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

• Shilpa Seth

Abstract- This paper has made an attempt to highlight and assess the substantive and procedural aspects of the law protecting children against sexual abuse especially the light of the recent enactment of the Protection of Children from Sexual Offence Act, 2012. But the mere fact that a legislation has been made is not going to be sufficient to protect the soul of our future generations from scars of sexual abuse. The myth that pedophiles and child abusers are predatory strangers needs to be dispensed and this can only happen by taking collective steps, out of which the quintessential one is to break the silence.

Keywords- Children, Sexual abuse, Sexual Offence, Civilized society

Children are the future of our country and on their tiny shoulders rest the progress and development of a nation. Specially, in a civilized society prime importance must be given towards the welfare of children because the welfare of the entire community, its growth and development depend on the health and well being of its children. In order to ensure that children are become decent and useful member of the society they must be helped to grow into maturity. They need proper nourishment, protection and care like a tender plant. Just as a tender plant cannot grow into a tree if it is not properly nourished similarly children too cannot grow.

Therefore, keeping in a mind the tender age of children they must be provided special protection against the various offences that are committed against them. One such offence is sexual abuse of children. In our society sexual abuse of children is slowly gaining momentum and has been a existence in our society for decades. It is a harsh reality that this social evil though it exists in our society but it is difficult for the majority of us to even accept that this evil exists mainly because of the guilt and shame associated with it. Sexual abuse of children, undoubtedly, is the violation of the basic human right of children. The innocent victims of sexual abuse carry these scars throughout their lives. One of the major problems that arise in cases of child sexual abuses is that since the children are not able to fully understand the different dimensions of child abuse and they fear to talk about their experiences. As a result majority of the time cases of child sexual abuse never come in light. In even parents refuse to report the case fearing that what the society will think. This fear of society is the main cause for many of the child abuse cases unreported and thereby encourages the abuser.

Meaning of Sexual Abuse of Child- Child sexual abuse is any kind of physical or mental violation of a child with sexual intent, usually by a person who is in a position of trust or power vis-a-vis the child. It is any sexual

behavior directed towards a person under the age of 16 years, without the informed consent. Any child below the age of consent may be deemed to have been sexually abused when a sexually mature person has by design or by regime of the usual social or specific responsibilities in respect of the child engaged permitted engagement of the child in activity of a sexual nature, which is indented lead to the sexual gratification of the abusive person. Child sexual abuse includes adult exposing his/her genitals to a child or persuading a child to do so, an adult touching a child's genitals or making the child touch the adult's genitals, an adult involving a child pornography, an adult intercourse with a child or any other sexual gesture or suggestion made by an adult towards a child.

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

SAKSHI, an Indian organization, working on women and child rights, has defined child sexual abuse as "the physical or mental violation of a child with sexual intent, usually by an older person, who is in some position of trust and/or power vis-the child".

Child Sexual abusers- Children are generally sexually abused by adults. Child abusers do not have a distinct profile. The offenders generally fall into two categories i.e. Pedophiles or fixated persons and Regressed Offenders. Pedophiles are dangerously good planners, manipulative and often very clever persons. On the other hand regressed offenders are more common and come mostly from within the family. The regressed offenders usually abuse children to relieve the stress that they are unable to cope up with. Hence their victims are usually from within the family who are accessible and over whom they can exert pressure. Apart from these two categories in some Cases even a family friend, teacher or the nice neighbor have turned out to be child sexual abusers. Normally in these cases, the abuser is the one whom the child trusts. As a result the child is shocked and because of shame is not able to talk about it with anyone.

Apart from the above mentioned children belonging to poor families, children who are abused and neglected by parents and children of prostitutes have no other but to live in the streets. There, they are sexually abused and the abusers me be any member of the public which may include even the police. Some children are sold by their parents to the managers of brothels. Such children end up being sexually abused everyday of their lives by those who visit those brothels.

Children those who work as domestic servant may be sexually abused by their masters. Child care institutions are established in order to take care and protect children in need. However, there have been instance of child sexual abuse in such institutions as well. In such cases the abusers may be the management or staff or any inmate such institutions. Since children staying in these institutions have very little cot with the outside world therefore instances of such abuse never come to light.

International Parameter—The U.N, Convention on the Rights of the Child, 1989 has cast important responsibilities on state to protect the child from all forms of sexual abuse (Article 1).

Accordingly, under Article 34 of this convention "each state should take all appropriate national, bi-lateral and multi-lateral measures to prevent the inducement or coercion of child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices and the exploitative use of children in pornographic performances and materials."

Under Article 35 of this convention, "the state is also required to take appropriate national, bilateral and multi-lateral measures to prevent the abduction or the sale of or traffic in children any purpose in any forms."

It may be mentioned here that India ratified the convention on the Rights of the Child on 11 December, 1992; therefore, India is obliged to ensure that the rights of the child against sexual exploitation, enshrined in the convention, are protected in our country.

The Indian Scenario—The Constitution of India incorporates some of the rights included in the Convention on the Rights of the Child as 'Fundamental Rights' and 'Directive Principles of State Policy' "there are several assurances, meant specifically for children. Right to free and compulsory elementary education for all children in the 6-14 year age group", right to be protected from any hazardous employment till the age of 14 years' right to be protected from being abused and forced by economic necessity to enter occupations unsuited to their age or strength right to equal opportunities and facilities for a healthy and dignified upbringing' and compulsory education and care in their preliminary years.

The penal enactments by the legislature were however way too ill equipped to have incorporated the international mandates. The Indian Penal Code, 1860, India's criminal statute does not recognize pedophilia in any of its provisions. Due to Code some forthcoming conduct regarding pedophilic crimes and child sex abuse, the prosecutors are forced to rely upon the generalized terms that may not be adequate enough to furnish justice to such crimes. Generally, to criminalize sexual offenders this prototype a wide interpretation of the provisions were put in force that "criminalized sexual offences against women. Other forms of sexual crimes such as exhibitionism, the 'wrong' touch, penetration in any of the three orifices and insertion any foreign object did not find any place in the Code. Outraging the modesty of women can also be contested in the court of law given that modesty of women is subject to judicial interpretation.

The Protection of Children from Sexual Offences Act, 2012—The Protection of Children from Sexual Offences Act, 2012, has been passed by the Lok Sabha on May 22, 2012. The Protection of Children from Sexual Offences Act, 2012 has been drafted to strengthen the legal provisions for the protection of children from sexual abuse and exploitation. For the first time, a special law has been passed to address the issue of sexual offences against children. The Act is, in itself, a remarkable positive step in recognizing not only the issues with regard to child sexual abuse but also

takes intricate steps to tackle this enraging social issue.

While acknowledging the disadvantage that our adversarial legal holds, especially with the recognition of the sensitivity of the victim, the Act provides for a special court so as to do away the verbal battle and balancing of evidence which happens in a normal court of law, This formation of special courts is a relief, keeping in mind the nature of trial and examination procedure adopted in a court of law and this attains paramount importance since often the only witness available in such a case is the abused child himself. Credit needs to be given to this Act for understanding the sensitivity of the victim and the nature of the offence committed against him or her and thus has provided for the establishment of special courts for trial of offences under the Act, keeping the best interest of the child at every stage of the judicial process.

The Act considers every person below the age of 18 years as a child. This interpretation is a victim oriented step and does much to do away with the debate over the clash of age of consent of the child in various legislations. Keeping in mind, the age limit of marriage for girls is 18 the Act is in consonance with the institution of marriage which prima facie encompasses in itself sexual intercourse and the requisite age of consent. Furthermore, an offence is treated as aggravated when committed by a person in a position of trust authority of child, such as a member of Security force, police officer public servant etc.

The Act provides that penetrative sexual assault is punishable with imprisonment for not than seven years which may extend to imprisonment for life and fine. Aggravated penetrative sexual assault on the other hand is punishable for at least ten year which may extend to imprisonment for life sexual assault punishable for a period not less than three years which may extend to five years sexual harassment of a child is punishable for three years with a fine and use of children for pornographic purpose and voyeurism is punishable with an imprisonment of five years and in case of conviction seven years along with a fine.

Child friendly procedures are incorporated in this Act, they are-

- Recording the statement of the child at the residence of the child or at the place of his choice, preferably by a women police officer not below the rank of the sub- inspector. Evidence has to be recorded within 30 days
- No child to be detained in the police station in the night for any reason.
- Police officer to not be in uniform while recording the statement of the child
- The statement of the child to be recorded as spoken by the child.
- Assistance of an interpreter or translator or an expert as per the need of the child.
- Assistance of special educator or any person familiar with the manner of communication of the child in case child is disabled.
- In case the victim is a girl child, the medical examination shall be conducted by a woman doctor

- Frequent breaks for the child during trial.
- Child not to be called repeatedly to testify.
- No aggressive questioning or character assassination the child.

Shortcomings of the Act-The Act in its spirit is a misnomer since it does talk about protecting the child but only once the offence is committed, thus omitting any kind of preventive steps. The theory of punishment being a deterrent is extremely evident here but how effective will this deterrent be is open to much speculation, while keeping in mind be course of it, the Act also penalizes any sexual activity, even a consensual one, with children under 18 or between minors.

The provisions in the Act relating to the age do not reflect upon the stark realities of postmodern society due to conservatism and archaic conceptions. The fact cannot be denied that youth indulge in sexual acts. It would be unjust to penalize two consenting minors having consensual intercourse because the Act is silent. This lacuna in the Act bears a hypocritical outlook to a social concern which needs sensitivity and care to prevent the misuse of such acts in the future and to give justice to true victims.

The need of the present day society is that the law should be such that it endorses in itself a flexible standard for determining the age of consent of minors to avoid legal anomalies especially in case of minors being punished at par with an adult." In this regard, one may take cognizance of legal systems which have addressed the issue more comprehensively like the law in Switzerland, where though the legal age of consent has been fixed at sixteen years," an exception has been carved out for cases where the age difference between the involved parties is three years or less.

Similarly, in Israel, while sexual intercourse with a child below the age of fourteen years is considered to be statutory rape, irrespective of the consent, however if the child is between fourteen and sixteen years and the age gap between the two individuals is less than two years, consensual sexual intercourse is legal." The relativity of these laws rests in the fact that they endeavor to protect the child from sexual abuse whilst carving a reasonable exception in the case of minors engaging in intercourse consensually.

A further sensitization of the legislation is needed with regard to the initial addressing of the reporting of the incidents of abuse. The law has a victim-oriented, sensitized approach when it comes to the child but fails to encompass in itself persons and institutions which specialize in terms of child welfare and abuse cases. This aspect can be identified in the United States Federal Legislation" which calls upon the law enforcement agencies and the social service bodies to work together during investigation and trial for protecting and dealing with both the psychological and physiological trauma of a child sexually abused and this Acts as a buffer system against re-dramatization during the process.

The biggest lacuna in the legislation can be seen in Chapter V of the Act which describes the procedure for reporting of cases. The ambit of this part of the legislation is too wide and thus invites misuse. The term 'any person' is used to indicate anyone who has reason to believe that an offence under this Act is likely to be committed or knows that such an offence has been committed any time in the past is obliged to inform the special juvenile police or the local police. Failure to report is considered a criminal offence punishable by imprisonment. Furthermore, the legislation provides for no punishment for a child who makes false accusations or provides false information. This provision is child friendly, at the same time there are no provisions in the Act to check whether the child has made a false allegation. The legislation does not provide for any provision relating to the protection of the person other than a child, who reports the incident of abuse. The legislation also has no protection for whistle blowers.

For better implementation of the Act following Amendments made in 2019:-

- The amendment increases the minimum punishment from **seven years to ten years**. It further adds that if a person commits penetrative sexual assault on a child below the age of 16 years, he will be punishable with imprisonment between 20 years to life, with a fine.
- The amendment adds two more grounds to the definition of **aggravated penetrative sexual assault**. These include: (i) assault resulting in death of child, and (ii) assault committed during a natural calamity, or in any similar situations of violence. Currently, the punishment for aggravated penetrative sexual assault is imprisonment between 10 years to life, and a fine. It also **increases the minimum punishment from ten years to 20 years**, and the maximum punishment to death penalty.
- The amendment adds two more offences to the definition of **aggravated sexual assault**. These include: (i) assault committed during a natural calamity, and (ii) administering or helping in administering any hormone or any chemical substance, to a child for the purpose of attaining early sexual maturity.
- It defines child pornography as any visual depiction of sexually explicit conduct involving a child including photograph, video, digital or computer-generated image indistinguishable from an actual child and adds two other **offences for storage of pornographic material involving children**. These include: (i) failing to destroy, or delete, or report pornographic material involving a child, and (ii) transmitting, displaying, distributing such material except for the purpose of reporting it. It also enhances the punishments for such offences.

The Protection of Children from Sexual Offences Rules, March 2020- Following are the heads under which the PocsO Rules, 2020 have been laid down:

- Awareness generation and capacity building

- Procedure regarding care and protection of child
- Interpreters, translators, special educators, experts and support persons
- Medical aid and care
- Legal aid and assistance
- Special relief
- Compensation
- Procedure for imposition of fine and payment thereof
- Reporting of pornographic material involving a child
- Monitoring of implementation of the Act

Conclusion & Suggestions- This paper has made an attempt to highlight and assess the substantive and procedural aspects of the law protecting children against sexual abuse especially the light of the recent enactment of the Protection of Children from Sexual Offence Act, 2012. But the mere fact that a legislation has been made is not going to be sufficient to protect the soul of our future generations from scars of sexual abuse. The myth that pedophiles and child abusers are predatory strangers needs to be dispensed and this can only happen by taking collective steps, out of which the quintessential one is to break the silence.

These are some suggestions for better implementation-

1. Most of child abuses take place in a relationship as it is much safer and easier for a person to take advantage of the child's weakness and helpless so parents should be aware about this.
2. It is responsibility of our education system to provide the basic knowledge to children about how to identify unsafe touches and situations.
3. There are also some studies say that child sexual abuse can have a worst impact on the mental health of the child and if it is not healed at the earliest stage it would even affect at adulthood. To prevent this one need to undergo therapy and counseling so create support system for victims.
4. There is an urgent need to train the medical staff, teachers, judicial staff advocates and also sensitizing the public through NGO, Television broadcasting.
5. Educate employees to listen the children and ensure children's safety at work place. Child help No. help line should be publicized.
6. There is urge need in amendment in Sec. 7 of the Act according this provision physical contact and skin to skin touch is necessary for sexual assault so as to achieve the goal of this Act this section must be amend.
7. This Act has strong provision but weak implementation so vigilance committee should be constitute for proper monitoring and implementation of the Act.

Reference-

- The Protection of Children from Sexual Offences Act, 2012