

CHILD SEXUAL EXPLOITATION AND CHILD PROSTITUTION IN SRI LANKA: A LEGAL PERSPECTIVE.

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Abstract - Child sexual exploitation and child prostitution are some of the major challenges which Sri Lanka is facing as a developing tourist destination. Poverty, lack of education and inequality are some of the main causes for these kinds of issues. Sri Lanka is sometimes known as the heaven for sexual relationships among tourists due to the commonly found child prostitution services. This issue arises mostly in South Asian countries such as Sri Lanka, India, Nepal, Cambodia, Thailand and Philippine. Sri Lanka has a beautiful coastline around the country as it is an island with an attractive tourist destination which brought the country a huge benefit for the country's economy but on the other hand it exploits the countries future generation by giving a new face to these kinds of issues. This research will be focused on commercial sexual exploitation of children and child prostitution in Sri Lanka, how it is addressed in the legal framework and how the law has tried to prevent them and protect the children. Further, it discusses the legislative provisions of some selected jurisdictions such as North Ireland, England and Wales. Finally, this normative research which is based on a literature review focuses on the pros and cons of the Sri Lankan legislative provisions and proposes some recommendations.

Keywords - sex tourism, sexuality, child prostitutes, beach boys, childhood

I. INTRODUCTION

As stated in Article 1 of the United Nations Convention on the Rights of the Child 1989, "A child means every human being below the age of 18 years, unless under the national law applicable to the child. Majority is attained earlier." In Sri Lanka the age of majority is established as 18.

Children are the most vulnerable group in the growing society. Though there are so many child rights available in the present society still children are faced to various

kinds of child rights violating acts such as sexual abuse, sexual harassment, abduction, statutory rape, commercial sexual exploitation, incest, neglect, child marriages, trafficking and international adoption trade are some of them.

This can be shown very clearly by the national child protection authority statistical data reports¹ on the number of cases which has been reported to them. In 2010 the report states there were 3892 cases reported to the authority and 2017 report states this number as 9014 Therefore, it is amply clear that in present we have so many rights to protect the child. However, the main controversial question is whether the children enjoy them. Furthermore, the report indicates it's not the overall Sri Lankan child abused data it only shows the statistics on the complaints which the authority had received. This statement asserts that the number will be larger if they had covered the entire island through proper investigations and research.

This research focus on child sexual exploitation and child prostitution and the main objective of this research is to analyse whether the existing Sri Lankan Penal Code and Children and Young Person's Ordinance which is related to commercial sexual exploitation of children are adequate to protect the children. Furthermore, it aims to make suggestions on how to protect and prevent this issue.

II. METHODOLOGY

This study is a normative research and thus based on a literature review. Moreover, primary and secondary sources are used. Statutes, international treaties, conventions and case law have been used as primary resources in order

¹www.Childprotection.gov.lk (n.d.). National Child Protection Authority statistical data. [Online] Available at: <http://www.Childprotection.gov.lk/?id=2211> [Accessed 14 Jul.2018].

to carry out the research. Nonetheless, research articles, newspapers and reports prepared by National Child Protection Authority and UNICEF have been used as secondary sources in this research. A comparative legal research and analysis have also been used with regard to selected jurisdictions.

III. DISCUSSION

Among the major problems that today's world is facing, sexual exploitation of children is among the most crucial. United Nations International Children's Emergency Fund (UNICEF) conducted researches on commercial sexual exploitation of children (CSEC) which found challenging statistics on CSEC from around the world. For example, it states that India has 270,000 to 400,000 child sex workers² and Cambodia has a 31 per cent of minor sex workers. Even in Europe for example in Lithuania 20 per cent of prostitutes are children³. Mostly this can be seen in tourist destinations especially in developing countries in South – East Asia such as Thailand, Cambodia, Sri Lanka, Philippines, Nepal, India and other tourist destinations in Europe, Africa and America.

Tourism is not the one and only cause of child sexual exploitation. Social inequality, gender discrimination, cheap labour practices, corruption and poor educational opportunities can be identified as some of the basic causes of this issue. These conditions make children prematurely involve in livelihood activities, sex is the most in demand and gives a great profit without any investment so they choose it as the best option to solve their problems.

Mainly child Sexual exploitation occurs through child prostitution. This is much invisible in Sri Lanka, but as the tourism industry developed and foreigners start to travel to Sri Lanka this problem got a new face because some of the foreigners were seeking sexual relations with young boys. (Kalutara case, Baumann case, Lomond case.)⁴

When compared to the other South Asian countries, boys are more vulnerable than girls in Sri Lanka. (A boy

victim, the story of Kamal, Children in a coop, A Bevy of Boys Abused, some female Abusers)⁵ According to the UNICEF estimate, Sri Lanka has 15,000 male children who are involved in prostitution⁶. In Sri Lanka two types of child prostitution can be found. One is mostly known as “Beach Boys”, who are often imposed to work by the property owners along the coastline and most of them are school dropouts within the age range between 8-15 years. These prostitutes are mostly work alone or sometimes in gangs and could be found in beach resorts along the west and south-west coasts.

The other is “Bonded Children”; they are the children who are five years of age. They are mostly used for pornography and sexual activities as prostitution by internationally controlled rings. These children come from poor families around tourist coastal areas. Most of them were trafficked by an agent or pimp and put into prostitution. Often these children are injected with drugs or hormones and at last they get addicted to them. If these children are not removed from this in their early age it is difficult to effectively rehabilitate them. Prostitution of boys is unrecognised and prohibited subjects in many South Asian countries, as a result of this, cases which are involving the prostitution of boys are often unreported and covered in silence. Usually the perpetrators who are involved in these kinds of crimes are Swiss, German, Dutch and French paedophile.⁷

Hence, this research analyses the existing protection and trends in the application of Sri Lankan law in relation to protect the children from sexual exploitation and prostitution.

A. Commercial sexual exploitation of children and child prostitution defined.

As stated in the Stockholm Declaration and agenda for action⁸ of the world Congress against commercial sexual exploitation of children, commercial sexual exploitation is “A fundamental violation of children's rights. It comprises sexual abuse by the adult and remuneration in cash or kind to the child or the third person or persons. The child

²Commercial sexual exploitation and sexual abuse of children in South Asia. (2001). [e-book] Kathmandu: UNICEF. Available at: <https://riselearningnetwork.org/wp-content/uploads/2015/09/CSEC-in-SA-UNICEF-Yokohama-Report.pdf> [Accessed 21 Apr. 2018].

³Fact sheet: Commercial Sexual Exploitation. (n.d.). [online] UNICEF. Available at: https://www.unicef.org/spanish/media/files/sexploitation_fact.doc [Accessed 18 Jun. 2018].

⁴Samarasinghe, M. 1997. Ipsnewsnet. [Online]. [1 September 2018]. Available from: <http://www.ipsnewsnet/1997/02/sri-lanka-children-cracking-down-on-foreign-paedophiles/>

⁵Seneviratne, M (not dated). Wednesday's Children Some Case Studies of Sexually Exploited Children. Sri Lanka: A Publication of the PEACE Campaign.

⁶Lankanewspapers.com. (2006). Sri Lanka News/ Sri Lanka has 40,000 child prostitutes. [Online] Available at: <http://www.lankanewspapers.com/news/2006/6/7287.html>

⁷wijeratne, s. (2006). The sexual exploitation of children. The Sunday Leader. [online] Available at: <http://www.thesundayleader.lk/archive/20060430/focus.htm> [Accessed 6 Jun. 2018].

⁸The Stockholm Declaration and Agenda for Action. (n.d.). [e-book] Available at: https://www.dji.de/fileadmin/user_upload/izkk/StockholmAgenda1996.pdf [Accessed 20 Oct. 2018].

is treated as a sexual object and as a commercial object. The commercial sexual exploitation of children constitutes a form of coercion and amounts to forced labour and a contemporary form of slavery.”

To understand the issue well first it's very important to get to know the difference between Child Sexual Abuse (CSA) and Commercial Sexual Exploitation (CSEC). The term, “CSEC implies sexual abuse while sexual abuse can be done within the home, but it never implies necessarily the child should be further exploited to the benefit of the abuser or others.

The optional protocol to the convention on the right of the child 2000 on the sale of children, child prostitution and child pornography an international instrument focusing on all three aspects states child prostitution as, a minor used for sexual activities for any form of reward or payment.

B. Legal mechanism for the protection of children from commercial sexual exploitation and child prostitution.

International law, human rights and child rights instrument provides sufficient protection for CSEC. United Nations convention on the rights of child (UNCRC), 1989 prohibits the involvement of minors in the sexual industry. Children are recognized as a group requiring “safeguard and care, including appropriate legal protection” in order for them to “fully assume (their) responsibilities within the community”, says the preamble of the UNCRC.

Sri Lanka adopted the UNCRC in July 1991 and became a signatory to the global plan of action for children also in 1991. The UNCRC makes compulsory for all the state parties who have become members, to take necessary actions and measures to prevent all forms of sexual abuse and exploitation to protect children by article 34 of the convention.

Article 25 and 39 of UNCRC stimulates the State parties to recover the victimized child from psychological, physical and social integrity. Article 36 also mandates that protection should be afforded to the child against all form of exploitation detrimental any aspect of their welfare.

1) Sri Lankan law:

As Sri Lanka is a dualism country it has to implement an enabling legislation at national level to make these international conventions operative within the country. Sri Lanka took certain steps to give effect to

these conventions at the national level by enacting certain domestic legislations. Such as the Penal Code of Sri Lanka the Ordinance No.2 of 1883 and subsequent amendments and the Children and Young Person's Ordinance No.48 of 1939 are the main statutes which provide most legislative provisions on children based sexual activities, the Brothels Ordinance, the Vagrant's Ordinance 1941 also address child sexual abuse and CSEC in Sri Lanka.

Article 27 (13) of the Second Republic Constitution of Sri Lanka 1978 states that “the state shall promote with special care and interests of children and youth, so as to ensure their full development, physical, mental, moral, religious and social, and to protect them from exploitation and discrimination” and this is mostly enforced through article 12(4) of the constitution. But there wasn't any legislative provision of criminalizing a sexual abuse or exploitation of children until the penal code as amended in 1995, 1998 and 2006.

In 1995 sexual exploitation of children was introduced as a crime under the Sri Lankan penal code by section 360B. It criminalises a person who permits a child to be on any premises for the purpose of engaging the child in any kind of sexual activity or pornography will be considered as an offender and shall be convicted and punished with an imprisonment for a period of more than 5 years and less than 20years. It was the first statutory provision which made sexual exploitation of children a criminal offence and tried to reduce the crime by the stated penalties.

Penal Code defines rape under section 363 as a coercion penetrative sexual intercourse done by a male perpetrator with a female victim. Furthermore, section 364 (e) mentions about rape of a female child under 18 years and the later part of the section state about males on female statutory rape. Both the sections needed an element of penetration to prove the intercourse. But it is not explicitly recognized as child sexual exploitation or abuse in Sri Lanka.

A rapist shall be punished with imprisonment for a time period of not less than 10years and not more than 20years. Even if it's done by a young person under the age of 18 with a 16-year-old female even though the parties involved on their consent it shall be punished with imprisonment for ten years of time.

Though, an intercourse with a male child victim under the age of 16 or 18 by a female perpetrator is not recognized under rape or statutory rape, it can be sued under unnatural offences or under the offence of gross indecency between people. Even the statute covers homosexual relations and prohibits them, and the offenders shall be punished with imprisonment for ten years and if the victim is under 16 years and the offender is over 18 years of age then the penalty could be increased till 20 years by section 365 and 365(A) respectively. But these sections lack to protect male children and even the female children age between 16 to 18. Sometime section 365 and 365(A) can be used as convicting children as co-Perpetrators rather than victims. These sections of the Penal Code should be abolished then it will prevent children from being treated as offenders instead of victims in these kinds of exploitative situations. Or else the phrase which gives such idea should be repealed. Even section 364 of the Penal Code should be amended and include the offence of statutory rape for boys.

The Children and Young Person's Ordinance no.48 of 1939(CYPO) has provisions on child prostitution and child brothel. Section 72(1) on chapter 5 of the CYPO states about engaging a female victim under the age of 16 in prostitution is a crime. This offence has a maximum imprisonment of two years as the penalty which states in section 72(2) of CYPO. When reading this section, it is very clear that CYPO has legal provisions to criminalize and punish such offenders but the question is do it really protect the entire children, clearly the answer is no because these sections have only focused on female children so it is proven that this section is not gender-neutral

But however, section 73 of CYPO doesn't mention about a gender as in section 72. It generally says if any person lets a child or a young person to attain in sexual activity or brothels will be considered as an offender and shall be convicted by a summary trial before a magistrate and will be liable either to a fine not exceeding two hundred and fifty rupees, or imprisonment for a term of six months or both.

This section is the only statutory provision which can be found gender-neutral. Most of the perpetrators are funded by foreigners and even this kind of brothel customers are foreigners due to this reason a fine of rupees two hundred and fifty is not enough and even

the period of imprisonment of six months is not severe enough to stop these perpetrators. Always the punishments should be severe then the perpetrators and paedophiles will think twice before they commit these offences.

Though it is proven that the mechanisms surrounding child prostitution, child exploitation including allowing a child to be on premises for such activities are prohibited by Sri Lankan law but the penalty is not enough to stop these crimes and even some provisions should be interpreted more widely so it would be much easier to punish the offenders.

2) Comparison with some selected jurisdictional laws:

When analysing some foreign legal provisions, we can identify an advanced legal regime which regulates child sexual exploitation and child prostitution. The penal code of Sri Lanka says penetration is enough to prove rape and statutory rape but the Dutch law states to constitute a rape it should not only be sexual penetration, receiving fellatio, giving cunnilingus and even active French kissing also constitute a rape.⁹ When protecting children this kind of interpretation will be more effective to protect them against child prostitution and sexual exploitation.

Sexual Offences Act 2003 of England and Wales section 5 states that a penetration in vagina, mouth or anus is enough to constitute it as a sexual activity with a child if the child is under 13 it constitutes as rape and the penalties are severe sometime it could be life imprisonment. This shows very clear that the England law is gender-neutral so, it protects both the male as well as female children. When comparing Sri Lankan law with England and Wales, Sri Lanka protect children under the age of 16, so Sri Lanka is much forward than England when considering the age limit of the children but when comparing the penalties and the interpretation of the crime England stands much forward than Sri Lanka. These kinds of interpretation and penalties should be implemented in Sri Lanka to adequately protect both male and female children.

North Ireland too has a similar legal framework as England and Wales, the difference is their Sexual

⁹Wikipedia.org. 2018. Wikipedia.org. [Online]. [25 July 2018]. Available from: https://en.wikipedia.org/wiki/Statutory_rape

Offences Order of 2008 in section 15 they interpret the crime clearer as penetration not only with penis, it states with any body part or even with anything else constitutes the offence of rape and if the victimized child is under the age of 13 the sentencing will be life imprisonment. Comparing with these legislative provisions Sri Lanka should also amend the interpretation of statutory rape and the penalties and increase them till life imprisonment.

C. Conclusion and recommendation

As the above discussion reveals, it is apparent that Sri Lankan law relating to child sexual exploitation and child prostitution has its own weaknesses when it comes to interpreting the offence, sentencing and in enforcement. When deeply going through the comparison with the law enforced in England, Wales and north Ireland it is clear that Sri Lanka is lagging far behind in regulating child sexual exploitation and child prostitution. The Penal Code as a whole address all forms of sexual abuse but it doesn't properly protect children between ages 16 to 18 and it is not gender-neutral because it mostly protects the female child with most of its provisions. Even the Children and Young Person's Ordinance focus mostly on female victims. It can be pointed out as a weakness of the legislative provisions. It is clear though the legislations are successful it has still some gaps in it, one is its inability to address the issue of child prostitution because CYPO has provisions mostly about girls but it is not enough to protect the entire children. Especially boys who are sexually exploited mostly by tourists, they need more protection, so the provisions should be gender-neutral as it is in England, Wales and North Ireland laws. Another weakness on the legislation is it doesn't directly criminalise a foreign paedophile. Therefore, it is worthwhile to consider the prospects of re-enslaving the existing law with the examples drawn from England, Wales and north Ireland context.

Therefore, it is suggested to increase the penalty as life imprisonment for statutory rape, unnatural offences, act of gross indecency between persons and grave sexual abuse when the victim is a child and protection of both male and female children between the ages of 16 to 18 should be included in the above crimes; sexual exploitation of children should be introduced as a non-bailable offence; section 72 of CYPO should be amended by including male child victims to it to successfully protect the entire children who are the future of the country.

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