

Legal Protection of Children against Sexual Offences: International and National Perspectives



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Abstract

Child sexual abuse is a dark reality that routinely affects our daily lives, but the subject of CSA is still a taboo in India. There is a conspiracy of silence around the subject and a very large percentage of people feel that this is largely a Western problem and that it does not exist in India to any appreciable extent. Part of this reasoning, of course, lies in a traditional conservative family and community structure that does not talk about sex and sexuality at all. As a result, all forms of sexual abuse that a child faces do not get reported anywhere. The silence encourages and emboldens the abuser to continue the abuse and to press his advantage to subject the child to more severe forms of sexual abuse. Thus, in a majority of cases, it goes unnoticed and unreported because of the innocence of victim, stigma attached to the act, callousness and insensitivity of the investigation and the law enforcement agencies. Protection of Children from Sexual Offences Act, 2012 (POCSO) is an extraordinary and landmark legislation enacted to address the issue of sexual violence against children. It seeks to protect all children below the age of eighteen years from sexual assault, sexual harassment and pornography. These offences are clearly defined in POCSO and stringent punishment provided for such offences.

Keywords: Child Sexual Abuse, Sexual Exploitation, Rape, Sexual Harassment, Child Welfare Committee, Special Courts.

Introduction

Child Sexual Abuse is a global reality across all countries and social groups. It can take the form of harassment, rape or sexual exploitation in prostitution or pornography. It can happen in homes, institutions, schools, in travel and tourism facilities. Push for children's rights occurred in the 1960's and 1970's when children were viewed by some advocates as victims of discrimination or as an oppressed group. In the International context; "the growth of children's rights in international and transnational law has been identified as a striking change in the post war legal landscape."¹

Objective of the Study

The objective of the paper is to analyse the laws in India and Jammu and Kashmir State for the Protection of Children from Sexual offences.

Review of Literature

Policies and Legislation for Children in India, by C.P. Yadav is a comprehensive study about the status of children in India and reviews the manner in which existing laws are implemented in India regarding children. It highlights the issues relating to children, like, food insecurity, malnutrition and starvation, education, child labour violence and abuse against children. It also comprises full text of the Convention on the Rights of the Child, National Charter for Children 2003, National Health Policy, 2002.

Child Welfare in a Changing World, by A.K. Rizwianalyzes the welfare of children which according to him is promoted by social work by making use of certain social institutions, like, family, schools, colleges, courts, etc. This book highlights the child protection theory and practice in situations where what is conventionally described as cross-cultural and cross-national predominate, that is, where there are differences in perceptions about what constitutes satisfactory and unsatisfactory childcare. It represents an attempt to link thinking about child protection more firmly into the constantly developing anti-discriminatory approach to theory and practice. The book covers the topics, like, effects of child abuse,

children who sexually abuse other children, listening to abused child and removing the barriers of communication. It also covers issues relating to factors around male child sexual abuse and considers problems relating to its under reporting.

The Child Protection: A Fiction, by Mahender Gaur, explains the approach to child protection through various legislations, governmental schemes and programmes. It emphasises that despite various national and international instruments that are binding on the nations, the effort falls short of realization despite various programmes and policies in place. It discusses issues, like, sex selection and female foeticide, child marriage, child labour, child trafficking, sexual abuse, factors responsible and areas of concern related to these issues. This book also discusses in detail the Five-Year Plans with regard to the child protection, various schemes and programmes launched by the government.

A Complete Sex Education for Parents, Teenagers and Young Adults, by James Leslie Mc Cary, is written in an effort to fill gaps in the lack of sex education on the part of young people and the lack of its fundamental knowledge on the part of adults. Written in understandable terminology, the material is presented in an organized and teachable manner. The subject matter is arranged to generate many in-depth discussions in which young people and their parents can learn to understand each other's value systems.

Prescriptions for Child Mental Health and Education, by Arnold P. Goldstein, incorporates a complete chapter on child abuse. It highlights different models of child abuse, treatment methods, and problems in the implementation of treatment prescriptions.

Sex Abuse of children, by Nishant Singh, covers a detailed conceptual analysis of child sex abuse. It examines the models, like, Cinderella effect which is a term used by psychologists to describe the high incidence of step-children being physically abused, sexually abused, neglected or murdered, or otherwise mistreated at the hands of their step-parents at significantly higher rates than their genetic counterparts. It highlights day care sex abuse, with reference to some significant cases, like, Kern County Child Abuse cases, McMartin Preschool Trial and many more. It has discussed child abuse in all the dimensions, like, neglect, physical abuse, child sexual abuse, psychological abuse, etc. Other major topics dealt with in the book are child sex tourism, trafficking of children and child pornography.

Child Rights and Young Lives, by D. Sarada and N. Rajani, is a comprehensive document on child rights approach to development programmes, child rights education and research. The theoretical issues present an overview of different issues centred on child rights. The child related schemes initiated from time to time are critically examined and useful suggestions indicated.

International Perspective

On 10th December, 1948, the General Assembly of the United Nations adopted a Universal Declaration of human Rights, which provides some

protection for safeguarding the rights of the children and protecting them from exploitation. As per the Declaration, everyone has the right to life, liberty and security² and no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.³ By these provisions dignity of life of human being has been proposed to be protected, which also include the protection of children undoubtedly.

Convention on the Rights of the Child, 1989 (CRC) incorporates the full range of human rights, viz., civil, cultural, economic, political and social and creates the international foundation for the protection and promotion of human rights and fundamental freedoms of all persons under the age of 18. The CRC represents widespread recognition that children should be fully prepared to live an individual life in society and brought up in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

CRC lays stress on participation by children in decisions affecting them; protection of children against discrimination and all forms of neglect and exploitation; prevention of harm to them; provision of assistance to children for their basic needs. CRC follows a holistic approach to child's rights recognizing therein that the rights anchored in Convention are indivisible and inter-related and that equal importance must be attached to each and every right contained therein. Some of the important rights of children given in CRC are: a) Right to equality. b) Best of interest of the child has to prevail. c) Right of life, survival and development. d) Respect for children's own views. e) Right to special care are education for disabled children. f) Right to special protection for refugee children. g) Right to education. h) Right not be made to do harmful work. i) Right not to be sexually exploited or abused. j) Right to be protected from drugs. k) Right not to be subjected to torture or other cruel treatment. l) Right to be treated with dignity.

India ratified CRC on 11 December 1992, agreeing in principle to all Articles except with certain reservations on issues relating to child labour. UN adopted two Protocols to the CRC on 25 May 2000, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, 2000 (Sex Trafficking Protocol) and the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict (Child Soldiers Protocol).

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000 provides that State parties shall prohibit the sale of children, child prostitution and child pornography (Article 1). For the purposes of the Protocol, Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration (Article 2(a)). Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration (Article 2(b)). Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities

or any representation of the sexual parts of a child for primarily sexual purposes (Article 2(c)).

Legal Perspective in India

Child exploitation and gross violation of their human rights to live with dignity in the way of abuse, both mental and physical, including sexual abuse, are one of the most pressing international problems. In respect of social problem, various national contexts cannot be differed from international one. Position of India in respect of aforesaid exploitations of child is not exceptional. In India, various type of offences against the children are also being committed. They are also subject to various kinds of exploitation and torture, both physical and mental. They are also subject to various type of sexual abuse, including rape, molestation etc. in this regard it may be mentioned here that under the provision of municipal laws in India various safeguards and protections have been provided for the protection of the children both by constitutional provision, as well as other legislations.

Some provisions under Indian Constitution are provided for the protection of the children from exploitation and abuse and of course for the welfare of the children.

State shall make special provisions for the welfare of women and children.⁴ Constitution of India provides certain safeguard to the children from exploitation and from the deprivation of the basic human dignity. The State shall in particular, direct its policy towards securing that the tender age of the children is not abused and that citizens are not forced by economic necessity to enter avocation unsuited to their age or strength.⁵ So by invoking this provision of article 39(e) of the Constitution, children can be protected from the abuse of dignity of life which may include sexual abuse.

And as a preventive measures, the State shall direct its policy towards securing that the 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 morals and material abandonment.⁶ So by invoking this provision of Constitution of India, the protection of children and development of their personality may be secured and the children may be protected from exploitation from exploitation and abuse, committed against them.

In addition to it, provision of article 45 of the Constitution may be considered as preventive measures against exploitation of children. Article 45 of the Constitution provides that the States shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years. This provision of Constitution of India is actually providing the protection of human dignity of children.

Protection of Children from Sexual Offences Act, 2012 (POCSO)

POCSO is in line with Article 15(3) of the Constitution of India, which permits the State to make special provision for children. Before 2012, there were no specific laws in India that addressed sexual crimes

against children. Sexual offences against children were booked under the India Penal Code. The legislation is in response to the increasing instances of grave sexual offences against children and low rates of conviction for the same. This is the first legislation in the country that deals specifically with offences against children below eighteen years and clearly defines them. It includes within purview the abuse of boys as well as girls. The Act has the potential to instil hope in many child victims of abuse who have been denied justice due to the loose ends in Penal laws. The Act is progressive in its approach. It is gender-neutral and lays down stringent punishment for a range of sexual offences.

The Protection of Children from Sexual Offences Bill, 2011 was passed in the Rajya Sabha on 10 May 2012 and in the Lok Sabha on 22 May 2012, received the assent of the President of India on 20 June 2012. It is now known as The Protection of Children from Sexual Offences Act, 2012. It has 9 Chapters and 46 Sections.

The Act defines a child any person below eighteen years of age.⁷ It defines different forms of sexual abuse, including penetrative and non-penetrative assault, as well as sexual harassment and pornography. It deems a sexual assault to be "aggravated" under certain circumstances, such as when the abused child is mentally ill or when the abuse is committed by a person in a position of trust or authority like a family member, police officer, teacher or doctor.

POCSO Act makes it mandatory for every citizen to report cases of sexual offences against children to the police.⁸ Act provides for the setting up of Special Juvenile Courts and appointment of Special Public Prosecutors for the speedy trial of the accused.⁹ POCSO Act provides for more severe punishment, when the sexual offence is committed by a person in a position of trust or authority such as police officer or a member of security forces or public servant.¹⁰

POCSO Act calls for people, systems and procedures to be sensitive and respond to the needs of children. For instances, it clearly mentions that the child need not be taken to the police station to report a case of sexual offence. Rather it directs the police to be not in uniform and as far as practicable a woman officer not below the rank of sub-inspector to reach out to the child, based on the child's preference and convenience.¹¹

Media has to secure the identity and privacy of the child. Disclosing or publishing the identity of the child victim by mentioning name, address, neighbourhood, school name and other particulars is punishable with imprisonment of not less than six months but extended to one year or with fine or with both. It also prohibits making of negative reports that cause harm to the child's reputation. Provided that for reasons to be recorded in writing. The Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.¹²

The Act casts a duty on the Central State Governments to spread awareness through media including the television, radio and the print media at

regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of the Act.¹³ The National Commission for the Protection of Child Rights and the State Commissions for the Protection of Child Rights have been made the designated authority to monitor the implementation of the Act.¹⁴

Jammu and Kashmir State Legislations

Under the provisions of Constitution of Jammu and Kashmir, the State shall strive to secure the rights of children, the State shall secure to all the children the right to happy childhood with adequate medical care and attention and to all children and youth protection against exploitation and against moral or material abandonment.¹⁵ The state should take positive steps for the welfare of children as well as for improving the quality of their life.¹⁶ In Jammu and Kashmir sexual offences against children were covered under different Sections of Ranbir Penal Code. RPC does not provide for all types of sexual offences against children and more importantly does not distinguish between adult and child victims.

The Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act, 2013

The Act provides for strengthened provisions for both children in need of care and protection and children in conflict in law. According to section 2(1) of the Act, child in need of care and protection also includes the one who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts.¹⁷

Section 24 of the Juvenile Justice Act, indirectly and in a limited manner deals with child sexual abuse.

Section 24- whoever, having the actual charge of, or control over, a juvenile, assaults, abandons, exposes or wilfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such juvenile unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

Under section 24 of the Juvenile Justice Act the offender should be a person who has the charge of or control over a juvenile, and who exposes such juvenile to abuse. This Section does not cover sexual abuse at the hands of a stranger. It merely covers assault by a person having charge of, or control over a juvenile, or wilful neglect by such person which results in abuse.

The Jammu and Kashmir Protection of Children from Sexual Violence Ordinance, 2018

In the wake of Kathua Rape Case, Jammu and Kashmir Governor has approved two Ordinances on rape, one of which provides with death penalty to perpetrator committing rape of a girl below 12 years of age. Two Ordinances that received Vohra's nod were The Jammu and Kashmir Criminal Law Amendment Ordinance, 2018 and The Jammu and Kashmir Protection of Children from Sexual Violence Ordinance, 2018. Jammu and Kashmir Criminal Law Ordinance penalises a perpetrator committing rape on a girl below 16 years of age with 20 years of rigorous

imprisonment extending to life which, shall be the remainder of the natural life. Gangrape of a minor girl below the age of 16 years would be punishable with life imprisonment and committing rape or gangrape of a girl below 12 years would be punishable with death.¹⁸

The Jammu and Kashmir Protection of Children from Sexual Violence Ordinance, 2018 is a comprehensive law to provide for the protection of children for the protection of children from the offences of sexual assault, sexual harassment, pornography, while safeguarding the interests of the child at every stage of the Judicial process by incorporating child friendly mechanism for reporting, recording of evidence, investigation and speedy trial of offences through appointment of Special Public Prosecutors and designated Special courts. The Ordinance provides for stringent punishment which have been graded as per the gravity of the offence.

The Jammu and Kashmir Protection of Children from Sexual Violence Ordinance, 2018 includes all types of sexual victimization of children-penetrative, or non-penetrative sexual intercourse, pornography, sexual harassment, commercial sexual exploitation, sex tourism and online exploitation. Additionally, the offences of 'aggravated penetrative sexual assault'¹⁹ and 'Non-penetrative Sexual Assault'²⁰ is made more serious and attract stronger penalties when committed by a specified range of perpetrators in a wide array of situations or conditions, or has a severe impact on the victim. This includes sexual assault committed by persons in authority or position of power with respect to a child, committed by persons in a shared household with the child, in conditions such as : gangrape, causing grievous bodily harm, threatening with firearm or corrosive substances; during communal or sectarian violence, assaulting a child under 12 years of age, or who is physically or mentally disabled, causing a child to become pregnant, or knowingly assaulting a pregnant child, or infecting the child with HIV, repeated assaults, or accompanied by public degradation. The definition is very comprehensive and covers a range of possible scenarios.

Under the provisions of the ordinance, any person, including the child who has apprehension that an offence under this ordinance has been committed or has knowledge that an offence has been committed, shall provide such information to Special Juvenile Police Unit (Herein after called as SJPU) or the local Police.²¹ The SJPU or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and Special Court or where no Special court has been designated to the Court of Sessions.²² Where the SJPU or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then it shall make immediate arrangement to give him such care and protection, including admitting the child into shelter home or to the nearest hospital.²³

The Act incorporates child friendly procedure for reporting, recording of evidence, investigation and

trial of offences. These include recording the statement of the child or at the place of his choice, preferably by a woman police officer not below the rank of sub-inspector.²⁴ No child to be detained in the police station in the night for any reason. Police officer not to be in uniform while recording the statement of the child. The statement of child to be recorded as spoken by the child. The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence.²⁵ The trial of such cases to be held in cameras and in the presence of parents of the child.²⁶ Medical examination of the child to be conducted in the presence of the parent of the child or any other person in whom the child has trust or confidence. In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.²⁷

The Ordinance casts a duty on the government to spread awareness through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of this Ordinance.²⁸ All hospital whether public or private shall immediately provide the first aid or medical treatment, free of cost to the victims covered under this ordinance and shall immediately inform the police of such incident.²⁹

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.³⁰ The State Government shall prepare guidelines to take the help of NGO's, professionals and experts or person having knowledge of psychology, social work, physical health, mental health and child development to be association with the pre-trial and trial stage³¹ to assist the child.

Conclusion

Child Sexual Abuse is multi-dimensional and a problem of great magnitude in India that affects children of all ages, sex, race and socio-economic background. Likewise, the State of J&K is also afflicted with the problem of Child sexual Abuse where such cases are on the rise but mostly go unreported. This alarming increase in the Child Sexual Abuse cases calls for extensive and effective policy formulation and implementation efforts.

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