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IS WOMEN UNDER THREAT IN VIRTUAL WORLD: LEGAL REGIME REGULATING OBSCENITY AND CHILD PORNOGRAPHY IN CYBERSPACE*

Abstract: Of all the crimes being committed on the Internet, obscenity appears to be the one which has serious moral implications and it is the form of information that has increased in economic value in our network environment. It is said that the pornography industry has been estimated to contribute some \$20 billion annually to the global economy.¹ While the other crimes threaten the very credibility of the Internet, cyber pornography promotes the use of the Internet.² Information Technology Act has been passed by the Indian Parliament with an object to facilitate e-commerce, e-governance and to prevent Cyber Crimes. This legislation is unique in many respects. It provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication. It mandates electronic governance and provides infrastructure to achieve that goal. It chalks out an ambitious plan for preventing Cyber Crimes.

Pornography is available on the Internet in different formats whether that is short animated movies, sound files or textual stories.³ Thus, cyber pornography refers to stimulating sexual or other erotic activity over the Internet.⁴ This includes pornographic websites, pornographic magazines produced using computers to publish and print the material and the Internet to download and transmit pornographic pictures, photos, writings, etc.

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¹ Quoted in "Cashing on Porn Boom" BBC News, 5-7-2001.

² Vivek Sood, Chap 2 "Cyber Crime and Criminal Justice Penalties, Adjudication and Appeals Under the IT Act, 2000" in Cyber Law Simplified (Tata Mc Graw-Hill Publishing Co. Ltd., New Delhi, 2001) 70.

³ Y. Akdeniz, "Governance of Pornography and Child Pornography on the Global Internet: A Multi-Layered Approach"⁵⁵ in L. Edwards & C. Waelde (Eds.), *Law and the Internet: Regulating Cyberspace* (Hart Publishing, UK, 1997).

⁴ E-bhasin, "The Internet Service", <<http://www.ebhasin.com/bonline/profaqs.htm>>.

INTRODUCTION

1. *Obscenity*

Of all the crimes being committed on the Internet, obscenity appears to be the one which has serious moral implications and it is the form of information that has increased in economic value in our network environment. It is said that the pornography industry has been estimated to contribute some \$20 billion annually to the global economy.⁵ While the other crimes threaten the very credibility of the Internet, cyber pornography promotes the use of the Internet.⁶ Apart from general obscenity or pornographic material, there is also specified pornography such as child pornography which has increased multifold with the advent of information technology.

The Council of Europe Convention on Cyber crime in its preamble declares that it considers and gives importance to the 1989 United Nations Convention on the Rights of the Child and the 1999 International Labour Organisation Worst Forms of Child Labour Convention and it also aims at the “protection of society against cyber crime”.⁷ Thus, it has deliberated on the subject of child pornography and under Article 9⁸, has urged the Member States to legislate on it rendering child pornography a criminal offence. The article defines child pornography as including pornographic material which shows:-

1. A minor engaged in a sexual act.
2. A person shown as a minor and engaged in a sexual act.
3. “Realistic images” of a minor engaged in a “sexually explicit act”.

The definition remarkably upholds gender equality in this respect as it includes within the word "minor" not only females but males as well, as it uses the words "all persons under 18 years of age". Generally speaking, women are the object of physical exploitation or a symbol of sex but child pornography rightly upholds the right to decency of all children whether male or female, hence the definition is in the right direction. Article 9 regards

⁵ Quoted in “Cashing on Porn Boom” BBC News, 5-7-2001.

⁶ Vivek Sood, Chap 2 “Cyber Crime and Criminal Justice Penalties, Adjudication and Appeals Under the IT Act, 2000” in Cyber Law Simplified (Tata Mc Graw-Hill Publishing Co. Ltd., New Delhi, 2001) 70.

⁷ Preamble-The Council of Europe Convention on Cyber crime (Budapest 23-11-2001).

⁸ Art, 9, cl, 2-Offence related to child pornography.

following activities or conduct when done intentionally and without right as a criminal offence:

1. Production and distribution of child pornography through a computer system.
2. Presentation and depiction of child pornography through a computer system.
3. Distribution and transmission of child pornography through computer system.
4. Procuring child pornographic material for one's self or for others.
5. Possession of child pornography in any electronic form through the computer data storage medium.

2. ***Traditional obscenity***

A thin line demarcates between something which is obscene and something which is a piece of art or creativity. Obscenity is regarded as an offence as it drives a human to commit a crime which he would not have committed had he not encountered the disputed obscene material. The lecherous material arouses the baser instincts in a human being and corrupts his judgment so much so that he forgets the standards of decency and morality which are the gifts of civilisation and hence, the unnatural act got listed among crimes

The Supreme Court of India in *Ranjit D. Udeshi v. State of Maharashtra*⁹

(*Ranjit D. Udeshi*), has observed that the test of obscenity laid down by Cockburn CJ should not be discarded. It has held that the test of obscenity to adopt in India is that obscenity without preponderating social purpose or profit cannot have the constitutional protection of free speech and expression, and obscenity is treating sex in a manner appealing to the carnal side of human nature or having that tendency. The obscene matter in a book must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave

⁹ AIR 1965 SC 881: (1965) 2 Cri LJ 8.

and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall.¹⁰

Section 292 achieves the object of freedom of speech and expression enshrined in Article 19 (i)(a) of the Constitution of India which aims at upholding the values of public decency and morality. In *Ranjit D. Udeshi*¹¹, the court said that the freedom under Article 19(i)(a) is recognised as a means of social change, for advancement of human knowledge and it is not so expansive as to include within it, expressions or depictions of all sorts, indecent or obscene. Thus, Section 292, by making indecent expressions as a punishable offence, merely supplements the constitutional provisions under Article 19(1) (a) read with clause 2 of the same article. The restrictions therefore on ground of decency and morality are constitutional.

In *Chandrakant Kalyandas Kakodkar v. State of Maharashtra*¹², the Supreme Court ruled that the concept of obscenity would differ from country to country on the standard of morals of contemporary society and recognised that in India, the standards of contemporary society are fast changing. The court said that it is the class and not an isolated case into whose hands the book, article or story falls, suffer in their moral outlook or become deprave by reading it or might have impure and lecherous thoughts aroused in their minds.

The court later held in *Samaresb Bose v. Amal Mitra*¹³, that in order to constitute an offence under Section 292 IPC, the obscene matter must be so grossly indecent that it is prone to deprave and corrupt the mind of those who come across it. More importantly, the court also held that obscenity is an extremely subjective concept and may differ not only from society to society but also from Judge to Judge and though the Judge may apply his wisdom dispassionately; his mind may affect the verdict unconsciously.¹⁴

¹⁰ M. Hidayatullah J & R. Deb (Eds.), *Ratanlal & DhirajlaVs the Indian Penal Code* (26th Edn., Wadhwa & Co. (P) Ltd., Nagpur, 1987) 259.

¹¹ AIR 1965 SC 881: (1965) 2 Cri LJ 8.

¹² (1969) 2 SCC 687.

¹³ (1985) 4 SCC 289.

¹⁴ In *Bobby Art International v. Om Pal Singh Hoon*, (1996) 4 SCC 1, the Apex Court has justified even the nude scenes in the movie as it was necessary to show the atrocities committed on the young village girl which shattered her psyche and which ultimately led her to take the course of revenge. Thus, though nudity in movies in normal circumstances may be regarded as obscene, in the given surroundings as in the case of *Bandit Queen*, it is justified.

In UK, the *Hicklin test* dominated the legal circles until 1954 and slowly and gradually, public opinion towards sex became liberal and its horizons broadened so much so that Stable J observed in *R. v. Martin Seeker & Warburg Ltd*,¹⁵ that the *Hicklin test* should be applied keeping in mind present day standards, taking into account the prevailing attitude towards sex. The change in attitude led to the passing of the Obscene Publications Act, 1959 in which under Section 2, obscenity is described in the following words:

For the purpose of this Act, an article shall be deemed to be obscene if its effect... taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

In the US, the *Hicklin test* was abandoned in 1933 in *United States v. One Book Entitled Ulysses by James Joyce*¹⁶. Moreover, in US, obscenity is not an area of constitutionally protected speech or press.¹⁷ In 1973, the US Supreme Court issued the following test:

- (a) whether 'the average person, applying contemporary community.¹⁸ standards would find that the work, taken as a whole, appeals to the prurient interest...
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.¹⁹

However, in the US, an individual has the right to possess obscene materials in the privacy of his or her own home.²⁰ Thus, what the State restricts is the dissemination or publication of an offending material and not more

¹⁵ (1954) 1 WLR 1138, cited in, H.C. Dhokalia, *Right to Freedom of Speech and Expression in India*, 167

¹⁶ 72 F id 705.

¹⁷ *Roth v. United States*, 354 US 476, 484: 1 L Ed 2d 1498 (1957) ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.")

¹⁸ Defining the relevant "community" to determine patent offensiveness and appeal to prurient interest is that which appeals to shameful or morbid interest in sex. See, *Brockett v. Spokane Arcades Inc.*, 472 US 491: 86 L Ed 2d 394 (1985).

¹⁹ *Miller v. California*, 37 L Ed 2d 419: 413 US 15 (1973).

²⁰ "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what book he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 22 L Ed 2d 542: 394 US 557, 565 (1972).



3. *Cyber obscenity*

Technology and its proliferation expanded the ambit of the crime of obscenity. Today, pornographic material is freely and readily available on the Internet thus bringing the glut of such material to the common vision with great ease and for no value. Ramifications of such a crime are equally great. The Carnegie Mellon Study, though methodologically flawed, showed that at least half of Internet content was related to pornography and media attention was widely drawn which showed the genesis of the first Internet moral panic.²¹ Another project by Mehta and Plaza²² in 1994, analysed the content of pornography on the Internet and yet another study on the newsgroups by Harmon and Boeringer²³ in 1997[?] shows the ease with which the pornographic material on the Internet is accessed and viewed. Pornography is available on the Internet in different formats whether that is short animated movies, sound files or textual stories.²⁴ Thus, cyber pornography refers to stimulating sexual or other erotic activity over the Internet.²⁵ This includes pornographic websites, pornographic magazines produced using computers to publish and print the material and the Internet to download and transmit pornographic pictures, photos, writings, etc. Recent reports show that online pornography industry is growing at an alarming rate.²⁶ Hard-core pornography including material aimed at pedophiles has earned a bad reputation for the Internet. On the Internet, there is general pornography or other sexual material which is not illegal for adults to access, but there is a specific category of pornography called child pornography which is legally forbidden by almost all the legal systems including the US,

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²¹ M. Rimm, "Marketing Pornography on the Information Superhighway": A survey of 9,17,410 images, descriptions, short stories and animations downloaded 8.5 million times by consumers in over 2000 cities, in 40 countries, provinces and territories, (1995) 83 Geo LJ 1849

²² M.D. Mehta and E. Plaza Dwaine, "Content Analysis of Pornographic Images Available on the Internet" in *The Information Society*, (1997) 13, 2: 153-162, original study pre sented in October 1994.

²³ D. Harmon & C S. Boeringer, "A Content Analysis of the Internet-Accessible Written Pornographic Depictions" *Electronic Journal of Sociology*, 31, <<http://www.sociology.org/content/vol003.ooi/boeringer.html>>.

²⁴ Y. Akdeniz, "Governance of Pornography and Child Pornography on the Global Internet: A Multi-Layered Approach"⁵⁵ in L. Edwards & C. Waelde (Eds.), *Law and the Internet: Regulating Cyberspace* (Hart Publishing, UK, 1997).

²⁵ E-bhasin, "The Internet Service", <<http://www.ebhasin.com/bonline/profaqs.htm>>.

²⁶ In a 2002 report, online pornography industry generated approximately \$1 billion annu ally with growth projections to \$5-7 billions over the next five years. Almost 74 per cent of adult commercial sites display free teaser porn images on homepage. Children viewing online pornography is all the more shocking. Nine out of ten kids who are 8-16 years old have viewed porn online, mostly accidentally while doing homework. As much as 26 pop ular children's characters, such as *Pokemon*, *My Little Pony* and *Action Man*, revealed thousands of links to porn sites out of which 30 per cent were hardcore.

Source: <<http://www.enough.org/alarmingfacts.htm>> as quoted in S.K. Verma & Raman Mittal (Eds.), *Legal Dimensions of Cyberspace* (Indian Law Institute, New Delhi, 2004) 237.

the UK and India. It is illegal for adults to read or view child pornography.²⁷ It is this area of pornography which is stringently treated by legislation almost universally.

Legal approach to cyber pornography: Various legislations compared

A. USA

In the US, a pornography specific legislation, the Communications Decency Act, 1996 broadly aims at protecting children from exposure to indecent material and is the most successful and controversial effort so far.²⁸ The Communications Decency Act, 1996 thus,

... prohibits a person in interstate or foreign communications who uses a 'telecommunication device'²⁹ from knowingly making, creating, or soliciting any comment, request, suggestion, proposal, image or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication.³⁰

Regarding "interactive computer services" in particular, the Act prohibits their use to send or "display in a manner available to" a person under 18 any comment, request, proposal, suggestion, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication.³¹

Penalties under the Communications Decency Act, 1996 include fines up to \$1,00,000 and two years' imprisonment.³² The said Act being rated as broad enough to stifle the liberty of speech

²⁷ "Cyber Crime: High Tech Crime 5.1 Pornography Overview", JISC Legal Information Service.

²⁸ 18 USC S. 1343, 185.

²⁹ According to the government, "[w]hatever meaning is encompassed by th[e] term [tele communication device]; it specifically 'does not include an interactive computer device'". *ACLU v. Reno*, 929 F Supp 824 (ED Pa 1996), Defendant's opposition to plaintiffs motion for a temporary restraining order (E.D. Penn. 14-2-1996); 47 USC S. *zz(a)(i)(B)*. *Ibid*.

³⁰ *ACLU v. Reno*, 929 F Supp S24 (ED Pa 1996)3 Defendant's opposition to plaintiffs motion for a temporary restraining order (E.D. Penn. 14-2-1996); 47 USC S. *zz^(a)(i)(B)*. *Ibid*

³¹ 47 USC S. 223(d).

³² *Ibid*.

and expression guaranteed under the First Amendment was struck down in July 1997,³³ Under the Act, interest of minors is jealously guarded.

B. India

Traditional Indian law of obscenity is contained in Sections 292-294 IPC as mentioned above. However, though the unamended IT Act, 2000 was deficient in dealing with this crime, a lot more is done under the IT (Amendment) Act, 2008 in respect of obscenity and sex-related offences committed online. New sections have been inserted thus including obscenity relating crimes in the catena of cyber crimes. The earlier Section 67³⁴ was the only section dealing with it which was insufficient to deal with the offence of obscenity. The wording of the section was such which did away with any distinction between child pornography or mainstream pornography and regarded that obscenity in any form on the Net is illegal. The IT (Amendment) Act, 2008 (10 of 2009) has reformed the law of obscenity in India to a greater extent. The combined effect of Sections 66-E, 67^r, 67-A and 67-B is that online obscenity has been brought within the legal regime and it also differentiates between "child pornography" and "mainstream pornography". Section 67 which provides punishment for publishing obscene material in electronic form reads thus,

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³³ Dev Saif Gangee, "Pondering Cyber **Porn in the Indian Context**" in Nandan Kamath (Ed.), *Law Relating to Computers, Internet & E-Commerce* (Universal Law Publishing) 305.

³⁴ **67. "Publishing of information which is obscene in electronic form.—Whoever publishes** or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, 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 one lakh rupees and in the event of a *second* or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees."

The section was deficient in many ways:

Firstly, S. 67 said nothing about the knowledge of the offender, *i.e.* it says nothing whether in cases where such an offending material is hidden in the cache memory of a system of which the offender is unaware, what will be his liability in such a case?

Secondly, the section uses the word *persons* and omits to mention the age of such a person. It only means that *A* who is a matured person of 50 if the material published, *depraves and corrupts* his mind, the offence is committed and if a child of eight is not depraved or corrupted by seeing, hearing or reading such an offending material, the offence is not committed. Does the section then aim at particular application? Here the prosecution may take the help of S. 293 IPC as mentioned above. *Thirdly*, the section also omits to clarify as to what is "obscenity".

67. Punishment for publishing or transmitting obscene material in electronic form.—Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.

This section differs from the previous section only in two respects: *Firstly*, in the marginal heading, the word "transmitting" is inserted. *Secondly*, the quantum of punishment has undergone a change as the term of imprisonment has been decreased in the first conviction, from five to three years and in the second conviction, from ten to five years while the amount of fine has been increased from one lakh to five lakh rupees in the first conviction and from five lakh to ten lakh rupees in the second » conviction.

The section is deficient in many ways:

Firstly, Section 6j says nothing about the knowledge of the offender, *i.e.* it says nothing whether in cases where such an offending material is hidden in the cache memory of a system of which the offender is unaware, *I* what will be his liability in such a case?

Secondly, the term "obscenity" has not been defined. To put it so, the section does not dispel the content of obscenity. A comparison of Section 292 IPC and Section 67, IT Act discloses the similarity in omitting to clarify as to what is the true content of the term "obscenity"; vagueness regarding the term is the common lacuna of both the sections. The phrase "deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see, or hear the matter contained or embodied in it" is a verbatim replica of the phrase contained in Section 2, Obscene Publications Act, 1959 of UK which reads: *For the purposes of this Act an article shall be deemed to be obscene if its effect...is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.*

However, as the Obscene Publications Act, 1959 is an Act containing the detailed obscenity law of UK, the vagueness of the phrase is clarified in other parts of the Act, but as Section 67, IT Act is a sole provision on the \ Internet obscenity; the wordings could be more comprehensive.

However, the main stress is on publishing or transmitting the offending material in electronic form and hence, mere possession of such an offending material is not an offence under the section. The punishment given is not only twofold, *i.e.* not only that imprisonment and fine are to be read conjointly but that the punishment is two-tier as in the case of a subsequent conviction, the punishment is doubled which is stringent as according to Indian standards.

The punishment given is not only twofold but it is also stringent, *i.e.* for the first time commission of offence, the punishment includes both fine and imprisonment and for a subsequent commission, the quantum of this punishment is doubled which is more severe as compared to the Indian standard.

Like fraud and other crimes, in the matter of Internet obscenity too, the provisions of traditional obscenity law as contained in Section 293 IPC³⁵ will be helpful as to when it comes to prosecute persons dealing in cyber pornography that is applicable to persons under the age of 20 years.³⁶ Other Acts like the Indecent Representation of Women (Prohibition) Act, 1986 and Young Persons (Harmful Publications) Act, 1956 may also be invoked in the matter of Internet obscenity.

67-A.³⁷ *Punishment for publishing or transmitting of material containing sexually explicit act, etc. in electronic form.*—Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct 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 and in the event of second or subsequent conviction with

³⁵ *Sale, etc. of obscene objects to young person.*—Whoever sells, lets to hire, distributes, | exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of a 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 five thousand rupees.

³⁶ Raman Mittal & Nilotpal Deka, "Cyber Privacy" in S.K. Verma & Raman Mittal (Eds.), *Legal Dimensions of Cyberspace* (Indian Law Institute, New Delhi, 2004) 240.

³⁷ Inserted by virtue of S. 32 of the IT (Amendment) Act, 2008 (10 of 2009)

imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

This new section clearly comes out with the explanation that an act which depicts sex appealing activities in electronic form is also punishable. The section thus enlarges the area of obscenity and includes within it, depiction of sex activities. It is for the first time that any Indian law defines such type of offence thereby indicating indirectly that depiction of sex-related act in public is intolerable, prepares the weak minded to commit an offence and is morally degrading and hence, an offence. The punishment given here is two-tier which only shows that the fear of graver punishment may deter the criminal to commit the offence for the second time.

Section 67 (IT Act) and Section 292 (IPC)—The main body of both the sections including the opening clause have tremendous similarity in matter of wording. The words:

67. Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it...

292...if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it...

Thus, the similarity in these clauses show that both the penal law of the country and the technology law agree on the content of obscenity, or what constitutes obscenity.

Moreover, the exceptions under both the sections are the same. The exception under Section 292 says that the description of obscenity shall not extend to the following, namely:

- (a) any book, pamphlet, paper, writing, drawing, painting, representation or figure—
 - (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing,

painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or

(ii) which is kept or used bona fide for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in—

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

Under Section 67-B of the IT Act too, the exception is on the same ground that the description of obscenity in the main body of the section shall not apply to the following, namely:


Provided that provisions of Section 67, Section 67-A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form—

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

(ii) which is kept or used for bona fide heritage or religious purposes.

Thus the proviso to Section 67-B applies as an exception to all the three sections, *i.e.* Sections 67, 67-A and 67-B. The first sub-clauses are in exactly the same wording while in the second sub-clause in Section 67-B, the word "heritage" is included. These exceptions are in view of the cultural heritage of India where some pieces of art and painting are specimen of the rich culture of the country and thus, they are kept out of the purview of obscenity law whether in the virtual or in real world. Section 293 IPC, however, is in series of sections relating to obscenity and hence, it can be said that at that time, contacting young people under 20 years of age in respect of obscene material was itself considered an offence. The section reads thus,

293. Sale, etc., of obscene objects to young person.—Whoever sells, lets to hire, distributes, exhibits, or circulates to any person under the age of twenty years any such obscene object



as is referred to in the last preceding section, or offers or attempts so to do, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and, in the event of a 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 five thousand rupees.

Thus a perusal of the section shows that it provides for serious punishments and compared to Section 292, the punishment is an enhanced one. Thus selling, distributing, exhibiting obscene material to the underage is regarded as an offence. Even if today, a case is registered under Section 67-B, IT Act and such obscene material in electronic form is distributed to the persons under 20 years of age then the punishment can be met with Section 67-B read with Section 293 IPC.

Apart from Sections 67-A and 67-B, Section 66-E also relates to obscenity which is the result of violation of privacy. Section 66-E³⁸ talks of physical privacy and the projection of any physical part of a person without his or her consent. The section makes it an offence. Section 66-E(e) also describes as to what is violation of privacy as follows: *The expression "under circumstances violating privacy" means circumstances in which a person can have a reasonable expectation that he or his physique is not under public eye or general surveillance.*

³⁸ *Punishment for violation of privacy.*—Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.

Explanation. — For the purposes of this section —

- (a) "transmit" means to electronically send a visual image with the intent that it be viewed by a person or persons;
- (b) "capture", with respect to an image, means to videotape, photograph, film or record by any means;
- (c) "private area" means the naked or undergarment clad genitals, pubic area, buttocks or female breast;
- (d) "publishes" means reproduction in the printed or electronic form and making it available for public;
- (e) "under circumstances violating privacy" means circumstances in which a person can have a reasonable expectation that—
 - (i) he or she could disrobe in privacy, without being concerned that an image of his private area was being captured; or
 - (ii) any part of his or her private area would not be visible to the public, regardless of whether that person is in a public or private place.

The section, however suffers, from one lacuna and that is the phrase "without his or her consent" denotes that if such depiction of his or her physique is done with consent then it will not be an offence. This interpretation would lead to undesirable result as *firstly*, such depiction with consent would be rendered lawful which is surely not the intention of the legislature, and *secondly*, the consent merely for formality may be obtained unlawfully. Thus, the section needs an amendment so that the condition of consent could be removed and the phrase would read as "with or without consent".

Possession offence: A paradigm shift—In the UK, the Home Office recommends a distinct offence of possessing "explicit pornography" containing actual scenes or realistic depictions of:

1. intercourse or oral sex with an animal;
2. sexual interference with a human corpse;
3. serious violence in a sexual context; or
4. serious sexual violence³⁹

The suggested law, however, brings a change in the definition of the term "obscene material" which lays more stress on the content of the pornographic material rather than on the effect of it on the mind of the user.⁴⁰

Conclusion

Obscenity is a globally recognized complex issue which has attracted the attention of jurists, lawmakers and society at large. It can be stated that what is immoral for one may not be so for other or other society. Due to the latest technology people are becoming more power oriented day-by-day with the fully consciousness of their freedom rather than their duties to maintain the moral standards, decency, peace and order and to follow the law in country. Above all, judiciary is one among three organ of the government which performs the function of maintaining peace and order in the society and it is left to it for maintenance of the reasonable as well as prudent repository of

³⁹ *Consultation: On the Possession of Extreme Pornographic Material* (Scottish Executive and Home Office, 2005). The *Consultation* also specifies that "serious violence" will mean serious bodily harm in a setting that is sexual. The *Consultation* defines "serious bodily harm" as where a prosecution for grievous bodily harm could be brought in England and Wales, and assault to severe injury in Scotland, 40-42.

⁴⁰ Jacob Rowbottom, "Obscenity Laws and the Internet: Targeting the Supply and Demand" (Cri L Rev, Sweet & Maxwell, London 2006) 100.

moral standard in the society for dealing with obscenity in cyberspace. The use of new multimedia technology is increasing day-by day which is misused by the criminals in cyberspace.

Cyber obscenity is one out of those cyber crimes which is growing everyday both at national and international level. United States of America and India have enacted several laws for dealing with cyber obscenity; despite this many complicated legal issues still remain unresolved. There are number of offences taking place in both countries but only the few cases are lodged as a complaint. But due to this the cyber criminals are day-by-day more encouraged to get involved in such type of criminal activities. It is suggested that punishment needs to be enhanced for dealing with such crimes and there is a need to adopt specific and comprehensive definition of cyber obscenity in the cyberspace. On priority basis, there is a need to take concert action to stop the all forms of obscenity and child pornography specifically. There is also a need of issuance and determination of uniform guidelines for the internet service providers and cyber cafés which expressly mentions their liability and accountability such as there must be the provision for keeping the secrecy of the user's personal information which is provided on the basis of utmost good faith. For combating the problem of publishing obscene information in cyber space, there is a pressing need of spreading awareness in government as well as public. It is also highly demanded that the cyber authorities must be technically trained from time to time.

There is a need to inculcate the culture of continuous learning education among the law enforcement authorities because present knowledge becomes obsolete in a very short time. Society at large must be aware about the fact that they are also encouraging such activities by searching online obscene/pornographic material with the intention to satisfy him/her mentally.

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