

## Abstract

*Despite the government's ratification of numerous international treaties that prevent discrimination against the girl child, the 2001 Indian Census figures show a sharp decline in the child sex ratio in many regions in India. The substantive and procedural laws remain antiquated, with very few changes being made. Child marriage, though prohibited by law, continues to exist and is merely unreported. Child prostitution is also prohibited, but traffickers and brothel-keepers generally manage to escape the law. There are no proper laws to deal specifically with child sexual abuse—the existing provisions relating to sexual assault and rape are all that are available. This article analyzes the laws, their implementation and effects in these three areas of violence which impact on the girl child in India.*

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*Bien que le gouvernement indien ait ratifié de nombreuses conventions internationales s'engageant à protéger et à empêcher la discrimination contre les jeunes filles, les chiffres du recensement de 2001 montrent un déclin abrupt du taux de répartition des enfants selon le sexe en défaveur des filles dans de nombreuses régions de l'Inde. Les textes de lois et les procédures restent surannés, très peu de modifications y ayant été introduites depuis des décennies. Le mariage d'enfants, même s'il est interdit par la loi, continue à exister dans la vie quotidienne et est, dans une large mesure, très peu signalé. La prostitution des enfants est également interdite, mais les trafiquants et tenants de lieux de prostitution échappent aux lois et sont parfois activement soutenus par la police. Il n'existe pas de lois adéquates pour traiter l'abus sexuel chez les enfants, celui-ci étant interprété selon les clauses existantes liées aux violences sexuelles et au viol. Le présent article analyse la loi indienne, sa mise en application et ses effets dans trois domaines de violence affectant les jeunes filles en Inde.*

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*A pesar de que el gobierno de la India ha ratificado numerosas convenciones internacionales comprometiéndose a prevenir la discriminación contra las niñas, las cifras del Censo del 2001 muestran una drástica caída en la proporción de nacimientos femeninos (o la razón mujer-hombre en los nacimientos) en muchas regiones de la India. Las leyes substantivas y procesales siguen siendo anticuadas, con muy pocos cambios recientes. Aunque está prohibido por la ley, el matrimonio infantil sigue existiendo en la práctica y no es denunciado en la mayoría de los casos. La prostitución infantil también está prohibida, pero los traficantes y dueños de burdeles generalmente escapan al control de las autoridades. No hay leyes apropiadas para penalizar casos de abuso sexual infantil, los cuales se interpretan según las estipulaciones vigentes relacionadas con los atropellos sexuales y las violaciones. En este artículo se analizan las leyes de la India, y su implementación y efecto en estos tres tipos de violencia que tienen repercusiones en las niñas de este país.*

## LAW, VIOLENCE, AND THE GIRL CHILD

*Kirti Singh and Diviya Kapur*

Violence against the girl child in India assumes many forms, ranging from physical and sexual abuse to deliberate health and nutritional neglect. India has a high rate of infant mortality overall, but the rate is higher for infant girls than for infant boys. Even worse, after one year of age the infant mortality rate for the female child is one and a half times that of the male child.<sup>1</sup>

Discrimination against and neglect of the female child is also reflected by the child sex ratio (CSR) in the age group of 0-6 years, which has fallen to extremely low proportions: from 945 females per 1000 males in 1991 to 927 females per 1000 males in 2001.<sup>2</sup> Recent studies in the 2001 Census of the sex ratio at birth (SRB) and the CSR point to an increased practice of sex-selective abortions of female fetuses and female infanticide in certain parts of the country in

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spite of a law prohibiting this practice.<sup>3</sup>

As the girl child grows up, she is likely to be ill treated and subjected to physical, psychological, and sexual abuse, generally within the family. She is often married off at an early age and as a consequence is likely to have early pregnancies with all the attendant health risks. However, the law as it exists is unable to protect her and is insufficient to address the violence she may experience.<sup>4</sup>

Article 14 of the Constitution of India guarantees equality before the law and equal protection of the law to all persons. Article 15 specifically states that no person shall be discriminated against on the grounds of sex and further provides for affirmative action by the state, which can make special provisions and laws for women and children. Laws in violation of these fundamental rights can be challenged and are liable to be struck down by the courts. The state's obligation to enact laws conforming with fundamental rights is specifically stated in Article 13 of the Constitution. Additionally, the Directive Principles of State Policy under the Indian Constitution are meant to guide government policy. These directives include Article 39 (e) and (f), which state that children shall not be abused, and that they shall have freedom, dignity, and protection against exploitation. Additionally, Article 45 provides for free and compulsory education for all children until the age of 14.<sup>5</sup>

India's obligation to abide by international conventions and treaties is stated in Article 253 of the Constitution, which gives Parliament the power to make laws for implementing any treaty, agreement, or convention or any decision made at an international conference association or other body. More importantly, the Supreme Court of India has held that in the absence of domestic law, international conventions and norms not inconsistent with fundamental rights can be incorporated into the Indian law. Thus, the Supreme Court of India has incorporated a definition of sexual harassment drawn from the General Recommendations under Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) into law. This was done through a case that used this definition

of sexual harassment to ensure that guidelines could be developed for use by institutions in sexual harassment cases since no existing domestic law had dealt with the issue.<sup>6</sup> The Supreme Court has also held that the fundamental rights guaranteed in the Constitution “are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse,” and that the human rights of women, including the girl child, are an inalienable part of universal human rights and that all forms of gender discrimination violate the Constitution.<sup>7, 8</sup>

The Indian government has made various commitments, at the national and international level, to promoting the health and human rights of the girl child. These have included declaring the last decade as the Decade for the Girl Child, ratifying the Convention on the Rights of the Child (CRC), and stating that “persistent discrimination” and “violence” against the girl child is a critical area of concern.<sup>9</sup> These commitments and concerns have not, however, been translated into action or legislation. In the India Country Report to the treaty monitoring body that oversees implementation of the CRC, the government of India admitted its obligation to review and revise all laws and their implementation.<sup>10</sup> This document, which deals with children generally, also notes an increase in reports of the victimization of children through rape and related sexual offenses and through forced prostitution.<sup>11</sup> In addition, the Law Commission of India, women’s groups, and others have highlighted the dismal state of laws and their implementation and made suggestions for change.<sup>12</sup> Recognition by the Law Commission of India is particularly important because it is a statutory body that reviews existing legislation and recommends appropriate amendments and new laws. The reports of the Commission are tabled in Parliament and are supposed to be acted upon by the government.

In this article, we examine the substantive and procedural laws relating to child sexual abuse, child marriage, and child prostitution in India. In each area we examine the extent of the problem, the laws and their functioning, and make recommendations for appropriate changes.

## **Child Rape And Sexual Assault**

Women's groups have long highlighted the inadequate data and probable underreporting of sexual assaults against girls. In a 1994 study of 348 girls in Bangalore, 3 out of every 20 girls was found to have been a victim of rape, 5 out of 10 had been molested, and 8 out of 10 had been sexually harassed.<sup>13</sup> Crime statistics for the last 10 years show that the rape of children under 16 years of age consistently accounted for more than 25% of the total rape cases. In 1997 alone, more than 30% of reported cases were child rape.<sup>14</sup> However, the conviction rate is very low and less than 5% of the rape cases brought to trial resulted in convictions in 1997 and 1998.<sup>15</sup>

Child sexual abuse within the family cuts across class and caste divides and is equally prevalent in both the poor and rich sections of Indian society. It has been reported that 30 to 50% of abusers are close relatives, neighbors, or friends.<sup>16</sup> The abuse ranges from fondling and molestation to rape and is often protracted sexual abuse.

### **Legal Provisions**

Child rape has been defined in Indian law as sexual intercourse with a girl under 16 years of age.<sup>17</sup> However, engaging in sexual intercourse with a wife against her will does not amount to rape if she is over 15 years of age. Rape of a child wife between 12 and 15 years of age is punishable with imprisonment, a fine, or both. Imprisonment is limited to a maximum of two years, even though the minimum punishment for rape of a child under the age of 12 years is 10 years' imprisonment. Thus, the law of rape largely legitimizes child marriages.

Another area of concern is that only vaginal penetration by the penis is considered rape in Indian law, so abuse may not legally amount to rape. In one case, even though a six-year-old girl had been systematically fingered in her vagina and anus and made to perform oral sex over a period of time, as well as being forced to witness sexual orgies by her father, the Delhi High Court held that no rape had taken place but that the accused was guilty of molesting the child.<sup>18</sup> Though three orifices had been penetrated, no rape was established

under the law. In another case, a judge held that no rape had been proved, since there was no injury to the man's penis.<sup>19</sup>

In many cases of child rape, the courts come to a finding that only molestation has been established. Thus, rapists are punished only with the maximum two years' imprisonment provided for under the sexual assault section of the Indian Penal Code (IPC).<sup>20</sup> In one case, a man who fondled the genitals of a seven-month-old child was held guilty only of an offense under this section.<sup>21</sup>

The rape law does not cover male children. Section 377 of the IPC, under which some cases of male child rape have been reported, is a century and a half old, and addresses so-called "unnatural offenses," which it defines as "carnal intercourse against the order of nature with any man, woman or animal." The provision is discriminatory in that it seeks to punish consensual sex and homosexuality, and Indian human rights activists and the Law Commission have asked for it to be repealed.<sup>22</sup> Judges have also been reluctant to convict those accused of attempted rape, unless the attempt was at the last stage of the act. In one case, a court freed an accused man who had removed the victim's undergarments and forced her to the ground but ran away when her uncle came on the scene.<sup>23</sup>

There is also a total absence of procedural law in this area. The girl child has to appear and give evidence like any adult. While there is a law that provides for trials to be held privately rather than in open court, this does not solve the problem, as the child must still give evidence in a hostile environment, in the presence of the accused and his lawyer. The child may also be subjected to harsh cross-examination, which can further traumatize her.<sup>24</sup> The child may also be totally isolated during these trials, as even her family and others with whom she may feel secure are not permitted.<sup>25</sup>

### **Appreciation of Evidence and Gender Bias**

One major issue that has arisen in sexual assault cases is how courts should assess evidence. The child is often unable to explain or describe in adult language what has happened to her. Additionally, there is no provision to involve a child psychologist to assess the trauma that the

child has undergone or to assist the court in interpreting her oral evidence. In one case, a court held that no rape took place because the young child could not explain the act or speak of coitus in adult terms.<sup>26</sup>

Such problems as delays in lodging a rape complaint should be seen in the context of the realities of India, including various factors ranging from societal attitudes to the inaccessibility of police stations.<sup>27</sup> Delay in lodging a rape complaint often occurs because the child's family feels that making the sexual assault public would harm the child and bring "dishonor" to her and the family. In recognition of this problem, the Supreme Court once described the delay in lodging a complaint as "natural" since the girl's father was out of town and the mother waited to consult him.<sup>28</sup> Another problem that often arises in the case of child sexual abuse is the perception among many—including some judges—that the abuser or rapist should appear to the outside observer to be totally abnormal, especially when it is a close relative. This perception tends to hide the prevalence of child sexual abuse in the country. Such misperceptions even appear in the court system. In one case in which the mother of an infant girl (then aged three) accused the father of molestation and attempted rape of the child, the Supreme Court opened the text of its judgment by observing that some "incredulous" and "eerie" accusations had been made.<sup>29</sup> The Court then proceeded to interpret the medical evidence, which described the vagina of the child as being wider than that of other children in her age group, as an act of manipulation of the private parts of the child by the mother because of a marital dispute between the parties. In a shocking observation, the Court described the repeated assertion of the child that her father violated her private parts with his finger and penis as being concocted by the mother and dictated to the child. According to the mother's lawyer, disbelief and gender bias led to a serious miscarriage of justice.<sup>30</sup>

This bias is not uncommon. In a case in which a five-year-old child was raped and killed by a family friend, the gender bias of the judges stopped them from appreciating the evidence.<sup>31</sup> Though the girl had been admittedly taken

away by the accused and was last seen with him by a reliable witness, the Supreme Court brushed aside this evidence and stated that the witness had not named the child. The Court apparently also chose to disbelieve the testimony of the police and the child's father that the accused had led the police to the child's body, as this was not recorded at the inquest. Additionally, the Court did not give importance to the medical evidence of abrasions on the genitals of the accused. Even the presence of blood on the underpants and nail clippings of the accused were seen to be of no significance and the Court chose to accept the obviously false evidence of the accused that he had bleeding gums.

In asking for a review of the judgment in this case, women's organizations protested that the courts did not believe the evidence even when the police investigation was complete and commendable.<sup>32</sup> In many cases, the police investigation leaves much to be desired as the police are not trained and are not sensitive to girl child victims. They often do not properly record the child's complaint or interview her in an atmosphere in which she can speak freely. Sometimes, police even refuse to record complaints of familial abuse. These investigative failures even led the Law Commission to suggest that police personnel should be punished for not registering cases and for not investigating them properly.<sup>33</sup>

The judgments of the Supreme Court have not followed a uniform pattern. Rather, they have tended to depend on the mindset and ideology of individual judges. The presence of deeply negative alongside some positive judgments illustrates this.

In a case in 1994 in which a seven-year-old girl was raped and murdered by her uncle, the Supreme Court imposed a death sentence on the accused.<sup>34</sup> As in the case mentioned above, the child and her uncle were last seen together by a witness. Relying on this, the evidence of injuries on the accused, and other circumstantial evidence, the Court held that the "circumstances form a complete chain of evidence."<sup>35</sup>

In a positive judgment, the Court held that complete penetration is not necessary to constitute rape and that an



attempt at penetration would rise to the legal standard of rape. Additionally, the Court stated that the offense could be committed without causing injury to the genitals or leaving any seminal stains.<sup>36</sup> The Supreme Court held that there was no legal compulsion for corroboration of the girl child's evidence, so long as her evidence inspired confidence. The absence of spermatozoa and injuries to the male organ were also stated to not necessarily disqualify the case.<sup>37</sup> Though the legal definition of rape still requires that penetration take place, and in most cases this has been interpreted to mean complete penetration, the finding in this case gives hope that this interpretation could be used in future rape cases.

### **Suggestions for Change**

A subcommittee of the National Commission for Women has suggested that the definition of rape be changed and enlarged to cover oral and anal sex and insertion of objects into the vagina and anus.<sup>38</sup> This definition would be in accordance with international legal standards, including the definition by the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>39</sup> The International Criminal Tribunal for Rwanda (ICTR) has defined rape in even broader terms, as being "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."<sup>40</sup> The subcommittee of the National Commission for Women has also recommended making incest and repeated sexual assault offenses, as well as redefining sexual assaults other than rape, and recommended that punishments should vary according to the severity of the crime and the age of the victim. The Law Commission has also recently recommended these changes.<sup>41</sup>

Suggestions have also been made for the speedy disposition of cases and rehabilitation of victims. It has also been suggested that testimony given by children should not be recorded in the presence of the accused, but behind a screen, via a video recording, or at home. Children who are victims can then give their statements freely and fearlessly, in the presence of those sympathetic to them. Another suggestion that has been made is that children should not be directly

cross-examined. Instead, the lawyers' questions should be handed over to the judge to carry out the cross-examination.<sup>42</sup> While these suggestions by the Law Commission and various NGOs have been forwarded to the Law Minister, as of yet there has been no response.

### **Child Marriage**

The National Family Health Survey (NFHS-2) of 1998–1999 showed that, despite the steady rise in the age of first marriage, almost universally marriage is early in India and that 30% of women 15–19 years of age are married. Another 4% are married but “gauna” has not been performed.<sup>43</sup> Among women aged 20–24 years, almost 25% were married before age 15 and half were married before age 18. The mean age of marriage is about two and half years lower in rural areas than in urban areas for both males and females. Child marriages are particularly prevalent in some states. For example, each year on a particular festival day in Rajasthan, mass child marriages take place.<sup>44</sup> Illiteracy, poverty, cultural norms, and an anxiety based on the desire to marry off girls as soon as possible are factors that are often cited for child marriage.<sup>45</sup>

The legally permissible age of marriage in India is 18 years for girls and 21 years for boys as per the Child Marriage Restraint Act of 1929. This Act is applicable to all Indians regardless of their religion or community. The Act, in effect, is meant to override the individual laws of different religious communities and sects.<sup>46</sup> Though the Act was ostensibly passed to prevent child marriage, it does not invalidate the marriage of a child below the minimum age. Rather, as the Act has been interpreted by the courts, it aims at the restraint of such marriages, but the validity of such a marriage once it is performed is beyond the scope of the Act.<sup>47</sup>

The Act seeks to restrain child marriages by punishing the adults—parents, guardians, priests, or an adult bridegroom—responsible for the marriage. However, only extremely minor punishments are prescribed by the Act, indicating that the offense is taken lightly by the legislature. The Act provides for punishment of up to 15 days in jail or

a fine of up to 1000 rupees if the bridegroom is under 21 years of age. If the bridegroom is over 21 years of age, the Act provides for up to three months' imprisonment and a fine. The parents of the child and the person performing, conducting, or directing the child marriage may also be punished with up to three months' imprisonment and a fine. However, while expressly stipulating that no woman can be punished with imprisonment, the Act raises a presumption that the person responsible for the minor shall be presumed to have negligently failed to prevent the child marriage unless and until they can prove the contrary. The Act also makes prosecution extremely difficult, as it prohibits complaints after the first year of marriage.

Despite these provisions, the courts have been reluctant to find adults guilty under the Act. It has been held, for instance, that a guest escorting the bride and reminding others to raise a customary chorus cannot be punished under the Act.<sup>48</sup> Negotiation and preparation for the marriage is also not punishable.<sup>49</sup> Section 5 of the Act, which makes the person who conducts, directs, or performs the marriage liable, has been very narrowly construed by the court. It has also been held by the courts that for a person to be punished under the Act it must be proved that the marriage has been duly performed in accordance with all the religious rites applicable to the form of marriage.<sup>50</sup> This kind of reasoning allows an accused party to raise the plea that the marriage has not been performed according to applicable ceremonies. Though there have been some positive judgments under the Act saying that deterrent punishment should be awarded, courts have given extremely light punishments and let off the accused with small fines.<sup>51</sup>

The Act has been criticized on a number of counts. A section in the Act that allows for injunctions to stop child marriages is faulty, as hearing the opposite party is mandatory before an injunction can be granted. This procedure defeats the purpose of the provision, especially since the complaint may be filed just prior to the marriage. The Act is also faulty as it does not level punitive fines and does not punish persons other than the few adults listed in the Act who may have actively encouraged the marriage to take

place and participated in it.<sup>52</sup> The National Human Rights Commission has recommended that the offenses under the Act be made non-bailable and that authorities at the village level should be given the power to prevent child marriage.<sup>53</sup>

The Act clearly also discriminates between boys and girls in making the marriage age higher for boys. As discussed later, many false marriages are performed which serve to legitimize sexual abuse. Girl children may be sexually abused under the guise of marriage, yet the Act provides little redress. In the famous Ameena case, the girl was married to an older Saudi Arabian man by her parents because of extreme poverty.<sup>54</sup> The groom paid for the marriage ceremony, but before he could take the child out of the country, he was stopped at the airport in Delhi. It was never made clear whether he had actually had sexual intercourse with her. Since Ameena's parents were extremely poor, they explained their approval of the marriage as wanting to have one less mouth to feed.

It has been argued that invalidating all child marriages may result in girls losing rights that accrue from marriage, and so may not be desired by the girls themselves. However, health and human rights reasons dictate that marriages below a certain age, for instance 16 years, should be invalidated. It is also important to allow the girl to opt out of the marriage if she so desires. At present, the Hindu Marriage Act allows a girl to opt out of a marriage when she is between 15 and 18 years of age. These age limits are arbitrary and should be expanded. A woman should be allowed to repudiate a child marriage even after attaining majority.

In spite of the Act (and the high number of child marriages that continue to take place), very few cases have come before the court.<sup>55</sup> Of the few that have, many have been dismissed on technical grounds, defeating the very purpose of the legislation. There is an urgent need to strengthen the Act and to implement it, including the need to sensitize the courts to the gender aspects of the issue.

Legislation for compulsory registration of marriages would help deter child marriage.<sup>56</sup> It has also been suggested that births be registered more strictly, as, at present, a significant number of births at present are not registered.<sup>57</sup>

The government can also easily target areas of the country that have higher rates of child marriage. However, these changes seem unlikely, as the issue of child marriage has remained a low priority. The only significant amendments to the Act, passed in 1978, increased the minimum age for marriage, but did not address the many problems of enforcing the Act. In fact, India refused to ratify the 1962 UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. Even while ratifying CEDAW in 1994, the Indian government declared that registering marriages was not feasible for a country as vast as India.<sup>58</sup>

### **Child Prostitution**

While there are no complete surveys on child prostitution, it is estimated that there are approximately 400,000–500,000 children engaged in prostitution in India.<sup>59, 60</sup> One report states that girl child prostitution is increasing by 8–10% each year.<sup>61</sup> Though the causes of child prostitution are many, the majority of these children come from economically poor backgrounds. Child marriage is often used as a ploy to sell girls into prostitution. Migration from rural to urban areas, coupled with unemployment, also results in further marginalization of women and children and increases their vulnerability and risk of exploitation.<sup>62</sup>

Apart from poverty and illiteracy, religious and cultural practices also contribute to child prostitution and are particularly manifested in the Devdasi, Jogin, Basavi, and other forms of prostitution.<sup>63</sup> In the Banchara, Bedia, and Nat tribes, adult male family members traditionally do not work and depend on the earnings of young girls who are forced into prostitution.<sup>64</sup> The problems of both inter- and intra-border trafficking are immense and a large number of women and children are trafficked from Bangladesh and Nepal.<sup>65</sup>

Trafficking in women and children is prohibited by Article 23 of the Indian Constitution, and is a fundamental right—the Right against Exploitation. Article 23 protects the individual not only from exploitation by the state but also from exploitation by private individuals. Trafficking of

children, particularly the girl child, is also a criminal offense under various sections of the IPC.<sup>66</sup>

The IPC makes it an offense to procure any girl under the age of 18 years from any part of India with “the intention or knowledge that such girl will be forced or seduced to have illicit intercourse” and also forbids the procuring of girls from outside the country.<sup>67</sup> A High Court has, however, held that with respect to the procuring of girls, the IPC applies equally to traffickers, pimps, touts, and brothel-keepers. Even so, this applies only to the first offer of sale and not to subsequent offers of resale.<sup>68</sup> All these provisions are still in effect. The Immoral Traffic Prevention Act of 1986 (ITPA), discussed below, does not repeal the provisions of the IPC. This has created a situation where different punishments exist for the same offense.

The ITPA does not make prostitution *per se* an offense, except under certain circumstances.<sup>69</sup> The ITPA covers both male and female sex workers. It prohibits prostitution of those under 18 years of age and defines a child as someone less than 16 years of age, while a minor is defined as someone between 16–18 years of age.<sup>70</sup> The punishment prescribed is dependent on the age of the person being sexually exploited.<sup>71</sup> The ITPA also punishes any person over 18 years old who lives off the earnings of a sex worker—the punishment is increased if the sex worker is a child or minor.<sup>72</sup> Keeping a child or minor in a brothel has been made an offense.<sup>73</sup> Unfortunately, this section of the ITPA has been used to take the children of sex workers away from their parents. A presumption exists that if a child or minor found in a brothel is discovered to have been sexually abused, the authorities should presume that the child was there for the purpose of prostitution. Section 9 of the Act makes any person who is in a position of care or authority punishable for inducing a person into prostitution.<sup>74</sup>

Prostitution within 200 meters of a public place or within posted areas is prohibited.<sup>75</sup> This applies both to sex workers and clients, and if the offense is committed with a child or minor the punishment is greater. Seducing or soliciting prostitution in any public place has also been made punishable under the ITPA.<sup>76</sup> It is also important to read the

ITPA in conjunction with the Juvenile Justice Act of 1986 (JJA) as the prostituted children and minors must also be dealt with as per that Act.<sup>77</sup> A trafficked child is placed in the category of “neglected children” under the JJA. This Act seeks to protect and rehabilitate neglected children. The neglected child is supposed to appear before a board which decides whether the child should be kept in a juvenile home or with a parent, guardian, or other fit person and lays down certain conditions to be observed by the person given the custody of the juvenile.

The ITPA also provides for police officers dedicated to its enforcement. These police officers are given jurisdiction over the entire country and have various powers including, if they believe an offense has been committed, the ability to search and remove from the premises any person and produce her/him before a magistrate.<sup>78</sup> Section 21 of the ITPA directs state governments to establish “protective homes” and “corrective institutions.” Children or minors removed from such premises may be kept in a children’s home as an interim measure, but not for more than three weeks and if the child needs protection, she may be kept for not less than one year and not more than three years in such a home.<sup>79</sup>

In a recent Supreme Court case, the Court called on the national government to safeguard the interests and welfare of children, especially girls.<sup>80</sup> It issued directions to the government to take speedy action to eradicate child prostitution and to suggest protective and rehabilitative measures for rescued children, as well as to make necessary changes in the laws. In another judgment—which is objectionable in parts—the Supreme Court directed the state to devise suitable schemes for the rehabilitation of prostituted children and children of sex workers.<sup>81</sup> The government then set up a committee to frame a Plan of Action for the rescue and rehabilitation of prostituted children, but even though the report was submitted in 1998 no action has been taken. In one recent case, however, a High Court intervened and removed 469 girls from brothels.<sup>82</sup>

However, the ITPA is full of loopholes and the police often falsely record a higher age for the children that are taken into custody.<sup>83</sup> Surprisingly, the majority of the cases

booked by the police are against the women and girls and not against clients or brothel-keepers.<sup>84</sup> There are no legal provisions to take action against the police who, often in cooperation with the offenders, refuse to arrest them. Worse still, male customers are often made the complainants by the police and receive no punishment, while the women are prosecuted and substantial fines collected from them.<sup>85</sup>

Brothel-keepers and pimps are often tipped off by police before a raid.<sup>86</sup> They are able to prepare themselves with false affidavits and birth certificates to claim that they are relatives of the girls. The juvenile courts often then release the girls, who are taken back to the brothels.<sup>87</sup> The cooperation which exists between police and the brothel-keepers reinforces a situation in which escape is extremely difficult for the girls.<sup>88</sup>

The conditions for girls inside the brothels are miserable. Conditions are unsanitary, and many girls are physically abused and tortured and many kept against their will.<sup>89</sup> They are not in a position to insist that clients use condoms. Access to health facilities is denied to them and they are often unaware of health issues that relate to them.<sup>90</sup> Estimates of the number of these girls and women infected with HIV/AIDS range between 50 and 70%.<sup>91</sup>

The laws are thus insufficient and are not properly enforced. Amendments must be made to ensure that the customers, brothel-keepers, and pimps are the ones fined and punished. The burden of proof should also be shifted to them. Provisions for counseling and for female police to handle the girls' cases should be made. Section 16 of the ITPA gives the magistrate power to place the child in a home or school recognized by the government for an interim period, but there is no mention of rehabilitation or training. Measures for children's education and rehabilitation are essential.<sup>92</sup> Adequate numbers of shelter homes with minimum conditions should also be set up. The government must work to ensure that the rights to liberty, freedom from isolation, and access to health facilities for these girls are not compromised.

The government of India has, as a SAARC member, pledged to coordinate efforts and take effective measures



against trafficking.<sup>93</sup> However, the proposed SAARC Convention on Trafficking does not conform to international law definitions and standards and has a number of defects, one of which is that it does not distinguish between the different legal regimes required for women and children. Measures to bring the SAARC Convention into conformity with the UN Convention Against Transnational Organized Crime are therefore necessary.<sup>94</sup> The Special Rapporteur on Violence Against Women has also recognized that special measures are necessary for children.<sup>95</sup>

## **Conclusion**

The girl child faces many obstacles in interacting with the legal system. The substantive law on violence does not accurately reflect the violence that she may be subjected to. There is no legal recognition of the various kinds of sexual abuse and rape. In fact, archaic and patriarchal laws that were framed during the Victorian era continue to define the parameters of violence against the girl child. Additionally, procedural laws are complicated and lack provisions that are sensitive to the health and human rights of the girl child.

Even the observance and implementation of the existing provisions of law by the Indian government is inadequate. The police who record, investigate, and file cases in court are generally gender-biased, badly trained, inefficient, corrupt, and lacking in resources.<sup>96</sup> They do not register or properly investigate many complaints and have been found to fabricate, distort, and tamper with evidence.<sup>97</sup> Despite a few positive judgments, in the uncommon event that a case is filed in court, the quality of prosecution, gender bias, and inefficiency within the court system makes conviction unlikely.

Laws regarding the girl child have to be dealt with at many levels to bring about any significant change. There is an obvious need to bring about extensive changes in both substantive and procedural laws; a need to sensitize and train police personnel, judicial officers, and others dealing with the girl child; and a need to provide better facilities for the care, protection, and rehabilitation of the girl child.

Among the recommended changes is a redefinition of

rape to include oral and anal sex and the insertion of objects and a redefinition of sexual assault to include other forms of sexual violence. The Child Marriage Restraint Act has to be amended, particularly to invalidate child marriages before a certain age, and to strengthen preventive and punitive mechanisms. A separate legal regime is required for trafficked—including prostituted—children, which would prevent them from being treated as offenders. Preventive and rehabilitative measures must also be reevaluated and strengthened. The entire body of procedural criminal law must be reviewed to make it more sensitive to women and children.

The issue of violence against the girl child has until now been a low priority for the Indian government. For there to be any real and lasting change for the girl child, not only do policies and laws need to be changed, but economic and social realities must also be altered and poverty reduced so that the violation and neglect of their health and rights are no longer realities for the girl child.

## References

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2. J. K. Banthia, Registrar General and Census Commissioner, India, *Census of India 2001, Series Provisional Population Totals, Paper 1 of 2001* (Delhi: Aravali Printers & Publishers (P) Ltd, 2001), p. 92.
3. The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act of 1994. See M. K. Premi, "The Missing Girl Child," *Economic and Political Weekly* 36/21 (May 26–June 1, 2001): 1875–1880.
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6. *Vishaka v. State of Rajasthan*, 6 Supreme Court Cases 241 (1997) . See also the Convention for Elimination of Discrimination against Women and UNICEF Resolution 34/180, December 18, 1979.
7. *Vishaka* (see note 6) and *Apparel Export Promotion Council v. A. K. Chopra*, All India Reporter 1999 Supreme Court 625.
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16. P. Kapur, "Girl Child Abuse Violation of Her Human Rights," *Social Change*, 25/2 & 3 (1995).
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18. *Smt. S. Jakhu v. K. C. Jakhu*, Delhi Reported Judgments 29 (1996) 3.
19. *Mohd. Habib v. State*, 1989 Criminal Law Journal 137.
20. Under Section 354 of the IPC a person can be punished for sexual assault only with up to two years' imprisonment.
21. *State of Punjab v. Major Singh*, All India Reporter 1967 Supreme Court 63.
22. 172<sup>nd</sup> Report (see note 12).
23. *State of Madhya Pradesh v. Babulal*, All India Reporter 1960 Madhya Pradesh 155.
24. Our experience in rape trials shows that no special rules for cross-examination of children exist and they are therefore treated as any accused adult. The Supreme Court has also observed this in All India Reporter 1995 Supreme Court 1964 and in *State of Punjab v. Gurmit Singh*, Supreme Court Cases 272 (1996) 2.
25. *State v. Omprakash and Others*, F.I.R. No.216/93, Karkardooma Court and *Janwadi Mahila Samiti v. State*, Criminal Writ No. 313/95.
26. *Bahadur Singh v. State of Madhya Pradesh*, 1991 Criminal Law Journal 753.
27. For example, the medical evidence, apart from being of poor quality, is also often delayed because of the inaccessibility of doctors.
28. *Preeti Chand v. State of Himachal Pradesh*, All India Reporter 1989 Supreme Court 702.
29. *Satish Mehra v. Delhi Admn & Another*, 9 Supreme Court Cases 766 (1996).
30. Kamini Jaiswal, Supreme Court Advocate, in an interview with

researcher Nandita Rao.

31. *Jaharlal Das v. State of Orissa*, All India Reporter 1991 Supreme Court 1388.
32. India Democratic Women's Association and others in a letter dated April 18, 1994, to the Chief Justice of India.
33. Law Commission of India, *80<sup>th</sup> Report*, 1980.
34. *Laxman Naik v. State of Orissa*, 3 Supreme Court Cases 381 (1994).
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39. *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, p. 73, para. 185.
40. *Jean Paul Akesayu Judgment*, ICTR-96-4-T, delivered on 2 September 1998.
41. *Sakshi v. Union of India*, 6 Supreme Court Cases 591 (1999).
42. Proposed Law on Sexual Assault dated May 2000 by All India Democratic Women's Association, Institute for Sexual Healing and Awareness, and Sakshi. Document available from All India Democratic Women's Association, New Delhi.
43. NFHS-2 (see note 1), p. 56. The term "gauna" describes the ceremony that takes place when a girl is sent to her husband for co-habitation. It was and still is customary in many parts of India to marry the girl and not allow her to leave her parental family at least until menarche and often later. The NFHS-2 has reported that the period between marriage and gauna has now been reduced to about one year in most cases.
44. This commonly accepted fact is reported widely in the Indian media every year. The name of the festival is "Akha Teej."
45. *The Hindustan Times*, August 15, 1999; and M. Apte, Child Marriage in India, presented at the Planning Workshop on National Project on Girl Child and Family in India. Trivandrum, 1990; and U. Joshi, "Child Marriage: Causes and Prevention," *Social Welfare* 46/10 (2000): 18-19.
46. In India, different personal laws govern different religious communities and tribes only in the area of family law. These include marriage, divorce, custody, and inheritance laws. Criminal laws in the IPC and other criminal laws in different statutes apply uniformly to all persons except where specifically excluded.
47. *Munshi Ram v. Emperor*, All India Reporter 1936 Allahabad 11; *P. Venkataramana v. State*, All India Reporter 1977 Andhra Pradesh 43.
48. All India Reporter 1940 Bombay 363.
49. All India Reporter 1938 Nagpur 235.
50. All India Reporter 1963 Madhya Pradesh 126.
51. All India Reporter 1933 Patna 471 and All India Reporter 1960 Andhra Pradesh 302.
52. All India Reporter 1940 Bombay 363, 1942 Criminal Law Journal 62, and 1965 (2) Criminal Law Journal 167 (Madras).
53. U. Joshi (see note 45).
54. *Amrita Ahluwalia v. Union of India*, 1992 Criminal Law Journal 1906.
55. *All India Reporter Manual, Fifth Edition*, Volume IV (Nagpur: W. W. Chitale, 1989). The manual lists less than a hundred cases.

56. U. Joshi (see note 45) referring to a National Human Rights Commission recommendation.
57. U. Joshi (see note 45).
58. CEDAW (see note 6).
59. The term "child prostitution" is used in this paper to denote the force and exploitative aspect of this problem as well as to differentiate from adults who may be sex workers by choice or consent.
60. CRC: Country Report India (see note 9).
61. Womenspeak, *United Voices Against Globalisation, Poverty and Violence in India*, (New Delhi: Progressive Printers, 2000).
62. Sanlaap, *Janaki-The Glow Worm*, 2 & 3 (Calcutta: Sanlaap, 1997), pp. 12-13.
63. In March 1989, 2,000 girls were inducted as Devdasis in Karnataka State. In this customary system a young girl is dedicated to the Goddess Yellamma, and then becomes a temple prostitute for the rest of her life. Since the Devdasi Prohibition of Dedication Act of 1982 came into effect in 1984, the girls are dedicated in the houses of priests and in smaller temples to escape detection.
64. S. Pathak, "New Life for Bedia Girls," *Pioneer*, November 19, 1999, p. 6.
65. Sanlaap (see note 62), p. 8.
66. Sections 366, 366-A, 366-B, 372, and 373 of the IPC.
67. The first section imposes a punishment of imprisonment for up to 10 years plus a fine.
68. 51 Allahabad 1888 (1929).
69. As defined in sections 3 to 9 of ITPA. See *T. Jacob v. State*, All India Reporter 1971 Kerala 166. The term "prostitution" is used in this paper only because that is the language of ITPA.
70. Sections 2 (aa), (ca), and (cb) of ITPA.
71. As per Section 5 of the ITPA, the punishment is a minimum of 7 years, extending up to 14 years, for procuring, inducing, or causing a minor to carry on prostitution, while the same offense in relation to a child entails a minimum punishment of 7 years which may extend to life.
72. Section 4 of ITPA.
73. Under Section 6 of the ITPA, the detention of a child in a brothel shall raise the presumption that the said offense has been committed.
74. The punishment is 7 years, which may be extended for life or for 10 years with a fine.
75. Section 7 of the ITPA punishes any person who carries on prostitution and the person with whom such prostitution is carried on. It also provides that the license of a hotel can be cancelled when it is being used for prostitution (sex work) and the offense is in respect to a child or minor.
76. Section 8 of ITPA.
77. Section 24 of ITPA.
78. Sections 13 & 15 of ITPA.
79. In *Dr. Upendra Baxi v. State of U.P. and Another*, 2 Supreme Court Cases 308 (1983), the court expressed its surprise that not even a single girl or woman had ever been sent to the home under the provisions of ITPA .
80. *Vishal Jeet v. Union of India and Others*, All India Reporter 1990 Supreme Court 1412.
81. *Gaurav Jain v. Union of India*, All India Reporter 1997 Supreme

Court 3021. The judgment refers to sex workers as “fallen women” and talks of the need to take the children of sex workers away from their mothers.

82. United Nations Economic and Social Council, Report of the Special Rapporteur on Violence against Women, presented at the 57<sup>th</sup> Session of the Commission on Human Rights, February 6, 2001.

83. S. Gokilvani, *Crawling Women: The Vittil*, p. 26, available at the National Commission for Women Library, New Delhi.

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88. Sanlaap (see note 62) and a Case Study for Sanlaap Legal Aid Cell SALAH 1998.

89. P. N. Patekar & Ors (eds.), *The Girl Child in India – Issues and Perspectives* (Bombay: Indian Academy of Pediatrics, 1992), pp. 58 & 64.

90. Sanlaap (see note 62), p. 16.

91. Report of the Special Rapporteur (see note 82).

92. This discussion is in the light of trafficking and child prostitution and therefore does not take into account the different debates on decriminalization, legalization, etc.

93. Article 27 of the Declaration of the 9<sup>th</sup> SAARC Summit, Maldives, May 1997. Article 34 of the CRC also calls on all countries to prevent the exploitative use of children in prostitution and pornography and to prevent the inducement or coercion of children to engage in any unlawful sexual activity.

94. Report of the Special Rapporteur (see note 82).

95. *Ibid.*

96. Sections 170 and 173 of the Criminal Procedure Code, 1973 (Cr.P.C).

97. “Spurt in Crime Percentage,” *The Hindu*, July 4, 1999.