



PORNOGRAPHY IN CYBERSPACE – A TECHNO- LEGAL ANALYSIS

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Abstract -Women and Children are highly vulnerable to cybercrime and this is an issue of serious concern. With the rise of cyberspace, traditional pornographic content has now been largely replaced by online/digital pornographic content. The extensive availability of pornography on the Internet has stirred up a 'moral panic' shared by the government, law enforcement bodies such as the police, prosecutors and judges along with the media in general. It has provided legal gaps and made monitoring difficult, aiding the manufacturers and distributors, while for the consumer round-the-clock availability, easy accessibility and anonymity were served. Presently, there is no anti-pornography law in India and currently the ISP's are neither regulated nor penalized for not effectively regulating such sexually explicit content. In this article the Researcher has tried to discuss various legal issues and challenges of pornography in India. One third of the internet is covered by porn-sites which are leading to exploitation and suppression of women and children. To prevent it, a strong control of law is needed. Through this article researcher highlights about legal provisions and judicial interpretations of pornography.

Key words: *Cyberspace, Pornography, Law.*

1. INTRODUCTION

At the beginning of the 21st century, new information and communication technologies have cohesive with racism, sexism, and free enterprise to deepen the sexual exploitation of women and children across the globe. With the increasing approach of internet to the people, there is also an increase in the victimization of Women and children for sexual exploitation through internet. The younger generations, which use the internet and other online technologies extensively for staying connected for all day to day work and entertainment, are more vulnerable to targeted cyber-crime. This often happens in the form of cyber stalking, cyber bullying, pornography, harassment, and unwanted exposure to sexually explicit material etc. Pornography as an offence is as old as the history of human being, but pornography and obscenity which is punishable under criminal law on the internet is of recent origin. With the rise of cyberspace, traditional pornographic content has now been largely replaced by online/digital pornographic content. One third of the internet is covered by porn-sites which are leading to exploitation and clampdown of women and children. To prevent it, a strong control of law is needed. Though cyber pornography has not been legalized in India, yet, it's browsing has not been prohibited either except in the case of child pornography i.e. legal to watch, illegal to share. Thus there is no inclusive anti-pornography law in India and currently the ISP's are neither regulated nor penalized for not effectively regulating such sexually explicit content. In this background present paper highlights about pornography, legal provisions and judicial control.

2. PORNOGRAPHY IN CYBERSPACE

A Cyber space has become haven for cyber criminals. Women and girls are the most vulnerable targets on the internet. They have been victimized more specifically in the social networking websites. Apart from women, there are millions of men and children who are also the victims of cybercrimes. Pornography is often described as hard to define but easy to recognise. The term "pornography" comes from the Greek "*pornographos*" literally meaning writing about prostitutes.¹ The term "porn" refers to "indecent sexual stuff" which primarily includes "pictures." Pornography signifies to writings or movies on all kinds of sexual activities outside the bonds of marriage.² Thus, pornography in essence is a curse to the dignity and sanctity of human sexuality.

Pornography or obscenity is very sensitive issue all over the world yet there is no legal definition of the term 'pornography' in jurisdictions including India, the United States, The United Kingdom and so on, unless it is

¹Wolfson, *Eroticism, Obscenity, Pornography and Free Speech*, 60 Brook. L. Rev. 1038(1994 -1995).

²Ranjit D. Udesiv State of Maharashtra, AIR 1965 SC 881.



coupled with the term child.³ Child pornography has remained a concern for a long time and this was reflected in the European Union Convention of Cybercrime, 2001,⁴ which pushed the birth of many cybercrime regulations, including that of India.

There are many approaches to define pornography such as any sexually explicit material that is bad, although a particularly dominant approach has been to define pornography in terms of obscenity. This is also the practice followed in India, where pornography is seen as an aggravated form of obscenity. Pornography has been defined as, “the explicit written or visual depiction of living beings, including humans and animals, in sexual acts or fantasies primarily to arouse sexual responses in the reader, viewer or listener.”⁵ Pornography diminishes the worth and civil status of women and damages mutual respect between the sexes.” To define child pornography, According to United Nations Convention on the Rights of the Child (UNCRC) the child pornography includes any representation of a child engaged in real or stimulated explicit sexual activities or representation of the sexual parts of a child for primarily sexual purposes. Globalization has led the cyber pornography to emerge as one of the largest and biggest business threat for society.⁶ This not only covers the adult’s one but is very popular among children’s of all age. The millions of pornographic website that flourish on the internet are testimony to this. Another great disadvantage with a media like this is its easy availability and accessibility to children who can now log on to pornographic websites from their own houses in relative anonymity and the social and legal deterrents associated with physically purchasing an adult magazine from the stand are no longer present. Furthermore, there are more serious offences which have universal disapproval like child pornography and far easier for offenders to hide and propagate through the medium of the internet. Recent Indian incidents revolving around cyber pornography include the Air Force Balbharati School case⁷. A student of the Air Force Balbharati School, Delhi, was teased by all his classmates for having a pockmarked face. Tired of the cruel jokes, he decided to get back at his tormentors. He scanned photographs of his classmates and teachers, morphed them with nude photographs and put them up on a website that he uploaded on to a free web hosting service. It was only after the father of one of the class girls featured on the website objected and lodged a complaint with the police that any action was taken. In another event, in Mumbai a Swiss couple would gather slum children and then would force them to appear for obscene photographs. They would then upload these photographs to websites specially designed for paedophiles. The Mumbai police arrested the couple for pornography.⁸

Although the terms obscenity and pornography are often used interchangeably, they are different. The *obscene* is something that is foul, filthy, or impure, especially when exposed to public view. Obscenity is a legal term of art that applies to certain depictions of sex that are not protected by the constitutional guarantee of free speech because they appeal to debased sexual desire rather than the intellect. In *Miller v. California*,⁹ the U.S. Supreme Court defined obscenity as material that is predominantly “prurient” (that is, appealing to impure sexual desire) according to contemporary community standards; is “patently offensive” in its portrayal of sexual acts; and lacks “serious literary, artistic, political, or social value” when considered as a whole. In essence, the concept of

³Debarathi Halder and K. Jaishankar, *Cybercrimes Against Women in India* 119(SAGE Publications in India Pvt.Ltd., New Delhi, 2017).

⁴ Article 9(2) of the EU Convention of Cybercrime, 2001 stated that ‘the term ‘Child Pornography’ shall include pornographic material that visually depicts: (a) a minor engaged in sexually explicit conduct; (b) a person appearing to be a minor engaged in sexually explicit conduct; (c) realistic images representing a minor engaged in sexually explicit conduct’.

⁵Amita Verma, *Cyber Crimes and Law*, 120(Central law Publications, Allahabad, 1st edn. 2009).

⁶The size of the pornography industry worldwide is reported to be of more than 60 billion US dollars. Out of this, \$20 billion comes from Adult Videos, \$11 billion from Escort services, \$7.5 billion from Magazines, \$5 billion from Sex Clubs, \$2.5 billion from Internet and \$1.5 billion from CD-ROM. Notably, porn revenue is larger than all combined revenues of all professional football, baseball and basketball franchises.

⁷Air Force Bal Bharti School & Anr. v Delhi School Tribunal & Ors. on 16 January, 2013.

⁸Vandana B. Dave “Cyber Crime against Women in India: A Study under Major Concern of Netiquette in Cyber Space”⁴EXPLORER, The Monthly Newsletter, DHRD, VNSGU(2014) Available at https://hrdynsgu.ac.in/courses_pdfs/explorer_oct_2014.pdf (last visited Feb 5, 2019)

⁹413 U.S. 15 (1973).



obscenity is limited to material depicting hard core pornography, which means graphic portrayals of ultimate sex acts or lewd exhibition of sexual organs.

3. INTERNATIONAL INITIATIVES TO COMBAT CYBER PORNOGRAPHY

Legal measures play a significant role in the prevention and combating of cybercrime. Law is dynamic tool that enables the state to respond to new societal and security challenges, such as the appropriate balance between privacy and crime control, or the extent of liability of corporations that provide services. In addition to national laws, at the international level, the law of nations – international law – covers relations between states in all their myriad forms. Provisions in both national laws and international law are relevant to cybercrime.

The European Council's 12th Conference of Directors by the Criminological Research Institute in 1976 discussed the issue of computer-related crimes. In 1990 the United Nations Congress took special initiatives for the prevention of cybercrimes. The United Nations Economic and Social Council (UNESCO) took vital initiatives to combat online sexual abuse, child pornography, and paedophilia and took initiatives to adopt uniform preventive and controlling measures especially on 18-19 January, 1999 at Paris with 150 participants. In 2001, the European Council's Committee on Crime Problems and Cyber Crimes adopted the draft convention with the initiatives of 41 nations. It contains 29 Articles. The Convention deals with the content related offences. It prohibits child pornography and cyber pornography.

4. INDIAN LEGISLATIVE APPROACHES TO PORNOGRAPHY

The Constitution of India offers that all citizens have the right to freedom of speech and expression¹⁰ but in the interest of decency or morality, reasonable restrictions may be imposed on this freedom.¹¹ The term 'pornography' when used in relation to an offence is not defined in any statutes in India but the term 'obscenity' has been effectively explained in two statutes in India, and these legislations prescribe that 'obscenity' in certain circumstances constitutes an offence.

The Indian Penal Code, 1860

Though there is no specific provision in any statute that directly deals with pornography, it has been brought within the purview of section 292 dealing with obscenity in the Indian Penal Code, 1860 ('IPC'). The word obscene has not been defined in IPC as the concept of obscenity differs from society to society and from time to time. It prohibits sale, distribution, publication, export, import etc. of obscene books, pamphlets, papers, writings, drawings, paintings, representations and the like except justifications like literature, art, learning, monuments, etc. and prescribes punishments on first conviction with imprisonment for a term which may extend to 2 years and with fine which may extend to Rs. 2,000 and on second conviction with imprisonment for a term which may extend to 5 years and also with fine which may extend to Rs. 5,000.

Under Section 293, prohibits sale of obscene objects to young persons and prescribes punishments on first conviction with imprisonment for a term which may extend to 3 years and with fine which may extend to Rs. 2,000 and on second conviction with imprisonment for a term which may extend to 7 years and also with fine which may extend to Rs. 5,000. Under section 294, it further prohibits obscene acts and songs to annoyance of others in or near any public place and prescribes punishments with imprisonment for a term which may extend to 3 months or with fine or with both. Under S.354C of the Indian Penal Code on voyeurism, the offences included are capturing the image of a woman in a private or sexual act with a hidden camera or device, without the consent of the woman. If the woman consents to the capture of the images but not to its dissemination, then it is still an offence under the same law and the imprisonment is from three to seven years. Forcibly showing pornography to a woman is also included under sexual harassment under S.354A of the Indian Penal Code. Under section 509, It also prohibits word, gesture or act intended to insult the modesty of a woman and prescribes punishments with imprisonment for a term which may extend to 1 year or with fine or with both.

¹⁰The Constitution of India 1950, Art.19(1) (a).

¹¹The Constitution of India 1950, Art.19(2).



The Information Technology Act, 2000

Information Technology Act, 2000 deals with the issue of Cyber Pornography. Under the Act storing or private viewing of pornography is legal as it does not specifically restrict it. On the other hand transmitting or publishing the pornographic material is illegal.

Section 66A of the Information Technology Act, 2000 prohibits sending of offensive messages through communication service. Supreme Court in a landmark judgement¹² struck down Section 66A as it violates the freedom of expression guaranteed under article 19(1) a of the Constitution. Section 66 E of the IT Act, 2000 prohibits capturing, transmitting or publishing the image of a private area of a person without consent. Sections 67¹³ and 67A¹⁴ specifically prohibits transmission or publication of obscene material or sexually explicit act in electronic form. However, it does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form for the public good and religious purposes. The Indian law so far does not make any sort of distinction between the intermediaries involved and applies the same standard to every type of intermediary irrespective of the level of knowledge. A positive trend has been seen with regard to immunity granted to intermediaries. Section 79 has been modified so as to bring it conformity with the norms adopted by countries of the European Union which regulate liability on the basis of the European Directive on Electronic Commerce 2000. The Directive grants immunity to ISPs when they act as mere conduits and do not initiate the transmission, select the receiver or select or modify the information contained in the transmission. This is a welcome measure as it involves a shift from a strict liability perspective to a with-fault liability rule where the intermediary is held liable only if he had knowledge of the transmission. The stand on pornography continues to be that of dealing with intermediaries with an iron hand. The section on obscenity has been expanded to include a specific section on child pornography as an exclusion from this safe harbour "Section 67 B of Information Technology (Amendment) Act, 2008 prohibits storing, private viewing, transmission or publication of material containing child pornography in electronic form". which depicts children engaged in sexually explicit act or conduct is punishable 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. Despite amendments, lacunae continue to remain in the Act. What standard of knowledge has to be adopted hasn't been made clear. Also the issue of due diligence has not been made clear in the event of which the degree of care exercised would still be subject to interpretation by courts. The 2008 Amendment Act has also made the intermediaries strictly liable in situations where the content involves pornographic materials depicting minors or that can induce minors into sexually explicit acts. The Indian law still seems to want to exercise a tighter check on the intermediaries unlike countries like US where judicial interpretation has played a role in expanding the ambit of the immunity granted to intermediaries.

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act)

Chapter 3 of the POCSO Act, 2012 deals with Child Pornography. Section 14 prescribes the punishment for using a child for pornographic purposes under which a person can face imprisonment max up to 10 years along with fine. Section 15 prescribes the punishment for storage of child pornography material, which may extend to 3 years and fine or both. Interestingly, Cyber pornography has not been legalized in India, however, its browsing has not been prohibited either except in the case of child pornography. The facilitating of the commission of an offence under this act is also penalised under section 16 of the Act as abatement to commit an offence under the same Act.

¹²Shreya Singhal v Union of India, AIR 1523 SC 2015.

¹³ The Information Technology Act 2000, s.67 prescribes the punishment with imprisonment up to 3 years and fine up to 5 lakhs.

¹⁴ The Information Technology Act 2000, s.67A makes publication, transmission and causing to be transmitted and published in electronic form any material containing sexually explicit act or conduct, punishable with imprisonment up to 5 years and fine up to 10 lakhs.



5. JUDICIAL RESPONSES

In India, watching or possessing pornographic materials is legal. However, the production, publication, or distribution of such materials is illegal.¹⁵ Pornography is available in print magazines, but is mainly consumed using the internet. This consumption is increasing with the increased prevalence of smartphones and the internet. Despite the increased access, public discourse and attitudes on pornography remain muted and a taboo in many parts of India. The crime called cyber pornography presents itself in various ways posing new and new challenges before law and Courts both. Thus it will be helpful to look in to some decisions of Courts in order to appreciate the functioning of law vis-à-vis the incidents of cyber pornography.

The Supreme Court of India in *Khoday Distilleries Ltd. and Others v State of Karnataka and Others*¹⁶, held that there is no fundamental right to carry on business of exhibiting and publishing pornographic or obscene films and literature. In the case of *State of Tamil Nadu v. SuhasKatti*,¹⁷ The accused was charged under Section 67 of the I.T. Act, 2000 read with Sections 469 and 509 of the Indian Penal Code. He pleaded that the offensive e-mails might have been sent to the complainant (lady) either by her ex-husband whom she had divorced or she might have herself managed to do so in order to implicate the accused because he had turned down her requests to marry her. It was also argued on behalf of the accused that documentary evidence against him was not sustainable under Section 65(b) of the Indian Evidence Act. The Court, however, relied upon the expert witnesses and other evidence before it including the witnesses of cyber café owner and convicted the accused for the offence under Sections 469/509; IPC and Section 67 of the I.T. Act.

In the case of *Avnish Bajaj v. State (NCT Delhi)*,¹⁸ Baazee.com was an online auction website and Avnish Bajaj was in Chief Executive Officer (CEO). He was arrested in December, 2004 for distributing cyber pornographic material. The charges against him arose from the fact that someone had sold copies of pornographic CD through Baazee.com website. The CD was also being sold in the Delhi market. It was as a result of joint action of Delhi and Mumbai police that the accused was arrested. However, he was later released on bail by the Delhi High Court as there was no *prima facie* evidence that Mr. Bajaj directly or indirectly published the said pornography and the actual obscene recording of chip could not be viewed on Baazee.com. The investigation in this case revealed that Bajaj was of an Indian origin and had family ties in India. His company's web-site i.e. Baazee.com was a customer web-site which was dealing online sale of property on commission basis. An obscene MMS clipping A DPS girl having fun' was listed for sale on Baazee.com on November 27, 2004 and some copies of this clipping were sold by the company. The court held that accused deserved to be released on bail as the evidence showed that the obscene material may have been unwittingly offered for sale on his company's web-site and there was probability of the alleged crime having been actually committed by some other person. The accused was, however, ordered to furnish two sureties of one lakh rupees each and surrender his passport and not to leave India without the permission of the Court. He was finally enlarged on bail subject to condition that he shall participate and assist in the investigation.

In 2013 *Kamlesh Vaswani*¹⁹ filed PIL Petition in the Supreme Court of India seeking a ban on pornography in India. The Court issued a notice to the central government of India and sought its response. The government informed the Court that the Cyber Regulation Advisory Committee constituted under Section 88 of the IT Act, 2000 was assigned with a brief with regard to availability of pornography on the Internet and it was looking into the matter. In July 2015, while hearing petition, Chief Justice H.L. Dattu observed that, how can court restrain an adult from watching pornography within the four walls of a room and termed such a ban to be violative of Article 21 of the Indian Constitution which grants right to personal liberty to its citizens. On 26 January 2016, the Supreme Court had asked the Center to suggest ways to ban all forms of child pornography. The fresh advisory comes a year after government asked ISPs in August 2015 to block 857 websites showing porn content. However, it subsequently asked ISPs to block only those sites showing child pornographic

¹⁵ BrajeshRajak, *Pornography Laws: XXX Must not be Tolerated* 61(Universal Law Co., New Delhi, 2011).

¹⁶(1995)1 SCC 574 SC.

¹⁷Decided by the Chief Metropolitan Magistrate, Egmore, on November 5, 2004.

¹⁸(2005)3 Comp. LJ 364 (Delhi). This case is popularly known as Baazee.com case.

¹⁹ Writ Petition(s)(Civil) No(s). 177/2013.



content. ISPs on their part expressed inability to block such specific content. The decision to ban 857 sites had come after a petitioner had gone to the Supreme Court against pornographic websites and listed these sites.

Combating Cyber Pornography

Pornography has often been found as threat to social order and the consumption of pornography represents an indulgence of licentious sexual tastes which itself symbolises rebellion against social norms and constraints²⁰. Before the technological advancement that 21st century witnessed the access to such materials were limited so as the problems arising out of it. But due to the revolution brought about by the internet in communication, internet form pornography has taken its flow. This form is readily available and easily accessible. Now a day's children and teenagers are the worst addicts of pornography because of available-in-a-click feature of internet pornography. Internet pornography has added ten times to the problems and sufferings to the society as it was before the advent of the internet. In this paper we have tried to highlight different kind of physical harm, psychological side-effect, direct or indirect, proven or speculative harm of internet pornography and solutions to them with proposed legal regulations needed to combat internet pornography, proven or speculative harm of internet pornography and solutions to them with proposed legal regulations needed to combat internet pornography²¹. As this hardcore pornography is sold more, its demand, production and need for porn performers also increases which leads to the more exploitation of teens. The addiction of it leads to anonymous public sexual encounters which spread STDs, moreover chances of HIVs. Marital ties are evaporating as youth are being prone to more degrading and violence. The values and lifestyle propagated by the internet pornography is slowly taking the society to an irretrievable breakdown of character, ethics and morality. The mental and psychological consequences are graver. Due to non-fulfilment of sexual fantasies fuelled by porn sites most of the youth are adapting themselves with non-natural sex and indulge themselves in organized crime like sexual assaults, molestations and rape. Other than counselling, parental control and safety & privacy filters, some stricter legal punishment preferably penal has become a must to curb this menace. The production, distribution as well as reception of the obscene material should be criminalized to help the teenagers being exploited in porn industry and the teenagers getting addicted as done in the US by Communications Decency Act, 1996. Softcore and Hardcore Pornography should equally be banned and should be treated as illegal without any exceptions. Censorship and Right to Privacy should duly be taken care of by the ISPs and for this purpose guidelines should be laid down at the earliest. As adopted by US, UK and other European countries online laws should be enacted to ensure that these materials must not fall in the hands of minors as held in the International Conference on Combating Children Pornography on the Internet, 1999.

6. CONCLUSION

The present Information Technology Act is not exhaustive to deal with problems of pornography. Though Indian Penal Code, Criminal Procedure Code are some of various laws that deal with different aspects of pornography but still it arises confusion with their applicability. Further the presence of regulations such as cyber café regulations is not sufficient to curb the problems of facilitation of pornography and other cybercrimes. Hence there must be a law dealing with pornography exhaustively and central authority to monitor the activities of cyber café and ensure the compliance with regulations made by government must be established respectively. A separate Code on pornography laws must be prepared to deal with growing problem of pornography. Subsequently the issue of pornography is not going to be resolved with the effort of one country only. The need of an international organization monitoring internet activities is very much required in the present scenario.

²⁰ Lacombe Dany, *Blue Politics: Pornography and Law in this age of Feminism* (2nd edn, University of Toronto Press, 2004).

²¹ Easton M. Sushant, *The Problem of Pornography* (1st edn, Routledge Publication, 1994).