

TOWARDS PROTECTION OF CHILDREN AGAINST SEXUAL ABUSE: NO CHILD'S PLAY

*Pallavi Nautiyal and Arun Mal**

Indian society has tried very hard to sweep the issue of child sexual abuse under the carpet. It starts with the family hushing up instances of sexual abuse of children within the family, resulting in underreporting of the issue and a gross underestimation of the gravity of the problem. In a democracy, unless the society recognizes the need for a law to regulate an issue, the issue is not addressed. But the first step is obviously an acknowledgement of the issue itself. After the investigations into the Nithari killings that unearthed the grotesque sexual crimes against children and women, there was intense clamouring for a Bill to effectively deal with the protection of children from abuse. Therefore the Offences against Children (Prevention) Bill, 2005 was drafted. Although it has dealt with many issues, there are problems with the Bill which need to be highlighted. More importantly, the object of the Bill cannot be attained without the relaxation of the corresponding rules of evidence and procedure. This paper seeks to address some preliminary areas of concern with the substantive and procedural aspects of the law dealing with the issue of child sexual abuse, not only with respect to the Bill, but with that of the overarching scheme of child protection in India.

I. INTRODUCTION

Indian children, who account for a staggering forty two percent of the country's population,¹ have long been the victims of some of the most brutal sexual crimes known to humanity. The lackadaisical attitude of the Union legislature, the apathy of its law enforcement agencies and the conspicuous absence of any specialized legal framework to deal with cases of child sexual

* Students of the 4th and 2nd Year respectively, W.B. National University of Juridical Sciences, Kolkata.

¹ Hindustan Times, *Home to the Second Largest Child Population Globally, India is the World's Sixth Most Dangerous Place for Children*, available at <http://www.globalmarch.org/news/221007.php> (Last visited on March 14, 2010).

abuse have only played the role of transforming this bitter truth into a perennial reality that seems to have been passively solidified and strengthened by decades of state inaction. With the growing precedence of child trafficking, sex tourism, the *devadasi* system, prostitution, child pornography, incest and child rape, one is left horrified at the prospect that there is not a single legislation that specifically deals with the issue of child sexual abuse.

The reasons for the rampant instances of sexual abuse in India are manifold and rooted deep within the country's social fabric. Not unlike most other Asian countries, Indian children are socialized into a system where they are expected to obey and respect authority figures without ever questioning their actions. An all pervasive sensibility that rebellion is a sign of bad upbringing breeds a culture of abuse by encouraging sexual predators.² Adults in India are often seen to exercise a near feudal hold over children demanding their unquestioned and complete obedience. What is worse is that a feeling of shame and silence characterizes cases of sexual violence against children and this often comes in the way of bringing offenders to justice³.

Just when it had begun to seem as though the indifference of Indian society with respect to the protection and safety of its children was a phenomenon that was here to stay, the collective conscience of the Indian people was shaken as news broke about the massacre at Nithari, a small village at the outskirts of the national capital, in 2007 where thirty eight children were reported missing and had allegedly been raped and murdered.⁴ Amid the loud public outcries that followed the gut wrenching instances of child sexual abuse that came to the fore, the Ministry of Women and Child Development sought to expedite the passage of the Offences Against Children (Prevention) Bill, 2005 in an attempt to address the issue of child sexual abuse.

In this article, we propose to discuss some key aspects of the legal framework governing the protection of children against sexual abuse. Part II briefly discusses the legal framework which casts an obligation on the State to guarantee such protection, the laws enacted by the State in the pursuance of its obligations and the extent to which such laws have been effective in attaining their objective. Part III highlights the weaknesses of the Offences Against Children (Prevention) Bill, 2005 and proposes changes, where required, in the Bill. Part IV suggests certain reforms in the existing procedural and evidentiary law to facilitate the successful criminal prosecution of child sexual abuse cases, borrowing from foreign jurisdictions with more experience in this

² Neeta Lal, *Hidden Darkness: Child Sexual Abuse in India*, May 2, 2007 available at http://www.asiasentinel.com/index.php?option=com_content&task=view&id=476&Itemid=34 (Last visited on March 08, 2010).

³ See *infra* note 67, 68.

⁴ Neelam Raaj, *Children at Risk*, January 14, 2007, available at http://timesofindia.indiatimes.com/articles/how/117_3473.cms (Last visited on March 12, 2010).

field. There is a vast scope for reform in the procedural and evidentiary law pertaining to child sexual abuse but we have restricted the ambit of this Article to discuss only a few key changes.

II. LEGAL FRAMEWORK

India, with the world's second largest child population, has a complex framework of rights and guarantees that have been made in favour of children across a vast array of legal enactments ranging from the Constitution on the one hand to the Indian Penal Code and other statutory provisions on the other. The Constitution of India makes an exception to the overarching principle of equality by enabling the State to make special provisions in favour of children.⁵ A recent amendment to the Constitution further gives children between the ages of six and fourteen the fundamental right to free and compulsory education.⁶ A number of provisions in the Chapter on Fundamental Rights have also been devoted to preventing the trafficking of children and their employment in hazardous occupations.⁷ The constitutional framework for the protection of the child is, however, not limited in form to negative guarantees enforceable against the State alone. Several broad policy goals for the State to ensure the health and education of children have also been enshrined in the text of the Constitution.⁸ Besides the national framework, India is a signatory to the United Nations Convention on the Rights of the Child, 1989.

This strong international and constitutional mandate for protecting the rights of a child has surprisingly, however, not been borne out by other enactments of the Indian legislature. A case in point is the country's prime criminal statute- the Indian Penal Code's conspicuous reticence on child sexual abuse. Owing to the failure of the Code to explicitly recognize child sexual abuse as a distinct criminal offence, prosecutors and courts are often forced to rely on other generalized provisions which are often far too ill-equipped to deal with several instances of abuse. An oft used technique to criminalize sexual offenders is to give a wide application to provisions that were enacted with the intention of criminalizing sexual offences against women such as rape and the like. As a result, it is only girl-children who have been subjected to peno-vaginal penetration that can be covered under the ambit of rape as defined under the statute.⁹ Other forms of sexual abuse including exhibitionism, touching, penile-anal penetration, penile-oral penetration and object-vaginal penetration are left unpunished by the provision.

⁵ Constitution of India, 1950, Article 15(3).

⁶ Constitution of India, 1950, Article 21A.

⁷ Constitution of India, 1950, Articles 23,24.

⁸ Constitution of India, 1950, Articles 39(e), 39(f), 45.

⁹ Indian Penal Code, 1860, § 375.

Such other forms of penetration are covered by another provision of ‘*outraging the modesty of women*’¹⁰ which comes with its own baggage. Given that the *modesty of women* has been the subject of great judicial interpretation by the Hon’ble Supreme Court, children may often find themselves incapable of possessing such modesty.¹¹ It may further be noticed that in the event that a case of child abuse is sought to be prosecuted under Section 354, the maximum quantum of punishment is reduced to two years as opposed to a minimum of seven years in cases of rape. What is perhaps even worse is that neither of these provisions could be resorted to if the victim of child abuse happens to be a boy. The only relevant gender neutral provision in the Code is perhaps its most controversial one- *unnatural offences*.¹² While it recognizes the possibility of sexual abuse of boys, its high benchmark of the definition of the word “penetration” leaves molestation of boys unaddressed.

Such glaring lacunae in India’s criminal law have lead to an outburst of outrage by child rights activists who believe that a separate law designed exclusively to combat child sexual abuse is the need of the hour. An attempt to this end was made by an ambitious Public Interest Litigation in *Sakshi v. Union of India*¹³ where a challenge was made to the inadequacies of the Indian Penal Code to deal with instances of child sexual abuse. Having waxed eloquent about the prevalence of child sexual abuse in India, the Court surprisingly stopped short of providing a clear definition of sexual abuse and threw the ball back in the legislature’s court instead, thereby leaving Indian children without any protection.

III. THE OFFENCES AGAINST CHILDREN (PREVENTION) BILL, 2005

The Offences Against Children Bill, 2005 (The Bill), purports to be an Act to cover all forms of abuse against children and to clearly define the rights and remedies available to them. It comprehensively lists instances of sexual abuse to include touching a child directly or indirectly with sexual intent or in a sexual manner or forcing the child to touch the genitalia of any person, engaging in cunnilingus or fellatio with a child, exhibitionism and causing a child to watch pornography or engaging in sexual activity in the presence of a child.¹⁴ Further, the Bill also encompasses within its scope sexual activities which may not be specified as an offence under the Act.¹⁵ The Bill

¹⁰ Indian Penal Code, 1860, § 354.

¹¹ Consider the case of *State of Punjab v. Major Singh*, AIR 1967 SC 63, where the judges felt the need to deliberate on whether a girl who was seven and a half years of age could be said to possess the requisite *modesty* that was capable of being *outraged*.

¹² Indian Penal Code, 1860, § 377.

¹³ [2004] 3 LRI 242.

¹⁴ Offences Against Children (Prevention) Bill, 2005, § 5(i)-(vi).

¹⁵ Offences Against Children (Prevention) Bill, 2005, § 5(vii).

defines sexual assault as penetration of the child's vagina, urethra or anus by any body part of the offender or by an object.¹⁶ It also means manipulation of the child's body to cause penetration of the offender's vagina, urethra or anus.¹⁷ Other welcome provisions of the bill include enhanced punishment for abuse of trust¹⁸ and individuals who have been found convicted for child sexual abuse in the past.¹⁹ There are, however, three substantive provisions in the Bill that merit a discussion.

A. AGE OF CONSENT

The Bill is anomalous insofar as its conservative and archaic conceptions of the valid age of consent have the effect of harassing and penalizing teenagers for victimless crimes.²⁰ With a view to serve skewed understandings of public morality, the Bill as it stands today would penalize two consenting children below the age of sixteen for the offence of sexual assault if they chose to have consensual sexual intercourse owing to the fact that their consent is automatically vitiated by law. This provision bears the stench of legislative hypocrisy. Under Indian criminal law, only children below the age of seven are considered to be incapable of committing crimes.²¹ Children between the age of seven and twelve are considered to have committed a criminal offence only if it can be demonstrated that they have "attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion."²² If a child is thirteen years of age or above, he is treated at par with other adults with respect to his ability to commit a crime.²³ It would, therefore, be safe to conclude that Indian legislators are of the opinion that while a child of fourteen years is mature enough to understand the gravity of the crime that he commits, he is incapable of giving valid consent for sexual intercourse.

This provision is based on a deplorable sense of denial of child sexuality and is at the receiving end of bitter criticism not because one believes that children should not be discouraged from partaking of sexual intercourse at a tender age but because the Bill goes ahead and criminalizes the same and that too, using a hypocritical yardstick for measuring the level of a child's maturity.

¹⁶ Offences Against Children (Prevention) Bill, 2005, § 3(1).

¹⁷ Offences Against Children (Prevention) Bill, 2005, § 3(2).

¹⁸ Offences Against Children (Prevention) Bill, 2005, § 6.

¹⁹ Offences Against Children (Prevention) Bill, 2005, § 28.

²⁰ Oishik Sirkar and Debolina Dutta, *Protection Without Rights*, March 2, 2010, available at infochangeindia.org/Agenda/Child-Rights-In-India/Page-2.html (Last visited on March 8, 2010).

²¹ Indian Penal Code, 1860, § 82.

²² Indian Penal Code, 1860, § 83.

²³ *Id.*

Yet another lacuna that arises from such an unreasonably prudish policy stance is that sexual intercourse between two consenting teenagers may lead to one of them being charged with the offence of rape even if the age difference between the two is negligible. Consider a situation where a fifteen year old girl and a seventeen year old boy were to have consensual sex. The latter would obviously be prosecuted for rape and be imprisoned for a minimum term of seven years even if the two children involved were friends for a long time, had safe sex and were mature enough to consent to the sexual intercourse.

We are in agreement with scholars who have argued for a flexible and nuanced standard for determining the age of consent of minors to avoid legal anomalies of the sort discussed above.²⁴ Inspiration may be taken in this arena from the provisions of Swiss Law, where though the legal age of consent has been fixed at sixteen years,²⁵ an exception has been carved out for cases where the age difference between the involved parties is three years or less.²⁶ A similar position is reflected in Israel where, while sexual intercourse with a child below the age of fourteen years is considered to be statutory rape (i.e. consent is immaterial), if the child is between fourteen and sixteen years and the age gap between the two individuals is less than two years, consensual sexual intercourse is legal.²⁷ The effect of such a nuanced stance is that while all sexual activity between adults and children is patently illegal, it ensures that children below the age of consent are not criminalized.

It must further be taken note of the fact that even if such a flexible standard were to be followed, there may arise borderline cases where the age difference between the involved parties may be greater than the permissible level. Even in such cases, the judges must be exhorted to refer children to counseling on safe-sex, safe pregnancies and the emotional and physical fallouts of premature sex rather than sentencing them to jail terms as a punitive measure.²⁸ It is of utmost importance that the country's criminal law strikes an appropriate balance between protecting children from sexual abuse and exploitation on the one hand and permitting the sexual expression of young persons as they proceed to adulthood on the other.²⁹

B. GROOMING

Drawing inspiration from §14 and §15 of the recently enacted Sexual Offences Act, 2003 in the United Kingdom, the Bill has created a new criminal

²⁴ See, e.g., Tarunabh Khaitan, *Still a Matter of Shame*, April 24, 2006, available at http://www.streetkids-srh.org/show_news.php?id=31 (Last visited March 08, 2010).

²⁵ Swiss Federal Criminal Code, 1937, Art. 187(1).

²⁶ Swiss Federal Criminal Code, 1937, Art. 187(2).

²⁷ Israeli Penal Code, 1977, § 353.

²⁸ *Supra* note 25.

²⁹ Arfan Khan, *Comment- Sexual Offences Act, 2003*, 68 JOURNAL OF CRIMINAL LAW 220, 221 (2004).

offence called grooming³⁰ punishable with a prison term of up to five years and a fine.³¹ The term “grooming” has been defined to mean the deliberate preparation of a child or his/her parents or guardians for the purpose of arranging subsequent meetings with the child with the intention of sexually exploiting him/her. The move to include the offence of grooming is in consonance with the broader philosophy embraced by supporters of the criminalisation of such preparatory actions who believe that criminalisation allows for “preventive intervention against the evolving menace presented by an actor who is laying the groundwork for the commission of an offense”.³² The motivation behind the introduction of this provision in the English Law was stated by the UK Home office as the following:

“Sex offenders have always found ways of gaining the trust and confidence of children and some have seen the possibility of misusing the Internet to befriend children for their own purposes. There have been a number of cases in which sex offenders have deceived children in chat rooms into believing that they are also children or teenagers and share similar interests and have arranged meetings with them. To tackle grooming both on and off-line, we will be introducing a new offence of sexual grooming.”³³

It, however, seems that in its new found fervour to enact a special law to combat instances of child sexual abuse, the legislature has acted in ignorance of the criticism that have plagued this provision in the UK. The primary argument against the criminalization of sexual grooming is that it is only in retrospect that this process becomes important given that no harm may have been committed at all. Accordingly, the Bill tries to criminalize behavior which has not resulted in a legal injury but only might result in one; it aims at prosecuting people for things that someone thinks that they might do. Such an act would ordinarily be unable to even constitute a punishable attempt to commit a crime.³⁴

There further arises an additional difficulty in trying to prove such an intention because one will have to wait for the accused to make sufficient progress towards the commission of the offence for a clear intention to commit grooming to be made out. The evidential requirements for proving a clear

³⁰ Offences Against Children Bill, 2006, § 11.

³¹ Offences Against Children Bill, 2006, § 12.

³² Daniel Ohana, *Responding to Acts Preparatory to the Commission of a Crime*, *Crim. Just. Ethics* 23, 23 (2006).

³³ Home Office, *Protecting the Public: Strengthening Protection Against Sexual Offenders and Reforming the Law on Sexual Offences*, available at www.archive2.official-documents.co.uk/document/cm56/.../5668.pdf (Last visited on March 8, 2010).

³⁴ LAURA HOYANO AND CAROLINE KEENAN, *CHILD ABUSE- LAW AND POLICY* 204 (2007).

intention may, for instance, necessitate that the perpetrator at times be permitted to meet alone with the child which may hamper his/her safety in addition to being objectionable on ethical grounds.³⁵ A watchful eye will also have to be kept in order to ensure that this provision isn't misused for criminalizing or discouraging innocent interactions between children and adults.

C. Anonymity

In *Sakshi v. Union of India*,³⁶ the Delhi High Court was confronted with a case where an eight year old child had been penetrated in three orifices by her father. Instead of punishing the accused for rape, the Court found him guilty for the lesser offences of outraging the modesty of women and hurt. In an appeal against the decision before the Supreme Court, the appellant contended *inter alia* that the scope of sections 375 and 376 (dealing with rape) be widened to cover other forms of sexual abuse intended to humiliate, violate or degrade a woman or a child sexually. Taking cognizance of the sensitivity of child sexual abuse cases, the Court held that a screen may be used to keep the victim and/or witnesses away from the accused during the trial. A widely hailed decision, it also provided that the mandatory requirement for an in camera trial which was earlier reserved exclusively for cases of rape be extended to cases of abuse where there is no penile penetration. This directive of the Court has been cemented by the Bill which explicitly provides for in-camera trials.³⁷

While the provision for in-camera trials is indeed a step in the right direction, it does not go far enough in ensuring the absolute anonymity of the victim. Media reports revealing the name, address, school or any other particulars relating to the victim of the abuse has the potential of accentuating the emotional distress suffered by him/her. This may also act as a disincentive for some from continuing with proceedings and cooperating with prosecuting agencies. It is, therefore, recommended that a cue may be taken in this regard from the provisions of the Children and Young Persons Act, 1933 in the United Kingdom which prohibits any newspaper reports containing the above information or pictures of the person from being published.³⁸ This provision is applicable in respect of a child or young person concerned in the proceedings, as being the person by or against, or in respect of whom the proceedings are taken, or as being a witness therein. Courts in the United Kingdom are further empowered to impose restrictions on the reporting of alleged offences involving persons under eighteen years of age.³⁹

³⁵ *Supra* note 30.

³⁶ *Supra* note 13.

³⁷ Offences Against Children (Prevention) Bill, § 39.

³⁸ Children and Young Persons Act, 1933.

³⁹ § 44, The Youth Justice and Criminal Evidence Act, 1999.

IV. PROCEDURAL AND EVIDENTIARY CONCERNS

Getting the substantive part of the law right is actually less than half the battle won for child rights activists because the bigger hurdle in the way is putting the law into action. This is partly because of the nature of the crime⁴⁰ and partly because the beneficiaries in the present case being children require both a sensitive and sensible approach to make the law achieve its intended purpose. It need hardly be said that the Bill must be accompanied by a corresponding relaxation of the rules of evidence and procedure. In this Chapter, we propose to discuss some such measures which could supplement the Bill in its objective of securing justice to victims of child sexual abuse. The measures bear the following goals in mind- the need to improve children's participation in trials by encouraging them to give their best evidence and the need to decrease the possibility of the re-traumatisation of child complainants.

In the first place, any case of child sexual abuse requires indispensably the participation of child advocacy groups and psychologists to withstand the rigours of the legal process. There must be joint investigation and cooperation between law enforcement agencies and social services. In the U.S., for example, there is a Federal legislation⁴¹ and around 40 state laws concerning joint investigation and cooperation between law enforcement and social services and authorizing multidisciplinary teams.⁴² Multidisciplinary teams should be part of the investigation from the inception of the case, that is, from the time the complaint is filed.

The investigation would focus primarily on the child's testimony and therefore it is imperative that the child should receive every encouragement and opportunity to provide his/her best evidence. This is where child advocacy centers, social workers and psychologists come in. The evidence should be elicited in an atmosphere free of fear or pressure. The questions put to the child must be asked in a manner which is comprehensible to him/her. If the need arises, the psychologists can also conduct an evaluation of the child or

⁴⁰ Some of the difficulties in prosecuting cases of child sexual assault is that there is usually only one witness to a crime, the young age of the victim, lack of forensic evidence and delay in complaint.

⁴¹ 18 USCS § 3509 (2006).

⁴² See National District Attorneys Association, *Multidisciplinary/Multi-Agency Child Protection Teams*, July, 2006, available at http://www.ndaa.org/pdf/ncpca_statute_multidisciplinary_july_06.pdf (Last visited on March 10, 2010). See also Ministry of Women and Child Development, Government of India, *Study on Child Abuse: INDIA 2007*, 2007, 122-123, available at <http://wcd.nic.in/childabuse.pdf> (Last visited on March 14, 2010) (several recommendations made to curb child abuse and one of the recommendations of the Ministry was that child protection mechanisms should involve parents, elected representatives of urban and rural local bodies, teachers, anganwadi workers, medical practitioners, police and social workers and responsible members of the public among others).

determine the competency of the child. The purpose of involving social services in the investigative process is two-fold. In the first place, they are better suited than law enforcement officials to understand children and the methodology they employ to examine children will guarantee more accurate results. Secondly, they are also able to identify instances where the claims of sexual abuse are false.⁴³ This is, thus, an important safeguard because most cases of child sexual abuse would rest heavily on the testimony of the child.

Several child rights activists are critical of the adversarial system itself which our legal system has employed.⁴⁴ The style of the adversarial system is to lock two parties in a verbal battle where one party wins and the other loses. The role of the judge is to weigh the evidence put forward by both the parties without playing any part in the building of arguments or gathering of evidence. Central to this style is the concept of cross-examination where one party attempts to undermine the testimony of the witness of the rival party. Thus it is important for the prosecution witness to be able to stand his/her ground. This becomes more important in cases of sexual abuse because more often than not there is no other witness and the case, in effect, turns upon the evidence provided by the prosecution witness.

A way to bypass the problems posed by the adversarial legal system is the establishment of specialist courts, the key aspects of such courts being case management practices for early disposition of cases and specialization at the prosecutorial and the judicial levels.⁴⁵ In South Africa, for example, the Wynberg Sexual Offences Court is a dedicated criminal court which deals exclusively with sex offences.

The establishment of a specialist court would, no doubt, advance tremendously the cause of children's welfare. However there is a practical problem associated with the setting up of such courts. It would need a sufficient caseload to justify its establishment costs.⁴⁶ Specialist courts would require specialized training to be imparted to the judges as well as the counsels. Besides this, it would also need to be established in several places to reach

⁴³ While there will be incidents of false accusations by children and their manipulation by adults, there is no reason to believe that the vast majority of their accusations are untrue. Indeed, given underreporting of sex crimes, the converse may well be likely, that most claims are based in fact. Myrna S. Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, CRIMINAL JUSTICE, Vol. 24, p. 12, Spring 2009, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1469100 (Last visited on March 10, 2010) (discussing how the methods employed by multidisciplinary teams determine the veracity of children's allegations in cases of child sexual abuse).

⁴⁴ See, e.g., Anne Cossins, *Is There a Case for the Legal Representation of Children in Sexual Assault Trials?*, 16 CURRENT ISSUES CRIM. JUST. 160 (2004-2005).

⁴⁵ Anne Cossins, *Prosecuting Child Sexual Assault Cases: To Specialise or Not, that is the Question*, 18 CURRENT ISSUES CRIM. JUST. 317,318 (2006-2007).

⁴⁶ *Id.*, 335.

out to children living in rural areas, especially if such courts are to have exclusive jurisdiction over cases of child sexual abuse. Therefore, the establishment of specialist courts at this juncture could be met with opposition. Perhaps such courts could broaden their ambit to deal with either sex offences of both adults and children or dealing with all kinds of offences, not just sexual, committed upon children.

An alternative to the establishment of specialist courts could be the appointment of a legal representative for the child complainant.⁴⁷ To ensure the independence and impartiality of the representative, the representative should be appointed by the court and cannot be removed by the party he represents. The powers and obligations of the representative, *inter alia*, could include provision of information to the child about the investigative, pre-trial and trial processes, a right of appearance at trial, any pre-trial and bail hearings, the obligation to put all relevant evidence before the court, the obligation to object to questions put both by the defence as well as the prosecution and the obligation to act as an intermediary between the child and the defence during cross-examination.⁴⁸

In the US, the Victims of Child Abuse Act of 1990 permits the court to appoint a guardian ad litem (GAL) for a child who was a victim of, or a witness to, a crime involving abuse or exploitation.⁴⁹ GALs may attend all of the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child.⁵⁰ They may also apply for an order that the child's testimony be taken outside the courtroom and be televised by two-way closed circuit television or by a videotaped deposition.⁵¹

The admissibility of videotaped deposition as evidence has been accepted. The Supreme Court has observed that "the primary duty of the court is to do justice and failure of justice may occur not only by conviction of an innocent person but also by acquittal of a guilty person for unjustified failure to produce available evidence".⁵² This position was upheld in *Sakshi v.*

⁴⁷ *Supra* note 45.

⁴⁸ *Id.*, 175-179.

⁴⁹ 18 U.S.C. § 3509(h)(1).

⁵⁰ 18 U.S.C. §3509(h)(2).

⁵¹ 18 U.S.C. § 3509(b). The GAL may also gain access to all reports, evaluations, and records that are necessary to advocate effectively for the child, except attorney's work product and grand jury materials. While GALs are not required to be attorneys, the Victims of Child Abuse Act, 1990, provides that "[i]n making the appointment, the court shall consider a prospective guardian's background in, and familiarity, with the judicial process, social service programs, and child abuse issues." (18 U.S.C. § 3509(h)(1)). Given the indicated statutory duties of GALs, lawyers are typically appointed.

⁵² *State of Maharashtra v. Praful Desai*, AIR 2003 SC 2053,

*Union of India*⁵³ where the Supreme Court observed that “Rules of procedure are hand-maiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties”.⁵⁴

The Court acknowledged the fact that the sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock and in such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. The Court also acknowledged another harrowing experience faced by a victim of child abuse, which is the ordeal of cross-examination, where the questions often put are purposely designed to embarrass or confuse the victims. Therefore the Court suggested that the questions put in cross-examination be given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing.⁵⁵

A. LIMITATION

An issue which deserves serious thought concerns the law of limitation in cases of child sex abuse. The Statute of Limitations operates to insulate persons, whose conduct would have otherwise satisfied all of the elements of a claim or offense from suit or prosecution because of the elapse of a time limit fixed for the prosecution of such offences. It may leave victims of child sexual abuse with no recourse as there may be a delay in prosecution. This may be because of several reasons. The common causes of cases being unreported tend to be fear, shame, embarrassment, confusion or denial.⁵⁶ Another active cause is victim memory repression. This is a defence mechanism where the victims of sexual abuse subconsciously repress the painful memories of their abuse. However, the effects of such abuse may surface after several years.⁵⁷

⁵³ *Supra* note 13. See also N.Bala, R.C.L.Lindsay and E. McNamara, *Testimonial Aids for Children: The Canadian Experience with Closed Circuit Television, Screens and Videotapes*, 44 CRIM. L.Q. 461 (2000-2001) (a study of the Canadian experience with videotaped evidence which has shown positive results and suggested to make more frequent use of videotapes and closed-circuit television)

⁵⁴ *Id.*, ¶ 38.

⁵⁵ *Id.*, ¶ 39.

⁵⁶ For *e.g.*, in Canada, reporting of historic child sexual abuse is the norm rather than the exception. There are two broad classes of reasons for this- (1) factors related to the legal system(systemic) and (2) factors inherent in the offence (intrinsic). See Deborah A Connolly and J. Don Read, *Remembering Historical Child Sexual Abuse*, 47 CRIM. L.Q. 438,440-445 (2002-2003).

⁵⁷ See generally Peter E. Smith, *The Massachusetts Discovery Rule and its Application to Non-Perpetrators in Repressed Memory Child Sexual Abuse Cases*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 179 (2004).

There are several arguments raised by proponents of limitations in criminal cases.⁵⁸ In the first place, limitation periods force law enforcement authorities to promptly investigate a crime which would, if prosecuted at a later date, make the task of obtaining evidence more difficult and concentrate the State's resources on historic crimes rather than on tackling current crimes. Another argument advanced is that it would be unfair to judge the accused on his conduct which took place years ago when there might even be a possibility that he/she has undergone self-rehabilitation and no longer indulges in the offensive conduct. This may also have the effect of denying the accused a chance to defend himself/herself effectively and thus seriously infringes upon his right to a fair trial. An additional argument is that the desire to make the offender face liability for his offensive conduct by the public and even by the victim diminishes with time.

However, these arguments can be rebutted because of the intrinsic nature of the crime of child sexual abuse.⁵⁹ Usually, there is no evidence available and no witnesses besides the child himself. Moreover, studies have indicated that a person who has indulged in such an offensive conduct is likely to offend again.⁶⁰ Therefore abusers who have escaped criminal liability continue to pose a serious threat to society. Further in the case of sexual abuse, a desire to prosecute the offender does not diminish over time because of the long-standing effects of the crime on the victim. It has been opined that just as the victims of child abuse suffer the trauma of the abuse for the remainder of their lives, the accused should also have to fear the legal consequences of his actions for the remainder of his lives.⁶¹ This view finds support in the case of *R v. Spence, R v. F (D.L.)*,⁶² where the Alberta Court of Appeal observed the following:

“ When a period of many years has elapsed between the commission of an offence of sexual assault and its discovery by the authorities, that circumstance dictates review of the degree to which the usual principles of sentencing are applicable in such circumstances..... The lapse of time does not in any way render inapplicable the principles of general deterrence and denunciation. The first of these requires a sentence which will intimidate those other than the offender who might be tempted to follow his example. The second

⁵⁸ Amy Dunn, *Criminal Law- Statute of Limitations on Sexual Assault Crimes: Has The Availability Of DNA Evidence Rendered Them Obsolete?* , 23 UALR L. Rev. 849 (2000-2001).

⁵⁹ See David Viens, *Countdown to Injustice: The Irrational Application of Criminal Statutes of Limitations to Sexual Offenses Against Children*, 38 SUFFOLK U. L. REV. 169 (2004-2005).

⁶⁰ See, e.g., Graham Farrell, Coretta Phillips and Ken Pease, *Like Taking Candy: Why does Repeat Victimisation Occur?*, 35 BRIT. J. CRIMINOLOGY 384, 389 (1995).

⁶¹ See *supra* note 60, 191.

⁶² 78 C.C.C. (3d) 451.

requires a sentence by the imposition of which the court will reflect society's view of the wrongness of the conduct, and persuade those who might be confused about what is right and wrong. These two principles may overlap in their effect on the choice of sentence."⁶³

An alternative solution to the problem could be tolling, or freezing, of the statute of limitations when the victim is under the age of majority or suffers some mental deficiency at the time of the conduct.⁶⁴ Barring a few states, almost all states in the US have statutory tolling or extension provisions for criminal cases of childhood sex abuse.⁶⁵ A provision such as this should be applied to the law of limitations in India so that even if efforts to encourage child victims of sexual abuse to report their cases to the police do not have the desired effect, which is very probable in the Indian context,⁶⁶ justice may at least be done at a later stage.⁶⁷

⁶³ ¶¶ 9, 10. It was further observed in ¶ 12 that any substantial reduction in what would otherwise have been the sentence might be seen by potential offenders as an invitation to commit a sexual offence in such a way as to make prompt reporting of the offence improbable, such as by threatening the victim with reprisal if he or she reports it to a parent or the police. *See also* Giles Renaud, *Sentencing of Stale Sexual Offences: An Overview*, 36 *Crim. L.Q.* 241 (1993-1994).

⁶⁴ There was a wave of reporting of child sexual abuse in the US in 2004 against members of the clergy, some dating back to thirty or forty years. As a result of this, several states in the US abolished or extended the limitation period for crimes involving the sexual abuse of children. *See* Jesse Belcher-Timme, *The Clergy Sex Scandal In Massachusetts And The Legislative Response*, 30 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 243 (2004). Moreover, Congress has suggested that changed circumstances justify extension of the limitations period for this category of offenses. During congressional debate in 2002, Members of Congress cited accelerating crime rates as the reason for a newly proposed extension to the limitations period for such offenses: "The recent rash of child abductions clearly indicates the need to protect our children from sexual predators." Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, *AMERICAN CRIMINAL LAW REVIEW*, Vol 45:115, 127 (quoting H.R. REP. 107-723(I), at 89 (2002)).

⁶⁵ *See e.g.*, currently the Massachusetts statute of limitations for the prosecution of sexual offences against children is 15 years. If the alleged victim is under the age of sixteen at the time of the abuse, the period does not begin until the victim reaches that age.

⁶⁶ A nationwide study conducted by the Ministry of Women and Child Development, India, has revealed that more than 70% of children who have faced child sexual abuse did not tell anyone of the abuse, and out of the total children abused, only between 3-5% reported the matter to the police. *See* Ministry of Women and Child Development, Government of India, *supra* note 43.

⁶⁷ A study conducted by the Ministry of Women and Child Development, India, has revealed that among young adults (18-24), almost 46% have faced one or more forms of sexual abuse which includes sexual assault, forced to touch private parts of body, child exhibition and photographed in the nude. *See* Ministry of Women and Child Development, Government of India, *supra* note 43.

V. CONCLUSION

This paper has made an attempt to highlight certain substantive and procedural aspects of the law protecting children against sexual abuse which need a serious overhaul. In the first place, we have proposed changes to the Offences Against Children (Prevention) Bill, 2005, which covers within its purview the entire gamut of offences against children, to deal with child sexual abuse more effectively. We have suggested that the Bill should not criminalize consensual sexual activity between children whose ages are a few years apart. This has not been proposed with a view to encourage such activity but because we believe criminalizing it is a harsh measure intended to impose a skewed conception of morality on children when a more rational solution lies in counselling. We have also pointed out the problems associated with treating the offence of grooming as a crime. Finally, we have urged the need for a provision for anonymity of child victims in cases of sexual abuse because disclosure of their identity may have the negative impact of leaving a mark of indelible trauma on their sensitive minds and dissuading such victims from pursuing the course of criminal justice.

In dealing with the procedural and evidentiary aspects of the criminal law, we have suggested that every case of child sexual abuse must necessarily be dealt with by multidisciplinary teams, comprising child advocacy groups, psychologists, social workers and law enforcement officials, from the inception of the case. Secondly, we have also suggested that specialist courts be set up to cater exclusively to cases of sexual abuse of both children and adults or cases of all kinds of abuse against children. Because of the practical problems associated with it and the opposition it is likely to face, we have suggested that in the alternative, legal representatives be appointed for the child by the court who shall ease the rigours of the adversarial system and promote the best interests of the child.

Lastly, we have discussed how the statute of limitations obstructs the path of justice for victims of child sexual abuse and suggest that either the limitations period should be done away with altogether or be frozen till the child reaches the age of majority and then begin. Further, the limitation period in such crimes must begin after a longer duration of time than in “conventional” crimes because sexual abuse crimes do not pose the problems posed by “conventional” crimes to which the rationale of limitation periods apply.

While the recent spurt of legislative action on child rights issues through the Protection of Child Rights Act (2005), the Juvenile Justice (Care and Protection of Children) Act (2006) and the Immoral Traffic (Prevention) Amendment Bill (2006) is welcome, we are also skeptical that the same may be insufficient if broader requirements of evidence, procedure and larger societal conceptions of child rights issues do not undergo a change simultaneously. The Offences Against Children (Prevention) Bill, 2005 may well pave the way

for better child protection measures to follow, but as the bill gathers dust in its pursuit to get cabinet approval, India's children continue to be vulnerable to grave acts of sexual violence.