CHAPTER VII

LEGAL REDRESSAL: PROBLEMS AND PROSPECTS

The existing laws on sexual offences club sexual offences against children along with that against women. Children are treated merely as an extension of women. Though the nature of violence may be the same, repercussions are not the same.

Separate laws for sexual offences against children have to be formulated. Sexual offences against children have increased formidably. In today's scenario, the state has also covertly become a partner in the aggravation of this crime. With the deterioration of moral values, advent of a consumeristic culture, influx of satellite channels, advertisement controlled media boom, disintegration of family ties, breakup of joint family, values like love, care and protection seem to have vanished, and consequently children have been converted into commodities to be sold, bargained and bought. Statistics and reported cases reveal that children are mostly abused by people whom they trust and are intimate with, people who are responsible for their protection. This is a scary and horrifying condition for any child and the wounds do not heal fast. The abuse, irrespective of its gravity and nature may have taken place at an age when children do not know how to articulate or realize what has happened to them. They are not grown up enough to be aware of the price tag that society has attributed to values like virginity and chastity. But even at that tender age, each child
knows well that 'this is something I don’t like'. They are frightened of
the force, the compulsion behind sexual offences. In their ignorance,
they may feel sexual arousal which is but natural. But this does not
give them any satisfaction or contentment. It only produces feelings of
guilt, anger, shame, helplessness etc. but by the time, their power to
discriminate and perceive right and wrong is developed, they undergo
a severe trauma. They feel wronged and their world, the ideal world of
love and care which they build up in their dreams is shattered.

In Kerala, especially with the advent of tourism, cases of child
sexual abuse are on the rise. Girls and boys are equally exploited.
Hence, there is an immediate and urgent need for enactment of
separate laws.

**Drawbacks of the Existing Laws**

At present, sexual offences are tried under sections 376, 511
of 376, 377, 354 and 509 IPC. Penetration is an essential requirement
to be proved as rape. It must be by a penis per vaginum. The child can
be tried in court by opponent lawyers and can be cross examined
several times. Her character is examined and dissected as if she is at
the fag end of her life and her personality completely formed. The
accused persons past life is never opened up.

Section 354 talks about outraging the modesty of a woman.
How does one describe children’s modesty? What does a child
perceive by the word modesty and what answers will she have to the
opponent lawyer’s queries, in this context? Even if she is trained,
taught and coaxed to repeat crimes against her in the expected mystical, non-comprehensible legal language, how will she be able to chant these matters in the court, in an atmosphere which is so grave and alien to her.

In Kerala, in majority of the cases, a girl is used by several men and during identification parade she has to face the men again and again and identify them correctly.

Investigating police officers have innumerable excuses to provide against the child. She is treated as an adult and from their individual and personal moral plane, they blame her as a consenting party or as mentally handicapped person or sympathise with the mental weakness of the accused. The past of the accused is never taken into account. They believe that ‘real rape’ should be like a horror film and violence unleashed on the victim with grievous marks on her body to put it in their own words.

The courts continue with the same mind set and attitudes. They expect the rape/sexual abuse to be dramatic. They fail to understand the circumstances in which a child is abused or the mental growth of a child; the inability to discriminate or understand what is happening to the self. A sexual attack or abuse can be too stupefying for a child to resist or react especially since we socialize our girl children to be passive. Boys are equally victimized and rackets function in areas of Malappuram and Kozhikode.
The phenomenal increase in child sexual abuse has remained elusive especially in view of evidence that a substantial number of CSA cases are occurring within the family. Only a set of sensitive laws that punishes criminals and abusers will increase reporting and reduce the offence. Laws and social reforms should be complementary. Sometimes, law can precede social reformation. It can be the triggering factor to a change in attitudes, social thinking and living. Keeping this in mind, the researcher has proposed some amendments to the existing laws.

Objectives

1. To protect children from sexual offences.

2. To change existing laws and making it more sensitive towards children.

3. To help increase reporting of sexual offences.

4. To save children from mental, emotional trauma in facing the court especially under circumstances of delayed trial.

5. To ensure speedy convictions and awarding of punishment to offenders.

6. To review existing procedures relating to police investigation, medical examination, evidence and court practice with respect to crimes of sexual assault.
7. To ensure the creation of an environment which acknowledges the sensitive and gender specific nature of most sexual assault crimes as well as addresses the vulnerability and psychological implications of sexual assault on minor children.

**Amended Law**

Sexual abuse of any kind ranging from penetration to touching, gesturing, exhibiting etc in a non-desirable manner should be punished. Fondling, kissing, touching private parts, exposing the accused person's body in front of the victim, viewing/showing pornographic films in front of the child, sexual abuse over a long period of time, penetration with a foreign object, oral and anal intercourse are equally grave offences and involves serious repercussions to the child’s psyche as rape does and should be equally punished.

Rape and sexual abuse over a long period of time accompanied with violence, threat should be awarded with capital punishment especially in cases where people in power abuse their authority.

Protracted Sexual Assault deals with situations where children are abused over a long period of time but are unable to speak about their abuse until much later in life. The case of sexual abuse of children within families, often protracted through out their adolescence is an important area.

**Sexual Assault**

Section 375 and section 376 of the IPC, section 354 and section 509 be deleted and section 375 I be added:-
375 Sexual Assault

1. A person commits sexual assault against a minor where such person engages in any of the activities set out in subsection 2 [a] to 2 [c].

   explanation 1. A minor is a person who is 18 years of age or under.

2. “Sexual Assault” includes:
   a] The introduction [to any extent] by a man of his penis, into the vagina, the external genitalia, anus or mouth of another person.
   b] The introduction [to any extent] by a person of an object or a part of the body [other than the penis] into the vagina or anus of another person.
   c] Where any person, for a sexual purpose, touches, directly or indirectly with a part of the body or with an object, any part of the body of another person.
   d] Where any person with a sexual purpose utters only words, makes any sound or gesture, or exhibit any object or part of the body intending that such word or sound shall be heard, or that such gesture or exhibition shall be seen by a person or intrudes upon the privacy of a person.
Where any person for a sexual purpose invites, counsels or incites a minor person to touch, directly or indirectly with a part of the body or with an object, the body of any person including the body of the person who so invites, counsels or incites and the body of the person invited, counselled or incited.

375A Aggravated Sexual Assault

A person commits an aggravated form of sexual assault when

1. a] Such person being a police man/woman sexually assaults a minor:
   I. within the limits of the police precinct
   II. in his or her custody or in the custody of a public person subordinate to him or her; or
   III. while such person is in uniform.

b] being a public servant, commits sexual assault on a person in his custody or in the custody of a public servant subordinate to him.

c] being a personnel in the Armed Force commits sexual assault on a person while on duty

d] being on the management or on the staff of a jail, remand home or other place of custody established by or under any law of the time being in force or of a women’s or children’s institution commits sexual assault on any inmate of such jail, remand home or institution; or
e) being on the management or on the staff of a hospital commits sexual assault on a minor under such trust, authority or dominance.

f) being in a position of trust, authority, guardianship or of economic or social dominance commits sexual assault on a person under such trust, authority or dominance.

2. a) Such person commits a sexual assault on a minor who is pregnant.

   b) Such person commits a sexual assault on a minor who is suffering from mental or physical disability.

3. While committing a sexual assault causes grievous bodily harm, maims disfigures or endangers the life of a woman or minor.

4. Such person commits or has committed protracted sexual assault on a minor.

5. Where more than one person commits sexual assault on a woman or minor.

Explanation 1: where a person is sexually assaulted by one or more in persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed sexual assault within the meaning of this sub-section.

Explanation 2: “Women’s” or children’s “institution” whether called an orphanage or a home for neglected women or children or widows or
by any other name which is established and maintained for the reception and care of women and children.

Explanation 3: “Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

PUNISHMENT FOR SEXUAL ASSAULT

Section 376 [1]

a) Whoever commits sexual assault within the meaning of section 375 [2]a] or 375 [2]b] shall be punished with imprisonment of either description for a term that shall not be less than 7 years but which may be for life and with a punitive fine.

Provided that the court may in exceptional circumstances to be recorded in its judgment impose a sentence of imprisonment for a term of less than 7 years but not less than 5 years.

b) Whoever commits sexual assault with in the meaning of section 375 [2]c] shall be punished with imprisonment of either description for a term of not less than 2 years, but may extend to 5 years and with a punitive fine.

c) Whoever commits sexual assault within the meaning of section 375 [2]d] shall be punished with imprisonment of either description for a term of not less than one years but which may extend to 3 years and with a punitive fine.
376[2] Punishment for Aggravated Sexual Assault

a) Whoever commits assault within the meaning of section 375 A[1] [a-f] read with section 375 [2][a] or [b] shall be punished with not less than life imprisonment but which may be for capital punishment or castration.

b) Whoever commits a assault within the meaning of section 375 A[1] [a-f] read with section [2][c] shall be punished with imprisonment of either description which shall not be less than two years but which may be for five years and with a punitive fine.

c) Whoever commits a assault within the meaning of section 375 A[1] [a-f] read with section [2][c], if it is for a protracted period of time shall be punished with not less than 10 years but which may be for life imprisonment.

d) Whoever commits a assault within the meaning of section 375 A[1] [a-f] read with section [2][d] shall be punished with imprisonment of either description which shall not be less than two years but may be for 3 years with a punitive fine.


a) Whoever commits sexual assault within the meaning of section 375 A[2] [a] or [b] where the minor is over 12 years of age read with section 375 [2] [a] and [b] shall be punished with
imprisonment of either description which shall not be less than ten years but may be for life with a punitive fine.

b) Whoever commits sexual assault within the meaning of section 375 A[2][a] or [b] on a minor is over 12 years of age read with section 375 [2][c] shall be punished with imprisonment of either description which shall not be less than five years but may be for seven years and with a punitive fine.

c) Whoever commits sexual assault within the meaning of section 375 A[2][a] or [b] on a minor who is over 12 years of age read with section 375 [2][c] shall be punished with imprisonment of either description which shall not be less than ten years and with a punitive fine.

375 A Punishment for Sexual Assault of A Minor Up to the Age of 12 Years and V/S 375 A [3]

a) Whoever commits a sexual assault on a minor person up to the age of 12 years or under section 375 A[3] read with section 375 [2][a] or [b] shall be punished with not less than imprisonment for life but which may extend to capital punishment.

b) Whoever commits a sexual assault on a minor up to the age 12 years or under section 375 A [3] read with section 375 [2][c] shall be punished with imprisonment of either description which shall not be less than three years but which may be for five years and with a punitive fine.
c) Whoever commits a sexual assault on a minor up to the age of 12 years or under section 375 A[3] read with section 375 [2][d] shall be punished with imprisonment of either description which shall not be less than 7 years but which may be for 10 years and with a punitive fine.

d) Whoever commits a sexual assault on a minor person up to the age of 12 years or under section 375 A[3] read with section 375 [2][e] shall be punished with imprisonment of either description which shall not be less than 2 years and which may be for 3 years and with a punitive fine.

Although all forms of sexual assault against a minor are considered to be aggravated per se offences against children up to the age of 12 years have been treated as graver than offences committed against minor between the ages of 12 to 18.

Without infringing on the judges discretion, a minimum reporting may be delayed due sentence needs to be stipulated. Though there is a chance that stringent sentence might lessen the number of conviction as judges may feel empathic towards the accused who is to be given capital punishment or life imprisonment but judges, specially appointed for looking into sexual offences against children will show a special sensitivity in dealing with such case, we presume. Stringent enforcement of punishment will save children from being victimized.
Interrogation, Investigation, Medical Examination, Evidence in Cases Relating to Sexual Assault

The statement of the victim should be recorded at her/his own home in the presence of whom she trusts and who will not violate her trust. The police should inform a social worker/activist of a women’s organization/child specialist/psychiatrist/clinical psychologist working in the respective area before taking down the statement of the child. The charge sheet should be submitted within 2 months.

The forensics lab should prioritize cases of child sexual abuse or a special wing can be appointed to deal with children’s and women’s cases.

Special judge should be appointed to deal with the cases as soon as it is charge sheeted. A special court can be set up in a district to try such cases or at least a special room can be set apart for maintaining such files and a few clerical staff can be allotted this task. The child should be questioned by the magistrate and public prosecutor without being adorned in uniform, accompanied by a social worker at her/his own home. The opponent lawyer can submit his set of questions to the magistrate. The opponent lawyer can be present when the magistrate puts forth the questions after pruning them of any sarcasm. This will save the child from further facing the accused and save her from reliving the trauma. She will also be saved from the opponent lawyers cross-examination who is only keen on protecting his client at any cost. Some powers need to be conferred to the social worker/psychologist/child specialist who can check the magistrate if
questions are too harsh. Hence, the cross-examination will be made more human and the veracity of the child can also be examined at same time. The whole procedure of cross-examination of the child can be completed at her own home. The accused will be tried in the children’s court in the usual manner.

In an identification parade, the child should be protected behind a screen or one way mirror so that she can identify the accused unseen by them.

The child’s testimony is most important in such cases as there may be no eye witnesses for such a crime. So the child’s statement should be given the maximum weightage. There is no need to wait for chemical analysis as it can only be treated as corroborated evidence. The trial in the above mentioned way, can start at the earliest on the basis of child’s oral testimony and medical report. Chemical analysis may not always be useful as reporting may have delayed due concern about family’s honour, etc.

The investigation should be carried out by a sensitive police officer recruited specially in every district for enquiring into children cases. The investigation should be complete within a minimum of month and charge sheet should be submitted within a period of three months.

Other changes to be introduced are:-

The following section should be added to the IPC as recommended by the Law Commission and
Section 167

"167 A: whoever, being an officer in charge of a police station and required by law to record any information relating to the commission of a cognisable offence reported to him, refuses to record such information shall be punished with imprisonment of either description for a term which may extend to one year and with punitive fine."

The following section should be inserted in chapter eleven of the IPC:

"Non-recording of medical evidence in cases of sexual assault"

"Whoever being a registered medical practitioner, refuses to or fails to conduct a medical examination of an alleged victim of sexual assault, when requested to do so, shall be punishable with imprisonment of either description for a term which may extend to one year and with punitive fine."

As regards the medical examination of the victim and the accused the following is recommended.

1) Section 164 “[164 A] Where a case of sexual assault is reported to any police person, the said police person shall without any delay get the alleged victim of sexual assault medically examined by a registered medical practitioner with the consent of someone on her/his behalf."

2) The registered medical practitioner to whom such person is brought such without delay examine her person and prepare
a report specifically recording the result of her examination and giving the following details:

I. The name and address of the victim and of the person by whom she was brought
II. the age of the person
III. the state of the genitalia includes external genitalia
IV. marks of injuries, if any, on the person of the victim
V. general mental condition of the victim, and
VI. other mental particulars in reasonable detail

3) The report shall state precisely the reasons for each conclusion arrived at

4) The report shall specifically record that the consent of the victim or of some person competent to give such consent on her behalf to such examination has been obtained.

5) The exact time of commencement and completion of the examination shall also be noted in the report and the registered medical practitioner shall without delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause [a] of sub-section [5] of the section.

6) Nothing in this section shall be construed as rendering lawful any examination without the consent of the victim or of any person competent to give such consent on her behalf.
Section 114 of the evidence act shall be amended to read as follows:

"114 A In a prosecution for sexual assault under section 375 A where sexual assault is proved and the question is whether it was without the consent of the victim alleged to have been assaulted and she states in her evidence before the court that she did not consent, the court presume that she did not consent."

"Section 155 [A] of the Evidence Act which allows questions regarding the general immoral character of a prosecutrix in a trial for 'rape' or attempt to ravish must be deleted."

The following clause 4 will be added to section 146 of the Evidence Act:

"In a prosecution for sexual assault- or attempt to commit sexual assault where the question of consent is at issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the prosecution as to her previous sexual history, character and conduct for proving such consent or the quality of consent."

Suggestions proposed by the Committee for redrafting sexual assault law on behalf of National Commission for Women in 1993 have been incorporated in this chapter.