

**COMBATING CYBER OBSCENITY IN INDIA AND UNITED
STATES OF AMERICA: A COMPARATIVE ANALYSIS**

*Sushila Devi Chauhan**

*Ritu***

ABSTRACT

Obscenity is a global and complex issue because it involves other related issues like decency and morality which varies from society to society. What is immoral for one may not be so for others. With the advent of information technology people are becoming power oriented day-by-day with the consciousness of their freedom forgetting their duties to maintain the moral standards and decency in the society. Cyber Obscenity is a threat to the internet users all over the world as there is no territorial limit which distinguishes the commission of crime between the countries. Now-a-days cyber pornography has become a big industry. Due to the global accessibility, jurisdiction problem, differences in standard of morality and law in different countries, the enforcement of law has become impossible. The present paper is an attempt to evaluate the law governing cyber obscenity in India and compare the same with the legal regime in United States of America.

I. Introduction

WITH THE ADVENT of technological revolution, the concept of cyberspace also became popular to the people. The development of Information Technology is the mother of cyber space wherein internet provides many opportunities to the people equally for

* Assistant Professor, Department of Law, Kurukshetra University, Kurukshetra.

** Assistant Professor, Department of Law, MM University, Mullana, Ambala.

accessing any data storage and information etc. by use of high technology.¹ New inventions and discoveries have widened the scientific scope as well as brought the new challenges for legal world. The widespread growth of these technologies has led to commission of new types of crimes in the cyber space and has also become a matter of global concern. Cyber crimes are like the attack on secured information of individuals, corporations, or governments etc.

The popularity of social networking sites is increasing day by day. Due to this one can express his or her feelings very well, connect to old friends and also make new friends. But there is misuse of these sites by the cybercriminals for fulfilling their illegal purposes. In today's world, teenagers are in habit of watching live sex, video clip, MMS clip etc. Side by side the people have started to spend more and more time on networking sites because the people's addiction on them. Most of the time the end users of internet view, download, transmit, save and make printout of obscene materials for themselves and also transmit the same to others. In modern times, the development of Information Technology affects the life of the people all around the world.

II. Concept of Obscenity

Cyber obscenity is a very sensitive issue. The concept of obscenity changes with the time and place. We cannot judge obscenity in isolation. It needs a broader perspective to understand the notion of obscenity. The obscenity is directly related to morality and decency. We can define the obscenity with the help of historical development of 'test of obscenity' in various countries. In *Regina v. Hicklin*² case, the court observed that the material which has the

¹ Farooq Ahmad, *Cyber Law in India- Law on Internet* 367 (New Era Law Publications, Delhi, 2008).

²(1868) 3 QB 360.

likelihood to corrupt and deprave the minds of those persons whose minds are open to such immoral influences and who may read the publication of this type. The U.S Supreme Court in *Miller v. California*,³ given three tests for obscenity. But in *Pope v. Illinois*,⁴ it was held that there should be proper inquiry whether the community whose case is in the hand have serious value in that obscene material or whether a common person would find such values in it, if taken as a whole. Thus, it can be said that the standards and factors for obscenity vary greatly depending on norms and values of the state, town or city for that matter of foreign countries.⁵

The term pornography means to describe or to show sexual acts with the intention to cause sexual excitement through obscene websites or obscene material produced by using computers, internet and also includes downloading, transmitting pornographic videos, writings, photos and pictures etc. Obscenity in cyber space may be of various forms. The essential characteristics of pornography is the downloading of the obscene material by using computer and internet through the website so it also includes hosting of websites which contains prohibited and obscene material. The pornographic material is very harmful to the young generation because it can corrupt and deprave the minds of future of the country.

There is no well settled definition of obscenity. Material considered as a piece of artistic expression or literature in United States of America may be considered obscene in India. The Government and law enforcement machinery have been trying to restrict the availability of this type of material but the results have not been satisfactorily.

³ 413 US 15 (1975).

⁴ 481 US 497 (1987).

⁵ Vakul Sharma, *Information Technology: Law and Practice* 191 (Universal Law Publishing, edn. 4th, 2015).

III. Statutory Provisions in India

Article 19 (2) of the Indian Constitution provides that state has the power to impose reasonable limitations on freedom of expression to maintain morality and decency. To tackle with the problem of obscenity and pornography, we have four major laws.

The Indian Penal Code under section 292 comprehensively discusses the circumstances under which 'obscenity' may be an offence. In the case of *Ranjit D. Udeshi v. State of Maharashtra*⁶ Honourable Apex Court interpreted the word "obscene" and stated that obscene may be defined as "offensive to modesty or decency, lewd, filthy and repulsive." The Court further observed that it constitute the reasonable limitation on the right of freedom of expression guaranteed by Article 19, clause 2 of the Constitution of India in the interest of morality or decency. Further, Court in *Samaresh Bose v. Amal Mitra*⁷ held that the standards of morals of the society, the concept of "obscenity" may differ from one country to another country. In this case, the court also differentiated between the term "vulgarity" and "obscenity" by stating that a vulgar writing is not always obscene.

Indecent Representation of Woman (Prohibition) Act, 1986 prohibit the indecent representation of woman by writings, painting or through publication. It is an offence under this Act and punishable.⁸

Indian Parliament enacted The Protection of Children from Sexual Offences Act, 2012. This Act provides protection to the children against offences of pornography, sexual harassment and sexual assault, etc. The case of *Kamlesh Vaswani v. Union of India*⁹ is presently pending in the Indian Supreme Court. The Apex Court has

⁶ AIR 1965 SC 881.

⁷ AIR 1986 SC 967.

⁸ Section 2 (c) of Indecent Representation of Women (Prohibition) Act, 1986 defines the indecent representation of woman.

⁹ *Supra* Note 5.

directed State to file a detailed affidavit and posed a question whether the Department of Telecom (DOT *hereinafter*) or any other department of Indian Government is competent to issue directions to Internet Service Providers Association of India (ISPAI *hereinafter*) to call off sites showing pornography.¹⁰

In India, Information Technology Act, 2000 (IT Act *hereinafter*) contains the issue of online obscenity. Under the Act, storing or private viewing of obscene material is legal as it does not specifically restrict it. On the other hand, transmitting or publishing the obscene material is illegal. Before 2008, section 67 was the only provision of the Information Technology Act which prohibited the publication of obscene information including child pornography and obscenity. Section 67A of the IT Act, 2000 specifically restricts the publication of sexually explicit or obscene material and section 67B of the Act specifically prohibits child pornography. This section only criminalizes the publication and transmission of sexually explicit or obscene material in an electronic form but viewing, downloading, possession etc. is not an offence as per the provisions of the Act.

The main essentials of the section 67 of the IT Act are: (a) transmission of the information in electronic form and (b) that publication appeals to prurient and lascivious interest. This offence is bailable, cognizable and triable by the court of Judicial Magistrate of First Class.¹¹ An explanation clause is also added with this section which states the meaning of the word used in the section 67.

*State of Tamil Nadu v. Suhas Kutti*¹² is a first case of conviction under section 67 of IT Act, 2000 in India. In this case, some defamatory, obscene and annoying messages were posted about the victim on a yahoo messaging group due to which the victim started receiving annoying calls. She filed a FIR and accused was found

¹⁰ *Ibid.*

¹¹ Section 67 of Information Technology Act, 2000 (Act 21 of 2000).

¹² Cr. Comp 4680/ 2004, (CMM, Egmore), available at: <http://lawnn.com/tamil-nadu-vs-suhas-kutti/> (visited on April 5, 2017).

guilty under sections 469, 509 of the Indian Penal Code 1860 and section 67 of Information Technology Act.

In *Avinash Bajaj v. State (NCT) of Delhi*¹³ case, obscene material was put up for sale by one person on the website Baazee.com and sold/transmission of these clips to several people resided in various parts of the country in a very short duration. The issue was raised whether it was a publication under section 67 and the website had indirectly published the material. The court held that the ultimate transmission of obscene material wouldn't have been possible without initial facilitation by the website and therefore, the website was held liable under the section.

Section 67-A was added in the Information Technology in the year of 2008. It prohibits publication and transmission of sexually explicit material in electronic form. And this section contains some exceptions on the line of section 292 of the Indian Penal Code, 1860.

As we know, India is signatory to the Convention on the Right of the Child (CRC *hereinafter*) and ratify the optional protocol on the state of children, child prostitution and child pornography. So, section 67-B was added to the IT Act, 2000. Section 67-B criminalizes every type of pornography.

Section 67A and 67B are the only sections which are non-bailable as per section 77B of the Act, whereas others are bailable. We also have section 69-A of Information Technology Act, 2000 where Central Government or its officer appointed can issue directions to other government agencies and intermediaries to block such information for public access if it is in the interest of the State.

IV. Legislative and Judicial Approach in United States

The legislative development regarding child pornography in USA is the Child Pornography Prevention Act, 1996 (CPPA *hereinafter*), and the Child Online Protection Act, 1998 (COPA

¹³ (2005) 3 CompLJ 365 Del.

hereinafter). In the United States of America, the Act of 1996 banned the child pornography material which is produced by the computer technology that is representation of sexually explicit conduct involving or appearing to involve minors. The latter Act deals with commercial site operators who offer material deemed to harmful to minors to use *bonafide* methods to establish the identity of visitors to their site. The Communication Decency Act 1996 (CDA *hereinafter*), was also passed to protect minors from pornography. The CDA states that any person, who knowingly distribute, through the use of an interactive computer service or transports obscene material for sale in foreign or interstate commerce shall be liable to imprisonment up to five years for a first offence and up to ten years for each subsequent offence.

In reaction to CDA, a case was filed by the American Civil Liberties Union¹⁴ for challenging the validity of the CDA.¹⁵ It was held by the Court that the Communication Decency Act placed the heavy burden on the speech which is protected.¹⁶ Further, in *Reno v. ACLU*,¹⁷ it was held that CDA suppress a large amount of speech.

The CPPA amended the definition of child pornography as defined under Child Protection Act, 1984 by stating to include that which depicts the sexual conduct of child and also which appears to be depiction of children who are engaged in sexual conduct. Depiction may include any kind of photograph, picture, video, film or computer or computer-generated picture or images. Such depiction may be made or produced by mechanical, electronic or other means and may be promoted, advertised, described, presented, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in

¹⁴ ACLU *hereinafter*.

¹⁵ *American Civil Liberties Union v. Janet Reno, Attorney General of United States*, (1996) 929 F, 824 Supp.

¹⁶ *Ibid*.

¹⁷ (1997) 521 US 844.

sexually explicit conduct.¹⁸

After this, COPA was enacted. It provides that minors have the opportunities for accessing any material by using web and protects minors physically and psychologically. It imposes the restriction on a minor's access to harmful materials, prohibits its distribution and also provides protection to children from being exposed by it on the website or internet.¹⁹

Then the Protection of Children from Sexual Predators Act was passed in 1998 with the purpose to expand the liability of those persons who attempts to make a use of internet with the intention to spread child pornography on cyberspace. This Act specifically targets and criminalizes the knowingly pornography by using internet for commercial purpose which is harmful to minors. Minors may include child up to 16 years of age and younger.

On the very next day of signing COPA, a suit²⁰ was filed by ACLU²¹ in the Court with the purpose to prevent the enforcement of COPA. At last this case reached before the US Supreme Court. It was held by the court that COPA's dependence on the standards of community with the purpose for identifying harmful material to minors does not itself render statute substantially overbroad for the purpose of first amount. The government was enjoined from enforcing COPA.

The US judiciary has played an important role to overcome with the cyber pornography. In *United State v. Kufrovich*²² case, a charge was made against the defendant for knowingly using a means of Interstate Commerce with the intention to instigate a child for engaging in sexual activity under title 18 U.S.C. § 2422(b) and §

¹⁸ Section 2256.

¹⁹ Section 231.

²⁰ *American Civil Liberties Union v. Janet Reno, Attorney General of United States*, (1999) 31 F. Supp. 2d 473 (ED Pa).

²¹ American Civil Liberties Union.

²² (1997) 997 F. Supp. 246 (D. Conn).

2423(b). It was found by the court that the Communications Decency Act's parts violated the First Amendment and were not according to Constitution. The defendant contended that he had interacted through internet with the victim as protected in Constitution. That's why it could not be taken as evidence against him. But the court by rejecting his contention held that the charges which were made under that the statutes don't impermissible limit the speech. It was also held that it is a criminal offence of using means of interstate commerce with the intention to lure a child into sexual activities.

In *United States v. Hilton*²³ case, Hilton was charged by a federal grand jury for violation of 18 U.S.C. § 2252A (A)(5)(B) for criminal possession of computer disks which contains three or more pictures of child pornography. He challenged the state without denying the charges. He contended to dismiss the charges on grounds that the act was unconstitutional under the First Amendment. The U.S. District Court was also agreed with his contention regarding the vagueness of the definition of child pornography but in this case the issue was raised whether the CPPA poses substantial problems of over breadth and it would be sufficient to justify the decision of the lawmaking branches.

In *US v. Mathews*,²⁴ it was held by the court that under federal law each transfer of child pornographic image by email is a separate offence. The defendant contended that the successive email transmissions were also the part of online conversation which is single by nature. But his contention was rejected by the court. Later on, this decision was affirmed by the Appellate Court.

In case of *Davis v. Gracey*,²⁵ the CD-ROMs which were obscene by nature, were sold to an undercover officer by the accused. After this a search was made in his business premises on the basis of warrant and those CD-ROM files could be accessed by the police

²³ (1999) 167 F.3d 61 (1st GR.), cert. denied, 120 S. Ct. 115.

²⁴ (1998) 11 F. Supp 2d 656 (D. Md).

²⁵ (1997) 111 F. 3d 1472 (10th Cir).

officers through the bulletin board and could be seized the computer equipment which were used to operate it. Then a case was filed against the officers who made the search by Davis who was the related businessmen of accused and several other users of email on his bulletin board. In this case, they alleged that there was a violation of constitutional and statutory provisions through seizure of the email and computer equipment. It was held by the court that the original warrant was not against the constitution and the seizure of bulletin board email user files did not invalidate it.

In the case of *Fedeemer v. Haun*,²⁶ the Utah's sex offender notification statute was challenged by the plaintiff. This would make available on the internet, the sex offender registry information without any restriction to the general public. At the end, the Hon'ble court held that the registry information on the web site which is available globally will have no risk of encountering the offender and that was not related to the non-punitive goal of preventing additional sex offences with proper grounds. So it is liable to violate the both clauses of Double Jeopardy and *Ex Post Facto* but not the Equal Protection Clause which rationally guards against the sexual offences and the Due Process Clause which contains the "non private" information. Therefore, no cognizable harm to the reputation of the plaintiff was maintainable.

V. Comparative View

In India, section 292 to 294 of IPC contains the Indian law of obscenity. The IT Act, 2000 was deficient in dealing with obscenity before amendment by IT Amendment Act, 2008. It has improved the Indian law of obscenity to a greater extent. Now, the Information Technology Act, 2000 after amendment provides that storing or private viewing of obscenity is legal as it does not specifically restrict the same. On the other hand, transmitting or publishing the obscene

²⁶ (1999) 35 F. Supp. 852 (D. Utah).

material is illegal. There are some sections of IT Act, 2000 which prohibit cyber obscenity with certain exceptions to Section 67 & 67-A. The combined effect of sections 66E, 67, 67A and 67B is to differentiate between cyber pornography, child pornography and mainstream pornography and to bring the online pornography within the legal regime.

As compared to India, USA's first attempt for regulating the pornography on internet was the Communications Decency Act, 1998. Later on a case was filed by the American Civil Liberties Union (ACLU) in which the legal validity of the provisions of the Act was challenged as against the freedom of speech. At the end it was held by the US Supreme Court that this Act introduced heavy burden on protected speech which can't be accepted.²⁷ Further, in *Reno v. ACLU*,²⁸ it was held that CDA suppress a large amount of speech and the Child Online Protection Act, 1998 and the Child Pornography Prevention Act, 1996 contains the child pornography laws. The former Act requires commercial site operators who offer material deemed to harmful to minors to use *bonafide* methods to establish the identity of visitors to their site and the latter Act makes a prohibition on the knowingly use of computer technology with the intention to make a production of child pornography *i.e.*, to depict sexually explicit conduct which involves or appears to involve minors.

The Communication Decency Act, 1996 of United States of America differentiates between mainstream pornography and child pornography while in India no such difference exists under section 292 of IPC though the IT Act after amendment in 2008 has regarded obscenity as an offence but separately defined child pornography with punishment under section 67B. In United States of America, mere possession of obscene material is not an offence but publishing

²⁷ *Supra* note 15.

²⁸ (1997) 521 US 844.

or transmission of such obscene material is an offence while in India it is not an offence to merely possess such obscene material. In United States of America, child accessibility to porn sites is prohibited while in India browsing and downloading child porn images are punishable offence.

In *State v. Maxwell*²⁹ case, the defendant was charged for act of bringing child pornography material into the State where both the defendant and the victim were the residents of the State of Ohio while the service provider's servers were located in Virginia. According to the Ohio statute, knowledge on the part of the defendant was required, although the defendant was seemed to be ignorant of the fact the disputed transmission crossed the State lines yet. The Hon'ble Supreme Court of Ohio upheld the conviction by applying the strict liability standard concerning transmission.

On December 2, 2015, it was announced through press release by the United States Department of Justice that a man of northern California who operated the "revenge porn" website on the Internet was sentenced to 30 months in federal prison. He was punished for hiring another man to steal nude photos from e-mail accounts by hacking and later on to post them on his website.³⁰

VI. Conclusion and Suggestions

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

²⁹ (2002) 95 Ohio St 3d 254: 767 NE 2d 242.

³⁰ Press release dated December 02, 2015 "Operator of 'Revenge Porn' Website Sentenced to 2½ Years in Federal Prison in Email Hacking Scheme to Obtain Nude Photos" available at: <https://www.justice.gov/usao-cdca/pr/operator-revenge-porn-website-sentenced-2-years-federal-prison-email-hacking-scheme> (visited on April 9, 2017).

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 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. Searching online obscene material results in financially supporting those persons who are uploading such obscene information for gaining profit and such profit increases with increase in the number of subscribers and viewers. So, firstly, we should check ourselves not to provide financial support to the cyber criminals indirectly. Involving ISP's would be a good strategy and it would restrict the supply and may prove to be more beneficial as compared to simply identifying and prosecuting users of child pornography.

As we know that prevention is better than cure. The punishment for cyber obscenity must include all the four theories of punishment, i.e. retributive, deterrent, preventive and reformative theories.
