

# **Addition of the Offence of Molestation to the Pakistan Penal Code 1860**

## **Report 42**

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#### **Introduction and Rationale:**

The Lahore High Court, while disposing of an appeal (State V Abdul Malik, PLD 2000 Lah 449) reproduced the following observation of the Special Court constituted under the Anti-terrorism Act 1997 in a case pertained to sexual abuse of a 7 years old girl child:-

“The offence against the accused under Section 10 (4), Offence of Zina (Enforcement of Hudood) Ordinance 1979 is not made out. As regards the offence under Section 7, Anti-terrorism Act 1997, no such case against the accused is made out from the facts and circumstances of the case. As regards contention of the learned D.D.A about the allegation of child molestation against the accused, the said offence is neither punishable in any Section of Pakistan Penal Code nor any amendment has been made to make that offence punishable under Offence of Zina (Enforcement of Hudood) Ordinance 1979 and mere mentioning of the word ‘child molestation’ in the Schedule of the Anti Terrorism Act 1997 does not make the case against the accused triable by this court”.

The High Court further observed:

“As proponent of Islamic faith which lays special stress on the welfare of family and child, as a member of the United Nations and in accord with the afore-referred mandate, it is our religious, moral and constitutional duty to bring the required legislative and structural changes to honour our commitments to the rights of child and family. There is need to suitably amend the penal law with a view to make certain acts/wrong against the children punishable. There is need to create socio-economic institutions to fully realize the objectives of the International Convention. There is need to give a new and a fair deal to the child”.

The Court also observed that child molestation which is some times used as synonymous to child abuse is committed in the following forms:-

- (i) physical beatings to a child or subjecting him to severe beating, burns, strangulation, or human bites;
- (ii) neglecting a child by not providing the basic necessities of life including refusal or delay in providing food, clothing, shelter, medical care, education as well as abandonment and inadequate supervision;
- (iii) emotional abuse including constant criticizing, belittling, insulting, rejecting and providing no love, support or guidance; and
- (iv) sexual exploitation of a child, including rape, incest, fondling of the genitals, pornography, or exhibitionism.

A perusal of our criminal statutes reveals that there is no specific law on the subject to meet various situations and acts of molestation. Some provisions of the PPC touch the subject only partially e.g:

(i) S. 354. **Assault or criminal force to woman with intent to outrage her modesty.**- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both;

(ii) S. 354-A. **Assault or use of criminal force to woman and stripping her of her clothes.**- Whoever assault or uses criminal force to any woman and stripes her of her clothes and, in that condition exposes her to the public view, shall be punished with death or with imprisonment for life, and shall also be liable to fine;

(iii) S. 366-A. **Procreation of minor girl.**- Whoever by any

means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be or knowing that it is likely that she will be forced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and with fine; and

(iv) S. 509.- **Word, gesture or act intended to insult the modesty of a woman.**- Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or fine, or with both.

The above provisions of law do not fully attract various other forms/acts of molestation as observed by the High Court, hence there is need to enact a specific law on the subject. This need is also highlighted in the report of "National Workshop on Child Sexual Abuse and Exploitation in Pakistan", organized by the Lawyers for Human Rights and Legal Aid (LHRLA) in April 2000 at under the action aid programme of the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP). The report states that, "sexual abuse involves any violation of the rights of a child including severe forms i.e. rape or sodomy and also includes other activities of sexual nature that fall short of rape or sodomy e.g acts, like fondling, stroking, exposure to adult genitalia, caressing, etc. The report further highlighted that "the crucial difference between abuse and exploitation is that when a child is exposed to or abused for the purpose of monetary gain. So the trafficking of children, sale for prostitution or any other purpose would categorize as exploitation".

In 1997, the Economic and Social Commission for Asia and the Pacific carried out a study on sexually exploited and abused children. The study was conducted with data and research from 12 countries in the South Asia Region including Pakistan. The purpose was to confirm the incidence of child sexual abuse and its redress in all provinces of the country and to follow a campaign of creating general awareness about this neglected issue. The study was carried on children under 18 and, was carried out by the National Commission for Child Welfare and Development (NCCWD) and the provinces were delegated to various N.G.Os working within the indigenous areas. This study uncovered child sexual abuse and exploitation to be one of the least acknowledged and most neglected area of development. The study revealed that there exists no monitoring bodies to investigate complaints on any level within the country and that there is a shocking lack of awareness as regards this issue. It was further stated that sexual abuse is a taboo subject, more so if girl child is the victims, and in some areas, such incidents are suppressed. Moreover, in many areas, child sexual abuse is accepted as 'normal' and child sexual exploitation is also condoned in

the name of tradition. The study goes on to state that girl children are married off, boys and girls 'sold' into prostitution and surprisingly, despite being illegal, it is a very openly conducted vice. Certain localities and venues were found to be more renowned for such practices for example local hotels, parks, brothels, shops and transport depots. The effects of this accepted cultural trend on children's physical and mental health were found to be more disturbing, with no knowledge of HIV testing or AIDS despite the thriving demand for unprotected sexual practice being the norm.

The study identified certain factors as contributing to the exploitation and vulnerability of children including the prevalence of large-scale illiteracy and lack of education in both adults and children, which further deteriorate the situation.

This study finally gives recommendations for devising a national strategy and plan of action to ensure the recovery and reintegration of the victims of this practice and taking preventive measures to eradicating this evil<sup>[1]</sup>.

In an Article published in the News dated 19 September 2001, it is mentioned that, "child sexual abuse plays a vital role in deforming a society's moral and emotional health. It is now scientifically proven that sexual abuse suffered during childhood causes significant harm to adult survivors of such abuse. In short child molestation should be acknowledged as not a domestic problem but a social problem".

The United Nations Convention on the Rights of the Child 1989, which Pakistan ratified in 1990, stipulates that:-

#### **Article 19.**

1. State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow up of instances of child maltreatment described hereafter, and, as appropriate, for judicial involvement.

#### **Article 33.**

State Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs, and psychotropic substances as defined in the relevant international treaties, and to prevent the

use of children in the illicit production and trafficking of such substances.

**Article 34.**

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent-

- (a) the inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) the exploitative use of children in prostitution or other unlawful practices.
- (c) the exploitative use of children in pornographic performances and materials.

**Article 35.**

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of or traffic in children for any purpose or in any form.

The judgment of the High Court (State vs Abdul Malik) has also referred a survey report published in the DAWN dated 13<sup>th</sup> February, 2000 as under:-

“945 Children abused last year.  
Report by our Official Correspondent.

Islamabad, February 12, A spokesperson for Sahil, an NGO working against child abuse, told a press conference here on Friday that during 1999 as many as 945 children were sexually abused by 1,629 men.

Sahil put out these figures by monitoring media for cases of child sexual abuse. The N.G.O. monitors 11 Urdu and English Newspapers regularly.

The Spokesperson for the Sahil said that out of the 945 reported cases, 56 per cent pertained to girls and 44 per cent to boys.

According to the statistics of the Sahil, out of 1,629 abusers, 1219 were acquaintances. About murder after sexual assault, the N.G.O, said 15 girls were gang-raped and 120 boys were assaulted before murdered. It said that 169 girls were gang-raped and 117 male children were sodomised.

Sahil's data shows that 21 cases of incest were reported during January-December, 1999.

This is a confirmation for those who deny that incest occurs in Pakistan.

According to Sahil's figures, during this period, the abusers have targeted a majority of boys between the ages of 5-10 years and 10-15 years”.

According to a recent study conducted by Sahil (NGO) reported in the DAWN dated 26<sup>th</sup> April 2001:

“As many as 201 cases of child sexual abuse were reported from all over the country during the period from January to March, 2001.

According to a study, conducted by ‘Sahil’, non-governmental organization (NGO) working against child sexual abuse, 47 per cent of the cases were reported from rural areas while 53 per cent from urban areas.

According to the research report, 419 men along with 11 female abettors sexually abused these children. Out of these 419 abusers, 357 (85 per cent ) were acquaintances, it said.

The study report revealed that out of the total sexual abuse cases, 89 (42 per cent) were reported from Sindh and 57 (28 per cent) from the Punjab while the remaining 55 from the other two provinces.

Giving further break up, the report said 107 (53 per cent) female children and 94 (47 per cent) male children were sexually abused during the said period. Moreover, 25 female children had been gang raped, the report further said.

He said that these 945 cases were just the tip of the iceberg. Sahil maintains that the majority of the cases go unreported due to social tendencies of denial and silence.

During the same period seven female children and eight male children were murdered after being sexually assaulted, the report further said. The NGO stated that the abusers mostly targeted (75.5 pc) male children and females (89 pc) between the age of 16-18 years.

During this period, 98 cases of female children and 74 cases of male children were reported in police stations”.

The offence of molestation in any form is an act of indecency but to commit this act with a child is highly undesirable which must be severely punished. It may be further stated that the offence of molestation is not only confined to children, it may also be committed against women and adults and as it is not expressly provided in the Pakistan Penal Code therefore, the offenders went unpunished. The Secretariat of the Pakistan Law Commission proposed an amendment in the Pakistan Penal Code to incorporate the act of ” molestation” as offence and placed the proposal before the Commission reading as under.

Section 354 B. Whoever does, with any person, any of the following acts-

- (i) bothers such person with sexual motive; or
  - (ii) interferes with such person specifically sexually; or
  - (iii) sexual exploitation of such person, which includes sexual perversion, fondling, stroking or caressing, pornography, or exhibitionism; or
  - (iv) administers to such person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant or other similar substance and thereby renders, such person unconscious and engages in sexual act, or
  - (v) persuades, induces, entices, or coerces such person for making sexual contact;
- shall be guilty of an offence of molestation and shall be punished with rigorous imprisonment for a term which may extend to ten years and shall be also liable to fine.

The proposed amendment was considered by the Commission in its meeting held on 30<sup>th</sup> March 2002. The Commission agreed with the proposal in principle, and constituted a committee headed by Syed Afzal Haider, and comprising of a Mr. Abdul Qadir Halepota, Members of the Commission and Dr. Faqir Hussain, Secretary of the Commission to improve the expression of the proposed legislation and to make it more explicit. The said Committee held its meeting in the Secretariat of Pakistan Law Commission on 18<sup>th</sup> April, 2002 and revised the proposal reading as under:-

Whoever with sexual motive resorts to act of fondling, stroking, caressing, pornography, exhibitionism or inducing or intimidating any person, with or without his knowledge, to submit for such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

The issue again came before the Commission in its meeting on 18<sup>th</sup> May 2002, which approved the proposed amendment along with the consequential amendment in the Code of Criminal Procedure 1898.

The Commission also approved the following administrative measures which may help in diagnosing and curing the victim of child abuse.

- i. A well trained pool of child psychologist may be established for special care, rehabilitation of the victim of child abuse at national, provincial, district and tehsil level;
- ii. the social welfare departments should mobilize their resources to create general awareness about child sexual abuse;
- iii. Child abuse even if complained some time later the process of investigation

should not be hampered on technical grounds;

iv. special provisions should be made for compulsory psychological assistance from trained staff and separate health care and rehabilitation centers may be established for sexually abused children both male and female;

v. there should be a national policy and plan of action against child abuse and the media should be involved to launch campaign for awareness as regards this issue of vital importance;

vi. the NGOs may contribute in establishing child protective regime, raising awareness as most of the crimes committed against child are said to be crimes of omission or general societal ignorance;

vii. appropriate steps should be taken to rehabilitate those helpless children who are exposed to all kinds of societal brutality ranging from drugs addiction to molestation and from begging to theft;

viii. more stress should be laid on incorporating training of sexual abuse victims in the curriculum of medical colleges, and medical students be taught how to deal with victims of child abuse.

ix. child sexual abuse rehabilitation and treatment should be included in the syllabi for police, judicial officers, lawyers and medical doctors;

The recommendations of the Commission are sent to the Government for amending the Pakistan Penal Code and taking the required administrative measures. Draft amendment Ordinance is at Appendix -I.

## Appendix-I

### AN ORDINANCE

further to amend the Pakistan Penal Code 1860 and the Code of Criminal Procedure 1898

**WHEREAS** it is expedient further to amend the Pakistan Penal Code 186 (Act XLV of 1860) and the Code of Criminal Procedure 1898 (Act V of 1898) for the purpose hereinafter appearing;

**AND WHEREAS** the President is satisfied that circumstances exist which render it necessary to take immediate action;

**NOW, THEREFORE**, in pursuance of the Proclamation of Emergency of the Fourteenth day of October, 1999, and the Provisional Constitution Order No.1 of 1999, read with the Provisional Constitution (Amendment) Order No. 9 of 1999, and in exercise of all powers enabling him in that

behalf, the President of the Islamic Republic of Pakistan is pleased to make and promulgate the following Ordinance: -

1. **Short title and commencement.** --(1) This Ordinance may be called the Criminal Law (Amendment) Ordinance 2002.

(2) It shall come into force at once.

2. **Insertion of Section 354-B, Act XLV of 1860.**- In the Pakistan Penal Code 1860 (XLV of 1860), after Section 354-A, the following new Section shall be inserted, namely;

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“**354-B. Molestation with sexual motive.**- Whoever with sexual motive resorts to act of fondling, stroking, caressing, pornography, exhibitionism or inducing or intimidating any person, with or without his knowledge, to submit for such act, shall be punished with imprisonment of either description for a term which may extend to seven years or with fine or with both.

4. **Amendment of Schedule II, Act V of 1898.**- In the Code of Criminal Procedure 1898, (V of 1898) in Schedule II, after the entries relating to Section 354-A, the following new entries shall be inserted, namely: -

| 1.     | 2.                             | 3.    | 4.    | 5.    | 6.    | 7.   | 8.    |
|--------|--------------------------------|-------|-------|-------|-------|--|-------|
| “354-B | Molestation with Sexual motive | Ditto | Ditto | Ditto | Ditto | Imprisonment of either description for 7 years or with fine or both. | Ditto |

**President of Pakistan**

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[1] . National Workshop on Child Sexual Abuse And Exploitation, April 2000 P-3 & 4