



Protection of Children against Sexual Offences Act, 2012: An Analytical Study

Dr. S.D.Moharana, LL.M., Ph.d Principal, G.M. Law College, Puri, Utkal University,
Odisha

Abstract:

Children are the greatest gift to humanity and their sexual abuse is one of the most heinous crimes imaginable. Reliable estimates are hard to come to lime light. Since this is a secretative form of abuse, often causing victims to suffer in dark and claustrophobic silence? Child sexual abuse is physical or psychological maltreatment of a child, can be classified four major categories, physical abuse, emotional abuse, neglect and worst of all; the sexual abuse. Child Sexual Abuse (CSA) is a 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-à-vis the child. India is the second largest child population in the world, 42% of India's total population is below eighteen years. In a shocking revelation, a Government commissioned survey has found that more than 53% of Indian children are subjected to sexual abuse / assault. Majority of these cases were perpetrated by someone known to the child or in a position of trust and responsibility, Not surprisingly, most children did not report the abuse to anyone. The Parliament of India has been long awaited to make the law against child abuse even stricter, since the present law i.e. Protection of Children against Sexual Offences Act, 2012 has many Loopholes and then criminal gets discharged at minimum punishment. We urgently need Legislation that specifically addresses child abuse with it all forms. This paper will focus on child sexual abuse, laws, loopholes & the Protection of Children against Sexual Offence Act, 2012.

Introduction:

India is second populous country in the world and latest census 2011 reveals that it's a home of 17% of the world's population. Nearly nineteen percent of the world's children live in India, which constitutes 42 percent (more than one third) of India's total population and around 50 percent of these children are in need of care and protection¹. Despite having highest number of sexually abused children in the world, there is no special law in India which is fully equipped to counter the menace. Protection of children against sexual offences Act, 2012 (POCSO) is a special Law to protect children from offences against sexual assault, sexual harassment and pornography remains an

unimplemented law, unknown to moot and beyond knowledge or information of those who apply it. The POCSO defines 'Penetrative Sexual assault', 'Sexual Assault' and Sexual harassment making the offence aggravated if it is committed by a police officer, public servant, staff members of jail, remand, protection or observation home, staff of a hospital or educational institution or by a member of armed or security forces. POCSO provides relief rehabilitation as soon as the complaint is made to the special Juvenile police unit, local police unit or the local police who are required to make immediate arrangement for care & protection. The intent to commit an offence defined under POCSO is also punishable besides abetment or aiding



the sexual abuse of a child, special emphasis has been provided for trial in special procedure to avoid child not seeing accused at the time of testifying.

Child Sexual Abuse in India:

CSA remains a taboo but it's a very real problem in India, and the situation is aided by the absence of effective legislation and the silence that surrounds the offence. Majority of people feel this is a largely western problem and does not happen in India.

Statistics:

According to WHO, one in every four girls and one in every seven boys in the world are sexually abused. Virani (2000) states, the WHO found that at any given time, one of ten Indian children is the victim of sexual abuse.² But Lois J. Engel Recht, a researcher quotes studies showing that over 50 per cent of children in India are sexually abused, a rate that is higher than in any other country.³

Extent of the Problem:

Reliable estimates are hard to come since this is a furtive form of abuse, often causing victims to suffer in dark and claustrophobic silence.

To find out the extent of child abuse in India, The first ever National Study on Child Abuse was conducted by the *Ministry of Women and Child Development*, covering 12447 children, 2324 young adults and 2449 stakeholders across 13 states. In 2007 it published the report as "Study on Child Abuse: India 2007".⁴ The survey, covered different forms of child abuse i.e. physical, sexual and emotional as well as female child neglect, in five evidence groups, namely, children in a family environment, children in school, children at work,

children on the street and children in institutions.

This study brought out some shocking facts⁵, and its main findings in relation with sexual abuse are:

“Sexual abuse was reported by 53.22% children. Among them 52.94% were boys and 47.06% girls 21.90% of child respondents faced severe forms of sexual abuse, 5.69% had been sexually assaulted and 50.76% reported other forms of sexual abuse”.

- AP, Assam, Bihar and Delhi reported the highest percentage of sexual abuse among both sexes, as well as the highest incidence of sexual assaults.
- The highest incidence of sexual assault was reported in children on street, at work and in institutional care.
- 50% abusers were known to the child or in a position of trust and responsibility.
- Most Children did not report the matter to anyone.
- More than 53% children report facing one or more forms of sexual abuse and boys were equally at risk as girls.
- Almost 22% faced severe sexual abuse, 6% sexually assaulted.
- 50% of sexual offenders were known to the victim or were in positions of trust (family member, close relative, friend or neighbour).
- 5-12 year's group faced higher levels of abuse, largely unreported.
- Severest sexual abuse in age group of 11-16 years, 73% of sexual abuse



- victims were in age groups of 11-18 years.⁶
- The age wise distribution showed that though the abuse started at the age of 5 years, it gained momentum 10 years onward, peaking at 12 to 15 years and then starting to decline.
 - Another study on child abuse in Kolkata, Elaan, an NGO, found that four out of 10 boys faced sexual harassment in school. Generally the age of maximum abuse is between 9 to 12 years. The national study found that the abuse gained momentum at the age of 10 and peaked between 12 to 15.⁷

Tulir- CPHCSA's study in 2006, conducted among 2211 school going children in Chennai, indicates CSA prevalence rate of 42%. Children of all socio economic groups were found to be equally vulnerable. While 48% of boys reported having been abused, the prevalence rate among girls was 39%. 15% of both boys and girls had been severely abused.⁸

According to Brown, (2000) there are an estimated 2 million child prostitutes (under the age of fifteen) at work in India.⁹ Over 15 million children are working as bonded labour, in India. Twice as many girls than boys engaged in child labour. Child labourers and young domestic workers are most often sexually abused by the employers or other adults. Increased risk of HIV/AIDS from adult prostitutes, leads to an increased demand for younger child prostitutes, Sex tourism and Child marriages.¹⁰

Legal Loopholes:

Rape is an offence under the IPC, but lesser forms of sexual offences against children, are covered by grossly

inadequate and inexact provisions such as "outraging the modesty of a woman." How do we define modesty and apply Section 354, on outraging the modesty of women, with respect to children? The gravity of the offence under Section 509, dealing with obscene gestures, is less. Yet even in such cases, the child's psyche may be affected as severely as in a rape.

Hazy Laws & Lacuna:

In Indian legal system, the child has been defined differently in the various laws pertaining to children and the age of an individual in order to be determined as a "child" is not uniformly defined. Therefore it offers various gaps in the legal procedure which is used by the guilty to escape punishment. According to the Convention on the Rights of the Child, Article 1 defines "the child" as "every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier".

The IPC defines the child as being 12 years of age, whereas the Indian Traffic Prevention Act, 1956 defines a 'minor' as a person who has completed the age of 16 years but not 18 years. Section 376 of IPC, (punishment for rape), defines the age of consent to be 16 years of age, whereas Section 82 & 83 of the IPC states that nothing is an offence done by a child under 7 years, and further under 12 years, till he has attained sufficient maturity of understanding the nature of the Act and the consequences of his conduct on that occasion.

There also exists a differential definition for "boys and girls" as seen in the Juvenile Justice Act, which defines a male minor as being below 16 years and a female minor as being below 18 years of age.



Child Pornography (Article 20 Lanzarate Conventions, Article 9 Budget Conventions):-

To be criminalized:-

- Producing child pornography;
- Producing child pornography for the purpose of distribution through a computer system;
- Offering child pornography;
- Offering child pornography through a computer system;
- Making available child pornography;
- Distributing child pornography;
- Distributing child pornography through computer system;
- Transmitting child pornography;
- Transmitting child pornography through computer system;
- Procuring child pornography for oneself or for another person;
- Procuring child pornography through computer system for oneself and for another person;
- Possessing child pornography;
- Possessing child pornography in a computer system or on a computer data storage medium;
- Knowingly obtaining access, through information and communication technologies to child pornography.

The measuring of the real dimension of the volume of child pornography by circulating around the world is probably impossible while the volume and activity via Internet Relay Chat (IRC) OR www sites containing child pornography could so me how be measured, it would not be able to consider the volume of the traffic

which occurs through private channels¹¹. In any case special consideration should given also to various legal system & traditions.

POCSO and Its Content:-

Until recently, various provisions of the Indian Penal Code (IPC) were used to deal with sexual offences against children as the law did not make a distinction between an adult and a child. POCSO deals with sexual offences against persons below the age of 18 years. A child has been defined as a person below the age of 18 years. POCSO defines "Penetrative sexual assault", "sexual assault" and "sexual harassment" making the offence aggravated if it is committed by a police officer, public servant, staff member of jail, remand, protection or observation home, staff of a hospital or an educational institution or by a member of the armed or security forces . POCSO provides for relief and rehabilitation as soon as the complaint is made to the special Juvenile Police Unit or the local police who are required to make immediate arrangements for care and protection.

- 1) The POCSO Act 2012 enunciates that recording the statement of child at his residence or at place of choice, preferably by a women police officer in the rank of Sub-inspector. Evidence has to be recorded in 30 days.
- 2) No child to be detained in police station at night for any reason.
- 3) The statement of child to be recorded as spoken by child.
- 4) The Police Officer to not be in uniform while recording the statement of child.



- 5) There should be assistance of an interpreter or translator as per the need of the child.
- 6) Child not to see the accused at the time of testifying. The evidence of the child shall be recorded within a period of 30 days of the cognizance of the offence.
- 7) The medical examination of the child to be conducted in the presence of parent of the child or any other person in whom the child has trust or confidence.
- 8) In case the victim is a girl child, the medical examination shall be conducted by a female doctor.
- 9) No aggressive questioning or character assassination of the child made during cross examination.
- 10) The trial to be made in special court in camera.
- 11) It is duty of the Central Govt. and State Govts to publicise POCSO and impart periodic training.

Awareness of POCSO:-

State authorities, police and Educational institutions have done little to spread awareness of POCSO. The result is obvious. Ignorance is bliss. Those responsible for implementation of POCSO do not even know that any person or institution who fails to report the commission of an offence under POCSO or fails to record such an offence is also liable for punishment under section 21 of POCSO. Shockingly, in the most recent unfortunate rape case, the Delhi Police included the provisions of POCSO to the FIR reportedly after two days of the filling of the FIR on 15th April, 2013. In the infamous *Apna Ghar Rohtak Shelter Home Case of May 2012*, despite

rampant allegations of child sexual abuse of over 100 inmates, reportedly, the provisions of POCSO are still not stated to have been invoked against the accused. Most child sex abuse cases are not booked under POCSO. Child sex offenders get away despite a stringent law. Institutions wash their hands off disowning employees. POCSO is unknown. Indoctrination, training, familiarization and actual application by police officers and other stakeholders still remains a far cry.

A step forward to curb child sex abuse:-

The passing of the salutary law is more than significant for a variety of reasons. It defines exclusively the crime of sexual offences against children and fulfils the mandatory obligations of India as a signatory to the United Nations Convention on the Rights of the Child, acceded to on December 11, 1992. For monitoring and implementation of the provisions of POCSO, the Act enjoins that the National Commission and State Commissions for Protection of Child Rights constituted under the Commissions for Protection of Child Rights Act, 2005 shall ensure the effective carrying out of the provisions of POCSO. The Supreme Court in hard hitting directions on 7th February, 2013 has directed all States to ensure the effective carrying out of the provisions of POCSO. The Supreme Court in hard hitting directions on 7th February, 2013 has directed all states to ensure that the regulatory and monitoring bodies are constituted and made functional. In Punjab and Haryana, the fully functional commissions are non-existent or effectively non-functional.



A landmark judgment:-

Upon the *National Commission for Protection of Child Rights (NCPDR) petitioning the High Court, in a path breaking judgement rendered on 9th April, 2013, it has been directed that the States of Punjab and Haryana as well as Union Territory of Chandigarh shall ensure, that State Commissions for Protection of Child Rights headed by a Chairperson who should be a person who has been a judge of the High Court, shall become fully functional by appointing Chairpersons and six members appointed through a transparent selection process.* The High Court has further directed mandatory registration of all children homes, constitution and notification of children's courts and appointment of special public prosecutors besides constituting a proper selection committee to make further selections of various committees to be set up for child welfare. Hence, the entire machinery of monitoring child rights has been galvanized. A further direction has been issued that the National Commission and State Commissions shall start discharging their functions under POCSO for implementing its provisions and modules/training programmes for sensitizing all stakeholders on child rights and for dealing with cases in children's court be also initiated in the Chandigarh Judicial Academy. It is now for the State Governments to implement this beneficial mandate and create an effective machinery to check heinous crimes of gross sexual abuse against children by enlightening all concerned about it. It is the duty of the state to know perform its obligations for the welfare of the society.

The net effect of the judgment:-

The Justice Verma Committee Report, in one of its conclusions on child sexual abuse, holds: "There is urgent need to audit the performance of all institutions of governance and law and order. It is indeed necessary that we must now have external social audit for the sake of transparency. We also wish to make it clear that every case of a missing child must be registered as FIR". The Committee further make suggestions of constituting "an oversight mechanism" through the High Court, special training based programmes, sensitizing officials on sexual abuse of children and strict implementation of provisions of various enactments of child laws, summing up, we need to consolidate our efforts and focus our energies on existing laws and not look to amending more laws and making still further newer laws, alien to our culture, society, habits, life styles and harsh realities of the common man. In so far child sex abuse is concerned, POCSO is a wholesome law. The Government must create the machinery to implement it and educate its officer besides all stakeholders on what it contains. The remedy to handle the public outcry is by implementing POCSO. All child offenders must be charged, tried and punished in accordance with POCSO expeditiously. Speedy, stringent and relentless pursuit of POCSO is the remedy and a possible cure. The State must not waste its time in exploring alternatives when the answers exist in a law made by the parliament for these special offences against children, the most vulnerable section of the society. Today's children are tomorrow's future. Let us protect them. The laudable endeavours of Late Justice Verma must find implementation.



Discussion:

Different studies and their reports indicate that there is a traditional conservative family and community structure that does not talk about this topic. This silence encourages the abuser so that he is safe to sexually abuse. With no information being available about child sexual abuse, many children are growing up not knowing their rights have been violated. In this scenario the implementation of POCSO Act 2012, would be of great help in checking these cases of CSA.¹²

The comprehensive Act defines a range of sexual offences against children that have been ignored and proposes more stringent punishments for offenders. A law like this will ensure necessary legal provisions for victims and will make it easier for people to recognize the crime and to help police register a case under the appropriate legal provision that applies to such crimes.

Conclusion:

Child sexual abuse is a dark reality that routinely inflicts our daily lives but in a majority of cases it goes unnoticed and unreported on account of the innocence of the victim, stigma attached to the act, callousness and insensitivity of the investigating and the law enforcement agencies, etc. Merely enacting legislation will not be enough unless this is followed by strict enforcement of the law with accountability defined. Also, parents, teachers and others in the community have a vital role to protect children from sexual exploitation and abuse. Children are the country's greatest human resource and a measure of the country's social progress lies in the wellbeing of its children: that they are healthy, educated,

safe, and happy and have access to life opportunities.

It is our duty that Child Sexual Abuse should be combated as early as possible. This will help India shine bright and develop in a crime free way, as children are the leaders of tomorrow.

Criminal Law is one important element of response to the sexual exploitation and sexual abuse of children. The internet and ICT in general facilitate such offences and at the same time pose major challenges to law enforcement.

Online sexual violence against children is very much a transnational phenomena, Comprehensive domestic legislation (POCSO) harmonized with international standards in prerequisite for effective Law enforcement co-operation to protect children and investigate and prosecute offenders.

My research study shows that the provision of Lanzarate and Budget convention can indeed serve as bench marks for substitute criminal Law & offer guidance to any state in any part of the world in the development of legislation that is harmonized internationally. The POCSO Act would be a great asset for curbing sexual offences against children. The need of hour is mass awakening measures in corporate in POCSO Act and other criminal Laws and its effective implementation needs to be geared up at appropriate level.



References:

¹ "Study on child Abuse in India 2007" (PDF), published by the Govt. of India (Ministry of Women & Child Development)

² Virani Pinki. (2000). Bitter Chocolate: Child Sexual Abuse in India. New Delhi: Penguin Books.

³

<http://www.gits4u.com/chlcare/chlcare5.htm>.

⁴ "Study on Child Abuse India 2007 (PDF) Published by Govt. of India (Ministry of women & child development)".

⁵ Ibid.

⁶ [http://www.karmayog.org/child sex abuse/child sex abuse_3299 htm](http://www.karmayog.org/child%20sex%20abuse/child%20sex%20abuse_3299.htm).

⁷

<http://www.gits4u.com/chlcare/chlcare5.htm>.

⁸ Ibid.

⁹ Brown, Louise. (2000) Sex Slaves. The Trafficking of Women in Asia London Virago Press.

¹⁰ [http://www.mightylaws.in /672/child-sexual-abuse-India](http://www.mightylaws.in/672/child-sexual-abuse-India).

¹¹ Child pornography in the digital age, Anna Grant, Fiona David & Peter Grabosky in Transitional Organised crime volume-3, No-4, p 171 to 188 ISSN – 7387 London: Frank class & Co. 1997.

¹² [http://www.suite 101. com/ context/child-abuse-in-India-a303101](http://www.suite101.com/context/child-abuse-in-India-a303101).