

The Protection of Children from Sexual Offences Act, 2012 – An Analysis

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Unique Position of Children & their Vulnerability

- ▶ **Children**– considered precious in India since ancient times & always wanted and considered the future of nation– **Tender, shy, weak and vulnerable**
- ▶ **India**– home to 10% of world's child population & >1/3rd of its population consist of children (About 42% as per 2001 census)
- ▶ Children are the greatest gift to humanity. The sexual abuse of children is one of the most heinous crimes. It is an appalling violation of their trust, an ugly breach of our commitment to protect the innocent.– **Supreme Court of India in Childline India Foundation vs Alan John Waters & Ors. (Dated 18 March, 2011)– Para 24**

- ▶ **Increasing abuse of children in recent years** –(38,172 offences in 2012 including kidnapping, abduction, rape & procurement of minor children etc as per NCRB Crime Report 2012)
- ▶ **Predominance of sexual abuse of children** (53% of children face one or other form of sexual abuse as per ‘Study on Child Abuse–India 2007’ of MWCD, UoI.) & **inadequacy of laws to punish it**
- ▶ **Child sexual abuse– shrouded in secrecy, not reported in most cases & conspiracy of silence by many/all stakeholders**
- ▶ **A single incident may turn the life of child to destruction, violence, instability and danger to the society, if he has not been treated with care and caution.**

Relevant Laws in India dealing with Children and their abuse

- ▶ **Constitution of India– Art.39:**– The State shall, in particular, direct its policy towards securing *inter alia*:–
 - (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
 - (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
- ▶ **Article 15(3),23 & 24 etc**

Other Laws

- ▶ **The Juvenile Justice Act (Care and Protection of Children) Act 2000**
- ▶ **The Commissions for Protection of Child Rights Act, 2005** (see Functions of Commission u/s 13 & Powers of Commission in case of enquiries u/s 14 etc)
- ▶ **The Prohibition of Child Marriages Act 2006**
- ▶ **The Indian Penal Code, 1860** – does not provide for all types of sexual offences against children and, more importantly, does not distinguish between adult and child victims (refer to 2013 amendment)
- ▶ **The Information Technology Act 2000**

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act)

- ▶ Self-contained comprehensive legislation to provide protection to children from sexual abuse (total 44 sections)
- ▶ came into force on the 14th of November, 2012, along with the rules framed under the
- ▶ **Object** – to strengthen the legal provisions for the protection of children from sexual abuse and exploitation
- ▶ Provides protection to all children (male & female) under the age of 18 years from the offences of sexual assault, sexual harassment & pornography.
- ▶ **Provides for stringent punishments**, graded as per the gravity of the offence ranging from simple to rigorous imprisonment of varying periods and also provision for fine
- ▶ The rules rely on the structures established under the Juvenile Justice Act, 2000, such as Child Welfare Committees and District Child Protection Units, to make arrangements for the care and protection of the child and to ensure that the child is not re-victimised in the course of investigation and trial.

Offences under the Act & punishments prescribed

Penetrative Sexual Assault (Sec.3) [consent of child between 16&18 yrs–relevant) includes rape ,sodomy and oral sex etc technically

Not < 7 years which may extend to imprisonment for life, and fine (U/S.4)

Aggravated Penetrative Sexual Assault (Sec.5) – by relatives/police/armed forces person/supdt of jail , remand home /hospital or trustee – causing pregnancy/mental illness or incapacity/inflicts HIV virus/repeatedly assaults– protector becoming predator

Not <10 yrs which may extend to imprisonment for life, and fine (u/s 6)

Sexual Assault (Section 7) [consent of child between 16&18 yrs–relevant)

Not <3years which may extend to 5 years, and fine (Section 8)

Aggravated Sexual Assault (Section 9) by relatives/police/armed forces person/supdt of jail , remand home /hospital or trustee – causing pregnancy/mental illness or incapacity/inflicts HIV virus/repeatedly assaults– protector becoming predator

Not <5years which may extend to 7years, and fine (Section 10)

Offences under the Act & punishments

Sexual Harassment of the Child
(Section 11)

3 years and fine (Section 12)

Use of Child for Pornographic
Purposes (Section 13) including
TV programmes/advts –
print/electronic media etc

**5 years and fine and in the
event of subsequent conviction,
7years and fine (Section 14 (1))**

**attempt to commit an offence
under the Act (sec.18)**

**liable for punishment for up to
01 year/fine/both(Sec.18)**

**abetment of the offence(by
aid/conspiracy/instigation)
(Sec.16)**

**liable for punishment provided
for the same offence.(Sec.17)**

Offences under the Act & punishments

Failure to report or record a case u/s 19 or 20 whether the information was acquired through the discharge of professional duties or within a confidential relationship. (including obligation of media / hotel /hospital /club/studio to report to police about material/object sexually exploitative of child e.g.. pornographic or sexually related/obscene representation u/s 20)

Up to 6 months (in case of company/institution up to 01 year) (Sec.21)

Making any report/presenting any comments on a child in media/studio/photographic facilities without having complete & authentic information & without consent of child/parents/guardian involved as accused/victims or disclosure of identity of child, address, photo, family details, school, neighborhood without consent of child/parents/guardian

Not < 1 year and up to 2 years imprisonment or fine or both [s.23]

Procedure for reporting of cases (Sec.19)

- ▶ **Who can report?**–any person including the child
- ▶ **To whom?**–Spl.Juvenile Police unit(if any)/local police
- ▶ **When?**– either on actual commission of offence or apprehension of such commission
- ▶ **What should police do?**–
 - **record information/explain contents of report in local/understandable language;**
 - **admit child in shelter home/nearest hospital within 24 hours,**
 - **report matter to special court/court of session**

Procedure for recording statement of child by magistrate (Ss.24–27)

- ▶ In child friendly environment– presence parents/other trusted persons– if necessary with assistance of interpreter– if child is disabled with assistance of special educator/expert
- ▶ No uniform to be worn by police
- ▶ Presence of advocate of accused to be dispensed with
- ▶ To take steps to ensure that child shall not come in contact with accused at no point of time (s.36)
- ▶ Video conferencing may be permitted (s.36)
- ▶ Trial of cases to be in camera (s.37)
- ▶ Evidence of child– to be recorded by spl.court within 30 days from the court taking cognizance [s.35(1)]

Special courts

- ▶ Designated by state govt. among courts of session
- ▶ **Shall presume** commission of offences u/Ss.3,5,7 & 9 if child is <16 years [S.29]
- ▶ **Non-obstante clause**:- Spl.court empowered to try offences u/s 67-B of the Information Technology Act(rel.to publication/transmission of sexually explicit material depicting children...that may facilitate abuse of children online (s.28)
- ▶ **To be assisted by Special PP with min.7 years experience**
- ▶ Spl.court - not to call the child to testify repeatedly [s.33(5)]-not to permit aggressive questioning/character assassination of child [s.33(6)]
- ▶ **Shall complete the trial within one year from date of cognizance [s.35(2)]**

Other provisions

- ▶ Guidelines for use of NGOs/ professionals/ experts/persons having knowledge of psychology, social work, physical health, mental health & child development to be associated with pre-trial & trial stage to assist the child (s.39) [*See MINISTRY OF WOMEN AND CHILD DEVELOPMENT, GoI, Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012 (September, 2013)*]
- ▶ Rights of children to take assistance of legal practitioner (duty of LSAs to provide if necessary) s.41
- ▶ **Alternative punishment**—if offence is punishable under this law & other laws, the provision which punishes more shall be applied.[S.42]

Conclusion

- ▶ Human goodness has limits–human depravity has none. The need of the hour however, is not exasperation. The need of the hour is to mould and evolve the law so as to make it more sensitive and responsive to the demands of the time in order to resolve the basic problem –Justice THAKKAR in *Bharwada Bhoginbhai Hirjibhai vs State Of Gujarat* [AIR 1983 SC 753– a government servant employed in the Sachivalaya at Gandhinagar was found guilty, by the Sessions Judge, Mehsna, of serious charges of sexual misbehaviour with two young girls (aged about 10 or 12 and was convicted for the offence of rape, outraging the modesty of women, and wrongful confinement – conviction upheld by SC]