

SHARENTING PROBLEM' IN THE BACKDROP OF INDIAN LEGISLATION

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Abstract

The sharenting culture by parents of constantly posting images and videos of children on social media websites is one that poses threat to children's online privacy, safety, and autonomy. Despite having international law that seeks to protect children from arbitrary interference to their privacy, no law exists in India that ensures that children's cyber privacy at the hands of their parents is not endangered. This is in contrast with laws of several other countries across the world that have taken a legal stance on sharenting, as in France, as well as laws that comprehensively protect children from all possible harms, as in Georgia. In light of judgements such as Justice KS Puttaswamy v Union of India¹ which laid down privacy as a fundamental right to all, a law that protects children from the harms of sharenting seems crucial, yet it may also in arguendo deemed to be infringing upon a parent's right to freedom of speech. In view of the above, this paper proposes the need of a law in India that assigns duties and responsibilities to parents, adults, and body corporates in respect of sharenting, in realization of "best interests of a child" as envisioned by the United Nations Convention on the Rights of Child.²

Keywords: Sharenting, child privacy, online privacy, parental consent, cyber law

Introduction

Sharenting is a culture of parents sharing private pictures and videos of their children on social media without their consent. It has been found that nearly 1,500 images of the average child had been shared online by their fifth birthday.³ This kind of sharing does not give due regard to a child's opinion, as firstly consent is not taken from children at all while posting their content, and secondly, a child of a tender age is not capable of giving well-informed consent.

The rising trend of sharenting raises questions as to whether the act of parents posting their children's images violates the right to privacy of children under Article 21⁴ of the Constitution of

¹ (2017) 10 SCC 1.

² E/CN.4/RES/1990/74.

³ NOMINET, <https://www.nominet.uk/parents-oversharing-family-photos-online-lack-basic-privacy-know/> (last visited Aug. 25, 2023).

⁴ INDIA CONST. art 21.

India. Implementational challenges of possible counter-measures are also questionable in a traditional society like India which imbibes values of unhindered subservience to parents, as they are expected to know what is best for their child. The question of violation of privacy may be counter-questioned by arguing that any curb on the parent's freedom to post such images, is possibly violative of Article 19(1)(a)⁵ rights which guarantees freedom of speech.⁶

The Information Technology Act, 2000 ("IT Act") does not have any provision that protects a child's images from being posted casually on social media, except Section 67B⁷ which only punishes publishing material of a child in an obscene manner. Therefore, both the aspect of parental control as well as basic child rights in the digital world is largely unaddressed and so, the question remains as to whether such parental control requires restrictions under the law to protect children or whether they need to be deemed as purely private affairs that need no intervention.

In light of the same, this article will aim to identify whether there is a need to bring laws that hold parents responsible for the non-consensual posting of children's images, and if yes, how it can be incorporated within the legal regime.

Ramifications of Sharenting

The threat of sharenting is one that needs careful understanding. Some of them are listed below.

- Lack of child's consent

A child not having a say on whether/what/how much of their content needs to be posted might not seem like an imminent issue when the child is still not of a mature age. However, the problem of such posting is that such content leaves a digital footprint that never leaves the internet, and this will be open to view for future friends, partners, recruiters, fellow employees and many more, leading to unnecessary snooping into one's past private life.

- Commodification of children

Parents of the digital age are known to use children as content for their social media handles where they post a child's daily activities, seemingly funny reactions, a child's quirks, and many more and use it to garner viewership and subsequently money. In 2018, the top earner on YouTube, according to Forbes, was a 7-year-old boy named Ryan who generated \$22 million in earnings by playing with toys.⁸ The harm with this is that children are being put on public display

⁵ INDIA COST. art. 19, cl. a.

⁶ Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759 (2011).

⁷ Information Technology Act 2000, No. 21 of 2000, § 67B.

⁸ Madeline Berg, *How This 7-Year-Old Made \$22 Million Playing With Toys*, REUTERS (Aug. 25, 2023, 5:40 PM),

with every minutiae about them being public knowledge and public-interested news, thus disrupting their future adult life as well from being shielded from unwanted spotlight and intrusion of privacy. The children will also be forced to grow up as adults who do not have an identity apart from what is established for them by their parents.

- Identity theft

Children whose personal details are overshared online are often victims of identity theft. Images of children are often used to create fake accounts,⁹ their audios are used to deploy AI technology that can mimic their voice to speak any given sentence/s,¹⁰ and all other kinds of details can be used for fraudulent loans or credit card transactions or online shopping scams.¹¹

- Child Sexual Abuse Material

Images of children are used by cybercriminals to create child sexual abuse material (CSAM) and post this on sites where they are open for public viewership. In an age where even AI is used to generate CSAM, this comes by as no surprise.¹² AI Tools such as Stable Diffusion are open-source tools which are run in an unrestricted way and can be used by anyone for creating such material without any form of checking.¹³ Even though the tool's open source license asks users to abide by safe operations, the tool's underlying safety features can be easily bypassed by a user by adding certain lines to its code.¹⁴

- Resurgence of Abuse

If a child has already faced some form of physical/sexual abuse, it is a worry for both parents and children that the child's online footprint might be used by the perpetrator to trace the child's whereabouts to locate them.

Intervention of Law

<https://www.forbes.com/sites/maddieberg/2018/12/03/how-this-seven-year-old-made-22-million-playing-with-toys-2/#2ef58a054459>.

⁹ Vanessa Cordeiro, *Children's Rights and Digital Technologies: Children's Privacy in the Age of Social Media – The Perils of "Sharenting"*, HUMANIUM (Sep. 09, 2023, 4:03 PM), <https://www.humanium.org/en/childrens-rights-and-digital-technologies-childrens-privacy-in-the-age-of-social-media-the-perils-of-sharenting/>

¹⁰ Carter Evans, Analisa Novak, *Scammers use AI to mimic voices of loved ones in distress*, CBS NEWS (Sep. 06, 2023, 6: 47 am) <https://www.cbsnews.com/news/scammers-ai-mimic-voices-loved-ones-in-distress/>.

¹¹ Sean Coughlan, *'Sharenting' puts young at risk of online fraud*, BBC (Aug. 25, 2023, 5:52 PM), <https://www.bbc.com/news/education-44153754>.

¹² Drew Harwell, *AI-generated child sex images spawn new nightmare for the web*, THE WASHINGTON POST (Aug. 25, 2023, 5:54 PM), <https://www.washingtonpost.com/technology/2023/06/19/artificial-intelligence-child-sex-abuse-images/>.

¹³ *Id.*

¹⁴ *Id.*

The United Nations Convention on the Rights of Child (UNCRC) to which India is a signatory, lays down in Article 16 that 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.¹⁵ Article 19 also provides that State parties shall take all appropriate legislative and administrative measures to protect the child from all forms of...neglect or negligent treatment...while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.¹⁶ Particularly, Article 3(1) of the CRC provides that “in all actions concerning children, whether undertaken by public or private social welfare institutions, a court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”¹⁷

In India, there is no law as of today that regulates sharenting. However, countries across the globe have taken legislative measures to regulate, ban, and curb sharenting activities. Examining some of these laws would help take cues on how India can proceed.

France has adopted a complete ban on the non-consensual online posting of children’s images by parents and is the world’s first country to do so.¹⁸ The law requires that every decision on posting of a child’s image must be consented by the child based on their age and maturity level and also by both parents, failing which the court can ban the posting. The law also provides that parents might have to forgo their authority over the child’s image rights if posting “seriously affect the child's dignity or moral integrity.”

In Georgia, Article 24 of the Code on the Rights of Child¹⁹ states that “A parent or a person responsible for the upbringing of the child is obliged to respect the child’s personality, raise the child in accordance with the principles of peace, respect for human rights, tolerance, equality and solidarity, take care of the physical, mental, spiritual and social development of the child, prepare the child for individual social life, and to give priority to the best interests of the child.”

In the US, the Children’s Online Privacy Protection Act, 1998²⁰ (COPPA) exists, but it considers both the parent and the child to have unified interests and therefore cannot protect children from the perils of sharenting.

¹⁵ E/CN.4/RES/1990/74, art. 16.

¹⁶ E/CN.4/RES/1990/74, art. 19.

¹⁷ E/CN.4/RES/1990/74, art. 3, cl. 1.

¹⁸ Sounak Mukhopadhyay, *World-first law bans parents from sharing children’s photos on social media*, LIVEMINT (Aug. 25, 2023, 5:56 PM), <https://www.livemint.com/news/world/worldfirst-law-bans-parents-from-sharing-children-s-photos-on-social-media-11679458176060.html>.

¹⁹ The Code on the Rights of Child GEO-110163, art. 24.

²⁰ 15 U.S.C. §§ 6501–6506.

All across the world, the regulation surrounding sharenting is a grey area as there is no certainty of how rightly to control without infringing on private affairs.

Do parents have a fundamental right to sharent?

In India, the fundamental right to free speech and expression under Article 19(1)(a)²¹ provides exemptions under Article 19(2),²² wherein the grounds of restriction includes sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. None of these grounds provide for 'public interest' or 'children's welfare' as a ground for restriction, but clearly there are instances where courts have recognized that a child's welfare overrides the right to free speech.

In India in the case of *KS Puttaswamy v Union of India*, Justice Sanjay Kishan Kaul had stated that children leave digital footprints on social network websites 24/7 and that the result of their childish behaviour at one point of time in life should not lead to consequences later on and thus children need privacy in the virtual world as well.²³ In the US case of *In re Z (A Minor) (Identification: Restrictions on Publication)* the court accepted that there was no need to strive to create a balance between media freedom and privacy once it was found that the matter at issue related to 'upbringing' of the child, and so the paramountcy principle applied, giving a higher weightage to child privacy.²⁴ The term 'upbringing' was elaborated by Munby J. in *Kelly v BBC*, stating that 'Upbringing... involves a process in which the parent, or other person in loco parentis, is the subject and of which the child is the object.'²⁵ Therefore, judicial precedents have always weighed in favour of the child's right to privacy.

The Juvenile Justice (Care and Protection for Children) Act, 2015 in Section 74 states that no report in any newspaper, magazine, or audio-visual media regarding any inquiry or investigation or judicial procedure, shall disclose the name, address or school or any other particular of a child, which may lead to his/her identification.²⁶ This lies proof of the fact that protecting the identity of children is an interest that has great weight, so much so that it cannot even be infringed upon for purposes of investigation. Reading alongside the *Puttaswamy* judgment as well, it can be safely deduced that the right to privacy of a child under Article 21 is of a more significant and

²¹ INDIA CONST., art. 19.

²² INDIA CONST., art. 19, cl. a.

²³ (2017) 10 SCC 1.

²⁴ [1995] 4 All ER 961, CA.

²⁵ [2001] 1 All ER 323.

²⁶ Juvenile Justice (Care and Protection of Children) Act, No. 2 of 2016, § 74.

non-negotiable character while counterbalancing it against the right to free speech of parents under Article 19(1)(a).

Whether the data protection law in India has a role to play?

The DPDP Act does not concern itself with personal data shared for “personal or domestic purpose”.²⁷ However, the approach of treating a child’s interest under this Act gives insights into a general societal outlook towards the autonomy and individuality of a child. The Act regards both parents and children to have congruent interests in the protection and privacy of children’s data. This is signified in the Act in Section 9(1) where it states that the data fiduciary shall, before processing any personal data of a child who has a lawful guardian, obtain verifiable consent of the parent of such child or the lawful guardian.²⁸

This stance adopted by the Act does not warrant the “best interests of child” as envisioned by UNCRC primarily because the definition of child is a person who has not completed eighteen years of age²⁹ thereby requiring parental consent for processing data even for a “child” who can take informed decisions just as well as a major. The General Data Protection Regulation (GDPR) for instance sets the age of consent sixteen years of age but also allows individual states to set it as low as thirteen.³⁰ The COPPA also sets the age of “child” as anyone below thirteen years of age.³¹

However, a child has to be seen as an entity having interests distinct from that of its parents which is why a law on sharenting becomes necessary.

How can the law develop?

In India, neither do we have a substantive law on restricting sharenting, nor do we have a law or code that fosters rights of children. The best step forward is to have a law that restricts sharenting in a way that child welfare is ensured.

The welfare of a child is ensured when a danger or harm is avoided. Hence, it is not to mean that a prospective law must place a ban over parents sharing any data of children online until they are eighteen, rather, to put safeguards in place. The law must be developed for application to both parents who raise biological or adoptive children, all adults regardless of parental status, body corporates with an online presence, as well as educational institutions.

²⁷ The Digital Personal Data Protection Act, No. 22 of 2023, § 3(c).

²⁸ The Digital Personal Data Protection Act, No. 22 of 2023, § 9(1).

²⁹ The Digital Personal Data Protection Act, No. 22 of 2023, § 2(f).

³⁰ (EU) 2016/679, art. 8.

³¹ 15 U.S.C. 6501.

I. Parents

Parents must be restricted from sharing personally identifiable information of a child on online public platforms and instead be encouraged to post information in an anonymized manner. Any parent who posts content with personal identifiers of children such as their name, school name, house address etc. must be made subject to fines as penalty, except where such parent is able to prove that the visibility of the post was only to family members and the child's trusted contacts. As far as images and videos are concerned, it must be restricted from being posted beyond a certain threshold. An online child privacy law must focus on mandating social media intermediary sites to stipulate a safe monthly limit on posts involving children and auto-delete excess posts, so that parents who use popular social media sites restrict posts that may be harmful to children.

II. Adults

Adults are often guilty of posting advertently or inadvertently, pictures of other children who are not their own. This is also equally harmful to a child. A comprehensive law on children's online privacy must mandate that no person shall share content of children on any online public platform unless they are the biological/adoptive parents of such child or unless their biological/adoptive child also features in such image or video and the consent of the lawful guardian of such other child/children have also been taken.

III. Body Corporates

Social media platforms must be mandated to deploy AI tools and automatically flag and remove posts of parents involving children beyond the threshold fixed. It must also enable the option for parents to be notified when the image of their child is on the platform publicly so that the platform can be made to take down the posts which include pictures of children of whom the owner of the post is not the parent. For a prescribed time period a picture involving children may be put on hold from posting and the intended post may be notified by the platform to the individual of whom the child is identified as per the platform as a parent, based on previous posts of the parent where they have notified the face as that of their child to the platform. If no response is received within the stipulated time, or in case where there is no identifiable parent of such child on the platform, the post shall be barred from posting unless it is a group picture involving above thirty faces and no personal identifiers exist.

IV. Educational Institutions

A law on sharenting must also aim to require educational institutions to formulate photography and filming policy statements that educate and require parents to follow an anti-sharenting policy on pictures of children taken during school events due to personal identifiers in such images such as the campus building and school uniform.

Conclusion

At a time when India has made remarkable progress by enacting a legislation for digital personal data protection after over six years of deliberation, taking that step further by considering the privacy requirements of the younger citizens of the country can happen at no better time than now. It would be a measure that secures the right to privacy and identity of children, which are markers of progressive nations worldwide.