

“Child Sexual Abuse, affecting the Child Rights in India”

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Abstract:

The children of today would be the future of tomorrow. They are the citizen of this nation. Protecting their rights must be the foremost priority of the nation. Child sexual abuse is nowadays the fastest growing crime in India and also this is creating the adverse affect to the child rights as well.

This research paper is basically focusing upon the issue of child sexual abuse and its effect upon the childrens' rights. This paper will further deal with the Constitutional aspects and human rights aspects of the children in India. This will also include the legislative as well as judicial work upon the child sexual abuse.

This paper will proceed to throw light about; How far the judiciary is getting success to protect the children from sexual abuse?

Upto what extent the legislative have achieved the success after implementing the protection of children from sexual offences 2012?

Introduction:

The rights of children are relatively a new concept within the new Human Right discussion. The concept of child rights is comparatively a new concept which has gained the wider support only in the last few decades. Not only the child rights are relatively a new concept but the offence of child sexual abuse is also getting the recent introduction. The child sexual abuse is a very serious

crime and the biggest social issue in these days. It is a very recent and fastest growing offence in India.

Every citizen or non citizen of India is having the right of life and personal liberty; according to our Indian Constitution and the children are also having the same right. The child sexual abuse is a kind of exploitation of their child rights, which is being ensured by our Indian constitution. Therefore the rights of children are adversely affected whenever a child gets sexually exploited by any person. The child sexual abuse is a form of child abuse in which an adult of older adolescent, who is in a relationship of responsibility, trust or power, uses a child for fulfilling their sexual desires and lust.

Ironically, the majority of cases related to child abuse occur in home, school, the neighborhood or by the close relatives. In India many of these kinds of cases got unnoticed and the reason behind this is the shame, depravity and the matter of family honour. The child sexual abuse causes grievous effect upon the mental, physical level of the child and which causes the long term side effects upon the child. For e.g.: emotional and behavioral abnormality, abnormal sexual disorders and psychiatric disorders. The child sexual abuse is likely to become the burden for the child throughout their lifetime. Sexually abused children suffer from psychological symptoms which causes severe health issues during the lifetime of the children.

The basic reason for the exploitation of children is that they are easily approachable prey to the criminals or perpetrators. Also the family background of the child, their lifestyle, neglected behavior of their guardians; increases the chance of exploitation of the children and cause the sexual exploitation of these innocent kids.

Historical background of child rights:

Prior to sixteenth century there was no concept of child rights. They didn't consider the childhood as a different period of life. Mostly the children beyond the age of six year were considered as small adults. Even in the early stage of the nineteenth century the children were considered as the property of the parents and the children were having no legal rights. In the middle of the nineteenth century the idea of minor's rights appears in France for giving them special protection. Since 1881, the French law was also included with the educational rights of

the children. Later on at the starting phases of twentieth century, the protection of child rights had taken its place in every possible field. So after that the protection of child rights spread across the whole Europe.

When in 1919 the international community i.e. League of nations form, then the concept of protection of child rights emerged. On September 16th, 1924 the League of Nations has adopted the declaration of the rights of child. That was the first ever international treaty, which was having the concern of the children's right. At the time of World War II there were thousands of children in the worst situation. Then only the United Nations has created an urgency fund for those affected children in the year 1947. Later on it was named as UNICEF (United Nations International Children's Emergency Fund) and got its permanent status as an International Organization in 1953. In current scenario, there is the International Charter of the child rights, which was signed by 190 states out of 192.

Now a days the idea of child right protection is almost everywhere accepted and still there is more of awareness required and more effective application is required in the area if protection of child rights.

Historical background of child abuse:

Sexual abuse of children is an ancient crime. In ancient era approximately during the period of fifteenth and sixteenth century, it was discovered that, the adults of same households in Europe, treated their children as a sex object. During the nineteenth century the sexual abuse of children had spread all over the America. In the Newyork city, one third of the rape victims were under the age of 18 year in the period of 1790 to 1876. During the year of 1817 to 1899 many of the newspaper reported the crime of sexual exploitation of the children, out of which father and daughter incest was more than 500. In a text book published in 1894 named "A System of Legal Medicine" reported that the rape of children is the most frequent form of sexual offence. When these findings were reported the public had less interest for taking huge step to look at these type of offences.

In India it also exists in many forms, but before the introduction of protection of child from sexual act, 2012, the situation was ambiguous. The most of the children suffer due to silence

maintained by them or by their families. But from last few decades the offence of child abuse gained the large public attention. Since 1970's the sexual abuse of children has been increased and caused deep damage to the children. Now it is totally unacceptable for the society as a whole. Today the awareness is greater than the ancient era.

Constitutional aspect and children:

The constitution of India provides many rights of children, because of their venerable position in the society. It provides protection of the rights children. The rights provided under the constitutional law maintain the position of the children in this equitable society. It also contains the provision regarding protection, development, education and survival of children. Constitution also provides special laws for safeguarding the rights of children under the doctrine of prospective discrimination. Some provisions regarding under the Constitution of India are here in mentioned as follows:

“The constitution of India empowers the state to make special provisions for the safety and advancement of the children”.¹¹

“The children should be protected from the exploitation and should live their life with morality and dignity”.²

“The constitution also prohibits the employment of children in hazardous factories. It further protects the children under the age of 14 years to be employed in any factories and mines”.³

“The constitution also gives the freedom of life and liberty to the children of the society.”⁴

“The constitution further provides for free and compulsory education of children below the age of 14 year.”⁵

¹ Article 15(3), The Constitution of India

² Article 39, The Constitution of India

³ Article 24, The Constitution of India

⁴ Article 21, The Constitution of India

⁵ Article 21(A), The Constitution of India

Human rights and children:

The human right based approach targets the most marginalized group. Out of them the most vulnerable group consist of women and children globally. United Nations Human rights Commission is recognized as the holders of rights rather than the object of charity. It ensures that the rights of children are not only protected physically, psychologically, spiritually but in every possible aspect relating to their, basic health and education. The human right is working hard for safeguarding the children from sexual offences. Many of the child victims are still ill treated during their medical examination by the concerned authorities. The overall child protection mechanisms are almost a big failure because they are not properly practiced.

In 1979, The United Nations celebrated the ‘International year of the child’ as the remembrance of 1959’s declaration. As a result of which the UN general assembly adopted the convention on the rights of child in the year 1989. Article 54 of The UN Charter declared The Economic, Social and Cultural rights of the children. The child sexual abuse is a bigger challenge globally. It needs a proper reformation of already existing laws related to child rights and abuse. It is high time to take proper measures for eradication of the crime against children both nationally and internationally.

Legislature on sexual offences against children:

Initially there was no separate Act or law for the children who are sexually exploited. The only law which was able to punish such offenders was Indian Penal Code 1860, under Section(s) 375 and 376. These above mentioned Section(s) only dealt with female victims; there were no provisions for the male victims. Although Section 377 of Indian Penal Code, 1860 were dealing with unnatural offences but in such the offence can be tried by magistrate court which can impose punishment maximum up to 3 years. Now Section 377 also gets unconstitutional. In 2012, a new Act was introduced by legislation i.e. protection of child from sexual offences “Bill 2011”.Parliament has passed the bill on 22 May 2012,the Act came into force on 14 September 2012. The present Act is having its genesis under Article 15(3) of the constitution of India.

As far as international scenario is considered, India is a signatory member of UN Conference on Rights of Children and ensures its obligation and also from time to time makes useful provisions

for the upliftment of children. The Act not only deals with the category of sexual offences but also the sanctions provided under the Act.

Protection of Children from Sexual Offences Act, 2012

Act is an exhaustive law which clearly defines sexual assault, harassment and pornography as distinct offences. When an offence is committed by a public servant, police officer, members of armed forces, security personnel, jailor or any person in management of any medical or educational institution or guardian, responsible for the protection and care of child, it is considered as an aggravated form of sexual assault in the Act. The Act also defines different forms of sexual abuse of child below 18 years of age. The judiciary safeguards the interests of the child at every stage of judicial process by enforcing, child-friendly mechanisms for reporting, recording evidence, investigation and speedy trial of offences through designated special courts.

The said Act makes provisions for medical examination of a child in the manner designed to cause as little inconvenience as possible. The examination is to be carried out in the presence of the parent or other person whom the child trusts and in the case of a female child by only female doctor is required.

The Act also provides for special and fast track court that will conduct the proceedings in the close court, creating the child friendly environment. . Any complaint under this Act is to be filed before the special courts having all powers of court of sessions.⁶ The modern guidelines prepared by central govt. the Act are implemented by active participation of state govt. As per the guidelines of central govt. Further, the central govt. frames the guidelines for the use of person including NGO's, professionals and experts from different fields (child psychology, social work, physical health, mental health and child development) to assist the child at trial and pre trial stages

⁶ Sailja Pritam, The Protection of children from Sexual Offences Act,2012- A Bird Eye View, Nyaya Deep,Vol XIII, Oct.2012,p 87

Judicial approach upon the child sexual abuse:

In this modern era Judicial Activism emerged as a tool for protecting the right of children including sexual exploitation, trafficking, abuse etc. Some case dealt by the Indian judiciary for the protection of child rights based on the United Nations Convention on the Rights of Child. The judiciary has played a very important role in realizing the heinous crimes against the children. Through Judicial Activism, Indian Judiciary has issued many guidelines for the children who are affected by the sexual exploitation. Some important cases are herein after mentioned:

Sakshi v. Union of India⁷

In this case Sakshi an NGO filed a writ petition before the Supreme Court seeking a declaration that, all forms of penetration should be included in sexual intercourse under section 375 of Indian Penal Code, 1860. They have also prayed for the special measures at the time of recording of statement of children in the case of sexual abuse of the child. The Supreme Court laid down some guideline for the procedure of trial for the offence of child sexual abuse:

1. Some kind of arrangement or screen should be made for the victim or witness so that they do not see the face of accused.
2. The questions of cross examination should be firstly given to presiding officer of the court in written form, who may put them to the victim or witness in a language which is clear and not embarrassing.
3. Victim should be given proper breaks while giving his testimony in the court.

Gaurav Jain v. Union of India⁸

The Supreme Court has held that the children of prostitutes also have the rights of equality of opportunity, dignity, care and protection. In this case the Supreme Court has issued several directions to central govt., State govt. and NGOs to take necessary steps for protecting the child

⁷ AIR 2004 SC 3566

⁸ AIR 1997 SC 3021

from prostitution and rehabilitate them, so they can be the part of the main stream of the society without any pre stigma. The court further directs that the sexually exploited children to be provided proper education, financial support and every possible support for their upcoming life. if possible their marriage should be arranged so that they would never fall into the trap of red light again. The court also directs the Government of India, the department of women and child development, for establishment of juvenile shelter homes.

Vishal Jeet v. Union of India⁹

The Supreme Court in this case dealt with some important questions related to child sexual abuse. The court has observed that the problem is not only social but also socio economical, therefore the measures to be taken should be more of preventive despite of punitive. The Supreme Court issued some important directions for central and state govt. they directed the law enforcing authorities to take proper and speedy actions for the child prostitution matters. The Supreme Court also directed the authorities to provide the child victim's proper rehabilitation and shelter homes and if requires make a proper committee for eradicating child prostitution, protection, treatment and rehabilitation of child victims.

Nipun Saxena & Anr. v. Union of India & Ors¹⁰

This case is related to protection of the identity of the child victim. The Supreme Court is held that the children who are the victims of the sexual abuse should be protected so that they are not subjected to unnecessary ridicule and harassment. The Supreme Court further held that no person can print or publish the name of the victim or disclose any facts which can lead to victim's identification to the public at large. Trials under POCSO Act are conducted by the Special Court which is expected to child friendly and specifically provides that the special court shall not be permitted for the aggressive questioning or character assassination of the child. The intention of legislature is that the privacy and reputation of the child is not harmed. Therefore the mandate of the Supreme Court in this regard is with a view that the identity of the child victims should not

⁹ AIR1990 SC 1412

¹⁰ AIR 2013 SC 568

be put in any embarrassing situation. Not only this, the idea is to protect the dignity of an individual in the cases of child sexual abuse.

Sankar Kisanrao khade v. State of Maharashtra¹¹

The Supreme Court has observed in this case that, in most of the cases of child sexual abuse, the offence was committed by the person known to them or who have influence over them. The Court further held that, the sexual abuse can be in any manners like sexual molestation or encouraging, inducing or forcing child for the purpose of sexual gratification, sexual assault or deliberately exposing a child to sexual activity for the purpose of commercial exploitation.

Although the Supreme Court has made many laudable directions in many cases for the protection, still there is a long way to make these suggestions more effective. For more effective implementation, now judiciary is creating the awareness camps with the help of District Legal Services Authority and NGOs.

Conclusion:

The protection of child from sexual offences Act, 2012 is a very pivotal step by parliament for ensuring the safety and security of the children. This Act enables a separate legislation dealing exclusively with the offences against children. The Act of 2012 not only elaborates the categories of sexual offences with respect to children, but also raised the stringency of punishments for the accused under this Act. The Act facilitates the child friendly procedures which are to be followed in the case of child sexual abuse. The Central and the State Government are duty bound to spread awareness through different media sources about the POCSO Act, 2012. The Supreme Court has raised its concern related to child abuse in the case of Sankar Kisanrao Khade v. State of Maharashtra¹²; and laid down certain guidelines which are above mentioned. To get this problem uprooted from the society, every citizen must join hands together and every citizen must realize the seriousness of this crime and make legislation to work in an efficient manner. Therefore the future of the children is to be secured in the Nation.

¹¹ (2013)5 SCC 546

¹²(2013)5 SCC 546