

## BOOK REVIEWS

CHILD SEXUAL ABUSE TRIALS - LAWS, PROCEDURES AND PRECEDENTS (IN THE LIGHT OF INTERPRETATION OF POCSO ACT 2012 AS AMENDED IN 2019) (2020). By Geeta Oberoi, Thomson Reuters, Price 2805, ISBN: 9788194772392.

IN A society, which has millennially produced social indifference towards child sexual abuse, Geeta Oberoi's work comes as a cry for justice.<sup>1</sup> She is eminently poised to juxtapose the cries of sexually abused children with the voices of law. A pioneer of judicial education for a long time, her book is a foundational comparative study.<sup>2</sup> She has been engaged in the work of judicial academies in India (and Mauritius), having served the cause for long while in the National Judicial Academy, Bhopal as its Professor and its first and only, woman director. This magnum comprises a formidable 1622 pages, 37 well-organized chapters, and three relatively brief annexure. Oberoi painstakingly studies "almost all 888 cases", which offer a very disturbing narrative of what ails the rule of law, constitutionalism, legal profession, interpretation, administration, and enforcement of the special law, despite some notable steps taken by the judiciary to improve access.<sup>3</sup>

It is a scandal that the existing criminal law in India was for a long time considered adequate to combat the menace of child sexual abuse (CSA). It was a lost frontier for human rights until the General Assembly of the United Nations adopted the Convention on the Rights of the Child (UNCRC) in 1982.<sup>4</sup> That Convention requires states parties to undertake all appropriate national, bilateral and multilateral measures to prevent CSA. Yet it was only "in its 63<sup>rd</sup> year since declaring itself a republic" that Indian Parliament belatedly took a serious step to admit the reality of CSA in India, and legislated a specific law to that effect.

The Protection of Children from Sexual Offences Act, 2012 (POCSO, hereafter) was enacted, after extensive consultations and deliberations from 2008, and triggered by

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1 Geeta Oberoi, *Child Sexual Abuse Trials: Laws, Procedures and Precedents: In the Light of Interpretation of POCSO Act 2012 as amended in 2019* (Noida, Thomson Reuters, 2020). The quote marks refer to the text, except when words and phrases are taken directly out of POSCO in the earlier portions of text.

2 Geeta Oberoi, *Developing the Judicial Education Discourse* (Noida, Thomson Reuters, 2013).

3 Particularly through notable steps of digital access and the notable initiative of Justice Gita Mittal's 'The Vulnerable Witness Courtroom Project', see the Guidelines for recording of evidence of Vulnerable Witness, Delhi, available at: [https://delhidistrictcourts.nic.in/circulars/Vulnerable\\_Witness\\_Guidelines.pdf](https://delhidistrictcourts.nic.in/circulars/Vulnerable_Witness_Guidelines.pdf) (last visited on May 20, 2021).

4 See, Upendra Baxi, the Tara Ali Baig memorial lecture, entitled "Right to be Loved and to Learn" in *Inhuman Wrongs and Human Rights: Unconventional Essays*, 158-168 (Delhi, Har-Anand Publications, 1994).

child rights activism and the National Crimes Records Bureau data. The data reveals a social reality. As the author says "... children are not safe anymore – not at home, not in the company of relatives, not in the company of friends or relatives of friends, not in the schools, not even from strangers, not even in residential compounds, not in the company of neighbours –whether young or old. Almost anyone can be a threat to their physical existence and now a days more children are getting killed either to hide the crime or during the commission of the crime itself." The cases studied are presented in great narrative detail.

Of course, the legislative reforms are much to be welcomed. The POCSO Act is gender neutral as it defines a child as any person below 18 years of age. This itself marks a great normative advance. The Act regards the best interests and well-being of the child as of 'paramount importance' at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child. Different forms of sexual abuse, including penetrative and non-penetrative assault, stand criminalized; so are sexual harassment and pornography. The Act deems a sexual assault to be "aggravated" under certain circumstances.<sup>5</sup> People who traffic children for sexual purposes are also punishable with the offence of abetment. Further, POSCO Act defines "child pornography" as any visual depiction of sexually explicit conduct involving a child, which includes a "photograph, video, digital or computer generated image indistinguishable from an actual child", and "image created, adapted, or modified, but appear to depict a child". It prescribes stringent punishments with a maximum term of rigorous imprisonment for life, and fine.

The book in your hands is a vast one, and is primarily a manual for justices and lawyers. As such, it valuably focuses on decisions of courts, and arguments made by counsel on both sides—the prosecution and defence. It also engages the work of investigation and prosecution. Further, law reformers and media persons will find the work as an exhaustive source of legal administration, interpretation, and the futures these depict for social assault on children and young persons. Social movements and human rights folks will find here a goldmine of details on interpretation, administration, and enforcement. The work's pedagogic values and virtues, and not only in national or state judicial academies, cannot be overstressed.

Misleading will be an impression that there is too little evaluation and too many case narratives. Even when acknowledging some readerly fatigue at the narratives of decided cases, we must note at the outset that the evaluative framework and critical observations are ever-present here. But the author is at great pains to distinguish law and its administration as it is and as it ought to be. That 'ought' emerges specifically, for example, in chapters 1, 6, 9, 11-13, 28, 31-33, and 36. It may be another matter to

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<sup>5</sup> As when the abused child is mentally ill or when abuse is committed by a person in a position of trust, or authority *vis-à-vis* the child, like a family member, police officer, teacher, or doctor.

compose a sociological, anthropological, or ethical work on child sexual abuse. Nevertheless, these genres may not foreground legal and policy matters in such abundant mode as this book indeed provides.<sup>6</sup>

Yet, it remains difficult to be optimistic about future of CSA. The evils of violence against children, and especially the girl child, continue to happen even in ‘the best of homes’<sup>7</sup> and children often called ‘blossoms’ continue to wallow or lie in the ‘dust’ for no fault of theirs.<sup>8</sup> I proceed to mention some illustrations of the dire future ahead. Outside of a major change in social attitudes and conduct that will no longer continue (to deploy a phrase of Herbert Marcuse) to practice “repressive tolerance” towards child abuse, even the tasks of its future amelioration may remain feeble.<sup>9</sup>

The short chapter 28 of this book still continues to speak about situations of violence, violation, and abuse at the shelter homes, even to the point at least in one instance (in 2014, S.S. Nijjar and F.M. Ibrahim Kalifulla JJ.) moving the Supreme Court to a *suo motu* jurisdiction. Although the pattern of *suo motu* action in such matters by the constitutional and other courts is still not certain. In the meantime, we have to agree with Oberoi that unfortunately “custody itself became a cause of CSA”. The working of CSA deepen the germinal insights about violation and impunity in ‘total institutions’ first offered by Erving Goffman and later developed by Michel Foucault.

One of the important findings of the book is that the “girl child in the age group of 14 to 18, even though legally declared as a child, is more disbelieved than children below 14 years. This is so because a lot of agency is attributed to them”. The victims here “are expected to raise alarms about an offence, remember every small detail of the crime, and inspire confidence of the court that they were indeed victims.

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6 Some may have reservations about the length of the book. It could have been divided in two volumes or the relaxant exerts could have been provided in the annexures. However, length is a function of comprehensiveness. Almost nothing has been left behind. At least I have learnt a lot from , for example, preventive detention (ch. 31), court martials (ch. 30), incest (ch. 23), pregnancy (ch.26), and the doctrine of the evidence of evidence of last seen together (ch. 33).

7 Jocelyne A. Scutt, *Even In the Best of Homes: Violence in the Family* (London, Penguin, 1983). Her ground-breaking study of Australian families revealed the beating, rape and murder of wives, the bashing and sexual molestation of children – and the apathy of friends, family, doctors, police and the courts. People are “reluctant to ‘interfere because this conduct occurs within the family, and usually in the privacy of the home.” Scutt argued that the abuse will cease only when “the laws to protect people are properly enforced, when women gain public and private autonomy, and when children are regarded as human beings, not property.” See also, Jocelyne A. Scutt, ‘Restricted Vision-Women, and Wickedness In Witches the Courtroom’, available at: <http://www.austlii.edu.au/au/journals/DeakinLawRw/2001/2.pdf>(last visited on Mar. 30, 2021).

8 Kusum Nair, *Blossoms in the Dust*(London, Duckworth, 1961).

9 Robert Paul Wolff II, Barrington Moore, Jr., Herbert Marcuse, *A Critique of Pure Tolerance* (Boston, Beacon Press, 1965).

Further, kidnapping of girls in this age group is not believed...” (Chapter 32:1). Besides, the “victim herself can be the cause of acquittal from the serious CSA charges” in situations when the victim (i) does not support the case of prosecution, (ii) is married to the accused, (iii) voluntarily accompanied and is staying with the accused, and (iv) unable to prove her age below 18 years on the date of offence” (Chapter 32:1). Some of these categories are extremely problematic, especially (ii) and (iii) when consent is not proved, but circumstantially inferred from a certain course of conduct.

Very importantly, Chapter 34 reminds us about linkages between impoverishment (not ‘poverty’) and child sexual abuse. These linkages must more seriously be taken note of by courts and justices as an integral part of judicial notice doctrine and legal changes should further consider tweaking the burden of proof. However, it is common experience of most studies of CSA or CAN (child abuse and neglect) that official data do not take account of any linkage. Such studies as exist, however, demonstrate some linkage between CSA or CAN and vulnerability.<sup>10</sup> At any rate, vulnerability is emerging as a crucial aspect of human rights protection and promotion. Vulnerability to sexual abuse is particularly critical for child sexual assault, abuse, and neglect situations and it should be our prime duty to use our privileges and networks as a social responsibility to work towards the elimination of this menace of structural injustice in society.<sup>11</sup>

The book is replete with information and analysis of the judicial performance, but it can also be studied as a running and sad commentary on the ways of the Indian legal professions.

Of course, the forms of social and judicial activism are always to be applauded in every generation. Despite pointing out some glaring institutional failures, Oberoi, underscores, and applauds the fact that some parents, and more particularly the mothers, heroically file prosecution and preserve against all odds. One also finds here some

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10 See, for example, Paul Bywaters, Lisa Bunting, Gavin Davidson, Jennifer Hanratty, Will Mason, Claire McCartan and Nicole Steils, “The Relationship Between Poverty, Child Abuse and Neglect: An Evidence Review” (Joseph Rowntree Foundation, 2016); Candace Kruttschnitt, Jane D. McLeod and Maude Dornfeld, “The Economic Environment of Child Abuse” *Social Problems*, 41: 2, 299-315 (1994); Sarah A. Font and Kathryn Maguire-Jack, “The Scope, Nature, and Causes of Child Abuse and Neglect”, *The ANNALS of the American Academy of Political and Social Science*, 692:1, 26-49 (2021); Genevieve Young, Southward Catherin Eaton, Rory O’Connor and Helen Minnis, “Investigating the Causal Relationship Between Maltreatment and Cognition In Children: A Systematic Review” *Child Abuse & Neglect*, 107: 104603: (2020).

11 Iris Marion Young, *A Responsibility for Justice* (Oxford: Oxford University Press. 2011). See also, Ch.9, *The Future of Human Rights* (Delhi, Oxford University Press, 2020) attending to various aspects of ‘responsibility’ and the critique of the distinction between legal liability and moral responsibility.

warming stories of valiant investigation, prosecution, and justicing. However, in many ways, chapter 36 is the bleeding heart of the book. I can only give you a *flavour* of it by recalling its title and categories of ‘errors’ and ‘omissions’ that judges and courts should avoid. These comprise: (i) “blaming the victims”; (ii) “accepting result of virginity/two-finger test”; (iii) not “deciding in the best interest of the child”; (iv) disregarding “statute/precedent/principle/practice”; (v) not “remitting the case back for re-trial”; (vi) “(c) carelessness about the facts of the case”; (vii) “(m)istakes in appreciation of evidence; (viii) indecipherable language; (ix) inadvertence to the “rules of grammar”; (x) “use of grammar” not being followed; (xi) “absence of reasons” and (xii) “weak reasoning”.

This may appear to some, as a savage indictment of judicial process at work but Geeta Oberoi, is both a friend of judges and court as well as those violated by child sex abuse. She details every category with loads of examples. Her conclusions entitled the “way forward” constitute a recipe for the better and progressive administration of criminal justice generally and child-friendly justicing in particular. A sense of moral urgency attaches to these desirable judicial reforms; these errors and omissions could largely be corrected in house. Not to do so immediately is to betray the belated promise of child rights and justice and the mandate of the Constitution of India.

The overall conclusion is irresistible: “Judges at trial courts and appellate courts need sensitization on impact of their character assessment of child victim on overall criminal justice system. Victim naming, shaming and blaming leads to lower reporting of crime. This would mean that victims tolerate either injustice or protest against the same in any other platform but the court. This would diminish the faith in the justice system and make the courts irrelevant for future generations. Senior sociologists must be called to explain this interconnectedness to judges. Further, such victims who are not believed about their version refuse to believe in the sanctity of the system throughout their adult life. They refuse to knock on the doors of the courts ever again”.

Judicial *sensitization*, not *sanitization*, is both a necessity and a duty. Above all, it entails a de-routinization of justice administration<sup>12</sup>. The Constitution of India commands

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12 One expects another book from the learned author on law and social movements relative to CSA in India. This will be a valuable contribution to the sparse literature on this subject both in jurisprudence and social theory. We already learn authoritatively about the attainments and the limits of law and adjudication from this fine work. But do social movements — defined as “collectivities acting with some degree of organization and continuity outside of institutional or organizational channels for the purpose of challenging or defending extant authority, whether it is institutionally or culturally based, in the group, organization, society, culture, or world order of which they are a part”—succeed where the law fails? See, David A. Snow, Sarah A. Soule, and Hanspeter Kriesi, “Mapping the Terrain” in *The Blackwell Companion to Social Movements*, at 11, (2004). See also, Rajeswari Sunder Rajan, *The Scandal of the State: Women*,

not a BAU (business as usual) approach to the tasks of justice but adjudicative militancy against all forms of abuse and rightness of the children—the future citizens of India. Oberoi has shown, painstakingly and well, the ways forward and placed us all under a duty forever to combat child abuse and rightlessness.

*Upendra Baxi\**

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Law, and Citizenship in Postcolonial India, 171-212 (Durham, Duke University Press, 2003); Sharon Stephens (ed.), *Children and the Politics of Culture*, (Princeton, Princeton University Press, 1996); Jo Boyden, “Childhood and the policy makers: A comparative perspective on the globalization of childhood” in Allison James, Alan Prout, *Constructing and Reconstructing Childhood* (London, Taylor Francis, 2015).

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