

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012: A GREAT LEAP TOWARDS SECURITY OF CHILDREN'S RIGHTS

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Introduction

Children are most important asset of any nation. They are the crucial element for the prosperous of a nation. But it depends on the holistic development of children, and care and protection given to them.¹ When they are neglected or abused, their ethical, moral and intellectual growth is curtailed. It poses a challenge to the security of their rights.

Sexual abuse² is the worst form of child abuse. Though the offence knows no gender discrimination, pathetic victim is the girl child. The changing scenario of nature of sexual offences is making children more vulnerable to sexual assaults. The major dimensions of the multifaceted menace are molestation, child rape, fondling, child prostitution, incest, stalking and pedophilia. With the aid of technological development the menace is taking different shapes³ and gaining momentum in the country⁴. The traditional practices like *devadasi* and child marriages are also invariably associated with child sexual abuse.

According to a study⁵, 25% of the children are victims of sexual abuse in the country. The study reveals that among them, 30% of the

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¹ NUZHAT PAREEN KHAN, CHILD RIGHTS AND THE LAW XIII (2012).

² According to the World Health Organization (WHO), child sexual abuse is: "The involvement of a child in sexual activity that he/she does not fully comprehend, is unable to give informed consent to, or that violates the laws or social taboos of society".

³ E.g., child pornography, "live" online sexual abuse, child sex tourism, cyber stalking and bullying.

⁴ In the year 2010-5, 484 child sexual abuse cases were reported in India. In Uttar Pradesh the number of cases reported in the year was 1,182.

⁵ Conducted by PRAYAS, a Delhi based Non-governmental Organization (NGO) for the Ministry of Women and Child Development in collaboration with the United Nations Children's Fund (UNICEF) and Save the Child Fund, interviewed over 13,000 minor children and 800 stakeholders across 13 states. See THE HINDU (Mumbai ed.), March 21, 2007 at 9. However, according to the study by the NGO-'the Child Sweden', in 2006 in Chennai out of the total reported cases of 2,211, 42% children faced child sexual abuse. See *supra* note 1, at 41.

children are sexually abused by family members, relatives, or well known persons like teachers, neighbours, family friends, staff and management of protective homes, with whom the victim has close relation and trust.⁶ There are incidents of sexual abuse even by fathers and brothers. In such cases, the victims' faith and trustworthiness of relationship is damaged, their character is debased and they are demoralized. The chilling scenario of sexual abuse and statistics reveals the large scale suffering and exploitation of children in the country. Therefore, there is no safety for children even in their home. Such sexual abuse violates right to privacy, dignity, chastity and physical security of children.

In the absence of appropriate and comprehensive law⁷, particularly for preventing non-commercial forms of sexual exploitations, the Government of India enacted⁸, "the Protection of Children from Sexual Offences Act, 2012"⁹ (hereinafter the Act). The Act is made under the authority of Article 15(3) of the Constitution of India, 1950, in order to make international obligations under the United Nations (U.N.) Convention on Rights of Child¹⁰, legally enforceable in India.

⁶ In most of the rape cases reported in Delhi in the year 2012 the offenders are closely related to the victims. The figures compiled by the Delhi police show that out of the 662 rape cases reported in Delhi in 2012, 202 have involved neighbors and 189 have involved friends and relatives, 15 fathers, 7 stepfathers, 2 ex husbands, 17 brothers-in-law, 4 uncles, 3 cousins, 16 colleagues, 1 stepson, 2 father-in-law. Among them victim's doctors, principal, a priest are also there. Out of 662 victims 396 are below the age of 18 years (under 2 years' age groups 5 victims, between 2-12 years age group 105 victims, between 12-18 years age group 286 victims). In Mumbai, according to NCRB, in 2012-93% of rape cases reported are committed by known to the victim.

⁷ PEN. CODE §§ 354, 375, 376, 509. They provide protection from such sexual abuse. But these provisions are insufficient and inappropriate to govern all forms of sexual abuse like oral sex, other than penile-vaginal penetrations or incest. And also no distinction is made in these provisions for offences against minors as opposed to adults. However, all these provisions are amended by the Criminal Law (Amendment) Act, 2013 to define the offences according to the present trends and to provide more stringent form of punishments. The Immoral Traffic (Protection) Act, 1986 provides protection to children below 16 years age and confines to commercial sexual exploitation. It does not deal with cases of individual child sexual abuse. The Information Technology Act, 2000 (the IT Act, 2000) prohibits only publishing or transmission of child pornographic material in Section 67(B). The Juvenile Justice Act, 2000 aims on rehabilitation rather than prevention of child sexual abuse.

⁸ Goa is the first state in India to pass a law on protection of children from sexual abuse, titled-The Goa Children's Act, 2003. But it targets mainly on sex tourism.

⁹ Act No. 32 of 2012. It was passed in May, 2012 which came into force along with Rules, co-incidentally, on children's day of the year.

¹⁰ Article 34 provides that: State Parties undertake to protect the child from all form of sexual exploitation and sexual abuse. For these purposes, State Parties shall in

The Act specifically addresses child sexual abuse. The objective of the Act is protection of children from sexual assaults, sexual harassment and pornography, and also to establish special courts for trial of such offences. The state consciously enacted the Act to ensure safety of 40% of its population, who are the youngest citizens of the country; without their safety the nation will not be prosperous.

Offences under the Act: The Changing Dimension of Sex Crimes in India

The offences defined in the Act are gender neutral and against a child below the age of 18 years. The offences govern both the consensual and non-consensual commissions. The Act extensively defines various kinds of penetrative and non-penetrative sexual offences.

“Penetrative sexual assault” is defined in Section 3 of the Act as:

1. Penetrating penis into any body part of the child or making the child to penetrate his penis into the body parts of the offender or any other person; or
2. Insertion of any material object or body part into the body parts of the child or making the child to do so with the offender or any other person; or
3. Manipulating any body part of the child so as to cause penetration into the body parts of child or offender or any other person; or
4. Oral sex involving either party or making the child to do it with third party.

The definition is wide enough to govern all types of penetrations. It also covers much wider range of sexual acts including all forms of unusual and unnatural practices of sex. The section makes, not only commission of the act but also encouraging or influencing the child to do so is an offence. Making the child to do the acts with third person is also governed by the offence. Both conceptually and literally, the definition has gone beyond the scope of traditional concept of “rape”, which is limited to penile-vaginal penetration. However, the new

particular 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 sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

definition of “rape” under the Criminal Law (Amendment) Act, 2013 has been drafted on the same lines.

When penetrative sexual assault is committed by any police officer, member of armed forces or security forces, public servant, management or staff of jail or remand home or protective home or hospital including private hospital or educational institution or religious institutions or service providing institutions is known as an offence of “aggravated penetrative sexual assault”, under Section 5 of the Act. These persons may take the advantage of authority to easily influence the child. Therefore, to arrest their undue influence the acts are recognized as aggravated forms. When the penetrative sexual assault is committed by a group, or by using force, or causes physical disability or mental ill, or committed repeatedly, or against a child below 12 years of age, or by any relative, or during communal or sectarian violence, or by a habitual offenders, or on a pregnant girl or against disabled child is also known as an aggravated form of offence under the section. All these incidents make the child more vulnerable and the child is put under serious threat. The corresponding offence in penal law is “custodial rape” under Section 376(2). But the instant definition governs a wide range of offenders and a variety of assaults. For the purpose of the Act, the section broadened the scope of relatives and relations, which includes domestic relation and relation of shared household.

Physically touching any private part of the child with sexual intention or making the child to touch him/her or any other person is termed as “sexual assault”.¹¹ Physical intimacy other than penetration constitutes the offence.¹² If the “sexual assault” is committed by any person or in any manner specified in Section 5 of the Act, is known as the offence of “aggravated sexual assault”. Infliction of child with the human immunodeficiency virus (HIV) or any other life threatening disease is also brought within the ambit of the offence.

If anyone, with sexual intention, tries to draw attention of the child by words, any sound, gesture, by showing any object or body part is known as “sexual harassment”. It is an attempt to draw the attention of the child either by verbal or visual means without physical contact. Such acts not only interfere with the privacy of the child but also

¹¹ The Criminal Law (Amendment) Act, No. 13 of 2013, INDIA CODE (2013) § 7.

¹² Sexual assaults other than rape fall under Section 354 of Indian Penal Code, 1860 (hereinafter IPC). See S.N. MISRA, INDIAN PENAL CODE 583 (2008).

insult the modesty of the child. Making the child to exhibit any body part, attracting a child for pornographic purposes, threatening by use of indecent photographs of child, the act of repeatedly following or watching or contacting a child by any manner and means are also governed by the offence.

Using a child in any form of media for the sexual gratification is known as the offence of “use of child for pornographic purposes”. It includes all types of advertisements or programmes in any form. Storage of child pornographic material “for commercial purposes” is also governed by the Act. However, the Act ignores “users” of child pornographic material.

To protect the best interest of the child, the Act prohibits a wide variety of sexual offences against children. It governs visual, verbal, physical and ethical forms of sexual abuses as well. Perhaps, the Act is the first Indian legislation, which specifically governs all forms of sexual abuses. The Act provides clear definitions and descriptions of offences. It noticeably draws distinction between the offences. But it failed to address certain categories of abuses like *devadasi* system, sex tourism and child marriage, where sexual abuse of child is largely associated with.

Punishments under the Act: More Deterrent

The Act provides higher and deterrent form of punishments. Perhaps, the Act is the first legislation in India, which provides higher degree of punishments for sexual offences. For commission of “penetrative sexual assaults” punishment prescribed in Section 4 is imprisonment for a term not less than 7 years but extended to life and fine. The amended provision of Section 376 of IPC also provides the same term of punishment for bodily penetration. But for penetration of penis with other than vagina, punishment provided in Section 377 of IPC is imprisonment for a term of 10 years and also fine. For the similar nature of offence the Goa Children’s Act, 2003 provides punishment of imprisonment for a maximum period of 10 years and fine of 2 *lakh* rupees. Therefore, comparatively the instant Act provides heavier punishment for the offence.

Punishment for aggravated penetrative sexual assault, which includes incest, is imprisonment for not less than 10 years but extended to life and fine. For custodial rape, IPC provides the same quantum of punishment in Section 376(2). However, the original text of IPC does not provide any specific provision for incest. For

incestuous offence the punishment prescribed in the Goa Children's Act, 2003 is imprisonment for a term of 1 year and fine of 1 *lakh* rupees only. Perhaps, these laws have not taken incest as a serious form of offence.

For sexual assaults' punishment prescribed in Section 8 is imprisonment for not less than 3 years which may be extended to 5 years and fine. For the corresponding offence, IPC in Section 354 provides imprisonment for a term not less than 1 year but extended to 5 years and fine. However, the Goa Children's Act, 2003 makes the offence punishable with 3 years imprisonment and fine of 1 *lakh* rupees. Aggravated sexual assault is punished with imprisonment for a term not less than 5 years but which may be extended to 7 years and fine. Sexual harassment of the child is punished with imprisonment extending up to 3 years and fine. For the corresponding offence in penal law the punishment prescribed in Section 509 is simple imprisonment for a term which may be extended to 3 years and fine. Though the punishments under IPC appear same and similar to that of the Act, they got seeds of high punishments, for 2013 Amendment Act, only from the Act.

The "abettor" of the offence is punished with same quantum of punishment provided for such abetted offence. For "attempts" punishment is half of the punishment provided in the original offence. When the offence is punishable under this Act and also under various provisions of IPC, the offender shall be punished under either law, which provides higher degree of punishment. This alternative punishment provision is a special feature of the Act. The provisions of the Act are in addition to and not in derogation of the provisions of any other law. However the Act has overriding effect. But, when the offender is a minor, he shall be punished under the Juvenile Justice (Care and Protection of Children) Act, 2000 but not under the instant Act. Therefore, in case of minor offender the deterrence and significance of the Act are diluted. In order to uphold the integrity of the Act and to do meaningful justice to the child victims, as it is desired by the Act, juvenile offenders should also be governed by the Act. This change is desirable as there are growing incidents of involvement of minors in sexual offences.¹³

The perusal of penal provisions of the Act indicates that the Act provides higher degree of punishments than the existing laws. And

¹³ The Delhi Gang Rape Incidence, Dec. 2012.

also punishments under the Act are stringent and commensurate with the gravity of the offence. However, surgical or chemical castration is also desirable for sexual offences against children, at least in case of the aggravated forms of offences, like in Poland and Moldova.

Special Features of the Act: Child Friendly Procedures and Provisions

- The statement of the victim shall be recorded at the residence of the child or at any place according to the victim's choice.
- The statement shall be recorded preferably by a women police officer, not below the rank of sub-inspector.
- While recording the statement of the child the police officer shall not be in uniform.
- Victim shall not be detained in the police station for any reason in the night.
- Statement of the victim shall be recorded as spoken by the victim and in the presence of parents. If it is required, assistance can be taken from interpreter or expert.
- Medical examination shall be conducted in the presence of parents. In case of girl victim it should be conducted by a lady doctor.
- During trial of the victim frequent breaks should be given and he/she should not be called repeatedly.
- The court shall create a child friendly atmosphere. Aggressive questions should not be asked.
- The evidence shall be recorded within 30 days of the cognizance.
- The child is not exposed to the accused at the time of recording evidence.
- The trials to be conducted "in-camera" and in the presence of the parents.
- Disclosing the identity of the victim in media is made a punishable offence.
- In case of offences under Sections 3, 5, 7 and 9 of the Act the burden of proof lies on the accused.
- For rendering speedy justice to victims, the Act provides for constitution of special courts for each district.
- Time limit for completion of trial is fixed as 1 year.
- The Act makes reporting of offences under the Act mandatory.
- Misuse of the Act is made punishable offence for adults.
- The complaint receiving agency is required to make immediate arrangement to give the child adequate care and protection by

admitting the child into a shelter home or hospital within 24 hours of the report.

- In case of emergency treatment, no documentation or magisterial requisition would be necessary before the treatment.
- The state is under obligation to pay compensation to victims within 30 days. According to the Rules made under the Act, the criteria for awarding compensation includes loss of education and employ-mental opportunity along with disability, disease, pregnancy suffered by the victim because of the abuse. The Act also provides for interim payment of compensation.
- The Act imposes obligation on central and state governments to give wide publicity to the provisions of the Act.
- The obligation to enforce the Act is on state governments.
- The National Commission for Protection of Child Rights and State Commission for the Protection of Child Rights are responsible to monitor the implementation of the Act.

All these provisions are adopted with a view to minimize discomfort for the child. Throughout the Act, a strong desire of the state to protect interest of the child is evident.

Conclusion

A perusal of the above discussion reveals that the Protection of Children from Sexual Offences Act, 2012 is a comprehensive law on child sexual abuse. The specific features of the Act are, a wide variety of offences, clear definitions, deterrent punishments, speedy justice, child friendly trial procedures, mandatory reporting provision, effective compensation, exemption from legal formalities for treatment, protection from misuse and alternative punishment provisions etc. It is not only thorough but tough law on child sexual abuse. The Act, throughout the text emphasized protection of privacy and confidentiality of children for their all round development. But the important task is effective implementation of the Act. For achieving this objective wide and intensive spreading of awareness of the features and provisions of the Act is necessary. Parents, teachers and more importantly children must be educated. Sensitizing the police, judiciary, authorities and public is necessary for effective implementation of the Act. Media and NGOs play a crucial role in spreading awareness among masses. States also must take prompt and positive initiative to implement the Act by constituting special courts, child protection units, providing appropriate compensation and giving a wide publicity to the provisions of the Act. It is also

necessary that all agencies involved in ensuring the welfare of the children to act in a coordinated manner to protect physical security, dignity of life and healthy development of the children guaranteed under Articles 39(e) and (f) of the Constitution of India, 1950. However, on September 11, 2013 the Maharashtra cabinet approved a scheme known as *Manodhairya Yojana*, which would be launched on October 2, aiming at providing financial assistance up to Rs. 3 *laks*, medical benefit, legal aid, rehabilitation and counseling to victims of child sexual abuse. It reflects the progressive attitude of the state towards protection of the child rights.

