IPC has to come, and if IPC will come, then the point about presumption would become irrelevant.

Another male Delhi judge, upon being asked if the presumption of guilt has helped to secure more convictions, made a point that could be the reason for the majority of respondents to not identify this reform as a significant one. He said:

> It is a matter of saying (*kehne ki baat hai)*. [Section] 29 is immaterial on ground. Even the lawyers do not know anything here *(Vakeelon ko bhi kuchh pata nahi hai yahan)*. This kind of laws are for such a legal system that is advanced. It is for a place where people are literate and well-read. Here, advocates do not even know how to properly frame questions. (DPJ 5)

Reflecting on this lack of training to frame proper questions, particularly in defence counsels, which jeopardises the accused's rights, including effective defence, during the trial, one Bihar male respondent – a court staff member – said:

> Sometimes by asking questions [about consent] they [defence lawyers] are taking the life of their client [accused]; something that they should not ask as it will go against them. They do not know the rules of POCSO. What happens mostly in POCSO is that you have to prove that the rape that took place, the victim is below eighteen [years]. If you are working as a Defence then you should prove that she is above eighteen. But here, they keep proving that it has happened with consent. There is no issue of consent and non-consent there. So, this should be understood by the Defence. They do not understand this, and that is why they spoil their own case. (BCS 1)

It thus seems that this significant legal change works poorly in practice. There appears to be continuing clarification being given by higher courts in this regard.

8.2.4 Reflections on the data on changes in the roles of key players in the trial and improvement in access to justice

The POCSO reforms, in policy terms, have an impact on the roles of key players in the trial, including that of the judge. Special prosecutors and the defence counsels cannot ask questions directly to child victims. They need to communicate the questions to be put to the child to the special judge, who in turn will put those questions to the child. My interviews and observations suggest that these major reforms, in practice, have led to a change in the roles of both lawyers and judges in POCSO trials – at least in Delhi, and to a limited extent in Bihar.

The findings suggest that lawyers in Delhi are not asking questions directly to children. Judges in Delhi are more engaged, more interactive, and interventionist than they would traditionally be in adversarial trials with regard to the recording of child victims' testimonies. A new player, i.e., a support person, who has not been mentioned in the Act but in the POCSO

Rules, has entered the trial scene in Delhi, and is responsible for passing the questions from the judge to the child. The awareness and implementation of a modified judicial approach with respect to child victims was reported by my respondents as well as were observed by me at the two field sites, though much more in Delhi than in Bihar.

In Bihar, the lawyers continue to ask questions directly to children with rare interventions by the judges. The observational data suggest the presence of a support person in one of the Bihar districts but with no participation in child's examination during trial. While the respondents in Bihar did not pay much attention nor gave much value to judicial engagement and interaction, and to the voice and positive trial experience of the child victims and accused, those in Delhi were found to be far more committed to these.

The policy and practice of enhanced and proactive judicial role of acting as a medium between the lawyers and child victims is a manifestation of the shift to a managerial approach within what is still, overall, an adversarial model of criminal process. Usually lawyers, particularly a Defence lawyer, question a witness in a criminal trial. And in a traditional adversarial trial, there is often a hostile line of questioning on the part of the defence counsels. But the perception that the character assassination and aggressive linguistic techniques and modalities deployed by defence lawyers interrupt the narration of child victims and adversely affect their welfare and dignity led to the taking away of the defence's right to directly question child witnesses. Moreover, it was extended to public prosecutors too as even they, like defence lawyers, cannot ask questions directly to child victims.

Participating in a trial being a communicative enterprise (R. A. Duff, 1998), the law has attempted to make this communication as inclusive, engaging, and respectful, as possible, in its attempt to mitigate risks of further harm to the child victims. Further, as Crenshaw (1989) argues that the interpretation of legal discourse in a courtroom should always be understood in the context of wider, intersectional systems of power, the impact of sociocultural norms of caste, class, and gender do impact the ways in which child witnesses are examined and testify. The findings suggest that roles played by gender and judicial experience in judging in POCSO cases and its impact on access to justice is ambivalent. One male judge from Bihar said:

> Usually, offences with lesser punishments are dealt with by the Chief Judicial Magistrate courts or the Judicial Magistrate First Class courts. But, in POCSO, the Sessions Court is taking cognizance of the matter as the legislature may have thought that these are serious and sensitive matters and should be decided by experienced judges. (BPJ 1)

He then added that this approach is to improve access to justice. So, there seems to be a perception of connection between accessibility to justice and judicial experience. However, this does not appear to be translating on the ground in the absence of training and infrastructure. Further, though Bandes (2009) argues that gender differences might suggest different approaches to judging or the judicial role between men and women and perhaps a less complete allegiance among women to the cultural script of dispassion in which emotions play no role, it is not certain whether female judges were more sensitive to child witnesses than the male judges from the respondents' responses.

The judicial role with regard to child witnesses has seen a substantial change. In Delhi, on one hand, the direct engagement between child and judge has diminished because there are very few face-to-face interactions between them. Such few interactions have been in cases where the judicial practice to provide 'child-friendly' support to very young child witnesses during trial has been to call them near the judge's desk or even make them sit on judge's lap. On the other hand, the POCSO reforms have led to a far greater involvement of judges in terms of engagement and interaction with different legal players, particularly the lawyers and support persons, in the courtroom during the trial. Delhi respondents reported that the judges showcase child-friendliness by giving chocolates and biscuits to child witnesses and by interacting with them and other legal actors in a manner that might not be considered within the scope of adversarial trial process in the strictest sense.

8.3 Conclusion

This chapter has examined the perceptions and experiences of respondents in relation to the procedural reforms on POCSO trials. I identified on that aspect of the POCSO trial which has the highest potential to make an impact on child victims' access to justice, i.e., the mode and nature of questioning child victims. The POCSO reforms mandate multiple changes – in roles, in procedures, in court spaces, and in the use of technologies, all of which are interconnected. The extent to which these changes have been implemented is, as I found, variable between the two sites.

One of the major developments that emerges from this chapter is the new judicial role. From being an 'umpire', the POCSO judge is expected to be the institutional mechanism that now channels the activities of the advocates and acts as the intervenor to ensure they comply with the new ethos of the POCSO trial process. This new role does not really suggest an

adoption of an inquisitorial role on the adversarial system, but rather appears to be a strange hybrid, and more of a shift from adversarialism to managerialism (McEwan, 2011).

Respondents reported that this managerial role is realised far more in Delhi than in Bihar. My empirical findings suggest that the extent to which judges have become more sensitive to child victims' needs during trial – both in terms of courtroom language and behaviour – is mixed.

The findings also point to the importance of judges' understanding of the concepts of 'voice' and 'respect', and their implementation in the courtroom, which Wexler (2007) and Burke & Leben (2007) argue, form the basis of therapeutic jurisprudence and procedural fairness respectively. The engendering of new judicial role by the POCSO law seems informed by therapeutic jurisprudence's view of the law as a potential therapeutic agent. Certain procedural reforms, as reported, have made the judges take command from lawyers and be more sensitive to children's demands during recording their testimony- be it in terms of giving breaks or formulating questions that would not have the potential to assassinate the child's character. However, the way these crucial procedural reforms have been implemented or not implemented was found to be deeply problematic, especially in Bihar, where neither the judges nor the lawyers seem to be adopting this approach uniformly.

The Bihar respondents argued that the lack of personnel training and infrastructure, certain sociocultural norms, and state funding have been limiting factors for the operationalisation of reforms to the trial stage of POCSO cases. This has led to child witnesses in Bihar in particular facing many difficulties, be it in terms of not having a congenial trial space, or the lack of supportive courtroom personnel who have gone even to the extent of treating children poorly in some instances. Both my interview and observational data suggest that Bihar advocates blatantly violate the POCSO trial procedures without any consequences. There also seem to be opportunities, in meetings between prosecutors and child witnesses, for the ethic of a more sensitive and inclusive procedure to be undermined, leaving such children open to abuse.

Delhi, on the other hand, was reported to be far ahead in terms of implementation of the reforms for the POCSO trial stage, mainly the adoption of technology in the form of video-link. The judges especially seemed far more concerned and active with regard to child victims and sensitive to their needs. The courtroom experiences of the child victims – including in terms of testifying from vulnerable witness deposition rooms, and the nature of their interaction with court personnel – were reported to have improved, thereby enhancing fairness in the legal procedures employed during the trial process (Sarat, 1977; Tyler, 1984, 1988, 2007).

The child friendly special trial procedures have attempted to balance the requirement for fair treatment of child witnesses without putting the accused's right to a fair trial into peril. However, it needs to be further explored if and how much the constraints on questioning child witnesses and lack of physical observation of their demeanour by the accused and the defence counsel affect the fair trial. The judicial interaction with different actors, particularly the child witnesses, during the trial suggests the importance of an informal and less impersonal judicial engagement and interaction reflecting somewhat different ideas of judicial performance, justice, and legitimacy, which was also identified by Australian magistrates in Roach Anleu & Mack's (2017) work.

The respondents have identified the linkage between the procedural dimension of the trial process outlined in this chapter and the parties' access to justice. From the issue of who will interact with child victims and how, to how best their testimony can be recorded without their revictimisation by the criminal process, all these elements contribute to the fairness of the trial process and thereby access to justice. The next chapter deals with another dimension of the trial process- speed, and its relationship with providing speedy justice as a facet of improving the parties' access to justice.

Chapter 9

Stakeholder experiences and perceptions of the impact of the POCSO Reforms on speed of the trial process

9.1 Introduction

The previous chapter focused on the stakeholder experiences and perceptions of the impact of the POCSO Reforms on trial procedures, particularly the examination of child victims. This chapter examines the stakeholder perceptions of the speed of the trial process set up by the POCSO reforms.[301] One of the primary objectives of the POCSO Act is to provide for the establishment of Special Courts for the speedy trial of sexual offences against children.[302] Expediting the trial process is one of the main concerns of the POCSO law. So, it is important to explore the nature of a 'special court' along with other factors that are significant in speeding up the trial process.

9.2 Exclusive courts to speed up the trial process

By law, a POCSO special court is distinctive- its jurisdiction is over the POCSO Act's cases only or cases in which the accused is simultaneously charged with both POCSO and non-POCSO offences.[303] As mentioned in the earlier chapters, to speed up the criminal process, the requirement for committal of a case by a magistrate's court to sessions court has been removed.[304] The law also demands the special court must record the child testimony within thirty days,[305] and must complete the trial, as far as possible, within a period of one year,[306] of taking cognizance[307] of the offence.

[301] The discussions in this chapter are different from what I discussed earlier in chapter five about stakeholder perceptions of speedy justice as one of the goals of the POCSO reforms and as an aspect of access to justice.
[302] See, the Preamble to the POCSO Act. Also, see, section 28, the POCSO Act.
[303] While trying an offence under this Act, a Special Court shall also try an offence other than the POCSO offences, with which the accused may, under CrPC, be charged at the same trial. See, section 28 (2), POCSO Act.
[304] Section 33(1), POCSO. Usually as per the Criminal Procedure Code, all criminal cases first go to a Magistrate's court and then are committed by that Magistrate's court to a Sessions court.
[305] Section 35(1), POCSO.
[306] Section 35(2), POCSO.
[307] It means the action of taking judicial notice of a case. This stage comes after the police submits its report before a court.

9.2.1 Issues in Bihar

Bihar stakeholders reported a perception that special courts exclusively trying POCSO cases would speed up the trial process, thereby enhancing the parties' access to justice. However, the respondents argued that the courts in Bihar, designated as POCSO special courts with special judges and prosecutors, were also trying non-POCSO cases, which had no relation to POCSO offences. This resulted in delays in the completion of POCSO cases.

One male judge from Bihar (BPJ 1), talked about the significance of the special court and its exclusive jurisdiction for access to justice and justice delivery. He said, "conviction rate is low because there is still no special and exclusive court to try [only] POCSO matters. The regular courts are overburdened. So, this is a barrier to access to justice." Being asked about the least successful aspect of the POCSO reforms, another Bihar male judge said that there are no exclusive special courts to hear only POCSO cases, and "nothing much has been done in relation to POCSO except enacting the law" (BPJ 2). He contended that the law is there, but the institutions like Special Juvenile Police Unit, Child Welfare Committee, and support persons, which have their roles in the law's implementation, are either not established or are insufficient in number with poor conditions and inefficient working, which delays the process. He then reflected on access to justice in the context of speedy trial by talking about exclusive courts for POCSO cases:

> There is a complete relation between POCSO court reforms and access to justice. If POCSO courts are not improved, then there will be a delay in securing justice. For example, if a POCSO court also deals with the SC/ST [cases under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities)] Act and Civil and other Criminal matters, then it will have lesser time to deal with POCSO cases, and because of this a POCSO case would not be disposed within the time frame prescribed under the POCSO Act. (BPJ 2)

A similar concern was shown by a Bihar male court staff about the non-exclusive nature of the POCSO court he was working in:

> Our court is not exclusively a POCSO court. The Supreme Court's notification has come that this court would be made a special court, but in our court, we see Sessions' cases [non-POCSO criminal cases] as well. There are cases of Drugs,

> POCSO cases, and other than this all the cases of 376 where rape is committed against an adult, so the trial of all these cases takes place at our court. (BCS 1)

Another male member of court staff from Bihar also said that the special POCSO court has been given other powers as well (BCS 2). Arguing that although non-POCSO cases are few in number, he added, "there should be an exclusive court for POCSO." Upon being asked about the benefit of an exclusive POCSO court, he said that it would lead to a quicker disposal of POCSO cases. He further noted that if there is no timely disposal of such cases, it will be an injustice to not only the child victims but to everyone. This respondent also said that "the way number of [POCSO] cases are increasing, many [POCSO] courts need to be built" in this district,[308] which had only one POCSO court, thereby leading to delay.

The reason for this failure of a core reform in Bihar was suggested by one Bihar respondent- a male prosecutor (BPP 1). He argued that the administration, i.e., the government of Bihar, does not give heed to these vital requirements despite him writing multiple letters to them. Another reason that could be gathered through the assessment of documents of court reforms is the limited state funding for the courts in Bihar, which is one of the poorest Indian states, in contrast to Delhi.

9.2.2 Issues in Delhi

Delhi stakeholders reported that there are special courts exclusively trying POCSO cases. However, they said that more special courts are needed along with far more vulnerable witness deposition rooms (VWDR) so that each special court has its own VWDR. Further, they cited other factors for delay in POCSO cases that I discuss in the following section.

9.3 Long case lists, delay tactics, and POCSO trial as a multi-factor organism

9.3.1 Issues in Bihar

As mentioned above, there was a lack of special courts in Bihar dealing exclusively with POCSO cases. So, these courts had long case lists of around 40-45 matters each day, including the non-POCSO cases. The respondents argued that this delays the trial of POCSO cases. One male Bihar defence counsel linked the burden of caseload on the POCSO court to the pressure

[308] This district had a population of 2.48 million in the year 2020.

on judges to dispose of the cases quickly, which he said leads to lack of judicial interaction with child witnesses and the absence of a congenial court atmosphere for young children:

> So, where the child is of tender age, the court atmosphere is not like that. And the reason behind this is the burden on the court. There is a single court. Cases are on the rise. If the judge will give 5 or 7 sittings with one child for interaction, then when will he conduct the trial. (BDC 1)

One male Bihar prosecutor also discussed the impact of delay on child witnesses' memory and therefore their testimony. He said:

> There is usually a long duration between the occurrence of the incident and the victim's statement under 164 [before a magistrate] and then the victim's evidence in the court during the trial. Even the Judge or I would not be able to recall incidents and dates etc. with such time gaps. Judicial willpower is needed for speedy justice. There should be a speedy trial monitoring officer. (BPP 1)

9.3.2 Issues in Delhi

Delhi's POCSO courts, according to the Delhi respondents, were dealing with only POCSO cases and had only 10-12 matters each day. However, there were other factors causing delay reported here. One Delhi male Judge argued that defence lawyers very often want to postpone the cross-examination to another day. The judge further added:

> We try that it should not be postponed. That the child should not be called to the Court repeatedly.[309] What happened then is that it was 1.30 PM. Many times, it is 1.40, many times it is 1.50, and many times it is 1.55, and I did not even have my lunch. There is only one reason, that let it [recording of child witness's testimony] be over. Because even if four questions are left, and we call the child witness again next time, then it will be a nightmare for him, poor fellow. The questions which were asked last time will be repeated. (DPJ 3)

He argued that he does not want to give that chance to the lawyers to call the child witness repeatedly to the court.

[309] S. 33(5) of the POCSO Act says: The Special Court shall ensure that the child is not called repeatedly to testify in the court.

This judge narrated another incident that causes delay in POCSO trials, which he said could be either genuine, when the lawyers are likely to be caught up with other cases, or a trickery, when they want to delay the proceedings:

> I reached the Vulnerable Witness Room. We also made the accused sit there. Alright! Our PP [prosecutor] is also present there. Our [child] victim is also sitting there. Alright! But…lawyer, the accused's lawyer is missing. The Defence counsel is not there. "Where is your Lawyer, Sir?" "He is in so and so Court." "Why?" "Because there is not only a POCSO case. He has other cases too." "When will he get rid of those then?" "Call him quickly, brother." Now, Judge Sir is sitting like a fool. (DPJ 3)

The judge contended that what usually happens in this scenario is that the case does not proceed in the absence of the accused's lawyer, despite the consequent delay. He added that it is so because the child witness is very important to a POCSO case and on the basis of their testimony the entire case might be decided. This demonstrates the difficulty of expediting the trial process, which comprises many essential parts.

This judge, while highlighting that he had 10-12 POCSO matters a day, praised the mandates of timeline in the law for speedy processing of POCSO cases. He said, "I do not consider the keeping of timeline to be of any harm. Because somewhere you will have to put the timeline. And mostly, the legislature has made us law-breakers." By using the term 'law-breakers', he meant that the legislature has put in such a timeline in the POCSO law that is humanly impossible. He further argued that:

> There are two strange things going on here in India. One is…the calculation to fix a time for everything. Right! I understand this as if a Pigeon is closing his eyes while looking at the Cat. If you have 5000 cases of POCSO, then how will you do it. I do not want to talk about myself, my condition got worse in this. And most people get sick. And the second biggest calculation which we have here is that if the player is unable to goal, then you keep changing the goalpost. The best method to do that if you are unable to bring it is that you raise the presumption. (DPJ 3)

9.4 Absence of a Special Task Force and extra-legal considerations as factors of delay

A male public prosecutor from Bihar shed light on the issue of a special task force, which he said, needs to be established in each district to speed up the trial, in accordance with the Supreme Court's decision[310] (BPP 3). He added that there is no such task force in his district. This task force should involve the concerned special PP and a police officer in a team whose function should be to connect to the concerned special court to produce witnesses in POCSO cases during the trial. He further noted:

> Look, in any case, testimony is the most important thing. If the witness appears before the court on time, then that case gets disposed of sooner. Whatever its judgment, positive or negative, that is another thing, but that case gets disposed of. And you take any case, a witness is a very big thing, it is everything. And if from time to time the witness appears, then that case quickly moves forward. (BPP 3)

This respondent also highlighted that "there is no need to bring any change in the law. There is a need to be a little more serious while working at the ground level." He said that the constitution of the task force had the objective of combined working by the Police and the Prosecution:

> They both should keep pace. The Police agencies' work should be to produce witnesses, and the Prosecution's work should be to get their testimony recorded. This means if they work in the form of a chain then…there will be a time reduction and the trial will move at a faster pace. And the victim will also get justice soon... what I am saying is that the witness comes very late and is unable to come. (BPP 3)

He means that such coordination between the prosecution and the police will lead to speedier justice thus improving access to justice for both the child victim and the accused. In the context of delay in trial, one male judge from Bihar argued for providing police protection to victims from the date of occurrence of the incident till the disposal of the case, so that they should not be threatened by the accused persons and can testify before court in a timely manner (BPJ 3). Another judicial member, a male Bihar Judicial Magistrate also said that there is no special task force yet, which makes it difficult for Police to bring and take back child victims,

[310] *Alakh Alok Srivastava v. Union of India & Ors.* (2018) 17 SCC 291.

particularly when there is some disturbance in the gallery outside the courtrooms (BJM 3).

A male prosecutor from Bihar said that the judge holding the then office was slow, and lacked intelligence, boldness, and strong authority in the courtroom (BPP 1). He then said that the previous POCSO judge had served convictions in 14 out of 75 registered POCSO cases. This is a very high conviction rate in Bihar's context.[311] The prosecutor went on to report that on getting the news of promotion[312] and transfer, the former judge stopped convictions, telling the prosecutor, "Who will perform the task of a butcher?"[313] The prosecutor said about the POCSO judges:

> They are also human beings. So, they have various kinds of thoughts. He [the former judge] is a practicing religious person. He thinks that I am a judge and if I do so many convictions then the God may do something against me. There are many things, what can you do. (BPP 1)

By using the term 'butcher', the lawyer seems to suggest the judge's perception of conviction and the consequent punishments under the POCSO Act as severe and excessive. He also appears to hint at the judge's record of far more convictions than is typical, and of extra-legal consideration like his religious belief and promotion and transfer, as factors inhibiting the judge from deciding cases. He praised the former judge as being hard-working, for the reason that more convictions meant that the POCSO court and its officers, including himself, are functioning well. He claimed that the rest of the judges who joined afterwards were bogus[314]. He added that judges rarely want to convict.

In Delhi, the respondents did not report any problems regarding the special task force or extra-legal considerations such as promotion and transfer. However, they considered two additional factors causing disruption and delay in trial, which seemed relatively minor issues. First is the shifting of all the concerned court personnel from the special courtroom to the Vulnerable Witness Deposition Room (VWDR), which usually is on a different floor, for the examination of a child witness. They argued this shift interrupts the court proceedings once

[311] This (18.7%) is a very high POCSO conviction rate for Bihar, which has an overall conviction rate of 3% (2012-2016). See, chapter 4.

[312] Usually, POCSO judges are promoted to a more senior position of a Principal judge and transferred to another district within the same state. Bihar lawyers highlighted promotion and transfer as one of the delay factors. Many judges held the POCSO special judge position for short duration, during which they did not want to decide the POCSO cases. Between 25th March 2017 to 20th March 2020, i.e., around three years, there were 8 POCSO judges in a Bihar district, with one judge having a tenure of just a month.

[313] Translated from Hindi: *Kaun Kasaai waala kaam karega.*

[314] This stakeholder used the term 'bogus', which literally means fake or not genuine, but by which he meant 'someone who as per him is not working properly.'

they are under way and also contributes to the delay in the trial. Another factor they cited was the lack of sufficient number of VWDRs. They claimed that sometimes all the concerned parties to a case, including the child witness, have to wait for a VWDR to become vacant, as there is unavailability of a VWDR for each POCSO court.

9.5 Conclusion

This chapter has examined the perceptions and experiences of respondents concerning the impact of POCSO reforms on speedy trial and their implications. This chapter also responds to what is the meaning of POCSO 'special' courts. There appear to be three models of such courts- designated special courts with both POCSO and non-POCSO cases, designated special courts with only POCSO cases, and newly built special courts, i.e., new courtrooms that act as special courts, to deal exclusively with POCSO cases. While the former two are carved out from the existing court infrastructure, the last one is an addition to the infrastructure.

It has also explored the structural issues that affect the throughput of the POCSO cases. Multiple factors, including non-exclusive special courts, and the absence of a special task force, were highlighted by the Bihar respondents as reasons for the delay and poor operationalisation of reforms to speed up the trial of POCSO cases in Bihar. In Delhi, although the respondents reported positively on these aspects, they argued for building more VWDRs and highlighted other factors such as delay tactics by defence lawyers, which affect the speed of the trial. The existing timeline for the POCSO trial was also criticised as impractical, particularly if the courts were overburdened. The next chapter deals with the third dimension of the trial process – the geography of trial space – and its relationship with improving the parties' access to justice.

Chapter 10

Stakeholder experiences and perceptions of the impact of the POCSO Reforms on the POCSO court architecture and trial space

10.1 Introduction

The previous chapter focused on the stakeholder experiences and perceptions of the impact of the POCSO Reforms on the speed of the trial process. This chapter focuses on the POCSO reform goal of improving the trial experience of the child victim, focusing on providing a child-friendly trial space with the help of purposely built customized 'special' courts. Various questions arise: how do POCSO special courts look – both externally and internally? In what kinds of courthouses do they operate? Do these courts provide the type of trial space required by the POCSO law?

I examine the materialities of special courts that have bearing on the nature and function of criminal trial space, and thereby on the trial. As the stakeholders identified, the geography of the trial has significant implications for access to justice for the two parties during the trial. I will analyse the stakeholders' perceptions and experiences of the materialities of POCSO special courts, which include courthouse buildings where the special courts are situated, the architecture of the special courtrooms, furniture design, and the use of technologies, in particular, video links. The law requires that POCSO courtrooms are designed and organised in such a way as to ensure that the child is not exposed to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the child's statement and communicate with his advocate.[315] To do this, the law says, "the special court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device."[316]

I explore in this chapter how access to justice means access to a congenial trial space which is compatible with conducting a fair trial. This would include ensuring the safety and dignity of child witnesses so that they testify during the trial without being revictimised. These demands entail spatial arrangement separating the child witnesses from the accused, giving the child witnesses waiting facilities in the court area, and providing child witnesses access to a

[315] Section 36(1), POCSO.
[316] Section 36(2), POCSO.

support person and the judge as per the need. It is thus important to analyse what the trial space makes visible and invisible, and what does it erase and privilege.

I have used the images of the POCSO courts in Bihar and Delhi to give a clearer picture of their architectural design and spatial arrangements. The intention is to show how the law in relation to the built environment of POCSO courts is being followed to improve access to justice in POCSO cases by making special courts child-friendly. I will also discuss the built environments of POCSO special courts in Bihar and Delhi respectively and how the respondents perceived these features and their operationalisation. I will further explore how the courthouses and special courts act as spaces of power and of access to law and justice (Branco, 2016, 2018; S. Kumar, 2017), particularly for child victims, during the trial.

10.2 Court architecture, child-friendliness, and access to justice in Bihar

This section examines the architecture of the special courts in Bihar. The Bihar respondents reported inconsistencies in the customized court spaces of special courts. Their responses suggested that only in one district did the court have a separate vulnerable witness deposition room, a video-link connecting this room to the main POCSO courtroom, and waiting facilities for child witnesses. I observed this court along with three more designated POCSO courts- one each from three other districts and found their responses to be true.

Each of the three designated POCSO courts existed as a single courtroom in a larger court building with multiple courtrooms numbering from ten to twelve. While the other courtrooms for hearing both criminal and civil matters were similar in design, the POCSO courtrooms had some specialist architectural or procedural arrangements. There seemed to be, however, no separate entrance for child victims to reach and enter these POCSO courts, to protect them from meeting the alleged perpetrator or a family member in conflict with the child, and to safeguard them from a harsh environment while waiting to be heard (Branco, 2018), nor any special vehicles to bring them to these courts. It was common to observe defence counsels bringing in child victims and their parents to the courtrooms with the potential to influence their testimony.

In terms of the customization of the three POCSO special courtrooms, one had the usual witness box merely mounted with one-sided visible glass to record a child's testimony. The other two had no special architectural but procedural arrangements. The respondents from these

districts claimed that child testimony is recorded in the judge's chamber to keep the child away from the regular court space and a mirror is used when the child has to recognise the accused.

A male defence counsel working in Bihar said that the special court is just tokenistic. Explaining that "there would not be [a] crowd during the trial of the child witness" and "the culprit would not be there," he said everything else has remained the same:

> There is a special court on the paper. There is a special courtroom. A special prosecutor is there. But the rest of the *modus operandi* is the same. The courtroom is the same, same situations, same atmosphere. (BDC 1)

He then added that there is a box for the child witness's deposition inside the courtroom. Further, talking about the lack of interaction with child witnesses by court personnel during trial, he questioned the usefulness of merely putting up wall paintings and keeping books in the vulnerable witness deposition room for children:

> So, everywhere you have drawn pictures, have put up paintings, have put up all these things. But will that bring mental changes in the child? You need to have interaction with the child, that interaction is not there. A child has come, and the judge is sitting in the same way on the chair with the same court atmosphere. (BDC 1)

Reflecting on the adverse impact of formal dress on child witnesses' experience, he criticised the POCSO judges and defence lawyers for wearing their coat, gown, and band.[317] But he informed me that the special prosecutor does not put on the formal dress. This respondent seems to be raising some fundamental questions about whether the special POCSO courts in Bihar really are different from conventional courts. The difference he seems to be suggesting is paper thin and the changes made of questionable affect in terms of the goals they are designed to achieve. He also seems to have a wider understanding of how the culture of the courtroom is generated and uses that to point out the limits of what is rather a tokenistic response. Also, this holds more value coming from a defence counsel, who, one might expect, would be more hostile to the reforms that limit his role and that of his client.

[317] There is only one specific provision in the POCSO Act that relates to formal dress, i.e., uniform, which is section 24(2). It says: "The police officer while recording the statement of the child shall not be in uniform."

Another male defence counsel from Bihar said that there is a special physical courtroom. He noted that the procedure to shield child witnesses from the accused is followed with the help of a one-way mirror:

> When she comes to the court, then there is a mirror that has been put. She [child victim] stands behind the mirror. It is so because the accused who is standing there should not come into contact with her. It may be that because of the eye contact with him, she may get scared, and she might change her statement. All these things are very good, very nice. (BDC 2)

When prompted to talk more about it, the defence counsel said that the use of a one-way mirror is everywhere in India and has been mentioned in the Act itself. On being asked about how a child-friendly environment is created in a POCSO courtroom, he described the special courtroom's spatial organisation to me while raising concern over the child victim's first encounter with the POCSO court during trial:

> In today's time, it is the trend that the child victim comes into the POCSO courtroom; the accused will be standing in the dock, and the child victim will get into the witness box. The entire courtroom is closed. And then when a child enters the courtroom, she observes, for the first time [in life], that there is a distinct lifted-up area cordoned off by a red cloth where there is a Judge sitting with a tie around his neck. Beside him sitting is the Steno, the one who types the evidence. On one side is the *Peshkaar* [clerk], then there are two lawyers- the Defence lawyer will be there, the prosecution lawyer will be there. One lawyer is for her. And if there is any guardian of the child victim, like a father or mother, then they will be there. (BDC 2)

I observed that this mirror was mounted on the top of the usual witness box located inside the courtroom as there was no separate vulnerable witness deposition room in this POCSO court. This architectural change was praised by another male defence counsel too:

> This is a good step. It has been built so that the victim does not come in direct touch with the accused, and the victim also did not get any chance to see the accused. It is also now not the case that while the accused is standing at the backside, she gets terrorised and scared because of his presence. So, there is a benefit from the box. (BDC 3)

However, my observation of this court suggests there was a movement of lawyers and litigants in and out of court even during a POCSO trial. The defence lawyer who earlier praised the use of mirror then explained how merely closing the courtroom, without shielding the child from the hostile court premises, is insufficient to give child victims a friendly experience:

> Before the courtroom is closed, the outside area and the courtroom too remain open. She has not seen this environment in her entire life. Even behind the glass what would be her mental condition, you just tell me. A havoc is created by all of this.[318] (BDC 2)

Pointing to the impact of the environment of court premises on child victims' memory and mental condition when they encounter and navigate it to reach the special courtroom, the lawyer said:

> If there is a seven-eight years old child [coming] in the court, and there are police personnel standing outside the room. The victim goes through the outside corridor, and then gets in the courtroom. There is a mirror placed there in a particular way. She is then made to stand behind the glass. And Judge *Saahab* is sitting there. After looking at all this, her mindset is already disturbed. (BDC 2)

He then said that the area outside the courtroom looks like a police cantonment, and with so many litigants present in corridors, taking such a child through those spaces to the courtroom and then just closing it is insufficient to create a child-friendly atmosphere. "As they all get to know that there is a small kid who has come to the court to depose, all of them, litigants, lawyers, gather around to see that", he noted, asking me, "so imagine and tell me what the impact on the mind of that child would be." He was of the opinion that this approach of creating a child-friendly environment by merely closing the courtroom is impractical and should not be employed.

This eagerness among litigants and lawyers to watch the child testimony also reminds me of the earlier quote from a judge about the court staff members 'enjoying' child testimony. The problem with these situations is that they show two aspects of the potential for the trial as a spectacle to resist the reforms. One, it is of serious concern, especially in the context of POCSO reforms, that there is no public awareness of the possible harm this can cause to child victims. Two, even the members of the court staff need sensitisation. All this suggests that it is

[318] Translated from Hindi: *Ek aise hi havoc create ho jata hai*.

not enough to close the courtroom and change its layout. It also connects to earlier points about the impact of all aspects of the trial process and performance that takes place in the court on child witnesses and their testimony. This raises pertinent questions- why should a courtroom be used at all for examining children, and what could be the alternatives in the absence of a vulnerable witness deposition room?

In light of the critique of the implementation of the spatial reforms, there were some suggestions from the Bihar respondents as to how a congenial trial space for child witnesses should be constructed. One Bihar male defence counsel's suggestion was that child witnesses' evidence should either be taken in the judge's chamber or somewhere away from the court premises in the company of the child's friends:

> Call her in your chamber. Even if there is a place outside and other than the chamber, then take her evidence there. Take her evidence in the presence of those children who usually mingle with and play with her every day and are of the same age group as her. So that she could feel that my own people are around me. Even if lawyers and the Judge are there, it is fine, because in every child's house there is a maternal uncle, paternal uncle, grandfather, grandmother, and other such relatives. (BDC 2)

This seems to be an odd and problematic proposal, as a child complainant testifying in the direct presence of other children would jeopardise their privacy and dignity, which the POCSO law seeks to protect. This proposal is problematic also, given that, presumably, many sexual offences against children that are being tried are alleged to have taken place in home environments, involving family/friends.

10.2.1 Prevention of child victims' exposure to the accused during the trial

There were different arrangements in place at the four POCSO courts I observed in Bihar to ensure that the child witness is not exposed in any way to the accused at the time of recording of the evidence. In one of the POCSO courtrooms, I saw, what one male court staff member from Bihar (BCS 1) called, "a cabin-like box" (see Figure 10.1). This was the only special courtroom I observed in Bihar which had a separate child witness deposition room (CWDR) connected to this courtroom via a video-link. However, the live feed from the CWDR was visible only on the computer screen placed on the judge's desk facing the judge, which, therefore, was not visible to either the defence lawyer, the accused persons, the prosecution

lawyer, or anyone else present in the courtroom. There was no other computer screen present in the courtroom to give access to the live feed to the defence. The display monitor placed at the top of the left wall of the courtroom was switched off, and none of the respondents from this district told me if this monitor is used for showing the live feed. The cabin was located beside the usual witness box inside the courtroom and had a one-way view mirror at its front.

The child had to come inside the courtroom to enter the cabin. Both- the cabin box and the CWDR were being used here for deposition by child witnesses. On inquiry about the origin and purpose of the box, the same respondent said that it came in the absence of complete guidelines regarding the design of the CWDR. When this court was designated as a special court, this was an alternative arrangement to secure the privacy of child witnesses, he added. Later on, new guidelines to have a separate deposition room for child witnesses came in from the higher judiciary (BCS 1).

On questioning why is it still in use despite the presence of the CWDR, he explained that the box is used "when there is device failure," as the video-link cannot be used in such a situation. He further said that the cabin must not be used if there is a separate deposition room available to record the testimony via videoconferencing. However, as I observed, the box was still being used even when there was no device failure. It was used twice during the period of my observation. Moreover, in one of those two instances, the girl fainted and fell on the floor while being examined from within the cabin; the examination was long and without any break. She was later offered water by the court clerk.

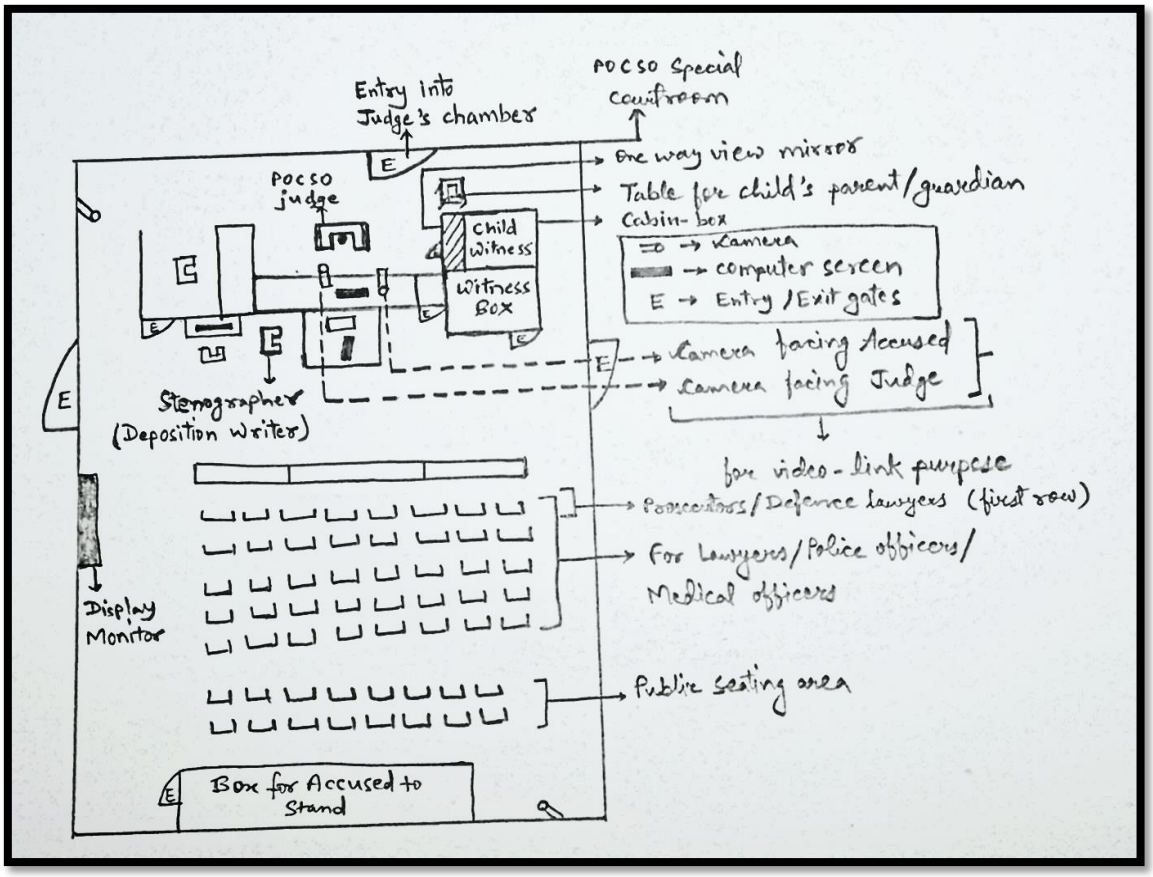


Figure 10.1: POCSO Special Courtroom in one of the districts of Bihar

10.3 Courthouses and special courtrooms in Delhi

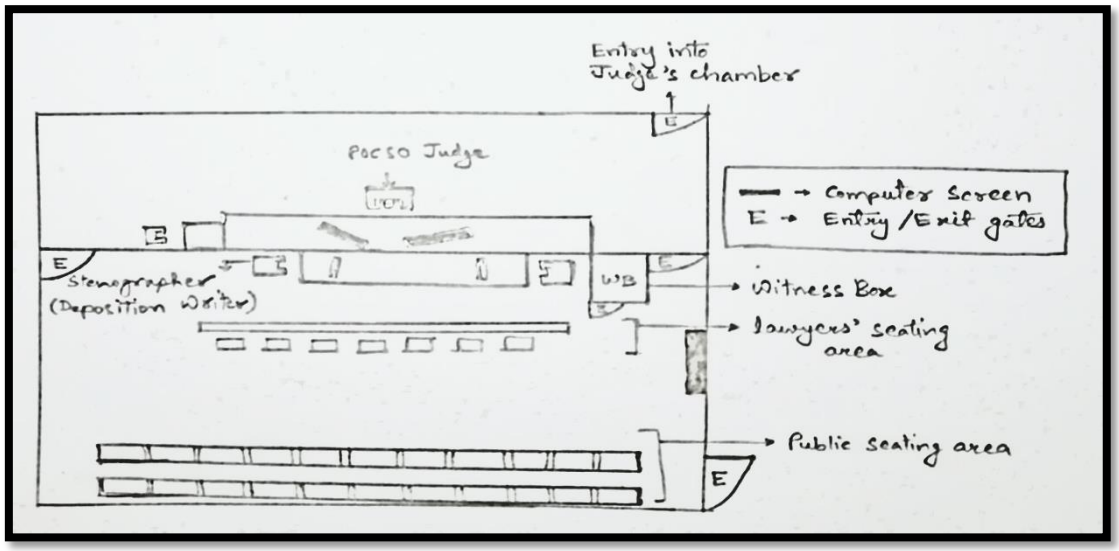
Delhi respondents claimed that all the districts in Delhi[319] have at least one POCSO court, with some having more than one. I verified and found that there were nineteen POCSO courts for eleven Delhi districts. There were different court complexes in Delhi catering to one or more Delhi districts. These complexes had buildings that sheltered these POCSO courts along with other courts. Stakeholders also reported that the Delhi POCSO courts had different architectural features from those in Bihar. They said that these courts are also different from the regular Delhi criminal courts. These POCSO courts have separate vulnerable witness rooms, with waiting facilities for child witnesses, as well as the video-link. They also have other arrangements such as a wooden separator with curtain for when the child witnesses testify from within a POCSO courtroom.

[319] Delhi has a population of 31.2 million people.

One female judge from Delhi discussed how the courtrooms were changed in terms of infrastructure and design to tackle the problems that remained even in the *in-camera* trial (DPJ 4). She said, post the *Nirbhaya* case, fast-track courts and special courtrooms were established, and she had got a special VWDR. VWDRs were available in all Delhi district court complexes. However, they were fewer in number than the POCSO courtrooms, and so had to be shared between two or more POCSO courts, she added. Arguing that the POCSO Rules define a vulnerable witness as any witness who is below eighteen years of age, the judge added that they depose in the VWDR, which has a very child-friendly environment. However, neither the Act nor the Rules define a vulnerable witness. She further explained:

> The VWDR has pastries, chocolates, Frooti [mango juice] for the child witnesses who come for deposition.[320] There is a Panel of Support Persons, who are mostly from legal aid services, to help and support the child witnesses during their deposition. There are vehicles provided by the government, and in POCSO cases, the child witnesses have to be brought to the VWDR in those vehicles. Along with the courtroom, there is a deposition room and one recreational room. (DPJ 4)

My observation found that a POCSO special court indeed was a combination of three rooms. One was the main POCSO special courtroom (see Figure 10.2), the second was the vulnerable witness deposition room (see Figure 10.3), and the third was the video-linkage room cum recreational room (see Figure 10.4).



[320] This approach of using food to make child witnesses comfortable might be related to the fact that they did not eat anything before coming to the court or may feel hungry while waiting for or testifying during the trial. Also, most child witnesses belong to a poor family who might not have access to such items in their daily lives.

Figure 10.2: Room 1- POCSO Special Courtroom in one of the districts of Delhi

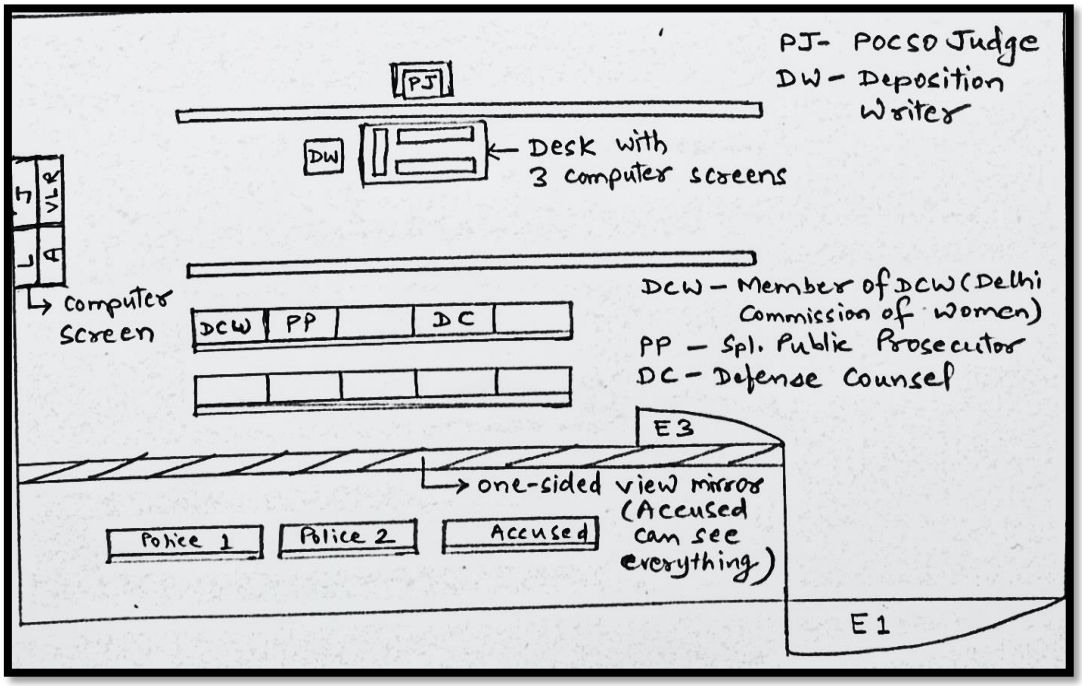


Figure 10.3: Room 2- Vulnerable Witness Deposition Room (VWDR)

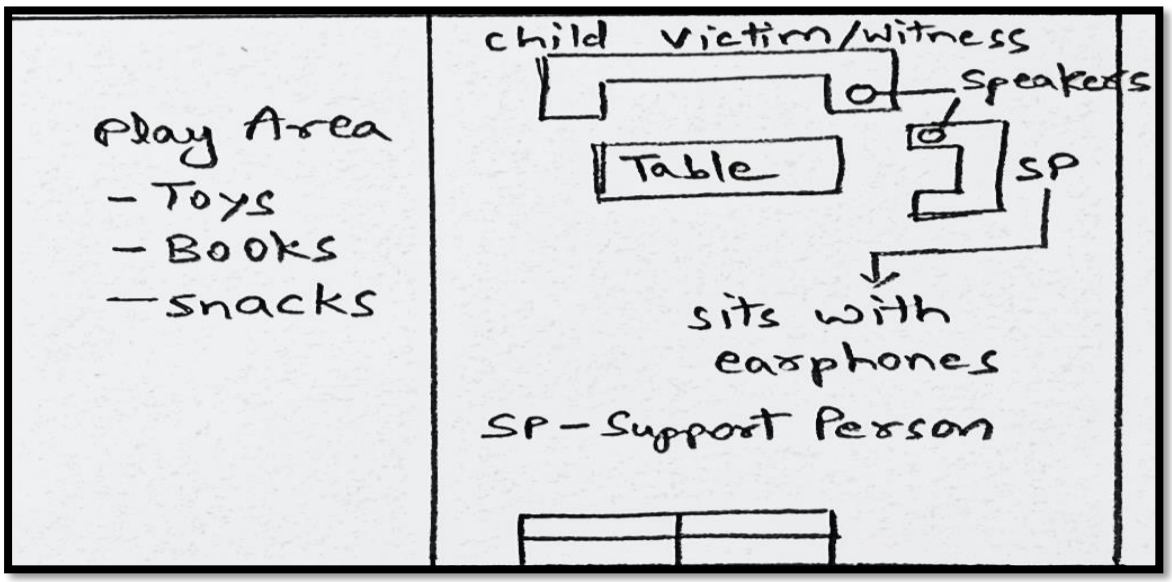


Figure 10.4: Room 3- Video-Linkage Room (VLR) cum Recreational Room

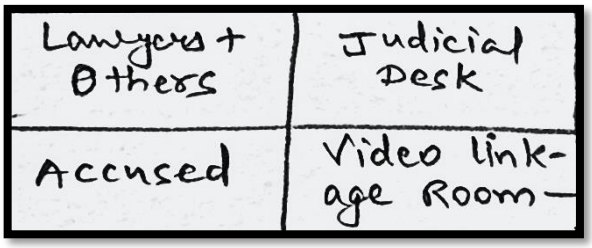


Figure 10.5: Computer Screen as seen in the VWDR

The computer screen, present in both the VWDR and the VLR, was split into four parts. As Figure 10.5 suggests: top-left part of the screen was a wide-angled view of the bar table along with lawyers and the DCW member, top-right was a narrow shot of the judicial desk, with a head-and-shoulders shot of the judge, bottom-left showed the accused, and bottom-right presented the wider view of the VLR, where a child witness sits together with the support person. This screen is visible to everyone present in the VWDR, including the accused sitting behind the one-sided view mirror.

The Delhi respondents reported that the control of the cameras' feed coming on the screens in both the VWDR and VLR is with the judge, who can either keep it or turn it off. The accused's face is shown on the computer screen in the VLR only for the child to recognise them. The child victim cannot see anything beyond the VLR, which has two sofas and a table with a computer screen, along with a recreational room (play area). VLR seems to be what Branco has reported in her findings as the need for "a more intimate space" for the child – "a room with a simpler symbolism and scaled-down architecture, especially in terms of furniture and bench configuration" (2018: 410). The accused is confined within a box with the one-way view mirror in the VWDR. Its purpose, respondents said, is to shield child victims from the accused when the children are called into the VWDR to the judge's dais. This happens when child victims do not depose from the VLR through the video link because of their hesitation.

10.4 Stakeholders' perceptions of the use of video-links & the role of judges

There was a consensus among the respondents that in Bihar the video-link was in use in only one POCSO court in a particular Bihar district, while in Delhi, POCSO courts in all the districts were using video-link to record child witnesses' testimonies. The respondents argued that the use of video-link presented many challenges to different legal actors participating in the trial. All the Delhi judges agreed that there are challenges to remain unbiased and independent. This wasn't highlighted by any judge from Bihar, including the one who was holding a POCSO court which had the availability of a video-link. I also observed a lack of training on the part of the judges and lawyers in Bihar on how to conduct examination with the help of the video-link. The lawyers also appeared disinterested in the use of video-link, and hence insensitive to the mandate of law as well as of the dignity and privacy of child witnesses.

Even the support person present in one Bihar district did not seem to be acting as an intermediary.

The majority of respondents said that more 'active' judicial engagement is required to use the video-link in an effective way. They further argued that assertion of judicial 'control' in distributed courtroom space becomes difficult during the trial. I feel an analogy can be drawn of the lawyers who seemed to be acting as 'ventriloquists', speaking to their audience, i.e., child witnesses, through the judges & support persons acting as 'dummies'. However, the judges and support persons in POCSO trials are of course more than mere dummies because of the nature of investment they make in such trials. There was a clear agreement among the respondents from both the locations that effective functioning of a POCSO court demands employment of a collaborative process- where there is mutual cooperation between support persons, members of the technical staff, and lawyers from both sides.

The judge, they argued, has acquired a central role, in which all these trial participants need to assist and work as a team. One concern that was raised by a majority of the defence counsels from Delhi, and by some Delhi prosecutors, was that their questions get mangled while travelling from them to the child witnesses via the judge and the support person. This seemed to have made particularly the defence lawyers angry who felt that the judiciary are showing some forms of bias against the accused and that they, as the lawyers, have lost control of proceedings. However, on this point, the Delhi judges argued that it is nothing but the defence's trick to delay the trial and get the child witnesses to reappear, which actually goes against the letter and spirit of the POCSO law.

10.5 Conclusion

This chapter has examined the perceptions and experiences of respondents concerning the impact of POCSO reforms on the architectural modifications and spatial arrangements of special courts and their implications on the trial. I identified the special architecture and spatial organisation of the POCSO court, including the use of a video link during the trial are a response to POCSO law's objective of providing a child-friendly trial space without marginalizing the accused's rights and the larger goal of fairness of the trial. They have the potential to make an impact in the context of access to justice. As Rock (1991) argues, the social organisation of space shapes the witnesses' experiences in court, it could be gathered from the findings that the space factor is significant not only for both the child witnesses' and defendants' healthy experiences during the POCSO trials but also for the fairness of the trial.

In Bihar, the POCSO special courts shared the building with other courts with jurisdiction in non-POCSO criminal matters and civil matters. Now, looking at how justice interiors may or may not facilitate critical principles of justice, and particularly access to justice (Branco, 2018), the interior architectural and spatial dimensions of POCSO courts differed between Bihar districts. Bihar had just one district with a special court having a separate VWDR and a video link. The judges and lawyers here were reported to be untrained and reluctant to use these facilities during the trial. Other Bihar districts either had the regular courtrooms customized with a one-way view mirror or had the arrangement of child testimony carried out in the judges' chamber. The respondents in Bihar reported that such tokenistic changes in the courts, combined with court personnel's insensitivity towards child victims, have the potential to adversely affect their trial experience.

They seem to be informed by the state making choices from the options given in the POCSO provisions, and appear to be tied to the varying administrative practices, poor judicial education, and perhaps most crucially lack of state funds. Recently, more special courts have been established in Bihar to deliver speedy trials in POCSO cases. However, it needs to be seen if that will translate into a success, considering my empirical findings that suggest the operation of reforms in the trial process in Bihar merged with many problems other than just the number of POCSO special courts.

Delhi, on the other hand, was reported to be far ahead in terms of implementation of the reforms for the POCSO trial stage, mainly the adoption of technology in the form of video-link. The findings suggest that Delhi had a much more robust infrastructure of special courts with architectural modifications and recreational rooms to cater to the needs of the child victims during the trial. The judges especially seemed far more concerned and active about child witnesses and were sensitive to their demands. The courtroom experiences of the child witnesses- including in terms of testifying from VWDRs and the nature of their interaction with court personnel- were reported as improved thereby reflecting fairness in the legal procedures employed during the trial process (Sarat, 1977; Tyler, 1984, 1988, 2007). However, at stake are also, as Rock (1991) argues, very grave matters of liberty and confinement, accusation and vindication, reputation and veracity, matters which passionately concern both the defendants and child victims.

Chapter 11

Conclusion

11.1 Introduction

This thesis sought to address the gaps in empirical scholarship on the operation of reforms under the POCSO laws that govern the cases of sexual offences against children in India. Three research questions that pinpointed important gaps in knowledge were formulated in the following terms.

1. To what extent, and in what ways, do the POCSO reforms have the explicit policy aim of improving access to justice?
2. To what extent are the POCSO reforms, as envisaged by the POSCO Act and Rules, being implemented?
3. In what ways have the POCSO reforms had the effect of improving access to justice for victims and defendants?

To answer these questions, the research engaged qualitative empirical methods in the form of stakeholder interviews and court observations, in combination with a review of official statistics on POCSO cases. The official data of registered POCSO cases in India indicates numbers have risen from 32,608 in 2017 to 47,335 in 2019. Around 130 POCSO cases are being registered each day in India. The police have disposed of around 70% of these cases each year, with the remaining 30% of cases being added to the following year's police caseload. The cases disposed of by the police include the cases sent to the court for trial as well as those cases in which the file is closed. Around 94% of the cases disposed of by the police are sent to court for trial in a year. The rate of completion of trial of POCSO cases, on the other hand, has remained extremely low at 10%. 90% of cases sent to trial were not processed by the court in the legal year and were added to the following year's court caseload. This has led to an increase in the number of cases awaiting trial from 84,143 in 2017 to 179,893 in 2020 which is the most recent data.[321] The conviction rate in cases whose trial was completed from 2016 to 2019 has been around 33%.

[321] See, Table 4A.5, Crime in India 2020, Statistics, Volume 1, NCRB, p. 338.

While these quantitative data shed some light on the operation of the POCSO reforms, they are insufficient to answer the research questions. I engaged qualitative empirical methods in the form of stakeholder interviews supplemented by court observations to provide new data. Qualitative empirical research has a significant role to play in providing insight into court processes and the experiences and perceptions of the court actors engaged in those processes. It requires time and resources and produces data, which is detailed, nuanced, and contextualised.

To carry out the research, I chose Bihar and Delhi as the two field sites. These two places had the highest cases of child sexual abuse as per the 2007 government report. They also stand at the two ends of a human development spectrum, including in terms of literacy rate, and state funding of their criminal justice systems. The review of the quantitative data on the POCSO cases and POCSO courts in the two locations suggest that the numbers of registered POCSO cases in Bihar and Delhi have been fluctuating since 2016. In 2019, they had 1540 and 1719 cases respectively. In the 11 Delhi districts, there were 19 POCSO special courts exclusively dealing with POCSO cases. In Bihar, there were 38 special courts in 38 Bihar districts. In Bihar, the existing Additional Sessions Judge's court in each district was designated as a POCSO Court. However, none of these courts was reported to be dealing exclusively with POCSO cases. Due to the increase in pending POCSO cases, the Bihar government, in the year 2020, announced the addition of 22 exclusive POCSO courts in 11 districts.

My interviews were with those people who have the responsibility for implementing the reforms. Accordingly, I interviewed special judges, judicial magistrates, special prosecution lawyers, defence lawyers, NGO lawyers, support staff members, and police personnel at the two locations. I also observed POCSO special courts at these two locations. Below I discuss my responses to the three questions that set the whole thesis in motion.

11.2 To what extent, and in what ways, do the POCSO reforms have the explicit policy aim of improving access to justice?

11.2.1 Aims of the POCSO reforms and access to justice

At the root of the POCSO reforms are various factors as discussed in chapter 2. Writing in her 1992 article, Segal (1992: 888) argued that "A gradual increase in public and professional interest in the intrafamilial maltreatment of children suggests that child abuse will be an issue that warrants attention in India in the 1990s and into the 21st century." 21st century India did

indeed focus on child abuse generally and child sexual abuse specifically and brought in the POCSO Act as a gender-neutral law, which introduced both substantive and procedural reforms. The policy objectives are to comprehensively define sexual offences against children, to provide harsher punishments and speedy trials for child sexual violence cases, and to cater for the welfare of the child victims in the criminal process, particularly during the trial.

The thesis begins with a study of these objectives by employing and examining the concept and meaning of access to justice and what access to justice reforms generally entail. A historical journey is taken to reflect on access to justice reforms, both in the Western and the Indian contexts, and also to trace their development in the context of the adversarial criminal justice system and the survivors' movement.

The empirical findings suggest that the stakeholders envisaged the aims of the POCSO reforms in three ways: (a) criminalisation and punishment, (b) protection of child victims by child-friendly procedures and child-friendly special courtrooms, and (c) speedy trial and speedy justice. In the context of access to justice being an explicit aim of the POCSO reforms, the stakeholder perceptions can be categorised into three themes. First, they associated the creation of special child-friendly courts, special personnel, and special procedures with improvement in access to justice in the sense that such dedicated courts and personnel would speed up the overall criminal process in POCSO cases. Further, these dedicated personnel would be specifically trained to follow the special procedures. Second, while they identified the mechanisms of speedy trial improving accessibility to justice for both child victims and accused, they reported the use of videoconferencing during POCSO trials as improving access to justice for child victims. And third, they recognised the gender, attitude & behaviour of court personnel as tools to improve access to justice for child victims. They said that these tools would make the personnel involved in POCSO cases engage with the child victims with care and sensitivity thus leading to a better child testimony and fairness in trial.

Thus, the study identifies that the POCSO law, which brings in substantive, procedural, infrastructural, and spatial changes, does have an explicit policy aim of improving access to justice. The findings suggest that there is an attempt to improve access to justice, though particularly for the child victims when such accessibility is analysed through conceptual tools of speedy justice, procedural justice, and therapeutic jurisprudence. The POCSO reforms seem to give more priority to the needs of the child victims, and it is their 'access to justice' that is at the forefront.

For the accused, while the goal of speedy justice has relevance, it is hard to identify other features of the reforms that support their access to justice, particularly in light of the limited

availability and poor quality of the publicly funded legal representation. Further, there is a presumption of guilt of the accused and the burden of proof has been reversed from the prosecution to the accused with regard to certain POCSO offences. The POCSO Act, however, does attempt to create a balance between the competing interests of the child victims and the accused by penalising false complaints or information against any person.

Also, a lot of the access debates I reviewed tend to focus on the accused/defendant -with the good reason of balancing the power between the accused and the state. As I argued in the earlier chapters the might of the state makes the accused/defendants very vulnerable in light of the provisions of presumption of guilt and shift in burden of proof. This raises the question- does this mean the accused/defendant is more vulnerable to state power in POCSO cases? Despite being the most controversial and significant reforms, this particular reform did not seem to attract many comments from the respondents. My data does not talk much about it. This is an evolving area in the POCSO regime as the courts are still working through the application of this provision.

The POCSO reforms, therefore, are predicated on an understanding of access to justice as a matter of specialisation of regular adjudication institutions and procedures, to deliver justice in the cases of child sexual violence.

11.2.2 Substantive legal reforms under the POCSO Act and access to justice

While the stakeholders reported positively on POCSO reforms having an explicit policy aim of improving access to justice, there was concern among them about the substantive reform of criminalisation of what they called 'consensual' or 'love-affairs' cases, i.e., where non-exploitative sexual activity has taken place between two adolescents or an adult and an adolescent. While a majority of the respondents thought of this as unjustified both for the children and the accused, and thereby, adversely impacting their access to justice, the special judges reported difficulty in punishing the accused in such cases. A similar finding emerged in another study, where the High Court judges reported the conceptualization of consent as challenging in the so-called 'love cases', with one judge noting: "Children need their parents' support, and they soon give in under their pressure. When we call them in our chamber and ask, they tell us the truth. It is a very difficult scenario" (Barn & Kumari, 2015: 443).

Further, the findings of this research on the substantive legal reforms suggest that issues of criminalisation and punishment by the Act are given more weight than the procedural reforms by the respondents across the whole sample. However, attitudes vary. On the one hand,

some respondents assume that the problem of sexual offences against children is much worse than it was in the past. From this perspective, the imperative underlying the POCSO reforms was that the law had to catch up with this reality. On the other hand, some respondents feel that the law has always failed to grapple with the existing reality of sexual violence against children. Another important finding is that the weight given to the procedural reforms by the Delhi respondents was higher than those by the Bihar respondents.

Nearly all respondents believed that the substantive law reforms, i.e., expansion in the definition of sexual offences against children and increased severity of punishment, were very much needed to help the child victims access justice. All but a few of the respondents also seemed to believe that the enhancement and gradation of punishment were also needed to have a deterrent effect on perpetrators of such crimes and to send a strong signal to the society that the state cares for its children.

11.3 To what extent are the POCSO reforms, as envisaged by the POSCO Act and Rules, being implemented?

11.3.1 Findings on special POCSO training of stakeholders

The POCSO Act and Rules require stakeholders to be regularly trained to implement the POCSO reforms. The findings regarding the status and nature of stakeholder training as claimed by the state authorities suggest a clear difference between Bihar and Delhi in public access to information and training resources. Bihar performed poorly in comparison to Delhi. However, my empirical findings paint a negative picture of stakeholder training in both Bihar and Delhi. A minority of respondents said that they had received POCSO-related training and thought it to be sufficient. A smaller minority of respondents claimed to have received the specific training but did not think it to be sufficient. The majority of respondents reported that they did not receive any training in dealing with POCSO matters. While all the POCSO judges mentioned receiving the general judicial training upon their induction as magistrates, some stakeholders, particularly from the Bihar judiciary, clearly rejected the very idea that formal training is required.

It has been argued that training is a mechanism to change stakeholder actions and responses, but this viewpoint too often removes it from the culture and structures within which those stakeholders make their decisions (Hoyle, 1998; Stanko & Hohl, 2018). Thus, the issue

of stakeholder responses to POCSO training in the two places, and their lack of requisite attitudinal change can be linked to the socioeconomic cultural and structural factors.

Further, the data revealed that some judges believe in their intrinsic abilities and knowledge of court procedures. This suggests that while subordinate judicial culture and personnel are changing over time, the judicial training is still impacted by the core culture of subordinate judiciary, i.e., lack of judicial diversity, know-all judicial attitude, and command ethos. Few stakeholders – a judge and two court staff members – also reported the courtroom interaction among different groups of court personnel as one of the training methods to effectively carry out their professional tasks. An especially alarming finding was that a judge and a prosecutor reported having trained themselves by viewing a fictional movie.

This thesis has provided insights into the tension that exists between the institutional resistance to special training and its necessity. The efforts to impart POCSO-related training ought to be grounded in acknowledging, assessing, and tackling the institutional resistance to change and the sociolegal cultural factors that exist in a particular region. Moreover, given that India continues to be a caste- and patriarchal society, as is particularly evident in its criminalisation of the socio-economically marginalised and sexual victimisation of its girls and women, the insights from anti-caste and feminist research on sexual violence against women and children ought to inform the content and content delivery mechanism of stakeholder training for the POCSO cases. It is only then that the 'training gap', i.e., the gap between what is required by the POCSO law for its implementation and what was reported on the ground, can be bridged.

11.3.2 Access to justice and limitations and shortcomings of the implementation of the POCSO reforms: pre-trial stage

11.3.2.1 Reporting of POCSO cases and medical examination of child victims

On the issue of implementation of the POCSO reforms in the pre-trial stage in Bihar and Delhi, the findings paint different pictures of the two locations. There are evidently multiple socio-economic-legal factors at play that shape and determine the nature of implementation of the reforms during the stages of reporting sexual offences against children and medical examination of child victims.

Further, the very nature of the state, like Delhi - being the capital city, and thus with a better-funded criminal justice system and more media scrutiny - governs how effectively the

reforms are executed on the ground. According to my respondents' accounts and observational data, Bihar and Delhi are two different life-worlds residing in the same universe when it comes to the implementation of POCSO reforms in the pre-trial stages. Bihar, where the stakeholders reported poor personnel and infrastructural support to child victims in the pre-trial stage, and violation of procedural rules during registration of police complaints and medical examination of child victims, lags far behind Delhi in terms of implementation of the pre-trial POCSO reforms.

11.3.2.2 On 'False' allegations

The perception and experiences of the respondents in relation to 'false' cases present a strong emerging theme in the data: namely, that the POCSO law is frequently used as a tool for harassment, revenge and violence. If their reporting is correct, that the POCSO law is widely misused in this manner, the result is that children are further victimised, rather than protected. Such a finding, however, goes against what Barn & Kumari (2015) found in their empirical study where many of the High Court judges they interviewed strongly believed that false rape allegations were rare because of the unique social milieu of Indian society and culture. It is difficult to explain this disparity between these findings and my own findings in relation to false allegations. However, it could be because the higher court judges are usually distant from the everyday practices within the trial courts, unlike my stakeholders who work in trial courts and will have different experiences while dealing with POCSO cases. Also, "lower courts are closer to the human effects of economic, political, and social change, and they recognize and respond to these impacts more readily than higher courts that do not deal with the same volume and mix of cases and participants" (Roach Anleu & Mack, 2017: 7).

11.3.2.3 Procedural justice in the pre-trial stage

Moreover, the findings reveal that procedural justice elements- voice, neutrality, and trust, as well as communication, being a good listener, courtesy, and patience (Roach Anleu & Mack, 2017), are necessary to build the confidence of child victims and their parents and family members in the legal authorities and institutions during the criminal process. These elements are also essential for creating child-friendly pre-trial procedures. Stakeholders report that fair and dignified treatment from the very beginning of the POCSO process, and during the direct encounters with police, medical staff, and judicial magistrates, helps dilute the stigma and shame in opening up about and reporting such incidents to legal authorities.

11.3.3 Access to justice and limitations and shortcomings of the implementation of the POCSO reforms: trial stage

11.3.3.1 New judicial role in POCSO trials

Looking at what the findings say about the implications of the reforms for the trial stage, one of the major developments that emerges is the new judicial role. From being a neutral quiet 'umpire', the POCSO judge is expected to be the institutional mechanism that now channels the activities of the advocates and acts as the intervenor to ensure they comply with the new ethos of the POCSO trial process. The interview findings suggest that this role is realised far more in Delhi than in Bihar. In Delhi, the judges especially seemed far more concerned and proactive in relation to child witnesses and sensitive to their demands. This has likely improved child witnesses' experiences of testifying from vulnerable witness deposition rooms in Delhi.

11.3.3.2 Special trial procedures, child-friendly trial space, and examination of child victims

The findings suggest that the lack of personnel training and court and related infrastructure, poor funding by the state government, and socio-cultural norms, have been limiting factors for the operationalisation of the reforms to the trial stage in Bihar. This has led to Bihar child witnesses facing many difficulties, be it in terms of accessing the POCSO courts, not having a congenial trial space and the lack of supportive courtroom personnel. There is also a blatant violation of the POCSO trial procedures in Bihar without any judicial interference or consequences. Further, the architectural dimensions of POCSO courts differ between Bihar districts. The facility of video-link to record child testimony existed only in one of the four Bihar districts, and even there it was not used regularly.

Delhi, on the other hand, was reported to be well advanced in implementation of the reforms to the trial stage, including in terms of the use of video-links to record children's testimony. Despite these reforms and their somewhat effective operation in Delhi, it can certainly be argued that social relationships and interactions, cultural norms, and power hierarchies outside the courtroom influence what goes inside the courtroom during trials. Further, the stakeholders across the two locations perceived the built environment of special POCSO courts to be a significant part of the POCSO reforms in theory, but not necessarily significant in practice.

11.3.3.3 New site for victimisation of children and accused

Overall, as is true for any criminal justice reform, it is clear that the POCSO reforms do not work in isolation. Poor infrastructure, lack of awareness and training, and poor implementation of the POCSO law will expose people, particularly those who are socially and economically marginalised, to injustice rather than improving their access to justice, and the POCSO reforms provide new opportunities for this to happen. The stakeholders reported that this could happen when either privileged individuals misuse the POCSO law by victimising their innocent children to file false complaints against marginalised individuals, or in disputes between equally marginalised people, for ulterior motives of personal revenge or in pursuit of other non-sexual disputes.

11.4 In what ways have the POCSO reforms had the effect of improving access to justice for victims and defendants?

Concerning the POCSO reforms, the respondents could draw the relation between the aims of the POCSO Act and access to justice through the lenses of speedy justice and procedural justice. Without explicitly mentioning these, they talked about how the procedural changes are meant to improve the speed of the trial process and the experience of the child victims of the trial process through better engagement and interaction, and no direct questioning by lawyers of child victims.

However, they reported that this goal has not been achieved. They tend to feel, in practice, that victims' access is undermined by all the practical/structural limits and constraints on implementation, as well as by wider problems such as false allegations. The findings reveal conflicting opinions among respondents on whether the access to justice of one party - the child victim - is being improved at the risk of having a detrimental effect on access to justice for the other party - the accused. Although the reforms aim to help improve access to justice for child victims, it does seem from the respondents' experiences and perceptions that the reforms are creating impediments to justice for the accused, particularly with regard to securing bail, which then also undermines the fairness of the trial process. A majority of respondents reported that the principle of 'bail is the rule, jail is an exception' seems to have been reversed, particularly in cases where penetrative sexual assault has been alleged. The reasons reported are a poor legal aid system and a rigid judicial approach to POCSO allegations. It is also noteworthy that

far more respondents from Delhi talked about the issue of bail and how reforms impact the accused's rights than those from Bihar.

In Delhi, the stakeholders reported that the POCSO reforms do have the effect of improving access to justice for child victims, to the extent that implementation involves provision of support persons, following the special procedures including videoconferencing during the trial, and better judicial engagement. However, the findings suggest that the nature of implementation is powerfully stitched into a particular location, not only in relation to caste, class and other social forces but also the poor state funding to the criminal justice system. Bihar, therefore, was described as a place where the POCSO reforms have not had much impact on improving access to justice even for the child victims.

Moreover, there are broader social and cultural challenges to improving access to justice for child victims of sexual violence, which include – among much else – the many barriers to both recognising and reporting criminality of this kind. There is literature that reveals a high incidence of child sexual violence cases among the middle and upper classes (Virani, 2000), and that only 15% to 20% of the rape incidents are brought to the police's attention in India (Barn & Kumari, 2015). So, it appears that the POCSO reforms are yet to reach a majority of victims and perpetrators of child sexual violence, particularly in families that occupy the higher rungs of the Indian society. These are the challenges which are, of course, by no means unique to India but will take their own somewhat different forms in different contexts.

11.5 Limitations of the project and future directions

11.5.1 Limitations

As a relatively small-scale, qualitative study, it inevitably has several limitations. These include the nature and size of the sample. Consequently, one must be vigilant about generalizations from these findings. The size of the sample was smaller than would have been preferred, and the respondents were selected on a non-random basis. Further, the method of sample selection: purposive and opportunistic, may have tapped a nonrepresentative sample, and similar responses concerning certain aspects of the operation of the POCSO reforms, such as training, in Bihar and Delhi, indicate the need for caution in interpreting the results.

Additionally, because of time, budgetary, and access constraints, this study did not include an investigation of the perspectives of child victims, accused, and their family members

on the implementation of the POCSO reforms. These limitations informed and narrowed the research questions which were focused on the challenges to delivering on the policies and goals set out in the POCSO reforms.

While more rigorous, larger-scales studies are necessary for a clearer understanding of the operation of POCSO reforms, this study provides much-needed qualitative data in this relatively unexplored area of how the law deals with child sexual violence in India. Future studies may need to focus on a much larger and more diverse sample population, and also address the experiences of those whose lives are most directly impacted by the POCSO reforms. In addition, future efforts would need to have cross-cultural sample groups, to explore if social identities of the accused and child victims, such as their caste and religion, affect the operation and implications of the POCSO reforms.

It would also be important to carry out research with cross-regional sample groups to examine if children in different locations within India experience the impact of POCSO reforms differently. This study, in this regard, does indicate that findings from an urban setting, like Delhi, are highly unlikely to be generalisable to different regions. It is clear that the operation and implications of POCSO reforms differ between states, thus advancing the argument for intra-country comparative studies. The focus of this study has been on stakeholders' experiences and perceptions, rather than their actual behaviour, and perceptions may vary when a specific respondent is presented with a real incident. The observational findings provided some insight into behaviour and the extent to which it conformed with respondents' accounts, but this was a limited part of the empirical investigation.

11.5.2 Future directions

There are multiple aspects of the POCSO reforms and their implementation that are yet to be comprehensively explored, pointing to areas for future empirical and theoretical research in India. The following are some examples of potential research questions:

- How does intersectional marginalisation based on caste and gender affect child victims and shape their experience of the POCSO reforms, particularly the pre-trial process?
- How do we reconcile theories of fair labelling and proportionality, and sexual autonomy of adolescents, with the criminalisation of 'non-exploitative' sexual offences against children?
- What are the impacts of sexual abuse on child victims and their siblings and parents?
- What are the experiences and perceptions of those who are falsely convicted of POCSO offences?

- What are the experiences and perceptions of the accused and their family members of the implementation of the POCSO reforms?
- How does a conviction under the POCSO Act impact the family members of the victims and accused?
- How do the complainants perceive and experience reporting POCSO offences to the police?
- What are the investigative practices in POCSO cases, and the role of women police personnel in policing intervention in child sexual violence cases?
- What are the prosecutorial practices in POCSO cases and the challenges for prosecutors in the wake of the POCSO reforms?
- What are the implications of the use of audio-visual technology on a child's testimony and the judicial role during the trial?
- How do the support persons provide support to child victims and what do they think of their role in POCSO cases?

11.6 Conclusion

The POCSO reforms – special institutions, personnel, and procedures- are relatively new, having been in existence for just a decade. They have been enacted keeping in mind the vulnerability of child victims of sexual offences and their revictimisation during the criminal process. Like any other law, the POCSO law too functions in a space shaped by a variety of social forces including gender, class, and caste. It is evident from this research work that those social forces, in the absence of requisite training, funding, and infrastructural support, and in combination with the existing legal culture, work as barriers to access justice not only for child victims but accused persons too.

The stakeholders need to perform their work in a manner that respects all participants in this new form of adversarial trial to maximize "interactional legitimacy" (Roach Anleu & Mack, 2017). While there needs to be more public awareness of the POCSO law and attitudinal change to breakdown the secrecy and stigma that surrounds the issue of child sexual violence, and to deliver justice in that small minority of such cases that are reported, delivery of the policy goals of the POCSO reforms will also be assisted through further and far more wide-ranging empirical research.

Bibliography

Abdulali, S. (2018). *What We Talk About When We Talk About Rape.* The New Press.

Aberbach, J. D., & Rockman, B. A. (2002). Conducting and Coding Elite Interviews. *PS: Political Science and Politics*, *35*(4), 673–676.

Adler, P. A., & Adler, P. (1998). Observation Techniques. In N. Denzin & Y. S. Lincoln (Eds.), *Collecting and Interpreting Qualitative Materials* (pp. 79–110). Sage Publications Ltd.

Agnes, F. (2015). Section 498A, Marital Rape and Adverse Propaganda. *Economic and Political Weekly*, *50*(23), 12–15.

Alcoff, L. (1992). The Problem of Speaking for Others. *Cultural Critique*, *20*(20), 5–32.

Ali, B., Adenwalla, M., & Punekar, S. (2017). *Implementation of the POCSO Act: Goals, Gaps and Challenges- Study of Cases of Special Courts in Delhi & Mumbai (2012-2015)*. http://haqcrc.org/wp-content/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf

Allan, J. (1991). The Working and Rationale of the Hearsay Rule and the Implications of Modern Psychological Knowledge. *Current Legal Problems*, *44*(1), 217–240. https://doi.org/10.1093/clp/44.1.217

Bail, S. (2015). From Nyaya Panchayats to Gram Nyayalayas: The Indian State and Rural Justice. *Socio-Legal Review*, *11*(1), 83–102.

Baird, V. A. (2001). Building Institutional Legitimacy: The Role of Procedural Justice. *Political Research Quarterly*, *54*(2), 333–354.

Bandes, S. A. (2009a). Empathetic Judging and the Rule of Law. *Cardozo Law Review De Novo*, 133–148. http://via.library.depaul.edu/law-faculty-pubs/2115

Bandes, S. A. (2009b). Victims, "Closure," and the sociology of emotion. *Law and Contemporary Problems*, *72*(2), 1–26.

Banerjee, S. (2005). Indian Jails : Turned Upside Down. *Economic and Political Weekly*, *40*(50), 5226–5228.

Barn, R., & Kumari, V. (2015). Understanding Complainant Credibility in Rape Appeals: A Case Study of High Court Judgments and Judges' Perspectives in India. *British Journal of Criminology*, *55*(3), 435–453. https://doi.org/10.1093/bjc/azu112

Barn, R., & Powers, R. A. (2018). Rape Myth Acceptance in Contemporary Times: A Comparative Study of University Students in India and the United Kingdom. *Journal of Interpersonal Violence*, 1–22. https://doi.org/10.1177/0886260518775750

Bastedo, T. G. (1968). Law Colleges and Law Students in Bihar. *Law & Society Review*, *3*(2/3), 269–294.

Basu, S. (2012). Judges of Normality: Mediating Marriage in the Family Courts of Kolkata, India. *Signs: Journal of Women in Culture and Society*, *37*(2), 469–492. https://doi.org/10.1086/661712

Batool, E., Butt, I., Mushtaq, S., Munaza, R., & Rather, N. (2016). *Do you Remember Kunan-Poshpora?* Zubaan.

Baxi, P. (2007). Access to Justice and Rule-of (Good) Law: The Cunning of Judicial Reform in India. In *UN Commission on the Legal Empowerment of the Poor*. https://doi.org/10.1177/0973703020080202

Baxi, P. (2014). *Public Secrets of Law: Rape Trials in India*. Oxford University Press.

Baxi, P. (2016a). Ethnography of Adjudication. *The Book Review*, *July*, 21–22.

Baxi, P. (2016b). Impractical Topics, Practical Fields: Notes on Researching Sexual Violence in India. *Economic and Political Weekly*, *LI*(18), 80–88.

Baxi, P. (2021). Law, Emasculation, and Sexual Violence in India. *Current Anthropology*, *62*(February). https://doi.org/10.1086/711649

Baxi, U. (1975). Legal Assistance to the Poor- A Critique of the Expert Committee Report. *Economic & Political Weekly*, *10*(July 5, 1975), 1005.

Baxi, U. (1976). Access, Development, and Distributive Justice: Access Problems of the "Rural" Population. *Journal of the Indian Law Institute*, *18*(3), 375–430.

Baxi, U., & Galanter, M. (1979). Panchayat Justice: An Indian Experiment in Legal Access. In M. Cappelletti & B. Garth (Eds.), *Access to justice: Emerging Perspectives and Issues*. http://marcgalanter.net/Documents/papers/scannedpdf/panchayatjustice.pdf

Bhattacheryya, U. (2021). *After I Was Raped*. Pan Macmillan India.

Bhawnani, G. (2021). The mother's "character" on trial in child sexual abuse cases. *Indian Law Review*, *00*(00), 1–20. https://doi.org/10.1080/24730580.2021.1952376

Bhuwania, A. (2014). Courting the People: The Rise of Public Interest Litigation in Post-Emergency India. *Comparative Studies of South Asia, Africa and the Middle East*, *34*(2), 314–335. https://doi.org/10.1215/1089201X-2773875

Blake, N. (2019). *Understanding Courts*.

Branco, P. (2016). Courthouses as Spaces of Recognition, Functionality and Access to Law and Justice: A Portuguese Reflection. *Oñati Socio-Legal Series*, *6*(3), 426–441.

Branco, P. (2018). Considering a different model for the Family and Children Courthouse Building. Reflections on the Portuguese experience. *Oñati Socio-Legal Series*, *8*(3),

400–418. https://doi.org/10.35295/osls.iisl/0000-0000-0000-0940

Braun, V., & Clarke, V. (2006). Using thematic analysis in psychology. *Qualitative Research in Psychology*, *3*(2), 77–101. https://doi.org/10.1191/1478088706qp063oa

Brereton, Z. (2016). Perpetuating Myths of Women as False Complainants in Rape Cases in India: Culture V. The Law. *International Journal of Comparative and Applied Criminal Justice*, *41*(1–2), 41–62. https://doi.org/http://dx.doi.org/10.1080/01924036.2016.1233442

Burke, K., & Leben, S. (2007). Procedural Fairness: A Key Ingredient in Public Satisfaction. *Court Review*, *44*(1/2), 1–25.

Cappelletti, M., & Garth, B. (1978). Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective. *Buffalo Law Review*, *27*, 181.

Cassels, J. (1989). Judicial Activism and Public Interest Litigation in India: Attempting the Impossible? *The American Journal of Comparative Law*, *37*(3), 495–519.

Centre for Child and the Law. (2016). *Report of Study on the working of Special Courts under the POCSO Act, 2012 in Delhi* (Issue January). https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf

Centre for Child and the Law. (2018). *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues*.

Centre for Research & Planning. (2016). *Subordinate Courts of India: A Report on Access to Justice*.

Chakravarti, U., Butalia, U., Baxi, P., Barbora, X., Chakravarti, A., Singh, M., Levin, N. R., & Zaidi, S. (2007). Rape Culture. *Economic & Political Weekly*, *42*(50), 4.

Chandrachud, A. (2014). *The Informal Constitution: Unwritten Criteria in Selecting Judges for the Supreme Court of India*. Oxford University Press.

Chaudhary, S. (2021). *Decriminalising Sexual Contact with Minors under POCSO ? Notes for a Conversation*. P39A Criminal Law Blog.

Cohn, B. S. (1959). Some Notes on Law and Change in North India. *Economic Development and Cultural Change*, *8*(1), 79–93.

Cohn, B. S. (1989). Law and the Colonial State in India. In J. Starr & J. F. Collier (Eds.), *History and Power in the Study of Law: New Directions in Legal Anthropology*. Cornell University Press.

Cownie, F., & Bradney, A. (2013). Socio-legal studies: A challenge to the doctrinal approach. In D. Watkins & M. Burton (Eds.), *Research Methods in Law*. Routledge.

Crenshaw, K. (1989). Demarginalizing the Intersection of Race and Sex: A Black Feminist

Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics. *University of Chicago Legal Forum*, *1*, 139–168.

Daniels, R. J., Trebilcock, M. J., & Carson, L. D. (2011). The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies. *The American Journal of Comparative Law*, *59*(1), 111–178. https://doi.org/10.5131/AJCL.2010.0015

Datta, P., & Rai, S. (2021). *How to Start Resolving the Indian Judiciary's Long-Running Case Backlog*.

Denitch, B. (1972). Elite Interviewing and Social Structure: An Example From Yugoslavia. *The Public Opinion Quarterly*, *36*(2), 143–158.

Dhavan, R., & Jacob, A. (1978). *Selection and Appointment of Supreme Court Judges: A Case Study*. Tara Publications.

Diwakar, J. (2020). Sex as a Weapon to Settle Scores against Dalits : A Quotidian Phenomenon. *CASTE: A Global Journal on Social Exclusion*, *1*(1), 121–134. https://doi.org/10.26812/caste.v1i2.206

Duff, A., Farmer, L., Marshall, S., & Tadros, V. (Eds.). (2006). *The Trial on Trial (Volume 2): Judgment and Calling to Account*. Hart Publishing.

Duff, R. A. (1998). Law, language and community: some preconditions of criminal liability. *Oxford Journal of Legal Studies*, *18*(2), 189–206. https://doi.org/10.1093/ojls/18.2.189

eCommittee. (2019). *eCourts Project Phase II: Objectives Accomplishment Report*.

Ellison, L. (2001). *The Adversarial Process and the Vulnerable Witness*. Oxford University Press.

Feeley, M. M. (1979). *The Process is the Punishment: Handling Cases in a Lower Criminal Court*.

Felstiner, W. L. F., Abel, R. L., & Sarat, A. (1980). The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . . *Law & Society Review*, *15*(3/4), 631–654.

Flick, U. (2009). *An Introduction To Qualitative Research*. Sage Publications Ltd. https://doi.org/978-1-84787-323-1

Flick, U., Kardoff, E. von, & Steinke, I. (Eds.). (2004). *A Companion to Qualitative Research*. Sage Publications Ltd.

Gadbois Jr., G. H. (1970). Indian Judicial Behaviour. *Economic and Political Weekly*, *January*, 149–166.

Galanter, M. (1968). The Displacement of Traditional Law in Modern India. *Journal of Social Issues*, *24*, 65–91.

Galanter, M. (1974). Why the Haves Come out Ahead: Speculations on the Limits of Legal Change. *Law & Social Inquiry*, *9*, 95–160. https://doi.org/10.3366/ajicl.2011.0005

Galanter, M. (1978). Indian Law as an Indigenous Conceptual System. *Social Science Research Council*, *32*, 42–46.

Galanter, M. (1981a). Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law. *Journal of Legal Pluralism*, *19*.

Galanter, M. (1981b). Justice in Many Rooms: Courts, Private Ordering and Indigenous Law. *Journal of Legal Pluralism*.

Galanter, M. (1983, March). Making law work for the oppressed. *The Other Side*, 7–15.

Galanter, M. (1984). *Competing Equalities: Law and the Backward Classes in India*. University of California Press. https://doi.org/10.2307/3323788

Galanter, M. (2010). Access to Justice in a World of Expanding Social Capability. *Fordham Urban Law Journal*, *37*(1), 115–128.

Galanter, M., & Krishnan, J. K. (2004). "Bread for the Poor": Access to Justice and the Rights of the Needy in India. *Hastings Law Journal*, *55*(March), 789–834.

Gammon, J. (1999). A Denial of Innocence: Female Juvenile Victims of Rape and the English Legal System in the 18th Century. In A. Fletcher & S. Hussey (Eds.), *Childhood in Question: Children, Parents and the State* (pp. 74–95). Manchester University Press.

Gangoli, G. (1996). The right to protection from sexual assault: The Indian antirape campaign. *Development in Practice*, *6*(4), 334. https://doi.org/10.1080/0961452961000157944

Gangoli, G. (2012). Controlling women's sexuality: rape law in India. In N. Westmarland & G. Gangoli (Eds.), *International approaches to rape* (pp. 101–120). Bristol University Press, Policy Press.

Gangoli, G., & Rew, M. (2018). Continuities and Change: The Law Commission and Sexual Violence. *Journal of Indian Law and Society*, *6*(Monsoon), 110–124.

Garth, B. (2001). Rethinking the Processes and Criteria for Success. In R. V. Puymbroeck (Ed.), *Comprehensive Legal and Judical Development: Toward and Agenda for a Just and Equitable Society in the 21st Century*. The World Bank.

Garth, B., Cappelletti, M., & Trocker, N. (1985). Access to Justice -- Variations and Continuity of a World-Wide Movement. *Revista Juridica De La Universidad De Puerto Rico*, 221–263.

Gibbs, P. (2017). *Defendants on video – conveyor belt justice or a revolution in access?* (Issue October).

Glynn, A. N., & Sen, M. (2015). Identifying judicial empathy: Does having daughters cause judges to rule for women's issues? *American Journal of Political Science*, *59*(1), 37–54. https://doi.org/10.1111/ajps.12118

Green, S. P. (2020). Legal Moralism, Overinclusive Offenses, and the Problem of Wrongfulness Conflation. *Criminal Law and Philosophy*, *14*(3), 417–430. https://doi.org/10.1007/s11572-019-09514-8

Grube, K. B. (1992). Electronic Plea Taking at Florida's Weekend First Appearance Hearings: Weekend Justice or Weakened Justice. *Stetson Law Review*, *21*, 329–376. https://doi.org/10.3868/s050-004-015-0003-8

Hesford, W. S. (1999). Reading Rape Stories: Material Rhetoric and the Trauma of Representation. *College English*, *62*(2), 192–221.

Higgins, A. (2014). Legal Aid and Access to Justice in India. *National Law School of India Review*, *26*, 13–30. https://doi.org/10.3366/ajicl.2011.0005

Hoyle, C. (1998). *Negotiating Domestic Violence: Police, Criminal Justice and Victims*. Oxford University Press.

Jacobson, J., Hunter, G., & Kirby, A. (2016). *Inside Crown Court: Personal experiences and questions of legitimacy*. Policy Press.

Jain, S., Vythilingam, M., Eapen, V., & Reddy, J. (1992). Psychotherapy and Childhood Sexual Abuse. *Indian Journal of Psychiatry*, *34*(4), 388. https://doi.org/10.1111/j.1939-0025.1940.tb05768.x

Jauregui, B. (2013). Beatings, beacons, and big men: Police disempowerment and delegitimation in India. *Law & Social Inquiry*, *38*(3), 643–669. https://doi.org/10.1111/lsi.12030

Jensen, E. J., & Heller, T. C. (Eds.). (2003). *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*. Stanford University Press.

Julian, R. (2011). Crossing boundaries, developing trust: qualitative criminological research across cultures and disciplines. In *Qualitative Criminology: Stories from the Field*. Federation Press.

Kacker, L., Varadan, S., & Kumar, P. (2007). *Study on Child Abuse: India 2007*. https://doi.org/10.1177/0973184913411162

Kaushal, T. (2020). *Why Men Rape: An Indian Undercover Investigation*. HarperCollins India.

Kezar, A. (2003). Transformational Elite Interviews: Principles and Problems. *Qualitative Inquiry*, *9*(3), 395–415. https://doi.org/10.1177/1077800403251762

Koppell, G. O. (1968). Abstract of The Indian Lawyer as Social Innovator : Legal Aid in India. *Law & Society Review*, *3*(2/3), 299–300.

Kothari, J., & Ravi, A. (2015). *The Myth of Speedy and Substantive Justice: A Study of the Special Fast Track Courts for Sexual Assault and Child Sexual Abuse Cases in Karnataka*.

Krishnan, J. K., Kavadi, S. N., Girach, A., Kokal, K., Mazumdar, S., Panday, G., Sen, A., Sodhi, A., & Shukla, B. T. (2014). Grappling at the Grassroots: Access to Justice in India's Lower Tier. *Harvard Human Rights Journal*, *27*, 151–189.

Kuckartz, U., & Rädiker, S. (2019). *Analyzing Qualitative Data with MAXQDA: Text Audio, and Video*. Springer. https://doi.org/10.1007/978-3-030-15671-8

Kumar, P., & Raghavan, V. (2020). Undertrial Prisoners in Bihar: A Study of Liquor Ban Arrests. *Economic and Political Weekly*, *55*(7).

Kumar, S. (2017). Interpreting the Scales of Justice: Architecture, Symbolism and Semiotics of the Supreme Court of India. *International Journal for the Semiotics of Law*, *30*(4), 637–675. https://doi.org/10.1007/s11196-017-9513-1

Kumari, V. (1993). *Treatise on the Juvenile Justice Act, 1986*. Indian Law Institute.

Kumari, V., & Barn, R. (2017). Sentencing in Rape Cases: A Critical Appraisal of Judicial Decisions in India. *Journal of the Indian Law Institute*, *59*(1), 1–25.

Langbein, J. H. (2003). *The Origins of Adversary Criminal Trial*. Oxford University Press.

Law Commission of India. (1978). *Report No. 77 (Delay and Arrears in Trial Courts)*.

Law Commission of India. (1980). *Report No. 84 (Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence)*.

Law Commission of India. (1987). *Report No. 120 (Manpower Planning in Judiciary: A Blueprint)*.

Law Commission of India. (1988). *Report No. 127 [Resource allocation for infrastructural services in Judicial Administration- (A Continuum of the Report on Manpower Planning in Judiciary: A Blueprint)]*.

Law Commission of India. (2009). *Report No. 230 (Reforms in the Judiciary- Some Suggestions)*.

Lokaneeta, J. (2017). Debating the Indian Supreme Court: Equality, Liberty, and the Rule of Law. *Law, Culture and the Humanities*, *13*(3), 353–368. https://doi.org/10.1177/1743872115596158

Mack, K., Wallace, A., & Anleu, S. R. (2013). *Judicial Workload: Time, Tasks and Work Organisation*.

Maher, G. (2013). Principles and Politics in Law Reform: Sexual Offences in Scots Law. *Edinburgh School of Law Research Paper No. 2013/40*.

Mandal, S. (2013). The Burden of Intelligibility: Disabled Women's Testimony in Rape Trials. *Indian Journal of Gender Studies*, *20*(1), 1–29. https://doi.org/10.1177/0971521512465934

Mandal, S. (2014). The Impossibility of Marital Rape: Contestations Around Marriage, Sex, Violence and the Law in Contemporary India. *Australian Feminist Studies*, *29*(81), 255–272. https://doi.org/10.1080/08164649.2014.958124

Marschan-Hayes, E. (2015). *An Observational Case Study of Judicial Case Management in Crown Court Pre-Trial Proceedings*. Birkbeck, University of London.

McEwan, J. (2011). From Adversarialism to Managerialism: Criminal Justice in Transition. *Legal Studies*, *31*(4), 519–546.

McKay, C. (2018). Video Links from Prison: Court "Appearance" within Carceral Space. *Law, Culture and the Humanities*, *14*(2), 242–262. https://doi.org/10.1177/1743872115608350

McKay, C. (2021). *The Pixelated Prisoner: Prison Video Links, Court "Appearance" and the Justice Matrix*. Routledge.

Mendelsohn, O. (1981). The Pathology of the Indian Legal System. *Modern Asian Studies*, *15*(4), 823–863. https://doi.org/10.2307/312173

Moran, L. J. (2012). Review essay: Visual justice. *International Journal of Law in Context*, *8*(3), 431–446. https://doi.org/http://dx.doi.org/10.1017/S1744552312000286

Mulcahy, L. (2008). The Unbearable Lightness of Being? Shifts Towards the Virtual Trial. *Journal of Law and Society*, *35*(4), 464–489.

Mulcahy, L. (2011). Legal Architecture: Justice, due process and the place of law. In *Routledge*. Routledge. https://doi.org/10.1017/CBO9781107415324.004

Mulcahy, L. (2017). Eyes of the Law: A Visual Turn in Socio-Legal Studies? *Journal of Law and Society*, *44*(October), S111–S128. https://doi.org/10.1111/jols.12052

Mulcahy, L. (2021). *What do you do when your Research Subjects Lie to You?* Frontiers of Socio-Legal Studies. http://frontiers.csls.ox.ac.uk/ethics-of-partiality/#continue

Muralidhar, S. (2005). *Law, Poverty and Legal Aid: Access to Criminal Justice*. Lexis Nexis Butterworths.

Nader, L. (1997). Sidney W. Mintz Lecture for 1995: Controlling Processes: Tracing the Dynamic Components of Power. *Current Anthropology*, *38*(5), 711–738. https://doi.org/10.1086/204663

Natarajan, M. (2012). *Women police in a changing society: Back door to equality*. Ashgate Publishing Ltd.

Noorani, A. G. (1984). Public Interest Litigation. *Economic and Political Weekly*, *19*(36), 1568–1569.

Nupur, Jha, R., Prasad, D., & Srivastava, D. (2021). *India Justice Report: Ranking States on Police, Judiciary, Prisons and Legal Aid*.

Olson, S. M., & Huth, D. A. (1998). Explaining Public Attitudes Toward Local Courts. *The Justice System Journal*, *20*(1), 41–61.

Packer, H. L. (1964). Two Models of the Criminal Process. *University of Pennsylvania Law Review*, *113*(1), 1–68.

Partners for Law in Development. (2017). *Towards Victim Friendly Responses and Procedures for Prosecuting Rape: A Study of Pre-Trial and Trial Stages of Rape Prosecutions in Delhi (Jan 2014- March 2015)*.

Patil, P. (2016). Understanding sexual violence as a form of caste violence. *Journal of Social Inclusion*, *7*(1).

Patkar, P., & Kandula, P. (2016). *Four years since POCSO: Unfolding of the POCSO Act In the State of Maharashtra*.

Philips, S. U. (1998). *Ideology in the Language of Judges: How Judges Practice Law, Politics and Courtroom Control*. Oxford University Press.

Pillai, K. N. C. (1977). Criminal jurisdiction of Nyaya Panchayats. *Journal of the Indian Law Institute*, *19*(4), 438–481.

Potter, D. C. (1986). *India's Political Administrators 1919–1983*. Clarendon Press.

Poulin, A. B. (2004). Criminal Justice and Videoconferencing Technology: The Remote Defendant. *Tulane Law Review*, *78*, 1089–1167.

Puri, N. (2020). *Jennifer: One Woman, Two Continents And A Truth Called Child Trafficking*. Rupa Publications.

Rädiker, S., & Kuckartz, U. (2020). *Focused Analysis of Qualitative Interviews with MAXQDA: Step by Step*. MAXQDA Press.

Rawls, J. (1971). A Theory of Justice. In *Harvard University Press*. http://books.google.com/books?hl=en&lr=&id=kvpby7HtAe0C&oi=fnd&pg=PR11&dq=A+Theory+of+Justice&ots=ti7rv7Bba-&sig=btlO9jsUFUVo0hFNpQbn50PU1GE

Rivera, S. W., Kozyreva, P. M., & Sarovskii, E. G. (2002). Interviewing Political Elites: Lessons from Russia *. *Political Science & Politics*, *December*, 683–688.

Roach Anleu, S., & Mack, K. (2017). *Performing Judicial Authority in the Lower Courts*.

Palgrave Macmillan.

Roach, K. (1999). Four Models of the Criminal Process. *The Journal of Criminal Law and Criminology*, *89*(2), 671. https://doi.org/10.2307/1144140

Robb, P. (1988). Law and Agrarian Society in India: The Case of Bihar and the Nineteenth-Century Tenancy Debate. *Modern Asian Studies*, *22*(2), 319–354. https://doi.org/10.2307/312625

Robinson, N. (2016). Judicial Architecture and Capacity. In S. Choudhry, M. Khosla, & P. B. Mehta (Eds.), *The Oxford Handbook of the Indian Constitution* (pp. 330–348). Oxford University Press. https://doi.org/10.2139/ssrn.2505523

Rock, P. (1991). Witnesses and Space in a Crown Court. *British Journal of Criminology*, *31*(3), 266–279.

Rock, P. (1993). *The Social World of an English Crown Court*. Clarendon Press.

Rosenbloom, J. D. (1998). Social Ideology as Seen Through Courtroom and Courthouse Architecture. *Columbia- VLA Journal of Law & the Arts*, *22*(4), 463–523. https://doi.org/10.3386/w19846

Roth, M. D. (2000). Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth. *UCLA Law Review*, *48*, 185. https://doi.org/10.3868/s050-004-015-0003-8

Rowden, E. (2018). Distributed Courts and Legitimacy: What do we lose when we lose the courthouse? *Law, Culture and the Humanities*, *14*(2), 263–281. https://doi.org/10.1177/1743872115612966

Rowden, E., & Jones, D. (2018). Design, Dignity and due process: The construction of the Coffs Harbour Courthouse. *Law, Culture and the Humanities*, *14*(2), 317–336. https://doi.org/10.1177/1743872115612954

Rowden, E., & Wallace, A. (2018). Remote judging: the impact of video links on the image and the role of the judge. *International Journal of Law in Context*, *14*(4), 504–524. https://doi.org/10.1017/s1744552318000216

Rowden, E., Wallace, A., & Goodman-delahunty, J. (2010). Sentencing by videolink: Up in the air? *Criminal Law Journal*, *34*, 363–384.

Ryan, G. W., & Bernard, H. R. (2003). Techniques to Identify Themes. *Field Methods*, *15*(1), 85.

Sarat, A. (1977). Studying American Legal Culture: An Assessment of Survey Evidence. *Law & Society Review*, *11*, 427.

Sathe, S. P. (1997). Curbs on Public Interest Litigation: UF Government's Evil Designs.

Economic and Political Weekly, *32*(9/ 10), 441–442.

Scott, A. (1988). Feminism and the Seductiveness of the "Real Event." *Feminist Review*, *28*, 88–102.

Segal, U. A. (1992). Child abuse in India: An empirical report on perceptions. *Child Abuse & Neglect*, *16*(6), 887–908. https://doi.org/10.1016/0145-2134(92)90090-E

Seidman, I. (2006). *Interviewing as Qualitative Research*. Teachers College Press.

Sekhri, A. (2019). Pendency in the Indian Criminal Process: A Creature of Crisis or Flawed Design? *Socio-Legal Review*, *15*.

Singha, R. (1998). *A Despotism of Law: Crime and Justice in Early Colonial India*. Oxford University Press.

Spaulding, N. W. (2012). The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial. *Yale Journal of Law & the Humanities*, *24*(1), 311–343. http://digitalcommons.law.yale.edu/yjlh/vol24/iss1/16

Stanko, E. A., & Hohl, K. (2018). Why training is not improving the police response to sexual violence against women: a glimpse into the "black box" of police training. In E. Milne, K. Brennan, N. South, & J. Turton (Eds.), *Women and the Criminal Justice System: Failing Victims and Offenders?* (pp. 167–186). Palgrave Macmillan.

Stewart, A. (2010). Gender and Judging in India. *Warwick School of Law Research Paper No. 2010/11*, 1–18.

Sunshine, J., & Tyler, T. R. (2003). The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing. *Law & Society Review*, *37*(3), 513–548.

Surendranath, A. (2016). *Death Penalty India Report*.

Taslitz, A. E. (1999). *Rape and the Culture of the Courtroom*. New York University Press.

Tomkins, A. (2003). *Public Law*. Oxford University Press.

Trubek, D. M. (1984). Where the Action Is: Critical Legal Studies and Empiricism. *Stanford Law Review*, *36*(1/2), 575. https://doi.org/10.2307/1228692

Tyler, T. R. (1984). The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience. *Law & Society Review*, *18*(1), 51–74.

Tyler, T. R. (1988). What is Procedural Justice- Criteria Used by Citizens to Assess the Fairness of Legal Procedures. *Law & Society Review*, *22*(1), 103–135.

Tyler, T. R. (1994). Governing amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government. *Law & Society Review*, *28*(4), 809–832.

Tyler, T. R. (2003). Procedural Justice, Legitimacy, and the Effective Rule of Law. *Crime and Justice*, *30*, 283–357.

Tyler, T. R. (2004). Enhancing Police Legitimacy. *The Annals of the American Academy of Political and Social Science*, *593*, 84–99. https://doi.org/10.1177/0002716203262627

Tyler, T. R. (2007). Procedural Justice and the Courts. *Court Review*, *44*(1/2), 26–31.

Vidhi Centre for Legal Policy. (2016). *Law in Numbers: Evidence based approaches to legal reform*.

Virani, P. (2000). *Bitter Chocolate: Child Sexual Abuse in India*. Penguin India.

Vygotsky, L. (1987). *Thought and language* (A. Kozulin (Ed.)). MIT Press.

Wallace, A. (2017). Australia's Lower-level Criminal Courts: Tackling 21st Century Problems in a 19th Century Paradigm? In R. Levy, M. O'Brien, S. Rice, P. Ridge, & M. Thornton (Eds.), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (pp. 201–210). ANU Press.

Ward, J. (2015). Transforming "Summary Justice" through police-led prosecution and "Virtual Courts." *British Journal of Criminology*, *55*(2), 341–358. https://doi.org/10.1093/bjc/azu077

Ward, J. (2017). *Transforming Summary Justice: Modernisation in the Lower Criminal Courts*. Routledge. https://doi.org/10.1093/bjc/azy022

Wexler, D. B. (2007). Adding Color to the White Paper: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence. *Court Review*, *44*(1/2), 78–81.

Whittier, N. (2016). Where Are the Children? *Gender & Society*, *30*(1), 95–108. https://doi.org/10.1177/0891243215612412

Wiener, M. J. (2009). *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870-1935*. Cambridge University Press.

Wilson, B. (2020). Can Legislation Alone Protect Devadasi Girls from Child Sexual Abuse and Exploitation? *Journal of Child Sexual Abuse*, *29*(5), 606–625. https://doi.org/10.1080/10538712.2020.1774696

Wincup, E. (2017). Interviews and Focus Groups. In *Criminological Research: Understanding Qualitative Methods* (pp. 97–112). Sage Publications Ltd.

Winick, B. J. (2002). Therapeutic Jurisprudence and Problem Solving Courts. *Fordham Urban Law Journal*, *30*(3).

Winick, B. J., & Wexler, D. B. (2015). Drug Treatment Court: Therapeutic Jurisprudence Applied. *Touro Law Review*, *18*(3).

Annex I- Interview Schedule[322]

Interviewee's background

i. Tell me about your professional journey so far.

POSCO court reforms and Access to Justice

ii. What do you consider to be the main aims of the POCSO court reforms?

iii. What, if any, is the connection between the POCSO court reforms and Access to Justice?

iv. Who has benefited the most from the POCSO reforms?

Factors influencing (supporting/ undermining) Access to Justice

v. What supports and what undermines Access to Justice in trial proceedings of child sexual abuse cases?

vi. What impact has the POCSO reforms had on the way you undertake your role in the special court?

vii. What measures, if any, have been taken by you to create 'child-friendly' atmosphere in the courtroom?

viii. What in your opinion has been the most important aspect of the POCSO reforms on what happens in the courtroom?

ix. What has been the least successful aspect of the POCSO reforms?

Respondent's experience and training

x. What training did you receive to facilitate the POCSO reforms?

xi. Do you feel there is a need for more training, and of what kind?

Concluding remarks

xii. Would you like to comment further on the meaning of access to justice and its relation to the POCSO court reforms?

xiii. What can be done to enhance Access to Justice in the POCSO courts in future in terms of both policy and practice?

[322] This schedule was adjusted for different categories of respondents.

Annex II- Relationship in law between the age of consent, marriageable age, and legality of marriages involving minor children

Year	**Age of consent under sec. 375, 5th/6th clause, Indian Penal Code (IPC)**	**Age mentioned in the Exception to sec. 375, IPC** (Sexual intercourse or sexual acts by a man with his own wife, the wife not being under this age, is not rape.)	**Minimum age of marriage under the Child Marriage Restraint Act (CMRA), 1929**
1860 (under IPC)	10 years	10 years	N/A
1891 (Act 10 of 1891) (after the amendment of IPC)	12 years	12 years	N/A
1925 (after the amendment of IPC)	14 years	13 years	N/A
1929 (after the passing of the Child Marriage Restraint Act)	14 years	13 years	14 years
1940 (after the amendment of the IPC and the Child Marriage Restraint Act)	16 years	15 years	15 years
1978 (amendment to CMRA 1929)	16 years	15 years	18 years
1980 (84th LCI recommendation)[323]	16 years (increase to 18 years, but was not accepted)	15 years (increase to 18 years, but was not accepted)	18 years

[323] 84th Report of the Law Commission of India, 1980- Since the CMRA 1929 prohibits the marriage of a girl below 18 years of age, sexual intercourse with a girl child below 18 years of age should also be prohibited, and the IPC should reflect that position thereby making sexual intercourse with a girl child below 18 years of age an offence.

2000 (172nd LCI recommendation)[324]	16 years	15 years (increase to 16 years, but was not accepted)	18 years
2006 Prohibition of Child Marriage Act (PCMA) 2006	16 years	15 years	Minimum age of marriage under the PCMA, 2006 - 18(Female) / 21(Male) years
2012 (POCSO Act has criminalised the consensual sexual intercourse with a girl or boy below 18 years)	16 years	15 years	
2013 Criminal Law Amendment Act brought by Verma Committee (pre-SC's Independent Thought decision)	Age of consent under section 375, 6th clause of the IPC - 18 years	15 years (increase to 16 years, but was not accepted)	Minimum age of marriage under the PCMA, 2006 - 18(F) / 21(M) years
2017 and afterwards (post-SC's *Independent Thought* decision)	18 years	18 years	18(F) / 21(M) years

[324] 172nd Report of the Law Commission of India, 2000 - an exception be added to Section 375 of the IPC to the effect that sexual intercourse by a man with his own wife, the wife not being under 16 years of age, is not sexual assault. In other words, the earlier recommendation made by the LCI was not approved. In other words, according to the LCI the husband of a girl child who is not below 16 years of age can sexually assault and even rape his wife and the assault or rape would not be punishable - and if it is made punishable, then it would amount to excessive interference with the marital relationship.

Annex III- Participants' Demographics

Table 1: Bihar participants

Participant code	Gender	Age (years)	Experience (months)[325]	Mode of interview
BPJ 1	M	56	4	Interview notes
BPJ 2	M	57	8	Interview notes
BPJ 3	M	58	8	Interview notes
BPJ 4	M	58	16	Interview notes
BJM 1	F	30	3	Audio recording
BJM 2	F	30	4	Interview notes
BJM 3	M	34	24	Interview notes
BJM 4	M	35	34	Interview notes
BPP 1	M	68	48	Audio recording
BPP 2	M	65	84	Audio recording
BPP 3	M	40	8	Audio recording
BPP 4	M	50	50	Audio recording
BPP 5	M	65	50	Audio recording
BNGO	M	30	50	Audio recording
BDC 1	M	55	78	Audio recording
BDC 2	M	60	78	Audio recording
BDC 3	M	56	78	Audio recording
BDC 4	M	61	85	Interview notes
BCS 1	M	32	20	Audio recording
BCS 2	M	47	3	Audio recording
BCS 3	M	42	48	Interview notes
BCS 4	M	32	24	Interview notes
BCS 5	F	35	84	Interview notes

Table 2: Delhi participants

Participant code	Gender	Age (years)	Experience (months)	Mode of interview
DPJ 1	M	47	10	Interview notes
DPJ 2	F	50	2	Audio recording
DPJ 3	M	59	72	Audio recording
DPJ 4	F	50	30	Interview notes
DPJ 5	M	55	2	Interview notes

[325] For only those participants who either mentioned that they are working on POCSO matters since the POCSO Act came in or did not mention anything but were continuously in the practice, I calculated their work experience from January 2013.

DPJ 6	M	45	10	Interview notes
DPJ 7	M	45	10	Interview notes
DJM 1	F	35	78	Audio recording
DJM 2	F	30	7	Audio recording
DPP 1	M	45	24	Interview notes
DPP 2	F	42	8	Interview notes
DPP 3	M	55	2	Audio recording
DPP 4	M	40	6	Interview notes
DNGO	M	34	78	Interview notes
DDC 1	M	33	60	Audio recording
DDC 2	M	35	60	Audio recording
DDC 3	M	45	72	Audio recording
DDC 4	M	36	72	Audio recording
DCS 1	M	45	12	Audio recording
DCS 2	F	46	6	Audio recording
DCS 3	F	35	4	Audio recording
DCS 4	M	40	24	Audio recording
DCS 5	F	41	18	Audio recording
DCS 6	F	38	30	Interview notes
DCS 7	F	35	78	Audio recording
DCS 8	F	30	12	Interview notes

Annex IV

Table 1: Nature and punishments of POCSO offences

POCSO offences	**Act's provisions**	**Punishments**	
		2012 Act	**Post 2019 Amendment**
Penetrative sexual assault (PSA)	Ss. 3 & 4	7 years to Life imprisonment (LI) + fine	• 10 years to LI + fine (victim: 16 years or more) • 20 years to LI (for remainder of natural life) + fine (victim: less than 16 years)
Aggravated PSA	Ss. 5 & 6	10 years to LI + fine	20 years to LI (for remainder of natural life) + fine or with Death
Sexual Assault (SA)	Ss. 7 & 8	3 to 5 years imprisonment + fine	No change
Aggravated SA	Ss. 9 & 10	5 to 7 years imprisonment + fine	No change
Sexual Harassment	Ss. 11 & 12	May extend to 3 years imprisonment + fine	No change
Using child for pornographic purposes	Ss. 13 & 14	On first conviction: may extend to 5 years + fine	On first conviction: not less than 5 years + fine
		On second or subsequent conviction: may extend to 7 years + fine	On second or subsequent conviction: not less than 7 years + fine
Storage of pornographic material involving child	S. 15	May extend to 3 years imprisonment or fine or both	Recategorization in 3 parts: 1. Fine of 5,000-10,000 rupees 2. May extend to 3 years imprisonment or fine or both. 3. On first conviction: 3 to 5 years imprisonment or fine or both On second conviction: 5 to 7 years imprisonment + fine

Table 2: Police Disposal of POCSO cases

Year	POCSO cases pending investigation from the previous year	Cases reported during this year	Cases reopened for investigation	total cases for investigation (Columns 2+3+4)	Total cases disposed of by police (percentage to col. 5)	Cases pending investigation at the end of the year
2016	12038	36022	N/A	48060	32777 (68%)	15283
2017	12312	32608	4	44924	29817 (66%)	15078
2018 [326]	15139	39966	23	55128	37847 (69%)	17255
2019	17833	47464	85	65382	45879 (70%)	19471

Table 3: Court Disposal of POCSO cases

Year	Cases pending trial from the previous year	Cases sent for trial during the year	total cases for trial	Cases in which trial were completed (percentage of total cases for trial)	Cases convicted	Cases pending trial at the end of the year	Conviction rate (of total cases whose trial was completed)
2016	70,435	30,891	1,01,326	10,884 (11%)	3,226	90,205	30%
2017	65,360	28,063	93,423	9,097 (10%)	3,020	84,143	33%
2018 [327]	84,413	35,685	1,20,098	11,374 (9%)	3,911	108,488	34%
2019	1,07,538	42,795	1,50,333	16,275 (11%)	5,702	133,492	35%

[326] The CII 2018 report mentions the numbers of murder with rape of children separately. See, pp. 318 and 321, CII 2018. I have added these numbers here.
[327] The CII 2018 report mentions the numbers of murder with rape of children separately. See, pp. 330, 332 and 333, CII 2018. I have added these numbers here.

Table 4: Plea bargained, compounded, or compromised in POCSO cases

Year	Cases disposed-off by plea-bargaining[328]	Cases compounded or compromised
2016	6	229
2017	30	102
2018	20	157
2019	36	371

Table 5: Conviction rates in POCSO cases in Bihar and Delhi

State	Duration	Conviction Rate
Bihar	November 2012 - December 2016	3%[329] [83 convicted out of 2716 registered POCSO cases during this period]
	2017 - 2019	63%[330] [conviction percentage of POCSO cases where trial was completed]
Delhi	2014 - 2016	18%[331] [conviction percentage of total registered POCSO cases]
	2017 - 2019	58%[332] [conviction percentage of POCSO cases where trial was completed]

[328] See, section 265A, the Code of Criminal Procedure, 1973.
[329] See, Times of India (2017) 'Conviction rate in POCSO cases just 3.05% in state'. 10 May. At: https://timesofindia.indiatimes.com/city/patna/conviction-rate-in-pocso-cases-just-3-05-in-state/articleshow/58599194.cms (accessed 19 July 2019).
[330] See, Press Information Bureau, Delhi (2021) 'Conviction Rate in POCSO Cases'. 05 August. At: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1742825 (accessed 2 October 2021).
[331] See, Indian Express (2018) 'POCSO: Why cases of child sexual abuse mostly end in acquittal'. 25 June. At: https://indianexpress.com/article/cities/delhi/pocso-a-case-study-delhi-high-court-child-sexual-abuse-cases-4912888/ (accessed 19 July 2019)
[332] See, note 330.