



Addressing Legal Inconsistencies on Child Pornography

This editorial is based on [“Downloading child pornography is an offence”](#) which was published in The Hindu on 08/02/2024. The article explores the implications of the recent judgement by the Madras High Court in the case of 'S. Harish vs Inspector of Police' and its varied impacts on different sectors of society.

For Prelims: [Protection of Children from Sexual Offences \(POCSO\) Act, 2012](#), [UN Convention on the Rights of the Child in 1992](#), [Indian Penal Code](#), [Juvenile Justice \(Care and Protection of Children\) Act 2015](#), Information Technology Act, 2000

For Mains: Issues in Implementation of POCSO Act, 2000 and Way Forward.

Recently, the Madras [High Court](#), in the case of **S. Harish vs Inspector of Police (2020)** ruled that downloading child pornography does not constitute an offence under Section 67B of the Information Technology (IT) Act, 2000. The court cited a precedent set by the Kerala High Court, which held that watching pornography in private spaces is not a violation of Section 292 of the [Indian Penal Code \(IPC\)](#).

The police had filed the final report after investigation and cognisance had been taken by the High Court under Section 14(1) of the [Protection of Children from Sexual Offences \(POCSO\) Act, 2012](#) and Section 67B of the IT Act, 2000.

What is the POCSO Act, 2012?

▪ **About:**

- The POCSO Act was enacted in consequence to India's ratification of the [UN Convention on the Rights of the Child in 1992](#).
 - The aim of this special law is to address offences of sexual exploitation and sexual abuse of children, which were either not specifically defined or in adequately penalised.
 - The Act defines a child as any person below the age of 18 years. The Act provides punishment as per the gravity of offence.
 - The Act was further reviewed and amended in 2019 to Introduce more stringent punishment including the death penalty for Committing sexual crimes on children, with a view to deter the perpetrators & prevent such crimes against children.
- The Government of India has also notified the **POCSO Rules, 2020**.
 - Rule-9 of the POCSO Rules allows the Special Court to order interim compensation for the child's needs related to relief or rehabilitation after the FIR's registration. This compensation is adjusted against the final compensation, if any.
 - The POCSO Rules empower the Child Welfare Committee (CWC) to provide a support person to assist the child throughout the investigation and trial process.
 - The support person is responsible for ensuring the child's best interests, including physical, emotional, and mental well-being.

▪ Features:

◦ Gender-Neutral Nature:

- The Act recognizes that both girls and boys can be victims of sexual abuse and that such abuse is a crime regardless of the gender of the victim.
- This is in line with the principle that all children have the right to protection from sexual abuse and exploitation, and that laws should not discriminate based on gender.

◦ Ease in Reporting Cases:

- There is sufficient general awareness now to report cases of sexual exploitation of children not only by individuals but also by institutions as non-reporting has been made a specific offence under the Act. This has made it comparatively difficult to hide offences against children.

◦ Explicit Definition of Terms:

- The storage of **child pornography material has been made a new offence.**
- Further, the offence of 'sexual assault' has been defined in explicit terms (with increased minimum punishment) unlike an abstract definition of 'outraging modesty of a woman' in the IPC.

◦ Immediate Payment of Special Relief:

- Under the POCSO Rules, the CWC may recommend immediate payment for essential needs like food, clothes, and transportation, using funds from the District Legal Services Authority (DLSA), the District Child Protection Unit (DCPU), or funds maintained under the [Juvenile Justice Act, 2015](#).
- The payment must be made within a week of receiving the CWC's recommendation.

What are the Issues in the Recent Judgement of Madras High Court?

▪ Different Interpretation of Section 67B:

- The facts of Investigation are sufficient to attract the application of Section 67B(b) of the IT Act, 2000 but the High Court held that in order to constitute an offence, the accused must have published, transmitted, created material depicting children in sexually explicit act or conduct.
 - Thus, the High Court reached its judgement without analysing all of Section 67B, and reading into sub-clause (b), which clearly delineates the act of the accused.

▪ Incomplete Reference to Kerala HC's Judgement:

- The Madras HC referred to a precedent, without mentioning details, i.e., title or year, of that case, where the High Court of Kerala dealt with the scope of Section 292 of the IPC and held that watching an obscene photograph or obscene videos by a person by itself was not an offence.
 - The ratio of this case does not apply to the cases of child pornography, particularly the one under consideration.

▪ Negligence of Constitutional Validity of Section 67B:

- A case decided by the HC of Kerala in **Aneesh vs State of Kerala, 2023** did not pertain to child pornography. While watching adult pornography in privacy has been held as not to be an offence under Section 292 of the IPC (both by the HC of Kerala and the [Supreme Court of India](#)), downloading sexually explicit material pertaining to children is clearly an offence under the IT Act.
 - In none of the cases so far has the constitutionality of Section 67B(b) been challenged and its vires held unconstitutional.

▪ Excessive Reliance on Section 482 of CrPC:

- The Madras HC used its inherent powers under Section 482 of the [Criminal Procedure Code \(CrPC\)](#) to prevent misuse of the process of court and quashed the judicial proceedings.
- The Supreme Court has laid down certain guidelines in **State of Haryana vs Bhajan Lal (1992)** to exercise powers under Section 482 of the CrPC (or extraordinary powers under [Article 226](#)) including that such powers could be used where the allegations made in the FIR do not, prima facie, constitute an offence or make out a case against the accused.

What are the Different Legislations Regulating Child Pornography?

- **Section 67B of IT Act, 2000:** Section 67B has five sub-clauses dealing with different aspects such as:
 - (a) talks about publishing or transmitting material depicting children engaged in sexually explicit act or conduct,
 - (b) deals with acts including downloading of child pornography material,
 - (c) talks about cultivating, enticing or inducing children to [an] online sexually explicit relationship,
 - (d) talks about facilitating abuse of children online and sub-clause,
 - (e) talks about recording abuse/a sexually explicit act with children.
- **Section 14 of POCSO Act, 2012:**
 - Sub-section 1 states that Whoever uses a child or children for pornographic purposes shall be punished with imprisonment for a term which shall not be less than five years and shall also be liable to fine and in the event of second or subsequent conviction with imprisonment for a term which shall not be less than seven years and also be liable to fine.
 - Sub-section 2 mentions that Whoever using a child or children for pornographic purposes under sub-section (1), commits an offence referred to in section 3 or section 5 or section 7 or section 9 by directly participating in such pornographic acts, shall be punished for the said offences also under section 4, section 6, section 8 and section 10, respectively, in addition to the punishment provided in sub-section (1).

WHAT LAW SAYS		POCSO ACT, 2012
Section 67B Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form Anyone publishing or transmitting child pornography 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		Section 15 Any person, who stores, for commercial purposes any pornographic material in any form involving a child shall be punished with imprisonment of either description which may extend to three years or with fine or both

What Steps Need to Be Taken to Address the Issues?

- **Adhering to Comprehensive Legislative Framework:**
 - Section 67B of the IT Act, along with related sections such as 67, 67A and Section 14 of POCSO Act, 2012, constitutes a comprehensive legislative framework to address offences related to child pornography. The inclusion of specific provisions reflects the intent to combat sexual exploitation of children in cyberspace.
- **National Crime Records Bureau's Role:**
 - The [National Crime Records Bureau \(NCRB\)](#), Ministry of Home Affairs, under an agreement with the American National Center for Missing & Exploited Children, regularly gets geo-tagged CyberTipline reports to prosecute those who upload the child sexual abuse materials (CSAM) from anywhere in India.
 - This should also entail safeguarding and preserving the privacy concerns and bodily integrity of child victims and not be published openly on the website.
- **Terminology Adjustment:**
 - Advocates suggest replacing "child pornography" with "child sexual abuse materials" (CSAM) to better reflect the non-consensual nature of the content. This linguistic shift will enhance legal clarity and emphasise the seriousness of the offence.
- **Harmonising Legal Provisions:**
 - There's a call for harmonising provisions between the POCSO Act, 2012 and the IT Act, 2000 to ensure consistency in addressing offences related to child sexual exploitation. This alignment would streamline legal procedures and strengthen the protection of children.
- **Making CSAM a Separate Offence:**
 - Amendments to the POCSO Act may be necessary to include possession of CSAM as a separate offence, aligning it with the provisions of the IT Act, 2000. Such changes would

address inconsistencies and provide clearer legal guidance in prosecution of the perpetrators.

▪ **Importance of State Action:**

- It's crucial for the state government and respective investigating agencies to appeal against the Madras High Court's decision to prevent setting a detrimental precedent. Upholding the integrity of laws related to child protection is essential for safeguarding vulnerable populations and ensuring justice.

What are the Initiatives to Curb Child Abuse?

- [Child Abuse Prevention and Investigation Unit](#)
- [Beti Bachao Beti Padhao](#)
- [The Juvenile Justice \(Care and Protection of Children\) Act, 2015](#)
- [Child Marriage Prohibition Act \(2006\)](#)
- [Child Labour Prohibition and Regulation Act, 2016](#)
- **Fast Track Special Courts:** Since October 2019, the Department of Justice is implementing a [Centrally Sponsored Scheme](#), to set up Fast Track Special Courts (FTSCs) including exclusive POCSO Courts across the nation for expeditious trial relating to sexual offences where each court comprises of 1 Judicial Officer and 7 Staff Members.

Conclusion

The judgement of the Madras High Court raises crucial legal and ethical considerations regarding the interpretation and application of laws concerning child pornography. The discrepancy between the POCSO Act, 2012 and the IT Act, 2000 regarding the possession of CSAM warrants legislative review and amendment to ensure coherence and effectiveness in combating online exploitation of children. Therefore, it is imperative for the State government to appeal against this judgement and take proactive measures to strengthen legal safeguards and protect the rights of children in the digital age.

Drishti Mains Question:

Discuss the legal and societal implications of child sexual abuse and pornography, addressing legislative measures, societal attitudes, and preventive strategies.

UPSC Civil Services Examination Previous Year Question (PYQ)

Prelims:

Q1. With reference to the United Nations Convention on the Rights of the Child, consider the following: (2010)

1. The Right to Development
2. The Right to Expression
3. The Right to Recreation

Which of the above is/are the Rights of the child?

- (a) 1 only
- (b) 1 and 3 only
- (c) 2 and 3 only
- (d) 1, 2 and 3

Ans: (d)

Mains:

Q2. Examine the main provisions of the National Child Policy and throw light on the status of its implementation. **(2016)**

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