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Downloading child pornography is an offence

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Recently, the Madras High Court, in *S. Harish vs Inspector of Police*, quashed the judicial proceedings and held that downloading child pornography was not an offence under Section 67B of the Information Technology (IT) Act, 2000. The High Court categorically said that watching child pornography *per se* was not an offence as the accused had merely downloaded it onto his electronic gadget and had watched it in private.

The High Court also referred to a case decided by the Kerala High Court where it had been held that watching pornography in private space was not an offence under Section 292 of the Indian Penal Code (IPC). This case related to the quashing a criminal case registered against a youth in 2016 by the Aluva police as he had been watching pornographic material on his mobile phone on the roadside at night.

In this case, after investigation, the police had filed the final report and cognisance had been taken by the High Court under Section 14(I) of the Protection of Children from Sexual Offences (POCSO) Act, 2012 and Section 67B of the IT Act.

Section 67B(b) of the IT Act says that 'whoever, - 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' shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees....'

Reading into a sub-clause

It is undisputed that two files pertaining to child pornography were downloaded and available on the mobile phone of the accused. The forensic science report also corroborated the presence of the two files. These facts are sufficient to attract the application of Section 67B(b) of the IT Act, 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.

The High Court did not reproduce Section 67B in its judgment for justification. Section 67B has five sub-clauses, from (a) to (e). While sub-clause (a) talks about publishing or transmitting material depicting children engaged in sexually explicit act or conduct, sub-clause (b) deals with acts including downloading of child pornography material. Sub-clause (c) talks about cultivating, enticing or inducing children to [an] online sexually explicit relationship. Sub-clause (d) talks about facilitating abuse of children online and sub-clause (e) talks about recording abuse/a sexually explicit act with children.

There must be an appeal against a recent judgment of the Madras High Court in a case of the downloading of child pornography material

Thus, the High Court reached its judgment without analysing all of Section 67B, and reading into sub-clause (b), which clearly delineates the act of the accused.

The flaw in citing a precedent

The High Court 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.

A case decided by the High Court of Kerala in September 2023 (*Aneesh vs State of Kerala*) 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 High Court 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.

The Madras High Court 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 first information report or the complaint, even if taken at face value and accepted in their entirety do not, *prima facie*, constitute an offence or make out a case against the accused. Therefore, under the given facts and circumstances of the case, the Madras High Court could not in its wisdom quash the judicial proceeding when an offence was clearly made out under Section 67B(b) of the IT Act. However, it is agreed that the police had wrongly applied Section 14 of the POCSO Act as there was no evidence pertaining to the use of any child or children for pornographic purposes by the accused himself. Also, Section 15 of the POCSO Act punishes storage or the possession of child pornographic material only if it is done with an intent to share or transmit, or display or distribute, or for commercial purpose.

Remove the inconsistency

It is important to mention here that Section 67 read with Sections 67A and 67B of the IT Act are a complete code and the given acts are exclusively punishable under this code. This section was amended in October 2009 and, *inter alia*, even seeking or downloading child pornography made a specific offence. The purpose of enacting special Acts such as the POCSO Act and making special provisions in the IT Act is to protect children from sexual exploitation and punish people involved in different forms of exploitation.

The National Crime Records Bureau, 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. The use of the term CSAM is preferred because the term pornography implies consent which a child is not capable of giving. Therefore, it will be better if the term 'child pornography' is replaced with the term 'CSAM' in Indian laws. Similarly, the POCSO Act may also be amended and mere possession of CSAM be made a separate offence to remove inconsistency between the provisions of the POCSO Act and the IT Act. Finally, the State government must appeal against this judgment of the Madras High Court. Otherwise, it will set a bad precedent for the State.

The views expressed are personal

Equity concerns in banning fossil fuel extraction

The inadequate response from governments and corporations in dealing with the issue of climate change is leading to not only a dramatic rise in climate change litigation in many parts of the world but is also resulting in growing momentum that is in favour of phasing out of fossil fuel subsidies and the banning of the extraction of fossil fuel itself. Momentum is also growing in favour of a Fossil Fuel Non-Proliferation Treaty. There is a proposal in academic literature which sets out the case for a coal elimination treaty by 2030 with the aim of phasing out the mining and the burning of coal. The rationale behind this is linked to the Production Gap (Production Gap Report, or PGR 2023) that exists between the plans by fossil fuel producing countries to produce 110% more fossil fuels by 2030 and their incompatibility with the goal of the Paris Agreement 2015 to keep warming below 1.5° Celsius as compared to pre-industrial levels.

The element of phasing out fossil fuel emerged for the first time in the United Nations Framework Convention on Climate Change (UNFCCC) at COP26 in Glasgow, in 2021, which made a reference to phasing down unabated coal power and phasing out inefficient fossil fuel subsidies. In fact, there was a call by many to phase out coal and fossil fuel subsidies. COP28 in Dubai in 2023, in Dubai, also adopted a decision relating to the transitioning away from fossil fuels in energy systems, so as to achieve net zero emissions by 2050 in keeping with the science. It appears logical that to achieve the long-term temperature goal set at Paris and avert climate disruption, fossil fuel production cannot continue unabated. The question that remains to be answered is how to align these proposals with the anchor sheet principles of the climate change regime – the Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC) and Nationally determined contributions (NDC).

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India and other like-minded developing countries need to call out the hypocrisy of some of the developed countries

Equitable phasing out of fossil fuels

The UNFCCC, the Kyoto Protocol and the Paris Agreement are aimed at the reduction of greenhouse gases and removal by sinks in conformity with the CBDR-RC. The latter, governed by the criteria of per capita emissions, historic emissions made by a developed country party and the financial and technological resources (which a developed country commands as compared to a developing country), faces serious challenges when applied in the context of fossil fuel extraction.

Those countries that are heavily dependent on revenues and employment in the fossil fuel sector are likely to experience serious difficulties in transitioning away from fossil fuel.

For instance, there are countries such as Canada, the United States and the United Kingdom which are less dependent on revenues from fossil fuel, as they have a more diversified economy (non-fossil fuel income to cope with transitional costs) together with higher per capita income, and thereby greater capacity to transition away from fossil fuels. In contrast, there are countries such as Azerbaijan, Congo, Iraq, Nigeria, Oman, and Timor Leste that are heavily dependent on fossil fuels for government revenue and with economies that are relatively less diversified, thereby giving them limited capacity to transit. These countries cannot be expected to take the lead in phasing out fossil fuel.

International law and fossil fuel

In the international legal system, a state is within its rights to use natural resources lying within its territory for its economic development. But this is accompanied by a caveat not to cause significant harm to another state when a natural resource is trans-boundary in nature. The prevention of harm to another is a due diligence obligation, and a state has to undertake all appropriate measures in light of the magnitude of the proposed project having trans-boundary consequences.

The obligation has been largely tested in international water course situations and the International Court of Justice (ICJ, 2010) in the Pulp Mills Case described conducting trans-boundary environmental impact assessment (EIA) as part of customary international law. This duty is linked to a bilateral situation and its application in the context of a global commons is so far unclear, which amounts to saying that a state cannot be expected to undertake EIA for extraction of fossil fuel for its effects on the global environment other than local. Scholars from the West are taking a legally ill-founded plea that states are required to conduct an EIA for their fossil fuel extraction to prevent global warming. They are also propagating the human rights consequences of fossil fuel extraction on the local population and indigenous people in the tribal areas of Chhattisgarh, Jharkhand and Odisha in violation of the UN Declaration envisaging free prior informed consent of the tribal people. The basis of the Paris Agreement is NDCs, which does not bind a state to prohibit fossil fuel extraction.

India's situation

Despite India's notable progress in renewable energy systems, fossil fuel continues to dominate India's power sector. Nearly 3.6 million people in 159 districts are rooted in the fossil fuel economy through direct or indirect jobs related to the coal mining and power sector. A country such as India, which is facing serious unemployment concerns, cannot afford to transit towards cleaner fuel without adequate transition support and creation of suitable economic opportunities and livelihoods for those affected. India's subsidies on kerosene oil have come under scrutiny in the West as it is found to be inconsistent with Article 2(1)(c) of the Paris Agreement and is also considered as inefficient subsidies.

In line with the CBDR-RC, India has given a clear hint of a differential time-frame at COP26 when it intervened and succeeded in toning down the language from "phasing out" to "phasing down" unabated coal. India must lean on its coalition building strategy with like-minded developing country parties in opposing the hypocrisy of developed country parties since most major fossil fuel producers plan to increase production (this includes Australia, Canada, and the U.S. (as per the PGR) while expecting developing countries to radically shift their economies, with limited support.

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