



ANALYSIS OF THE LEGAL PROVISIONS AVAILABLE FOR PROTECTION OF CHILDREN AGAINST ABUSE IN INDIA WITH SPECIAL REFERENCE TO SEXUAL ABUSE

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“There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they grow up in peace.”

---Kofi Annan¹

Abstract:

Child abuse is although shrouded in secrecy but the fact is that it has been increasing day by day all over the world and India is not an exception to it. Child abuse in India has various forms, such as, child labour, trafficking, corporal punishment, child prostitution, sexual abuse etc. Realizing the importance of children and their vulnerability in a society dominated by adults, India has kept provisions for securing their rights in every possible way. Much before the United Nations Convention on Rights of the Child (UNCRC) that emerged in 1989, the Constitution of India directed the State to ensure protection of children from all forms of abuse and exploitation. Based on the Directive Principles of the State Policy to protect and promote the interests of children the government of India has taken several steps towards protection of children's rights in the last two decades in addition to the penal statutes. These include the enactment and formation of various statutes and bodies such as the Juvenile Justice (Care and Protection) Act 2000, Prohibition of Child Marriage Act (2006), the formation of the National Commission for Protection of Child Rights (2005), the Child Labour (Prohibition & Regulation) Act, 1986, Prevention of children from Sexual Offences (POCSO Act 2012) to protect, promote and defend child rights in the country and many more. This paper gives a glimpse of Child abuse along with a brief outline of the legal provisions of various statutes in force in India. In addition, the researcher has tried to find out whether the existing legal provisions is well equipped to tackle such crime or is there a need of a new legislation or amendment.

Keywords: Child, Rights, Abuse, Statutes.

Introduction

Children's are the most important assets of every nation. In fact, a nation's future primarily depends upon what its children become when they grow up as responsible citizens and this depends upon what rights they enjoy and what type of care & protection they get to develop themselves as a good citizen of a nation. In spite of such importance, the rights of the child are violated every day in every sphere of life by the adults which many times leads to abuse in different forms.²

The term 'child' needs to be defined before analyzing child abuse and the rights available to child. Biologically childhood is the stage between infancy and adulthood. According to the UNCRC 'a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'. This definition of child allows individual countries to determine the definition of child according to their own discretion in their respective laws. But in India the definition is not uniform because various laws related to children define children with different age limits. There is no universally accepted age for determination of childhood in India. However, the most applicable age for determining a person to be child is 18 years as per the Indian Majority Act, 1875.³

The problem of child abuse and child rights violation is prevailing on large scale all over the world including India. Child abuse is a state of emotional, physical, economic and sexual maltreatment meted out to a person below the age of eighteen and is a globally prevalent phenomenon.⁴ However, in India, as in many other countries, there has been no understanding of the extent, magnitude and trends of the problem.

Abuses on children are a big blot on society at large as it shook's the human consciousness of the society and retard the normal healthy growth of children. It leads to grave physical and psychological effects on the body and mind of a child and dismantles

¹ United Nations Report on Child Abuse. (2000). "The State of the World's Children". UNICEF.

² Khan, Dr N P. (2012). "Child Rights and the Law 209" (12th ed.). Haryana: Universal Law Publishing.

³ Section 3, Indian Majority Act, 1875

⁴ Rinchin, S. & Maitra, S. (2001) Child Sexual Abuse and Social Factors Preventing Disclosure: Adolescent girls' narratives. New Delhi, India: Sage Publications 301



the normal growth of a child.⁵ It does not leave only physical injuries on the body but also leaves an everlasting scar on the child's mind at a very nascent age.

Child abuse has serious physical and psycho-social consequences which adversely affect the health and overall well-being of a child. According to WHO, "Child abuse or maltreatment constitutes all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power."⁶

The term 'Child Abuse' may have different connotations in different cultural milieu and socio-economic situations. A universal definition of child abuse in the Indian context does not exist and has yet to be defined. However, child abuse can be classified into the following types as per WHO:

- **Physical Abuse:** Physical abuse is the inflicting of physical injury upon a child. This may include burning, hitting, punching, shaking, kicking, beating or otherwise harming a child. It also includes child labour and corporal punishment in school, children's home, day care centres, hostels etc.
- **Sexual Abuse:** Sexual abuse is inappropriate sexual behaviour with a child. It includes fondling a child's genitals, making the child fondle the adult's genitals, intercourse, incest, rape, sodomy, exhibitionism and sexual exploitation.
- **Emotional Abuse:** Emotional abuse is also known as verbal abuse, mental abuse, and psychological maltreatment. It includes acts or the failures to act by parents or caretakers that have caused or could cause, serious behavioural, cognitive, emotional, or mental trauma.

Most of the nations in the world have witnessed child rights violation very often and from time immemorial, but the concern for protection of child rights specially for protection of child from sexual abuse is gaining momentum only in the recent years due to which there is a scarcity of research in this field. United Nations has always placed child on the top of their policies. Based on the international policies framed by the UN the national governments including India have enacted special laws and policies to protect the children from exploitation and abuse.

In the present paper the researcher would make an attempt to find out the various forms of rights against child abuse available in India and will try to examine the existing statutory laws which directly or indirectly give legal protection to the children from being abused at any point of time. In addition the researcher would provide with some suggestion for better protection of the rights of child.

Objective of the research

- To find out the various forms of rights guaranteed by different statutes, policies and schemes against child abuse available within Indian legal system and analyse them.
- To suggest strategies and programme for preventing and addressing issues of child abuse.

Research questions

- Whether the provisions inserted under the existing municipal laws are sufficient enough for the protection of children from abuses in India?
- Whether special laws like JJ Act & POCSO Act are adequate to deal with the cases of child abuse and protect their rights?

Methodology & sources of data:

To achieve the objectives of the research the researcher had employed the most amply used doctrinal research methodology which is also called as the 'Arm chair research'. The study will be based on two sources- Primary and Secondary. Primary sources are mainly Constitution of India, Statutory laws and Judicial decisions. Secondary sources include Books, Magazine articles, Commentaries, Journals, News Papers (Editorials and Articles) and Online Databases etc.

Legislative Measures in Protection of Child Rights against Abuse in India

The ultimate responsibility to protect its nation's children lies with the Government. By ratification of International instruments dealing with rights of child, the Government's has become bound and hence framed certain special legislative, administrative, social and educational measures to prevent and protect children from maltreatment. In 1992, India accepted the

⁵ Aggarwal, K. Dalwai, S. & Galagali, P. (2010). "Recommendations on recognition and response to child abuse and neglect in the Indian setting" 12 IP 495

⁶ Deb, S. (2009). "Child protection: scenario in India". IJCHHD, (3)339



obligations of the UN Convention on the Rights of the Child (CRC).⁷ In the last two decades, the government has taken several steps towards publically advance children's rights. These include the Juvenile Justice (Care and Protection) Act 2000 (amended in 2006), Prohibition of Child Marriage Act (2006), the formation of the National Commission for Protection of Child Rights (2005), a National Plan of Action for children (2005), the Child Labour (Prohibition & Regulation) Act, 1986 and advancing legislations such as Prevention of children from Sexual Offences (POCSO Act 2012) to protect, promote and defend child rights in the country.⁸ A few of the important legislative framework and schemes for the protection of child rights against abuse are discussed below:

3.2.1 Constitutional Provision on the Protection of Child

The constitution of India which was adopted by free India although did not directly speak about specific list of rights of children or protective measures for children against any type of abuse but the framers of the constitution had tactfully inserted certain provisions so that positive discriminatory treatment for the children of India can be made by the government of India by enacting specific statutes and policies.

Provisions that can be utilized for the protection of children have been found within the preamble, fundamental rights, directive principles of state policy and fundamental duties. The expression 'social justice' that had been included in the preamble aims at ensuring equality along with liberty. Children being marginalized section of the society, the government have the responsibility to take every possible measures to improve their condition. Article 23 and 24 prohibit child sexual abuse in the form of prohibition of human trafficking for the purpose of slave trade or prostitution. Article 15 empowers the state to make special provision for children through which the state can take measures to protect the children from sexual abuse.

3.2.2 Right Against Physical Abuse or Corporal Punishment

Punishment includes some kind of physical pain caused to a child with a bonafide intention or for the benefit of the child. However, in the recent time, we can see that the punishment gets extreme which results in abuse of the child. Thus, in order to solve this problem, the government of India has inserted a provision under Section 17 of Right to Education Act, 2009 which puts prohibition on physical punishment and mental harassment to child.

In addition to these, there are several provisions of the Indian Penal Code (IPC) relating to varying degree of physical pain and intimidation which can be used to prosecute perpetrators of corporal punishment against children in an institution setting. These provisions are highlighted below:

- Section 305- Abetment of suicide Committed by the child
 - Section 323- Voluntarily causing hurt
 - Section 325 –Voluntarily causing grievous hurt
 - Section 326- Voluntarily causing hurt by dangerous weapons or means
 - Section 352- Assault or use of criminal force otherwise than a grave provocation
 - Section 354- Outraging the modesty of a women
 - Section 506- Criminal intimidation
 - Section 509- Word, Gesture or Act intended to insult the modesty of a woman
- Further, there are various guidelines issued by the National Commission for Protection of Child Rights on banning corporal punishment, in the year 2007. These are as follows:
- All children are to be informed through campaigns and publicity drives that they have a right to speak against corporal punishment and bring it to the notice of the authorities.
 - Every school, including hostels, JJ Homes, shelter homes and other public institutions meant for children must have a forum where children can express their views.
 - Further a box where children can drop their complaints, even if anonymous has to be provided for in each school.
 - There has to be a monthly meeting of the PTAs or any other body such as the SEC/VEC to review the complaints and take action.
 - The PTAs are to be encouraged to act immediately on any complaints made by children without postponement of the issue and wait for a more grave injury to be caused.

3.2.3 Rights and Protection Under Juvenile Justice Act, 1987 (as Amended Up to Date)

The word 'juvenile' originates in the *latin* word namely '*juvenis*' which means young. Juvenile justice is the legal system that aspires to protect all children, bringing within its ambit the children in need of protection, besides those in conflict with law. However,

⁷Chatterjee,P. and Chakraborty,P. (2006). "Short and long-term problems faced by trafficked children: a qualitative study". *SSI* (12)167-182

⁸ United Nations Third and Fourth Combined periodic report on the Convention on the Rights of the Child. (2011). Retrived from www.wcd.nic.in



the word has come to be used together and often interchangeably with 'delinquency' – which describes children who are in conflict with law.⁹

Prescribing different treatment for juvenile offenders is an offshoot of the new penology, which came to be applied with the realization that courts, procedures and prisons meant for adult offenders could hardly be expected to serve the interests of juvenile offenders. Thus, with this intention in mind the Juvenile Justice Act 1986 was enacted which replaced the Children's Acts formerly in operation in the States and the Union Territories. It can be proclaimed as the first all-India child welfare enactment seeking to promote the best interests of the juveniles' by incorporating into its fold not only some of the major provisions and clauses of the Indian Constitution and National Policy Resolution for Children declared by India in 1974, but also universally agreed principles and standards for the protection of juveniles such as the United Nations Declaration of the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

The primary object of juvenile justice system under this aforesaid act can be highlighted as below:

- prevention (ensuring that children do not come in conflict with the law),
- diversion (that children are kept away from formal criminal justice system and into community based and restorative processes to prevent repeat delinquency),
- protection (of juveniles-in-conflict-with-law from human rights violations and the children from exploitation and abuse).

Thus, the mission is not to simply punish the violators but to help the young violators of law to get back in the society on the right path, the focus being to look into the complexity of the life situation of the child and thus offering commensurate rehabilitation program in the best interest of the child, thus ensuring aftercare and reintegration of all the children who have been left out, back into the society. Some of the specific changes brought in by the Juvenile Justice Act are as follows:

- an uniform definition of juvenile for the whole country
- a wider role to voluntary organizations
- prohibition for imprisonment of children under all circumstances, and
- an uniform structure of juvenile justice for the whole country.

However, in order to make the juvenile justice system more effective and up to date the JJ Act, 2000 was enacted which repealed the JJ Act, 1987. The JJ (care and protection of children) Act, 2000 marked a new beginning; it mirrored a sincere desire to realize the two-fold constitutional aspirations i.e., that the State has an obligation to provide ideal conditions for development of the child and that it must also act to protect them against exploitation¹⁰. However, later this Act was further amended in the year 2015 which changed the age of juvenile under the Act. A few of the important provisions dealing with rights of child are discussed below:

3.2.3.1 Rights of juvenile after apprehension

As soon as a juvenile in conflict with law is apprehended by police, he shall be placed under the charge of the special juvenile police unit or the designated police officer, who shall produce the juvenile before the Board without any loss of time but within a period of twenty- four hours of his apprehension excluding the time necessary for the journey, from the place where the juvenile was apprehended, to the Board¹¹. However, a safeguard had been provided here for the juveniles in conflict with law in the Proviso to the section which says, 'Provided that in no case, a juvenile in conflict with law shall be placed in a police lock-up or lodged in a jail'.

In addition to the above provisions regarding rights of juveniles, there are some specific provision provided under the Juvenile Justice Rule 2007 which provides for the guidelines for prevention of sexual abuse of children. These are mentioned below: Every institution shall have systems of ensuring that there is no abuse, neglect and maltreatment and this shall include the staff being aware of what constitutes abuse, neglect and maltreatment as well as early indicators of abuse, neglect and maltreatment and how to respond to these.¹²

In the event of any physical, sexual or emotional abuse, including neglect of juveniles and children in an institution by those responsible for care and protection, the following action shall be taken:

- (i) the incidence of abuse and exploitation must be reported by any staff immediately to the Officer-in-Charge
- (ii) when an allegation of abuse comes to the knowledge of the Officer-in-Charge, he shall place it before the Board or Committee

⁹ Adenwalla, M. (2006). Child Protection and Juvenile Justice System: for Juvenile in Conflict with Law. Retrieved from <http://childlineindia.org.in/pdf/CP-JJ-JCL.pdf>

¹⁰The Juvenile Justice (Care & Protection of Children) Act 2015, Sections 14, 15, 30, 33, 39.

¹¹Section 57, Cr.P.C., 1973

¹²Rule 60, Juvenile Justice Rules, 2007



(iii) the Board or Committee shall direct the local police station or Special Juvenile Police Unit to register a case, take due cognizance of such occurrences and conduct necessary investigations

(iv) the Board or Committee shall take necessary steps to ensure completion of all inquiry and provide legal aid as well as counseling to the juvenile or child victim

(v) the Board or Committee shall transfer such a juvenile or child to another institution or place of safety or fit person

3.2.4 Protection Under the Child Labour (Prohibition and Regulation) Act, 1986

Child labour is one of the most prominent and worst forms of child exploitation along with abuse in the civilized society. In order to eliminate and control this abuse Child Labour (Prohibition and Regulation) Act was passed in the year 1986. The Act prohibits the employment of children in certain dangerous occupation where there is maximum chance of abuse in various forms¹³. The Act bans the employment of child who have not completed the age of 14 years. It also regulate the working conditions of children above 14 years in such places where there working is not prohibited by law.

3.2.5 Rightsof Child Under the Commission for The Protection of Child Rights Act, 2005

The object behind this piece of legislation in is to ensure that all laws, policies, programmes and administrative mechanisms are in consonance with the child rights perspective as enshrined in the Constitution of India as well as in, the United Nation Convention on the Rights of the Child, which India ratified in 1992.

The basic functions of the commission regarding protection of child rights from being abuse are as follows:

- Examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation;
- Present to the Central Government, annually and at such other intervals, as the Commission may deem fit, reports upon the working of those safeguards;
- Inquire into violation of child rights and recommend initiation of proceedings in such cases;
- Examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution and recommend appropriate remedial measures.

3.2.6 Rightsof Child Under Prohibition of Child Marriage Act, 2006

Child marriage is violation of basic human rights of a child as because it leads to various types of abuse such as physical, psychological and sexual abuse.¹⁴ Thus, in order to eradicate such forms of abuse committed on a child the government of India had brought the Prohibition of Child Marriage Act, 2006. Under this piece of legislation every child has a right not to get married in a very tender age that is 18 years for girls and 21 years for boys¹⁵.

According to this law a child marriage is a marriage to which either of the parties is a child¹⁶. The act declares child marriage as an illegal activity punishable by law. The act punishes persons performing, conducting, directing, or abetting any child marriage, with rigorous imprisonment which may extend to two (2) years and fine which may extend to one lakh rupees.¹⁷ All offences under this act are made cognizable and non bailable.¹⁸

3.2.7 Protection Under the Immoral Trafficking (Prevention) Act, 1956(Amended In 2006)

This act was passed in order to prevent immoral trafficking of human being for various purposes such as, prostitution or sex trade, slavery, trade of human organ etc.¹⁹ Although this act is a general Act applicable to all irrespective of age and sex but still it defines child as a person below 18 years of age.²⁰ Prostitution is a worst form of sexual abuse that can be committed against a human being irrespective of his or her age. Children are often victim of such crime due to the high demand in international market. Thus, this

¹³ Section 3, Child Labour (Prohibition and Regulation) Act, 1986

¹⁴ Adenwalla, M. (2006). Child Protection and Juvenile Justice System: for Juvenile in Conflict with Law. Retrieved from <http://childlineindia.org.in/pdf/CP-JJ-JCL.pdf>

¹⁵ Section 2(a), The Prohibition of Child Marriage Act, 2006

¹⁶ Section 2(b), The Prohibition of Child Marriage Act, 2006

¹⁷ Section 10, The Prohibition of Child Marriage Act, 2006

¹⁸ Section 15, The Prohibition of Child Marriage Act, 2006

¹⁹ Nath, N. & Kohli, M. (1988) "Child Abuse in India: Some issues". National Seminar on Child Abuse in India, New Delhi, India

²⁰ Section 2(aa), the Immoral Trafficking (Prevention) Act, 1956(amended in 2006)



act has declared such activities as illegal and punishable under this said law. The punishment under this act is not less than 7 years of imprisonment but which may extend to life imprisonment.²¹

3.2.8 National Commission for Protection of Child Rights (NCPCR)

NCPCR was established by the Government of India in March 2007 by an Act of Parliament, with a wide mandate and considerable powers. The Delhi Commission for protection of child rights was started in July 2008. Similar bodies at State level have been pursuing various matters concerning child rights and protection. Telephonic help lines namely, CHILDLINE 1098 and Child Welfare Committees (CWC) have been established, where reports of child abuse or a child likely to be threatened to be harmed can be made and help sought.

3.2.9 Provisions under the Protection of Children from Sexual Offences (POCSO) Act, 2012

Child Sexual Abuse is any kind of physical or mental violation of a child with sexual intent, usually by a person who is in a position of trust or power over the child. It is any sexual behavior directed towards a person under the age of 18 years. Any child below the age of consent may be deemed to have been sexually abused when a sexually mature person has by design or by neglect of the usual societal or specific responsibilities in respect of the child engaged or permitted engagement of the child in activity of a sexual nature, which is intended to lead to the sexual gratification of the abusive person. Thus, in order to overcome this problem of child sexual abuse the government of India had brought the Protection of Children from Sexual Offences (POCSO) Act, 2012.

The Protection of Children from Sexual Offences Act, 2012 specifically address the issue of sexual offences committed against children, which until now had been tried under laws that did not differentiate between adult and child victims. Under this act, various child friendly procedures are put in place at various stages of the judicial process. Also, the Special Court is to complete the trial within a period of one year, as far as possible. Disclosing the name of the child in the media is a punishable offence, punishable by up to one year. The law provides for relief and rehabilitation of the child, as soon as the complaint is made to the Special Juvenile Police Unit (SJPU) or to the local police. Immediate & adequate care and protection (such as admitting the child into a shelter home or to the nearest hospital within twenty-four hours of the report) are provided. The Child Welfare Committee (CWC) is also required to be notified within 24 hours of recording the complaint.

A few specific provisions of this act in order to protect the children's from abuse are as follows:

- The Act defines a child as any person below the age of 18 years.
- This is the first time that an Act has listed aspects of touch as well as non touch behaviour (eg: photographing a child in an obscene manner) under the ambit of sexual offences.
- The Act incorporates child friendly procedures for reporting, recording of evidence, investigation and trial of offences.
- The attempt to commit an offence under the Act has also been made liable for punishment for up to half the punishment prescribed for the commission of the offence.
- The Act also provides for punishment for abetment of the offence, which is the same as for the commission of the offence.
- For the heinous offences like, Penetrative Sexual Assault, Aggravated Penetrative Sexual Assault, Sexual Assault and Aggravated Sexual Assault, the burden of proof is shifted on the accused.
- The media has been barred from disclosing the identity of the child without the prior permission of the Special Court due to sensitivity of such matter.

3.3 Conclusion and Suggestion

Child abuse is although shrouded in secrecy but the fact is that it has been increasing day by day all over the world and India is not an exception to it. Child abuse had taken place in India from time immemorial due to various social factors prevailing in Indian society. Further, certain kinds of traditional practices that are accepted across the country, knowingly or un-knowingly amount to child abuse in India. Existing socio-economic conditions also render some children vulnerable and more at risk to abuse, exploitation and neglect.

After analyzing the various legal provisions existing in India for ascertaining rights of child against abuse it can be concluded that Indian Government have enacted several statutes which include provisions to deal with the problem of child abuse and specifically sexual abuse in India in addition to the Constitution of India. All these acts have enough guidelines and measures for the protection of the children from various types of abuse which are as per the international laws but still the problem of child abuse have not seen its sunset only due to the wide gap between the law, policy and its implementation. Thus, it can be summed up that if the laws would have been properly enforced by the various government machineries the problem of child abuse including sexual abuse would have been under control.

²¹ Section 5, the Immoral Trafficking (Prevention) Act, 1956(amended in 2006)



Suggestion

- Display the Childline 1098 number in every school, observation homes, hostels, public offices etc.
- Develop and disseminate guidelines for school administrators and teaching staff on protecting children from sexual abuse, recognizing abuse, appropriately speaking to victims, handling disclosure of abuse, and taking appropriate action when allegations arise.
- The central govt. & the state govt. should jointly take initiative in training the police, government and private social workers, child welfare committee members, doctors, judges, and other court personnel who work with children and deal with the cases of abuse.
- The provisions of the statute book should be implemented in the real sense.

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