

# Sexual Abuse against Male Children and the Related National Practices and International Legal Obligation of Nepal

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## Abstract

*Nepal has aimed to prevent and protect children from all forms of violence, abuse, and exploitation by adopting a broad range of national laws, rules, regulations, and policies along with the international legal commitments. However, these rights are frequently violated. Sexual abuse against male children and pedophilia are rising issues of child sexual abuse that have remained a hidden phenomenon over the years. This paper is thus an endeavor to study the sexual abuse against male children via the pedophilic character of offenders in the context of Nepal. By adopting key informant interview methods, assessing national and international legal practices, and collecting information from the secondary sources; this paper examines the relationship among child sexual abuse and pedophilia, the sociological aspects of male child sexual victimization, and the modus operandi to cause abuse. In addition, this research delves into analyzing Nepal's existing legal commitments to address sexual abuse in the international arena and the legal challenges Nepal is explicitly facing in addressing male child sexual abuse via pedophilia. The paper assesses the roles of various stakeholders in standing together to vigorously address this issue.*

**Keywords:** *Child Sexual Abuse, Victimization, Pedophilia, prepubescent, modus operandi, masculinity, unnatural sex.*

## I. Introduction

Sex, sexual behavior, or a tendency towards it is a natural phenomenon. Those sexual behaviors and urges are associated with biological composition, hormonal functions, and most importantly the plethora of environmental and social aspects that have affected our lives. However, sexual thoughts and related activities become problematic when it leads to the involvement of an unwilling participant<sup>1</sup> and when the sexual

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<sup>1</sup> Edward L. Rowan, M.D., *Understanding Child Sexual Abuse*, University Press of Mississippi, USA, 1st Edition, 2006, pp. 3-4.

relation between the participants is considered fundamentally wrong. Unwanted sexual contact with an unwilling person is commonly described as sexual assault, a crime that transcends gender boundaries.

Child Sexual Abuse (CSA) involves two basic elements: compassionate behavior and an intentional element mixed with it. Sexual abuse might involve harassment as well as intercourse. On the other hand, pedophilia is a part or manifestation of behavioral, cognitive, and emotional abnormality. The result of the abnormalities and anomalies in the three areas is seen in their mental inability to cognize the right and the wrong. As per the facts, laws, and cases discussed it is seen that CSA, mostly the victimization of male children, is a result of the pedophilic characters of the offenders because of their abnormalities in cognition. Since the abuse involves an adult and a child or the age gap between the victim and offender has to be at least 5 years, there is a certain idea of fundamental wrongfulness of the sex with a child.

When child sexual abuse is discussed, the mental shortcut that is often followed makes one believe that it is a crime that has a female victim. But this is not the only situation. Male child sexual abuse is still an issue not well addressed because of a series of societal and legal constraints. Pedophilia is also an issue having a greater connection with the child sexual abuse. Therefore, there is a need to explore male child sexual abuse, mostly via the influence of pedophilic characteristics and the gray area of the law in the context of Nepal to address the issue. This paper thus endeavors to explore the key issues relevant to male child sexual abuse in relation to pedophilia.

## II. Understanding Child Sexual Abuse and Pedophilia

Child abuse is defined as any intentionally harmful action(s) carried out on a child under the age of 18 by either an adult or another child.<sup>2</sup> This definition includes all sorts and forms of physical and emotional abuse that impair a child's "health, survival, growth, or dignity in the context of a relationship of duty, trust, or power."<sup>3</sup>

CSA<sup>4</sup> is one of the forms of child abuse. It occurs when an adult or older adolescent uses a child for sexual arousal or intercourse. This may be caused by pedophilia, but it is not the only reason as CSA via the pedophilic character is one of the subsets of various

<sup>2</sup> Vanessa Cezarita Cordeiro, 'Child Abuse', *Humanium.org*, Geneva, 25 June 2021, available at <https://www.humanium.org/en/abuse/>, accessed on 13 May 2022.

<sup>3</sup> 'Violence Against Children', *World Health Organization*, available at [https://www.who.int/healthtopics/violence-against-children#tab=tab\\_2](https://www.who.int/healthtopics/violence-against-children#tab=tab_2), accessed on 13 May 2022.

<sup>4</sup> Child Sexual Abuse involves basically two things;

Sexual activity with a minor who has not achieved the legal age for sexual activity under national law.

Conducting sexual activities with child by the use of coercion, force or threats, undue influence of any kinds such as influence made on the basis of recognized position in certain business or any authority and the abuse made of children in the vulnerable position; mental or physical handicap or a dependency situation. John Frederick, 'Sexual Abuse and Exploitation of Boys in South Asia: A Review of Research Findings, Legislation, Policy and Program Responses', *Innocenti Working Paper no. 2010-02*, United Nations International Children's Emergency Fund (UNICEF), 2010, p. 3 available at [https://www.unicef-irc.org/publications/pdf/iwp\\_2010\\_02.pdf](https://www.unicef-irc.org/publications/pdf/iwp_2010_02.pdf), accessed on 15 May 2022.

other causes of CSA. Compassionate behavior mixed with the intention to cause abuse against the child sexually refers to the CSA<sup>5</sup>.

*Pedophilia* is derived from the Greek words for love (*philia*) of young children (*pedeiktos*).<sup>6</sup> This word is typically defined as a recurrent sexual interest in prepubescent children, reflected in persistent thoughts, fantasies, urges, sexual arousal, and behavior under "deviant"<sup>7</sup> circumstances.<sup>8</sup> It<sup>9</sup> is a mental disorder caused via various factors such as bio-psycho-social factors, personality type; anti-social, impulsive, and sadist traits might be influenced by the fantasies expressed in the movies, media, and the rest.<sup>10</sup> Questions as to why they develop sexual feelings for children might be because of their intimacy deficits, being victimized by sexual abuse in the past, personality crisis, cognitive distortion, and many more.<sup>11</sup> Pedophiles behave normally but their abnormality cannot be accessed unless and until they commit such crime. This purports that pedophilia is an attraction and not an action and when the pedophilic tendency comes into action, the CSA is perpetrated.<sup>12</sup> This is to say, the covert desire does not amount to criminal liability while the overt expression (intention and the act commission) results in the CSA.<sup>13</sup> Psychologists say that usually, the age difference between the perpetrator and victim has to be 5 years to access the pedophilic character.<sup>14</sup>

### III. Sociology of Male Child Sexual Victimization<sup>15</sup>

CSA has been a matter of immense discussion, and the cases of this are heard to have happened *de novo*. It is not a gender biased discussion but somehow research and investigation tend to focus on the sexual abuse of girls making male sexual abuse a less prioritized issue. One of the reasons behind this condition is the difficulty in disclosing the problems related to sexual abuse as men are perceived via socially constructed gender roles as being strong and non-emotional.

<sup>5</sup> Smriti Sapkota, Child Offence and Punishment Practices, Advocate Rajendra Bhattarai, Specialist in the Criminal law and Justice, 20 June 2022.

<sup>6</sup> Michael C. Seto, *Pedophilia and Sexual Offenses Against Children*, Center for Addiction and Mental Health and University of Toronto, Annual Review of Sex Research, 2004 available at [https://www.researchgate.net/publication/326564057\\_Pedophilia\\_and\\_sexual\\_offending\\_against\\_children\\_Theory\\_assessment\\_and\\_intervention\\_2nd\\_ed](https://www.researchgate.net/publication/326564057_Pedophilia_and_sexual_offending_against_children_Theory_assessment_and_intervention_2nd_ed), accessed on 12 May 2022.

<sup>7</sup> Deviant behavior refers to the nonhuman objects of desire, misery or humiliation by the person or partner, or involvement of children or other non-consenting persons and is also termed as aberrant behavior.

<sup>8</sup> Seto (n 7).

<sup>9</sup> In its most extreme form, pedophilia reflects an exclusive sexual preference for prepubescent children to adults.

<sup>10</sup> Smriti Sapkota, Child Offence and Punishment Practices, Trishna Ghosh Bista, Clinical Psychologist, Mental Hospital Lagankhel, 24 July 2022.

<sup>11</sup> Ibid.

<sup>12</sup> Alia E. Dastagir, 'The complicated research behind pedophilia', *The USA Today*, USA, 10/01/2022, available at <https://www.usatoday.com/story/life/health-wellness/2022/01/10/pedophiles-pedophilia-sexual-disorder/8768423002/>, accessed on 11 May 2022.

<sup>13</sup> Bhattarai (n 6).

<sup>14</sup> Bista (n 11).

<sup>15</sup> This refers to the state and also the process of a male child becoming the victim of certain offense.

The causes of male children being victimized are poverty and social discriminatory factors.<sup>16</sup> Because of the poverty factors, the victims get lured easily, so the abuser causes the abuse. Similarly, the perceived notions of society regarding the power functions of males, the idea of the biological impact of the sexual violence against males is lesser than that of females. The distinguished idea of masculinity, the works of NGO/INGOs and the Media highlighting the issues of female sexual abuse to males at an extreme level might be some of the reasons as to suppression of male voices regarding abuse.<sup>17</sup>

The way how "masculinity"<sup>18</sup> is socially constructed may be one of the reasons why issues of sexual abuse against men are not disclosed the way crimes against female victims are done. Strength, independence, and rationality are associated with the masculine qualities whereas fragility, passivity, and emotionalism are taken to be the feminine ones.<sup>19</sup> Masculinities can be divided into three categories: socially engrained norms<sup>20</sup>, social structure<sup>21</sup>, and law, all of which reinforce gender disparities and promote a culture of violence, including gender-based violence.<sup>22</sup>

Social customs *per se* contribute to the vulnerability of boys, as they are generally considered capable of protecting themselves and because society in general tends to deny the sexual abuse of boys.<sup>23</sup> In Nepalese society, the lesser knowledge of law has also been one of the reasons for the dominance of patriarchal stereotypes. In addition to this, the reasons why male issues on sexual abuse are suppressed due to the lack of sex education in the sufficient condition as sex is still regarded as taboo in the Nepalese society. This may explain why the sexual abuse of boys is less frequently reported than the abuse of girls, whether due to lower frequency or greater denial of the problem and statistics may not give an accurate picture of the problem.<sup>24</sup>

Moreover, one of the reasons why male sexual abuse does not significantly come out is because people have a preconceived notion that children will never be abused

<sup>16</sup> Rajit Bhakta Pradhananga, *Crimes Against Women in Nepal*, Lumbini Books, Kathmandu, 2018, p. 299.

<sup>17</sup> Smriti Sapkota, Child Offence and Punishment Practices, Padam Pd. Pandey, Deputy Attorney General of Nepal, 3 July 2022.

<sup>18</sup> Masculinity is the broad set of processes that include gender relations and gender practices between men and women and their effects in bodily experience, personality and culture. Dr. Zuleyka Zevallos, 'Sociology of Gender', *Other Sociologist*, available at <https://othersociologist.com/sociology-of-gender/>, accessed on 16 June 2022.

<sup>19</sup> Krishna K. Thapa, Raju Ghimire et.al, 'Exploring and Addressing Sexual Violence of Boys in Nepal', *Voice of Children*, 2019, Lalitpur, pp. 11-12 available at <https://changemakersforchildren.community/system/files/2021-05/Exploring%20and%20Addressing%20Sexual%20Violence%20of%20Boys%20in%20Nepal%20-%20Voice%20of%20Children.pdf>, accessed 13 May 2022.

<sup>20</sup> It is depicted in form of gender norms and based on social hierarchy created by the gender roles created in the society from the time of birth.

<sup>21</sup> The Nepali society opts the patriarchal social structure which necessitates men to become strong in compared to women.

<sup>22</sup> 'Nepali Masculinities: Gender-Based Violence', *UNDP*, 2014, Lalitpur, available at, [https://www.undp.org/content/dam/nepal/docs/projects/UNDP\\_NP\\_AVRSCS\\_nepali\\_masculinities\\_and\\_gender-based\\_violence.pdf](https://www.undp.org/content/dam/nepal/docs/projects/UNDP_NP_AVRSCS_nepali_masculinities_and_gender-based_violence.pdf), accessed on 13 May 2022.

<sup>23</sup> Frederick (n 5), p. 5.

<sup>24</sup> *Ibid.*

sexually, and for males, it is beyond the imagination of the general people.<sup>25</sup> Apart from this, from a practical approach, the cases of male CSA via pedophilia are lesser in comparison to sexual abuse of a female child, therefore resulting in lesser reporting of the cases.<sup>26</sup> Furthermore, the preconceived notion of people comes into play in the sheer reluctance to report the male CSA cases as it is presumed instantly that females are the only victims of sexual abuse of any kind.<sup>27</sup>

#### IV. Modus Operandi<sup>28</sup> of the Pedophiles to Cause Abuse

Sexual abuse is largely unreported and viewed as a private matter.<sup>29</sup> The modus operandi of the commission of such acts is determined by the offender-victim relationship either intrafamilial or extrafamilial<sup>30</sup>. The subjective analysis of the situation reveals that it occurs in all situations and is usually committed by a family member, relative, neighbor, teacher, or caretaker of the child. Male children, mostly in the streets, working as house servants, are in most cases victims of CSA via pedophilic character.<sup>31</sup>

In the context of Nepal, there are two ways in which pedophiles approach street children. First, the pedophiles directly approach any street children and second, they approach through a leader of street children who has already been a victim of sexual abuse when he was younger. Such leaders of street children mostly work as brokers for pedophiles and provide young children with a commission.<sup>32</sup>

Every child in the street is vulnerable to sexual abuse, be it from foreign pedophiles, sex tourists, locals, their own peers, or leaders. It is often observed that pedophiles who arrive from foreign countries acquire the chance to abuse street children under the veil of charity by providing them with food or medical assistance.<sup>33</sup> The child is immature on physical, mental, economic, and social grounds and thus leading them to become vulnerable. As they are vulnerable, they get manipulated easily, and thus, the

<sup>25</sup> Smriti Sapkota, Child Offence and Punishment Practices, Gyanendra Shrestha, Child Rights Consultant, National Child Rights Council, Shreemahal, Lalitpur, 20 June 2022.

<sup>26</sup> Smriti Sapkota, Child Offence and Punishment Practices, Raju Khatiwada, Chief Judge of Kathmandu District Court, 3 July 2022.

<sup>27</sup> Ibid.

<sup>28</sup> Modus operandi refers to a method of operation or pattern of criminal behavior so distinctive that separate crimes or wrongful conduct are recognized as the work of the same person. 'Modus Operandi' Cornell Law School, available at [https://www.law.cornell.edu/wex/modus\\_operandi](https://www.law.cornell.edu/wex/modus_operandi), accessed on 28 June 2022.

<sup>29</sup> 'Child Protection Mapping and Assessment Summary Report', *Ministry of Women, Children and Social Welfare and Central Child Welfare Board*, 2015, Lalitpur, p. 64, available at <https://www.unicef.org/nepal/media/751/file/Child%20Protection%20Mapping.pdf>, accessed on 14 May 2022.

<sup>30</sup> Benoit Leclerc, Jean Proulx & Eric Beaugard, 'Examining the Modus Operandi of Sexual Offenders Against Children and its Practical Implications' available at <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.890.4250&rep=rep1&type=pdf> p. 11, accessed on 20 June 2022.

<sup>31</sup> Based on interview with Dr. Ananta Prasad Adhikari, Chief Consultant Psychiatrist and Director, Mental Hospital Lagankhel on 24 June 2022.

<sup>32</sup> Ministry of Women, Children and Social Welfare and Central Child Welfare Board, 2015 (n 30).

<sup>33</sup> Govind Subedi, 'Trafficking and Sexual Abuse among Street Children in Kathmandu', *ILO International Program on the Elimination of Child Labor (IPEC)*, 2002, Kathmandu, pp. 29-30, available at <http://www.ilo.org/ipecinfo/product/download.do?type=document&id=773>, accessed on 15 May 2022.

pedophiles use the modus operandi in the form of grooming and luring children by congregating their needs.<sup>34</sup> Street children typically develop their own sense of identity, sense of justice, and survival techniques because they receive little public sympathy or government support, which puts them at a higher risk of victimization and makes it challenging for them to seek justice or a forum to file complaints if they are abused.

Therefore, pedophilia continues to be an unreported crime against children.<sup>35</sup>

## V. Situation of Pedophilia and Male Child Sexual Victimization in Nepal

Despite the legal practices, provisions, and belief that children are vulnerable and need to be protected on all grounds, victimization still persists in the society. As mentioned above, male child sexual victimization is not as expressly outspoken due to various reasons. Most of the street children and children in child centers are seen to have been victimized by these offenses.

In the case of *Nepal Government v Munna Miya Ansari (known as Gulab Miya) and Awalesh Miya*<sup>36</sup>, the modus operandi<sup>37</sup> to cause sexual abuse in the form of unnatural sexual intercourse against a 4-year-old child is explicitly reflected. Moreover, albeit the offender is a child himself/herself, the victim must be provided with financial compensation<sup>38</sup>.

The Supreme Court of Nepal in the case of *Bam Bahadur Khatri v Nepal Government* has recognized that children irrespective of gender can be victims of unnatural sexual offences/ even intercourse.<sup>39</sup> Therefore, the legal fraternity must posit the way forward to take the cases of male child sexual abuse into concern without any sort of gender bias.

In the years 2015 and 2016 (2072 and 2073 B.S.) two cases<sup>40</sup> of the pedophilia were registered in the Kathmandu Valley. In these cases, the victims were the street boys in the Thamel area. In the first case, the offender was an Arabian citizen, while in the next, it was a French Citizen. The modus operandi of both the offenders were the same as they took the boys to a guest house and committed oral and anal sexual activities along with masturbation and other unnatural activities and provided them with money, food, and clothes.

In the Fiscal year 2021/22 (2077/78 B.S.) as per the report published by the Police

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<sup>34</sup> Smriti Sapkota, Child Offence and Punishment Practices, Sapana Khadka, Inspector, Women, Children and Senior Citizen Service Center, Kalimati, 1 July 2022.

<sup>35</sup> Ibid, p. 39.

<sup>36</sup> *Nepal Government v Munna Miya Ansari (known as Gulab Miya) and Awalesh Miya*, NKP 2076 (2019), volume 1, Decision no. 10361.

<sup>37</sup> Here, the perpetrators took the 4 years old baby boy to his father's tailoring shop when he was out and closed the shutters and threatened to kill the boy if he made noise. They covered his mouth with cloth and committed unnatural sexual offence followed by rape by penetrating the penis into the boy's anus one by one.

<sup>38</sup> *Nepal Government v Munna Miya Ansari* (n 37).

<sup>39</sup> *Bam Bahadur Khatri v Nepal Government*, NKP 2075 (2018), Volume 5, Decision no. 10019.

<sup>40</sup> Khadka (n 35).

Headquarter and the WCSCSC<sup>41</sup> there was one case of rape against a male child while 1665 cases of female and with regard to CSA, there are 3 and 301 cases against male and female children.<sup>42</sup> Furthermore, there are 29 cases of unnatural intercourse against male children and 6 against female children.<sup>43</sup> This shows that unnatural sexual offenses are highly posed towards male children and are vulnerable as like of the female child regarding the same.

As per the report published by Sathi Organization, 95% of the child survivors from pedophilia from a foreign perpetrator are male and rest 5% are female<sup>44</sup> while that victimized by Nepali perpetrator consist 98% female and 2% male child survivors<sup>45</sup>. This shows that pedophilia has been influenced by western culture in the context of Nepal.<sup>46</sup> In addition, most of the foreign perpetrators are Europeans, followed by American, Canadian, Indian, Australian, Saudi Arabian, and Danish Citizens, while in the context of Nepali perpetrators, they are mostly the ones who are known to survivors i.e. fathers, relatives, parent's friends, cousin, etc.<sup>47</sup>

## VI. Legal Paradigm of Male Child Sexual Abuse

The Constitution of Nepal<sup>48</sup> (hereinafter Constitution) has guaranteed the rights of the child and their holistic development as fundamental rights that cover aspects of their safety, protection, development, and participation. A child, as per the Act relating to the Rights of Children, 2018<sup>49</sup> (hereinafter Children's Act) and the Convention on the Rights of Child, 1989<sup>50</sup> is a human being below the age of 18. Nepal ratified<sup>51</sup> the CRC<sup>52</sup>, its first OP<sup>53</sup> on 14 September 1990 and 6 January 2006 respectively which have explicitly provisioned on the issues related to criminalization of child trafficking, prostitution, abuses of various forms and the protection, ensuring justice, etc. This international commitment of the Government of Nepal has created the obligation of Nepal at the international level to protect child rights.

<sup>41</sup> 'Child Rights Status Report in Nepal', *National Child Rights Council*, 2021, Lalitpur, Nepal, available at <https://www.ncrc.gov.np/uploads/topics/16546761986596.pdf> p. 118, accessed on 15 June 2022.

<sup>42</sup> Ibid p. 119.

<sup>43</sup> Ibid.

<sup>44</sup> 'A Study on Child Sexual Abuse in Nepal with Focus on Travel and Tourism Sector', *Saathi*, 2020, Kathmandu, pp. 10-11 available at <https://saathi.org.np/wp-content/uploads/2021/06/A-Study-on-Child-Sexual-Abuse-in-Nepal-with-Focus-on-Travel-and-Tourism.pdf>, accessed on 17 July 2022.

<sup>45</sup> Ibid, pp. 27-28.

<sup>46</sup> Shrestha (n 26).

<sup>47</sup> Ibid, pp 22-29.

<sup>48</sup> *Nepalko Sambidhan*, (Constitution of Nepal), 2018.

<sup>49</sup> *Balbalika Sambandhi Ain, 2075*(The Act on rights relating to Children 2018), Nepal, s. 2(j).

<sup>50</sup> *Convention on the Rights of Child*, 2 September 1990, 1577 UNTS 3, New York, 20 November 1989, art. 1.

<sup>51</sup> *Sandhi Ain, 2047*, (The Treaty Act, 1910), s. 4, 5, 6.

<sup>52</sup> CRC (n 51), art. 19, 34, 36, 39.

<sup>53</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000, 2171 UNTS 227, New York, 18 January 2002, art. 1, 2, 4, 5, 6, 7, 8, 9, 10 available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx> accessed 30 June 2022.

Any child is immature on physical, mental, economic, and social grounds; therefore he or she must be provided with special safeguards or protection including the appropriate legal protection.<sup>54</sup> Child being a vulnerable being shall not be subjected to any kind of physical, mental, or any other form of torture anywhere.<sup>55</sup> The 15th Plan of the Government of Nepal and the National Policy related to Children, 2012<sup>56</sup> have envisioned a child-friendly society with child rights ensured and securing the lives of children and adolescents by ending all forms of violence against them.<sup>57</sup>

The Muluki Criminal Code, 2074 (2017) (hereinafter Criminal Code) specifies the rape<sup>58</sup>, the CSA<sup>59</sup>, unnatural sex<sup>60</sup>, and the punishment practices and seeing this, the male CSA<sup>61</sup> is addressed via the provision related to CSA and unnatural sex<sup>62</sup> in case of penetration. The offense related to rape<sup>63</sup> is defined as a sexual intercourse done by a man to a woman without her consent<sup>64</sup> or with a girl child below 18 years of age even with her consent.<sup>65</sup> A person convicted of rape shall be liable to the sentence<sup>66</sup>

<sup>54</sup> *Geneva Declaration on the Rights of Child*, 26 September 1924, LON Spec. Supp. 21 at 43, Geneva, preamble.

<sup>55</sup> *Constitution* (n 49), art. 39(7).

<sup>56</sup> *Balbalika Sambandhi Rastriya Niti, 2069* (The National Policy Related to Children, 2012, Ministry of Women, Children and Senior Citizens, Government of Nepal, paras. 7.1, 8.3, 8.6, 9.3, 9.5, 9.19, 2012), available at <https://mowcsc.gov.np/rules/Tqy0Nmb3GzujBvAvMzvFZ1i1s0y2lur17lncMadb-1625469084.pdf>, accessed on 30 June 2022.

<sup>57</sup> 'The Fifteenth Plan; Fiscal Year 2019/20-2023/24', *Government of Nepal; National Planning Commission*, 2020, Kathmandu, p. 268-2072, available at [https://npc.gov.np/images/category/15th\\_plan\\_English\\_Version.pdf](https://npc.gov.np/images/category/15th_plan_English_Version.pdf), accessed on 30 June 2022.

<sup>58</sup> *Muluki Aparadb Sambhita, 2074* (National Criminal Code, 2017), ss. 219, 224.

<sup>59</sup> *Ibid.* s. 225.

<sup>60</sup> *Ibid.* s. 226.

<sup>61</sup> If a person enters a lonely area in an unexpected way, holds or touches a child's sexual organ, or obtains access to a child's sexual organ, it will be deemed child sexual abuse. To touch, hold, or engage in any unconventional sexual behavior/conduct with a child with the intent to engage in sexual activity is child sexual abuse. There is a provision of imprisonment for a term not exceeding three years and fine not exceeding thirty thousand rupees.

<sup>62</sup> This involves penetration without consent. The person liable of this offence shall be liable to the sentence of imprisonment for a term not exceeding three years and a fine not exceeding thirty thousand rupees in case of adult victim and if committed against child shall be sentenced under rape chapter.

<sup>63</sup> Rape shall also refer to the penetration of penis into anus or mouth or inserted to an extent in anus, mouth or vagina, insertion of any object other than penis into vagina as per explanation clause; section 219(2)(c) of the Criminal Code.

<sup>64</sup> Consent obtained by way of coercion, undue influence, intimidation, threat, misrepresentation or kidnapping or taking of hostage and obtained at time of being of unsoundness of mind, shall not be considered consent as per the explanation clause of section 219 (2) of National Criminal Code.

<sup>65</sup> *Criminal Code* (n 59), s. 219(2).

<sup>66</sup> For the offence of rape as described, following are the structure of imprisonment:

- If the victim girl is below ten years, fully incapacitated woman, disabled or woman of age more than 70 years shall be punished for life imprisonment.
- If the victim girl is 10 years or up to less than 14 years then the punishment shall be imprisonment for 18 to 20 years.
- If the victim girl is 14 years or up to less than 16 years, then the punishment shall be imprisonment for 12 to 14 years.
- If the victim girl is 16 years or up to less than 18 years, then the punishment shall be imprisonment for 10 to 12 years.
- If the victim woman is 18 years or above, then the punishment shall be imprisonment for 7 to 10 years.

of imprisonment keeping in concern the circumstances and the age of the victim. For the crimes under Section 219 (rape), 225 (CSA) and 226(3) (unnatural sexual offense against a child) there shall be the statute of limitation of one year from the commission of such offense.<sup>67</sup>

The children are subjected to protection<sup>68</sup> and security from all the aspects resulting in their susceptibility and it is the duty of the government<sup>69</sup> of all levels to take necessary measures to prevent possible accidents, minimize risks, and, in case of violation, invoke necessary compensatory mechanisms.

Furthermore, the Children's Act has specifically addressed the offense of sexual abuse<sup>70</sup> against children including pornography, pedophilia (although not specifically written), unnatural sexual activities, prostitution, etc. and for acts of use of the child for purpose of sexual gratification<sup>71</sup> and engagement or cause to engage in the child sexual exploitation<sup>72</sup>, the punishment shall be imposable on the offender of rape<sup>73</sup> under the prevailing law. For the offense under sections 66(g) and (h) against a child and if no case has been filed within 1 year from the date of commission, the statute of limitation for filing the case with respect to the offence against the child shall continue to exist until one year after such a child has attained the age of eighteen years.<sup>74</sup> Furthermore, this shall be a state party case.<sup>75</sup>

## VII. Analysis And Conclusion

### A. Wrongfulness of Adult-Child Sexual Relationship

Adult-child sex is unnatural from a biological and psychological point of view<sup>76</sup> as sexual activities must be carried out via the consent and the consent of child is never consent.<sup>77</sup> Additionally, it infringes on the rights of children as it involves premature objectification<sup>78</sup> and sexualization of children<sup>79</sup> which disturbs their childhood and further development. It infringes on the basic form of societal norms as adult-child sex is not acceptable in the society. There is a fear that adults will manipulate children's

<sup>67</sup> Criminal Code (n 59), s. 229(2).

<sup>68</sup> Children's Act (n 52), ss. 7, 25, 48, 50, 57.

<sup>69</sup> Ibid s. 3.

<sup>70</sup> Ibid, s. 66 (3).

<sup>71</sup> Ibid, s. 66(3)(g).

<sup>72</sup> Ibid, s. 66(3)(h).

<sup>73</sup> Ibid, s. 72(3)(g).

<sup>74</sup> Ibid, s. 74(2).

<sup>75</sup> Ibid, s. 76.

<sup>76</sup> David Finkelhor, 'What's wrong with sex between adults and children?', *American Journal of Orthopsychiatry*, p. 1, issue 49, 1979 p. 1-2, available at <http://www.itp-arcados.net/wissenschaft/whatswrongwith6.pdf>, accessed on 12 May, 2022.

<sup>77</sup> The sexual relationship among the child and adult is considered fundamentally wrong.

<sup>78</sup> Finkelhor (n 77) pp. 44-46.

<sup>79</sup> Seto (n 7).

beliefs, desires, emotions, or logic in order to get them to consent when they would not or should not otherwise<sup>80</sup> so, even if a child consents to sex, it is the result of manipulation<sup>81</sup>.

Seeing the trend of abuse, the foreign abusers abuse the male child as a caregiver or while residing in Nepal for tourism purposes and mostly the victims of abuse are observed to be either street children or the ones under the shelter of such caregivers. For the purpose of Nepali offenders of male CSA, they are mostly the ones known to the child either family members, relatives, or any other acquaintanceship.

Commercial value is also attached with the CSA via unnatural sexual intercourse and harassment. This is because; children are highly vulnerable and can be greatly manipulated. For street children, they are highly in need of love, care and fulfillment of their necessity such as food, clothes, etc. Therefore, pedophilic abuses to male child are committed via the grooming approach rather than the threat approach in general.

## **B. Inconsistencies in Existing Practice of Investigation and Related Processes**

Finkelhor's Precondition theory, 1948 examines four preconditions that has to be fulfilled before sexual abuse occurs; motivation to abuse child sexually, overcoming internal inhibitions, overcoming external inhibitions, and dealing with the child's possible resistance to abuse.<sup>82</sup> Apart from this, the Integrated Theory of Marshall and Barbaree affirm this to be as a result of several interrelated elements; biological, psychological, socio-cultural, and situational.<sup>83</sup>

For tracing what is CSA, the psychological assessment and physiological and biological tests of both the offender and the victim is to be done. In the context of Nepal, proper tests are not seen to be done and this shows that the criminal investigation system is still based on the common sense knowledge. This directly relates to the common sense knowledge investigating officers posit that rape is the crime committed against females and not males as the evidence of rape is viable in females rather than males. For male victims they perceive sexual abuse do not cause the biological and other consequences as like of female victims. This makes the investigation weaker.<sup>84</sup> Furthermore, the absence of the tests of glandular system and mental tests of the victim and the abuser and studying the tests in a synchronized effort are not seen in practice which makes the investigation weak and research on male child sexual abuse and the pedophiles connection to them remains a shadow.<sup>85</sup>

<sup>80</sup> Stephen Kershner, *Pedophilia and Adult-Child Sex: A Philosophical Analysis*, Lexington Books, USA, 1st Edition, 2015, pp. 41-43.

<sup>81</sup> Bista (n 11).

<sup>82</sup> Saathi (n 45), p. 2.

<sup>83</sup> Ibid.

<sup>84</sup> Bhattarai (n 6).

<sup>85</sup> Ibid.

Psychological test of offender is needed to trace out the mental status as well as the intention element of the offender to commit such crime. Physiological tests of an offender are needed because if a sexual activity *per se* crime of such is committed without the intention or by the influence of disturbed mental conditions, the physiological reports shall show the condition/status of hormones and fluids in a way different to the sexual activity committed with the intention to commit such. Biological tests are needed to find out any signs of struggle or marks, etc. to prove the offender in particular to perpetrate such activities. Therefore, if the balance between the physiological, biological and psychological tests is maintained, it shall assure a proper investigation, prosecution and sentencing. On part of the victim, psychological, biological, and physiological tests are to be conducted so as to find out the psychological, mental, emotional, and biological effect inside and out undergone by the victim which would help in determining compensation. Furthermore, there is a mandatory requirement for preparation of psycho-sociological and psychological study report,<sup>86</sup> but in practice it is merely seen. This will highly affect the investigation, prosecution, proceeding, hearing/ adjudication.

### C. Inconsistencies in the Existing Legal Provisions

Analyzing male child sexual abuse from a legal lens, the Constitution of Nepal has guaranteed the rights of children as fundamental rights and the chapter on offense related to rape in the Criminal Code, 2074 (2017) and Section 66 of the Children's Act, 2018 have mentioned the rape offense, conditions that amount to CSA, etc. The CRC and its optional protocols have been ratified by Nepal, so Nepal has an international obligation to create laws and establish a system of governance in line with international legal instruments.

The existing legal provisions and practices are seen to be hugely governed by common sense knowledge and the predominance of the socially established value system aiding the milieu of gender bias. Section 219 of the Criminal Code defines rape as an offense committed by a male against female. This shows the gender biasness in the Nepalese legislation to address rape issues, resulting in the exclusion of men, male children, and homosexual individuals as potential rape victims. Such a narrow definition of rape related offenses has left out a number of sexual crimes qualified as "sexual harassment" and most importantly in the case of male child victims who proceeded from the CSA and unnatural sexual offense.

Provision related to unnatural sexual offense as mentioned in Section 226(3) of the Criminal Code states that unnatural sexual offense against a child shall be punished as punishments related to rape. This has left a ground for issues of such crime to be addressed as of rape. Albeit of this fact, there are certain procedural technicalities that shall come into play. If a court settles a case related to unnatural sexual offense against a male child, although the court sentences the perpetrator as per rape laws

<sup>86</sup> Children's Act (n 50), s. 45.

as mentioned in section 219, the substance of offense shall only be unnatural sexual offense and not rape. Therefore, the definitions of rape are still substantially gender biased; the definition of rape does not refer to forceful and unintentional sexual activity done against males. This depicts the formulation of laws as highly conducted from a one-sided approach. So, in this condition, the definition of rape as; "where a person has sexual intercourse with another person without their consent or a child below 18 years of age even with their consent, such person shall be considered to commit rape on another person or child" shall sound appropriate.

Most importantly, the laws have not explicitly defined unnatural sex and have not mentioned provisions related to pedophilia, therefore, addressing those issues has resulted in huge problems. Another important issue that is often raised is the technicalities of the procedure. Children's Act is a special act in case of addressing overall issues related to children but, Criminal Code is a special act to invoke for matters related to rape.<sup>87</sup> Albeit having this fact, the statute of limitation for such act as per Criminal Code provides for one year from the date of commission of such crime, and for the Children's Act, it has created more flexible ground that the statute of limitation shall be 1 year after the child victim attains the age of 18 years if no case has been filed prior. Therefore, if a child is victimized by such an offense and cannot file a case prior, this provision can be used. Therefore, this has created inconsistencies in the application of invoking procedures for such cases.

Furthermore, in the matter of sentencing, the sentencing act provides for a separate hearing for crimes punishable by more than three years imprisonment or a fine of up to thirty thousand rupees.<sup>88</sup> The Criminal Code has provided that offenses involving CSA and unnatural sex shall be punishable by imprisonment of up to three years and a fine of up to thirty thousand, while for the same offense, the Children's Act has provided for the punishment up to three years and fine up to seventy thousand at minimum.<sup>89</sup> This shows that the criminal code requires no separate hearing for sentencing while Children's Act requires separate hearing for sentencing as per the sentencing act. These disparities and inconsistencies in the existing legal provisions have created many problems to address the issue of child sexual offenses in general.

## D. Findings

This is unfortunate that the sexual abuse of children is increasing day by day while the laws are not able to address the increasing problems of being less gender neutral and also because of the inconsistencies within the laws itself. Some of the major findings of the research are as follows:

- a) The issues of male child sexual abuse are still unaddressed because of various

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<sup>87</sup> Pandey (n 18).

<sup>88</sup> *Kasur (Sajaya Niradharan tatha Karyannayan) Ain, 2074* (The Crime Offences (Sentencing and Execution) Act, 2017), Nepal, s. 9(1).

<sup>89</sup> Children's Act, (n 50), s. 72(3)(b).

socio, economic, legal, and political reasons.

- b) The lack of explicit sex education and awareness among the people, the ingrained social value system set by the existing orthodox social structure have been some of the important reasons why male child sexual abuse remains unaddressed.
- c) The chapter on rape in the Criminal Code is not gender neutral since it mentions rape is a crime committed against females by males, which is derailing the access to justice of children regardless of their gender.
- d) There is no clear definition of unnatural sexual offenses mentioned in the existing laws of Nepal.
- e) Pedophilia, being one of the major reasons for child sexual abuse is still not regulated via the laws as it is not explicitly mentioned in the existing laws of Nepal.
- f) The rise of street children, orphans, care-seekers, etc. especially as a result of so-called poverty-plus circumstances has created a risk that pedophilia instances may increase in the coming years.
- g) Absence of proper tests shows the criminal investigations being based on common sense knowledge rather than scientific knowledge.
- h) A number of sexual crimes classified as "sexual harassment" and, most notably, in the case of male child victims who were subjected to the CSA and unnatural sexual offense, have been excluded by the restrictive definition of rape-related offenses.

## E. Recommendations

- a) Control of child sexual abuse of various forms and related criminal activities in an expected manner shall be achieved if a variety of stakeholders, including the government, civil society, and the business community collaborate.
- b) The government's job is to identify the issue, create or change legislation, and then put that legislation into effect.
- c) Through media, seminars, research, and workshops, civil society has a responsibility to bring victims' issues to the public's attention while also offering rescue and rehabilitation assistance.
- d) Sex education is a necessary subject matter to be included in the pedagogy of study from the school level incorporating various forms of abuses to make the students cautious in the same regard.
- e) The government must carry out activities regarding sex education even at the societal levels in the areas other than schools and colleges so as to make the people aware of dimensions of sexual violence regardless of gender, class, caste, and so on.

## F. Conclusion

In the context of Nepal, male CSA and pedophilia abuse remains highly unreported because of various sociological, psychological, and biological causes. The socio-cultural norms and values are highly influencing in terms of behavioral, institutional, and structural practices in Nepal leaving a broad area for abuse and violation of rights.

Hence, the issues of Male CSA via pedophilia is an example issue to trace out the inconsistencies in existing laws and their enforcement, therefore; concerned stakeholders have to put a collaborative effort to combat the existing problems and problems coming along the way.

## ANNEXES – Key Informant Interview Questionnaires

### ANNEX 1

Interview with Psychologists and Psychiatrists at Mental Hospital, Lagankhel (Psychologist Trishna Ghosh Bista and Psychiatrist Dr. Ananta Prasad Adhikari)

#### SECTION A: INTRODUCTION

- A1 Name
- A2 Address
- A3 Designation
- A4 Office
- A5 Specialization

#### SECTION B: CONCEPT OF PEDOPHILIA

- B1 How do we understand pedophilia?
- B2 How does it develop?
- B3 What are the behavioral patterns shown by the pedophiles?
- B4 Is pedophilia a gender-subjective issue?
- B5 How far is it true that pedophilia causes child sexual abuse? What is the relationship between child sexual abuse and pedophilia?

#### SECTION C: CAUSES AND EFFECTS

- C1 What is the modus operandi of victimizing a child of sexual abuse with a special focus on the male child?
- C2 What are the psychological effects faced by male children out of child sexual abuse?
- C3 Are these pedophiles mentally challenged or insane or are of different category?
- C4 If they commit such crime, should they be criminalized or are they subjected to treatment? What would be the best way to access justice in this case?

**ANNEX 2**

Interview with Advocate Rabindra Bhattarai.

**SECTION A: INTRODUCTION**

- A1 Name
- A2 Address
- A3 Designation
- A4 Office
- A5 Specialization
- A6 Practice/experience

**SECTION B: CHILD SEXUAL ABUSE AND PEDOPHILIA**

- B1 How do we need to identify child sexual abuse explicitly in the context of Nepal?
- B2 How do we perceive pedophilia and pedophiles specifically in the context of Nepal?
- B3 Can we draw a relationship between pedophilia and child sexual abuse?
- B4 Who is prone to the victimization of child sexual abuse via pedophilia?
- B5 What are the trends of the patterns pedophiles assume to groom children?

**SECTION C: LAWS AND CHALLENGES**

- C1 What is the modus operandi of the so-called pedophile to victimize the child?
- C2 What may be the reasons for male sexual victimization not being addressed and not coming out in the sphere of discussion?
- C3 Is the law addressing sexual abuse specifically regarding the children sufficient enough to address the issues of children regardless of their gender?
- C4 What are the legal challenges that Nepal is facing to address the issues of male child sexual abuse?
- C5 What role might be played by the stakeholders; parliamentarians, civil societies, judiciary, defense lawyers, and prosecutors to address the issue?
- C6 Do you prefer anything beyond this on the issue?

**ANNEX 3**

Interview with Chief Judge Raju Khaiwada, Kathmandu District Court

**SECTION A: INTRODUCTION**

- A1 Name
- A2 Address
- A3 Designation
- A4 Office
- A5 Specialization
- A6 Practice/experience

**SECTION B: PEDOPHILIA AND CHILD SEXUAL ABUSE**

- B1 How do we perceive pedophilia and pedophiles specifically in the context of Nepal?
- B2 Can we draw a relationship between pedophilia and child sexual abuse?

**SECTION C: LAWS AND CHALLENGES**

- C1 Are there any cases related to pedophilia been tried by this court?
- C2 What were the legal pronouncements regarding the cases of pedophilia being tried by the court and their basis?
- C3 What may be the reasons for male sexual victimization not being addressed and not coming out in the sphere of discussion?
- C4 Are the Nepalese legal provisions addressing sexual abuse specifically regarding children sufficient enough to address the issues of children regardless of their gender?
- C5 Are the Nepalese legal provisions with regard to the issues addressing male child sexual abuse compatible with international practices?
- C6 What are the legal and judicial challenges that Nepal is facing to address the issues of male child sexual abuse?
- C7 What role might be played by judiciary to address such issues?
- C8 What might be the roles that the other concerned stakeholders can apply to address this issue?
- C9 Would you like to add a few points on this issue?

**ANNEX 4**

Interview with Child Rights Consultant Gyanendra Shrestha, National Child Rights Council (NCRC).

**SECTION A: INTRODUCTION**

- A1 Name
- A2 Address
- A3 Designation
- A4 Office
- A5 Specialization
- A6 Practice/experience

**SECTION B: CHILD SEXUAL ABUSE AND PEDOPHILIA**

- B1 How do we need to identify child sexual abuse explicitly in the context of Nepal?
- B2 What are the current trends of operation of the abuses against children?
- B3 How do we perceive pedophilia and pedophiles specifically in the context of Nepal?
- B4 Can we draw a relationship between pedophilia and child sexual abuse?
- B5 What is the situation of male child sexual violence in Nepal?
- B6 What may be the reasons for male sexual victimization not being addressed and not coming out in the sphere of discussion?
- B7 What are the recent data on the part of sexual abuses against children on the basis of gender ratio?

**SECTION C: LAWS AND POLICIES**

- C1 Is there a comprehensive national policy and/or a National Action Plan to address and combat sexual abuse and sexual exploitation of children with a special focus on male child sexual abuse?
- C2 Are the Nepalese legal provisions addressing sexual abuse specifically regarding children sufficient enough to address the issues of children regardless of their gender?
- C3 Are the Nepalese legal provisions with regard to the issues addressing male child sexual abuse compatible with international practices?
- C4 What are the efforts made by this institution to address male child sexual abuse issues?
- C5 What might be the roles played by this institution and the other stakeholders to address the issue itself and the legal inadequacies?

**ANNEX 5**

Interview with Deputy Attorney General Padam Prasad Pandey, Office of the Attorney General.

**SECTION A: INTRODUCTION**

- A1 Name
- A2 Address
- A3 Designation
- A4 Office
- A5 Specialization
- A6 Practice/experience

**SECTION B: CHILD SEXUAL ABUSE AND PEDOPHILIA**

- B1 How do we perceive pedophilia and pedophiles specifically in the context of Nepal?
- B2 Can we draw a relationship between pedophilia and child sexual abuse?
- B3 Who is prone to the victimization of child sexual abuse via pedophilia?
- B4 What are the trends of the patterns and modus operandi of the so-called pedophile to victimize the child?
- B5 Does child sexual abuse have anything to do with gender specificity?
- B6 Where are the probable places where male children face such violence?
- B7 What may be the reasons for male sexual victimization not being addressed and not coming out in the sphere of discussion?

**SECTION C: LAWS**

- C1 Is the law addressing sexual abuse specifically regarding the children sufficient enough to address the issues of children regardless of their gender?
- C2 What are the legal challenges Nepal is facing to address issues of male child sexual abuse?
- C3 Are there any challenges you face while instituting a case/ filing a charge sheet for these kinds of offenses?
- C4 What role might be played by the stakeholders; parliamentarians, civil societies, judiciary, defense lawyers, and prosecutors to address the issue?
- C5 Do you prefer anything beyond this on the issue?

**ANNEX 6**

Interview with Inspector Sapana Khadka, Women, Child and Senior Citizen Service Center, Kalimati, Kathmandu

**SECTION A: INTRODUCTION**

- A1 Name
- A2 Address
- A3 Designation
- A4 Office
- A5 Specialization

**SECTION B: PEDOPHILIA AND CHILD SEXUAL ABUSE**

- B1 How do we perceive pedophilia and pedophiles specifically in the context of Nepal?

- B2 Can we draw a relationship between pedophilia and child sexual abuse?
- B3 Have you undergone any sort of training related to child protection?
- B4 How many cases of pedophilia have been registered/ filed in this station so far and what is the status of the case?

### SECTION C: INVESTIGATION

- C1 Who is prone to the victimization of the child sexual abuse via pedophilia as per your investigations or understanding?
- C2 What are the trends of the patterns and modus operandi of the so-called pedophile to victimize the child?
- C3 Are there any challenges you face while investigating these kinds of offenses?
- C4 What are the possible steps that should be undertaken by Nepal Police to address the issue?