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FOREWORD

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DEMYSTIFYING THE MYTHS OF SEXUAL OFFENCES AGAINST CHILDREN IN INDIA- A SOCIO-LEGAL PERSPECTIVE.

BY DEVARSH SHAH & DHRUV CHHAJED¹

INTRODUCTION:

Sexual Abuse against children is increasing at a swelling rate in India. As per the National Crime Records Bureau's 2016 report² instances of child rape in India increased massively by 82% in the year 2015-16. This is just one surprising number which has come out. It is also admitted by the NCRB that majority of crimes against children are not reported owing to the societal pressure. To bring down the crimes against children the Central Govt. brought Protection of Children from Sexual Offences Act (POCSO) in the year 2012. POCSO provides for rigorous punishments to the offenders and hence aims at creating a deterrence in the minds of the potential offenders. There are several other laws for the protection of children. However, the data presented by NCRB suggests that the legal framework of India has terribly failed in providing substantive protection to children. The collective or social impact of sexual offences against children is also significantly high. The child, family, relatives and the entire society at large, everybody gets impacted by such heinous crimes. It is therefore inevitable to study the legal framework for the protection of children from sexual abuse in light of its societal impact.

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² India, National Crime Records Bureau, Ministry of Home Affairs. (2018). *Crime in India, 2016* (p. 193). Delhi: Director, NCRB.

PART 1: A SOCIOLOGICAL OVERVIEW

- WHAT IS CHILD SEXUAL ABUSE?

World Health Organisation also known as WHO defines Child Sexual Abuse as follows:

“Child sexual abuse is the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws or social taboos of society.”³

It is vital to demarcate Child Sexual Abuse with sexual offences against the adults because in child sexual abuse the perpetrators of the crime, in most cases are those who are in close relation with the victim. Children require extra protection and care since they are more prone to depression and irreparable shock. They may not be able to deal with it like an adult and the child may succumb to the societal pressures.

- WHY AN INDIVIDUAL SEXUALLY ABUSES A CHILD?

It is paramount to understand the motive of the individuals who sexually abuse children because they are like everyone else, mere ‘humans’ and understanding them can help us in figuring out the best ways of protecting children. It is their bewildered mental tendency, which makes them do such heinous and ruthless acts. If considered from the standpoint of Psycho-Analytic School of Criminology (proposed by Sigmund Freud), the **id** of the individual overpowers the **superego** which makes him do such acts. When an individual fails to strike a balance between his demonic desires (id) and his moral values (superego), he ends up committing such cruelty on children.

However, this is not an end in itself. The answer to the question is far more intricate and multiplex in nature. There are several other factors which induce an individual to sexually abuse children. *Thinkuknow*, an education program of England’s National Crime agency states a few of them.⁴ As per this agency the gamut of factors include desires for sexual gratification, delusions, psychological difficulties, life experiences and supportive friends. Any of these factors can externally influence an individual to carry out such acts of brutality.

³ Child sexual abuse. (n.d.). Retrieved March 13, 2019, from https://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap7.pdf

⁴ Why do people sexually abuse children? (n.d.). Retrieved March 14, 2019, from <https://www.thinkuknow.co.uk/parents/articles/why-do-people-sexually-abuse-children/>

• IMPACT OF ABUSE ON A CHILD:

The effect of child sexual abuse is devastating for the child as well as for those who are close to him/her. It impacts the entire society at large in one way or the other. There can be various transitory effects that exhibit regressive behaviour as well as perpetual effects, which include anxiety, depression, self-destruction through alcohol, drug addictions and insomnia. Economic impact, which is often neglected, also has a significant impact on the victim. As per a recent study, the average lifetime cost per victim of child abuse in United States is \$ 210,012.⁵

Further the South Eastern Centre Against Sexual Assault, Australia has examined the various effects of childhood sexual abuse.⁶ They are briefly defined hereunder:

Sr. No.	Type of effect	Brief Description
1	Psychological	Includes fear, helplessness, guilt, responsibility, isolation, betrayal, anger, sadness and flashbacks
2	Long term effects	Depression, low self-esteem, social isolation, self-destructive behaviour, parenting problems etc.
3	The Child Sexual Abuse Accommodation Syndrome	Developed by Roland Summit, it determines the ways in which a child reacts to sexual abuse. There are five ways* in which a child reacts.
4	Post-traumatic Stress Disorder	These are the effects that appear after many years of the abuse. It includes psychological as well as long term effects.
5	The Stockholm Syndrome	Its presence is indicated when the captive feels positive feelings towards his/her captor and vice versa.

* The five type of reactions are as under

1) *Secrecy: tendency to keep the abuse secret*

2) *Helplessness: because children are helpless, they cannot escape from a dangerous situation*

3) *Entrapment: Children feel trapped and they accept the situation and survive.*

4) *Conflicted and unconvincing disclosure: disclosures may be fraught with anxiety or retraction.*

⁵ Fang, X., Brown, D. S., Florence, C. S., & Mercy, J. A. (2012). The economic burden of child maltreatment in the United States and implications for prevention. *Child Abuse & Neglect*, 36(2), 156-165.

⁶ The effects of childhood sexual abuse. (n.d.). Retrieved March 14, 2019, from <https://www.secasa.com.au/pages/the-effects-of-childhood-sexual-abuse>

5) *Retraction: Children who do disclose abuse may be flooded with guilt and fear of betrayal*

It is therefore clear that sexual abuse of children has a consequential impact in their life as well as the life of those who are closely associated to them. To reduce this negative impact, it is inevitable to make laws and take effective steps to eliminate the diabolical elements of sexual abuse against children from society.

- **ROLE OF KEY STAKEHOLDERS:**

It is well understood that parents are a child's first guide, a parent must take all the measures to ensure their child's bodily security, an important lesson a parent can teach his child is to understand their bodies and boundaries, and the kind of touches that imply a multiplicity of meanings among other things. Role of medical professionals is also key to the immediate well-being and long-term wellbeing of the victim or child. The medical professional is also prescribed to take a child-friendly interview and to avoid strong emotions of shock or disbelief for the benefit of the child.

There is a rather indispensable role played by the Child Welfare Committee (CWC) in the post-abuse period of the child, it first-hand ensures the child's safety within the household and avails removal from his/her family or household to be placed in a Children's Home under the Juvenile Justice Act 2015 if at all found necessary.⁷

- **SOCIOLOGICAL ANALYSIS OF CHILD SEXUAL ABUSE**

Incidents of sexual abuse vary on a study to study basis, however, on a conservative estimate we can say "that by 18 years of age, 19% of girls and 9% of boys are sexually abused."⁸ Finkelhor has used the word "incest" as the "family or intrafamilial sexual abuse"⁹. There are a lot of explanations regarding the actions of each family member in terms of individuals within the family rather than in terms of individual background and motivation. The most common and reoccurring is namely the father-daughter incest, rather than other forms of common form of sexual abuse interfamily. This described by *Finkelhor* is occurring when, "*the marital relationship has broken down, the mother is alienated from the roles of wife and mother, and*

⁷ Juvenile Justice Act of 2015

⁸ Hodson, D., & Skeen, P. (1987, April 1). Child Sexual Abuse: A Review of Research and Theory with ... Retrieved March 15, 2019, from

https://www.researchgate.net/publication/271696986_Child_Sexual_Abuse_A_Review_of_Research_and_Theory_with_Implications_for_Family_Life_Educators

⁹ Finkelhor, D. (1984). *Child sexual abuse: New theory and research*. New York: Free Press.

the father makes an alliance with the oldest daughter that substitutes for the marital relationship and becomes sexual.”¹⁰

While analysing the child abuse on theory basis, multiple fields such as psychology, sociology, and anthropology have been found purposeful. Child Sexual Abuse is a complex process involving attributes of the participant’s cultural setting, family and interpersonal dynamics that is there are too many variables to be accounted for arriving at any possible conclusion for such a behaviour. Children face a lot during and post abuse period of incident, *Bem* has established an Attribution theory enlightening a post abuse mental state where the abused children blame themselves for sexual abuse and what factors sometimes make outsiders feel less sympathetic to the abused children, this is also known as “*Attribution Theory*”¹¹, further those who believe in a feminist perspective suggest that the power discrepancy between man and women is an important underlying factor in sexual abuse¹², others who draw from the theories of moral and development suggest that sexual abusers are characterized by deficits such as primitive moral development¹³.

¹⁰ Finkelhor, D. (1984). *Child sexual abuse: New theory and research*. New York: Free Press.

¹¹ Bem, D. (1972). Self-perception. In Leonard Berkowitz (Ed.), *Advances in experimental social psychology*, Vol. 6 (pp. 1-62). New York: Academic Press.

¹² HERMAN, J., *FATHER-DAUGHTER INCEST* (2003).

¹³ Carolyn Moore Newberger, *The cognitive structure of parenthood: Designing a descriptive measure*, 1980 NEW DIRECTIONS FOR CHILD AND ADOLESCENT DEVELOPMENT. 45, 67 (1980).

PART 2: CHILD SEXUAL ABUSE IN INDIA

It cannot be denied that India is home to the colossal number of sexually abused children in the world. India does not stand a very strong position when it comes to the occurrence of events such as Sexual abuse and Incest events, national crime Records Bureau shows a rapid growth in the incidents of offences against children, it can be stated that in India a child is sexually abused every 15 minutes according to the government figures, according to the reports on crime in India for 2016, there has been 1,06,958 cases of crimes against children, among these 36022 cases were recorded under the POCSO ACT 2012.¹⁴ Ministry of Women and Child Welfare, supported by UNICEF, conducted a survey and found that 53.22% of children faced one or more forms of a child abused.¹⁵

We also find that the *male child sexual abuse* is still a snub reality in India. It is yet to be understood that Child Sexual Abuse is gender neutral, it is even worse for the sexually abused male children, for they are attached with the stigma of staying strong and showcasing a false strength showcasing believes that dominates into the common Indian Households. The IPC sections 354 A, 354 B, 354 C and 354 D, dealing in sexual harassment, disrobing, stalking and voyeurism, fails to recognize men as a victim by only as perpetrators. In fact, Section 375 of IPC, which deals with the definition of rape, does not acknowledge male rape either.¹⁶ The study showing that 53.22% of children are at least once subject to such abuse also provides that the number of boys abused amounted to 52.94%. Such statistics are appalling for a country that does not still believe to consider that there still lies the fact of male rape and male sexual abuse.

¹⁴ India, National Crime Records Bureau, Ministry of Home Affairs. (2018). *Crime in India, 2016* (p. 195). Delhi: Director, NCRB.----- sir please change from foot note 1

¹⁵ Vyjayanthikanugodu Srinivasa Subramaniam et al., *Silence of male child sexual abuse in India: Qualitative analysis of barriers for seeking psychiatric help in a multidisciplinary unit in a general hospital*, 59 INDIAN JOURNAL OF PSYCHIATRY 202–207 (2017).

¹⁶ Tanya Ranjan, MALE CHILD SEXUAL ABUSE REMAINS IGNORED IN INDIA THE CITIZEN (2019), <https://www.thecitizen.in/index.php/en/newsdetail/index/7/13906/male-child-sexual-abuse-remains-ignored-in-india> (last visited Mar 2, 2019).

PART 3: THE LEGAL FRAMEWORK IN INDIA

- LAWS ENFORCEABLE IN INDIA AND ABROAD REGARDING THE CHILD RIGHTS AND ABUSE

India developed a meticulous legislation against child sexual abuse only after 2012, Goa Children's Act 2003¹⁷ was the only specific legislation that dealt in Child abuse Pre-2012 period in India. Child Sexual Abuse, however, was dealt and Prosecuted Under the India Penal Code 1860 Section 375- Rape, Section 354- Outraging modesty of Woman, Section 377- Unnatural Offences¹⁸. Post-2012 era, the New Act named Protection of Children from Sexual Offences (POSCO) Act 2012, provides a variety of offences under which an accused can be punished¹⁹. The current legislation of 2012 deals from the use and collection of pornography to various procedural reforms. One of the outstanding features of this legislation remains that the act is gender neutral.

The United Convention on the Rights of the Child is an international treaty that legally obligates the nation to protect children's rights. CRC requires the states to protect the children from all forms of sexual abuse and exploitation according to article 34 and 35 of the CRC.²⁰ As of 2015, more than 195 countries have ratified the convention, including almost every member of the United Nations.

- WHO IS A CHILD IN THE EYES OF LAW?

To elaborate upon the current situation regarding child abuse. It would be beneficial to take into account the current definition of a person to be included in the age group of children.

In India, the definition under the Protection of Children from Sexual Offences Act, 2012 regarding who is included in the umbrella of a child is section 2(d) of the act stating "any person below the age of 18 is a child."²¹

The US Supreme Court held in *Esquivel-Quintana v. Sessions*²², held that the victim in sexual abuse of a minor conviction must be less than 16 years old.

¹⁷ Goa Children Act. No.18, Acts of Parliament, 2003 (India).

¹⁸ Indian Penal Code. sec § 377, 354, 375.

¹⁹ Protection of Children from Sexual Offences Act. No.34, Acts of Parliament, 2012 (India).

²⁰ UN General Assembly, *Convention on the Rights of the Child*, Article 34 & 35, 20 November 1989, United Nations, Treaty Series, vol. 1577,

²¹ Protection of Children from Sexual Offences Act. No.34, Acts of Parliament, 2012 (India).

²² *Esquivel-Quintana v. Sessions*, 559 U. S. 133, 2, 3 (2017).

The definition under the Convention on the Rights of the Child, states under the article 1 *“As a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger. The committee on the Rights of the Child, the monitoring body for the Convention, has encouraged States to review the age of the majority if it is set below 18 and to increase the level of protection for all children under 18.”*²³

Hence, we can find conformity in the international and national statutes and reasoning for having the basic assumption of a child being of under the age of 18 years. However, UN provides the pliability of the person group to be according to the laws of the particular country to be set below the age of 18.

International precedents from the South African Case law of Daniel Johannes Stephanus Van Der Bank v The State (2008)²⁴, involving a case of a rape victim of 19 year old women who had the mental age of 8.5 years, facing cerebral palsy, was granted by the South African court protection and justice under juvenile statutes expanding the term “age” and including the mental age of the victim along the general interpretation of the biological age. However, in Eera v. State of NCT of Delhi²⁵, the supreme court clearly held that the adult person with the mental age of a child cannot be treated as a victim under the protection of Children from Sexual Offences Act 2012.

• ISSUES DEALT BY THE JUDICIARY IN RECENT TIMES

Indian Judiciary has been actively dealing with multiple issues surrounding the offences pertaining to child sexual abuse. The Supreme Court has issued multiple guidelines and has framed many rules for the fast track settlement of disputes under POCSO act. Apart from that, the Supreme Court is actively taking note of the allied issues. The following section discusses the 4 major issues on which the Supreme Court has delivered its judgement. Further, an attempt has been made to make a sociological analysis of the same.

1) FAST TRACK COURTS AND PENDENCY OF CASES

As dealt in earlier cases, regarding the secrecy of identity of Children victims seeking aid under the POCSO Act 2012. In the case Alakh Alok Srivastava Vs. Union of India & Ors.²⁶ then CJI

²³UN General Assembly, *Convention on the Rights of the Child*, Article 1, 20 November 1989, United Nations, Treaty Series, vol. 1577.

²⁴Daniel Johannes Stephanus Van Der Bank v The State, A498/2008 (High Court Of South Africa; December 19, 2014).

²⁵Eera v. state of NCT of Delhi, 2017 SCC OnLine SC 293 (Supreme Court of India; July 21, 2017).

²⁶Alakh Alok Srivastava V. Union of India, 2018 SCC OnLine SC 211 (Supreme Court of India; March 12, 2018).

Dipak Mishra headed the bench in the writ petition for speedy trial of the POCSO cases, a viable solution that the court arrived was the establishment of special courts that would be guided by individual state high courts and would be bound to follow certain guidelines that the supreme court states in the case further. The petitioner reported that *“the rate of pendency as high as 89% to 95%, although section 35 of the Act envisages the conclusion of trial within one year from the date of cognizance.”*²⁷

Understanding the procedure of the special court, the guide directs the court to fast track the cases by not granting unnecessary adjournments and complete the trial in a timebound manner, provide adequate and child-friendly atmosphere to remain in the court keeping in view the POSCO Act. All these points considers the basic innocence and tender mental capacity of the child to face these trials. Further, the trials conducted by the presiding officers in the matter of psychological response include multiple things such as not allowing the advocates of the accused by the magistrate at the time of recording the statement of witness’s u/s § 164 of Cr.P.C.²⁸

2) NECESSARY MEASURES NEED TO BE TAKEN DURING THE PROCEEDING OF CASES

There are certain necessary steps to be taken for creating a comfortable atmosphere for the child while recording the evidence of abused child, there should be guidance of experts or persons having knowledge about child welfare, it is the duty of the special court to permit frequent breaks to the child during to the trial and to create friendly environment by allowing a family member or a guardian or a friend or relative in whom the child has trust or finds confidence in, to remain present during the recording of evidence²⁹.

3) THE HISTORIC STRIKING DOWN OF EXCEPTION 2 TO § 375 OF IPC

The Hon. Supreme court of India in Independent Thought v. Union of India³⁰ dealt with the contradictory provisions of Indian Penal Code³¹ and Protection of Children from Sexual Offences.³² The exception 2 to the § 375 of the IPC which allows a male to have sexual intercourse with his wife provided that his wife is not below the age of 15. Contrary to that the

²⁷ Jain, M. (2018, May 01). Child Rapes: SC Issues Directions For The Better Implementation Of POCSO Act. Retrieved March 15, 2019, from <https://www.livelaw.in/child-rapes-sc-issues-directions-for-the-better-implementation-of-pocso-act/>

²⁸ Criminal Procedure Code, § 164 (1973).

²⁹ Shekar, M. C. (n.d.). Salient features in investigation, prosecution and trial of cases under Pocso Act - 2012 [pdf].

³⁰ Independent Thought v. Union of India (2017) 10 SCC 800 (Supreme Court of India; October 11, 2017).

³¹ Indian Penal Code, § 375(2) (1860).

³² Protection of Children from Sexual Offences, § 5(n) (2012).

§ 5(n) criminalises sexual intercourse with a child by any of the blood relatives of the child or a person living with the child in the same household. For the purpose of the Pocso Act, 2012 the child is a person who is below the age of 18 years.³³ The Supreme Court while examining the said writ petition struck down the exception 2 to the § 375 of the IPC terming it as unconstitutional and violative of Human Rights.

Supreme Court held that under article 34 of the Convention on Child Rights³⁴ the Govt of India was bound to undertake all national measures to prevent the coercion of a child to engage in any sexual activity. Further, the Supreme Court also held that the dichotomy between POCSO Act and IPC was not in the spirit of Article 34 of the CRC. The court firmly opined that the exception 2 to the § 375 of the IPC was violative of the Articles 14,15 and 21 of the Indian Constitution and the spirit of the POSCO act. Having said so the Hon. court ordered striking down of the exception 2 to the § 375 of the IPC.

The Supreme Court decision is highly appreciable because it provides protection against sexual offences to the girl child of the age 15-18 years. The decision has been welcomed across forums in India. But its implementation still remains a challenge in a vast and diverse country like India. It is pertinent to note that the marriage of a girl below the age of 18 in India is completely illegal and is a punishable offence. This is not something contemporary but has been in practice for decades. However, there are still some communities and rural areas in India who choose to either ignore the law or they are not aware of it. In most cases when a law is deliberately ignored there is a contradictory custom which is favoured by the masses. It is, therefore, reasonable to opine that when a custom says 'sexual intercourse with a wife, even though she is below the age of 18, is not contrary to morals', the community may choose to ignore the law. And as discussed earlier, mostly offences against children are not reported. So, what needs to be thought upon is how we would prevent the Supreme Court's decision from becoming just a mere theoretical framework without any substantial practical implementation.

4) IDENTITY ISSUES IN THE CASES OF SEXUAL ABUSE AGAINST CHILDREN

Maintaining the name of the victim confidential in the cases of child sexual abuse is exceedingly important. If the identity of the child gets revealed then he becomes a symbol of disgrace in the society. The society in India still sees it as a taboo. People need to understand

³³ Protection of Children from Sexual Offences Act, 2012, § 2(d), No.34, Acts of Parliament, 2012 (India).

³⁴ UN General Assembly, *Convention on the Rights of the Child*, Article 34, 20 November 1989, United Nations, Treaty Series, vol. 1577.

that a child is not in conflict with the law but he is a victim of an offence. A child may not be able to withstand the social ostracization and mental harassment undertaken by society and may succumb to the societal pressure ending his life.

The courts in India have understood these complications and hence formulated a law prohibiting the revelation victim's identity in the cases of sexual abuse against children falling under the aegis of POCSO. The Hon. Supreme Court of India in a very recent case of *Nipun Saxena v. Union of India*³⁵ recognised the need for providing extra protection to the child victims in the case of sexual assault/abuse. The Division Bench went on to say that reporting of such cases by the media did garner TRPs but does no credit to the credibility of the media. The court laid down that disclosing the name of the child's village, name, address, school or other particulars which may lead to the identification of the child are in conflict with the §23(2) of the POCSO³⁶ Act. The court affirmed with consensus the judgement of the Calcutta High Court in *Bijoy v. State of W.B.*³⁷ where it was held that neither during the trial nor investigation the name of the victim should be disclosed. It also asked the High Courts of other states to implement the directions of the Calcutta High Court in the aforementioned case.

However, its implementation has still remained on paper. It is the inefficiency of the public administration which has led to the revelation of the identity of the victims in many cases. The society also sometimes becomes inhumane in its conduct when it treats the victim and the family as inferior. They are excluded from society. It is inevitable for the society to change and sympathise the victim and his/her family.

5) LIBERAL APPROACH OF THE COURTS TOWARDS THE ACCUSED

The Hon. Supreme Court in a very recent judgement of *Nand Kishore v. State of M.P.*³⁸ granted relief to the accused who sexually abused an 8-year-old girl by converting his death sentence into a lifer. The victim was subjected to extreme cruelty and brutality to the extent of cutting down her head and legs by the accused. In yet another case which took place in Madhya Pradesh³⁹ in 2014, the Supreme Court took a similar stand and reduced the sentence of the accused. The Hon. Court arrived at the decision considering the doctrine of 'rarest of the rare' cases and the penal provisions which existed during that time.

³⁵ *Nipun Saxena v. Union of India*, 2018 SCC OnLine SC 2772.

³⁶ Protection of Children from Sexual Offences Act, § 23(2), No. 34, Acts of Parliament, 2012 (India).

³⁷ *Bijoy v. State of W.B.*, 2017 SCC OnLine Cal 417.

³⁸ *Nand Kishore v. State of M.P.*, 2019 SCC OnLine SC 43.

³⁹ *Vijay Raikwar v. State of M.P.*, 2019 SCC OnLine SC 198.

A significant increase in sexual offences against children warranted for a reconsideration of the ‘rarest of the rare case’ doctrine and the penal provisions pertaining to sexual offences against children. After the Kathua and Unnao rape cases, an unsuccessful attempt has been made by amending the Indian Penal Code through Criminal Law (Amendment) Act, 2018. Unsuccessful because it still leaves the scope for punishing sexual abuse of girls below 12 years of age with either life imprisonment or death.⁴⁰ Hence the accused can always contend that his offence was not rarest of the rare and hence he should not be given a death sentence. The other concern is that after implementation of such law, the possibility of survival of the victim would be negatively hampered, because the aggressor would find murdering the victim more convenient rather than getting reported to be later hanged to death.

The impact of such liberal provisions can be disastrous to the victim as well as to the society at large. It is very difficult for the victim to recover from the shock if she survives the cruelty of the accused, and in such circumstances, if she gets to know that the accused is still alive, she may be disturbed. Another major flaw with the existing state of laws is the neglect towards the sexual offences against the male child. The amendment does not discuss the consequences of sexually exploiting a male child. Such loopholes in law always give way to potential criminals to commit such violent and brutal crimes. One of the major purposes of such laws is always to deter the potential criminals from indulging into such crimes but that seems to be too far to achieve in the present times.

⁴⁰ The Criminal Law (Amendment) Act, 2018, § 5, No. 35, Acts of Parliament, 2018 (India).

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