

DIGITAL AGE DILEMMAS: ADDRESSING THE GAP IN CHILD PORNOGRAPHY LAWS IN THE DIGITAL AGE

-By Sandra Sunil¹

Abstract

The sexual exploitation of children has long been present in society, historically manifested through erotic literature and imagery featuring minors. However, modern technological advancements, particularly the Internet and digital devices, have redefined pornography and its distribution. These developments have unfortunately facilitated easier and cost-effective production and dissemination of Child Pornography. The Internet has emerged as a primary medium for transmitting such material, serving as both a distribution channel and a vast storage repository for such contents. There are laws including POCSO, Information Technology and the Bharatiya Nyaya Sanhita to protect children from being exploited for the use of sexual contents and pornography. But can these existing laws counter the technological advancement, easy accessibility and cross-border nature of the offence? This paper aims at looking into the effectiveness of the existing laws in countering Child pornography and whether a more specific and comprehensive law is required in this regard.

Recent Judicial Pronouncements have held that merely storing or watching Child porn is not an offence and that there has to be a sexual intent and purpose of sexual gratification involved, for a video to be termed as pornographic. This raises an important question; what exactly is an offence of Child Pornography? And where do we draw the line? This paper aims at understanding what qualifies as an offense of Child Pornography and whether it should be restricted to making and distributing of such content, or whether its scope should be wide enough to include in its ambit anyone who engage with such content in any manner. This paper examines the measures taken by Authorities and interprets judicial responses to these initiatives.

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Additionally, it studies how far the present measures are effective and offers recommendations for more effective strategies to address and mitigate the issue of child pornography in the Digital Age.

Introduction

The digital age has ushered in unprecedented connectivity and access to information, but it has also given rise to new and complex challenges in protecting the most vulnerable members of society - children. This research paper explores the critical issue of child pornography in the modern era, examining its proliferation, legal frameworks, and the multifaceted efforts to combat this heinous crime.

As technology evolves rapidly, so too do the methods used by perpetrators to produce, distribute, and access child pornographic material. This paper delves into the legal landscape surrounding child pornography in India, analysing key legislation such as the Information Technology Act, 2000 and the Protection of Children from Sexual Offences Act, 2012. It also examines international approaches and conventions aimed at addressing this global problem.

The research highlights recent judicial decisions and interpretations that have shaped the understanding and application of child pornography laws in India. These cases reveal the complexities and sometimes contradictions in legal reasoning when dealing with digital-age crimes against children.

Furthermore, this paper evaluates the effectiveness of various measures implemented to counter child pornography, from website bans to awareness campaigns. It explores the challenges faced in enforcement, including technological hurdles and jurisdictional issues in cyberspace.

By presenting a comprehensive analysis of the current state of child pornography laws, enforcement efforts, and persistent challenges, this paper aims to contribute to the ongoing dialogue on protecting children in the digital age. It concludes by offering recommendations for a more robust, coordinated approach involving legal reforms, technological solutions, international cooperation, and societal awareness to combat this pervasive threat to children's safety and well-being.

Legal Provisions

Information Technology Act, 2000

Section 67B

This Section sets penalties for actions involving child pornography or sexually explicit material related to children in electronic form. It applies to anyone who:

- Publishes or transmits any material electronically that shows children engaged in sexually explicit acts.
- Creates, browses, downloads, promotes, or distributes text or digital content that depicts children in an obscene, indecent, or sexually explicit manner.
- Induces or entices children into online relationships with the intent of involving them in sexually explicit acts or engaging in behaviour that would offend a reasonable adult.
- Facilitates online abuse of children in any form.
- Records sexual abuse involving children in electronic form, either of oneself or others. ²

The Section provides Punishment of imprisonment up to five years and a fine up to ten lakh rupees for first time offenders and Imprisonment up to seven years and a fine up to ten lakh rupees for repeat offenders.

Protection of Children from Sexual Offence Act, 2012

Section 2 (1) (da)

The Act introduces a clear, legal definition of child pornography under Section 2 (1) (da). It includes any visual depiction of sexually explicit conduct involving a child, such as photographs, videos, or digital/computer-generated images that resemble a real child. It also covers content adapted or modified to depict a child, including cartoons and animated images. ³

Section 13

² The Information Technology Act, 2000, § 67B, No. 21, Acts of Parliament, 2000 (India).

³ The Protection of Children from Sexual Offences Act, 2012, § 2 (1) (da), No.32, Acts of Parliament, 2012 (India).

Anyone who uses a child in any form of media, including television, internet, or print, for sexually suggestive purposes is guilty of child pornography. This includes showing a child's genitals, depicting a child engaged in sexual acts (real or simulated), or presenting a child in an indecent or obscene manner.⁴

The definition of "use a child" includes any involvement of a child in the creation, production, sharing, or distribution of pornographic material through any technology.

Section 14

Section 14 outlines punishments for using children in pornography. It penalizes:

1. Exploiting children for pornographic purposes.
2. Direct involvement in pornographic acts involving penetrative or aggravated penetrative sexual assault.
3. Participation in acts involving sexual assault or aggravated sexual assault during the creation of pornographic content.

Repeat offences are also considered and have been given stricter punishments.⁵

Section 15

Section 15 deals with the punishment for storing or possessing child pornographic material:

1. Without Intent to Share or Transmit: Fined for failing to delete, destroy, or report the material.
2. With Intent to share or distribute: Punishable by imprisonment, a fine, or both.
3. For Commercial Purposes: Stricter punishments, including higher imprisonment terms and fines, are imposed for first and subsequent offenses.⁶

⁴ The Protection of Children from Sexual Offences Act, 2012, §13, No.32, Acts of Parliament, 2012 (India).

⁵ The Protection of Children from Sexual Offences Act, 2012, §14, No.32, Acts of Parliament, 2012 (India).

⁶ The Protection of Children from Sexual Offences Act, 2012, §15, No.32, Acts of Parliament, 2012 (India).

The Protection of Children from Sexual Offences (Amendment) Act, 2019 was, aiming to address the widespread issue of child sexual abuse. It strengthens provisions to combat sexual offenses against children, particularly child pornography.

Storing child pornographic material without reporting or deleting it is punishable by a fine of at least ₹5,000, which increases for repeat offenses. Distributing such content is punishable with up to three years in prison. The act imposes harsher penalties for using children for pornographic purposes, with up to five years' imprisonment for a first offense and up to seven years for subsequent offenses.

The amendment emphasizes zero tolerance for child pornography and enhances punishments for violations. The Act is significant because it provides, for the first time in Indian law, a specific definition of child pornography, which was previously lacking. This definition ensures more effective implementation of laws and punishment for offenses involving child sexual exploitation.

The Bharatiya Nyaya Sanhita

Section 295

Anyone who sells, lets to hire, distributes, exhibits or circulates obscene material to a child or attempt to do that will be punished with three years' imprisonment of either description and up to two thousand rupees fine for the first offense and seven years imprisonment of either description and up to five thousand Rupees Fine on a subsequent offense.⁷

International Approach

The United Nations Convention on the Rights of the Child (UNCRC)

The United Nations Convention on the Rights of the Child (UNCRC) stands as a cornerstone of international law protecting children's rights, ratified by 193 countries, though notably not by the

⁷ The Bharatiya Nyaya Sanhita, 2023, § 295, No.45, Acts of Parliament, 2023 (India).

United States. While the UNCRC aims to safeguard various aspects of children's welfare and development, it has faced criticism for initially overlooking the issue of child pornography in its 1989 formation. The convention broadly defines a child as anyone under 18, which has caused some discord with nations recognizing different ages of adulthood. Despite its widespread acceptance, the UNCRC's enforcement mechanisms have been scrutinized for their lack of direct power and ambiguity in certain areas, such as national criminal legislation and age of consent. The committee's role is limited to making recommendations, without concrete enforcement capabilities. Nevertheless, the UNCRC remains a crucial international instrument in the global effort to combat child pornography and protect children's rights, even as it grapples with implementation challenges and critiques of its effectiveness.⁸

The Optional Protocol to the United Nations Convention on the Rights of the Child, 2000

The Optional Protocol to the United Nations Convention on the Rights of the Child, adopted in 2000, focuses on addressing the sale of children, child prostitution, and child pornography. It was introduced in response to the growing threat of online child exploitation in the digital era.

Inspired by the 1999 Vienna Conference on combating online child pornography, the Protocol seeks to criminalize various aspects of child pornography globally and encourages collaboration between governments and the internet industry.

As the foremost international treaty on child sexual exploitation, the Optional Protocol provides a detailed definition of child pornography, encompassing any depiction of a child engaging in sexual activities or sexually explicit representations, whether real or simulated. It also includes provisions for extra-territorial enforcement, enhancing its global applicability.

Although the Protocol has certain limitations in its scope and approach, it serves as a robust framework for international efforts to combat child pornography and related offenses. It offers a

⁸ United Nations Convention on the Rights of Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

roadmap for nations to safeguard children from sexual exploitation in the rapidly changing digital environment.⁹

Council of Europe Convention on Cybercrime, 2001(The Budapest Convention)

The Council of Europe's Budapest Convention on Cybercrime is a key international treaty addressing online crimes, including child pornography. Its strengths lie in its modern approach, clear definitions, and comprehensive coverage of child pornography offenses, as outlined in Article 9. The convention encourages nations to align their laws with its provisions, fostering a unified global stance against child exploitation online. Despite criticism regarding its adaptability to rapid technological changes and some jurisdictional limitations, the Budapest Convention remains a crucial tool in combating cybercrime. It has successfully established a framework for criminalizing child pornography and reflects a widespread recognition of the seriousness of this issue. While not perfect, the convention represents significant progress in international cooperation to protect children from online exploitation and combat cybercrime more broadly.¹⁰

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 2007

The Council of Europe's 2007 Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse stands out for its treatment of child pornography as child abuse and its inclusion of sexual tourism. While it aims to harmonize practices among European nations, it has notable limitations. These include inadequate provisions for victim support, lack of global adoption, and failure to criminalize viewing child pornography without downloading. Despite these shortcomings, the convention marks a significant step in recognizing various forms of child sexual exploitation. The case of *New York v. Kent*¹¹ in the U.S., which allowed the use of temporary internet files as evidence in child pornography cases, highlights the evolving nature of this legal landscape. Overall, the convention represents progress in child protection efforts, but also

⁹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227.

¹⁰ Convention on Cybercrime, Nov. 23, 2001, E.T.S. No. 185.

¹¹ *New York v. Kent*, N.Y. Slip Op. 3572 (N.Y. 2012)

underscores the challenges in creating comprehensive, globally applicable legislation in this domain.¹²

Judicial Approach

Even though there are very limited cases dealing with the matter of child pornography which has been dealt by the higher judiciary, the reason for which can be correlated with the social stigma associated with it.

Question of Applicable Law and Jurisdiction

In the case of *Sharat Babu Digumarti V. Government (NCT of Delhi)*¹³ question involved charges against the accused under both Section 67 of the IT Act and Section 292 of the Indian Penal Code (IPC) of 1860. The court's task was to determine whether these sections could be applied simultaneously. In this case, the court focused on the non-obstante provisions in Section 81 of the IT Act. After careful consideration, the court concluded that the charges under Section 292 of the IPC could not be sustained. The court found that Sections 67, 67A, and 67B of the IT Act, 2000 were comprehensive in addressing issues related to transmitting obscene material electronically. Due to the non-obstante clause in Section 81, the IT Act, as a special law, takes precedence over the IPC, which is considered a general law. This led to the creation of laws specifically targeting Child Sexual Abuse and Child Pornography. The courts have consistently distinguished between general and special laws, applying special laws to cases involving child pornography.

In the case of *State of A.P. v. Mangali Yadagiri*¹⁴, the High Court of Hyderabad addressed the jurisdictional issue of the rape of a 14-year-old girl belonging to a SC/ST community. The perpetrators not only committed the crime but also took photographs of the victim. They then used these images to threaten the girl, warning her that they would publicize them if she reported the

¹² Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Oct. 25, 2007, C.E.T.S. No. 201.

¹³ *Sharat Babu Digumarti V. Government (NCT of Delhi)*, AIR 2017 SC 150

¹⁴ *State of A.P. v. Mangali Yadagiri*, 2016 CRLJ 1415

crime which effectively silenced the victim for a period of time. The Court ruled that the appropriate venue for the trial in this regard would be the POCSO Special Court.

The case of *P. Shanmugavel Raj v. State and Ors.*¹⁵ the Madras High Court addressed jurisdictional issues in a criminal revision petition challenging the committal of a trial for the rape of a 13-year-old girl. The case was initially pending in the Sessions Court, but the High Court intervened, referencing provisions of the relevant act that required the establishment of special courts for such cases. The Court ordered the trial to be transferred to the special court as mandated by the act, aligning with the legislative intent to provide specialized forums for sexual offenses against minors. The Court also emphasized the importance of having a prosecutor with specific expertise in handling sensitive cases.

Granting of Bail

Apart from the Jurisdictional confusions, the granting of bail in cases involving child pornography and sexual abuse is a complex and often controversial aspect as courts may exercise their discretion to grant bail even in serious offenses against children. This practice highlights the legal system's attempt to balance the rights of the accused with the gravity of the alleged crimes and the need to protect vulnerable victims. In the case of *Hector Firdaus Kothavala v. State of Maharashtra*¹⁶, where a father accused of sexually abusing his two young children, aged 4 and 6, which came to light when the wife discovered the abuse and filed a complaint. Despite the heinous nature of the alleged crime, the court granted anticipatory bail to the accused. In the case of *Shashi and Ors. v. The State of Karnataka*¹⁷, friends of the victim's father allegedly lured the minor girl to collect firewood from the jungle, where they raped her and recorded the act. The accused were charged under POCSO and IT Act. Even in this case bail was granted to the accused. Similarly in *Ishan v. State of M.P.*¹⁸, which involved a juvenile accused of raping a girl at his sister's house and recording the act, the case was initially handled by the Juvenile Justice Board. A revision petition

¹⁵ P. Shanmugavel Raj v. State and Ors. ,(1996) 6 SCC 267

¹⁶ Hector Firdaus Kothavala v. State of Maharashtra , Crime No 79 of 2013, Criminal Anticipatory Bail Application No.712 of 2013

¹⁷ Shashi and Ors. v. The State of Karnataka , 2000 CRILJ 4808

¹⁸ Ishan v. State of Madya Pradesh, 2014 LawSuit(MP) 2129

was later filed in the High Court of Madhya Pradesh, which resulted in the accused being released on bail.

But in the case of *Sandeep Gopal V. State of Kerala*¹⁹, the Kerala High Court addressed whether bail should be granted to an individual accused of child pornography. The prosecution argued that the crime was serious and that releasing the accused could lead to interference with the ongoing investigation. The Court agreed, taking into account factors such as the nature of the allegations and the potential impact on the victim and their family. The Court concluded that granting bail could lead to attempts to intimidate or influence prosecution witnesses, and therefore, denied the accused bail.

Recent Judicial Confusions

Recently in the case of *Just Rights for Children Alliance and Anr. v. Sebin Thomas*²⁰, the Kerala High Court ruled that merely storing or possessing child pornographic material does not constitute a crime under the POCSO Act. The case involved a petitioner who had downloaded child pornographic material on his phone via the Telegram app. The Court emphasized that possession must be accompanied by an intention to transmit, propagate, display, or distribute the material to constitute an offense. Since there was no evidence of such intent in this case, the Court held that the essential ingredients of the offense were not met. It further noted that Section 67B of the IT Act requires these elements to establish a violation. Consequently, the Court found no prima facie offense under Section 15(2) of the POCSO Act or Section 67B (b) of the IT Act. The Supreme Court has since issued a notice challenging this decision in light of a similar issue addressed by the Madras High Court regarding the viewing of child pornography.²¹

Madras High Court in a recent decision, *S Harish v. Inspector of Police and Another*²² has set aside the charges against an accused for watching child pornography, stating that merely watching child

¹⁹ *Sandeep Gopal v. State of Kerala, Bail App..No. 1602 of 2011, High Court of Kerala, Judgement dated 10th March 2011.*

²⁰ *Just Rights for Children Alliance and Anr. v. Sebin Thomas , Crl. Rev. Pet No. 610 of 2024*

²¹ Anmol Kaur Bawa, *Supreme Court To Consider Correctness Of Kerala HC View That Mere Storage Of Child Pornography Is No Offence Under POCSO/IT Acts* (12 Aug 2024, 4:51 PM), <https://www.livelaw.in/top-stories/supreme-court-to-consider-correctness-of-kerala-hc-view-that-mere-storage-of-child-pornography-is-no-offence-under-pocsoit-acts-266550?fromIpLogin=65727.29031270104>

²² *S Harish v. Inspector of Police and Another , 2024 LiveLaw (Mad) 17*

pornography would not amount to an offence under the POCSO Act. According to the Court, the provisions mandated for the use of child for pornographic purposes which was absent in this case as the accused only watched pornography including children which was evident from his mobile phones which included two files containing such contents.²³

“To make out an offence under Section 14(1) of Protection of Child from Sexual Offences Act, 2012, a child or children must have been used for pornography purposes. This would mean that the accused person should have used the child for pornographic purposes. Even assuming that the accused person had watched child pornography video that strictly will not fall within the scope of Section 14(1) of Protection of Child from Sexual Offences Act, 2012. Since he has not used a child or children for pornographic purposes, at the best, it can only be construed as a moral decay on the part of the accused person.”

The case has also relied on the judgment of the Kerala High Court in the similar facts. The Supreme Court has orally disapproved on this Decision of the Madras High Court stating it as ‘Atrocious’. The bench including CJI DY Chandrachud comprising Justices JB Pardiwala and Manoj Misra, while hearing of the plea filed by Just Rights for Children Alliance, a coalition of NGOs also issued notice on the petition returnable within three weeks.²⁴

“On September 23, 2024, the Supreme Court overturned a Madras High Court judgment that had ruled that mere storage of child pornographic material without intent to transmit was not an offense under the Protection of Children from Sexual Offences (POCSO) Act. A bench comprising Chief Justice DY Chandrachud and Justice JB Pardiwala deemed the High Court's decision to quash criminal proceedings a serious error. The Supreme Court reinstated the prosecution, asserting that

²³ Upasana Sajeev, *Merely Watching Child Pornography Not an Offence under POCSO Act or Section 67B Information Technology Act: Madras High Court*, LiveLaw.in (12 Jan 2024 10:35 AM), <https://www.livelaw.in/high-court/madras-high-court/watching-child-pornography-not-offence-under-pocso-act-madras-high-court-246551?fromIpLogin=59754.34494167326>

²⁴ Anmol Kaur Bawa, *'Atrocious' : Supreme Court Frowns Upon Madras HC Judgment That Watching Child Porn In Private Isn't Offence*, LiveLaw.in (11 Mar 2024, 3:27 PM), <https://www.livelaw.in/top-stories/atrocious-supreme-court-frowns-upon-madras-hc-judgment-that-watching-child-porn-in-private-isnt-offence-251885?fromIpLogin=15195.184844526666>

the failure to delete, destroy, or report such material implies an intent to transmit it. This inaction, the Court stated, *prima facie* creates a presumption of a culpable mental state as required by law.²⁵

In a similar trend, the Karnataka High Court in the case of *Inayathulla N and State by Police Sub Inspector*²⁶ has recalled its previous ruling, in which it had stated that merely watching pornography does not constitute an offence under Section 67B of the Information Technology Act. The Court acknowledged its earlier decision as an error, explaining that it had failed to consider clause (b) of the section. This clause stipulates that individuals who create, collect, seek, browse, download, advertise, promote, exchange, or distribute material in any electronic form that depicts children in an obscene, indecent, or sexually explicit manner are also liable under the law. As a result, the Court ordered further investigation in the matter following a recall application filed by the State Government.²⁷

The Delhi High Court recently exercised its *suo moto* revisional power to revise a decision by a Trial Court on a PIL filed by Tulir Charitable Trust in the case of *Tulir Charitable Trust V. Union of India & Ors.*²⁸ According to the High Court, the Trial Court erred in deciding that the proceedings can only be continued in case of strict proof to determine the age of the children in the pornographic videos, as Child Pornography will not be constituted if a child is not involved.

“In the opinion of this Court, it is the definition of 'child pornography' which is of relevance while considering whether Section 15 of the POCSO Act has to be invoked or not,” the Court pointed out and concluded that only a *prima facie* suspicion of involvement of a child or a subjective satisfaction/inference as regards the appearance of persons is sufficient to attract the provisions of Child Pornography.²⁹

²⁵ Anmol Kaur Bawa, *Storage Of Child Pornography Without Deletion Or Reporting Indicates Intention To Transmit, Constitutes POCSO Act Offence : Supreme Court* (23 Sept 2024 6:14 AM), <https://www.livelaw.in/top-stories/storage-of-child-pornography-offence-under-pocso-act-supreme-court-270344?fromIpLogin=51029.057566054245>

²⁶ *Inayathulla N and State by Police Sub Inspector*, 2024 LiveLaw (Kar) 320

²⁷ Mustafa Plumber, *Karnataka HC Recalls Order Which Held Watching Child Porn Online Not An Offence, Says Erroneously Overlooked Relevant Provision Of IT Act*, (20 July 2024, 11:29 AM), <https://www.livelaw.in/high-court/karnataka-high-court/karnataka-high-court-recalls-order-watching-child-pornography-section-67b-information-technology-act-263980>

²⁸ *Tulir Charitable Trust V. Union of India & Ors.*, 2024 LiveLaw (Del) 576

²⁹ Nupur Thapliyal, *Trial Court Discharges Two Men Accused Of Storing Child Pornographic Material, Delhi High Court Registers Suo Moto Case* (11 May 2024, 1:21 PM), <https://www.livelaw.in/high-court/delhi-high->

Kerala High Court also ruled in the similar lines in the case of *Parthasarathi M v. State of Kerala & Connected Cases*³⁰ when it held that strict proof of age is not always required to establish the offence of child pornography. Justice K. Babu, while deciding the case, emphasized that requiring proof of age would undermine the purpose of the legislation, as it is often difficult to determine the age of individuals involved, given the anonymous nature of the internet. The Court further clarified that the prosecution is not obligated to prove the victim's age and that the case can proceed based on the appearance of the individuals involved. In appropriate cases, expert opinions, such as those from pediatricians, may be sought. Additionally, the Court laid down specific guidelines for determining whether material qualifies as child pornography.³¹

These recent judgements shows how the Judiciary have been going back and forth on this matter. Judiciary have been showing clear confusion on the interpretation of Child Pornography Laws. It is unclear as to where to draw the line and what essentially constitute the offence of Child Pornography.

Attempts to Counter Child Pornography and its effectiveness

The Government has taken a number of measures to counter the issue of Child Pornography over the years. In the case of *Jayesh S. Thakkar v. State of Maharashtra*³², the petitioners addressed a letter to the Chief Justice of the Bombay High Court regarding online pornographic websites. The court treated this letter as a writ petition in its own right. In response, the Bombay High Court appointed a committee which was tasked with suggesting and recommending both preventative and controlling measures to protect children from accessing pornographic and obscene content online.

[court/trial-court-discharges-two-men-accused-of-storing-child-pornographic-material-delhi-high-court-registers-suo-moto-case-257675?fromIpLogin=6641.394799386857](https://www.livelaw.in/high-court/kerala-high-court/kerala-high-court-identity-strict-proof-age-model-not-required-to-be-ascertained-in-all-cases-of-child-pornography-lays-down-guidelines-254972)

³⁰ Parthasarathi M v. State of Kerala & Connected Cases , 2024 LiveLaw (Ker) 240

³¹ Tellmy Jolly, *Strict Proof For Determining Age Not Required In Every Case Of Child Pornography: Kerala High Court Lays Down Guidelines* (12 Apr 2024, 4:46 PM), <https://www.livelaw.in/high-court/kerala-high-court/kerala-high-court-identity-strict-proof-age-model-not-required-to-be-ascertained-in-all-cases-of-child-pornography-lays-down-guidelines-254972>

³² Jayesh S. Thakkar v. State of Maharashtra , Suo Motu Writ Petition No. 1611 of 2001, (Mumbai High Court)

In the case of *The Kamlesh Vaswani v. Union of India & Ors case*³³, the court directed the Central Government to implement measures to block access to websites containing child pornography and to establish regulations to prevent people from accessing such websites. The court classified these websites as "obscene" and considered them a threat to social morality. As a result of this Judgement the Government banned 857 pornographic sites in the year 2015.³⁴ The Indian government initially enacted a broad ban on certain websites, citing the Information Technology Act and Article 19(2) of the Indian Constitution which allowed the government to impose restrictions based on considerations of decency and morality. However, this comprehensive prohibition was subsequently scaled back. Since then there have been multiple instances of banning of pornographic sites in order to counter child pornography, ever since 2015, almost 1000 porn sites were banned in India.

In the case of *In Re: Prajwala Letter Dated 18.2.2015*³⁵ Videos Of Sexual Violence And Recommendations, the Supreme Court had appointed an expert committee to address the issue and directed involvement from the Amicus Curiae and the petitioner's counsel. The expert committee submitted a report and the Court found that major issues had been resolved, though some non-consensus issues remained but the Supreme Court decided to close the PIL, stating that further monitoring by the Court was unnecessary due to the technical nature of the remaining issues, which had to be dealt by the Government.

³³ The Kamlesh Vaswani v. Union of India & Ors case , (2016) 7 SCC 592

³⁴ Palak Nigam, Child Pornography In India: A Study From Socio-Legal Perspectives (Jul 6, 2022), <https://articles.manupatra.com/article-details/CHILD-PORNOGRAPHY-IN-INDIA-A-STUDY-FROM-SOCIO-LEGAL-PERSPECTIVES>

³⁵ In Re: Prajwala Letter Dated 18.2.2015, (2018) 15 scc 551

In the case of *Unknown v. State Of Uttarakhand And Others, 2018*³⁶, Court said that Internet Service License Holders have not fully complied with directives to block obscene and pornographic websites, leaving them easily accessible to children. This exposure can negatively affect young minds and potentially lead to criminal behavior. While internet providers were expected to protect children by blocking these sites, the responsibility extends to the entire society, including parents, teachers, and school management. The ongoing accessibility of such content to minors highlights the need for more effective implementation of protective measures. Following this Judgement, it was mandated for Internet Service Providers to abide by the order of the Department of Telecommunication, notified on 31st July, 2015, asking Internet Service Providers (ISPs) to disable 857 websites including pornographic content is to be strictly complied with and the license of those who failed to do so shall be suspended.

In the case of *Prakash (Dr.) v. State of Tamil Nadu*³⁷, Supreme Court has held that for the purpose of protecting the interests of the contemporary society even the State Governments may have to apprehend perpetrators of cyber obscenity by invoking local State legislations accordingly.

Various other initiatives have been implemented to enhance cyber safety awareness and child protection. Telecom providers are now sending informative messages to users, while the government's Twitter account @CyberDost shares cyber safety information. Cyber awareness programs are being conducted across multiple cities, and FM radio stations broadcast spots and jingles on the topic. A handbook for adolescents and students has been published, and the CBSE curriculum now includes a chapter on cyber security. Furthermore, the National Commission for Protection of Child Rights (NCPCR) and State Commissions for Protection of Child Rights (SCPCR), responsible for overseeing the implementation of the POCSO Act, have developed educational materials. These information, education, and communication (IEC) resources related to the POCSO Act are accessible on the NCPCR website (www.ncpcr.gov.in).³⁸

³⁶ Unknown v. State Of Uttarakhand And Others, 2018, WRIT PETITION (PIL) No. 158 of 2018

³⁷ Prakash (Dr.) v. State of Tamil Nadu, 2002 Cri LJ 2596

³⁸ Press Info. Bureau, Gov't of India, Ministry of Women & Child Dev., Digital Exploitation of Children (July 18, 2019, 4:35 PM), <https://pib.gov.in/PressReleasePage.aspx?PRID=1579541>

Effectiveness of the Attempts and Challenges

The digital age has given rise to new forms of criminal activity, with offenders increasingly utilizing computer technology to facilitate and conceal illicit operations. The issue of Child Pornography has gained global recognition as a significant and expanding problem. As digital communication technologies become more widespread, this illegal market is likely to continue growing in scope and reach.

To analyze how effective the implementations of the measures taken by the Government it is a prerequisite to understand the cases of Child Pornography cases. In the year 2021, 526 cases of Child Pornography were reported across India³⁹, which increased to 667 cases in the year 2022⁴⁰. During COVID-19 pandemic, the number was even higher as India witnessed a 95% increase in internet searches for child sexual abuse materials in the year 2020 compared to 2019. The State of Uttar Pradesh even had the highest incidents of child pornography cases in the year 2020 as well with over 161 registered cases out of a total of 730 cases registered in India in 2020⁴¹. In India, a pornographic video is captured every 40 seconds and 38% of the videos are related to child sexual abuse. This should be understood as only a very small proportion of the real cases due to the non-reporting of many cases of these nature.⁴² The director of the Indian Cyber Army Stated that almost one-fourth of the queries on the search engines in India over the Internet are related to child porn.⁴³

Even after multiple attempts by the Government through various measures including complete banning of the porn sites. This shows that there is a clear lacunae in the implementation of the measures taken. Online porn sites have various means of surviving through such measures including tweaking their portal names. Pornographic websites often change their domain names to avoid detection and maintain accessibility. This can be done through domain transfers, redirects, or the creation of new domains. Mirror sites are often introduced which are copies of the original

³⁹ MINISTRY OF HOME AFFAIRS, NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA (2021)

⁴⁰ MINISTRY OF HOME AFFAIRS, NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA (2022)

⁴¹ MINISTRY OF HOME AFFAIRS, NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA (2020)

⁴² Milind Rajratnam, Combating Child Pornography, JURIST (May 21, 2020), <https://www.jurist.org/commentary/2020/05/milind-rajratnam-combating-child-pornography/>.

⁴³ Alarming Issue of Pornography on Social Media and Its Effect on Children and Society as a Whole, PRS INDIA (July 2021), <https://prsindia.org/policy/report-summaries/alarming-issue-pornography-social-media-and-its-effect-children-and-society-whole>.

website hosted on different servers, allowing users to access the content even if the primary site is blocked. Content Distribution Networks distribute content across multiple servers worldwide, making it difficult to block all instances. Several porn sites have launched altered URLs so that Indian users can still access their content.⁴⁴

Another most resorted way is the use of VPNs and Proxy servers. Virtual Private Networks mask users' IP addresses, allowing them to bypass geo-restrictions and access blocked content, while proxies route internet traffic through intermediary servers to conceal the user's location. Tor Browser are also used as a network of volunteer-operated servers to encrypt and route traffic, making it difficult to track or block.⁴⁵

The Delhi High Court addressed the complex challenges of regulating online pornography, highlighting the internet's unique characteristics that complicate control efforts. The court noted the absence of effective content filters and the widespread availability of digital pornographic material, including to minors. It emphasized the difficulties in tracing content origins, determining audience reach, and managing cross-border transmission. These factors collectively create significant hurdles for governments and legislators attempting to implement effective regulations in the digital sphere.⁴⁶ The internet's global nature allows offenders to operate across multiple countries, exploiting differences in laws and enforcement capabilities. Material can be produced in one nation, hosted in another, and accessed worldwide, creating challenges in determining which jurisdiction has authority to investigate and prosecute. International cooperation is often hindered by varying legal definitions, evidence-sharing protocols, and extradition agreements.

Suggestions for countering Child Pornography

A comprehensive approach is necessary to shield children from online sexual predators. This strategy should involve multiple layers of protection surrounding the child, limiting opportunities for offenders, and creating a strong deterrent by ensuring the risks of punishment outweigh any

⁴⁴ Sameera Khan, *The Menace of Child Pornography in India: A Critical Appraisal*, 3 INDIAN J.L. & LEGAL RSCH. 1 (2021)

⁴⁵ Akhilesh Kumar Pandey & Suresh Naagar, *A Legal Framework in India for Cybercrime Related to Child Pornography*, 4 INDIAN J.L. & LEGAL RSCH. 1 (2022).

⁴⁶ Criminal Revision Case (MD) No.743 of 2013

perceived benefits of the crime. This protective network begins with parental oversight and extends through the educational system, Internet Service Providers (ISPs), and other businesses. Additionally, both national governments and the global community have a crucial role to play in this effort.⁴⁷

Parental Controls

Cohen and Felson's routine activity approach to crime outlines several technological tools designed to safeguard children in digital spaces, including the Engine for Relationship Analysis (ERA), Engine for Content Analysis (ECA), Real-time Message Filter (RMF), Net Nanny, and Surf Watch. These tools offer varying levels of protection, from monitoring long-term online relationships to real-time content filtering. However, their effectiveness is limited by low awareness and adoption rates. While parents play a crucial role in online safety, they cannot bear sole responsibility, particularly given that vulnerable adolescents may not always heed parental advice. The challenge lies in striking a balance between protections and allowing children the freedom to navigate the online world safely.⁴⁸

Changes in Indian Education System

Indian schools must play a crucial role in educating children about online safety and sexual exploitation. Prevention strategies should acknowledge adolescents' developmental stages, recognizing that sexual feelings are normal while teaching the distinction between appropriate peer relationships and inappropriate adult advances. Indian youth need open, honest discussions about how predators might exploit their vulnerabilities. A course on sex education has to be introduced into the curriculum to explain what amounts to sexual exploitation, as in many cases children are unaware of what has actually happened to them, which in most cases result in non-reporting of such Crimes. It also makes the adolescent understand the concept of healthy sexual relationship, as confusions may lead for them to resort such pornographic videos in such very young age. Drawing inspiration from the UK's CEOP model, India could implement similar educational

⁴⁷ https://www.researchgate.net/publication/236346952_Online_Child_Sex_Offenders_Challenges_and_Counter-Measures

⁴⁸ Marie Eneman, Online Child Sex Offenders: Challenges and Counter-Measures, 52 HOWARD J. CRIM. JUST. 190 (2013).

campaigns in schools, sports associations, and youth organizations to raise awareness about sexual abuse risks.⁴⁹

Internet Service Providers

Internet Service Providers (ISPs) can play a crucial role in countering child pornography through a multi-faceted approach. While implementing robust filtering systems for WWW traffic is a start, ISPs should expand their efforts to cover other technologies like IRC, P2P networks, email, and FTP, which are also frequently used for this illegal activity. To enhance effectiveness, ISPs should coordinate their efforts nationally and internationally, ensuring consistent implementation across providers. Regular updates to blacklists and the development of advanced content analysis tools, potentially using AI and machine learning, can improve detection capabilities. ISPs can also contribute by educating users about online safety, collaborating closely with law enforcement agencies, and monitoring emerging technologies for potential misuse. Proactive measures, such as systems to detect and report suspicious activities, should be implemented alongside reactive blocking. Supporting academic research into online child exploitation can provide valuable insights for developing more effective countermeasures. As encryption becomes more prevalent, ISPs need to find ways to detect potential abuse without compromising user privacy. It's important to recognize that no single approach will completely solve this complex problem, and ISPs must remain vigilant and adaptive in their strategies to combat online child exploitation effectively.⁵⁰

Indian Legal System

In the case of *XXX v. State of Kerala*⁵¹, which involved charges under Sections 13(b) and 14 of the POCSO Act, which deal with using children in media for sexual gratification. The court found that the video did not depict any real or simulated sexual acts involving children, and was not made for sexual gratification. Section 15 of the POCSO Act, dealing with storage of material involving children, was also considered. The court determined that the video did not contain anything that could be called pornographic. With respect to charges under Section 67B of the IT Act, which criminalizes publishing material depicting children in sexually explicit acts, court found that

⁴⁹ Id.

⁵⁰ Kimberly McCabe, *The Role of Internet Service Providers in Cases of Child Pornography and Child Prostitution*, 26 SOC. SCI. COMPUTER REV. 247 (2007).

⁵¹ *XXX v. State of Kerala*, 2023 LiveLaw (Ker) 252

painting on the mother's body could not be characterized as a sexually explicit act involving children. It was emphasized that the children were not naked in the video and were engaged in a creative activity, not looking at anything inappropriate. The court concluded that there was no evidence of the children being used for pornography or any hint of sexuality in the video.⁵²⁵³

This can be considered a progressive Judgement when it comes to child pornography, as Judges were able to distinguish clearly what is pornography and what is not. But this leaves into question about digitally altered videos. Law should also include provisions related to digitally altered content, such as morphing and use of graphics to portray a minor in a sexually explicit manner. Law is silent on whether such contents can be included under the purview of child pornography. This area requires a clarity on part of the legislations.

In the above discussed judicial confusions, it can be observed that Judiciary has been going back and forth on the topic of Child pornography and this indecisiveness creates a lacunae in the existing laws. The enactments on Child pornography should have a more exhaustive scope, as it should include within it all ambits of Child pornography, including watching it. As long as there are viewers, perpetrators would be encouraged to create more such contents.

It has been observed as a trend that in many a cases Bail including anticipatory bail has been granted to the accused even in the gravest of crimes against children. Even though bail cannot be withheld as a form of punishment⁵⁴, nature of the offence is a deciding factor in granting of bail. Courts should be more stringent in granting bail in offences of child pornography as it being a crime of high moral turpitude, especially when associated with Child Sexual abuse.

Rapid growth of the Technology being the major challenge, can only be countered with collaboration with Technological experts. Justice system should not work in isolation, there has to be inter-disciplinary approach to counter crimes of such nature, especially in the case of detection.

⁵² Navya Benny, *Kerala High Court Quashes Case Against Rehana Fathima Over Video Showing Her Children Painting On Her Semi-Naked Body* (5 June, 2023 7:58 AM), <https://www.livelaw.in/high-court/kerala-high-court/kerala-high-court-rehana-fathima-pocso-act-children-painting-naked-body-video-obscenity-quashed-230069#menu-toggle?fromIpLogin=75767.51656202425>

⁵³ Navya Benny, *Nudity Of Female Upper Body Shouldn't Be Regarded As Sexual Or Obscene By Default : Kerala High Court* (5 June 2023, 9:57 AM), <https://www.livelaw.in/high-court/kerala-high-court/kerala-high-court-nudity-female-body-obscene-sexuality-230081>

⁵⁴ Javed Gulam Nabi Shaikh Versus The State Of Maharashtra And Anr

It has always been observed that criminals are always one step ahead of the Law. By leveraging their expertise, governments can develop more effective strategies to prevent the production, distribution, and access of child pornography. This collaboration can involve joint research, development of advanced technologies to detect and remove harmful content, and training law enforcement personnel in the latest digital forensics techniques. Furthermore, technological experts can assist in creating public awareness campaigns about the dangers of child pornography and provide guidance on online safety measures for children and parents. Through such partnerships, states can stay ahead of the evolving methods used by perpetrators and ensure the protection of vulnerable children.

State should also Ensure Corporation with International Organizations and Conventions and should confirm to the same. Cyber space and Internet being a supraterritorial entity, can only be controlled through International Corporations.

In additions to this, there has to be a collective efforts on part of the State to safeguard the victims of such offences. The crime of child pornography is often associated with Sexual abuse as well, State has to ensure that victims are given proper counseling together with Comprehensive Support Systems and Victims Protection Schemes. In each case, the victim should be provided a comfortable space in which he/ she could be understood. It is preferred to form an individualized Support system for each victims, which should include the victim's parents/ guardians and counsellors and Doctors of their preference. As the Victim is guaranteed the right to be Forgotten, as has been declared by the Supreme Court in the case of *Puttaswamy v. Union of India*⁵⁵, State has to ensure that the contents involving the victim has been taken down.

International Cooperation

International responsibility is crucial for effectively managing and combating child pornography in our increasingly interconnected digital world. The global nature of this issue requires a coordinated and comprehensive approach that transcends national borders.

⁵⁵ Puttaswamy v. Union of India, AIR 2018 SC (SUPP) 1841

Firstly, there is a pressing need to harmonize legislation and definitions across countries. The document references various international conventions and protocols, such as the UN Convention on the Rights of the Child and its Optional Protocol, as well as the Budapest Convention on Cybercrime. To improve global efforts, nations should work towards aligning their laws and adopting consistent definitions of child pornography. This harmonization would facilitate more effective cross-border cooperation, enabling smoother joint investigations, evidence sharing, and extradition processes when necessary.⁵⁶

The role of Internet Service Providers (ISPs) in this fight cannot be overstated. There should be a concerted effort to develop and implement global content filtering systems. ISPs should coordinate internationally to ensure consistent and effective filtering across various online platforms, including WWW traffic, IRC, P2P networks, email, and FTP. This could be supported by the creation of an international database of known child pornography content, aiding in quick identification and removal across different jurisdictions. Key strategies include strengthening initiatives like the Virtual Global Taskforce (VGT) to build effective international law enforcement partnerships, implementing the UN Convention on the Rights of the Child through coordinated measures, and enhancing projects like CIRCAMP to dismantle criminal networks.⁵⁷

Law enforcement collaboration on an international scale is another critical aspect. Enhancing cooperation between agencies worldwide would allow for the sharing of best practices, intelligence, and resources in combating child pornography networks that operate across borders. This collaboration should be complemented by clear guidelines and agreements on handling cases that span multiple jurisdictions, ensuring that perpetrators cannot exploit legal loopholes or differences in national laws.

Education and awareness also play a vital role in this global effort. Implementing international awareness campaigns and educational programs can inform children, parents, and educators about the risks of online sexual exploitation and how to prevent it. This should be coupled with support for developing nations, providing technical assistance and resources to countries that may lack the

⁵⁶ Deshpandea, Aashish, et al. ,*Child Pornography in India - Issues and Challenges*, Multidisciplinary Science Journal (July 26, 2024), <https://doi.org/10.31893/multiscience.2024ss0529>.

⁵⁷ Samir Bhadury, *Child Pornography in India: Issues and Challenges*, 6 J. Positive Sch. Psych. 6524 (2022).

infrastructure or expertise to effectively combat child pornography within their borders. Regular international conferences and forums should be organized for policymakers, law enforcement, and child protection experts to share knowledge, discuss emerging trends, and develop coordinated strategies.

Finally, it's important to address the challenges posed by emerging technologies. International collaboration is necessary to stay ahead of technological advancements that may be exploited for child pornography, such as encryption technologies, and to develop appropriate countermeasures. This could be supported by standardized international reporting mechanisms for suspected child pornography, making it easier for individuals and organizations to report content regardless of their location.⁵⁸

Collaboration with Technological Companies

Engagement with global tech companies is another crucial element in combating Child Pornography. Collaborating with multinational tech companies and social media platforms can help develop and implement consistent policies and technologies for detecting and removing child pornography content across different countries. These companies, with their vast resources, cutting-edge technologies, and worldwide reach, are uniquely positioned to make a significant impact. Key areas of collaboration include developing and implementing standardized content recognition technologies, enhancing safety measures on social media platforms, and engaging cloud storage and file-sharing services to prevent the storage and distribution of illegal content. Tech giants can also share their expertise with smaller companies, helping them implement effective child protection measures.⁵⁹

Conclusion

The digital age has brought unprecedented challenges in combating child pornography, necessitating a multifaceted and dynamic approach to protect vulnerable children. This research

⁵⁸ Id.

⁵⁹ Id.

paper has explored the complex landscape of child pornography in the modern era, examining legal frameworks, judicial interpretations, enforcement efforts, and persistent challenges.

The analysis reveals that while India has established comprehensive legislation to address child pornography, including the Information Technology Act and the POCSO Act, there remain significant gaps in implementation and interpretation. Recent judicial decisions highlight the ongoing struggle to apply traditional legal concepts to rapidly evolving digital crimes, sometimes leading to contradictory rulings that underscore the need for clearer guidelines and more consistent application of the law.

Despite various government initiatives to counter child pornography, including website bans and awareness campaigns, the effectiveness of these measures has been limited. The paper demonstrates that technological advancements often outpace legal and enforcement efforts, allowing perpetrators to exploit new platforms and methods for producing and distributing illegal content.

The research emphasizes the critical need for a more holistic and coordinated approach to combating child pornography. This approach should encompass:

1. Legal reforms to address emerging technologies and close loopholes in existing legislation.
2. Enhanced international cooperation to tackle the global nature of cybercrime.
3. Stronger partnerships with technology companies to develop more effective detection and prevention tools.
4. Improved education and awareness programs for children, parents, and educators.
5. Increased support and protection for victims, including comprehensive counseling and rehabilitation services.

Furthermore, the paper highlights the importance of striking a balance between robust enforcement and protecting individual privacy rights in the digital sphere. It also calls for greater interdisciplinary collaboration, bringing together legal experts, technologists, child psychologists, and law enforcement agencies to develop more effective strategies.

In conclusion, while the challenge of child pornography in the digital age is daunting, it is not insurmountable. By adopting a comprehensive, adaptable, and collaborative approach, society can work towards creating a safer online environment for children. The fight against child pornography requires constant vigilance, innovation, and a commitment to protecting the most vulnerable members of our society in an ever-evolving digital landscape.

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