

## **PEDOPHILIA: A BEHAVIORAL AND LEGAL ANALYSIS**

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### **ABSTRACT**

India is a shelter of 430 million children; it is about 42 percent of the entire population of this country. 50 percent of the entire population of children is under care and protection i.e. the protection from child sexual abuse.

Child sexual abuse includes rape, sexual harassment, incest, etc. is an escalating problem factor of concern in India. It is a factual blot in a civilized society that millions of children including both boys and girls are sexually exploited within and outside the verge of their dwelling. Most of the time the exploiter is from the relatives or a person well known to the child. The graph of child sexual abuse is worse in India than in any other country of the world.

Pedophilia: a psychiatric disorder that means an ongoing sexual attraction to pre-pubertal children. This sexual arousal of a pedophile makes him to commit child sexual abuse. It does not mean that all pedophile commit sexual abuse, but all those who commit sexual abuse might be suffering from pedophilia. Although there is substantial evidence in the historical and anthropological record of the sexual use of children by adults, surprisingly little is known about the etiology of pedophilia or its relation to other forms of sexual aggression. The legal philosophy of pedophilia which is also much of the research has accepted is treating all offenders convicted of “child molestation” as pedophiles, in spite of the age or appearance of the victim.

Most important, much of the research has accepted a legal definition of pedophilia, treating all offenders convicted of child molestation as pedophiles, regardless of the age or appearance of the victim.

This paper pertains the meaning, symptoms, cause of pedophilia, further it also deals with medical statistics and legal provisions with the help of case study and judgments of the court, which explain the gravity of threat over the society by this disorder.

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## MEANING AND DEFINITION OF PEDOPHILIA

Pedophilia is considered a paraphilia, a condition in which a person's sexual arousal and gratification depend on fantasizing about and engaging in sexual behavior that is atypical and extreme. Pedophilia is defined as the fantasy or act of sexual activity with children who are generally of the age 13 years or younger. Pedophiles are usually men and can be attracted to either or both sexes. How well they relate to adults of the opposite sex varies.

Pedophilic disorder can be diagnosed in people who are willing to disclose this paraphilia as well as in people who deny any sexual attraction to children, despite objective evidence of pedophilia. For the condition to be diagnosed, an individual must either act on their sexual urges or experience significant distress as a result of their urges or fantasies. Without these two criteria, a person may have a pedophilic sexual orientation but not pedophilic disorder.

The prevalence of pedophilic disorder is unknown, but the highest possible prevalence in the male population is approximately three to five percent. The prevalence in the female population is thought to be a small fraction of the prevalence in males.

The offenders are usually family friends or relatives. Types of activities vary and may include just looking at a child or undressing and touching a child. However, acts often do involve oral sex or touching of genitals of the child or offender. Studies suggest that children who feel uncared for or lonely may be at higher risk for sexual abuse.

Although, pedophilia is a mental disorder but hitherto is not considered as unsoundness of mind therefore, offences committed by pedophilic are not exempted or do not come under exception in Indian Penal Code 1860 under Section 84. As far as section 84 under chapter IV of General Exception of Indian Penal Code, 1860 concern and tells that *“Nothing is an offence which is done by a person who, at the time of doing it by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to the law.”* Although, here unsoundness of mind means medical unsoundness which includes some disease but, disease of such nature due to which the person is incapable of knowing the nature of the act. In nutshell medical is totally different from legal unsoundness.

Pedophilia is such a psychiatric disorder in which the person has knowledge of the nature of act and its legal consequences which he is intending to perform. The apex court described the entitlement of accused to benefit of section 84 in case of *Elavarasan V. State*<sup>2</sup> in which court held that “*while determining whether the accused is entitled to the benefit of section 84 of the Code the court has to consider the circumstances as the preceded, attended or followed the crime but it is equally true that such circumstances must be established by credible evidence.*”

Pedophilia is a psychiatric disorder due to which an adult or older juvenile experiences sexual arousal to prepubescent. Although girls typically begin with the process of puberty in between the age of 10 to 13, and boys at age 11 or 12. The criteria for pedophilia extend hitherto the age of 13 years for prepubescence. A person who is diagnosed with pedophilia must be at least 16 years old and at least five years older than the prepubescent child, for the attraction to be diagnosed as pedophilia.<sup>3</sup>

### **MEDICAL DEFINITION OF PEDOPHILIA**

Pedophilia is termed pedophilic disorder in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), and the manual defines it as a paraphilia involving intense and recurrent sexual urges towards and fantasies about prepubescent children that have either been acted upon or which cause the person with the attraction distress or interpersonal difficulty. The International Classification of Diseases (ICD-10) defines it as a sexual preference for children of prepubertal or early pubertal age.<sup>4</sup>

Pedophilia is one of the most stigmatized mental disorders.<sup>5</sup> One study reported high levels of anger, fear and social rejection towards pedophiles who have not committed a crime.<sup>6</sup> The authors suggested such attitudes could negatively impact child sexual abuse prevention by

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<sup>2</sup> AIR 2011 SC 2816: (2011) 7 SCC 110: JT 2011 (8) SC 77: (2011) 7 SCALE 33.

<sup>3</sup> Diagnostic and Statistical Manual of Mental Disorders, (5 ed. 2013).

<sup>4</sup> INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS, (10 ed. 2010), <http://apps.who.int/classifications/icd10/browse/2010/en#/F65.4> (last visited Apr 6, 2017).

<sup>5</sup> Sara Jhanke & Juergen Hoyer, Stigmatization of People With Pedophilia: A Blind Spot in Stigma Research, 25 INTERNATIONAL JOURNAL OF SEXUAL HEALTH (2013), <http://www.tandfonline.com/doi/abs/10.1080/19317611.2013.795921> (last visited Jun 12, 2017).

<sup>6</sup> Jahnke J, Imhoff R & Hoyer J, Stigmatization of people with pedophilia: two comparative surveys, CLINICAL PSYCHOLOGY AND PSYCHOTHERAPY (2014), <https://www.ncbi.nlm.nih.gov/pubmed/24948422> (last visited Jun 18, 2017).

reducing pedophiles' mental stability and discouraging them from seeking help.<sup>7</sup> According to sociologists Melanie-Angela Neuilly and Kristen Zgoba, social concern over pedophilia intensified greatly in the 1990s, coinciding with several sensational sex crimes (but a general decline in child sexual abuse rates).

Social attitudes towards child sexual abuse are extremely negative, with some surveys ranking it as morally worse than murder.<sup>8</sup> Early research showed that there was a great deal of misunderstanding and unrealistic perceptions in the general public about child sexual abuse and pedophiles. However, a 2004 study concluded that the public was well-informed on some aspects of these subjects.<sup>9</sup>

### DSM AND ICD-10 REPORT ON PEDOPHILIA

The *Diagnostic and Statistical Manual of Mental Disorders* 5th edition (DSM-5) has a significantly larger diagnostic features section for pedophilia than the previous DSM version, the DSM-IV-TR, and states, "The diagnostic criteria for pedophilic disorder are intended to apply both to individuals who freely disclose this paraphilia and to individuals who deny any sexual attraction to prepubertal children (generally age 13 years or younger), despite substantial objective evidence to the contrary."<sup>10</sup> Like the DSM-IV-TR, the manual outlines specific criteria for use in the diagnosis of this disorder. These include the presence of sexually arousing fantasies, behaviors or urges that involve some kind of sexual activity with a prepubescent child (with the diagnostic criteria for the disorder extending the cut-off point for prepubescence to age 13) for six months or more, or that the subject has acted on these urges or suffers from distress as a result of having these feelings. The criteria also indicates that the subject should be 16 or older and that the child or children they fantasize about are at least five years younger than them, though ongoing sexual relationships between a 12- to 13-year-old and a late adolescent are advised to be excluded. A diagnosis is further specified by the sex of the children the person is

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<sup>7</sup> Sara Jhanke & Juergen Hoyer, Stigmatization of People With Pedophilia: A Blind Spot in Stigma Research, 25 INTERNATIONAL JOURNAL OF SEXUAL HEALTH(2013), <http://www.tandfonline.com/doi/abs/10.1080/19317611.2013.795921> (last visited Jun 12, 2017).

<sup>8</sup> MICHAEL C SETO, 44 PEDOPHILIA AND SEXUAL OFFENDING AGAINST CHILDREN: THEORY, ASSESSMENT, AND INTERVENTION(2008).

<sup>9</sup> Mc Carten K, Here There Be Monsters!: the public's perception of paedophiles with particular reference to Belfast and Leicester, 44 NCBI(2004), <https://www.ncbi.nlm.nih.gov/pubmed/15573972> (last visited Jun 21, 2017).

<sup>10</sup> DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION, (American Psychiatric Publishing ed., 5 ed.), <http://dsm.psychiatryonline.org/doi/book/10.1176/appi.books.9780890425596> (last visited Jun 8, 2017).

attracted to, if the impulses or acts are limited to incest, and if the attraction is "exclusive" or "nonexclusive".<sup>11</sup>

Several terms have been used to distinguish "true pedophiles" from non-pedophilic and non-exclusive offenders, or to distinguish among types of offenders on a continuum according to strength and exclusivity of pedophilic interest, and motivation for the offense (see child sexual offender types). Exclusive pedophiles are sometimes referred to as *true pedophiles*. They are sexually attracted to prepubescent children, and only prepubescent children. Non-exclusive offenders—or "non-exclusive pedophiles"—may at times be referred to as *non-pedophilic* offenders, but the two terms are not always synonymous. Non-exclusive offenders are sexually attracted to both children and adults, and can be sexually aroused by both, though a sexual preference for one over the other in this case may also exist. If the attraction is a sexual preference for prepubescent children, such offenders are considered pedophiles in the same vein as exclusive offenders.<sup>12</sup>

Neither the DSM nor the ICD-10 diagnostic criteria require actual sexual activity with a prepubescent youth. The diagnosis can therefore be made based on the presence of fantasies or sexual urges even if they have never been acted upon. On the other hand, a person who acts upon these urges yet experiences no distress about their fantasies or urges can also qualify for the diagnosis. *Acting* on sexual urges is not limited to overt sex acts for purposes of this diagnosis, and can sometimes include indecent exposure, voyeuristic or frotteuristic behaviors,<sup>13</sup> or masturbating to child pornography.<sup>14</sup> Often, these behaviors need to be considered in-context with an element of clinical judgment before a diagnosis is made. Likewise, when the patient is in late adolescence, the age difference is not specified in hard numbers and instead requires careful consideration of the situation.

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<sup>11</sup> *Ibid*

<sup>12</sup> Lisa J Cohen & Loger I Galynker, Psychopathology and Personality Traits of Pedophiles, *PSYCHIATRIC TIMES*, 2009, <http://www.psychiatristimes.com/articles/psychopathology-and-personality-traits-pedophiles> (last visited Jun 10, 2017).

<sup>13</sup> *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION*, (American Psychiatric Publishing ed., 5 ed.), <http://dsm.psychiatryonline.org/doi/book/10.1176/appi.books.9780890425596> (last visited Jun 9, 2017).

<sup>14</sup> seto MC, Cantor JM & Blanchard R, Child pornography offenses are a valid diagnostic indicator of pedophilia, *JOURNAL OF ABNORMAL PSYCHOLOGY*(2006), <http://www.apa.org/pubs/journals/abn/?tab=2> (last visited Jun 13, 2017).

Ego-dystonic sexual orientation includes people who acknowledge that they have a sexual preference for prepubertal children, but wish to change it due to the associated psychological or behavioral problems (or both).

### **SYMPTOMS AND CHARACTERISTICS OF PARAPHILIC DISORDERS**

Most people with atypical sexual interests do not have a mental disorder. To be diagnosed with a paraphilic disorder, DSM-5 requires that people with these interests:<sup>15</sup>

1. Feel personal distress about their interest, not merely distress resulting from society's disapproval; or
2. Have a sexual desire or behavior that involves another person's psychological distress, injury, or death, or a desire for sexual behaviors involving unwilling persons or persons unable to give legal consent.
3. Recurrent, intense sexual fantasies, urges or behaviors involving sexual activity with a prepubescent child (generally age 13 years or younger) for a period of at least 6 months.
4. These sexual urges have been acted on or cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.
5. The person is at least age 16 and at least five years older than the child in the first category. However, this does not include an individual in late adolescence involved in an ongoing sexual relationship with a 12- or 13-year-old.

Paraphilic disorders includes eight conditions: exhibitionistic disorder, fetishistic disorder, frotteuristic disorder, pedophilic disorder, sexual masochism disorder, sexual sadism disorder, transvestic disorder, and voyeuristic disorder.

For pedophilic disorder to be diagnosed, the following criteria must be met:

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<sup>15</sup> Paraphilic Disorders, [HTTPS://WEB.ARCHIVE.ORG\(2013\), https://web.archive.org/web/20160724010712/https://www.dsm5.org/Documents/Paraphilic%20Disorders%20Fact%20Sheet.pdf](https://web.archive.org/2013/https://www.dsm5.org/Documents/Paraphilic%20Disorders%20Fact%20Sheet.pdf) (last visited Jun 15, 2017).

Additionally, a diagnosis of pedophilic disorder should specify whether the individual is exclusively attracted to children or not, the gender that the individual is attracted to, and whether the sexual urges are limited to incest.

There are a number of difficulties with the diagnosis of pedophilia. People who have this condition rarely seek help voluntarily—counseling and treatment are often the result of a court order. Interviews, surveillance, or internet records obtained through a criminal investigation can be helpful evidence in diagnosing the disorder. Extensive use of child pornography is a useful diagnostic indicator of pedophilic disorder. Additionally, genital sexual arousal can be measured in a laboratory setting through sexual stimuli and is based on the relative change in penile response.

Paraphilias as a group have a high rate of comorbidity with one another and an equally high rate of comorbidity with anxiety, major depression or mood disorders, and substance abuse disorders.

### **CAUSES FOR PEDOPHILIC DISORDER**

The causes of pedophilia and other paraphilia are not known exactly. There is some evidence that pedophilia may run in families, though it is unclear whether this stems from genetics or learned behavior.

Other factors, such as abnormalities in male sexual hormones or the brain chemical serotonin, have not been proven as factors in the development of paraphilias or pedophilia. A history of childhood sexual abuse is also a potential factor in the development of pedophilias but this, too, has not been proven.

Behavioral learning models suggest that a child who is the victim or observer of inappropriate sexual behaviors learns to imitate and is later reinforced for these same behaviors. These individuals are deprived of normal social and sexual contacts and thus seek gratification through less socially acceptable means. Physiological models focus on the relationship between hormones, behavior, and the central nervous system with a particular interest in the role of aggression and male sexual hormones.

Individuals may become aware of their sexual interest in children around the time of puberty. Pedophilia may be a lifelong condition, but pedophilic disorder includes elements that may change over time (distress, psychosocial impairment, tendency to act on urges).

### **PEDOPHILIA: CHILD SEXUAL ABUSE AND CHILD ON CHILD SEXUAL ABUSE**

Child Sexual Abuse (CSA) is a mental or physical violation of a child with sexual intent, generally by a person who is in the position of power and trust of a child. Apart from the definition, sexual abuse also includes:

1. An adult revealing his/her genital organs to the child and influencing the child to do the same for them i.e. exhibitionism.
2. An adult touches the child's genital organ with hands or with other objects and persuading the child to touch their genitalia i.e. touching and fondling of a child.
3. An adult having anal, oral and vaginal intercourse with a child with or without penetration i.e. assault which includes rape and sodomy.
4. An adult is persuading or encouraging a child to hear, read or view any pornographic material.
5. An adult forcing a child to indulge in any sexual activity.
6. An adult marrying a minor, or minor marrying another minor is considered to be a forced relation.

Children are not only the victims of child sexual abuse but are also traumatized by the law because they are unaware of the act itself. Due to the trauma which children are suffering, their future is jeopardized.

There are very few cases of child sexual abuse which are reported. Other victims do not even share their plight with their parents. The worst part is the feeling of silence and shame which characterizes the cases of sexual abuse amongst children. To overcome the detrimental effects of child sexual abuse, youth must be protected from this harm. It is imperative to capture the

perpetrators of the sexual assault against Indian children. The increasing menace of child sexual abuse is not just limited to domestic spheres but extended to places which aim at protecting the interests of the child such as Juvenile Justice Homes.

### **DISTINCTION BETWEEN CHILD MOLESTER AND PEDOPHILES**

The DSM-IV-TR criteria was criticized simultaneously for being over-inclusive, as well as under-inclusive.<sup>16</sup> Though most researchers distinguish between child molesters and pedophiles,<sup>17</sup> Studer and Aylwin argue that the DSM criteria are over-inclusive because all acts of child molestation warrant the diagnosis. A child molester satisfies criteria A because of the behavior involving sexual activity with prepubescent children and criteria B because the individual has acted on those urges.<sup>18</sup> Furthermore, they argue that it also is under-inclusive in the case of individuals who do not act upon it and are not distressed by it.<sup>19</sup> The latter point has also been made by several other researchers who have remarked that a so-called "contented pedophile"—an individual who fantasizes about having sex with a child and masturbates to these fantasies, but does not commit child sexual abuse, and who does not feel subjectively distressed afterward—does not meet the DSM-IV-TR criteria for pedophilia, because this person does not meet Criterion B.<sup>20</sup> A large-scale survey about usage of different classification systems showed that the DSM classification is only rarely used. As an explanation, it was suggested that the under-inclusiveness, as well as a lack of validity, reliability and clarity might have led to the rejection of the DSM classification.<sup>21</sup>

Ray Blanchard, an American- Canadian sexologist known for his research studies on pedophilia, addressed (in his literature review for the DSM-5) the aforementioned objections to the DSM-IV-TR, and proposed a general solution applicable to all paraphilias. This meant namely a distinction between *paraphilia* and *paraphilic disorder*. The latter term is proposed to identify

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<sup>16</sup> Studer LH Aylwin AS, Pedophilia: The problem with diagnosis and limitations of CBT in treatment, 67 MEDICAL HYPOTHESES, 2006, at 774–781, <https://www.ncbi.nlm.nih.gov/pubmed/15573972> (last visited Jun 15, 2017).

<sup>17</sup> Aedwards M, Treatment for Paedophiles; Treatment for Sex Offenders, PAEDOPHILE POLICY AND PREVENTION, 1997, at 74–75.

<sup>18</sup> Studer LH & Aylwin AS, Pedophilia: The problem with diagnosis and limitations of CBT in treatment, MEDICAL HYPOTHESES, 774-781 (2006).

<sup>19</sup> Ibid

<sup>20</sup> Eto MC, PEDOPHILIA ANNUAL REVIEW OF CLINICAL PSYCHOLOGY 391–407 391-407 (2009).

<sup>21</sup> Feelgood S & Hoyer j, Child molester or paedophile? Sociolegal versus psychopathological classification of sexual offenders against children, JOURNAL OF SEXUAL AGGRESSION (2008), <http://www.tandfonline.com/doi/abs/10.1080/13552600802133860> (last visited Jun 22, 2017).

the diagnosable mental disorder which meets Criterion A and B, whereas an individual who does not meet Criterion B can be ascertained but *not* diagnosed as having a paraphilia.<sup>22</sup> Blanchard and a number of his colleagues also proposed that hebephilia become a diagnosable mental disorder under the DSM-5 to resolve the physical development overlap between pedophilia and hebephilia by combining the categories under *pedophilic disorder*, but with specifiers on which age range (or both) is the primary interest.<sup>23</sup> The proposal for hebephilia was rejected by the American Psychiatric Association,<sup>24</sup> but the distinction between *paraphilia* and *paraphilic disorder* was implemented.<sup>25</sup>

The American Psychiatric Association stated that "in the case of pedophilic disorder, the notable detail is what was not revised in the new manual.

In popular usage, the word *pedophilia* is often applied to any sexual interest in children or the act of child sexual abuse.<sup>26</sup> This use conflates the sexual attraction to prepubescent children with the act of child sexual abuse, and fails to distinguish between attractions to prepubescent and pubescent or post-pubescent minors.<sup>27</sup> Researchers recommend that these imprecise uses be avoided because although people who commit child sexual abuse sometimes exhibit the disorder,<sup>28</sup> child sexual abuse offenders are not pedophiles unless they have a primary or exclusive sexual interest in prepubescent children,<sup>29</sup> and the literature indicates the existence of pedophiles that do not molest children.<sup>30</sup>

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<sup>22</sup> Blanchard R, The DSM diagnostic criteria for pedophilia, ARCH SEX BEHAV 304–16, 304-16 (2010), <https://www.ncbi.nlm.nih.gov/pubmed/19757012> (last visited Jun 23, 2017).

<sup>23</sup> S berlin, INTERVIEW WITH FREDERICK S. BERLIN, M.D., PH.D(1997).

<sup>24</sup> karen Franklin, "Psychiatry Rejects Novel Sexual Disorder :Hebephilia, USA: PSYCHOLOGY TODAY, 2012.

<sup>25</sup> Diagnostic and Statistical Manual of Mental Disorders, 5th Edition, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS(2013), <http://dsm.psychiatryonline.org/doi/book/10.1176/appi.books.9780890425596> (last visited Jun 17, 2017).

<sup>26</sup> seto Michael, Pedophilia and Sexual Offending Against Children, AMERICAN PSYCHOLOGICAL ASSOCIATION(2008), [http://www.apa.org/membership/?keyword=american%20psychiatric%20association&gclid=CPal\\_ZGm5dQCFccQaAodV30K5w](http://www.apa.org/membership/?keyword=american%20psychiatric%20association&gclid=CPal_ZGm5dQCFccQaAodV30K5w) (last visited Jun 17, 2017).

<sup>27</sup> Kenneth V Lanning, Child Molesters: A Behavioral Analysis, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN(2010), [http://www.missingkids.com/en\\_US/publications/NC70.pdf](http://www.missingkids.com/en_US/publications/NC70.pdf).

<sup>28</sup> Fagan PJ, Wise TN, Schmidt CW, Berlin FS, Pedophilia, JAMA. (November 2002).

<sup>29</sup> Blaney, Paul H.; Millon, Theodore. Oxford Textbook of Psychopathology (Oxford Series in Clinical Psychology) (2nd ed.). Oxford University Press, USA (2009).

<sup>30</sup>seto Michael, Pedophilia and Sexual Offending Against Children, AMERICAN PSYCHOLOGICAL ASSOCIATION(2008), [http://www.apa.org/membership/?keyword=american%20psychiatric%20association&gclid=CPal\\_ZGm5dQCFccQaAodV30K5w](http://www.apa.org/membership/?keyword=american%20psychiatric%20association&gclid=CPal_ZGm5dQCFccQaAodV30K5w) (last visited Jun 17, 2017).

As Price-Robertson, Bromfield and Vassallo (2010) suggest, the term ‘child sexual abuse’ refers to a wide variety of behaviours, including both contact offences (eg: fondling genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or another object, fondling of breasts) and non-contact offences (eg: voyeurism, exhibitionism and exposing the child to pornography). Definitions of child sexual abuse adopted by researchers can influence the prevalence of abuse reported.

### **CHILD ABUSE IN JUVENILE JUSTICE HOMES**

The main aim of the juvenile justice act is “*to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by providing a child-friendly approach in adjudication and disposition of the matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment.*”<sup>31</sup> In spite of the aim and objective of the Juvenile Justice Act, its implementation has resulted in child sexual abuse in many states. Many of the rape cases have been taken place in juvenile justice homes i.e. with special families, observation homes, or shelter homes, etc. The girls remain at high risk of assault and abuse even in the protection home. There are many cases in which the perpetrator are staff members including caretakers, security guards, etc. In most of the cases, the sexual assault continues for a longer period as victims are not ready to dissent and endure quietly in the absence of inspection. The cases like two minor girls are assaulted by the manager of Baba Deep Jyoti Anath Ashram in Odisha, or boys sodomised by guards and senior inmates at govt. run Ashiana home for boys, Delhi or Arya Orphanage Case, Delhi, related to sexual abuse of a child in Juvenile Justice Homes.<sup>32</sup>

Sexual abuse of children in juvenile justice homes is an easy example of child on child sexual abuse.

### **STATISTICAL DATA OF SEXUAL ABUSE IN INDIA**

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<sup>31</sup> INDIA’S HELL HOLES: CHILD SEXUAL ASSAULT IN JUVENILE JUSTICE HOMES, 1 INDIA’S HELL HOLES: CHILD SEXUAL ASSAULT IN JUVENILE JUSTICE HOMES 01–56 01-56 (2013). ISBN : 978-81-88987-32-0.

<sup>32</sup> Ibid.

A report by the Ministry of Women and Child Development in India (supported by Save the Children and UNICEF) shows its major findings in respect of child abuse.

The following are the major findings on sexual abuse in India by the Study, Child Abuse, India, 2007.

1. 53.22% children reported having faced one or more forms of sexual abuse.
2. 21.90 % child respondents facing severe forms of sexual abuse and 50.76% other forms of sexual abuse.
3. 50% abuses are persons known to the child or in a position of trust and responsibility ;
4. Children on street, children at work and children in institutional care reported the highest incidence of sexual assault.
5. Most of the children did not report the matter to anyone.

#### **LEGAL PROVISIONS AGAINST OFFENCES COMMITTED BY PEDOPHILIC**

To overcome the growing menace of sex crimes against children in India, there are legal frameworks of rights and guarantees enacted in the support of children. These include a vast array of legal enactments ranging from Constitution from one point view to the Indian Penal Code and other statutory provisions like Protection of Children from Sexual Offences Act (POCSO).

Until 2012, there was no appropriate legal framework in India which deals with child sexual abuse. Earlier sex crimes against children were protected by section 354, 375, 377,509 of Indian Penal Code, 1860. Section 354 deals with “*Assault or criminal force to woman with intent to outrage her modesty,*”<sup>33</sup> Section 375 deals with rape, Section 509 states any person who intends to insult the modesty of a woman through word, gesture or act and Section 377 of the IPC deals with unnatural offence.

Under section 376(2)(f) of Indian Penal Code 1860, whoever, commits rape on a woman when she is under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.

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<sup>33</sup> Section:354 of Indian Penal Code, 1860.

The pornography was dealt with Young Persons (Harmful Publication) Act, 1956. In the year 2012, the Parliament of India has passed the Protection of Children against Sexual Offences Act (POCSO) for the victims of child sexual abuse below 18 years of age.

### **POCSO: A SPECIFIC ACT AGAINST CHILD SEXUAL ABUSE IN INDIA**

Since, POCSO Act is gender neutral. The consent of the child is immaterial under this act. Moreover, this law mandates the reporting and recording of sexual abuse against a child. Section 19(1) of the POCSO Act makes it compulsory to report the offence. In addition to this, this act lists the sexual crimes committed against a child. Section 3 of the POCSO Act states: *“A person is said to commit “penetrative sexual assault” if (a) “he penetrates his penis, to any extent, into the vagina, mouth, urethra, or anus of a child or makes the child to do so with him or any other person”;* Since the words *“any other person”* are used in Section 3(a), women may also be offenders or victims under the second part of Section 3(a).<sup>34</sup> Further, it also provides protection to minors during the judicial process. Section 5(j) of the Act: *“Whoever commits penetrative sexual assault on a child, which in the case of female child, makes the child pregnant as a consequence of sexual assault.”* However, even in these offences, women can be joined as abettors under Section 16 of, POCSO Act”.<sup>35</sup>

### **PROVISIONS IN POCSO**

The following are the provisions enumerated in Prevention of Children from Sexual Offences Act, 2012.

- 1) As soon as the matter is reported to the police officer, within 24 hours, the case should be presented before the Child Welfare Committee.
- 2) The statement of the minor should be recorded in his or her home or his or her favorite place only by a female police officer.
- 3) This act also provides a speedy trial and in camera proceedings to ensure confidentiality.

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<sup>34</sup> The Protection of Children from Sexual Offences Act, 2012.

<sup>35</sup> The Protection of Children from Sexual Offences Act, 2012.

- 4) The minor should not be called in the court repeatedly. He or she may be testified through video from home.
- 5) The medical examination must be conducted by a female doctor, in the presence of a person whom minor trusted. Consent of the parents or guardians if present, otherwise the consent of medical professional on the behalf of a minor is required.
- 6) The defense should route all the question through the judge and cannot ask any aggressive or character assassination questions to the juvenile.
- 7) The minor should not be exposed to accused in any way during the recording of evidence.

### **PUNISHMENT ENUMERATED UNDER POCSO**

The following are the punishment enumerated in Prevention of Children from Sexual Offences Act, 2012.

1. For penetrative sexual assault, the sentence not less than seven years extended up to life imprisonment along with fine under section 4 of the POCSO Act.
2. Aggravated sexual assault committed by a person of trust or authority like police officer under section 6 would be punished with not less than ten years and extended up to rigorous life incarceration and fine.
3. For the non-penetrative sexual assault committed by a person with sexual intent must be punished with not less than three years and extended up to 5 years of imprisonment under section 10 of the POCSO Act.
4. Under section 10, if the aggravated sexual assault is done by the authority or by the person of trust, it would be punished with not less than five years and extended up to seven years of incarceration.
5. For sexual harassment under section 12 of the POCSO Act, prescribes a punishment of 3 years along with fine.

As per section 42 of the POCSO Act, where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, 1860 then notwithstanding

anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

### **CASE STUDY**

In India a report by the Asian Centre for Human Rights states that India saw an increase of 36% of child rape cases from 2001 (2,113 cases) to 2011 (7,112 cases). As per 2001 census, about 440 million individuals in India were below 18 years of age and constitute 42% of total population. A total of 33098 cases of child sex abuse were recorded in India during 2011, when compared to 26694 reported in 2010. For every 155 minutes a child, less than 16 years is raped, for every 13th hour a child under 10 year is sexually abused. At any point of time, it is estimated by the Government that 40% of Indian children are susceptible to threats and like being homeless trafficking, drug abuse, and forced labour. In India, every second, a child is being exposed to one or other form of sexual abuse and the child faces critical form of it.<sup>36</sup>

In The V. unknown, the Madras High Court held that before parting with this matter, this Court is constrained to state that the child sexual abuse is alarmingly increasing day by day. One cannot be sure that all such cases are reported to the police. Children are the weakest and most vulnerable section of human population since they are unable to raise their voice against those who injure them.<sup>37</sup>

In case of State Vs. Vijay<sup>38</sup> court held that World Health Organization (WHO) estimates that globally, 8 percent of boys and 25 percent of girls below age 18 suffer sexual abuse of some kind every year. India has the dubious distinction of having the world's largest number of sexually abused children with a child below 16 years raped every 155th minute, a child below 10 every 13th hour, and one in every 10 children sexually abused at any point in tome. An estimated 6,00,000-7,00,000 children are sexually abused in India. Government of India, in report to the UN Committee on the Rights of the Child, presented in State vs. Vijay @ Bittu//FIR

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<sup>36</sup> CrI.O.P.(Md)No. 11735 Of 2014 And ... vs State, 9, 9 (2015).para 8, 9, 27, 28, 31, 41.

<sup>37</sup> The vs. unknown, (2009).

<sup>38</sup> State vs. Vijay, (2010).

No.282/07. Under section 376(2)(f) of Indian Penal Code, 1860. January 2003, identified child sexual abuse as a priority issue and one that required urgent attention.

It was held in the aforesaid case that, sexual abuse of a child 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 violate the laws or social taboos of society. The data is merely the test identification parade (TIP) of an iceberg as child sexual abuse cases remain unreported and under-reported, cloaked in secrecy, taboo and traditional patriarchal mind sets which subsumes child's victimization to adult dominance. Contrary to popular belief that the threat of sexual abuse is always from outsiders, the abuser in almost 90 per cent cases is someone the child knows and trusts. He may be a member of the family - father, uncle, cousin older siblings or servants, driver's gardeners, family friends or neighbors.

It was also held that the physical scar may heal up, but the mental scar will always remain. Child sexual abuse is a serious and heinous offence against the society and humanity. To show mercy in child sexual abuse case would be a travesty of justice. The socio-economic status of the convict in child sexual abuse case is not a relevant consideration in awarding punishment. The convict shattered basic human right of victim i.e. the prosecutrix i.e. to live with honour and dignity. Judicial response to human rights cannot be blunted by legal jugglery<sup>39</sup>. No special and adequate circumstances exist which may warrant the awarding of sentence less than ten years rigorous imprisonment to the convict.

In the United States, following *Kansas v. Hendricks*, sex offenders who have certain mental disorders, including pedophilia, can be subject to indefinite civil commitment under various state laws (generically called SVP laws<sup>40</sup>) and the federal Adam Walsh Child Protection and Safety Act of 2006.<sup>41</sup> Similar legislation exists in Canada:

## CONCLUSION

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<sup>39</sup> Vijay @ Bittu//FIR No.282/07. Under section 376(2)(f) of Indian Penal Code, 1860.

<sup>40</sup> Grant H Morris, Commentary: Punishing the Unpunishable—The Abuse of Psychiatry to Confine Those We Love to Hate, *THE JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW* 556–562, 556-562 (2002), <http://jaapl.org/content/jaapl/30/4/556.full.pdf> (last visited Jun 15, 2017).

<sup>41</sup> Holland & Jesse J, Court: Sexually Dangerous Can Be Kept in Prison, ABCNews, May 17, 2010, <https://web.archive.org/web/20100520014516/http://abcnews.go.com/Politics/wireStory?id=10666088> (last visited Jun 17, 2017).

An understanding of child sex offenders, based on the available evidence, is critical if child sexual abuse is to be prevented and responded to in effective ways. A wide range of criminal justice and related professionals (eg: police, therapists, corrections) and processes (eg: investigative, court, sentencing) deal with child sex offenders and could benefit from an accurate understanding of this population of offenders. This paper contributes to the literature on perpetrators of child sexual abuse by outlining the evidence around a number of common misperceptions. Specifically, it highlights that:

1. Not all child sex offenders are ‘paedophiles’. That is, child sex offenders are a heterogeneous group with varying offender profiles;
2. children are usually abused by someone they know, although data suggest that strangers comprise nearly one in five perpetrators of child sexual abuse against males
3. Not all child sex offenders have been victims of sexual abuse themselves and there are complex relationships between being a victim of child sexual abuse and becoming a perpetrator, which require further research. It is important to recognize that while many offenders report a history of being sexually abused, most victims of child sexual abuse do not become perpetrators later in life;
4. while not all child sex offenders have high rates of recidivism, a specific subset— those who target extra familial male children—do frequently reoffend; and
5. Although it is difficult to accurately determine how many children a child sex offender has already offended against by the time he is detected for an offence, this number varies according to offending profiles and is unlikely to be as high as is commonly assumed. There is, however, a subset of extra familial male offenders who abuse high numbers of victims.

Although, sexual offending against children is a highly emotive issue, it is important that the empirical literature on this topic underpins any public policy response to child sex offenders (eg: risk assessment, treatment, investigative and court processes, sentencing, child protection policies) in order to ensure the implementation of approaches that are best placed to enhance public safety and protect children from sexual abuse.

In view of the facts and circumstances in the aforesaid study, it is my personal suggestions to the Government:

- 1) Immediate steps may be taken to prevent child abuse and to rehabilitate the victims.
- 2) The police officials may be directed to take immediate action on the complaints of child abuse particularly sexual abuse.
- 3) The police officials may be directed to take the help of Child Welfare Committees even in respect of interrogation of the child, who has suffered sexual assault through 'in-camera' proceedings as the child would be in tension and emotion to reveal the sexual assault committed on her and women police may be entrusted the job of interrogating the child abuse victims.
- 4) The victims of child abuse may be examined by using the services of Gynecologists and female Doctors and subjecting the victims for repeated medical examinations should be avoided.
- 5)The victims of child abuse and the complainants should be given adequate police protection during the course of investigation and trial.
- 6)A separate legal cell may be created for handling child sexual abuse cases in co-ordination with the Child Welfare Committees for the purpose of proper handling of the child sexual abuse cases and conducting trial.