

Child Pornography: A Comparative Analysis

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Abstract: *Protecting children is extremely important due to the way societal norms are changing. Given the fact, that children cannot assess the wrong and right path by their own selves, the modern technology can trap them into something serious and irreparable. A child, being defenseless, can go through serious torture both mentally and physically, if he falls prey to the ordeal of child abuse. Child sexual abuse is an international epidemic and no single jurisdiction can be held liable for its rapid growth, alone. Child Pornography is pernicious part of child abuse which is aimed at scarring children in every way possible. The trauma of this abhorrent crime has made its roots strong and it is pivotal to address the problem in a proper manner. The criminal justice systems, holding strong on the outside reflect negligible results due to shortcomings of interpretations and inconsistency with parallel enactments. This essay aims at defining the problem of child pornography and discussing its predicament in three jurisdictions, namely, USA, UK and India by comparing their respective frameworks and interpretation of enactments.*

Keywords: Child Pornography, Sexual, Pedophile

1. Introduction

Child pornography is a serious issue which is emerging in the community and poses an acute threat to the most vulnerable members of the society, that is, children. Unimaginable enlargement and development of internet has led to many positive as well as negative effects on children. Internet has no doubt, facilitated innovative study patterns and 'day-to-day' learning session to enhance the education system both on academic and personal front but at the same time has shown its dark evil side, which cannot be denied. Child abuse is an umbrella term which covers various crimes committed against children. For instance, child trafficking, prostitution, kidnappings and many more. It is significant to note that no country is blessed with immunity in terms of this issue and requires undivided attention at all times. Among all other forms of abuse, child porn is known to be the worst genre. It is so, owing to the fact that it not only causes destruction to the child physically but also tortures him mentally. Pornography has been an arguable topic on the conflict of being right or wrong and pertaining to its existence as it involves adults. [1] As soon as children are embroiled to such an element, it is bound to be declared illegal, which is the case in most of the nations.

2. Defining Child Pornography

The Optional Protocol to the Convention on the Rights of the Child 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. [2] Child pornography involves a child, as mentioned in the definition and pedophile. A pedophile, in most cases is a male (and some, a female) who imposes his/her sexual desires onto a child [3]. Paedophilia is common term used to express a sexual preference which greatly covers fantasizing sexual activities with children. Such an occurrence is a direct denial of a healthy sexual relationship which reflects when it occurs between two adults. [4] According to Article 9 of the Cyber Crime Convention, 2001, child pornography is defined as "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. "Children are very delicate and vulnerable on intellectual front and it is arduous for them to step back from

the negative constituents of the modish technological era. Social media is the catchiest platform wherein children tend to fall prey to or get in touch with people who look for minors to fulfill their sexual pleasures. This makes it easier for the pedophile(s) to target innocent children and brainwash them, which leads to heinous crimes like child pornography and trafficking.

3. Child Pornography as a Problem in the USA

There was a prediction made by the United States government about technology soon existing on a level where it will make depictions of virtual children look real. Existence of child pornography taking place in the country evidences the same. [5] Child pornography is defined under section 2256 of title 18 U.S.C. as *any visual depiction of sexually explicit conduct involving a minor (someone under 18 years of age)*. Photographs, videos, digital or computer-generated images indistinguishable from an actual minor, and images created, adapted, or modified, but appear to depict an identifiable, actual minor are included in visual depictions. Section 2251 of title 18 U.S.C. deals with sexual exploitation of children (production of child pornography). [6] Sexually explicit conduct does not require a portrayal of a child engaging in sexual activity as just an image of a naked child may amount to illegal child pornography, provided it adequately suggests exploitation of a child sexually. [7] Section 2251 of title 18, U.S.C. expressly suggests that persuading, inducing, enticing or coercing a minor to engage in any sexually exploitive conduct majorly for the purpose of producing a visual that results in child pornography is illegal and whoever commits the same or conspires to do so is subject to prosecution under the federal law. Section 2252A of title 18, U.S.C. specifically prohibits if this heinous crime is committed interstate or foreign commerce by any means which includes computer. This section gives a further boost to the jurisdiction based crime and supports a major possibility of combating child pornography. Retribution to the offence also holds strong in the USA when it comes to child pornography. It can be well understood by section 2251 and section 2252 as the former states that a first-time child porn offender will face a fine and a minimum of 15 years in the prison which can go up to 30 years while the latter states that first time offender convicted for transporting child porn interstate or foreign commerce will face a fine as well as minimum of 5 years in

prison which can go up to 20 years. Child pornography is not new to the country and amounts to be an old-world crime. The first ever American jurisdiction to prohibit child porn came into existence in California. The law was passed in 1962, prohibiting the usage of minor to “prepare [], publish [], print [], exhibit [], distribute [], or offer [] to distribute. . . any obscene matter.” [8] The law protecting victims of child porn had ‘obscenity’ as a weapon which was an exception to free speech under First Amendment. Obscenity being a customary exception to the First Amendment played a great side to the states in avoiding constitutional questions. [9] Unlike other statues looking for a merger between obscenity as an element and criminalizing the production as well as distribution of child porn, New York chose to adopt different statues for both. This law was upheld by the United States Supreme Court in *New York v. Ferber*. [10] The apex court delivered that a heinous offence like child pornography found no protection under the First Amendment and the states could criminalize the production and distribution of pornographic content pertaining to children regardless of the obscenity attribute being present. Taking a note of the above mentioned landmark judgment, some jurisdictions, like Ohio, came up with prohibiting the possession of child porn images which was upheld by the apex court in the judgment of *Osborne v. Ohio*. [11] It was expressed in the delivered judgment that albeit private possession of obscene articles was granted protection constitutionally, child pornography had to be judged on a different echelon due to it being a direct harm to the children. [12] A notable attribute is the new sentencing commission of United States which formed by the way of Sentencing Reform Act, 1984. [13] United States sentencing guidelines provides for the judge to first evaluate the level of offence involved and criminal history (prior convictions of the offender) thereafter. Every crime is looked upon with regards to facts and offence level of each case. [14] This was affected in the case of *United States v. Booker* [15] wherein two provisions of Sentencing Reform ACT, 1984 were held unconstitutional and as a result the sentencing guidelines became advisory in nature and “reasonableness” was another conventional element introduced as standard of appellate review. [16] The Booker era, basically, diminished the efficacy of guidelines. [17] The guidelines in general, suggest the courts to evaluate the range and consider factors under section 3533(a) [18] before reaching downward departure [19]. Despite of consisting appropriate enactments to deal with the issue of child pornography, USA still lacks in its final call which will be discussed in the comparison, later in this essay.

4. Peril of Child Pornography in The United Kingdom

There has been a global outburst of child pornography in the recent years and it has taken over the internet due to the usage of production and distribution methods attached to it. Protection of Children Act, 1978 (PCA) is the principal legislation supervising the problem of child pornography in the United Kingdom. [20] The element of mere possession of pornographic content pertaining to children was, however, criminalized only with the passage of Criminal Justice Act, 1988 (CJA). [21] Another enactment known as The Sexual Offence Act, 2003 (SOA) deals with the threat

of child porn. The said act, in compliance with European Union Council Framework Decision, altered the age of a ‘child’ from 16 years to 18 years with 16 years to be taken as the consent age. [22] This was worth noting in the case of *R v. Owen* [23], wherein an image was held to be indecent and if the age was 16 years at that time, which was legal as per the previous provision, the image would not have been brought under the meaning of indecency. [24] As mentioned earlier, CJA, Section 160 expressly states that, ‘It is an offence for a person to have any indecent photograph of a child in his possession’ which was given a boost by covering pseudo-photographs under the umbrella of Criminal Justice and Public Order

Act, 1994 (CJPOA). [25] It is also pertinent to note that SOA is the first enactment which directly deals with the plague of child pornography while the logic remains the same behind already present notion of an indecent photograph of a child. [26] The laws framed to tackle child pornography are mainly the laws of indecency in the UK, that is to say, the scope of the concerned crime still lies behind the covering layer of ‘indecency’. Nevertheless, prohibition of erotic and sexually explicit content concerning images of children further finds its rescue point in the Coroners Justice Act, 2009. Corners Justice Act 2009 made it an offence to keep prohibited images of children in possession. [27] An independent organization is also set by the UK, namely, Internet Watch Foundation to keep an eye on the destruction caused by child pornography. It provides for a mechanism of a hotline which provides an opportunity to all the individuals to report about the illicit content on the web, to the police. [28] This initiative can play a vital role in resisting the problem of child pornography along with providing an opportunity to the public to understand the harm and save the most vulnerable section of the society, that is, children.

5. Child Pornography: The Indian Scenario

India is known to be one of the largest contributors and consumers of child pornography despite a ban being imposed by the government on sites feeding such content. It is deduced that the situation is alarming as shockingly, almost 35-38 percent of the total pornographic content uploaded online pertains to children. [29] Child pornography is a crime under two pronounced legislations, Information Technology Act, 2000 (ITA) and Indian Penal Code, 1860 (IPC). The Information Technology Bill passed in February 2009 made production, creation and transmission of child pornography illegal and a punishable offence. [30] A striking feature of the bill is that along with other attributes, it makes browsing illicit content pertaining to a child, illegal and prescribed punishment for the first-time offender in such a case can attract five-year sentence as well as a huge fine of Rs. 10 Lakh. [31] Section 67B of the ITA specifically deals with child pornography. According to this section, it is an offence to depict a child engaged in a sexual activity, create text or digital images or advertise or promote any material depicting children in obscene or indecent manner or induce children to online relationship with one or more children. [32] Indian Penal Code does not deal with online obscenity directly but specifies sale, etc of obscene matter to the minors as an offence. [33] Also, the rationale behind section 292 [34] is what drove Section 67 of the ITA to prohibit

“obscenity on internet and in electronic form” by the way of amendment of 2008. [35] The Protection of Children from Sexual Offences Act, 2012 (POSCO) is another well thought of legislation, which expressly talks about protecting children from offences pertaining to sexual abuse and pornography in its preamble. It also provides for establishment of Special Courts for such cases and empowers the state to make stringent provisions concerning children. [36] Chapter III of POSCO particularly talks about *using a child for pornographic purposes and punishment therefore*. [37] Section 15 of the same act provides for punishment for storage of pornographic material involving child making it possession of illicit sexual content pertaining to a child, an offence. It is also pertinent to note that POSCO puts media, studio and photographic facilities under an obligation to report cases of child porn, as and when they come across illegal content online. [38] Test of Obscenity was initially laid down in Regina v. Hicklin. [39] It was stated that, “tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.” [40] Lord Cockburn, in the said case, opined that, “danger of prurient literature was that it would suggest to the minds of the young of either sex, and even to the persons of more advanced years thoughts of a most impure and libidinous character.” [41] The apex court of India also observed Cockburn’s test to be relevant. [42] It has been explained by the Supreme Court that obscenity is a differential aspect which can oscillate as per the perception of different states. [43] For instance, the three-point test in the United States, laid down in the case of Miller v. California. [44] Firstly, whether the “average person” applying societal calibre would find the content, as a whole, to be of sexual interest. Secondly, whether the content suggests or describes, in an evidently offensive manner, sexual material which is expressly denied by the state law. Thirdly, whether content, gravely lacks, literary, artistic, political or scientific value. [45] However, this test requires more clarity in the terms of defining “average person”. In an Indian case, it is stated by the Supreme Court that a prudent or “average” man should take into account, his common sense to judge whether the content amounts to obscenity. This obviously excludes the mind frame possessed by a hypertensive person. [46]

6. Conclusion: Comparing the Jurisdictions: USA, UK and India

Findings of this essay suggest that there is a wide gap between the federal system and sentencing guidelines in the USA. Despite of the purpose of Sentencing Reform Act, 1984, the guidelines concerning child-porn have failed to prosecute criminals on the fundamentals of punishment, that is, deterrence and rehabilitation. Due to the Booker’s era, courts have a lax pattern to apply their opinion whereas the guidelines simply discourage courts to contemplate factors such as previous criminal record, age, family responsibility, physical or mental condition unless it amounts to an unusual and unavoidable magnitude, when judging criminal culpability in general and pertaining to child porn. UK on the other hand, has stringent set of laws governing the problem of child pornography but is lacks on the aspect that the laws are covered by the blanket of ‘indecent laws’ which on various occasions refrains the

judicial system to talk about this heinous crime independently. In other words, focusing on indecency, takes away the attention from the anguish that child porn results in. Indecency is principally the moral facet of the offence, which on the turn, ruins the importance of the child’s lamentable experience. The existing laws will only work better and in an uncompromising manner if the moralistic approach is taken away and the enactments are reframed to match the actual harm around child pornography. The Indian stand seems much organized as an outcome of this essay. The country has specific provisions dealing with deleterious issue of child pornography. Apart from the ITA and IPC, POSCO is another piece of legislation which confirms the seriousness of the issue and uses no blanket term to address the problem unlike UK and USA. Furthermore, Tata Commutations is the first internet service provider to be a part of Internet Watch Foundation. This is a significant initiative to protect Indian networks from child sexual abuse content online. [47] “Perfection is a myth”, in the light of the said statement, the research conducted points a slight drawback pertaining to section 15 of POSCO which only covers punishment for storage of child pornographic material for “commercial use”. The provision should have been specific about the kind of use or should have laid down exceptions to the usage as it will widen the scope of prosecution in possession cases. Considering the flaws in all the three jurisdictions, USA comes out be the most liberal with UK being on similar lines but still stringent than USA. India, on the other hand holds a stronger position in this regard due to its peculiar legislations committed towards countering the problem of child pornography. In a nutshell, child porn is not a state issue but a global nuisance and major jurisdictions in the world are required to fight it on both national and international level to eradicate the issue completely. Understanding the delicate state of mind, a child carries and the threat it poses to the society, it is important to save the future by educating children, parents and responsible citizens.

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