

**CHILD ABUSE AND PORNOGRAPHY VIS-À-VIS RIGHT TO FREE SPEECH AND  
RECENT TRENDS**- Ritika Kanwar<sup>1</sup>**ABSTRACT**

Since its inception, internet has proved to be source of expression. Right to free speech and expression comes with limitations with respect to what content can be posted or shared on social media. 'Child pornography' or 'sexual exploitation of children' can said to be such limitation as being violative and contrary to the best interest along with basic and fundamental rights of children. It refers to depicting or modifying child in explicitly sexual activities and compromising positions through the medium of images, videos or otherwise computer- generated media and circulating it to the world at large. Child sexual abuse means exploitation of a minor, i.e., a human below the age of 18 years who is incapable of understanding such concepts (as defined under A. 1 of Convention on Rights of Child) to meet sexual or recreational needs of people at the cost of physical, mental, emotional and psychological well- being of the child. Moreover, the society also indirectly banishes them. This criminal activity is itself a base for promoting other related crimes like human trafficking, sex tourism, etc. which violates the basic rights and dignity of children and further hampers the growth and well-being of nation as a whole.

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## **INTRODUCTION**

The cases of child abuse and pornography have been increased many folds and most shockingly 90% are done by known ones or relatives. It has also been a lucrative industry from past decade earning million dollars by making the child victims more vulnerable and infringing their dignity and rights. National Centre for Sexual Abuse has certified that online business of child porn is growing homogeneously at fast rate covering 38% of porn industry having highest number of consumers and producers. Due to a flourishing business, majority of people have made this stream as a sole source of earning bread, which seems to be both illegal and irresponsible.

In a recent study on May 02, 2020 by National Crime Records Bureau (NCRB, India) National Centre for Missing and Exploited Children (NCMEC, US) it has been found that more than 25,000 medias out of total content of child pornography on internet have been uploaded in last 5 months. Additionally, NCMEC found out that among 184 Interpol member countries, half of the countries have no law to control the evil of child pornography and among 45 countries who have a comprehensive legislation, implementation is looked with suspicious eyes.<sup>2</sup>

Section 13 of Protection of Children from Sexual Offences (POCSO) Act, 2012<sup>3</sup> (hereinafter referred to as '2012 Act') defines child pornography as where the child is abused for the purposes of sexual activities. However, many exclusions in the said basic definition terribly affects the implementation of law for the benefit of child and offender is left untouched from the penal provisions of the 2012 Act. Another major reason for increase in cases of child abuse is hiding such incidents by parent, being sometimes themselves involved in such incidents or otherwise feared leakage of such incidents will have adverse impact on their reputation and child's future.

## **COMBAT: LEGISLATIVE FRAMEWORK IN INDIA & ABROAD**

### **Global Framework**

With regard to regulatory framework abroad, UN Convention on Rights of Child of 1989 (hereinafter referred to as '1989 convention') emerged as first legally binding treaty aims

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<sup>2</sup> Milind Rajratnam, "Combating child pornography in India", May 14, 2020 available at: <https://www.jurist.org/commentary/2020/05/milind-rajratnam-combating-child-pornography/> (Last visited June 05, 2020).

<sup>3</sup> The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012).

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toward protection of children rights from sexual abuse. A. 34 of 1989 convention makes it obligatory for states to undertake all competent national, bilateral or multinational measures for protecting children from sexual exploitation. Later in 2000 UNGA adopted Optional Protocol on Sale of Children, Child Prostitution and Child Pornography (hereinafter referred to as '2000 Protocol') as only legally binding universal protocol dealing with issue of sexual exploitation or abuse of children. Apart from recognition of victims' rights, 2000 Protocol laid down standards for their protection in criminal justice system. It not only promotes the idea of implementation of extra- territorial legislations and, thereby, strengthens the international cooperation but also disregards the concept of dual criminality. A. 3 of 2000 Protocol makes it mandatory to criminalize the production, distribution, dissemination, offer, sale import or export of child pornography. A. 3 (1) (c) of 2000 Protocol imposes obligation to punish possession of child pornographic material on States, in case it is held for any of the aforementioned purposes.

Another leading convention dealing with a pragmatic approach for protection of child rights against sexual abuse having universally application on judicial officers and law enforcement agencies is Budapest Convention, originally known as Council of Europe Convention on Cyber Crime of 2001 (hereinafter referred to as '2001 convention') Child pornography is defined under A. 9 of 2001 Convention as material depicting minor being engaged explicitly in sexual activities and criminalises the same. 2001 Convention is famously known for its usage of unambiguous terminology and detailed categorisation of child pornographic material on internet. Finally, Convention on Protection of Children against Sexual Exploitation and Sexual Abuse of 2007 (hereinafter referred to as '2007 convention') was adopted with wider realm covering offence of sex tourism and child pornography withing child abuse. The 2007 Convention only applies to European nations as not being adopted globally.

Even after having such comprehensive international conventions, there have been significant drawbacks regarding implementation of the same. The need of the hour is to frame conclusive universal guidelines for detection, assessment, prosecution and implementation of child pornography as international law principle with a pragmatic, participative and inclusive approach. There must be promotion of cooperation and reinforcement of redressal mechanisms among member countries in order to flourish the global community and the idea of humanity.

### **Framework in India**

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With increase in child abuse cases and technological advancement in India, government has enacted and amended suitable laws along with significant reforms in criminal justice administration. The decision of blocking 857 pornographic websites in the light of IT Act read with A. 19 (2) of constitution was done under authority of imposing reasonable restrictions on grounds of public morality and decency for combating the menace of child pornography in the country. However, it was later restricted only to websites containing child pornographic material.

### ***Indian Penal Code, 1860***

S. 293 of Indian Penal Code<sup>4</sup> (hereinafter referred to as '1860 Code') expressly states exhibition, circulation, dissemination, distribution, sale etc. of indecent and obscene material related to any person below the age of 20 years as a cognizable offence.

### ***Information and Technology (IT) Act, 2000***

The IT Act<sup>5</sup> of 2000 (hereinafter referred to as '2000 Act') lays foundation of cyber laws in India and governs every crime in cyberspace. Prior to amendment, the 2000 Act only covers punishment for publication and transmission of obscene material which includes 2 years imprisonment along with fine up to 5 lacs initially and 5 years imprisonment along with fine up to 10 lacs for subsequent conviction.

Moreover, under 1860 Code and Indecent Representation of Women (Prohibition) Act, 1986 instances of pornography were not covered. But 2008 amendment has incorporated child pornography as a cognizable and non-bailable offence with penalty of five years imprisonment along with fine of 10 lacs initially and seven years imprisonment along with 10 lacs fine for subsequent offenders through S. 67B of 2000 Act. Under 2000 Act, only storage and consumption of child pornography is criminalised not the adult pornographic material.

The said act basically criminalises pornographic depiction of child irrespective of consent. Post 2008 amendment, browsing, creation, publication, transmission, circulation and collection of any sexually explicit material containing children along with facilitating and recording of sexual abuse with children is punishable by law. S. 67C of 2000 Act takes into consideration intermediaries and make them criminally liable for retention, circulation and production of such related information on some conditions (when liability is not imposed) which were modified by the 2008 amendment under S. 79 of 2000 Act.

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<sup>4</sup> The Indian Penal Code, 1860 (Act 40 of 1860).

<sup>5</sup> The Information Technology Act, 2000 (Act 21 of 2000).

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### ***POCSO Act, 2012***

It is one of the landmark and foremost legislation related to sexual assault, exploitation, abuse or harassment and child pornography in India, and thereby, penalising sexual gratification of child. It aims at protection of child from exploitation and degradation. The said act prescribes offences for usage, preparation, production, sale, transmission, publication and circulation of child pornographic material.

S. 14 of 2012 Act criminalises usage of children for pornographic purposes and depiction of child's reproductive organs or child's engagement in sexually stimulated activities including indecent portrayal of child through any kind of media and prescribes a penalty of five years imprisonment and/ or fine initially and ten years imprisonment and/ or fine or life imprisonment in case of subsequent conviction. Under 2012 Act, storage of pornographic material related to child for commercial purposes is categorised as offence, not the non-commercial purposes, with a penalty of three years imprisonment and/ or fine with regard to S. 15 of 2012 Act. However, there have been no cases and judgments on the same. Unlike 2000 Act, it criminalises usage of child for pornographic purposes irrespective of consent.

### **The Judicial Approach**

#### ***State of AP v. Mangali Yadagiri***<sup>6</sup>

Herein, a 14-year-old SC/ST girl was raped and threatened to hinder from complaining otherwise they will make public the pictures of her genitals. The High Court of Hyderabad was approached to decide whether the case to be tried under POCSO court or SC/ST court and the former was decided by the hon'ble high court.

#### ***P. Shanmugavel Raj v. State and Ors.***<sup>7</sup>

Herein, in a criminal revision petition, the High Court of Madras committed the trial regarding rape of a 13 years old girl from sessions court to special court which is to be established under the provisions of the act along with appointment of special prosecutor.

#### ***Hector Firdaus Kothavala v. State of Maharashtra***<sup>8</sup>

Herein, the matter revolves around grant of anticipatory bail in an offence covered under 2012 Act. A father was charged with a heinous crime of making sexual advancement to his four and six-year-old children. However, the anticipatory bail was granted to the accused as

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<sup>6</sup> 2016 CrLJ 1415.

<sup>7</sup> 2015 (1) Crimes 536 (Mad.).

<sup>8</sup> 2014 (2) BCR (Cri) 834.

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case was made in accordance with wife's allegations and children have no greater understanding towards the same.

***Shashi and Ors. v. The State of Karnataka***<sup>9</sup>

Herein, the facts constitute rape of a teenage girl by friends of her father when she went to collect firewood for them in jungle along with recording of the same preposterous act. Even after being charged under 2012 Act and 2000 Act, they were granted bail.

***Ishan v. State of M.P.***

Herein, the facts of the case are inclusive of incident narrated to parents by victim describing rape of a teenage girl (victim) and video recording of that ludicrous act by her friend's brother who was a juvenile. He was tried by Juvenile Justice Board (JJB) and was later released on bail by High Court in a revision petition filed.

Despite of elaborate legal provisions, combating child pornography has proven to be a seriously challenging task due to fallacious and ineffective implementation strategies. The technological advancement has not reached up to a level and extent of removing and wiping out such material from a wider range over dark web. However, the judiciary has taken strict stand toward such cases due to abundance of evidence. But the major issue still remains with disclosure and coming out with such matters instead of avoiding the same. There is a need to establish standards of exercising fundamental right of speech and expression on social media.

**CHILD PORNOGRAPHY: RECENT TRENDS**

India Child Protection Fund (ICPF) has recently come out with a study showing sharp increase in online searches and demand for child pornography material or child sexual abuse material (CSAM) during lockdown in pandemic times. This demand has also been accelerated by ease in availability of data absolutely free of cost made by such producers. Organisations like ECPAT, UN and Europol have certified the attempts to build an emotional connection with children of tender age and inducing them further to provide pornographic material. There are significant figures showing violence and torturing towards innocent children wherein they are actually screaming in pain. The demand for such violent content is double the demand for original child pornographic material.

With the spike in similar cases, Maharashtra government has stated that as on April 21, 2020, 133 FIRs have been registered and 44 people have been arrested for the same offence since

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<sup>9</sup> 2000 CriLJ 4808.

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commencement of lockdown. NCMEC receives tip-offs through citizens, service providers and uses software to track child pornography content online that is shared with law enforcement agencies in the form of 'tipline reports' providing details like IP address of the device used to surf child pornography. Till January this year, India received 25,000 such reports for cases of CSAM across the country. The nationwide lockdown to contain the COVID-19 outbreak has exposed a dark underbelly of our society — millions of paedophiles, child rapists and child pornography addicts have increased their activities online, making the internet extremely unsafe for our children.<sup>10</sup>

It is more terrifying and shocking to know that most incidents of child pornography, as reported, are done by relatives and known ones. This scenario is even worsened in lockdown 2020 owing to the fact of home restraint, frustration, agitation and mental stress. This will be a major potential threat to children stuck at home because of the lockdown. The spike in child porn consumption during the lockdown period shows the huge presence of paedophiles, child rapists and child pornography addicts online. This makes the internet - which is used for everything from playing indoor games, socialising and online classes by children - extremely unsafe for them because of the threat of cyber-trafficking, grooming, sextortion, sexting, live streaming of child sexual abuse.<sup>11</sup>

In addition to instant rise in demand for child pornography, recently on June 02, 2020, the CBI along with its special unit OCSAE<sup>12</sup> has booked a Delhi based- firm along with its directors for hosting objectionable and offensive websites of Russian domain containing CSAM or pornographic material related to children under 2000 Act and 2012 Act. The jurisdiction revolves around Russia, India and Netherlands on the basis of owner of content, location of servers and facilitating hosting of such inappropriate and obnoxious material. Such similar cases of child pornography have been identified internationally and being booked by competent authority in the month of October 2019 (on the basis of information from German Embassy) and February 2018. In these cases, the child pornographic material, a significant partition of which promotes violence and torture against innocent children, was being circulated in online WhatsApp groups of various persons among different countries.

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<sup>10</sup> Express News Service, "Spike in child pornography cases: 46 held, over 130 FIRs registered during lockdown, says Maharashtra Home Minister", *The Indian Express*, April 21, 2020.

<sup>11</sup> Mrityunjay Bose, "Online search for child porn escalates after lockdown", *The Deccan Herald*, April 20, 2020.

<sup>12</sup> Online Child Sexual Abuse and Exploitation Prevention.

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**CONCLUSION AND PATH AHEAD: RECOMMENDATIONS**

In lieu of enhancement in speed and usage of internet along with ease in availability of pornographic material, there has been slight difficulty for governments to control such material and tackle the issue at hand, especially in this lockdown era. In addition to the same, pornographic material to hidden or dark web makes implementation and regulations of competent legislations and protection of children from such indecent acts a complete struggle. Moreover, the child pornographic content can be transmitted and circulated widely at ease, and hence accessible anywhere to all. Thus, it becomes difficult to define and restrict the jurisdiction of such crimes and identify the source.

The concept of jurisdiction has been debated a lot posing an issue with respect to recognition of cyberspace as a novel form of digital or international space. Besides being a punishable offence, it has grave societal impact. Therefore, there is a need for destruction of the problem from its roots in order to prevent exploitation and further abuse of innocent children who are victims and are in the need of special care and protection. Another significant fault with the regulation machinery is that the approach of the legislation is offender centric rather than being victim centric. They are diverted to take hold of and punish the wrong doers instead of saving the children from such inhuman treatment.

Along with being a legal issue, it also constitutes issues of morality, integrity and societal values. Circulation of such material over dark web adversely affects the potential perception of child towards humanity. Some of the recommendations regarding combating child pornography for government and society at large can be:

- Application of IT Act provisions in POCSO special courts.
- Implementation of statutory provisions, technical expertise, innovative technology and self- regulation to churn out menace of child pornography.
- Awareness among folks regarding disclosure and setting efficient communication network for empowering central authority.
- Cooperation and consolidated efforts by nations at global level by launching connections with other jurisdictions.