

**CHILD SEXUAL ABUSE IN INDIA : LEGISLATIVE AND JUDICIAL
RESPONSE**

Pooja Bali¹ & Suresh Kumar²

INTRODUCTION

Children of today are citizen of tomorrow. They are the future of the nation. Child abuse in India is dreadful because it's a growing and repetitive problem, too many children die or later may become abused themselves. Abuse occurs when people mistreats or misuse other people, showing no concern for their integrity or innate worth as individuals and in a manner that degrades their well-being. Child abuse means causing serious physical or emotional harm by an adult to a child. Child abuse can take the form of physical abuse, sexual abuse, neglect and abandonment or emotional or psychological abuse. Child abuse may become a problem and burden to the affected child for life. Pregnancy, a fresh encounter with sexual assault may open the wounds of the survivor again. Another context for the arousal of early abuse related trauma can be approaching or having entered middle age. As the survivor struggles with the task of adult life, the legacy of the childhood becomes increasingly burdensome. Often the precipitant is a change in the equilibrium of close relationship. The facade can hold no longer and the underlying fragmentation becomes manifest. When and if a breakdown occurs it can take symptomatic forms that mimic virtually every forms of psychiatric disorder. Survivors fears that they are going insane or will have to die.

Children are the easy prey to all mentally frustrated persons who intend to satisfy sexual desire and lust. Harmful traditional practices like child marriages, caste system and discrimination against the girl child, child labour and devdasi impact negatively on children and increase their vulnerability to abuse and neglect. Lack of adequate nutrition, poor access to medical and educational facilities, migration from rural to urban areas, leading to raise

*Asstt. Prof. Himcapes College of Law, Badhera, Tehsil Haroli, Distt. Una, Himachal Pradesh, Pin 177209

*Asstt. Prof. Himcapes College of Law, Badhera, Tehsil Haroli, Distt. Una, Himachal Pradesh, Pin 172209

urban poverty, children on streets and child beggars. These increase the vulnerabilities of children and expose them to situations of abuse and exploitation.

HISTORICAL DEVELOPMENT

Sexual abuse of children is far from new. Historians of the family have discovered that adults in elite households in fifteenth- and sixteenth-century Europe sometimes treated young children as sexual playthings. A striking example involves the future King of France, Louis XIII. According to a diary kept by the royal physician, members of the French royal court fondled his genitals and ladies in waiting played sexual games with his tiny fists. The young were sexually abused was well known to nineteenth-century Americans. In New York City, between 1790 and 1876, between a third and a half of rape victims were under the age of 19; during the 1820s, the figure was 76 percent. The historian Lynn Sacco found more than 500 published newspaper reports of father-daughter incest between 1817 and 1899. An 1894 textbook, *A System of Legal Medicine*, reported that the “rape of children is the most frequent form of sexual crime.” In his landmark study of female sexual behavior, published in 1953, Alfred Kinsey reported that fully a quarter of all girls under the age of 14 reported that they had experienced some form of sexual abuse, including exhibitionism, fondling, or incest (at rates roughly similar to those reported today). Yet when these findings were reported, they evoked virtually no public interest, although Kinsey’s statistics about pre-marital sexual activity and adultery provoked a huge public outcry.¹

Abusive acts against children fall under the preview of law in almost all developed countries. In India it exists in many forms but the laws are still ambiguous and most children suffer silence. Child abuse has gained public attention in the past few decades and now has become one of the most high profile crimes. Since 1970s the sexual abuse of the children and child molestation has increasingly been recognized as deeply damaging to children and thus unacceptable for the society as a whole².

CONSTITUTIONAL PROVISIONS AND CHILDREN

¹ Steven Mintz, Placing Childhood Sexual Abuse in Historical Perspective, <http://blogs.ssrc.org/tif/2012/07/13/placing-childhood-sexual-abuse-in-historical-perspective/>

² Protecting the Loss of innocence (with special reference to protection of children from sexual offence Act, 2012, Law Profiles Volume, 4 March 2013, p,25.

The Constitution of India recognizes the vulnerable position of the children and their rights to protection. The rights of children and their aspirations are of paramount importance in our march towards an inclusive and equitable society. The Constitution of India contains provisions for survival, development and protection of children. The doctrine of protective discrimination guarantees necessary and special laws and policies that safeguards their rights.

- (i) The Constitution of India empowers the state Government to make special provisions for the advancement of the children.³
- (ii) The Constitution of India provides that that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.⁴
- (iii) The Constitution prohibits employment of young children in factories. It lays down that, no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in other hazardous employment.⁵
- (iv) The Constitution imposes a duty on the state to provide free and compulsory education for all children till they complete the age of fourteen years.⁶

JUDICIARY ON SEXUAL OFFENCES AGAINST CHILDREN

The judiciary has played a pivotal role in realizing this heinous crime against children. Time and again the judiciary has issued various guidelines for ensuring the security and rehabilitation of the children affected by sexual assault.

- (i) **Shakshiv. Union of India**⁷

The Supreme Court laid down following guidelines for holding the trial of child sex abuse:

³Article 15(3), The Constitution of India

⁴Article 39, The Constitution of India

⁵Article 24, The Constitution of India

⁶Article 21A, The Constitution of India

⁷AIR 2004 SC 3566

- (a) A screen or some such arrangement should be made where the victim or witnesses do not see the body or face of the accused.
 - (b) The questions put in cross examination on behalf of the accused, insofar as they relate directly to the incident should be given in writing to the presiding officer of the court, who may put them to the victim or witnesses in a language which is clear and not embarrassing.
 - (c) The victim of the child abuse or rape, while giving testimony in the court, should be allowed sufficient breaks as and when required.
- (ii) **Shankar kisanraokhadev State of Maharashtra**⁸

The court observed that in most of the cases children are abused by persons known to them or who have influence over them. The court also held that sexual abuse can be in any form like sexually molested or assaulted or encouraging, inducing or forcing the child to be used for the sexual gratification of another person, using a child or deliberately exposing a child to sexual activities or pornography or procuring or allowing a child to be procured for commercial exploitation and so on.

- (iii) **Gaurav Jain v Union Of India**⁹

The Supreme Court issued several directions to Central Government, State Governments and Non-Governmental Organizations which are as follows:

- (a) The court held that it is the duty of Government and all voluntary NGOs to take necessary measures for protecting them from prostitution rehabilitate them so that they may lead a life with dignity.
- (b) The court directed that the abused children should be provided opportunities for education, financial support, development, marketing facilities for goods produced by them. If possible, their marriages may be arranged so that the problem of child prostitution can be eradicated. Marriage would give them real status in society. They should be given housing facilities, legal aid, free counseling assistance and similar add and service so that they do not fall into the trap of red light areas again.

⁸(2013) 5 SCC 546

⁹ 1990 AIR 292, 1989 SCR Supl2) 173

- (c) The court held that economic empowerment is one of the major factor that prevent the practice of dedication of the young girls to the prostitution as Devdasis, Jogins or Venkatasins. Referring the various measure taken by the different states the court directed that the social welfare department should undertake similar rehabilitation programmes for the following woman, so that the whole practice is totally eradicated and they are not again trapped into the prostitution.
- (d) The court directed that the rescue and rehabilitation of the child prostitutes and children should be kept under Nodal Department, namely, Department of Woman and Child Development under the Ministry of Welfare and Human Resource, Government of India, devise, suitable scheme for proper and effective implementation. The court directed the Ministry of Welfare, Government of India for the establishment of Juvenile Homes.

(iv) Vishal Jeety Union Of India¹⁰

The Supreme Court held that this matter is of great importance warranting a comprehensive and searching analysis and requiring a humanistic rather than a purely legalistic approach from different angles. The court stated that this malady is not only a social but also a socio-economic problem and, therefore, the measures to be taken in that regard should be more preventive rather than punitive.

The SC issued the following directions inter alia to the State Governments and Union Territories:

- (a) Direct concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution.
- (b) Take steps in providing adequate and rehabilitative homes.
- (c) Set up separate Advisory Committee consisting of relevant Government officials, sociologists, criminologists, members of the women/ child welfare/ voluntary social organizations to make suggestions for eradicating child prostitution and

¹⁰AIR 1990 S.C. 1412

the devdasi and jogin tradition; and measures for care, protection, treatment, development and rehabilitation of victims.

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

On 22 May 2012, the parliament passed, The protection of children from sexual offences bill 2011. Till the passing of this Act, the law relating to sexual offences against children was lying scattered in various provisions of Indian Penal Code, 1860. But, now with the passing of this Act, we have a separate law relating to sexual offences against children. The present Act has its genesis in Article 15 (3) of the Constitution of India. From the global perspective also, India has correspond its obligation as a signatory of United Nation convention on rights of children, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child. This Act not only prescribes the different category of sexual offences against children but also provides for stringent punishments for the offences.

PENETRATIVE SEXUAL ASSAULT

The Act clearly defines sexual assault, sexual harassment and pornography as distinct offences. When an offence is committed by a public servant, police officer, member of armed forces, security personnel, jailor or any person in the management of any medical or educational institution or a guardian who is responsible for the protection and care of the child, it is considered as an aggravated form of penetrative sexual assault under the Act.¹¹

SEXUAL ASSAULT

The Act defines sexual assault as, “whoever with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.” When such assault is committed by a public servant, police officer, member of armed forces, security personnel, jailor or any person in the management of medical or educational institution or a guardian

¹¹Section 3 and 4, The Protection of Children from Sexual Offences Act, 2012

who is responsible for the protection and care of the child, it is considered as an aggravated form of sexual assault under the Act.¹²

SEXUAL HARASSMENT

A person is said to commit sexual harassment upon a child when such person with sexual intent,¹³

- (i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or
- (ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or
- (iii) shows any object to a child in any form or media for pornographic purposes; or
- (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or
- (v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or entices a child for pornographic purposes or gives gratification therefor.

USING CHILD FOR PORNOGRAPHIC PURPOSES

Using a child in any form of media (including programmes or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programmes or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, amounts to an offence under this Act.¹⁴

PROCEDURE UNDER THE ACT

The criminal law has been made widely applicable in dealing with the cases under this Act. Any child offender has been directed to be dealt under juvenile justice (care and protection of

¹²Section 7, The Protection of Children from Sexual Offences Act, 2012

¹³Section 5 and 6, The Protection of Children from Sexual Offences Act, 2012

¹⁴Section 13, and 14, The Protection of Children from Sexual Offences Act, 2012

children) Act 2000. Any complaint under this Act is to be filed before the special courts having all the powers of a court of session.¹⁵

PROVISIONS FOR SPREADING AWARENESS AND MONITORING

A duty is cast on the central Government and state Government to spread awareness through the media including television, radio and print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of this Act. The national commission for the protection of children rights and the state commission for the protection of child are the designated authorities to monitor the implementation of this Act.¹⁶

CHILD FRIENDLY PROCEDURE

The Act makes provisions for a child friendly procedure in the following way:¹⁷

- (i) Recording the statement of the child at the residence of the child or at a place of his choice by a women police officer not below the rank of sub-inspector.
- (ii) No child to be detained in the police station in the night for any reason.
- (iii) Police officer not to be in uniform while recording the statement of the child.
- (iv) The statement of the child is to be recorded as spoken by the child.
- (v) Assistance of an interpreter or translator or an expert as per the need of the child.
- (vi) Medical examination of the child to be conducted in the presence of the parents of the child or any other person in whom the child has trust or confidence.
- (vii) If victim is a girl child, the medical examination shall be conducted by a female doctor.
- (viii) Frequent breaks for the child during trial.
- (ix) Child not to be called repeatedly to testify.
- (x) No aggressive questions or character assassination of the child.

¹⁵SailjaPritam, The Protection of children From Sexual Offences Act, 2012- A Bird Eye View, Nayaya Deep, Vol XIII, Oct. 2012, p 87

¹⁶*Ibid*

¹⁷*Id* at p. 85

CONCLUSION

The Protection of Children from Sexual Offences Act, 2012 is a significant step by the parliament for securing the future of the children. With the passing of this Act, now we have a separate legislation dealing exclusively with the offences of child abuse. The present Act not only categorically defines the sexual offences in detail which were not clear earlier but also makes provisions for certain stringent punishments for the accused guilty of committing any offence under this Act. The Act makes provisions for a child friendly procedure to be followed in child sexual abuse cases at the same time for the better implementation of the Act a duty is cast on the National Commission for the Protection of Child Rights (NCPCR) and The State Commission for the Protection of Child Rights (SCPCR). The Central Government and the State Government are also duty bound to spread awareness through media including television, radio and the print media at regular intervals to make the general public, children as well as their parents aware of the provisions of this Act. Child abuse in India is considered to be a social taboo. Most families choose to cover up such incidents. The Supreme Court has also raised its concern in *Shankar kisanraokhade v state of Maharashtra*, “that some adult members of the families including the parents choose not to report such crimes to the police on the plea that it was for the sake of protecting the child from social stigma and it would also do more harm to the victim.” Such narrow thinking needs to be eradicated from the roots if the future of the children is to be secured in this country.

According to WHO, one in every four girls and one in every seven boys in the world are sexually abused. Virani (2000) states, the WHO found that at any time, one of ten Indian children is the victim of sexual abuse. These figures clearly show as to how serious we are with relation to the protection of the young children. To get this problem uprooted from the society every citizen must join hands together and everyone needs to realize the seriousness of this highly sensitive issue and to give a push to the present legislation to work in an efficient manner.