

A LEGAL RE-DEFINATION OF THE TERM PEDOPHILIA

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The term Pedophilia denotes a condition where an adult male/female desires or finds a pre-pubescent or early pubescent child sexually appealing[1]. This description makes it apparent that the aforesaid is a clinical description of a disorder which requires requisite treatment to be cured. However, the narrative surrounding pedophilia rarely if ever takes on this role. What we find is the painful and automatic association that pedophilia is believed to have with the heinous act of child sexual abuse

The persecution and stigmatization of those who suffer from this affliction and their inability to seek help regarding the same, is what I seek to reflect upon. At the same I would like to reflect upon the possible approaches that can be taken to combat this in the Indian context. The biological basis for the arousal of pedophilic elements amongst individuals has been attributed to “cross wiring”[2] in the brain’s anatomy which is responsible for controlling an individual’s desire[3]. While this idea is still relatively new, it hasn’t stopped the arisal of questions, questioning whether the underlying basis behind pedophilia is genetic. Or like other expressions of sexuality, it is entirely reliant on the individual’s choice.

The answer for the above, has often lead to skewed responses but more has often has been the former than the latter[4]. Concurrently, instead of using the term ‘sexual orientation’ to describe the condition, they have opted to use the term ‘age orientation’ The 5th edition of the DSM[5] created a distinction between paraphilias (deviant sexuality) and paraphilic disorders[6]. This distinction recognizes the former term as the scenario entailing recurrent, intense sexually arousing fantasies, sexual urges, or behaviors being experienced over a sustained period[7]. While the latter is instead recognized as the condition in which the individual acts on said urges with a non-consenting person or alternatively causes severe impairment to social, occupational, or other important areas of functioning.

This distinction is important for it lays down that merely meeting the conditions of paraphilia does not amount to it being a disorder. Instead fulfilling the latter mentioned criterion amounts to a disorder. Which begs the question: when a heterosexual man walks on the street and finds a woman to be attractive, is that wrong[8]. The obvious answer would be no, for it would be wrong on both legal and moral grounds, only if he coerced her to engage in any sexual act with him.

A similar understanding to the DSM prescribed affliction of Pedophilic disorder would do well to sensitize the approach towards individuals suffering from such an affliction. For it is one thing to possess an organic desire to do something, it is quite another to act on it. Furthermore an understanding of this problem in such a schematic manner, would in the long run, prevent acts of child sexual abuse from actually transpiring. Many countries such as certain states in the United States have legislation which are incriminatory towards them[9]. Even the realm of a psychologists/psychiatrist office is no longer safe haven for these medical officials are often instructed to report individuals showing pedophilic desires[10].

Such an act results in two outcomes, the person who suffers from the problem endures more suffering by losing out on his job, social status, personal esteem amongst other things. More importantly the stigmatic approach assigned to the “coming out” with the problem ensures that the afflicted individuals will not avail the requisite psychological help to deal with it. With this problem left unchecked, a vicious and cyclical relationship is established between Pedophilia, Child Sexual abuse and the wider public’s understanding of the understanding of the same.

The media representation through films/documentaries such as *Police* (2011) or *Capturing the Friedman’s* (2003) have made far and few efforts to understand or document the aforementioned dimension of pedophilia. The

representation of this affliction has often centered on themes such as documenting the post-facto life of the child sexual abuse victims or the officers of the law who deal with such matters as witnessed in *Police*.

Upon deeper examination of such representation, it appears as being understandably so. As defending the corner of those whose likely actions may place other's in harm's way, might justifiably generate rancor and derision. A prospect which would serve as a bane both in a creative and commercial sense. Thus the intent is not to condone the acts of one Jimmy Saville[11], or the Catholic Church sexual abuse cases in the Boston area[12] and the more recently apprehended Sunil Rastogi amongst many[13]. Instead it is to encourage the imposition of accountability on a pedophile for her/his actions and not for their orientation.

For it is often the inexplicable yet contorted relation established between the terms of pedophilia and child sexual abuse, that more often than not does more harm than good. For if the intent is to protect the children in true Foucauldian fashion, it is imperative that not only does pedophilia and child sexual abuse/ paraphilic/pedophilic disorder be distinguished on a statutory and scholarly disposition. With the former being labeled as a sexual orientation while the latter being treated as a mental disorder with accompanying set of formal sanctions attached to it.

A simultaneous requirement being the need for an equivocal change in the societal understanding of the said condition as a Sexual Orientation rather than a pre-emptive crime. For the naysayers who used medical manuals who fail to see the difference between pedophilia and pedophilic disorder, forget that homosexuality not too long ago was deemed as mental disorder in the very same context.

At this juncture it is essential to take into account the incumbent legislation present to combat child sexual abuse. While for the longest time the Indian Penal Code provisions for rape, outraging a woman's modesty and unnatural offences were the only pan national remedies to penalize Child sexual abusers[14]. With Goa being the only state having it's a specific legislation[15] to deal with Child sexual offenders.

However with the passing of the POCSO Act[16], 2012 a pan national legislation pertaining to child sexual abuse has been passed. While there have been questions posed regarding the aforesaid legislation, on the whole it has been a largely positive development. However there is an equivocal need to spread awareness amongst the masses regarding the distinction between pedophilia, the orientation and the disorder of child sexual abuse.

For this is not an attempt to provide an excuse justifying the heinous acts of individuals by showing reliance on the concept neurolaw[17]. The case law across multiple jurisdictions has on occasion recognized the genetic/cross-wiring basis behind pedophilia or the disorder component to give accompanying sentences to child sexual abusers[18]. A trajectory which I am of the opinion is not entirely suitable for the Indian context in the present scenario[19].

Instead the idea I wish to delve is to build on a support mechanism for individuals dealing with pedophilia. For, while the American Psychiatric Association might have gone back and forth on granting the nomenclature of sexual orientation to pedophilia/ paraphillia[20]. What can be inferred is that pedophilia is still looked at with a degree of derision. Deemed as a mental aberration, individuals who suffer from it would on many occasions like to rid themselves of their sexual preferences. In a bid to fit in with the normalized societal set-up, a diagnostic mechanism where they can discuss and alleviate their concerns is an essentiality of the present day and age.

In a bid to eliminate the cases of a Sunil Rastogi from rising not only is there an ardent need to for stringent legislation but an equal parts basis of policy aimed at individuals who wish to both embrace their sexual identity and not act on it or those who wish to have an outlet to "cure" it. For behaviors as enacted by individuals with a pedophilic orientation are reliant on strong biological urges, which are often difficult to temper[21]. The psychiatric burden as imposed can be difficult for individuals experiencing sexual attraction to children, for the society will prohibit them from engaging in any activity with the aforesaid. Going through such a life can prove to be a challenge for anyone. Thus making the presence of a support mechanism imperative.

In light of the aforesaid it can be stated that merely having a blanket legislation such as POSCO is not enough. An initiative aimed at providing acceptance to the orientation of a proportion of the society is equally necessary. This space to be given can come in the form of either societal acceptance of their orientation or alternatively allowing individuals the volition to deal with their orientation by rejecting it or learning how to cope with it.

Here the role of state does come into full focus. Instead of adopting the U.S system of maintaining public directories regarding sexual offenders, which can prove to be problematic[22]. It is essential for the state to statutorily define what the term pedophilia constitutes. As well as make an attempt to break its automatic association of the aforesaid with the vile act of child sexual abuse.

For this ideologue should also be aimed at media representation of pedophiles, whereby headline for cases of convicted child sexual abusers should read as the same and not be addressed as a pedophile. Forums such as *Virtuous Pedophiles*[23] or alternatively similar platforms could be encouraged as providing a support mechanism to pedophiles. For approaches such as cognitive behavioral therapy alongside medication can provide the requisite help in managing the previously spoken of urges

Additionally even in the case of convicted child sexual abusers, alongside the jail sentence, there should be a provision of providing psychological help. For if the intent behind Criminal law is deterrence, prevention, treatment, and retribution, then there is no better way to bring it into practice. As the intent behind justice is not to merely punish a particular instance but also prevent a recurrence of the same. Finally an approach such as this also takes into account the understanding of Child sexual abuse as a “disorder”, thus allowing for the penal provisions to run concurrently with the ideologue of mental health.

While these may appear as being small alterations, however in order to acknowledge Pedophilia as a sexual orientation that can be distinguished from a criminal mindset and simultaneously preventing the cases of the likes of Sunil Rastogi to rise in the future, a reflection by the state mechanism is needed. Suggestions such as the aforesaid can only be the beginning of a renewed attempt by our society at large to deal with the issue of pedophilia.

[1]As defined in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5)

[2] A research team at the Center for Mental Health and Addiction has tried to explain this “cross wiring” by stating that seeing a child sets off the same neural response that men typically experience around an attractive woman. Alan Zarembo, *Many researchers taking a different view of pedophilia*, LOS ANGELES TIMES(Jan.14, 2013), <http://articles.latimes.com/2013/jan/14/local/la-me-pedophiles-20130115>

[3] Steven Rosenfeld, *Are some men born pedophiles? new science says yes, but sexologists say not so fast*, ALTERNET (Feb. 21, 2013), <http://www.alternet.org/are-some-men-born-pedophiles-new-science-says-yes-sexologists-say-not-so-fast>

Jefferey M. Burns & Russell H. Swedlow, *Right Orbitofrontal Tumor With Pedophilia Symptom and Constructional Apraxia Sign*, 60 *Arch Neurol.* 437–440 (2003)

Burns and Swedlow tried to assert this using the case of a 40 year old man who developed an overnight interest in child pornography and sexually molested his daughter. They discuss their hypothesis by relying on the orbitofrontal cortex playing a role in impulse control

[4] Fred. S. Berlin, *Pedophilia and DSM-5: The Importance of Clearly Defining the Nature of a Pedophilic Disorder*,42, *J Am Acad Psychiatry Law*,404,404-07, 2014

[5]. As used by Clinicians the *Diagnostic and Statistical Manual of Mental Disorders* as published by the American Psychiatric Association provides for the definite basis for classification of disorders.

[6] Caleb Lack, *PARAPHILIAS TO PARAPHILIC DISORDERS: CHANGES IN THE DSM-5*, Skeptic (Nov. 15, 2013), <http://www.skepticink.com/gps/2013/11/15/paraphilias-to-paraphilic-disorders-changes-in-the-dsm-5/>

[7] A bare minimum of 6 months

[8] The question can be reversed and posited in the form of a heterosexual woman, but taking into account the legal understanding of the term Rape in India, the example of the male has been used.

[9] The Americans With Disabilities Act, 1990 42 U.S.C. §§ 12101–12213 (2012) & §504 of the Rehabilitation Act although provide protection to individuals who might suffer discrimination owing to their mental disabilities. However these legislation explicitly exclude pedophilia from said discussion. Margo Kaplan, *Pedophilia: A disorder not a crime*, THE NEW YORK TIMES(Oct. 5, 2014), <https://www.nytimes.com/2014/10/06/opinion/pedophilia-a-disorder-not-a-crime.html>

Even the multiple registries for sexual offenders in the United States are one which border on excessiveness as enacted under the Megan Law (with its variants in different states). The classification of sexual offenders under Tier I of said legislations appears to be ambiguous and thus very broad to include any individual exhibiting pedophilic orientation.

[10] *Gross v. Myers* 748 P. 2d 459, the case contended with the issue whether under the Montana Code [41-3-201(1), MCA (1985)] an individual running a therapy group was supposed to report confidential information to state authorities under the aforesaid mandate.

CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2014), http://www.childwelfare.gov/systemwide/laws_policies/statutes/mandatory.pdf; Hall & Hall, supra note 28, at 467, 468

[11]Terrence McCoy, *How BBC star Jimmy Savile allegedly got away with abusing 500 children and sex with dead bodies*, The Washington Post(June. 27, 2014), <https://www.google.co.in/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=jimmy%20savile%20pedophile>

[12]Matt Rocheleau, *Database of accused clergy in Boston Archdiocese*, Boston Globe (Nov. 6, 2015),

<https://www.bostonglobe.com/metro/2015/11/06/least-clergy-have-been-accused-child-sex-abuse-boston-archdiocese/5cKpjVOPhEh7IYnCWqJl/story.html>

[13] Aadil Ikram Zaki, *Serial rapist, wanted for 13 years, arrested in Delhi; pedophile admits he sexually assaulted 500 girls*, INDIA (Jan.16, 2017), <http://www.india.com/news/india/serial-rapist-arrested-in-delhi-after-13-years-paedophile-admits-he-suxually-assaulted-500-girls-1761770/>

[14] Sections 375,354 &377 of the Indian Penal Code, 1860

[15] Goa Children's Act, 2003

[16] Protection of Children Against Sexual Offences Act, 2012

[17] Lawyers utilizing brain scans and neuropsychological tests to reduce the defendant's sentences, with the same being used to clear the defendant's culpability or even reduce their sentence in a myriad of criminal cases in the United States. Allowed in India to a limited capacity (polygraph tests deemed as self-incriminatory under *Selvi v. State of Karnataka* (2010) 7 SCC 263, however insanity when proven is allowed for under Section 84 of Indian Penal Code,1860). Ian Sample, *U.S. Courts see a rise in defendants blaming their brains for criminal acts*, THE GUARDIAN(Nov. 10, 2013), <https://www.theguardian.com/world/2013/nov/10/us-rise-defendants-blame-brains-crimes-neuroscience>

[18] *Kansas v. Hendricks* 521 U.S. 346 (1997). This case dealt with the constitutionality of a legislation dealing with the civil containment of convicted child sexual abusers. In the United States there appears to be clear distinction on the issue of pleading insanity as a defense for pedophilia for the definition of mental disease or defect for the

insanity statute, excludes “abnormal manifested only by criminal or otherwise antisocial conduct. American Bar Association, *Sexually Violent Predators; Sexual Offenders*, 34, Ment Phys Disabil Law Rep., 413, 420 (2010)

[19] As civil containment legislations can raise multiple issues pertaining to erosion of Fundamental Rights. More so thus rein country such as India, where the rights of Individuals very strongly entrenched.

Margo Kaplan, *Taking Pedophilia Seriously*, 72, Wash. & Lee L. Rev, 75, 138-39 (2015)

[20] Cheryl Wetzstein, *APA to correct manual: Pedophilia is not a ‘sexual orientation’*, THE WASHINGTON TIMES (Oct. 31, 2013), <http://www.washingtontimes.com/news/2013/oct/31/apa-correct-manual-clarification-pedophilia-not-se/>

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[21] Fred. S. Berlin, *Pedophilia and DSM-5: The Importance of Clearly Defining the Nature of a Pedophilic Disorder*, 42, J Am Acad Psychiatry Law, 404, 404-07, 2014

[22] For in scenarios such as this the deficiencies of the POSCO Act can come to fruition, as cases of consensual intercourse between minors or consensual sexual intercourse between a minor and major can lead to the latter being penalized under the aforesaid act. While legislators in the United States have created certain “Romeo & Juliet” exceptions for circumstances such as these. However an applicability of the same happening appears questionable if the registry concept (as established under *Megan’s Law*) is adopted in India. Instead the present legislation should take into account such problems and keep an expansive outlook in order to prevent miscarriage of justice.

While simultaneously it essential to take into account that there is no evidence which suggests that maintaining public records of sexual offenders necessarily amounts to a good control mechanism.

No Easy Answers-Sex Offender Laws in the US, HUMAN RIGHTS WATCH(Sep.11, 2007), <https://www.hrw.org/report/2007/09/11/no-easy-answers/sex-offender-laws-us>

[23] <http://www.virped.org/>