

Legislative Protection against Child Sexual Abuse in India

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Abstract

To get a better insight into the problem of labour migration and protection available to migrant workers, a review of studies on migration has been presented. The study has brought to surface that the migrant workers working in Kurukshetra district are facing many problems. A brief account of such problems is discussed in this paper.

Keywords: *Migration of Workers, Internal Migrants, Socio- Economic Issues, Migration.*

Introduction

In a country that is striving to grant equal opportunity and a decent standard of living to every man, woman and child, there is great concern for that fact that despite efforts, a large percentage of our children continue to live and survive in less than adequate means, and further they face violence and exploitation of many kinds. In the privacy of the family and in the wider community, children also suffer systemic abuse of their rights through such practices as child labour, bonded labour, prostitution, trafficking for numerous purposes, and sexual abuse due to reasons of child marriages and dedication of young girls. A very significant drawback in the area of sexual abuse and violence committed against children is the lack of

awareness and denial of the whole issue, coupled with lack of adequate representative data on the extent and form of sexual violence against children and an analysis of the impact of such violence on children. The 'state' is under a paramount obligation to create support and sustain a 'protective environment' for 'children'. Hence, any failure or lapse in the 'protection' frameworks is primarily the failure of state. The National Centre on Child Abuse and Neglect (NCCAN) ¹ defines 'sexual abuse' as –

“Any childhood sexual experience that interferes with or has the potential for interfering with a child's healthy development”.

To fulfill the commitments and obligations made in the CRC and other child-specific instruments, several special laws have been made or special provisions have been incorporated in others, which have a bearing on the issues related to children. While analyzing the provisions of the IPC with respect to sexual abuse of children, it would be worthwhile to examine other laws and whether they offer any protection against child sexual abuse.

Protection given in the Indian Penal Code 1860

The Indian Penal Code deals with the sexual abuse of children by covering it within the provisions of rape. The Code provides punishment for the offence of the rape only in case it is committed against a female child. Section 375 IPC covers the rape of a woman / girl and not a male-child. The rape of a boy-child or homosexual rape is not even considered by the Code. Under the provisions of the IPC the rape of a male-child or an adult male amounts to an “unnatural offence”. The sexual abuse of the boy-child is covered under Section 377, which provides for ‘Unnatural Offences’. There are no special provisions for addressing sexual violence against boys except under Section 377 of IPC. The Law Commission in its 172nd Report acknowledged² that boys too are victims of sexual abuse. “Not only women but young boys are being increasingly subjected to forced sexual assaults. Forced sexual assault causes no less trauma and psychological damage to a boy than to a girl subjected to such offence. Boys and girls both are being subjected to oral sexual intercourse too”. The Freddy Peats case³ of Goa brought home the sinister truth that young boys are being regularly used for all kinds of sexual acts and sexual perversions in certain tourist centres mainly for edification of the foreign tourists. The abusers of young boys are both men and women. The law, however, continues to treat non-consensual penetration upon a boy-child as an offence under Section 377 IPC on par with certain forms of consensual penetration (ex. consensual homosexual sex) where the consenting party can be held liable as an abettor or otherwise⁴.

Section 375 defining ‘rape’ and Section 354, which deals with

‘assault or criminal force to woman with intent to outrage her modesty’, does not apply to boys. Is Section 354 called ‘outraging modesty’ because it is non-penetrative, and therefore, cannot be considered harmful to a child? Moreover, the most ironical component of this provision is that it applies only to women and the girl-child and has no application to boys. Does the law consider that boys cannot have ‘modesty’ since only girls can have it? Sections 354 and 509 of the IPC lay down punishments for assault, use of criminal force, words or gestures intended to outrage the modesty of a woman. These sections clearly recognize gender-based assumptions of male and female sexuality. Any public gesture of sexuality towards women is outrageous to their modesty but similar actions by men towards other men are outside the purview of law. The law seems to presume that either men have no modesty or their modesty is impossible to outrage or even when it is outraged they can take care of themselves without needing protection from law⁵.

There are several provisions in the IPC that either deal with or have a bearing on child prostitution and the trafficking of children for purposes of prostitution. In this way, the scheme of protection provided to children against sexual abuse is discriminatory on the bases of sex.

The Immoral Traffic (Prevention) Act, 1956

The Act is the only statute that defines prostitution⁵. Since the Act does not define “persons” it is understood to include children. Unfortunately, it does not contain any special provisions dealing with prostitution of children⁶, particularly with reference to the treatment and rehabilitation of rescued children⁷. This Act is

applicable to girls as well as to boys who may become victims of sexual exploitation and abuse.

The Juvenile Justice (Care and Protection of Children) Act, 2000 Vis-À-Vis Child Sexual Abuse

The Juvenile Justice System in India is based on the principle of promoting and safe guarding the rights of children. Where it relates to children, the criminal process is governed by the Juvenile Justice (Care and Protection of Children) Act, 2000.

Under the Juvenile Justice Act, 2000 a sexually abused child would fall under the definition of a “child in need of care and protection”⁹ Strangely a child-specific legislation such as the Juvenile Justice Act does not provide any definition of the term ‘abuse’ or ‘sexual abuse’, whilst mentioning these terms.

The most ironical aspect of this legislation is that though it was amended in 2000 from its previous version of 1986, it failed to take cognizance of the problem of child sexual abuse. A sexually abused child is certainly a ‘child in need of care and protection’. Neither the legislation explains the terms ‘abuse’ and ‘sexual abuse’, nor does it make any specific provisions for dealing with sexually abused children.

The Protection of Children from Sexual Offences Act, 2012 (Pocso)

The Protection of Children from Sexual Offences Act, 2012, has been passed by the Lok Sabha today, 22nd May, 2012. The Bill was earlier passed by the Rajya Sabha on 10th May, 2012. This Act has been drafted to strengthen the legal

provisions for the protection of children from sexual abuse and exploitation. The Protection of Children from Sexual Offences Act, 2012 defines a child as any person below the age of 18 years and provides protection to all children under the age of 18 years from the offences of sexual assault, sexual harassment and pornography. These offences have been clearly defined for the first time in law. The Act provides for stringent punishments, which have been graded as per the gravity of the offence. The punishments range from simple to rigorous imprisonment of varying periods. There is also provision for fine, which is to be decided by the Court. The Act provides for the establishment of Special Courts for trial of offences under the Act, keeping the best interest of the child as of paramount importance at every stage of the judicial process. The Act incorporates child friendly procedures for reporting, recording of evidence, investigation and trial of offences. For the more heinous offences of Penetrative Sexual Assault, Aggravated Penetrative Sexual Assault, Sexual Assault and Aggravated Sexual Assault, the burden of proof is shifted on the accused. This provision has been made keeping in view the greater vulnerability and innocence of children. At the same time, to prevent misuse of the law, punishment has been provided for making false complaint or proving false information with malicious intent. Such punishment has been kept relatively light (six months) to encourage reporting. If false complaint is made against a child, punishment is higher (one year).¹⁰

The Act can become effective only if a police complaint is lodged reporting a child sex abuse instance.

Judicial Response to Child Rape and Child Sexual Abuse

The manner in which some trial courts have interpreted the law and assessed the evidence has often proved to be an obstacle in the trial of rape cases, especially in matters of rape of a child. When the offenders are of young age, the courts have sometimes given lenient sentences with the prime reason being the youthful age of the culprit. In *Vinod Kumar v. State of Madhya Pradesh*¹¹, an 11-year-old girl was raped by a youth while another gagged her with her own saree. The Sessions Court gave 5-years imprisonment to the accused. Upon appeal the High Court stated, "Increasing cases of personal violence and crime do not justify a severe sentence on young offenders".

At other times, courts have given extremely hard punishments, even to the extent of invoking the death penalty. In *Hareesh Mohandas Rajput v. State of Maharashtra*¹², this Court opined that the death sentence, in a given case, can be awarded where the victims are innocent children and helpless women, especially when the crime is committed in a most cruel and inhuman manner which is extremely brutal, grotesque, diabolical and revolting.

Conclusion

To comply with its international commitments and the Constitutional mandate, India has enacted many legislations dealing specifically with children and has made provisions in other statutes for protecting rights of children. Recently enacted the protection of children from sexual offences act, 2012 is a laudatory step.

To expect penal law to solve the problem of child sexual abuse or any other social problem is nothing more than a utopian dream. While the law to protect children from sexual abuse and punishment to the abuser remains inadequate, societal attitudes continue to be an even bigger impediment. How can the children be protected when there is no acknowledgement of the problem? We are talking of the law here as one of the tools, but not the only tool, in the elimination of child sexual abuse and commercial sexual exploitation of children.

References

- [1] Child Abuse Prevention and Treatment Act, 1974. Title 42, Chapter 67, Sub – Chapter I, § 5101
- [2] Chapter 3, para 3.1
- [3] State v. Freddy Albert Peats & Others: Goa, Sessions Case No. 24 of 1992.
- [4] Supra note 67. p. 528, Para 9 (f).
- [5] Supra note 52. p. 148
- [6] Section 2 (f) – "prostitution" means the sexual exploitation or abuse of persons for commercial purpose and the expression 'prostitute' shall be construed accordingly.
- [7] Barse Sheela, *INDIAN LAWS ON PROSTITUTION AND SEXUAL OFFENCES*, 1996. p. 101
- [8] Supra note 35. p. 19
- [9] Section 2 (d) – "child in need of care and protection" means a child –
- [10] Section 7, 8 & 9
- [11] 1987 Cr L J 1541
- [12] (2011) 12 SCC 56