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“THE ISSUE OF CHILD PORNOGRAPHY IN INDIA”.

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I. INTRODUCTION:

India hosts the largest number of children in the world, with approximately forty-two percent of the overall population under the age of eighteen.¹ The adequate health and the safety of the children in a country are prime for envisaging future development. It is not a contemporary phenomenon to see children being treated as a sexual object. It has persisted in the form of pornographic literature, paintings, etc that involved children from time immemorial. The internet has given both adults and children tons of opportunity to access information about everything in the world.

However, there is a flip side to it that is negative. This facilitates to increasing cases of sexual abuse and exploitation prominently in the form of pornography. The exploitation of children is more common because of kids being vulnerable. Children of the slum dwellers or marginalized groups, children of separated parents, or criminally associated parents, or who are completing prison sentences, are more prone to such violence. With the development in Video and Audio devices like cameras, computers, applications, and, of course, Internet growth, a new definition of pornography came into existence.

¹[Ccl.nls.ac.in,https://ccl.nls.ac.in/wp-content/uploads/2017/01/Implementation-of-the-Protection of Children from Sexual Offences Act-2012-by special-courts-challenges-and-issues-1.pdf](https://ccl.nls.ac.in/wp-content/uploads/2017/01/Implementation-of-the-Protection-of-Children-from-Sexual-Offences-Act-2012-by-special-courts-challenges-and-issues-1.pdf) (last visited Aug 1, 2020).

The increase in resources and information has rendered child pornography inexpensive and made it easier to spread and produce. The internet is serving as a database of a great deal of information and knowledge and a significant medium of obscene content distribution. Presently, pedophiles can readily obtain child pornography because of the transnational existence of the internet. Jurisdiction has become another concern as the internet is a global database and as the principle of sovereignty, one state would not authorize any other state or nation to intervene in their domestic matter. As child pornography is an illegal industry, it is impossible to determine its true value. The government of states has strongly and publicly criticized the subject of pornography and they are taking steps to monitor the internet.²

Recently the government of India has sought to curb child pornography. One example is the Protection of Children from Sexual Offences Act, 2012.

Protection of Children from Sexual Offences Act, 2012, is an exhaustive law that compiles all the offences like sexual harassment, sexual assault, and pornography keeping in mind the safety and security of the child at every judicial proceeding making it child friendly through the designated special court.

A child is well-defined as "any individual under the age of eighteen and identifies various types of sexual assault, which includes penetration and non-penetration abuse, sexual harassment and pornographic exploitation³, additionally identifies that a sexual offence is "aggravated" in circumstances, such as the abuse of a mentally ill child or when an adult in a trustworthy role abuse their childlike close family member, police officer, teacher or doctor.

A person who is involved in the trafficking of children with the intention of sexual exploitation will be liable for abetment under this act. The act punishes the accused if

² Marvin R.V. Storrow, Child Pornography and Freedom of Expression, 64 Advocate Vancouver 625 2006.

³ Unicef.org, https://www.unicef.org/protection/files/Terminology_guidelines_396922-E.pdf (last visited Aug 1, 2020).

convicted according to the degree of crime, the maximum punishment under the act a person can get is rigorous lifetime imprisonment topped with fine.⁴

II. OBSCENITY AND CHILD PORNOGRAPHY- MEANING AND DEFINITION:

The crime of pornography is not only legally but morally wrong. The word pornography does not have a standard definition, it is just said to be of an obscene character. The U.S. supreme court set a three-point benchmark to determine whether porno graphical content is 'obscene' or not in the case of *Miller v. California*⁵. The standards are recognized: “(a) whether ‘the regular person, applying current community standards’ would find that the work, taken as a whole, looks like the prurient interest, (b) whether the work portrays or defines, in a patently offensive way, sexual comportment precisely defined by the relevant state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” The Miller method was used as a benchmark. Nonetheless, the application of this is debatable on the Internet.⁶ Under Common Law, in the case of *R. v. Hicklin*⁷ the Court for the first time applied with the test of obscenity. It was stated by Lord Cockburn that: “Whether the material identified as obscene tends 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 typically applies to photographs or videos and, in some instances, literature that portrays children involved in explicit sexual activities. The present technologies facilitate the documentation and recording of the sexual exploitation of children. Child pornography is a record of sexual exploitation of children. Therefore, child pornography includes sexual harassment and the abuse of children and is frequently connected to child and

⁴ Human Trafficking, forced labour & slavery corporate accountability database Human Trafficking, forced labour & slavery corporate accountability database, <https://accountabilityhub.org/provision/indian-penal-code-section-370/> (last visited Aug 1, 2020).

⁵ *Miller v. California*, 413 U.S. 15 (1973, Supreme Court of United States).

⁶ [Media.neliti.com,https://media.neliti.com/media/publications/28638-EN-intermediary-liability-and-child-pornography-a-comparative-analysis.pdf](https://media.neliti.com/media/publications/28638-EN-intermediary-liability-and-child-pornography-a-comparative-analysis.pdf) (last visited Aug 6, 2020).

⁷ *R v. Hicklin*, 1868 LR 3 QB 360,371 (1868, Court of Queen’s Bench).

prostitution, child sex tourism, and human trafficking of minors. In the Optional Protocol of CRC⁸ Child, Pornography definition is representation in any form where a child is involved in sexual activities or a depiction of sexual activity whose primary focus is a child. According to ECPAT International (2008), child-safe describes visual representations expressed in photographs, films, cassettes, drawings, painting, computer discs, and other devices where audio-visual representation can be recorded. Scrutinizing the definitions is indicative of the fact that two noticeable characteristics should be taken into account while defining child pornography. One includes the materials and the other being the type of depicted activities.⁹

III. ANALYSIS OF THE OFFENCE OF 'CHILD PORNOGRAPHY' UNDER THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012:

One of the key factors that pushed the Government of India to promulgate the Protection of Children from Sexual Offences Act, 2012 legislation was the increased cases of child abuse and advocacy for the safety of children on a media platform and public discourse. The Act criminalizes sexual abuse, sexual harassment, and pornography. There are guidelines and certain protocols laid down to work with offenders for police and the courts. The problem is dealt with by special children's courts; nevertheless, successful implementation of such rules remains a major concern. The implementation issue has significantly impeded the security of children from sexual exploitation in the nation. Furthermore, it is the National Commission on the Rights of the Child formed in 2007 as an autonomous institution to ensure that the children's rights enshrined in the Constitution of India and the United Nations

⁸ A/RES/54/263 - 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 - UN Documents: Gathering a body of global agreements Un-documents.net, <http://www.un-documents.net/a54r263.htm> (last visited Aug 2, 2020)

⁹ Child Pornography: Model Legislation & Global Review, Fifth Edition, International Centre for Missing & Exploited Children, this project was funded in part through Grant Number S-INLEC-04- GR-0015 of the U.S. Department of State. The opinions, findings, and conclusions or recommendations expressed herein are those of the author and do not necessarily reflect those of the U.S. Department of State.

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Convention on the Rights of the Child are compatible with all rules, legislation, and programs. The duty of regulating the enforcement of the Protection of Children from Sexual Offences Act, 2012 was also delegated to the Commission. Sexual exploitation, such as showing child pornography, could not be charged unless sexual offence in the form of penetration occurred and the prosecution pertaining to sexual exploitations of boys had no mention in any provision but now even these are protected under the. Protection of Children from Sexual Offences Act, 2012.¹⁰

The Act states it would be sexual harassment¹¹ if a person shows pornography to a child, or alluring a child in pornographic purposes or any or watching a child personally or through some visual, electronic or other means, or threatens to use a real or notorious depiction of the body part of the child on any form of media or involve with a child in any sexual act will be punished with imprisonment extending to three years. Furthermore, the legislation specifically states that anyone who uses a child for sexual gratifying himself in the form of making a representation of sexual organs of a child, using him or her for real-life sexual activities, that can be with or without penetration or just obscene representation of a child will be imprisoned for five years and if he is convicted again then seven years and fine.

Additionally, it states that in case someone uses a child with the intention of pornographic purpose and takes part directly in pornographic activities by committing sexual assault in the form of penetration exploiting then he will be punished with an imprisonment of not less than ten years' and might extend to life imprisonment. If the sexual exploitation is of aggravated nature the sexual offender will be punished with rigor life imprisonment and fine.¹²

In Section 15 a person shall be imprisoned for a term extending up to three years and/or fine for the stored pornographic material for all commercial use. In the event of abetment by any person in connection with the above offences, he is seen as if he committed such an offence.¹³

¹⁰ Child Protection Law and Policy Loc.gov, <https://www.loc.gov/law/help/child-protection-law/india.php> (last visited Aug 2, 2020).

¹¹ Section 11/12, The Protection of Children from Sexual Offences Act, No. 32 of 2012.

¹² Section 13/14, The Protection of Children from Sexual Offences Act, No. 32 of 2012.

¹³ Section 17, The Protection of Children from Sexual Offences Act, No. 32 of 2012.

Finally, in the case of an attempt to any sexual act the person will be punished, with one half of life imprisonment or with the longest term of prescribed imprisonment and/or with fine as the court decides.

IV. JUDICIAL PRONOUNCEMENTS AFTER PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012:

In the landmark case Supreme Court in *Eera v. State (Govt. of NCT Delhi)*¹⁴, The Court decided to classify the minors and provide them with a lawful consent entitlement under the Protection of Children from Sexual Offences Act, 2012, Act by recommending the statutory age with which the minors have a connection. The Parliament has deemed it to be necessary that a person's concept of "age" should be determined by physical age or biological age as the most acceptable criterion. The Protection of Children from Sexual Offences Act, 2012, aims at recognizing minors as a category and addressing them appropriately to prevent the sexual offences against them. The sanguine intent in each level of a judicial process is to preserve the welfare and well-being of children. It separates a child categorically from an adult.

The brief facts of the *State of Maharashtra v. Dattatraya*¹⁵, accused were the neighbour of the victim, aged five years and he had taken the victim to his house and forcibly and had vaginal and anal sex, caused her cranial injuries and smothered her as a result of which she died. The accused was found guilty under the Protection of Children from Sexual Offences Act, 2012, and was awarded capital punishment.

In the case of *State v. Mohd. Zahid*¹⁶, The accused caught hold of the victim's hand forcefully, after her school hours, near a tea shop, and asked her to accompany him and the victim tried to free herself due to which the victim suffered injuries on her right hand. she got rid of the accused's crutches, the gesture was counter to and malicious against her desires.

¹⁴ (2017) 15 SCC 133.

¹⁵ 2007 LLR 1132 (SC) 132.

¹⁶ 1999 (2) ACR 1668 (SC).

The Supreme Court found him guilty under the Protection of Children from Sexual Offences Act, 2012.

The accused in *State v. Mohan*¹⁷, had attempted to commit rape upon a minor girl child aged about eleven and the Supreme Court emphasized the fact that ‘even if the act of the convict is prima facie not grave, but has had irreversible consequences on the mental health of a minor girlchild’. There was no leniency in this matter and the accused was convicted under the Protection of Children from Sexual Offences Act, 2012. (section 6 and section 18) and the act was termed to be ‘aggregated penetrative sexual assault’. Act and was punished under sections 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 for sexual assault and sexual harassment.

In *Siddu v. State of Karnataka and Ors.*¹⁸, the Hon’ble Court interprets Section 34 of the Protection of Children from Sexual Offences Act, 2012. The court observed that objective of the taking into account the age of the accused under Section 34 of the act is to decide which would be the competent court to try the accused and punish him for the crime. If the accused is held to be less than eighteen years and is a Juvenile, the learned Sessions Judge will lose his power to conduct a trial and the Juvenile Justice Board alone is competent authority to try and dispose of the case, following the said special enactment.

V. CONCLUSION:

India has a large population of children and is one of the youngest nations. Keeping this in mind, it should be ensured that the legal framework is developed for the betterment of the children as they serve as the future of this country. Children are vulnerable to a different form of exploitation but sexual exploitation is the most traumatic and a heinous crime, it leaves the child deeply impacted and it would haunt the child for his lifetime, so laws should be framed in accordance so that this problem can be tackled out. The crime of Child Pornography is a crime against society and not just the child. The majority of such video clips

¹⁷ Criminal Appeal No. 878-879 of 2011.

¹⁸ AIR 1968 Raj 79.

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are typically made in third world countries. The main challenge with combating this crime is that there are very few sites showing obscene items because the platforms are limited in number they do not form a majority concern. However, according to the capacity of different nations, National and International laws, conventions are placed pertaining to this issue.

The other challenge is that these children themselves are the subjects of this abuse, and require extra care and protection. Instead of rescuing children from this inhumane condition, the authorities focus more on capturing the culprit, who, because of the problem of jurisdiction and difficulty of finding them, are hard to find and capture. The children involved in or forced to be in the images and video for any kind of pornography are mistreated and subjected to social abuse even if they were never guilty because of social stigma.

The Protection of Children from Sexual Offences Act, 2012 undoubtedly has a very broad ambit but the constant development of technology and the growing internet database has a far-reaching impact on the circulation of child pornography. Only by combining statutory measures, filtering technologies and self-regulation can the fight against children's pornography on the internet can be achieved. Global policymakers have vowed to eliminate child pornography.

International awareness and the strengthening of efforts to eliminate child pornography are very important. The technology currently available must be enhanced to remove child pornography from the internet database. Additionally, lawmakers much like technological development must evolve from time to time to cater to the need of the time and safeguard the sound development of the children in a healthy society.