

Efficacy of the POCSO Act, 2012 in Curbing Victimization of Children in the Offence of Child Pornography

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ABSTRACT:

The Internet offers plenty of opportunities for adults as well as children in imparting knowledge about anything that is in existence with the universe. Yet, it has some negative consequences. It contributes to the rampant increase of sexual abuse and exploitation such as pornography. Children, in specific, are more vulnerable to such abuse or exploitation, including children from ethnic minorities and marginalized populations, children of slum dwellers or sex workers, children of divorced parents or parents involved in criminality or serving jail sentences. This paper discusses the offense of child pornography and its nature through various international mechanisms and the legislative framework in India. It focuses on the legal loopholes and real life impediments faced by the provisions dealt with, at the time of its implementation, by making a critical analysis of the Protection of Children against Sexual Offences Act, 2012 regarding its adequacy in reducing such crime. This paper enunciates the scope of developing country like India in creating a balance between promoting the development of better and more interactive internet services and protecting children against the wide spreading sexual offense, namely child pornography.

INTRODUCTION:

“Technological progress is like an axe in the hands of a pathological criminal.”

-Sir Albert Einstein

The present society is so technologically dependent that, it is glued to their electronic gadgets in search of everything. These gadgets which are easily assessable and have become an answer to each question one has on the mind, with a single click. Similarly, when on one side technology has helped us in solving crimes, on the other hand, it has given birth to many new ones too. One of such kinds is cybercrime. India is one of the first few countries to combat cyber crimes.^[1] However, some issues, especially in respect of child pornography have still majorly remained a grey area.

New technology has given birth to social networking. So the E-mail and text communication eventually have turned into profiling. The profiling technology

improvised by the techies has led to many applications that allow the users to add information like photo, video, files, etc. subsequently grouping has emerged. Now the social networking technology improving in many dimensions like geo-tagging, tagging, geo-social networking, interoperability between the social networks by Open ID and Open Social, real-time web, location-based, live feed, GPS live location, etc. While globally the negative side of the unmitigated use of social media is articulated, India has embraced social media without being too bothered about its possible hazards.[2] According to a Microsoft study in June 2012 that more than 50% of the children in India using the net are either threatened or harassed online. The 'Global Youth Online Behaviour Survey' conducted by Microsoft, revealed that 53% of the surveyed children aged between eight and 17 in India admitted they were victims of cyber bullying.[3] India has emerged as one of the biggest contributors and consumers of child pornography despite a crackdown against such material on the internet. Alarming, 35-38 per cent of the total porn uploaded on the web is related to children or teenagers. [4]

OBSENIETY AND CHILD PORNOGRAPHY- MEANING AND DEFINITION:

Pornography is an offense with grave moral implications.[5] There isn't any well-settled definition for the offense of 'pornography'. It has rather been related to something which is obscene in nature. The U.S. Supreme Court in the case of *Miller v. California*[6] laid down the three-point test to decide whether a pornographic work was "obscene" or not. The standards laid down are; (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. The Miller test has stood the test of time for more than a quarter-century. Yet, its applicability to the internet is debatable.[7] Under Common Law, in the case of *R. v. Hicklin*[8] Court for the first time supplied with the test of obscenity. It was provided by Lord Cockburn that: "*Whether the tendency of the material charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall...*"

Child pornography usually refers to images or films and in some cases writings depicting sexually explicit activities involving a child. In other words, child pornography is a record of child sexual abuse. The abuse of the child occurs during the sexual acts which are recorded with the help of modern and sophisticated technology. Child pornography, therefore, involves sexual abuse and the exploitation of children and is often linked to the prostitution of children, child sex tourism and the trafficking of children for sexual purposes.[9] In the Optional Protocol to CRC[10], child pornography is defined as being 'any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.' According to ECPAT international (2008), a child-safe definition should include visual representations embodied in photographs, films, video cassettes, DVDs, drawings, paintings, sculptures as well as tapes, computer discs and other devices on which audio-visual representations can be recorded. A scrutiny of the definitions cited above indicates

that there are two obvious aspects to be taken into account while defining child pornography. One includes the materials and the other being the type of depicted activities.[11]

CONCEPT OF 'CHILD PORNOGRAPHY' UNDER IPC AND IT (AMENDMENT) ACT, 2008:

The criminal law in India is inadequate in many respects to deal with the sensitive and serious issue of sexual offences against children. The 172nd Law Commission report[12] has reviewed all the laws dealing with sexual offences after the *Sakshi v Union of India*[13] Case. After which, the said Commission appealed for numerous amendments to the laws dealing with this subject. Until May 2012, various provisions of IPC, like Section 354, 376 and 377 which dealt with 'sexual offences' were also applied to the cases of child sexual abuse.[14] This resulted in a serious miscarriage of justice as those provisions were not reasonably sufficient for their application to cases of child sexual abuse. However, certain amendments were made in the IPC after the Nirbhaya case under the 2013 Criminal Law Amendment Act. Nonetheless, it is still incomplete and has failed to deal with the sexual offences involving children.

Talking especially about obscenity, the conventional law, Sections 292 and 293 of IPC deals with it, but it does not work per se deal with 'obscenity online'. This difficulty was solved by the insertion of Section 29 A[15] which included electronic documents also within the purview of documents thus making the law applicable to electronic media as well. However, the Indian Penal Code was found inadequate to deal with issues of pornography online as fixing liability on the transmitters of information online was found to be difficult as the question of motive or intention was difficult to be proved in their case. Even though section 292 includes overt acts, as well as illegal omissions, section 35 of the IPC puts intention or knowledge to be proved on the part of the party which is quite difficult in the case of Internet Service Providers. In *Ranjit D. Udeshi v. State of Maharashtra*,[16] the Supreme Court drew a difference between 'obscenity' and 'pornography'. [17] It was held that *while pornography denotes writing, pictures, etc. intended to arise sexual desire, obscenity may include publication not intended to do so but which have the tendency*. [18] While both offend against public decency and morals, pornography is obscenity in a more aggravated form. The court possibly wishing to dispose of such a technicality of intention being important to prove knowledge of the content has said that clause (1) of Section 292 does not make it necessary for knowledge to be there on the part of the offender as in every case if knowledge of the same were to be proved, it would tip the balance in favour of the offender. His liability is therefore strict. However, in the case, it was also said that the prosecution had the burden of proving that accused person did intend to sell such an object.[19]

When it comes to Section 67B[20] of Information Technology Act, 2000, the legislature has taken special care of online abuse of a child in the Cyberspace which is so rampant & easy owing to certain advantages of Information Technology. Along with publication or transmission of impugned material, as per Information Technology Act, 2000, even browsing and downloading of material depicting or containing a child in an obscene or indecent or in a sexually explicit act, or abusing children online, etc.

is now an offence with severe punishment. 'Child pornography', is also part and parcel of 'Code of obscenity' as reflected in the Information Technology Act, 2000, through various wrongs. But then, despite having such an outstanding arrangement dealing with child pornography, child pornography was rampant and being committed online with very ease and with far-reaching implications,^[21] which led to its inclusion in the POCSO Act also.

ANALYSIS OF THE OFFENCE OF 'CHILD PORNOGRAPHY' UNDER THE POSCO ACT, 2012:

The increased issues of child crimes and thus activism for the protection of children in media and public discourse are one of the important reason which accounted for the Government of India to pass a special law, namely; The Protection of Children from Sexual Offences Act, 2012. This Act criminalizes sexual assault, sexual harassment, and child pornography.^[22] All forms of child sexual abuses are specific offenses with specific punishments for the perpetrators. It has laid down certain guidelines for police and court authorities to deal with the victims. Special child courts are also setup to deal with the issue; however, the effective application of these guidelines remains a point of concern. The problem of implementation has highly hampered the protection of children from sexual abuse in the country. Furthermore, National Commission for the Protection of Child Rights which was established as an independent body in 2007 which ensures that all such laws, policies, and programmes, are in agreement with the child rights enshrined in the Constitution of India and the UN Convention on the Rights of the Child.^[23] The Commission has also been assigned the task of overseeing the implementation of the POSCO Act.^[24] Many forms of sexual abuse, like showing pornography to children could not be prosecuted; unless there was penetrative sexual assault and there were no provisions that could prosecute sexual offences against boys, but all these have been included in the POCSO Act. Sexual Harassment^[25] under this Act states that, any person who shows objects to a child in any form or media for pornographic purposes, or enticing a child for pornographic purposes or gives gratification, or constantly watches a child either directly or through electronic, digital or any other means, or threatens to use a real or fabricated depiction through electronic, digital or any other mode of any part of the body of the child or involvement of the child in a sexual act shall be punished with an imprisonment of either description extending to 3 years. Furthermore, the Act also specifically mentions about punishing any person for using a child for sexual gratification; like representation of the sexual organs of a child or using his/her for real or simulated sexual acts, with or without any kind of penetration or the indecent or obscene representation of child, with an imprisonment of either description extending to 5 years and fine, and in case of any subsequent conviction, imprisonment shall be extending to 7 years and fine. It even states that, if any person uses a child for pornographic purposes and directly participates in pornographic acts, by committing a penetrative sexual assault then he shall be punished with an imprisonment of minimum 10 years and extending to life imprisonment, and fine, but in case it is in an aggravated form, then the offender shall be punished with a rigorous life imprisonment and fine. When any person uses a child for pornographic purposes and directly participates in pornographic acts, by committing sexual assault, then he shall be punished with an imprisonment of 6 years extending to 8 years and fine, and

when it is in an aggravated form, imprisonment shall be ranging from 6 years to 8 years.[26] Section 15[27] states, the person storing pornographic materials in any form for commercial purposes shall be imprisoned for a term extending to 3 years and/or fine. In case of abetment of any person as to the above-mentioned offences, such person shall be punished as if he himself has committed such an offence.[28] Lastly, in case of an attempt, the person shall be punished with imprisonment extending to one half of the life imprisonment or longest term of imprisonment as prescribed, and/ or with fine, as the case may be.[29]

CONCLUSION:

With the enactment of the POSCO Act, India now has one of the most comprehensive laws that not only allow justice for children who are victims of sexual offences but also takes into account the best interests and wellbeing of the child. It is no doubt landmark legislation in the area of child protection.

The Apex Court's suggestion to the government to find ways to block child pornography has put the government in a dilemma[30]. Although the court and the government are firm and committed on banning child pornography, they are unable to find the appropriate mechanism and technology so far. Despite the fact that agencies like the Interpol, Central Bureau of Investigation (CBI) and other authorities are taking necessary action to block websites that indulge in child pornography, it is not technically possible for the government as many of these pornographic websites are not under the country's jurisdiction. Technical experts feel that it is technically challenging, even if it is not impossible, to block these websites altogether. Besides, there are various bottlenecks and challenges beyond government control such as jurisdiction over foreign pornographic websites, control over foreign internet service providers, and unavailability of appropriate technology which can make distinctions between "pornography" and "child pornography" possible. Secondly, the court wants to ban only "child pornography" and not "pornography" per se as it believes that "adults have a fundamental right to watch pornography within the privacy of their own homes"[31] and it is individual privacy and personal liberty; banning pornographic websites would be a violation of Article 21 (Right to Personal Liberty) of the constitution.[32]

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