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**LEGAL REGIME REGULATING CYBER OBSCENITY AND FREEDOM OF  
EXPRESSION**

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**ABSTRACT**

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In any civilized Society, Pornography or Obscenity is liable to be condemned and regulated by law thereby aiming to secure and protect freedom of speech and expression guaranteed by Constitution of India under Article 19 (1) (a). Due to cultural and ideological differences, Law regulating Obscenity is not the same world-wide. Few States have Liberal approach whereas; country like India has rigid approach due to its conservative culture towards Pornography. There was a huge cry by various eminent groups on the recent Ban by Indian Government on 800 Porn Web sites. This ban was lifted within a short span temporarily only to the extent of those web sites which does not involve Child Pornography. Government is careful in responding to the issues relating to Cyber Pornography thereby trying to strike a balance between Freedom of Speech and Expression and also imposing reasonable restrictions on same by enacting Laws on Obscenity and also upholding the validity of Sec 297 of IPC as reasonable restriction to Freedom of Speech and Expression. IT Act also regulates Pornography content available on Internet. But, this is considered to be a Grey area, as the law on Cyber Obscenity is quite insufficient and also Offline Obscenity Law cannot be equally applied to cases on Online Obscenity. Further, in India, Pornography is neither legalized nor criminalized. It is swaying half way. The present article aims at study of relevant regulations relating to curbing cyber obscenity and in particular whether it is really necessary to strike a balance between Freedom of Speech and imposing reasonable restrictions in Cyber World relating to Obscenity. Can the Online Porn Content Law be stricter in sense compared to Offline Law on Obscenity? Identifying the possible hindrances and grey areas in legal framework relating to Internet Obscenity and thereby concluding with suggestions.

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## INTRODUCTION

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With the Government imposing a ban on 800 porn sites few months ago<sup>2</sup>, most of the eminent groups debated on various social networking sites and offline, whether such ban amounts to violation of their rights of speech and expression and also privacy, prima facie. After facing several criticisms, Government alas lifts the ban limiting to only those sites which do not include Child Pornography.

This move came after the country's Supreme Court ruled last month that banning pornographic websites is the job of the elected government. The court heard a petition from a lawyer, acting in a personal capacity, who argued that online pornography fuelled sex crimes. <sup>3</sup> Debate mostly cried that this ban on pornography web sites is violating the individual's freedom, whereas, those against this ban contended that watching it promotes sexism and violence against women.

Some research works say that since most pornographic content portrays women primarily as objects of male satisfaction, it aggravates sexual aggression against women. With this debate, Government is now trying to strike a balance between Rights of Freedom and imposing Obscenity as a Reasonable restriction, thereby carefully analyzing this situation with the available laws on Pornography and also the grey areas.

At present, problem faced by Indian Government is with respect to the no standard definition relating to Obscenity. Apart from this, Offline or Traditional or General Obscenity definition or the laws are considered to be insufficient to regulate the Cyber Pornography; the probable reason is due to easy accessibility, distribution and transmission of the Content available online. Many things which we do off-line are easily available on internet and we can do those works at a single click of the computer with the help of internet and World Wide Web. Commerce, Business, Research, Governance Online shopping and trading and communication are being carried out with the help of it. Internet is considered to be both boon as well as bane for today's fast growing society.

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<sup>2</sup> For a detailed discussion, See M Rajendran & Abhishek Saha (2015). Govt blocks over 800 porn websites, more under review. Hindustan Times, 03 August 2015, <http://www.hindustantimes.com/india/govt-blocks-over-800-porn-websites-more-under-review/story-QpMly1ILk0IsX3cdd0dKUM.html> Last accessed 25th September 2015.

<sup>3</sup> For a detailed discussion, See ENS Economic Bureau (2015). Porn ban: Govt reviews order, asks ISPs to block only child porn. The Indian Express, 05 August 2015, <http://indianexpress.com/article/india/india-others/govt-reviews-porn-ban-decides-to-unblock-non-porn-sites/#sthash.jAlf3hw.dpuf> Last accessed 25th September 2015.

Problem relating to Obscenity is graver due to easy availability of live sex, sex images, sex chatting, sex videos which are being carried out and shown on line by virtue of or by means of internet, which made a revolution in the cyber world. Children are more vulnerable to all these activities. No restriction can easily put on these activities. It is readily available for users of all ages.<sup>4</sup> The worldwide nature of such material as well as the ability to download images makes the system virtually impossible to censor.

Hence, Online Pornography cannot be of equal parlance with Offline Pornography or General Pornography. The Governments steps in imposing ban cannot be of any help in eliminating violence on Women;<sup>5</sup> as the same content even though banned, can be easily accessible by proxy servers or on other International Porn sites and hundreds of new web sites designed daily Online. Hence, Parliamentarians and Supreme Court have invited public opinion with respect to the regulation of Online Pornography.

In case of Offline Obscenity, the medium by which Obscene acts done are through Films, Prints, & text books, Public & Private shows, Circulation of material, etc. So far as obscenity on Internet or on line or in electronic form available in different forms, such as: Picture, Short animated movies, Sound files and Stories, Different communications etc. Moreover internet also makes it possible to discuss Sex (literature, queries, consultations, chat groups, etc.), see live sex video footage, etc.<sup>6</sup> Hence, the reach of the Content available is only at a click away on Internet.

Although the Indian Constitution guarantees the fundamental right of freedom of speech and expression; it has been held that law against obscenity is constitutional. But the problem here to be discussed is how the law relating to obscenity is striking a balance while determining what constitute an obscenity in any particular work (Online or Offline), considering the Aspect of Freedom of Speech & Expression on Internet (as a Fundamental Right under Article 19 (1) (a) of the Indian Constitution), and Standards of decency or morality or contemporary community standards, (as a reasonable restriction under the same

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<sup>4</sup> Sahu, Manisha. (2012). Be Legal, Be Intelligent: Cyber Obscenity. New India Law, Blogspot, 18 November 2012. <http://newindialaw.blogspot.in/2012/11/v-behaviorurldefaultvmlo.html>. Last accessed on 25<sup>th</sup> September 2015.

<sup>5</sup> For a detailed discussion, See Zee News Media Bureau (2015). Ban on internet porn: Here's why it is impossible. Zee News India, 04 August 2015. [http://zeenews.india.com/news/india/ban-on-internet-porn-heres-why-it-is-impossible\\_1641140.html](http://zeenews.india.com/news/india/ban-on-internet-porn-heres-why-it-is-impossible_1641140.html). Last accessed 25<sup>th</sup> September 2015.

<sup>6</sup> Wadje, Ashok, Obscenity in Electronic Form: Exploration of Regulations (January 4, 2013). Available at SSRN: <http://ssrn.com/abstract=2196473> or <http://dx.doi.org/10.2139/ssrn.2196473>. Last accessed 25<sup>th</sup> September 2015.

Article 19 (2). In a nutshell, one has to identify a definition of obscenity that preserves the power of legislature to regulate the worst forms of pornography for public welfare, and yet does not deter freedom of speech and expression.

#### **MEANING AND DEFINITION OF OBSCENITY (OFFLINE) –**

##### **Judicial and Legislative Approach**

There is no settled definition of “pornography” or “obscenity”. What is considered simply sexually explicit but not obscene in western countries may well be considered obscene in India. In this context, the word “obscene” has not been defined specifically by any law or legislation, so the question or an issue of recognizing obscenity must, therefore, be decided with reference to legal provision & case law.

In general, Obscenity is a legal term that applies to anything offensive to moral and is often equated with the term Pornography. Obscenity is derived from the Latin word *obscaena*. First time, Concept of Obscenity was explained in **R V. Hicklin**<sup>7</sup>, the word obscene was clearly defined as “*Any matter which has the tendency to deprave or corrupt those whose minds are open to immoral influence*”.

The **Hicklin’s test** states that a governing body may prohibit anything that “depraves and corrupts those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall.

Although the word obscene is not defined in the Indian Penal Code, the judiciary have had an occasion to distinguish obscenity from art and literature that contains sex and nudity by stating that it is necessary to decide whether the obscene information is lascivious and may deprave minds who find pleasure in such things.

Supreme Court of India, in the case of **K. Abbas v. The Union of India & another**<sup>8</sup> made a distinction between Sex and obscenity and has observed that, *it would be wrong to perceive nudity & sex as essentially obscene, indecent or immoral. „Sex“ & „obscenity“ are not always synonymous.*”

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<sup>7</sup> 1868 LR 3 QB 360,371

<sup>8</sup> AIR 1971 SC 51

Moreover, **Information Technology Act, 2000**<sup>9</sup> too has not provided any definition of the term „obscenity“ but provided the same guidelines as is provided by sub-section (2) of Section 292 of **Indian Penal Code, 1860**. Also it makes certain acts<sup>10</sup>, in relation obscenity in electronic form, as punishable. The only difference is that Information Technology Act, 2000 regulates obscenity<sup>11</sup> on electronic format.

So in this connection, task would be to lay down a *criterion, description* and *basis* with the help of which one can identify an obscene content as sought to be prohibited by law, though not definition thereof. This could not have been possible for legislature to lay down a formula and thereby to define obscenity in a specified form.

If one observes above mentioned provisions i.e. Section 292 of Indian Penal Code, 1860 and Section 67 of IT Act, 2000, would come to know criterion given for the purpose of identifying an obscene content or material which is to be regulated and punished.

*Section 292 of IPC:*

“... a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be *obscene 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 person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.*”

In this context, there is one more statute which is worth mentioning here: **Indecent Representation of Women (Prohibition) Act, 1986** which defines „indecent representation“ as:<sup>12</sup>

*“Indecent representation of women” means the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals”.*

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<sup>9</sup> Section 67: 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.

<sup>10</sup> Section 67: Whoever publishes or transmits or causes to be published or transmitted in the electronic form.

<sup>11</sup> Publishing or transmitting any obscene material in electronic format.

<sup>12</sup> Section 2 (c) of Indecent Representation of Women (Prohibition) Act, 1986.

This legislation too, provides some guidelines on the equal footings of IPC & IT Act so far as curbing menace of obscenity. Indecent Representation of Women (Prohibition) Act, 1986 prohibits depiction of certain things in relation to women, her body or her form or any part thereof. The *criterion* to identify *indecent representation* is:

*“... effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals”.*

After analyzing above mentioned legal provisions, now, in order to know the substantial position of law, it is pertinent to discuss and know about approach of judiciary. Judiciary through various case laws have thrown light on the issues of obscenity and pornography,

Indian Courts have started discussing this very issue with the help of various judgments delivered in relation to obscenity. In a landmark judgment, decided by Bombay High Court in **Ranjit Udeshi and Ors. Vs. The State**<sup>13</sup> has extensively discussed this issue and laid down a test to identify which material or work or content shall amount to obscene one. Court held:

*“that the test of obscenity to adopt in India is that obscenity without a preponderating social purpose or profit can’t have the constitutional protection of free speech and expression and obscenity in 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 and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book on it must not be overlooked.”* It further interpreted the word “obscene” as that, which is “offensive to modesty or decency, lewd, filthy and repulsive.”

The Court further observed that: “where the art and obscenity are mixed, art must be so preponderant as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have not effect and may be overlooked.”

These observations made by court seems pertinent in the wake of absence of definition of obscenity as court has specifically mentioned the same concerned has laid down the criteria as to how to adjudge obscenity in a given work or document.

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<sup>13</sup> AIR 1962 Bom 268

Moreover, Supreme Court in **Samaresh Bose Vs. Amal Mitra**<sup>14</sup> has wisely laid down a test to adjudge obscenity in following words: “*The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society.*” Supreme Court laid down “*likely-audience*” test in judging the question of obscenity. Judges should try:

- To place himself in position of *author* and try to understand what is it that he (author) seeks to convey.
- Then in the position of a *reader* of every age group in whose hand it is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the reader.
- Apply his *judicial mind* to decide whether the book in question can be said to be obscene<sup>35</sup>.

It may be interesting to note that Supreme Court after this observation i.e. “likely-audience” test, set a new trend of tests of identifying and regulating obscenity, which is a departure of the “hard-core pornography” and “most vulnerable person” test of *Hicklin*.

In a recent ruling of **Aveek Sarkar Vs. State of West Bengal and Ors**<sup>15</sup>, Supreme Court of India has declined to accept *Hicklin*’s test which was further followed by Indian judiciary in series of subsequent case as discussed above and held that:

*“A picture of a nude/seminude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire...Only those sex-related materials which have a tendency of “exciting lustful thoughts” can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.”*

Considering all the above definitions interpreted by the judiciary, we can analyse that the purview of Cyber Obscenity has been specifically dealt thereby keeping in mind the online Cyber Space features of easy accessibility and free availability to the users.

#### **CYBER OBSCENITY – LEGISLATIVE AND JUDICIAL APPROACH IN INDIA**

Cyber-Obscenity or Cyber Pornography is the trading of sexually expressive materials within cyber space. The word Cyber or Cyber space denotes a virtual environment within

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<sup>14</sup> (1985) 4 SCC 289

<sup>15</sup> AIR 2014 SC1 1495

which networked computers activity takes place and Obscenity is any statement or act which strongly offends the prevalent morality of the time.

As discussed earlier, obscenity on the Internet is available in different formats, which is why in order to cover “*online obscenity*” the IT Act has incorporated Code of Obscenity<sup>16</sup> in Section 67 as well as in subsequent amendments. So by virtue of this Section any person who creates and maintains pornographic websites is committing an offence and in some cases cyber café owners and managers may also be liable if they knowingly allow their customers to access pornographic websites. There is still a problem of ascertaining guilt as most of the pornographic websites are hosted in countries where cyber pornography and cyber space do not have a resolute ambit.

A plain reading of the relevant section of 67 of IT Act reveals that “*obscenity on internet or in electronic form*” includes:

*acts which publishes transmits, causes to be published “any material”, video files, audio files, text files, images, animations and even CDs, Web sites, Computer, Cell Phones etc, which is lascivious, appeals to prurient interest, and tends to deprave or corrupt of minds of the persons.*

IT Act after certain amendments in 2008 covers all aspects of offences related to cyber obscenity and provides punishment for:

Violation of privacy (coupled with cyber obscenity)

Publishing or transmitting obscene material in electronic form

Publishing or transmitting of material containing sexually explicit act, etc. in electronic form (Section 67 A)

*Child pornography (Section 67 B)*

Section 67 of the old Act is amended to reduce the term of imprisonment for publishing or transmitting obscene material in electronic form to 3 years from 5 years and increase the fine thereof from Indian Rs.100, 000 to Indian Rs.500, 000.

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<sup>16</sup> “Code of obscenity” in Information Technology Act, basically, reflected in its four forms. Those are:  
Obscenity in electronic form with respect to any material, or object.  
Obscenity in electronic form with respect to any act or conduct  
Obscenity in electronic form featuring or portraying child therein.



Let us now unleash the ingredients of the provisions in Information Technology Act, in this context: As per Section 67 of the IT Act ‘obscenity’ to mean “*anything which is lascivious or appeals to the prurient interest or if its effect is tends to deprave and corrupt persons.*”

Explanations:

*Lascivious*: is something that tends to excite lust.

*Appeals to*: in this context, means “*arouses interest*”.

*Prurient interest*: is characterized by lustful thoughts.

*Effect*: means to produce or cause some change or event.

*Tend to deprave and corrupt*: in the context of this section means “to lead someone to become morally bad”

*Persons*: here refers to natural persons and not artificial persons.

Therefore according to the law in India, anything that is lascivious or appeals to the prurient interest or if its effect is to deprave and corrupt persons would be considered to be ‘obscene’.

Well, there is one exception added to Section 67, 67A and 67B, which does not apply to or extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form 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 interests of science, literature, art or learning or other objects of general concern or which is kept or used for bona fide heritage or religious purposes.

This proviso which is added to code of obscenity under Information Technology Act, is aims to secure and protect freedom of speech and expression guaranteed by Constitution of India under Article 19 (1) (a).

In the context of I.T. Act, 2000, there have been famous trials and prosecutions before the court of law, and courts have had an occasion to deal with the aspects of cyber obscenity in order to widen its ambit.

The issue of Cyber obscenity was recently considered by Supreme Court in **Ajay Goswami Vs. Union of India**<sup>17</sup> court opined that earlier test of a community based standard has become redundant in the present Information Technology age and has held that prohibition

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<sup>17</sup> (2007) 1 SCC 143

on selling or publishing obscene material is a reasonable restriction imposed on the freedom of speech and expression provided under Article 19 of the Constitution of India. This has evolved a “*Responsible Reader Test.*”

This view was appreciated and recognized as the best one by the legal luminaries in the area of Cyber and Criminal law, since the approach of court in this case was logical as internet has diminished all geographical boundaries and community standards are rapidly becoming global rather than territory specific.

Further in the same case court differentiated between “*vulgarity*” and “*obscenity*”: as a vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences”.

In an another famous judgment delivered in **Avinash Bajaj vs. State of Delhi**<sup>18</sup> the Delhi High court had an occasion to deal with an MMS clip which was listed on Baze.com for sale through the website. The question in this case, for the purpose of Section 67, was, whether the website caused the publication of obscene material. There was a difficulty to book accused under IPC since Section 292 does not deal with the electronic obscenity.

Delhi High Court finally, ordered that while the case against the petitioner for the offences under Sections 292 and 294 IPC maybe quashed, his prosecution for the offence under Section 67 read with Section 85, IT Act will continue. Held in this case that impugned website has prima facie caused publication of obscene material. In **M. Saravanan & Dr. L. Prakash & Ors. V. State**,<sup>19</sup> a doctor photographed and video recorded several women engaging in obscene activities that he distributed through internet to make illegal money and the petitioner was prosecuted under Section 67 of I.T. Act, 2000.

Code of cyber obscenity reflected under Section 67 and in the subsequent amended provisions contains two crucial words: “publication” & “transmission” of obscene information or material in electronic form. These two words has to be looked from the perspective of extra-territorial jurisdiction and Internet technologies, keeping in view that obscenity“ is no longer a local and static phenomenon and that while interpreting Section 67,

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<sup>18</sup> 2005 DRJ 576.

<sup>19</sup> MANU/TN/8296/2006 Available at: <http://www.manupatrafast.in/pers/Personalized.aspx>. Last updated on June 19, 2014, at 1:56 pm

the court also has to take in to consideration the interest of our contemporary society and particularly the influence of the obscene material in electronic form on it.

Any particular work in the form of obscene material containing special skills should not be misjudged under the guise of contemporary standards so that discourse in art, labour and skilled work is not discouraged.

Another approach by Supreme Court in dealing with a Public Interest Litigation filed in 2013 by Indore lawyer Kamlesh Vaswani. The PIL has demanded an action plan and an exclusive law to contain the proliferation of pornographic sites on the Internet, especially in view of their adverse impact on children.

The petition said sexual content accessed by children today was graphic, violent, brutal, deviant and destructive, posed a threat to public order, and put society in danger, and pointed to the lack of laws to regulate such web sites<sup>20</sup>. A bench led by Chief Justice H L Dattu said: “Let us keep in mind the possible contention of a person who could ask what crime have I committed by browsing adult web sites in private within the four walls of my house. Could he not argue about his right to freedom to do something within the four walls of his house without violating any law?<sup>21</sup>”

The court had remarked that ways would have to be found to ensure that technological advancements did not always defeat the law, and had asked this Committee to also take note of Vaswani’s PIL. At the same time, the bench asked Government to take appropriate steps to ensure that the law was not violated.

This Approach of Judiciary in considering Online and Offline Pornography issue is laudable. Judiciary as well as Government is careful with the matter of Cyber Pornography thereby trying to strike a balance between Freedom of Expression and the Reasonable Restriction on Cyber Obscenity.

### **Freedom of Speech & Expression, Obscenity (Online or Offline) and Law**

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<sup>20</sup> Zee News Media Bureau (2015). Ban on internet porn: Here's why it is impossible. Zee News India, 04 August 2015. [http://zeenews.india.com/news/india/ban-on-internet-porn-heres-why-it-is-impossible\\_1641140.html](http://zeenews.india.com/news/india/ban-on-internet-porn-heres-why-it-is-impossible_1641140.html). Last accessed 25th September 2015.

<sup>21</sup> ENS Economic Bureau (2015). Porn ban: Govt reviews order, asks ISPs to block only child porn. The Indian Express, 05 August 2015, <http://indianexpress.com/article/india/india-others/govt-reviews-porn-ban-decides-to-unblock-non-porn-sites/#sthsh.jAIf3hw.dpuf>. Last accessed 25th September 2015

As discussed, obscene activities poses two challenges before law or in other words we can say, if Law to lay down a test to determine what constitute an obscenity in any particular work (Online or Offline), it has to see:

- 1) Aspect of Freedom of Speech & Expression on Internet (as a Fundamental Right under Article 19 (1) (a) of the Indian Constitution), and
- 2) Standards of decency or morality or contemporary community standards, (as a reasonable restriction under the same Article 19(2)).

Because often, under the guise of Article 19 (1) (a) of the Indian Constitution, religious, artistic and scientific writings or work in the form of picture or any electronic document, gets protected. So it is very difficult for the law to lay down a balance. Section 292 of the Indian Penal Code along with Section 67 of the Information Technology Act, 2000/2008 imposes a restriction on the fundamental right of the individual which is permissible under Indian Constitution.

The validity of the Section 292 of the IPC was challenged in the case of **Ranjit D. Udeshi vs. State of Maharashtra**<sup>22</sup> Hidayatullah, J., observed: “No doubt this Article (referring to Art. 19) Guarantees complete freedom of speech and expression but it also makes an exception in favor of existing laws which imposes restrictions on the exercise of the right in the interest of public decency & morality.”

#### **CHILD PORNOGRAPHY IN INDIA – LEGAL POSITION**

Child Pornography is a form of child sexual exploitation. Child pornography is defined as any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture, whether made or produced by electronic, mechanical or other means of sexually explicit conduct where the production of the visual depiction involves the use of minor engaging in sexually explicit conduct.

Today, Cyber Pornography is a very big Industry. It is because of the following reasons:

1. The easy, free, efficient, convenient and anonymous accessibility to pornographic material through the internet.

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<sup>22</sup> AIR 1962 Bom 268.

2. The anonymity of the cyber porn industry, global accessibility, problem of jurisdiction, different laws and standards of morality in different countries, which have made a mockery of the laws and their enforcement.

Section 67B<sup>23</sup> of Information Technology (Amendment) Act, 2008 deals with the Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form.

It says that whoever publishes, transmits or creates text or digit images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form which depicts children engaged in sexually explicit act or conduct shall be punished on first conviction with imprisonment of either a 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.

Hence, Child Pornography is absolutely banned in India. Even browsing and Viewing is held to be Punishable. Whereas, online pornography content other than child pornography is permitted to be viewed and browsed. There is no absolute ban imposed on the Online Porn Content apart from Child Pornography in India. Hence, Online Obscenity can be held to be a grey area, as the legal situation is not clear. It is neither legalized nor criminalized. It is half way left. How can some Porn Content Online are considered to be a form of religious, artistic and scientific writings or work?

It is completely derogating women thereby projecting women as a sexually satisfying Objects and also violating the law of *Indecent Representation of Woman*. For that matter, how can a normal Porn be justified and cannot affect the so called concepts of morality and decency in the society. One has to consider that how can these porn contents act on the minds of minors who watch these sites. This Content clearly project woman as a sexual objects and this may degrade the honor of the woman thereby resulting in various kinds of assaults against woman.

When there is nothing like Sex education in India, then some authors justify pornography to be completely banned. This grey area needs immediate attention. Most of the authors who are against to Online Pornography also contend that the women who are participating in such

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<sup>23</sup> In this context as per Explanation added to Section 67B of Information Technology Act, 2000, “Children” means a person who has not completed age of 18 years.

acts are all “real women” who are not into Porn Business. They are made to participate in sexual acts by using force. This is derogatory to the honour and dignity of woman and in no way less criminal in nature than that of child Pornography.

### **INTERMEDIARIES LIABILITY IN CYBER OBSCENITY**

The government’s July 31, 2015<sup>24</sup> order directing Internet Service Providers (ISPs) to block 857 porn sites came after Additional Solicitor General conveyed to the Department of Electronics and Information Technology (DeitY) the Supreme Court’s observation that “appropriate steps” were needed against pornographic sites, especially that featuring child pornography. The DeitY asked the Department of Telecommunications (DoT) to notify the ISPs under the Information Technology Act to disable the sites.

To order the blocking of these sites, the DoT relied on Section 79(3)(b) of the IT Act. Section 79 lays down conditions under which ISPs or intermediaries are exempt from culpability for offensive content uploaded by a third party. It obligates the intermediaries to exercise “due diligence”, and to act on the orders of the court or the government and its agencies to qualify for immunity.

On March 24, 2015, **Shreya Singhal’s Case**<sup>25</sup> while quashing the much abused Section 66A<sup>26</sup> of the IT Act — which allowed police to arrest people for social media posts that were construed as being “offensive” or “menacing” — the Supreme Court had also dealt with Section 79(3)(b), and read it down. The court held that intermediaries<sup>27</sup> cannot be called upon to exercise their discretion in blocking content, and that they must act only either on court orders or when the government asks them to.

“Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79,” the Supreme Court had ruled.

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<sup>24</sup> ENS Economic Bureau (2015). Porn ban: Govt reviews order, asks ISPs to block only child porn. The Indian Express, 05 August 2015, <http://indianexpress.com/article/india/india-others/govt-reviews-porn-ban-decides-to-unblock-non-porn-sites/#sthash.jAIf3hw.dpuf> Last accessed 25th September 2015

<sup>25</sup> Shreya Singhal v. Union of India, (2013) 12 SCC 73

<sup>26</sup> The Supreme Court has quashed Section 66(A) of the Information Technology Act, terming it "vague" and "unconstitutional". The reasons that the court gave while striking down the section of the law was because it affected Indian citizens' right to free speech.

<sup>27</sup> Internet Service Provider is an organization that provides Internet access and related services to users. A Network Service Provider means ‘Intermediary’ or any person who on the behalf of another person receives, stores or transmits the records or provides access to that information in an electronic form.

Hence, Intermediaries powers are not exclusive as per the above laid rules to regulate the available porn content on Internet. Intermediaries are liable to act on any online porn content issue until and unless they get an order from the Court or when the Government asks them to do so. So, it is completely the responsibility of the Judiciary and Parliament to enact laws or device a regulatory framework in such a way that the Porn content related issue can be mitigated.

### CONCLUSION

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Internet is very complex network and is vulnerable to several illegal activities. It is a strong medium of doing illegal activities especially cyber pornography, as “*Internet is very prone to porn*”. In the wake different electronic instruments having potential to be used as “*Computer*” and are getting connected to such a complex network, it is posing more threats and challenges before the Law to deal with all such electronic instruments and in a real sense it is the test of the Law to lay down a test, to decide obscenity on internet or in electronic form.

The IRW Act, 1986<sup>28</sup>, the provisions of IPC, 1860 are unable to deal with cyber obscenity and at the same time Indian IT Act/Law of 2000/2008 also getting it difficult to identify and curb the obscenity on Internet by considering the very complex nature of Internet and activities on it. Recognition of obscenity in a so-called obscene material should not be at the cost of the art, literature and freedom of speech and expression unless and until it is required by reasonable restrictions under Article 19(2) of the Indian Constitution.

Blocking websites, regulating and providing checks & guidelines for intermediaries, (including Internet Service Providers, Search Engines, Cyber Cafes or any other person or authority) preventing the publication of or propagation of pornography from certain forums would be the viable option to regulate the same.

### SUGGESTIONS

Agreeing, that the constant monitoring of Pornography Websites is not always possible as discussed. Daily some hundreds of new Porn Websites on Internet are taking birth which can be easily accessible by internet users. Users include Minors who are vulnerable and can the porn content watched can easily corrupt or pollute the minds of these groups.

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<sup>28</sup> Indecent Representation of Women Act (IRWA), 1986

Hence, Government can impose ban on hard core pornography sites which are vulgar and not decent thereby ordering Intermediaries to deal on the same by laying certain guidelines with respect to the content that should be banned. The guidelines or the framework laid with respect to online obscene content should be definite and clear for the intermediaries to block such websites when they emerge.

There should be a concept like X-box which will delete the content immediately as soon as it is made online thereby refraining the content to be visible online<sup>29</sup> i.e., For example, Microsoft has a system like that for Xbox — there’s a huge database of words and phrases that you can’t put on Xbox; they’ll disappear immediately. Government can make use of such technology thereby trying to mitigate the obscene Websites taking birth.

Further, Stringent laws to penalize Intermediaries should be enacted who disobey the guidelines laid with respect to the content available and who disobey the orders of the Government in imposing the framework laid for regulating online pornography.

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<sup>29</sup> Shrinivasan, Rukmini. Interview with Susan Benesch. *Dealing with hate speech, effectively* The Hindu, September 10 2015. Print.