

PEDOPHILIC DISORDER: PSYCHOLOGICAL PEEK FOR A BETTER INDIAN LEGAL FRAMEWORK

Sangita Sharma¹

Abstract

The daily growing sexual assaults against minors possesses a difficult question before us, that what precisely is the underlying cause of such heinous crimes against such innocent young beings. The society has failed to notice the biological root causes underlying such acts. Through research it has been obtained that 50% of all the individuals who sexually abuse children are pedophiles. To eradicate or to dilute such crimes we have to understand it from a scientific perspective, we have to understand what causes such disorders. Pedophilia is a mental disorder, the question is can it be considered as a legal insanity under Indian Penal Code. It is true that these people cannot be freed after they have committed such heinous crime, however a pedophile committing such crime is not a normal person, they had their own battles. Therefore the defence of diminished responsibility should be extended to pedophiles.

INTRODUCTION

In the view of the daily worsening emotionally distressing scenario regarding sexual abuses against children, it is necessary to ask a few hard questions regarding the society we live in today. However, in talking about abstract moral values and ethical notions, there is a very fundamental thing that remains relatively less investigated. That is, what exactly is the root cause

¹ 2nd year, BSc. LLB, Gujarat National Law University

that underlies the genesis of such heinous crimes against such innocent young beings? We fail to investigate this question thoroughly from a more scientific perspective, and thus fail to notice the biological root causes that underlie the genesis of such acts.

In terms of sexual abuse of children, we can differentiate two groups: first, those who show no sexual preference disorder and who would potentially sexually abuse an adult or a child without any discrimination whatsoever,² and second, those who display a sexual preference disorder,³ namely *pedophilia* and/or *hebephilia* and/or *ephebophilia*. The first category of offenders who commit such brutal crimes, are predominantly mentally retarded people, sexually inexperienced adolescents, those with antisocial personality disorders (ASPDs).⁴ The second category of people suffers from an involuntary condition that is termed as pedophilia, and they are the ones who will be discussed in this paper.

From the data obtained from the research that has been conducted in this area, **50%**⁵ of all the individuals who sexually abuse children are *pedophiles*. It has neurological origins and therefore cannot be put in the same category as child molestation. These people need therapy and the required medications in order to be functional within society, without posing any threat to themselves or others, especially to children. It is a real challenge because no “*cure*” exists for pedophilia. It is thus, extremely necessary to recognize the fact that they are involuntarily performing such a criminal act and it needs to be taken into consideration when charges are framed against them, in the interests of justice. Moreover, as of the state of society today, only

² Gilian Tenbergen et al., *The Neurobiology and Psychology of Pedophilia: Recent Advances and Challenges*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Jun. 24, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4478390/>.

³ *Ibid.*

⁴ *Ibid.*

⁵ Schaefer GA et al., *Potential and Dunkelfeld offenders: Two neglected target groups for prevention of child sexual abuse*, 33 INT J LAW PSYCHIATRY 154, (2010).

people who commit such crimes end up receiving the required treatment because only then does the society come to know about their problem. For the advancement of public policies, it is imperative for a person with pedophilia to come forward and resolve their issue before they perform any act which is deemed criminal in the eyes of the law. It is high time we broaden the definition of “*disability*”, and include the people who are suffering from pedophilia in the category of people who are suffering from a problem which has roots in their biology, due to which they pose a threat to some members of the society and therefore must be provided with adequate help. It is obvious that without legal protection, they cannot risk seeking therapy or disclosing their status to anyone in the society. The stigma we carry with ourselves regarding those people, even though understandable, should undergo a modification, if not a complete change.

In this paper, the first part delineates what exactly are these disorders. This paper will especially be dealing with pedophilia as a sexual mental disorder. The second part explains the causes of such disorders. The third part explores various Indian laws related to sexual offences involving minor. The fourth part analyzes insanity as a defence in India. The fifth part expounds the defence of diminished responsibility. The sixth part argues that defence of diminished responsibility should be allowed for pedophiles. Lastly, the paper concludes that for the betterment of public, section 84 of IPC should be broadened, and pedophilia as a disorder should be recognised and should be given partial defence.

WHAT IS PEDOPHILIA?

Pedophilia is a mental disorder which is defined by *Diagnostic and Statistical Manual of Mental Disorders – V* (DSM) as a disorder involving intense and repetitive sexual urges and fantasies in

prepubescent children, and causing significant distress in social, occupational or other important areas of functioning.⁶ It must last for at least six months; the person must be at least five years older and at most 16 years old than the prepubescent child.⁷ Prepubescent children are generally younger than 14 years. There are two other sexual mental disorders, which are Hebephilia and Ephebophilia. *Hebephilia* is the strong, persistent sexual interest by adults in pubescent children who are in their early adolescence, typically ages 11–14,⁸ and *Ephebophilia* is the primary sexual interest in children in their mid-to-late adolescents, generally ages 15 to 19.⁹

Pedophilic people are not always prone to molesting children, and there are few who restrict their desire for sexual contact with children within the realm of fantasies only.¹⁰ Some of them also exist who recognize that they are potential offenders and wish to seek therapeutic help or medical help.¹¹ The ones that are the most dangerous are the ones who act upon their urges and commit some sort of sexual offence against children.

CAUSES OF SUCH DISORDERS

The exact cause of pedophilia is not known till date. However, many test, studies and research have found that it is may be due to *neurological difference*¹² or as a *byproduct of other co morbid*

⁶ Gilian Tenbergen et al., *The Neurobiology and Psychology of Pedophilia: Recent Advances and Challenges*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Jun. 24, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4478390/>

⁷ *Ibid.*

⁸ Blanchard R et al., *Pedophilia, hebephilia, and the DSM-V*, 38 ARCH SEX BEHAV. 335, (2009).

⁹ Janet Rosenzweig, *We know about pedophiles, but what about ephebophiles?*, THE PHILADELPHIA INQUIRER (Jun. 23, 2021), https://www.inquirer.com/philly/blogs/healthy_kids/We-know-about-pedophiles-but-what-about-ephebophiles.html

¹⁰ Gilian Tenbergen et al., *The Neurobiology and Psychology of Pedophilia: Recent Advances and Challenges*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Jun. 24, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4478390/>

¹¹ *Ibid.*

¹² Margo Kaplan, *Pedophilia: A Disorder, Not a crime*, THE NEW YORK TIMES (Jun. 05, 2021), <https://www.nytimes.com/2014/10/06/opinion/pedophilia-a-disorder-not-a-crime.html>.

*psychiatric diseases*¹³. It does not always occur in isolation, and pedophiliacs often have histories of psychiatric disorders.

A substantial number of studies have revealed that, these people might have cerebral abnormalities found in their temporal lobes,¹⁴ are less cognitively impaired,¹⁵ have decreased gray matter,¹⁶ suffer from a failure of the brain to identify which environmental stimuli should provoke a sexual response,¹⁷ reduced activation of the hypothalamus as compared to non-pedophilic people when viewing sexually arousing pictures of adults,¹⁸ disturbances in the neurodevelopment *in utero* or early childhood,¹⁹ also some had mothers with psychiatric illness more than the average people.²⁰

Also, men with pedophilia have on average had poor scores on tests of visual-spatial ability and verbal memory.²¹ **61%** of pedophiles repeated a grade or were enrolled in special education classes.²² Men with pedophilia are three times more likely to be left-handed or ambidextrous. Some of them were found to have chromosomal abnormalities.²³ A study done by **Berlin and Kout**²⁴ shows that “*out of 41 men studied, seven of them were found to have chromosomal*

¹³ *Ibid.*

¹⁴ Gilian Tenbergen et al., *The Neurobiology and Psychology of Pedophilia: Recent Advances and Challenges*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Jun. 24, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4478390>.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Sharie Stines, *Causes of Pedophilia*, PHYSCHCENTRAL (Jun. 21, 2021), <https://pro.psychcentral.com/causes-of-pedophilia/>.

²¹ Margo Kaplan, *Pedophilia: A Disorder, Not a crime*, THE NEW YORK TIMES (Jun. 24, 2021), <https://www.nytimes.com/2014/10/06/opinion/pedophilia-a-disorder-not-a-crime.html>.

²² Sharie Stines, *Causes of Pedophilia*, PHYSCHCENTRAL (Aug. 21, 2015), <https://pro.psychcentral.com/causes-of-pedophilia/>.

²³ Margo Kaplan, *Pedophilia: A Disorder, Not a crime*, THE NEW YORK TIMES (Jun. 24, 2021), <https://www.nytimes.com/2014/10/06/opinion/pedophilia-a-disorder-not-a-crime.html> (last visited Sep. 14, 2020).

²⁴ Sharie Stines, *Causes of Pedophilia*, PHYSCHCENTRAL (Aug. 21, 2015), <https://pro.psychcentral.com/causes-of-pedophilia/>.

abnormalities”, including *Klinefelter syndrome*, a condition in which the male will have an extra X chromosome in their genes addition the current XY.

While most of these data show strong correlations over a lot of parameters across which the people were evaluated, it needs to be mentioned that none of those correlations have a strong enough predictive value, since correlation does not mean causation n. Therefore, as far as predictive power is concerned, there is still a gap in knowledge that seems to exist.

Since this disorder usually doesn't exist in isolation, patients have an extensive history of psychiatric disorders. From a research it was found that *two-thirds* had a lifetime history of mood or anxiety disorders²⁵, **60%** had lifetime substance abuse history²⁶, **60%** qualified for a personality disorder diagnosis²⁷, and of which obsessive-compulsive (**25%**)²⁸, antisocial (**22.5%**), narcissistic (**20%**)²⁹, and avoidant (**20%**)³⁰. Another study showed that **61.1%**³¹ of the sample qualified for a personality disorder diagnosis, with Borderline Personality Disorder (**22%; from Cluster B**) and Avoidant.

Personality Disorder (**33%; from Cluster C**).³² Statistics also indicate that more people who abuse children were also abused during their childhood. The range is anywhere between **20% and 93%**.³³

²⁵ Gilian Tenbergen et al., *The Neurobiology and Psychology of Pedophilia: Recent Advances and Challenges*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Jun. 27, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4478390>.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Gilian Tenbergen et al., *The Neurobiology and Psychology of Pedophilia: Recent Advances and Challenges*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Jun. 24, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4478390>.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

Individual with this disorder is very self-centered treats children as objects for the sake of gratification and does not really suffer personally with emotional distress as is the case with many mental disorders. The most unnerving part about this is the implication of the fact that they are not even aware of the fact that what they feel, or of the fact that what they are doing is something that is wrong and is deemed a criminal offence.³⁴ When the person committing a crime knows that the action they are performing is wrong, then it is relatively easy to make them see the error of their ways. However, people for whom no moral compass exists regarding the problem in the first place do not even think within the black and white framework within which a lot of the functional people in society operate. Thus, it becomes immensely more challenging issue.

Pedophiles are believed to have been undeveloped and are “*fixated*” or “*stuck*” at a certain stage of psychosexual development,³⁵ while their hormones and physical bodies matured/developed normally. As a result of this conflict, the adult-child that the pedophile has grown into relates to children a lot better than adults. While this certainly seems plausible enough, there is no tangible proof as of yet to convince anyone regarding the truth of this proposition.

LAWS GOVERNING SEXUAL OFFENCES

In India there are several laws governing the sexual offences against women. However, till now sexual harassment against men have not been recognized. Even after legalizing Section 377 of IPC, we still fail to recognize sexual harassment against men under IPC. The inference which is drawn from the aforementioned law, when extended to the domain of crimes committed against

³³ Sharie Stines, *Causes of Pedophilia*, PSYCHCENTRAL (Jun. 21, 2021), <https://pro.psychcentral.com/causes-of-pedophilia/>

³⁴ *Ibid.*

³⁵ Sharie Stines, *Causes of Pedophilia*, PSYCHCENTRAL (Jun. 21, 2021), <https://pro.psychcentral.com/causes-of-pedophilia/>.

children is that “*A pedophile molesting a girl might be punished but a pedophile molesting a boy will never be punished*”.

The first section that deals with this kind of offences is Section 509 of IPC *stating outraging a women’s modesty i.e. inappropriate touch or physical conduct, making sexual remark*³⁶ against the wish of the person is a criminal offence, no age limit is specified for offences under this section. Various other sections of IPC dealing with such offences are 166A, 354A, 370, 370A, 375, 376, 376A, 376C, 376D, 376E, 493, 509A, 509B etc. Except for section 376 which deals with the punishment for rape, other sections are related to sexual offences committed against adult women. Section 376 states that if anyone commits rape of a child less than **sixteen years** of age will be given rigorous imprisonment of not less than 10 years.³⁷ Sections of IPC deals with sexual offences against women, but not specifically related to minors. For sexual offences against minors we have POCSO Act, 2012.³⁸

The Protection of Children from Sexual Offences Act (POCSO) was formulated to deal with offences concerning child sexual abuse. POCSO is a gender neutral act³⁹, under this act victim can be either male or female. Under the act the victim are generally minors i.e. below 18 years of age, and therefore prepubescent children fall under this category. Similar to other provisions this act also sets a burden of proof of “*guilty until proven innocent*”.⁴⁰ As the burden of proof in all these kinds of offences is reversed it becomes exceedingly difficult to prove whether the accused is a child molester or a pedophile suffering from psychosexual disorder.

INSANITY AS A DEFENCE IN INDIA

³⁶ Indian Penal Code, 1860, § 509, No. 45, Acts of Parliament, 1860 (India).

³⁷ Indian Penal Code, 1860, § 306, No. 45, Acts of Parliament, 1860 (India).

³⁸ Protection of Children From Sexual Offences, § 2 Cl. 2 sb. cl. d, No. 32, Acts of Parliament, 2012 (India).

³⁹ *Ibid.*

⁴⁰ Protection of Children From Sexual Offences, § 29, No. 32, Acts of Parliament, 2012 (India).

Currently in India, under the Indian Penal Code, 1860, insanity as a defense is considered by judges in most of the cases. However, the factor that the person is simply suffering from a mental illness is not sufficient. The burden of proof is always on the one who is using the defence and they have to prove that they are actually mentally ill, beyond any reasonable doubt⁴¹. This is known as “*Mc’Naughten’s Rule*” which is also stated in Section 84 of IPC. There have been several tests which have evolved over centuries like Wild Beast Test, Insane Delusion Test etc but the most important one is the “*Right and Wrong Test*” formulated in *M’Naughten’s*⁴² case which is the basis for Section 84 of Indian Penal Code, 1860.

The **Section 84** of the Indian Penal Code, 1860 is defined as “*Nothing is an offence committed by someone who is currently unable to know the nature of the act or does what is wrong or contrary to legislation due to a lack of a sound mind.*”⁴³ To establish a defence under this section, there are two elements have to be proven: first, the accused was in a state of unsound mind at the time of committing the act; second, the accused was unable to know the nature of the act.

In the case of *Sarjerao Rambhau Machale vs The State of Maharashtra*⁴⁴, the accused were not held liable for punishment as they were insane at the time of the commission of the crime. At the time of committing the crime, if the accused didn’t know the moral nature of the act, and was not in the state of mind to be able to discriminate whether it was right or contrary to the law, the accused cannot be held liable. In the case of *X vs State of NCT of Delhi & Anr. S*⁴⁵, the High

⁴¹ Janhavi Arakeri, *Insanity as a Defence under the Indian Penal Code*, I PLEADERS (Jun 28, 2021), <https://blog.iplayers.in/insanity-defence-indian-penal-code/>.

⁴² *Ibid.*

⁴³ Indian Penal Code, 1860, § 84, No. 45, Acts of Parliament, 1860 (India).

⁴⁴ *Sarjerao Rambhau Machale v. The State of Maharashtra*, (2015) Bom HC.

⁴⁵ *X v. State of NCT of Delhi & Anr. S*, (2017) Del. HC.

Court of Delhi held that the accused cannot be held liable as at the time of committing the offense the accused was suffering from mental diseases and was a chronic mental patient, due to which he did not know the nature of the act committed.

However, it is important to note that there is a nuanced distinction between Legal and Medical insanity. All mentally ill people cannot seek immunity from a criminal case. It was pointed out that '*every person suffering from mental illness is not ipso facto exempted from criminal liability.*' by Supreme Court in the case of *Surendra Mishra vs State of Jharkhand*.⁴⁶ In the landmark judgment of *Ratan Lal vs State of Madhya Pradesh*⁴⁷ Supreme Court set the conviction aside based on two major factors. Firstly, with respect to the strong medical evidence that had been provided. Secondly, with respect to the behavior of the accused on the day of the act or occurrence.

In the case of *Shrikant Anandrao Bhosale vs State of Maharashtra*⁴⁸, the accused was acquitted because he was suffering from paranoid schizophrenia, and was incapable of comprehending the nature of the act committed by him.

In *Venkatesh vs State of Karnataka*⁴⁹, the court found out that the accused was not of unsound mind when assault took place. The court held that he would not be entitled the benefit under Section 84, IPC and conviction is not liable to interfere with. The accused was treated for schizophrenia three years before the incident and because returning to prison could cause mental imbalance, his sentence of five years was reduced to simple imprisonment of two years twenty days due to the fact that he was medically insane but he was not legally insane at the time.

⁴⁶ Surendra Mishra v. State of Jharkhand, (2011) 11 SCC 49.

⁴⁷ Ratan Lal v. State of Madhya Pradesh, 1971 AIR 778.

⁴⁸ Shrikant Anandrao Bhosale v. State of Maharashtra, (2002) 7 SCC 748.

⁴⁹ Venkatesh v. State of Karnataka, AIR 2000 SC 3561.

Therefore, in India to plead a defense of insanity one must not only prove that the person suffers from some mental disorder or so, but it is imperative to prove that the person was of a mentally unsound mind *at the time of committing the crime*. Thus, simply having a history of mental illness, while it may tilt the perspective of the court slightly towards a more lenient judgment for the accused, is definitely not sufficient criteria for the person to be exempt from the penalties of the crime that he/she has committed.

THE DEFENCE OF DIMINISHED RESPONSIBILITY

This defence has been recognized under English Law. The *defence of diminished responsibility or partial defence* is allowed only in case of murder where the judge reduces the sentencing of that defendant on the evidence that that he has cause harm or committed such act due to mental incapacity. This is recognized in several states of USA, in UK, Australia etc.

Insanity and diminished capacity are linked but are not same, the former one is defined in the IPC whereas the latter one is accepted as lacking the “*necessary state of mind*” for conviction in the diminished capacity defense.

The four necessary elements that should be proved for this defence is stated in the case of *R v Gold's*.⁵⁰ First, the accused should be suffered from an abnormality of mental functioning.⁵¹ Second, it should be arise from a recognized medical condition.⁵² Third, it must be substantially impair one or more of the abilities to understand the nature of its conduct, to form a rational

⁵⁰ R v. Gold's [2016] UKSC 61.

⁵¹ *Ibid.*

⁵² *Ibid.*

judgment and to exercise self control.⁵³ Fourth, it should cause or significantly contribute to the act/killing.⁵⁴ The word “*substantial*” was explained as an “*impairment of consequence or weight*” and not “*any impairment which is greater than merely trivial*”.⁵⁵

Thus, for this defence to apply the person must be suffering from an abnormality of a recognized medical condition⁵⁶ which substantially impaired his responsibility to understand his conduct, act or omissions⁵⁷ and which provides an explanation for being party to the killing/act.

PLEDGING DEFENCE UNDER DIMINISHED RESPONSIBILITY FOR PEDOPHILES

When pledging for the defense for pedophilia, the author feels that the convicted shouldn't be acquitted in all of the cases. As long as a crime has been committed, there must be a suitable penalty. However, the author feels that a person shouldn't be punished for something for which they did not have any control in the first place, without taking into consideration this factor. Based on the evidence available in case of people suffering from pedophilia, it becomes clear that simply imprisoning them is not going to do them any good because the fundamental psychological and biological setup that causes them to have such urges, is the issue that does not get resolved by this. Yes, they must be punished, but they also need to be rehabilitated so that they can be reintegrated into society.

The reasoning behind the defense of diminished responsibility can be extrapolated for pedophiles. Firstly, the person asking for the defence is suffering from a recognized sexual mental disorder which has been established. Secondly the neurological problem causes them to

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ R v. Gold's [2016] UKSC 61.

⁵⁶ Homicide Act, 1957, § 2 Cl. 1, No. 5 &6, Acts of Parliament, 1957 (United Kingdom).

⁵⁷ *Ibid.*

behave in such manner which results into such acts. Sometimes they don't feel what they are doing is wrong.⁵⁸ Thirdly they should have an explanation. As of now the defense is applied in murder, but the author is of the opinion that the principle can be extended for this case also. Thus, this defense cannot be absolute, and must be applied with utmost care so that it fulfills its objective, and be subjective with respect to the cases, individually. Many countries have recognized this defense for murder, hence we can go one step further and add this defense not only for murder but under section 84 of the IPC, for broadening its scope.

CONCLUSION

Arguing for the rights of derided and misunderstood groups is never popular, especially when they are associated with real harm. And let this be clearly mentioned that the author fully acknowledges the latent danger that pedophiles pose for the children, and it is most essential that we take the utmost care of our children in order to protect them from the dangers that lurk in society. Having said that, it is also important to accept the fact that pedophiles have a mental ailment, and removing the boundaries to their coming forward and seeking treatment, is not only the ethically right thing to do, but it would also advance the efforts to protect children from harm and would thus be beneficial for society in general.

The author feels that pedophilia should be recognized as a legal insanity. Therefore, section 84 of the IPC should be amended. It is suggested that the definition must be broadened, to incorporate the extrapolation of the partial defense of diminished responsibility as recognized in English Law. We must remember that ultimate goal of any well-developed society, is not elimination of

⁵⁸ Sharie Stines, *Causes of Pedophilia*, PSYCHCENTRAL (Jun. 21, 2021), <https://pro.psychcentral.com/causes-of-pedophilia/>.

all the members of the society who have committed a crime, but rather, to take the requisite action in order to see that everyone is more well-adjusted and functional members of the society.

The Indian High Courts have ensured that no person takes undue advantage of the defense by leading falsely. The insanity defense has been carefully scrutinized as it has a success rate about 17%. Thus, it can be said that the plea of insanity serves its purpose well and also protects the interests of the society at the same time. From this, we can conclude that if the defense of diminished responsibility is incorporated then there is a very small chance of misuse. It is proposed that a minimization of the sentence, along with mandatory psychological treatment and therapy, might be a far better solution that goes on to serve the interests of not only the accused but of the society as a whole.