

STILL A MATTER OF SHAME

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The New Bill To Protect Children From Sexual Abuse Does Not Address The Issue Of The Sexual Rights Of A Child, Writes Tarunabh Khaitan Published 24.04.06, 12:00 AM



The bill, on the whole, is a welcome measure. Section 377 of the Indian Penal Code, which has been used until now to prosecute cases of child sexual abuse, is thoroughly inadequate and makes no distinction between consensual and non-consensual sex. Nor does it give children the special treatment that they deserve. It is primarily a homophobic provision, mainly targeted against gay men, and its utility in prosecuting such cases is incidental, inadequate and problematic. It symbolizes the Indian reticence on issues concerning sex in general and child abuse in particular. While there is widespread acknowledgement that child sexual abuse is rampant, we choose to sweep it under the carpet rather than talk about it. Even the attitude of parents is usually to cover up the issue and blame the child, rather than confront the offender. Thus, a separate legislation covering child sexual abuse was long overdue.

Even if we assume that this proposed legislation will be accompanied by the repeal of section 377 of the IPC, which would have lost its residual legitimacy to exist on the statute book, the offences against children bill will create yet another provision which can be used to harass and penalize teenagers for victimless crimes, only to serve public morality.

Let us consider a child aged 15 years, who has consensual sex with another child aged 17 years. Under this legislation, the 17-year-old would have committed a crime against the 15-year-old. If both of the children involved are under 16 years of age, technically they are both guilty of sexual assault, since neither of them is capable of giving a valid consent in the eyes of the law.

The importance of protecting children from sexual abuse by adults cannot be over emphasized. However, to criminalize children under a legislation ostensibly meant to protect them solely on the basis of a prudish denial of child sexuality is simply moral policing. As Peter Tatchell puts it, 'the question is not whether children should have sex but whether we should criminalize them for doing so.'

The hypocrisy of the law-makers is apparent when one compares this law with the age at which children can be held responsible for committing a crime. Under section 82 of the IPC, only a child up to seven years of age is incapable in the eyes of the law of committing an offence. Section 83 of the IPC recognizes that a child above seven years of age but below twelve years is capable of committing a crime if she/he has "attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion." Children above the age of twelve are treated at par with adults in their ability to commit an offence. Therefore, a 13-year-old can be held responsible for committing a murder and even rape, but is incapable of giving consent for sex with another person of the same age! This legal fiction is not only illogical but also unrealistic.

What is the alternative? Can't the same doubts be raised for any arbitrarily determined minimum age of consent? The answer may lie in a flexible standard, as adopted under Swiss law. It fixes the minimum age of consent at fourteen years, but clearly provides that no child under the age of fourteen can be held criminally responsible for such behaviour. It further provides that if the child is over the age of fourteen, then she/he is not criminally responsible if the difference between his/her age and that of the other person involved is not more than three years. Therefore, a three-pronged approach is adopted under Swiss law: all adult-child sexual relationships are criminalized; no child aged below the age of consent can be criminalized; for those children older than the minimum age of consent, no criminal liability is imposed if the difference in age between the young people involved is not more than three years. This is a flexible standard, which allows a sexual relationship between a 14-year-old and a 17-year-old, but not with anyone older than that.

Germany and Israel also have comparable flexible standards. This flexible standard is more realistic inasmuch as it acknowledges child sexuality without criminalizing it or turning a blind eye towards it. A further safeguard should include an express defence of a "mistake of age of consent" if the victim is close to the age of consent and the accused honestly believed that she/he was of the age of consent. Further, in other borderline cases, where the difference between the two people was four years instead of three, the law should provide clear guidelines to the judge to refer the young people involved to counselling on safe-sex and pregnancy rather than imprisoning or fining them.

The shame culture that exists in India on every sexual issue has led to an ethos where everything is fine as long as we don't have to talk about it. This shame transforms into guilt, plaguing the family members, community and ultimately the child. Every effort is made to deny the abuse, and in the process, deny the sexual rights of the child. The proposed legislation only reaffirms this social attitude instead of challenging it.

The worst sufferers of this new legislation would be homeless children who live on the streets and on railway platforms. With the privacy of a roof denied to them, it is difficult for them to hide their sexual encounters from the prejudiced eyes of the police who are ever willing to

pick up these children on the slightest pretext. We are only making the most vulnerable of India's children even more vulnerable at the hands of the state authorities who have a well-documented history of abusing homeless children.

This child's right over his or her body includes not only the right not to be violated by an adult but also the right to sexual experimentation with peers. Criminalizing sexual contact between children is the ostrich-like solution where we hide from the problems we don't want to confront.

A more mature and reasonable response will be to ensure that the children understand that they are in control over their bodies and are empowered with the tools to act responsibly. Compulsory sex education in schools would be a good first step. Not filling up our badly-managed and already over-burdened juvenile homes with more children, that too for having consensual sex with other children, might be an equally good follow up measure.