

# **‘AGE’ OF THE PROSECUTRIX: AN AGGRAVATING FACTOR IN THE PUNISHMENT OF SEXUAL OFFENCES**

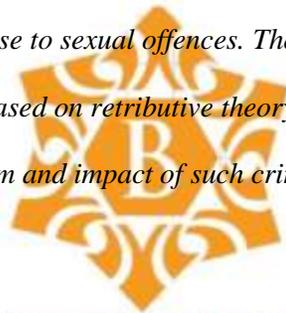
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## **ABSTRACT**

*This article engages with the weightage of ‘age’ of the prosecutrix while punishing the offender by the criminal justice system of India in response to sexual offences. The author(s) demonstrates the need of the hour on the importance of stricter laws based on retributive theory on crimes against minors by analyzing the existing laws in the Indian legal system and impact of such crimes on minors.*



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## INTRODUCTION

Violence affects the lives of millions of women worldwide, in all socio-economic and educational classes. Violence against women takes a **dismaying** variety of forms, from domestic abuse, rape to child marriages and female circumcision. The **purpose** of the law is to deliver justice to the prosecutrix and the society, to **establish** faith amongst the people towards law. The law should, in turn, create fear in the minds of potential offenders to ensure safety in society.

Even after protests and activism over and over again minor girls and women are being subjected to sexual offenses. In such cases where the victim is a minor, her consent is considered statutorily and judicially of no value altogether. Child Sexual Abuse (CSA) is a pressing human rights issue and public health concern. A systemic review of literature databases by few scholars of articles on Child Sexual Abuse in India conducted between 2006-2016 found that it is highly prevalent with 4-41% of girls in school and college samples have experienced one form of CSA (contact, non-contact or forced).<sup>[1]</sup> According to the data released by the National Crime Record Bureau, as many as 109 children were sexually abused every-day in the year 2018. Similarly, India saw a hike in the number of cases registered under the POCSO (Protection of Children from Sexual Offences) Act in 2018. According to the NCRB Data, 39,827 cases were reported in 2018 under the Protection of Children from Sexual Offences Act (POCSO), among which were 21,605 child rapes, which included 21,401 rapes of girls and 204 boys. <sup>[2]</sup>

Crimes against children include physical and emotional abuse, neglect, and exploitation, such as through child pornography or sex trafficking of minors, etc. Indian Penal Code and the various

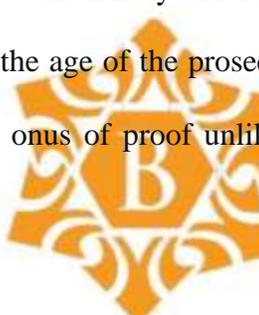
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<sup>1</sup> Vikas Choudhry et al., *Child sexual abuse in India: A systematic review.*, 13. PLoS ONE 1, 12-13 (2018)

<sup>2</sup> Anushika Srivastava, *109 Children Sexually Abused Every day in 2018 in India*, SHETHEPEOPLE,( Jan. 15, 2020, 9:15 PM ), <https://www.shethepeople.tv/news/sexual-abuse-children-2018-report/#:~:text=According%20to%20the%20data%2C%2032%2C608,of%20boys%2C%20the%20data%20showed.>

protective and preventive special and local laws specially mention the offenses wherein children are victims. The age of the child varies as per the definition given in the Juvenile Justice (Care and Protection of Children) Act, 2000 Amended.<sup>[3]</sup>

Therefore, an offense committed on a victim under the age of 18 years is considered a crime against children for analysis in this paper. Juvenile crime is like a disease in our society and when the prosecutrix is a minor it paves the way to an entirely different class of offenses. To make aware of the gravity of the offense committed, the age of the prosecutrix should be an aggravating factor while punishing sexual offenses. The onus of proof unlike commonly practiced passes on the accused rather than on the prosecutrix.



**LEGISLATIVE BACKGROUND: ACKNOWLEDGEMENT OF 'AGE' OF  
THE PROSECUTRIX AS AN AGGRAVATING FACTOR BY INDIAN  
LEGAL SYSTEM**

The Criminal Law (Amendment) Act, 1983 introduced the concept of aggravated rape which included custodial rape,<sup>[4]</sup> rape of women knowing her to be pregnant, in the Indian Penal Code

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<sup>3</sup> Shri. Akhilesh Kumar et al., *Crimes in India*, NATIONAL CRIMESRECORDS BUREAU (2015, 9:27 P.M), <https://ncrb.gov.in/sites/default/files/Compendium--15.11.16.pdf>

<sup>4</sup> IPC, s. 376 (2) Whoever, -

- (a) being a police officer, commits rape-
  - (i) within the limits of the police station to which such police officer is appointed; or
  - (ii) in the premises of any station house; or
  - (iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or
- (b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(IPC). Section 375 of the IPC defines rape and section 376 states the punishment for the same.<sup>[5]</sup>

Section 376 (3) of the Act states:

*“Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine”*

Section 376 (2) of the IPC constitutes the offense of Gang Rape. When one or more persons acting in furtherance of their common intention rape a woman. The minimum punishment for this offense is 10 years, but it can be extended to life imprisonment.

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Section 7 of the sexual offenses act, 2003 punishes an offender committing sexual assault on a child under 13 years of age with a maximum of 14 years of custody. The 2003 Act also provides that the age of consent is 16. Section 9-13 clarifies that any sexual activity involving consenting

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(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution.

<sup>5</sup> IPC s. 376(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which [shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.]

children under 16 is unlawful. Section 9-12 covers adult defendants and section 13 refers to child defendants.<sup>[6]</sup>

The maximum sentence for indecent assault on a woman under section 12 increases from 2 years to 5 years if the victim is under 13 and her age is stated on the indictment under the Sexual Offences Act, 1956.

In section 1 Indecency with Children Act, 1960 the word indecency was amended to a child less than 16 years of age previously under 14 years.

The Parliament passed the Protection of Children against Sexual offenses Act, 2012 (POCSO) to protect children from offenses of sexual assault, sexual harassment, and pornography against persons below the age of 18 years.  BURNISHED LAW JOURNAL

The Criminal law (Amendment) Act 2013 was made where offenders if under the age of 16-18 performs gruesome and violent murders and rapes would be tried and punished as an adult.<sup>[7]</sup>

India has also ratified the United Nations Convention on Rights to Children, it assumes the obligation to protect children which were fulfilled when POCSO was passed in 2012. Articles 15 and 39 of the Constitution allow and encourage the formulation of special legislation interest of

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<sup>6</sup> The Crown Prosecution Service, *Rape and Sexual Offences – Chapter 7: Key Legislation and Offences*, THE CROWN PROSECUTION SERVICE ( Oct. 19, 2020, 9:40 P.M), <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-7-key-legislation-and-offences>

<sup>7</sup> The Criminal (Amendment) Act, 2013, No. 13 (India)

children.<sup>[8]</sup> Thus, Indian Law has considered the age of ‘the prosecutrix’ as an aggravating factor while drafting and amending the necessary laws and punishment.

## **SENTENCING SEXUAL OFFENDER: RETRIBUTIVE JUSTICE VS. RESTORATIVE JUSTICE**

In India’s patriarchal society, the lives and dignity of women are under constant threat. In the last six months, i.e., between January 1, 2019, and June 30, 2019, 24, 212 cases of child abuse have been registered in India, which means 4000 cases in a month, 130 in a day, and one in every five minutes.<sup>[9]</sup> The victim of different age groups is differently affected by sexual harassment. There should be a strong deterrent for the society imposed by the law of land. Public calls for death penalty when heinous crimes are committed for employing continuous and consistent deterrent in our society. It is believed that rape is a tool of patriarchy as an act of violence. <sup>[10]</sup> The retributive theory of justice suggests that the severity of the punishment should be proportional to the seriousness of the crime. <sup>[11]</sup> The General Comment No. 10 under Point 71 of the Convention on the Rights of the Child states that the punishment for an offense should be in proportion not only to the circumstances and the gravity of the offense along with the age, circumstances, and needs of the child along with society. Retribution is based on the concept of *lex talionis*, i.e., the law of retaliation. There are also restorative approaches in reducing the risk of reoffending like sex

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<sup>8</sup> The Protection of Children from Sexual Offences Act, 2012

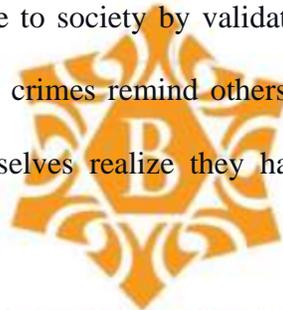
<sup>9</sup> Nandini Priya, *Is India Doing Enough To Tackle the Rising Number of Child Rapes?* YOUTH KI AWAAZ ( Jul. 29, 2019, 9:48 PM), <https://www.youthkiawaaz.com/2019/07/every-5-minutes-a-rape-incident-was-registered/>.

<sup>10</sup> Aisha K Gill et al., *Sentencing Sex Offenders in India: Retributive Justice versus Sex-offender Treatment Programmes and Restorative Justice approaches*, 8 (2) IJCJS, 166-181 (2013)

<sup>11</sup> Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 (11) THE JOURNAL OF PHILOSOPHY, 601–620 (1978)

offender treatment programs and restorative justice approaches. Restorative approaches are considered different as it has no set model on how reintegration is to be achieved and it prioritizes the process of reintegration of the offender into the society than shaming the offender. [12] Therefore, the punishment faced by the offender must also be different based on cases.

Punishing offenders helps in restoring balance in society and it satisfies society's need or desire for justice. Offenders have exploited society's benefits and have thus gained an improper and unethical advantage over their law-abiding counterparts. Retributive punishment removes this advantage and tries to restore balance to society by validating how individuals ought to act in society. Punishing criminals for their crimes remind others in society that such conduct is not appropriate, and the offenders themselves realize they have done wrong and deserve to be punished.[13]



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But the pertinent question is, *should the age of the victim be an aggravating factor while punishing the offender?*

The age of the prosecutrix is an important factor in broadcasting the fearless acts and behavior of the perpetrators despite the proposed death penalty as a punishment for the sexual offense on a minor. It is because India is a country reluctant to carry out death sentences. *A poor police investigation* is also one of the common reasons why criminals do not get punished in many cases.

The *conviction rate is as low* as 27.8%. This means out of 100 accused, only 28 gets convicted.[14]

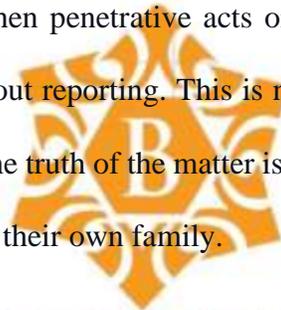
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<sup>12</sup>Aisha K Gill et al., *Sentencing Sex Offenders in India: Retributive Justice versus Sex-offender Treatment Programmes and Restorative Justice approaches*, 8 (2) IJCJS, 166-181 (2013)

<sup>13</sup> Arun Bothra, *Why is our conviction rate so low?* *The New Indian Express*, Feb 21, 2019.

<sup>14</sup> *Ibid.*

The minor victims of sexual offenses go through a *major trauma*. An individual 17 years of age or younger will not be considered to be legally matured enough to give their consent to participate in any kind of sexual activity. But there is a need for a change in the functioning of the criminal justice system when dealing with a special law meant to protect children.<sup>[15]</sup> For children, it is even more difficult to speak out and share as very few have the vocabulary to describe what has happened to them. Besides shame, *fear remains a major factor*. More often than not the abuser is a known person, whom the child trusts and even loves. The *normalization of abuse in society* has become so endemic.<sup>[16]</sup> That only when penetrative acts or bodily hurt and injury occurs then people pay attention or even think about reporting. This is not only the case of a community but also the police and such institution. The truth of the matter is that the most vulnerable children are even unsafe in their own homes, from their own family.



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53% of children in India have faced sexual abuse and the perpetrator mostly has been among close family, neighbors, or any person in authority. Flavia Agnes, lawyer, activist, and founder of Majlis, pointed out “In the 241 FIRs filed in Mumbai between March 2014 and 2015 12% cases involved rapes by fathers and stepfathers, while rapes by strangers in public places were 3%.”<sup>[17]</sup>

*Children are sexually abused and raped in the safest places*, by the people they trust the most, which impacts their whole life. The incident leaves its mark in the form of severe and long-term psychological consequences such as depression, suicidal tendencies, sexual dysfunction, self-

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<sup>15</sup> UrmiChudgar et. al, *Issues under the POCSO Act, 4HAQ: Centre for Child Rights* (2019)

<sup>16</sup> Dr Ninawa Butrus, *Judicial sentencing considerations in cases of violent offenders versus sexual offenders* 25 PSYCHIATR PSYCOLLAW 653-674 (2018).

<sup>17</sup> Flavia Agnes, *Parental Rape: Breaking the silence*, DECC. CHRONICLE, Jul 31, 2015.

mutilation, chronic anxiety, post-traumatic stress disorder, dissociation, memory impairment, and somatization.<sup>[18]</sup> Children who face sexual abuse are 35 times more likely to be *re-victimized later in life*.<sup>[19]</sup> When someone faces sexual abuse at a young age, they are unable to comprehend the gravity of the situation and often can be manipulated to indulge in self-blaming.<sup>[20]</sup> Sexually abused children are also more likely to engage in substance abuse to fill the void and ultimately they get caught up in that vicious circle of getting abused.<sup>[21]</sup> Children are much more affected by sexual abuse than adults. Therefore, the state must develop stricter laws to establish a deterrent to discourage people from committing such heinous crimes.

## CONCLUSION

It is well established that the younger minds are more severely impacted by instances of sexual abuse than adults. Moreover, children lack the knowledge about the kind of sexual abuse as can be seen in an incident recounted by Flavia Agnes where she says how a 13-year-old girl after a counseling session on sexual abuse in her school, wrote to her class teacher to tell her that her father has been raping her for six years since she was seven, and her mother was not helping. Given the heinous nature of the crime, the age of the victim becomes an aggravating factor to understand the depth of the offense which is committed by the offender regardless he is a juvenile or an adult while sentencing the accused. To increase deterrent in our society it is crucial for considering 'age' as an aggravating factor while punishing the offender. As, it states the heinous nature of the crime

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<sup>18</sup> KaytSukel, *Childhood Trauma Leaves Lasting Marks on the Brain*, DANA FOUNDATION (Oct. 24, 2011, 10:06 PM), <https://dana.org/article/childhood-trauma-leaves-lasting-marks-on-the-brain/>.

<sup>19</sup> Natalia D. Tapia, *Survivors of Child Sexual Abuse and Predictors of Adult Re-victimization in the United States: A Forward Logistic Regression Analysis*, 9 (1) IJCJS, 64-73 (2014)

<sup>20</sup> Sarh E. Ulluman et al., *Coping, Emotion Regulation, and Self-Blame as Mediators of Sexual Abuse and Psychological Symptoms in Adult Sexual Assault*, 23 (1) J CHILD SEX ABUS, 74-93 (2014)

<sup>21</sup> Ibid.

and points towards the gravity of the crime committed by the offender. Thereby, justifying in taking necessary retributive measures. It than lead to framing stricter and stronger the laws to curb and reduce sexual offences on minors. 'Age' of the prosecutrix should be an aggravating factor while shaping and influencing court's responses as not only guilty plea rate falls when age is not considered an important factor, but many cases are unreported and it may affect the community's attitude towards sexual offences. The protection of the minor from the hardship during the justice process should be established once it is well known that the child is a minor according to the act and proceed in leading her and her family towards justice. There are no doubt other factors that will impose significant barriers to successful prosecution in many cases but safeguarding the minors and reducing the risk is the main aim why such laws are formed at the first place. Placing 'age' of the prosecutrix as an aggravating factor at the top while punishing the offender will be towards the betterment of the society. Not only should the government by taking preventive measures and increase awareness but it should also bring in reforms in the legislative space by increasing the severity of punishments making it unthinkable to commit an offense against innocent children.

