

# Child Protection in the Digital Age<sup>1</sup>

Child sexual abuse is a multi-layered problem which negatively impacts children's safety, health and well being. Research from world-wide indicates that children's exposure to violence and abuse is associated with long-term physical, psychological, and emotional harm. Child abuse is finding new forms and channels through mobile and digital technologies.

Online child abuse and exploitation amplifies existing forms of offline bullying, stalking and harassment. It also facilitates the sexual exploitation of children through the production and dissemination of child sexual abuse materials and by facilitating the sexual exploitation and trafficking of children. Online abuse knows no national boundaries.

Even though India has a comprehensive legal framework for protection of child rights in the form of Juvenile Justice (Care and Protection of Children) Act 2015, POCSO Act, 2012 along with RTE Act 2009 and recently amended Child Labour (Prohibition and Regulation) Amendment Act, 2016, there is limited awareness of online risks for children, both among parents and guardian and children themselves. This paper shall attempt to conceptualise the legal mechanism for protection of child abuse in the digital age.

## Child Pornography

It is defined as any visual depiction involving the use of a minor, or one appearing to be a minor, engaging in sexually explicit conduct. Visual depictions include photographs, film, video, pictures or computer-generated images or pictures, whether made or produced by electronic, mechanical, or other means. Child pornography has become particularly problematic with the rise of the Internet and its ability to both transmit data far and wide and provide a level of anonymity to its users and the victims depicted in images of child pornography.<sup>2</sup>

## Child Rights Protection and the Law

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<sup>2</sup> <https://www.legalbites.in/child-pornography-menace/>

The rights of the child have been recognized under various International Conventions and National legislations. The Convention on the Rights of Child, 1989, elaborately discusses the rights of children. It discusses about the overall development of the child<sup>3</sup>.

### ***Article 13***

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others; or
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

### ***Article 16***

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

### ***Article 17***

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;

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<sup>3</sup> For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

### ***Article 19***

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

### ***Article 34***

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

### ***Article 36***

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Articles 34 and 35 of the Convention on the Rights of the Child say that governments should protect children from all forms of sexual exploitation and abuse and take all measures possible to ensure that they are not abducted, sold or trafficked.

The **Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography** is a protocol to the Convention on the Rights of the Child and requires parties to prohibit the sale of children, child

prostitution and child pornography. The Protocol was adopted by the United Nations General Assembly in 2000<sup>4</sup> and entered into force on 18 January 2002<sup>5</sup>. The Convention's Optional Protocol on the sale of children, child prostitution and child pornography supplements the Convention by providing States with detailed requirements to end the sexual exploitation and abuse of children. It also protects children from being sold for non-sexual purposes—such as other forms of forced labour, illegal adoption and organ donation.

According to the preamble, the protocol is intended to achieve the purposes of certain articles in the Convention on the Rights of the Child, where the rights are defined with the provision that parties should take "appropriate measures" to protect them. Article 1 of the protocol requires parties to protect the rights and interests of child victims of trafficking, child prostitution and child pornography.

The Protocol provides definitions for the offences of 'sale of children', 'child prostitution' and 'child pornography'. It also creates obligations on governments to criminalize and punish the activities related to these offences. It requires punishment not only for those offering or delivering children for the purposes of sexual exploitation, transfer of organs or children for profit or forced labour, but also for anyone accepting the child for these activities.

Article 2 of the Optional Protocol defines child pornography as "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." Article 3 of the Optional Protocol requires States Parties to criminalize "producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Article 2." Pornography can, among other forms, be represented in live performances, photographs, motion pictures, video recordings and the recording or broadcasting of digital images.

### **Budapest Convention**

Cyber Crime Convention, 2001, also known as Budapest Convention, is the first international treaty on crimes committed via the Internet and other computer networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography, hate crimes, and violations of network security. It was drawn up by

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4 [United Nations General Assembly](#) Session 54 Resolution 263. *Optional protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography* **A/RES/54/263** 25 March 2000.

<sup>5</sup> United Nations Treaty Collection: *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*.

the Council of Europe in Strasbourg, France, with the active participation of the Council of Europe's observer states Canada, Japan, South Africa and the United States. It also contains a series of powers and procedures such as the search of computer networks and lawful interception. However, India has declined to adopt the Convention on the ground that it was not part of its drafting.

As per the Article 9 of the Cyber Crime Convention, 2001, child pornography includes: “pornographic material that visually depicts: a minor engaged in sexually explicit conduct and a person appearing to be a minor engaged in sexually explicit conduct.” Article 9 of the Convention also provides for the punishment for child pornography.

### **National Legislation**

The specific legal response to protect children in the digital media can be tracked to two legislations namely, Information Technology Act, 2000 and Protection of Children from Sexual Offences, 2012. Apart from this, there are provisions relating to obscenity in the Indian Penal Code, Young Minds (Harmful) Publications Act which also addresses the issue of child pornography.

### **Information Technology Act, 2000**

S 67B of the Information Technology Act, 2000 deals with child pornography. It prescribes punishment for publishing or transmitting of material depicting children in sexually explicit act in electronic form. According to s. 67B whoever,

(a) Publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or

(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner;

or(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or

(d) facilitates abusing children online or

(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

Liability of Internet Service Provider is embodied in S. 79 of the Act.

The Indian IT Act, 2000 stipulates that Network service providers are not liable in certain cases, for any third party information or data made available by an ISP, if it proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commissioning of such offence<sup>6</sup>

A ‘network service provider’ means any person who provides access to information service in electronic form. For example: Internet service provider, cellular mobile services, customer access services, mobile satellite services etc. It essentially performs two tasks-to provide access to the network and to act as intermediary between an originator and addressee with respect to any particular electronic message.

The position on ISP liability in India is the same as prevailing in other countries. However, with the enforcement of the IT Amendment Bill 2008, certain additional grounds will be added whereby an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him if the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or the intermediary does not initiate the transmission, select the receiver of the transmission, and select or modify the information contained in the transmission and the intermediary observes due diligence while discharging his duties under the Act .The amended Section 79 of the IT Act ( yet to be enforced) provides that intermediaries will be held liable if the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act; or upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

### **Protection of Children against Sexual Offences, 2012**

Protection of Children against Sexual Offences, 2012 is new age legislation for the protection of children from sexual offences. According to S. 13 of the Act, it imposes an imprisonment for five years and fine and according to S. 14 (1) seven years and fine in the event of subsequent conviction.

<sup>6</sup> Section 79- Explanation- For the purpose of this section –  
 (a) “network service provider” means an intermediary;  
 (b) “Third party information” means any information dealt with by a network service or provider in his capacity as an intermediary.

## Child Pornography: Judicial Response

A PIL<sup>7</sup> was filed by an Indore based Advocate, Mr. Kamlesh Vaswani to declare watching porn as a cognizable and non bailable offence and declaring certain 66, 67, 69, 71, 72, 75, 79, 80 and 85 sections of Information Technology Act, 2000 as unconstitutional. In this case, during the course of arguments, the Centre had contended before the apex Court that ban on an adult watching porn site will be violation of right to privacy; State cannot do moral policing and enter people's bedrooms. But, the State also stated that child pornography needs to be banned and also had assured the Hon'ble Supreme Court that the State shall take every possible step to do that. The offence begins in distributing and sells of such obscene material. Further, Government had asked telecom operators and Internet Service Providers to block around 857 sites. However, later on this order to block the sites was revoked. But then, during the course of arguments, it was brought to the notice of the Hon'ble court that, every time a site is banned, a new one pops up. In 2015, Supreme Court Women's Association had filed an Intervention application in this PIL and had prayed for implementation of laws prohibiting porn and consequently blocking of porn sites. It has also prays for directions to the concerned authorities for taking strict measures to prevent distribution and access to pornography including measures regarding file sharing software. In this case, Additional Solicitor General of India had stated in August 2017, that a status report has been prepared by the government of India regarding steps taken by it to stop child pornography.

On a plea by NGO Prajwala<sup>8</sup> highlighting the availability of child porn and rape and gang rape videos online and seeking measures to check this, the Hon'ble Supreme Court hearing the matter, set up an Expert Committee headed by then Additional Secretary, Ministry of Electronics and Information Technology, Ajay Kumar, and comprised representatives of social media platforms and Internet service providers on March 22, 2017 to devise a plan to check circulation of child pornography and sexual violence videos on the Internet. The Committee has recommended setting up a cell within the CBI or the Ministry of Home Affairs to deal with such crimes.

The committee also proposed a "sub-project to be created" within the Cyber Crime Prevention Against Women and Children project of the Department of Women and Child Development "for eliminating child porn/rape and gang rape (content)." It called upon the government to ensure that "Search Engines other than those already implementing URL blocks for identified child porn/rape and gang rape content...initiate similar processes" and added that "internet companies should consider providing support to Indian NGOs to help bring awareness of these issues."

<sup>7</sup> Kamlesh Vaswani v. UOI (2014)6SCC705

<sup>8</sup> In Re Prajwala,(2015)



The report said WhatsApp should make further improvement in their reporting process which would enable easier reporting of contents in the App while maintaining the integrity of the contents and metadata available on phone at the time of reporting”. Content hosting platforms, social media platforms and search engines, it said, should provide links for reporting child porn and rape and gang rape imagery, as a specific category and the same must be more prominently displayed on their pages. On this, the companies said they were continuously working on improving processes for reporting content, including child porn and rape and gang rape content that violates their policies or applicable laws. The committee suggested that the solution lay in proactively identifying rogue sites by an independent agency which can identify sites that contains child porn and rape and gang rape content and blocking these sites. It added that “to prevent the circulation of subject imagery, government can block any additional sites/applications if they do not remove such contents of their own.”

The Supreme Court has asked the Centre to implement the proposal of this high-powered committee, which was constituted A bench of Justices Madan B Lokur and U U Lalit said it expected the government and social media platforms and Internet service providers, including Google, Yahoo, Facebook, WhatsApp and Microsoft, to “abide by the recommendations on which there is consensus and to try and implement them at the earliest.”

### **Internet Child Pornography: Challenges**

In the present age of Information Technology, the young children are on the Internet. It is observed that they use the Smartphone for playing games and also access various sites. The major challenge to Internet child Pornography is how to curb it? Because as has been rightly pointed out by the Hon’ble Supreme Court, these sites are like hydra and keep on popping up.

### **Suggestions**

On the issue of protecting children from accessing pornographic material, AG submitted that parental controls, which are easily available, can be used for that purpose.

- frame guidelines and adopting various measures towards improvement in the effectiveness of blocking Child pornography on the Internet and to take measures to eliminate child pornography;
- direction to all the schools in India to install jammers in the Buses to prevent access of pornographic sites on the cell phones by the Driver or anyone who is in charge of the children in the Buses;
- promote public relations and awareness-raising activities concerning risks and proper use of the Internet
- monitoring the use of internet of the children by their parents
- framing of a National policy to ban child porn



## Conclusion

It is to be remembered that just if offline pornography is prohibited, then online pornography cannot be permitted. However, it has been observed that it is much more difficult to curb online pornography. While hearing the public interest litigation filed by NGO Prajwala, Hon'ble Mr Justice R.F.Nariman had remarked that:

*It is impractical to block two crore websites as then two crore more sites will surface. They pop up in foreign countries and are hydra-headed. So only servers here will have to help.*

The Central government is to take steps to stop circulation child pornography videos. And it is also expected to formulate guidelines on the recommendation of the high power Committee formed by the Supreme Court, in the re Prajwala PIL. There is an urgent need to address this issue of protection of children from all kinds of exploitation in this digital age. India being a signatory to the Convention on Rights of Child and the Optional Protocol is committed to protection of children from exploitation. Major hurdles in curbing this nuisance are jurisdictional issues, non filtration of data by Internet Service providers beyond the due diligence and easy accessibility. However, it is observed that the existing legislations are inadequate to curb the menace of child pornography online due to the inherent challenges of the social networking sites. Hence an urgent need to frame appropriate guidelines for the same.

