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# **DIGITAL PRIVACY OF CHILDREN – A NEED FOR SPECIAL LEGISLATION**

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## **ABSTRACT**

**Key words:**

DATA PROTECTION; PERSONAL DATA; CYBER CRIME; PARENTAL CONSENT;  
DIGITAL LITERACY

The lives of children in this digital age are mediated by digital technology. They use mobile devices to access internet for academic purpose and entertainment. The pandemic situation has increased the usage of mobile and other digital gadgets by the children. Some study found that the screen time has increased among children because of online classes. Thus, access to digital environment has become part of children lives in this digital age. On the one hand, the digital environment exposes children to diverse information and helps in their development. Simultaneously, it has got negative impact on child's physical and mental well-being. Though internet acts as the information-hub, it poses serious threat to child's online safety. However, there is no comprehensive law dealing with the protection of privacy of children in digital environment. Other countries have adopted special law dealing with privacy of children. With increasing usage of online platforms by children and young adults, there are serious concerns about their privacy, safety and responsible use of such platforms. Children are more vulnerable to online crimes and this paper sets out the pressing need for special legislation to deal with digital privacy of children. The paper has been split into three sections. The first section elucidates the risks and harms to children in cyberspace. The second section of this paper spells

out the international concern of privacy of children in digital environment. The third part expounds the national framework on data protection and privacy. It exposes the challenges in promoting the online safety of children with reference to the Digital Data Protection Bill, 2022. It presses the need to enact a special legislation to protect children from cybercrimes and to promote responsible use of internet.

## I. INTRODUCTION:

The right to privacy is not a new concept. Yet, in recent times, privacy has gained more momentum than ever before. In the digital age the need to protect privacy has become very important as there is more threat to the private life of individuals. With the advent of internet and technology, there have been so many concerns about it. One such concern is right to privacy in digital environment. People use internet and technology for various reasons and they leave their footprint in the digital platform by leaving behind personal information. Recently there have been so many issues and cases regarding tracking of individual activities by different applications, websites, giant corporations etc. Data has become most valuable asset. Data protection is necessary in the digital age to prevent invasion of privacy and other crimes related to it.

Today, we are living in information and technology world and we are profiled. Whether we consent with knowledge or not, we provide our details to the authorities presuming that the information will be secure. While providing such details or personal information we press the button 'agree' enabling them to trade our personal information, which increases the risk of using it for unlawful or illegitimate purposes. The reality is we are being stalked by algorithms who profile us using our details. There are so many threats associated with these internet activities where data are being mined and stored without our knowledge.

Thus in this digital age, privacy and data protection has become one of the most important concerns at both national and international level. This is because violation and abuse of right to privacy may affect all individuals, particularly women and children. The rise in new online platforms, apps and other internet sources which collect and process information from people using it, has become a major threat to information privacy. It is very important to protect and respect the right to privacy, both online and offline to prevent violence and crime against

women and children. Children are the most vulnerable groups likely to be affected by the violation and abuse of privacy which includes cyber stalking, cyber bullying and harassments. Undoubtedly, the digital era benefits child's development in countless ways. The digital age has opened up many new opportunities for people around the world. However, the threats to privacy, both in the digital space and out of it, are rising at alarming rates. Unfortunately, children are particularly vulnerable to these kinds of attacks. The importance of children's right to privacy has manifested itself anew in the context of digital technologies. The existing framework primarily addresses the issues related to child safety as well as data processing, but not the protection of his/her dignity and reputation. This article highlights why the existing national and international frameworks are not enough to protect children's digital privacy. There needs to be more stringent measures in place to ensure that children are safe online.

## **II. RISKS AND HARM TO CHILDREN IN DIGITAL ENVIRONMENT:**

Exposure to harmful content and contact:

Internet has made it possible for anyone to upload contents from anywhere in the world. These content providers, often new and unprofessional content providers may be indifferent or ignorant to the rules and regulations which their own territories adhere to. The consequence of these factors is that children using the internet may risk exposure to content which may pose a risk of harm for example, in the form of sexually explicit content.

The internet enables communication in many forms, allowing contact with both known and unknown individuals. The children using digital platforms are exposed to harm either as recipient of abusive messages or as a sender sending their personal information to unknown individuals. This includes cyber grooming, where adults known or unknown to the child take advantage of these digital platforms to sexually exploit the child.

Victims of various cybercrimes:

The 2014 report of the Parliamentary Committee on Information Technology recognized that the online bullying of children by their peers was probably far more common than other offences.<sup>1</sup> Cyber bullying may involve "abuse and/or harassment by teasing or insulting victims' body shape, intellect, family background, dress sense, mother tongue, place of origin,

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<sup>1</sup> Standing Committee on Information Technology (2013-14), Fifteenth Lok Sabha, Ministry of Communications and Information Technology, Department of Electronics and Information Technology, "Cyber Crime, cyber security and right to privacy" 52<sup>nd</sup> Report, New Delhi, February, 2014.

attitude, race, caste, class, name calling, using modern telecommunication networks such as mobile phones (SMS/MMS) and Internet (chat rooms, emails, notice boards and groups).”<sup>2</sup> While such hurtful online behaviour is unlikely to be considered as an offence under Indian law, the severity, frequency and pervasiveness of such messages can cause significant distress to the targeted child. The incidence of such exposure is bound to increase as mobile technology, images and videos become easier to access. The potent combination of anonymity, immediacy and reach in the case of cyber bullying adds to the challenge.

One of the worst types of cybercrime in the world is online defamation. With easy access to internet and other social media networks, there has been potential increase of posting offensive content against a person. The harm caused to a person by the online publication of defamatory statements about him or her can be greater than verbal and offline statements and can have vastly more damaging consequences. For children in particular, the effects of online communication of sensitive personal information, images or videos can be devastating and intimidating.

Another serious issue is revenge pornography. Children especially teens share with consent their private pictures to boyfriends/girlfriends. This has the risk of other person circulating such content obtained from the child. Revenge pornography is the sharing of private, sexual materials, either photos or videos, of another person without their consent and with the purpose of causing embarrassment or distress. The images are sometimes accompanied by personal information about the subject, including their full name, address and links to their social media profiles.<sup>3</sup>

There are other similar crimes against children in the cyberspace. Digital environment has become a platform for more criminals to commit crimes at their leisure. Crimes such as online sextortion, online sexual exploitations are increasing. However, very few incidents are reported. In addition to this, there is behavioural harm like internet addiction, selfie trends where children try to gain attention by exposing themselves in the social media platforms.

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<sup>2</sup> Jaishankar, K., *Cyber Bullying: Profile and Policy Guidelines*. Tirunelveli: Department of Criminology and Criminal Justice, Manonmaniam Sundaranar University, 2009.

<sup>3</sup> Be Aware B4 You Share. *Revenge Porn, The Facts*

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/405286/revenge-pornfactsheet.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405286/revenge-pornfactsheet.pdf)

Today, laws and policies try to address these issues and provide penal provision to curb all such crimes. However, we lack in tech-sound measures to provide a safer digital platform. Policies identify the privacy issues and frame a privacy policy but such policies are only to control the information of individual. Despite coming up with so many policies and legislative frameworks and recommendations, digital environment needs a sound digital policy framework and educating children more about the harms and risks in the digital platform is significant.

### **III. INTERNATIONAL CONCERN ON ONLINE PRIVACY OF CHILDREN:**

The United Nations Convention on the Rights of Children (UNCRC) is an important international human rights treaty adopted to protect the rights of the children as children are more prone to abuses and exploitation. The UNCRC was adopted in the year 1989 and entered into force in 1990. This international agreement is legally binding on the member countries. It consists of 54 articles that lists various rights of children and provides measures to be taken by the government to implement the child rights. The Convention is based on the principle of non-discrimination and best interest of child. The Convention has got three optional protocol.

Right to privacy:

Every child has the right to privacy. Article 16 of the Convention provides that every child has the right to privacy, home and communication. They should be protected from unlawful attacks on reputation and honour. The Convention states that the government should protect the children from sexual exploitation and sexual abuse, including by people forcing children to have sex for money, or making sexual pictures or films of them.<sup>4</sup> All forms of abuse and exploitation are serious intrusion into the right to privacy of the children. It is a serious attack on their dignity and they are the most vulnerable group. Therefore, States must ensure protection to every child which defiles their dignity which in turn affects their right to life. Right to life doesn't mean mere existence but it includes everything which makes life meaningful and worthy. Sexual abuse and other forms of exploitation of children crush their life and no amendments in future will cure their trauma. Therefore, it is very important and necessary to safeguard children from social evils. They should take steps to prevent sale and

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<sup>4</sup> Art 34, UN Convention on Rights of Child, 20 Nov 1989. Available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

trafficking of children.<sup>5</sup> Every child with a disability should enjoy life at par with other children. Government should take necessary steps to remove all the obstacles for children with disabilities to become independent and to participate actively in the society.<sup>6</sup> Disabled children are taken advantage of and are abused. They must be given special attention.

Online Privacy and data protection:

Today, in the digital age children have become victims of various online crimes. The Committee on the Rights of the Child (CRC) published Draft document of General comment No. 25 (2021)<sup>7</sup> on children's rights in relation to the digital environment. It speaks about children's right to privacy in digital environment. The use of online platforms by the children has risen now due to pandemic situation. It is the duty of the State to ensure a safe digital environment to children. The document provides that interference with a child's privacy is only permissible if it is neither arbitrary nor unlawful. Any such interference should be allowed only if it is permissible by law, which is intended to serve a legitimate purpose, and designed to observe the best interests of the child. It must not conflict with the objectives or provisions of the Convention.

The activity of children in online platform may pose certain threats to their right to privacy. Data are routinely collected by the data processors as most of the online platforms require information for the proper functioning. The CRC in its General Commentary provides that a data may include information about children's identities, activities, location, communication, emotions, health and relationships. Certain combinations of personal data, including biometric data, can uniquely identify a child.<sup>8</sup> There are digital practices, such as automated data processing, profiling, behavioural targeting, mandatory identity verification, information filtering and mass surveillance which are becoming routine. The CRC in its comment expresses its concern that such digital practices may lead to arbitrary or unlawful interference with children's right to privacy and may have adverse consequences in their later part of lives.

Therefore, it requires the States parties to take legislative, administrative and other measures to ensure that children's privacy is respected and protected by all organizations and

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<sup>5</sup> Art 35 *Ibid.*

<sup>6</sup> Art 23 *Ibid.*

<sup>7</sup> Available at

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/25&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/25&Lang=en)

<sup>8</sup> Para 68 of General comment No. 25 (2021)<sup>8</sup> on children's rights in relation to the digital environment.

in all environments that process their data especially digital platforms. It states that the national legislation should contain strong safeguards, transparency, independent oversight and access to remedy. States parties should require the integration of privacy-by-design into digital products and services that affect children. It is the duty of the States to regularly review privacy and data protection legislation and ensure that procedures and practices prevent privacy invasion or accidental breaches of children's privacy.<sup>9</sup>

It also provides that children, based on their capacity or their parents or guardians or care givers' consent must be sought before processing data. The consent obtained must be free. It also requires the data processors to make such stored data to be accessible to the children and their parents and to rectify any inaccurate data. They must also be allowed to withdraw consent where the data stored is inappropriate and not used for legitimate purpose. Therefore, it is the duty of the States parties to ensure access of stored data, rectify data that are inaccurate or outdated and delete data unlawfully or unnecessarily stored by public authorities, private individuals or other bodies, subject to reasonable and lawful limitations.

Further, it adds that the data protection legislation should not arbitrarily limit the children from exercising their other rights. For example, right to expression. The digital environment has discriminatory, pornographic and other exploitative information. It also contains false information and information that provokes children to engage in harmful or unlawful activity. While using internet many inappropriate content pops up. All these information may come from different sources including sexual offenders or other content creators. Therefore, the States must design and implement a children- friendly policy and guidelines to protect them from harmful content and thus enable safety in digital environment.

#### **IV. INDIAN PRIVACY LAW – ISSUES AND CHALLENGES IN SAFEGUARDING CHILDREN IN DIGITAL ENVIRONMENT:**

Privacy – Fundamental to life:

The right to privacy is an inherent right of every human being. The Apex Court held that the right to privacy is a constitutional right and it forms the core of right to life and personal liberty.<sup>10</sup> Thus, the right to privacy though not expressly recognised under the Constitution, it

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<sup>9</sup> Refer Para 70 of the General comment No. 25 (2021)<sup>9</sup> on children's rights in relation to the digital environment.

<sup>10</sup> Justice K.S.Puttaswamy(Retd) and Anr v. Union of India, (2017) 10 SCC 1.

is an implicit right under Art 21.

Art 21 of the Constitution of India guarantees right to life and personal liberty. Art 21 states that “no person shall be deprived of his life and personal liberty except according to procedure established by law.” It guarantees two rights: right to life and right to personal liberty which are natural rights.

#### Right to life and Privacy:

The right to life is fundamental to the very existence of every human being. The term ‘life’ in Art 21 doesn’t mean mere animal or physical existence but it includes all those aspects of life, which makes a man’s life meaningful, complete, and worth living. It is the only article in the Constitution that has received the widest possible interpretation by the judiciary. Many rights have found shelter under the roof of Art 21. For example, right to life includes right to dignity, right to health, right to privacy etc. Thus, Art 21 includes everything that forms core element of life. It is through this widest interpretation of Art 21, the right to privacy was recognised. Just because such a right has not been given expressly in the Constitution doesn’t mean that it doesn’t exist. One has to understand that the right to privacy is a natural right. The Supreme Court observed that natural rights inherent in human beings because they are human and are not bestowed by the State. This right exists equally on every human being irrespective of class or strata, gender or orientation.<sup>11</sup> This observation makes it clear that natural rights are inalienable rights as they are inseparable from human personality. Thus right to privacy is inherent in every human being.

The right to life means a dignified life. Privacy is an important element to live a dignified life. Privacy ensures that every person can lead a life of dignity by securing inner recesses of the human personality from unwanted intrusion.

#### Right to personal liberty and privacy:

The expression personal liberty is a comprehensive term. Personal liberty is autonomy or freedom of an individual to make one’s choice without any unlawful restriction or coercion or interference by the State or other external restrains. In order to exercise personal liberty, privacy is essential. Privacy forms the basis of all liberty because it is in privacy that the individual can decide how liberty is best exercised. It recognises individual autonomy and the

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<sup>11</sup> *Ibid.*

right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a dignified life is necessary for a human being to fulfill the liberties and freedoms which are the cornerstone of the Constitution.

Though the Constitution does not expressly declare a right to privacy, the said right is essential ingredient of personal liberty. As already said, privacy protects the autonomy of the individual to control choices in one's life. It is privacy which recognises individual's ability to control vital aspects of his or her life. The personal choices governing a way of life are innate to privacy.

#### Understanding Privacy in Digital environment:

Impact of pandemic has led to the boom of E-learning and edu-tech platforms. Also, children born after 2010 (Generation Alpha), have grown up in a fully digital world. This means that children are online more than ever and their personal data is being accessed and used at increasingly greater rates. However, laws relating to children in India deals with the penal aspect of crimes against children. Therefore, special law for children's privacy is the need of the hour. Our laws do not focus on designing a safer digital space.

First, we should understand that the term "privacy" is not possible to be defined. It is said that attempt to define privacy has ended up only in classifying it based on the ways it is violated or infringed. Solove has rightly asserted that privacy is best understood as a "family of different yet related things."<sup>12</sup> Thus, privacy has been classified into seven types in the context of emerging new technologies:<sup>13</sup>

- i. **Privacy of person:** The privacy of person also known as 'bodily privacy' protects the integrity of individual's body. It is the right to protect the body from intrusions and tortures and to keep body functions and characteristics such as biometrics private.
- ii. **Privacy of behaviour and action:** This aspect of privacy includes the sensitive issues such as sexual orientation, sexual behaviour and action, religious activities etc. This privacy of personal behaviour covers activities both at public and private places.
- iii. **Privacy of Communication:** This type of privacy is about conversations in telephone, mail and other forms. It aims to prevent the interceptions of communications and recording or unlawfully

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<sup>12</sup> Solove, Understanding Privacy, 9.

<sup>13</sup> Rachel Finn and David Wright, Michael Friedewald, Fraunhofer ISI, "Seven Types of Privacy" 2013. Available at : <https://www.researchgate.net/publication/258892458>.

- accessing the messages. The privacy of communication enables free discussion and to dissent and thereby enables growth of communication sector.
- iv. Privacy of data and image: The privacy of data and image is to control access of one's data and image. Today this privacy is very important more than ever as people use online platforms to share their data and images.
  - v. Privacy of thoughts and feelings: The privacy of thoughts and feelings is the right of individual to share or not to share their feelings and thoughts.
  - vi. Privacy of location and space: Today technology has enabled tracking and monitoring of individual movement. The privacy of location and space means that the individual have the right to move in public or any space without being identified and monitored.
  - vii. Privacy of association: The privacy of association speaks about right to associate with whoever they wish.

Thus, privacy in digital environment is concerned more about consent, choice and control of one's personal information and everything that falls under the private zone of individual. Privacy being a dynamic concept takes different shapes in different context.

Data Protection Bill, 2022 on privacy of children:

The laws in India protect children from abuse and provides safeguard to them. IPC, POCSO, IT Act play a major role in dealing with offences committed against children. However, laws cannot deter crimes against children. Ensuring child's privacy is the joint responsibility of their parents/ guardians and stakeholders handling their data. Online privacy is concerned with the control of one's personal data. The current law mandates the data controllers to obtain consent of the data subject prior to collection of their personal data. But there is no separate provision differentiating the consent of the minors/ children. It just provides a general provision on consent of data subject. This has led to criticism as the Indian Contract Act makes the minors incompetent to contract. Their consent has no legal validity till they attain majority. Therefore, obtaining consent of the parent/ guardian to collect child's data is necessary. However, most parents take help of their children to use and access internet and other digital platforms. Applications that require age data request users to enter their date of birth. And it is easy for the minors to enter desirable input regarding age making them appear as over 18. In this case they are still children but the content that will be presented to them would be those that are meant for adults including content that might be disturbing or those involving use of alcohol and gambling. Additionally, in their privacy policies, applications sometimes state that they are not suited for and restricted from users under 18. Here, data fiduciaries avoid liability by placing the onus on the user to declare their age and properly read and understand the privacy

policy.

Parental Consent under the 2022 Bill:

Under the draft Digital Personal Data Protection Bill, 2022 ("**2022 Bill**"), a "child" means an individual who has not completed eighteen years of age.<sup>14</sup> The Bill mandates the data fiduciaries to obtain *verifiable parental consent* before processing their personal data.<sup>15</sup> Additionally, the 2022 Bill also restricts any tracking or behavioural monitoring of children or targeted advertising towards children. Treating individuals under 18 as children may not be suitable for data privacy governance since children between 13 and 18 use digital platforms to avail different services for academic purposes. It is not possible for them to get parental consent every time they switch platforms. The children below 18 years may be categorised based on their mental maturity. Children between 13 and 18 maybe treated as young adults. Even IPC speaks about the mental maturity of the children below 18 years. And children between 12 and 18 years can be punished for offences committed by them. And children between 16 and 18 years of age can be tried for heinous offences. Therefore, classifying children below 18 years based on mental maturity is necessary. Our government has taken this conservative view as children below 18 years are more vulnerable to cybercrimes. However, gating them and requiring parental consent every time they access internet and other platforms, would act as a barrier. Therefore, educating children about cyberspace, risks and harms attached to it and the consequences of every act done in digital platforms may be taught in schools as a practical session. Educating children alone can make them more safe and prevent them from unnecessary risks.

## **V. CHALLENGES IN SECURING SAFE CYBERSPACE – NEED FOR SPECIAL LAW:**

Principle of Consent: As discussed already, the proposed Bill is based on the principle of consent. Classifying children on certain factors like age, maturity, purpose of internet usage or access to platforms are to be considered. Even educated adults blindly consent to the terms and conditions of the policies. Both children and adults must be aware of the terms of the policies to which they consent to. Also, some applications wouldn't work if we do not give consent and deny permission to access our personal information. Such norms leave us with no option but to agree to the terms and conditions to enable access to the concerned platform. The Bill makes

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<sup>14</sup> Section 2(3) of the Digital Personal Data Protection Bill, 2022.

<sup>15</sup> Section 10(1) of the Digital Personal Data Protection Bill, 2022.

provision for withdrawal of consent by the data subject. This could affect the access to particular service when we deny consent.

**No Special Law:** India has special laws that protect and prevents children from various crimes committed against them in physical environment. Very few provisions deal with online crimes committed against children. As such, it would be better if we enact a separate law for child's privacy protection rather than covering them under the ambit of data protection bill. A comprehensive legislation that focuses on dealing with every aspect of digital activity of children and its consequences would secure a safe cyberspace for children.

**Lack of technology savvy skills:** Developing technological traits and using them in our daily life would resolve many concerns about privacy. Technology skills are crucial in one's life and authorities who are appointed for redressing grievances and other legal issues must have sound knowledge about cyber security and other technical knowledge. Hence, educating children and adults about cyber laws and safe and responsible use of technology is fundamental.

**Address and redress:** Our laws are concerned with addressing the problem and redressing them. However, focus on address and redress alone doesn't achieve the object and purpose of law. Address and redress do not nip the crimes in the bud. Emphasizing on designing a safer platform for children, devices and applications that are child-friendly and limited access can be made.

**Ignorance of Digital knowledge/ Digital literacy:** Children cannot escape from risks and harms attached to digital environment unless they are educated and trained to use it safely. Ignorance of digital knowledge can mislead the children and increase the risk of becoming victims of cybercrime. Hence, including a subject on digital world is indispensable in this digital age.

**Quick response and Redressal:** Immediate response on the part of authorities in taking necessary actions when faced with serious issues is important. Most cybercrime against children go unreported. Children must be aware of the redressal mechanism and quick response can impart confidence in the minds of public. Instead of treating them as victims and sensitising the issue, it is important to teach them their right to complaint against violation of their rights and take appropriate action against immediately. Redressal mechanism must be child-friendly.

**Awareness on ways and means to elude risks and responsible use of digital platform:** People tend to be indifferent towards things they are unaware of. No matter how serious the issue is, only when they have sufficient knowledge in the subject matter, they engage and be a part of

government policies in promoting safer and responsible use of digital environment.

Thus, the existing framework has got so many challenges in protecting the privacy of children. Therefore, it is necessary to enact a separate law throwing special attention on the privacy of children in digital environment. Internet usage has become inevitable among children of digital age. It is suggested that we create a new digital environment for children where they grow and develop safe and enjoy crime-free digital space. This cannot be achieved without a comprehensive law on digital privacy of children. Also, the existing legal framework or the proposed Bill on data protection is insufficient to uphold and protect the right to privacy of children in digital environment. Hence, need for a special law is expedient.

## **VI. CONCLUSION:**

This paper has stressed on the need for laws that safekeep children online. Given the growing reach of digital technology among children, there is dire need for a special law dealing with data privacy rights of children. Other countries have laws to protect the online privacy of child. Children are prone to sharing personal information without much thought. As a consequence, they pose risk to themselves and suffer from mental trauma of being a victim to online crimes. Therefore, creating or designing a safe zone for children is necessary. Special apps can be designed for them where there is no threat of privacy violation. Phones and gadgets are now available at cheap cost, where even children have a personal mobile phone. Devices for children which have limited access to networks and other platforms will safeguard children from serious crimes committed against them.

Digital privacy is more concerned with the data protection and information privacy. Though the 2022 Bill deals with the information privacy of individuals where information are collected, regulated and processed on the principle of consent, the Bill does not protect privacy. It regulates privacy based on our choice and consent. Therefore, this Bill does not protect or safeguard children from any harm or threat. It just stores and regulates the personal data of children based on the consent of the parents/ guardians. Hence, this paper emphasizes the need for special legislation to address the privacy issues of children. And to take measures to design a safe digital environment for children.