

LAWS REGULATING CYBER PORNOGRAPHY

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ABSTRACT

Pornography is a sensitive topic, and most people shy away from even building up a social dialogue. Cyber pornography has a grave impact on society's decency and morality. However, the contemporary generation does not hesitate to acknowledge the ever-growing cyber porn addiction. Sexual offences are one such crime that has prevailed in all societies for ages. With the advancement of science and technology, the complexities of life have enormously multiplied. The incident of sex delinquency has become too common. Pornography potentially shapes sexual attitudes in men and often develops a sexual desire for coercion as they imbibe predatory sexual behavior. Children are exposed to pornography at an increasingly early age. India is famed as the land of the Kama Sutra, yet we are extremely reticent to open a pensive dialogue to guide adolescents when they are caught up in the web of a complicated sexual muse. The change will occur only when society stops attaching vulgarity to sex and starts explaining its consequences if performed at a pubescent age just to explore the realm of sexual pleasures. This article is an attempt to address the ever growing sexual offences that may have crime causation with the acceleration in consumption of cyber porn. This article is based on the preconceived notion that if consumption of pornographic content corrupts one's mind, then a person who engages themselves in such unethical activities may be more prone to committing sexual offences. Due to a deficiency in stringent cyber laws to regulate the production and transmission of obscene material, anyone may access in cyberspace encourages people to indulge in the consumption of pornographic material. Lack of sex education makes young people prefer porn to satisfy their curiosity and sexual urges. The majority of the population is reluctant to accept a ban on pornography and would rather assert their right to access pornographic content under Article 21 of the Indian Constitution. If banning

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pornographic websites and applications that fail to censor explicit content will discourage people from indulging in visual stimulation, then the rate of sexual offenders will be reduced.

INTRODUCTION

Pornography is a sensitive and intricate topic to decipher, yet it holds an immense potential to destroy the moral values of a society by transcending realism and entering into the world of sexual fantasy. Porn is often labelled as an intense form of vulgarity and obscenity.

With the advent of globalization, accessing pornographic content has become a child's play. It's just one click away without any interference from any source. It comes with a lot of layers to it because of which even after acknowledging many social evil elements attached to pornographic content, the Government has not considered to efface it entirely from cyberspace. Pornography operates as a sexual stimulation that is designed and produced for adult entertainment. It arouses a desire to engage in sexual acts thereby satisfying a person's libido. Porn is a by-product of eroticism which may be depicted in any form of artwork and media on cyberspace. Generally, on cyber space, it is represented in form of clips, movies, films, pop-up advertisements and even literature. Porn not only instigates aggressive sexual behaviour but also encourages unnatural sexual activities, prostitution, incest, marital dissatisfaction resulting in divorce, engaging in casual sexual relationships that may pose a threat to contract sexually transmitted diseases and uncontrollable urge to indulge in sexual intercourse that may provoke a man to commit rape, to satisfy his concupiscence.

It is no surprise that many children are exposed to pornography at an unripened age. They may come across porn accidentally on their parents' gadgets or they may be introduced to it by their friends or cousins. Whatever the source of information is, the truth remains that such exposure to pornography at an early age has a deleterious impact on their naïve intellect that may take years to overcome. People who are victims of pornography addiction run a risk of becoming sex offenders.

The cultural setup of India has always considered sex to be taboo. In the 21st century people strongly advocates that growing cyber pornographic addiction must be acknowledged and formal socio-legal research must be carried out in this aspect. The present generation is dealing with this issue like never before. Porn has become a brain drug that digitally rewires it. Cyber pornography is just an extension of prostitution but on the virtual platform. The social awareness regarding the impact of cyber pornography is growing at a much slower pace as compared to the widespread exposure that pornography is gaining through cyber space. Legislature and judiciary tend to bring social change at a much slower pace than development in technology.

Consumption of pornographic content is rapidly increasing; consequently, every woman in her lifetime has experienced sexual harassment be it in public space, in the professional sphere or in close-knitted family settings. Cases of child exploitation have become the headline of an everyday newspaper. The is also true that cyber pornography may not in most cases have direct crime causation however it does serve as an instigating variable to commit sex crimes.

Humans in general believe what they watch and the idea of sexual intimacy gets corrupted with unrealistic fantasies and violent sexual behaviour. Pornography often sexually objectifies women as mere sex items for gaining sexual pleasure. Such a malevolent depiction of a woman violates her modesty. Government must maintain decency and morality in society and stringent laws must be enacted to preserve well being and morality in society.

Sexual offences have increased due to the easy accessibility of porn in cyberspace. This article will examine if the existing laws on cyber pornography are effective and whether the government should ban cyber pornography. Pornography is a subject that directly relates to people's lifestyles. Sex being a private and sensitive topic, it is important to understand the social setup for introducing any prohibitive laws such as anti-pornography laws as it has the potential of making any citizen a criminal. Therefore it is essential to understand people's opinions based on their experience and observation to examine if cyber pornography is a threat. A vast scientific study on the psychological impact of pornography on young minds should be made to determine its grave impact as now-a-days even juveniles are committing heinous crime such as rape. Negligence by

parents and a lot of privacy enables many adolescents to indulge in the consumption of cyber pornography.

Private viewing of cyber pornography is not banned because such an act is protected under Article 21 as the Right to Privacy of the Constitution of India. However, the State may enact prohibitive laws by imposing reasonable restrictions under Article 19 (2) upon the exercise of the right to privacy, for maintaining and preserving decency and morality in the society.

Cyber Pornography exists in cyber space and any person may access it through an electronic device having internet connectivity. Cyber Pornography, consist of visual materials containing explicit displays of sexual organs or acts of sexual intercourse, whether real or animated, to arouse erotic rather than aesthetic sensations. Briefly, cyber pornography is movies, short films or videos, clips that depict erotic behaviour intended to cause sexual arousal.

Indecency means non-conformance with accepted standards of morality, whereas obscenity refers to that which has prurient or lascivious appeal². The word obscene denotes the quality of being obscene which mean offensive to modesty or decency, lewd, filthy and repulsive.³ Obscenity places emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences.⁴ A material, content or object may be adjudged obscene only when it excites impure thoughts in the mind of ordinary persons of normal temperament.⁵ 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 person.⁶

People who defend cyber pornography by stating that cyber porn is all about sexual pleasure, self empowerment and freedom of choice needs to understand harm caused to human dignity and rights of victim that is enslaved in the flesh trade. Such people need to redefine the relationship between

² Federal Communications Commission v. Pacifica Foundation, 57 L Ed 2d 1073: 438 US 726 (1978).

³ Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881, 885, Para. 7: (1965) I SCR 65.

⁴ Samaresh Bose v. Amal Mitra (1985) 4 SCC 289: AIR 1986 SC 967.

⁵ P. S. Atchuthen Pillai and K. I. Vibhute, *PSA Pillai's Criminal Law*, LexisNexis, Ed.18, 2017).

⁶ Samresh Bose v. Amal Mitra (1985) 4 SCC 289.

free speech and the right to dignity. The notorious incest genre of pornography encourages sexual abuse of children within the family.⁷

Virtual pornography has significantly altered our sexuality. People who are addicted to cyber pornography, has done nothing punishable by law and cannot be termed as sex offenders but suffered that same anatomy. Sexual addiction is rooted in a complex web of family and marital relationships. This interdependent web is truly a system in which several things act together to form one function, like a computer system. This system is governed by definite rules that, in the addicts' case, confirm much of whatever he or she holds to be true in the crazy myths and beliefs which support the addiction. All member parts have a functional relationship; that is each person affects every other person. Nothing happens in isolation in this or any other system.⁸

In 2017, the British Parliament has passed an Act to implement “robust” age verification checks to access “legal pornographic websites”. However, this act did not regulate obscene content on the social media platform. To protect minors from cyber porn, the UK government has introduced to regulate content on social media by proposing, “Online Harms White Paper”. They must have figured out that the method of age verification control on porn websites is dubious and ineffective as it only asks permission and further a person may be able to successfully gain access to cyber porn by using virtual private networks (VPNs) or Tor browsers.⁹

Pornography sites are specifically designed to keep people engrossed in watching, clicking and scrolling indefinitely. Consumers view pornography and masturbate to give themselves a powerful neurochemical reward through orgasm. This cycle is a self-reinforcing process of ratcheting up sexual tension. The reward centre in the brain does not know what pornography is, it only registers levels of stimulation through dopamine and opioid spikes. The age verification technologies may not eliminate risks to children from pornography consumption, but it has the potential to vastly

⁷ Melinda Tankard Reist and Abigail Bray (Eds.), *Big Porn Inc: Exposing the Harms of the Global Pornography Industry*, (Spinifex Press, 2011).

⁸ Patrick Carnes, *Out of the Shadows: Understanding Sexual Addiction*, (Hazelden, Ed. 3rd, 2001.)

⁹ The Regulation of internet pornography: What a survey of under -18s tells us about the necessity for and potential efficacy of emerging legislative approaches, available at: https://www.researchgate.net/publication/351348341_The_regulation_of_internet_pornography_What_a_survey_of_under18s_tells_us_about_the_necessity_for_and_potential_efficacy_of_emerging_legislative_approaches (Visited on June 23, 2022).

reduce the levels of access to sexually explicit content, without restricting the rest of the society. Lastly the government should design a legal policy that would provide more safeguards to netizens by holding pornographic websites accountable for the harms caused by their products.¹⁰

Cyber pornography shapes a person's sexual attitudes and beliefs on sex. Even though exposure to pornographic material on the internet can be considered as a normative experience to the majority of growing adolescents, a sense of sexual uncertainty arises due to conflict between sexual beliefs set by family and those propagated by cyber porn.¹¹

The increasing availability of cyber pornography has raised concerns about the impact it may cause on minors and youth. Sexual arousal elicited by visual pornography stimuli activates other neural pathways mediating other functions like cognition, motivation, emotional arousal and somatosensory experiences. Supernormal stimuli response to artificially creating stimuli overrides and evolutionarily developed genetic response. Chronic internet pornography is highly stimulating. A Bio psycho-social formulation should suffice relevant information about factors impacting the problematic use. A person who absorbs his brain with cyber porn will sooner or later be diagnosed with a compulsive sexual behaviour disorder. A person who suffers from this disorder experience a persistent pattern of failure to control intense, repetitive sexual impulses or urges, resulting in repetitive sexual behaviours over an external period that causes marked distress or functional impairment. The security measures are ineffective and knowledge on the potential dangers of the internet is lacking among the netizens. Establishing protective measures to safeguard children from becoming a victim of cyber sexual exploitation will uplift children to achieve their ambition in life. Robust preventive and security measures should be encouraged by the government to nip the nefarious conduct of the sex offenders who exploit these children in the bud. The government at all levels should fund research on cyber sex offenders' behaviours. It would be beneficial to know if new offenders are surfacing and what avenues they are taking to victimize children sharing child pornography. Adolescents should be guided to understand and

¹⁰ Problematic Pornography Use: Legal and Health Policy Considerations, *available at:*
<https://link.springer.com/article/10.1007/s40429-021-00390-8> (Visited on June 23, 2022.)

¹¹ Internet Pornography Usage among today's adolescents: Clinical implications, assessment, and management, *available at:*
<https://iisb.org/pdf/june2020/5.%20Internet%20pornography%20usage%20among%20today's%20adolescents-Clinical%20implications,%20assessment,%20and%20management.pdf> (Visited on June 23, 2022).

establish their sexual boundaries while providing a safe and thriving environment. Open communication and dialogue between parents and adolescents regarding internet use and sexual behaviour must be conducted.¹²

LEGISLATIVE BACKGROUND OF PORNOGRAPHY IN INDIA

The advancement in information technology and electronic media has given rise to internet-related crimes which are known as “cyber crimes”. The widespread growth of these crimes has become a matter of global concern and poses a great challenge for the law enforcement agencies in the new millennium. Because of the peculiar nature of these crimes and the technicality involved, it becomes more hectic to navigate the cyber offenders as most of the time such cyber crimes are being committed anonymously and the evidence is destroyed in no time.

The Internet has given access to new flood gates for pornographic material being available on websites that have an adverse effect on the moral health of youngsters, particularly adolescents. Pornography on the internet may take various forms. It may include the hosting of websites containing obscene or prohibited materials or the use of computers for producing obscene materials. Such materials tend to pervert the thinking of adolescents and corrupt their mindset. However, the Apex court has protected citizens’ right to pornography under Article 19 (1) (a) (Freedom of speech and expression) and Article 21 (Right to privacy) by stating that any person of major age may watch porn privately. Such watching of cyber porn shall not involve children or animals. Let us discuss the stance of the constitution over this never-ending debate.

CONSTITUTIONAL SET UP:

Article 19 (1)¹³ guarantees the freedom of speech and expression and Article 19 (2) imposes reasonable restrictions over these freedoms. There are many grounds upon which restriction may be imposed by the State on the exercise of the right to freedom of speech and expression. “Decency and morality” under Article 19 (2) (e) is one such restriction that may curtail the enjoyment of freedom of speech and expression. As per Article 19 (2), the Government cannot be prevented

¹² The Effects of Pornography on Children and Young People, available at: <https://aifs.gov.au/publications/effects-pornography-children-and-young-people>, (Visited on June 24, 2022).

¹³ The Constitution of India, 1950.

from enacting any law that may impose reasonable restrictions on the exercise of this right to safeguard and maintain decency and morality in the community. Obscenity which is offensive to public decency and morality is outside the purview of the protection of free speech and expression because the Article dealing with the right itself excludes it. Thus, any interpretation of obscenity in the context of a criminal offence must be in good spirit with the constitutional guarantee of freedom of expression which freedom is not confined to the expression of ideas that are conventional or shared by the majority of masses. On the contrary, it is most often ideas that question or challenge prevailing norms, uphold by the majority that faces the greatest threat and requires the greatest protection.

The Constitution of India does not specifically embody about right to privacy but was later recognized by the Apex Court in *R. Rajagopal v. State of Tamil Nadu*¹⁴. This case is famously known as the “Auto Shankar case” wherein the Hon’ble Supreme Court held that the “Right to Privacy or Right to be let alone” is guaranteed by Article 21 of the constitution. The court however held that the Judiciary with its contempt powers and the Legislative with its privileges stands on a different footing. Delhi High Court raises the bar of right to privacy while adjudging “*Naz Foundation v. Government of NCT of Delhi*”¹⁵, the court held that privacy recognizes a right to sexual intimacy and body autonomy permits us to form caring human relationships without any interference from the society. Expression of one’s sexuality is at the centre of intimacy. If while expressing one’s sexual desires, one conducts consensually; without harming other individuals, then the invasion of that precinct will be a violation of the right to privacy. Therefore we may conclude that cyber porn when viewed privately by consenting adults fall within the arena of the right to privacy.

The right to privacy is not absolute. In *Mr. ‘X’ v. Hospital ‘Z’*¹⁶, the Supreme Court has held that although the right to privacy is a fundamental right under Article 21 of the Constitution it is not an absolute right and reasonable restrictions can be imposed on it for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

¹⁴ (1994) 6 SCC 632.

¹⁵ (2009) 160 DLT 277.

¹⁶ AIR 1995 SC 495

Any restriction imposed by the Government must pass the test of reasonability to qualify under any of the grounds set forth by Article 19(2). In *State of Madras v. V.G. Row*¹⁷, the Supreme Court held that the nature of the right infringed, the extent and urgency of the evil sought to be remedied and the prevailing conditions at the time would have to be considered in evaluating the validity of a restriction on a fundamental right. In *S. Rangarajan v. P. Jagjivan Ram*¹⁸, the Supreme Court held that a restriction under Article 19 (2) would be reasonable as long as (a) it delineated the kinds of speech being restricted and (b) it was introduced to prevent real harm that has a proximate nexus with such speech.

The words “morality and decency” are words with wide connotations. The word obscenity under English law is identical to the word “indecent” under the Indian Constitution. The test of obscenity is “whether the tendency of the matter charged as obscene and has potential to deprave and corrupt those whose minds are open to such immoral thoughts” and into whose hands a publication of this sort is likely to fall. Thus a publication is obscene if it tends to produce lascivious thoughts and arouses lustful desire in the minds of the majority of the public who are likely to consume such content.

Section 292 to 294 of the Indian Penal Code provides instances of restrictions on the freedom of speech and expression in the interest of decency and morality. These sections prohibit the sale or distribution or exhibition of obscene materials in public places. But, the Indian Penal Code does not lay down any test to determine obscenity.

THE LEGISLATIVE MEASURES:

Like fundamental rights of the citizen must be guarded, similarly, public decency and morality must be protected. As the state is the custodian of individual rights, it also has obligation to maintain decency and morality in society. Accordingly, laws have been enacted besides the constitutional filters.

¹⁷ AIR 1952 SC 196.

¹⁸ (1989) 2 SCC 574.

In India, there is no special act enacted that regulates Cyber pornography. Only child pornography is regulated and India has a zero-tolerance policy against sexually exploiting children. Following are certain provisions that penalize cyber pornography:

[A] INFORMATION TECHNOLOGY ACT 2000¹⁹

Section 67- A person who publishes or transmits or causes to be published in the electronic form, any lascivious material, or if its effect is such as to tend to deprave or corrupt the persons who are likely to deprave or corrupt the persons who are likely to view, read or hear the matter contained or embodied in it, is liable to punishment up to three years of imprisonment of either description and with fine which may extend to five lakh rupees. In case of a subsequent conviction, the offender will be awarded imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees.

Section 67A- Any person who publishes or transmits sexually exploit material through electronic form shall be punished with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in case of subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with finding which may extend to ten lakh rupees.

Section 67B (Child Pornography): Penal provision is provided under IT Act for publishing or transmitting of material depicting children in a sexually explicit act in electronic form. This section also prohibits the production of digital images, or the creation of the text or to collect, seek, surf, download, advertise, promotes, exchange or distributes content that depicts children in obscene or indecent or sexually compromising conditions.

Any person who entices or persuade children to maintain an online relationship with an adult for the sexually explicit act or in any manner that is perceived to be offensive to a prudent person on the computer resource or any person who abuses children online or records sexually explicit act with children shall be punished with imprisonment of either description for a term which may

¹⁹ Information Technology Act of 2000, Available at: https://www.indiacode.nic.in/bitstream/123456789/13116/1/it_act_2000_updated.pdf (Visited on June 25, 2022).

extend to five years and with fine which may extend to ten lakh rupees. In case of 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.

However, section 67, section 67A and section 67B does not apply to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form if the content therein is proved to be justified as being for the public good on the basis that such material must be excluded as it qualifies to be in the interest of science, literature, art or learning or other objects of general concern or such material are preserved and utilized for bona fide heritage or religious purposes.

[B] PROTECTION OF CHILDREN FROM SEXUAL OFFENCES 2012²⁰

As mentioned in the preamble, this act is introduced to protect children from sexual assault, sexual harassment and pornography.

Section 11 defines sexual harassment of a child.

- (i) Any person who utters any words or makes any sounds or gesture or exhibit any object or body part with a sexual intention and wants to child to hear or see it.
 - (ii) Any person who makes the child expose his any part of the body so as it is seen by such person or other person.
 - (iii) Any person who intentionally shows any object to a child in any form or media for pornographic purpose.
 - (iv) Any person who constantly stalks or contacts a child either directly or indirectly through electronic, digital or any other means.
 - (v) Any person who threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, or any part of the body of the child or the involvement of the child in sexual act.
- Any person who entice a child for pornographic purpose or gives gratification.

²⁰ Protection of Children from Sexual Offences of 2021, Available at: <https://legislative.gov.in/actsofparliamentfromtheyear/protection-children-sexual-offences-act-2012> ,(Visited on June 25, 2022).

Section 12 punishes person who performs any of the above mention sexual harassment act upon a child, with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

Chapter III of this act is devoted to “*Offence of child pornography and Punishment*”.

Section 13: Any person who exploits children for the pornographic purpose by depicting sexual organs of a child or engaging such a child in real or simulated sexual acts (oral or sexual intercourse) or represents such a child indecently and obscenely shall be guilty of the offence of using a child for a pornographic purpose. Such pornographic material involving a child must be prepared, produce, offer, transmit, publish, facilitate and distribute through any medium like print, electronic, computer or any other technology for preparation.

Section 14: Any person who engages a minor for producing pornographic material shall be awarded imprisonment for a term which shall not be less than five years and shall also be liable to fine and in case of subsequent conviction with imprisonment for a term which shall not be less than seven years and also be liable to fine.

Section 15: Whoever stores or possess child pornography in any form:

(1) Do not delete or destroy or report the same to the concerned authority but instead retains it intending to circulate or transmit child porn shall be liable to fine, not less than five thousand rupees and in case of a subsequent offence, shall be fined not less than ten thousand rupees.

(2) To transmit or propagate or display or distribute at any time except to report it or for using it as evidence in court shall be punished with imprisonment of either description which may extend to three years or with fine or both.

(3) For commercial purpose, shall be punished with imprisonment of either description which shall not be less than three years which may extend to five years or with fine or both. In case of subsequent conviction, with imprisonment of either description which shall not be less than five years which may extend to seven years and shall also be liable to fine.

The term “pornography” is only mentioned under POCSO Act but does not define it. IT act uses “sexually explicit and obscene” instead of pornography. Cyber laws on internet pornography are unregulated and may be referred to in parts and bits. However, child pornography is completely banned and strict action is taken against any person who is found involved in such a heinous offence.

[C] INDIAN PENAL CODE 1860²¹

Indian Penal code expressly prohibits obscenity. Section 292 to 249 of the code have been enacted for protecting and safeguarding the public morals by making sales etc of obscene literature and publications in general and to young persons in particular, a cognizable offence. Section 292 and 293 were added in line with the resolution passed by the International Convention for the Suppression and Circulation of and traffic in, Obscene Publications, signed by India at Geneva on 12th September 1923²².

Section 292: The publication of a book, pamphlet, paper, writing, drawing, painting, representation, figure etc will be deemed to be obscene if it causes the sexual desire or causes interest in sexual matters and has the potential to deprave and corrupt persons who are likely to read, see or hear the matter contained in such material.

Clause 2 of the section deals with the offence of sale, hire, circulation, distribution, public exhibition, import or export, possession of obscene objects or material for commercial use, an advertisement that any person is ready to engage in sexual acts or offers to do any sexual act shall be held liable for punishment. This clause provides for simple or rigorous imprisonment for a term of up to two years and a fine of up to two thousand rupees on first conviction. The term of imprisonment may extend to five years and the amount of fine to five thousand rupees on the subsequent conviction. A book pamphlet paper, writing, drawing, painting figure, or representation, which may appear to be obscene, is exempted, if its publication is justified if it is

²¹ The Indian Penal Code 1860, *available at:*

https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.iitk.ac.in/wc/data/IPC_186045.pdf&ved=2ahUKEwiKkafXi9_2AhWPCd4KHd49B2EQFnoECCMQAQ&usg=AOvVaw3Xfb8eGall-JNeQVo5Knda , (Visited on June 26, 2022).

made in the interest of science, literature, art, learning or other objects of general concern, or is preserved for bona fide and religious purpose. A sculptured, engraved, painted representation is exempted if it appears on an ancient monument²³, temple or car used for the conveyance of idols, or kept or utilized for religious purposes.

Section 293: Sale of obscene objects to a young person- Any person who sells, lets, hire, distribute, exhibit or circulate to a young person below the age of 20 years any obscene object, shall be punished for simple or rigorous imprisonment up to three years and with a fine up to two thousand rupees. In case of subsequent conviction, the term of imprisonment may be extended up to seven years and the amount of fine may be increased up to five thousand rupees.

Section 294: Obscene acts and songs- If any person who is caught watching internet pornography at a public place may be prosecuted under section 294 for annoying others with his obscene activities. Section 294 intends to promote public decency and morality. Any person, who annoys others by his obscene acts in a public place or has sung, recited or uttered any obscene songs or words in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months or with fine or both.

[D] THE INDECENT REPRESENTATION OF WOMEN (PROHIBITION) ACT, 1968²⁴

This act intends to prohibit indecent representation of women in any form, specifically in any publication or advertisement which has got a tendency to corrupt the public mind and morals. The preamble to the Act clearly states that this is “an act to prohibit indecent representation of women through advertisement or publications, writings, figures or in any other manner and for matters connected therewith or incidental thereto.”

Section 2 (c) of the Act defines “indecent representation of women” to mean “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

²³ The Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958)

²⁴ The Indecent Representation Of Women (Prohibition) Act, 1968, *available at*: https://legislative.gov.in/sites/default/files/A1986-60_0.pdf , (Visited on: June 27, 2022).

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

Section 3 of the Act prohibits a person from getting involved in any form in the publication or advertisement of women depicting indecent representation. As per the provision of this Section “no person shall publish, or cause to be published, or arrange or take part in the publication or exhibition of, any advertisement which contains indecent representation of women in any form”.

Section 4 of the Act prohibits the publication or sending by post of books, pamphlets etc., and containing indecent representation of women. As per the provision of this Section, “No person shall produce or cause to be produced, sell, let to hire, distribute, circulate or send by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photography, representation or figure which contains indecent representation of women in any form.” However, Section 4 also exempts certain objects from the purview of this Section.²⁵

Section 5 of the Act empowers an authorized officer to enter and search any place in which he has reason to believe that an offence under this Act has been or is being committed; seize any advertisement or any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which he has reason to believe contravenes any of the provisions of this Act and examine any record, register, document or any other material object found in any place as mentioned above seize the same if he has reason to believe that it may furnish any evidence of the commission of an offence punishable under this Act.

Section 6 and Section 7 provide for the penalties for the offences committed by individuals and companies and **Section 8** says that the offences committed under this Act are bailable and cognizable. Section 9 protects the action taken in good faith while Section 10 of the Act empowers the Central Government to make rules.

[E] THE YOUNG PERSONS (HARMFUL PUBLICATIONS) ACT 1956.²⁶

²⁵ Clauses (a), (b) and (c) of Section 4 of the Act.

²⁶ The Young Persons (Harmful Publications) Act 1956, *available at*:
<https://www.google.com/url?sa=t&source=web&rct=j&url=https://legislative.gov.in/sites/default/files/A1956->

This act was enacted in the early years of Independent India to prevent the dissemination of certain publications harmful to young persons. Section 2, Clause (a) of the Act defines harmful publication. As per the provision of the section “Harmful Publication” means “any book, magazine, pamphlet, leaflet, newspaper or other like publication which consists of stories told with the aid of pictures or without the aid of pictures or wholly in pictures being stories portraying wholly or mainly-

- (i) The commission of offences; or
- (ii) Acts of violence or cruelty; or
- (iii) Incidents of a repulsive or horrible nature,

in such a way that the publication as a whole would tend to corrupt a young person into whose hands it might fall, whether by inciting or encouraging him to commit offences or acts of violence or cruelty or in any other manner whatsoever.”

Section 3 of the Act provides for the penalty for the sale etc. of harmful publications. As per this Section, If any person-

- (a) Sells, let us hire, distributes, publicly exhibits or in any manner put into circulation, any harmful publication, or
- (b) For purpose of sell, hire, distribution, public exhibition or circulation, prints, makes, produces or has in his possession any harmful publication, or
- (c) Advertises or makes known by any means whatsoever that any harmful publication can be produced from or through any person,

he shall be punished with the imprisonment which may extend to six months, or with fine or with both.” Further, the Section provides that upon being convicted, the court may order the destruction of all copies of the harmful publication in respect of which the conviction was had and which are in the custody of the court or remain in possession or power of the person convicted.”

93_0.pdf&ved=2ahUKEwi_xsSIjN_2AhUIe94KHVb0DoQQFnoECAMQAQ&usg=AOvVaw0nZrS9w3ZMo7GfUtIJ_B14 , (Visited on June 27, 2022).

Section 4 empowers the Government to declare any publication as harmful publication after consulting the Chief Law Officer of the State and every such publication shall be fortified to the Government. Further Section 6 of the Act authorizes the officers empowered by the State Government and the Magistrate to seize and destroy the harmful publications.

If we scrutinize the above mentioned legislative measures, it is perspicuous that selling, publication, exhibition or transmission of any obscene material is not permissible and any person who is indulged or associated in such activities shall be held guilty and be punished as per the provisions of the respective legislations. The legislative intention is clear and loud that anybody trying to corrupt the mind of the young or the old and goes against the norms of morality and decency shall be dealt with as per the provisions of laws as these are not allowed under any circumstances.

JUDICIAL APPROACH

[A] The English Case Laws

England recognized obscenity as an offence and imposed a legally justified measure to restrict the scope of free speech and expression. In 1662 England enacted ²⁷ prohibitive law that bans publications of, “*any offensive books or pamphlets wherein any doctrine of opinion shall be asserted or maintained which is contrary to the Christian faith.*” In 1772, the first case was adjudged under this provision. Erotic literature, “*Venus in the Cloister*” was published in 1683 that graphically depicted a scene of voyeurism and female masturbation. The court held that such a publication was punishable under common law for, “weakening the bonds of morality.”²⁸

After this case, many others lined up upon similar matters. There was no lucidity over what material can be classified as obscene and what cannot; because there were no definitive elements involved explaining the offence of obscenity. An attempt was made in 1868 to determine what may be classified as obscene. In ***R v. Hicklin***²⁹, Justice Cockburn held that “*...any materials that tend to deprave or corrupt those whose minds are open to such immoral influences.*” Hicklins’

²⁷ Geoffrey R. Stone, Origin of Obscenity 31 NYU REV. L. SOC. CH. 711, 712 (2007)

²⁸ The King v. Curll, 2 Stra. 788 (1727)

²⁹ [1868] 3 LR 360 (QB).

test was based upon the effect of a publication on the most vulnerable members of society, whether or not they were likely to read it.

As a result, some of the literary works in England were destroyed on the basis that they were obscene. Literature such as D.H. Lawrence's *The Rainbow* was destroyed in 1915. In 1928, *The Well of Loneliness* was rejected by a Magistrate who felt that a passage that implied the two women had slept together would arouse thoughts of a most impure character and glorify a horrible tendency.³⁰

Hicklen's test continued to dominate until the judicial precedent was amended by Justice Stable in *Regina v. Martin Secker and Warburg Limited*³¹, passed a contradictory judgment. The Court observed that literature may be deemed to be unsuitable for the adolescent to read, however that does not mean that a publisher is guilty of a criminal offence. Hicklins' test was absolved in England after the enactment of the Obscene Publication Act 1956 that gave protection to legitimate publications having literary merit.

[B] The United States Case Laws:

The U.S. Supreme Court abandon Hicklen's test in *Roth v. United States*³². In this case, the Supreme Court decided an issue of obscenity as an exception to free speech and expression derived into the constitutionality of 18 United States Code (USC) 1461 that penalized mailing of any material which was "*obscene, lascivious, lewd or filthy and other publication of indecent character.*" The court upholds the constitutional validity of the above code and observed that "obscenity is not within the area of constitutionally protected freedom of speech and expression, either under the First Amendment, as to the Federal Government or under the Due Process Clause of the Fourteenth Amendment, as to the State." The court held that the rejection of "obscenity" was implicit in the First Amendment. Sex and Obscenity were held not to be synonymous with each other. Only sexual explicit content that tended "exciting lustful thoughts" were held to be

³⁰ G. Robertson, A. Nichol, *Media Law* (4th Edn. 2002) 156.

³¹ [1954] 1 W.L.R. 1138

³² 354 U.S. 476

obscene. The aspect of obscenity had to judge from the point of view of an average person by applying contemporary community standards.

In *Memoirs of a Woman of Pleasures v. Massachusetts*³³, the SC held that if obscene content possesses redeeming social value, any offensive depiction of sexual engagement may be excused.

In *Stanley v. Georgia*³⁴, the U.S. Supreme Court, upheld the right to privacy under U.S. law in the form of mere possession of obscene material. Possessing materials is an offence under Georgian law. The US SC distinguishes between the public display and private possession of obscenity. The Court held that unless there is reason to believe that a particular sort of expression may create considerable public harm, an individual's First Amendment rights must always be safeguarded. Georgia's contention that possessing pornography naturally lead to "deviant sexual behaviour and sexual crimes was disregarded by the court.

In *Miller v. California*³⁵, the US SC redefined the meaning of obscenity from that of "utterly without socially redeeming value" to that which do not possess, "serious literary, artistic, political or scientific value. According to Miller's test, obscene material is those that appeal to the prurient intent when consider as a whole and that depicts or describe as offensive by sexual conduct or excretory functions in a patently offensive manner as defined by applicable state law; and that the work as a whole, lacks serious literary, artistic, political, or scientific value.

In *Hamling v. United States*³⁶, in this case, the community standards principle got paired with an average person test to determine whether the subject matter is obscene or not.

In *Osborn v. Ohio*³⁷, the SC held that the First Amendment permits states to proscribe the mere possession of child pornography to be distinct from its distribution.

³³ 383 U.S. 413 (1966).

³⁴ 394 U.S. 557 (1969).

³⁵ 413 U.S. 15 (1973).

³⁶ 418 U.S. 87 (1973).

³⁷ 495 U.S. 103 (1990).

In *New York v. Ferber*³⁸, The SC held that the State's obligation to protect children from being sexually exploited leads to legislation forbidding the distribution of images of children performing sexual acts, even if the content does not exceed obscenity standards.

In *Reno v. American Civil Liberties Union*³⁹, the U.S. SC held that the provisions which prohibit indecency, provided under the Communications Decency Act 1996, contravenes with the First Amendment of the US Constitution that guarantees free speech and expression. This is a landmark case that adjudges to regulate indecent content available on the internet. The Communications Decency Act 1996 aimed to restrict pornographic content available on the Internet. It was also introduced to safeguard minors (Below 18 years old) from being exposed to sexually explicit material on cyber space by penalizing the knowing transmission of an obscene or indecent message that is patently offensive being sexual or excretory activities or organs as measured by the contemporary community standards to any recipient. The American Civil Liberties Union argued that some provisions of the law were unconstitutional and prayed for a preliminary injunction. The Government argued that the Supreme Court previously upheld the validity of CDA in *Ginsberg v. New York*⁴⁰, *FCC v. Pacifica Foundation*⁴¹ and *Renton v. Playtime Theatres Inc.*⁴² and in this case also should be held.

In *the Ginsberg case*, The SC held that even though the material may not be obscene, still it may prove to be harmful to children and its marketing may be regulated.

In *the Pacifica Foundation case*, the New York's FM radio Station namely WBAI aired a broadcast that featured George Carlin who used "Filthy Words" as a part of the segment about the perception of people towards language. John Douglas who happens to hear this show was he was driving with his 15 years old son. He filed a complaint with Federal Communication Commission and stated that such a program should not be aired at 2 pm when children are also to be a likely audience. The FCC served a letter to Pacifica Foundation chastising them for violating broad casting rules and regulations that prohibits airing of indecent content. The SC upholds FCC legal

³⁸ 458 U.S. 747 (1982).

³⁹ 521 U.S. 844 (1997).

⁴⁰ 390 U.S. 629 (1968)

⁴¹ 438 U.S. 726 (1978)

⁴² 475 U.S. 41 (1986).

sanction, determining that the segment was indecent but not obscene. The court observed that the State is under an obligation to protect children against offensive content and to regulate unwarranted use of offensive speech that is likely to transgress the privacy of any person. The SC held that this case law cannot be justified to relied upon as FCC's sanctions were not criminal and historically, television and radio broadcasts have got the most restricted First Amendment Protection. The reason for such restricted protection is because even after giving warnings a listener may not be safeguarded from unexpected program content where as in the case of the internet, the netizens make an affirmative move to gain access to sexually explicit material.

In the *Playtime Theaters case*, the SC upheld the validity of an Order that kept adult theatres out of the residential areas. With this, the Government stated that CDA was an attempt to cyber zone indecent content available on the internet. The response of SC on this point was however that the regulation imposed in the Renton case cannot be compared with CDA because CDA intended to enforce a content-based ban on speech.

In ACLU case, Justice John Paul Stevens differentiate between Internet Communication and other types of Communication wherein the Supreme Court has previously decided on. According to Justice John Paul Stevens, CDA lacks the specification that the First Amendment demands. The CDA effectively suppresses a huge quantity of communication that adults have a constitutional right to gain access to while restricting minors from being exposed to harmful speech. To make adult speech liable is unreasonable. The Court has acknowledged the obligation of the State to safeguard young minds from hazardous items on numerous occasions but that goal does not justify the unduly broad prohibition of adult speech. Lastly, the Supreme Court struck down section 223 (a) (1) (B), Section 223 (a) (2) and Section 223 (a) of the Communications Decency Act 1996 for being unconstitutional except for cases dealing with obscenity or child pornography.

In *Ashcroft V. American Civil Liberties Union*⁴³, the U.S. Supreme Court deleted two overarching provisions of the Child Pornography Prevention Act, 1996⁴⁴ as they violated the ability to participate in a significant amount of legal speech. Further, the court dismissed a plea to increase

⁴³ 535 U.S. 564 (2002).

⁴⁴ Child Pornography Prevention Act of 1996, Pub. L. No. 104-208 (1996), Codified at 18 U.S.C. §2252A, as Amended.

the scope of speech as it would fall outside the ambit of protection given by the First Amendment. The court held that simulated/virtual child pornography was protected under free speech.

Under the Child Pornography Prevention Act 1996, Section 2256 (8) (B) prohibits “any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture” that “is or appears to be, of a minor engaging in sexually explicit conduct. Section 2256(8) (D) prohibits “Any sexually explicit image that is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that it depicts, “a minor engaging in sexually explicit conduct.”

The Free Speech Coalition is an adult entertainment association that argued that the above mention two provisions of CPPA are overarching as the usage of the phrase, “appears to be” and “conveys the impression” are not well defined and are likely to encroach upon their right to exercise free speech as protected under First Amendment.

The issue raised in this matter was whether the Child Pornography Prevention Act of 1996 restrict free speech when it outlaws content that is neither obscene under *Miller’s case* nor Child Pornography under *Ferber’s case*?

As CPPA bans Virtual Child Pornography wherein no real minors are involved in its production and also bans possession and distribution of such images that depict adults who disguise them as minors by using digital imaging. The court observed that the age of the person who engages in sexual intercourse is relevant to ascertain if such a depiction offends community standards. Images of minors performing sexual acts offend community standards in contrast with adults.

Congress contended that the virtual images of children suggestive of sexual behaviour were likely to have an impact on children’s safety. A minor may be shown such images and be pursued by a paedophile to engage in sexual acts. A child who initially may be uncomfortable and protest from indulging in such sexual activity may be convinced after watching other children performing similar sexual acts and enjoying sexual pleasure and thus may justify their conduct. Such virtual child pornography may encourage many paedophiles to sexually exploited a real child thereby increasing the production and distribution of child pornography. The Congress also mentioned that advancement in technology poses a challenge to convict pornographers who use minors as it

is sometimes difficult to differentiate between computer-generated images and factual images involving real children. As technology upgrades, it will be tough for a prosecutor to prove that the images shown involve real children. Therefore under the veil of virtual child pornography, some pornographer who uses real minors do not escape, Congress has strung out its tentacles to proscribe virtual child pornography.

The Free Speech Coalition challenged the validity of CPPA as they fear that some of their production may qualify under sections 2256 (8) (B) and (D) although they claim that they do not use children in their pornographic content. Some of the members of the Free Speech Coalition are the publisher of Bold Type Inc. Book that shows the nudist lifestyle, Jim Gingerich, an artist who paints a nude painting and Ron Raffaelli a photographer who has specialized in erotic images.

The Court observed that it is not reasonable of Government to ban speech on the rationale that such speech is likely to encourage consumers to sexually abuse a child. The court held that the CPPA has an overarching as it prohibits materials that are neither obscene nor produced by sexually abusing any real children. Judge Ferguson dissented on the basis that obscene virtual images of a simulated child and real child pornography do not deserve protection under First Amendment. Sexual abuse of minors is a heinous offence that goes against the moral inclinations of a prudent man. Congress acknowledges in its legislative findings that there exist people who prey on minors to engage in sexual intercourse to satisfy their immoral lust. The First Amendment restricts government to regulate a person's personal affairs, however, the right to exercise free speech comes with its exceptions such as defamation, incitement, obscenity and child pornography involving real children.

The CPPA bans speech despite its valid literary, aesthetic, political, or scientific worth. The act prohibits the visual depiction of young people below 18 years of age even if a person wishes to display this as a theme of art. As different States has different age bars, below 18 years of age is considered as minor is taken to be higher than the legal age of marriage and age of consent for indulging in sexual intercourse in many States. If any person wants to explore themes that fall under the enlarged horizon of CPPA then any such movies that represent an isolated graphical representation of sexual conduct will qualify under the loosely defined provisions of the statutes.

Any person found to own or possess such material may be guilty of child pornography and has to suffer a harsh penalty regardless of the work's redeeming value.

The Court held that Government cannot prohibit speech on the ground that material fit for adults needs to ban as it is likely to fall into the hands of minors. Further, the court held that Section 2256 (8) (B) and (D) are overarching and hence unconstitutional.

[C] Indian Case Laws

In India, no significant development has been made on the regulation of cyber pornography. Multiples of Public Interest Litigation were filed that were later on disposed of by the Supreme Court on the ground that blanket ban cannot be imposed on porn websites as citizens has the right to privacy and freedom of speech and expression guaranteed by the Constitution of India. India maintains zero-tolerance against child pornography even in stimulated form and stringent punishment are imposed. Below are certain case laws that represent how obscenity was initially adjudged by the Supreme Court and the stance of the Supreme Court on PIL seeking a ban on cyber pornography.

In *Ajay Goswami v. Union of India*⁴⁵, the Supreme Court upheld the right of an adult citizen to entertainment not considering that such entertainment may be inappropriate for children. The petitioner argued that by permitting the newspaper industry to enjoy unchecked freedom of expression, the interests of children were not being adequately protected by the easy access to what was regarded as objectionable material, especially material with sexual content. The Court held that to shield minors, the adult population could not be restricted to reading what is fit for children alone.

In *Ranjit D. Udeshi v. the State of Maharashtra*⁴⁶, the Supreme Court drew a difference between obscenity and pornography. It was held that while pornography denotes writings, pictures etc intended to arouse sexual desire, obscenity may include publications not indented to do so but

⁴⁵ (2007) I SCC 143: AIR 2007 SC 439

⁴⁶ AIR 1965 SC 88I: (1965) I SCR 65.

which have that tendency. While both offend against public decency and morals, pornography is obscenity in a more aggravated form.

In **Shankar v. State of Tamil Nadu**⁴⁷, Supreme Court lamented the impact of television and films on young minds and the growth of crimes as a consequence of the depiction of obscenity and crime.

In **Reepik Ravinder v. State of Andhra Pradesh**⁴⁸, the High Court of Andhra Pradesh held that continued exposure to violent pornography was partially responsible for the defendant's proclivity to commit acts of rape.

In **Kamlesh Vaswani v. Union of India**⁴⁹, a Public Interest Litigation was filed before the Supreme Court for seeking a complete ban on pornographic websites and to make watching porn a non-bailable offence. The petitioner emphasized that there is no specific legislation that regulates pornography and addresses its harmful effects. The petition raises concern over minors who can easily access violent, brutal, and destructive pornography without any restriction or verification of their age. Pornographic advertisements are displayed without the permission of the user and such uncontrolled display of porn advertisement tends to be displayed while browsing the internet and is sufficient to offend netizens. The petitioner correlated pornography that has the potential to corrupt people's minds and encourages them to commit a sex crime against women and children.

The petitioner claims that a great bulk of pornography consumed in India is generated in the United States and the European Union, where it is legal. The petitioner argues that by providing consumers unrestricted access to such content, the government has allowed penetrating a notion that a woman's agony is a source of man's pleasure, leading to a culture that normalizes sexual assault. Article 21 of the constitution guarantees the right to dignity. A woman's right to dignity is been compromised when the state fails to regulate such disturbing content treating women as sex slaves and objects. Women's dignity is diminished as a result of the continual humiliating representations of them. The petition then situates this harm within the context of everyday disadvantage faced by

⁴⁷ (1994) 4 SCC 478.

⁴⁸ 1991 CriLJ 595.

⁴⁹ W.P. 177/2013, Kamlesh Vaswani's Copy of Petition, available at: <https://docs.google.com/file/d/0B-e-IXh7NmVmbGNXT1BraHF5RUU/edit> (Visited on June 29, 2022).

women, arguing that the constant presence of a narrative that reinforces their subservience in sexual matters will have an impact on their social status, as well as create unfair and unrealistic expectations for them in sexual relationships. A final judgment on this matter is yet to be delivered although certain measures have been taken.

In *Muthukumar v. Telecom Regulatory Authority of India & Ors*⁵⁰, Public Internet Litigation was filed by Petitioner s. Muthukumar, a lawyer to issue a writ of Mandamus against the Telecom Regulatory Authority of India (TRAI), The Ministry of Communication and Information Technology (MCIT), District Collector of Madurai and the Commissioner of Police of Karnataka before the Madras High Court. The Madras High Court suo moto also made the Ministry of Electronic and Information Technology, the Ministry of Information and Broadcasting and M/s. Byte Dance Technology Pvt Ltd. which is the parent company of the Tik Tok mobile application is the party to the dispute.

The Petitioner seeks to prohibit the download and usage of Tik Tok (Mobile Application) that allegedly contained explicit and disturbing material that degraded culture, and encouraged prostitution by way of pornography, it made minors vulnerable to paedophilia and affects adolescents' mental health adversely. On the 3rd of April 2019, the Madras High Court issued an interim order by directing the authorities to ban the Tik Tok app and also restricted Media to telecast any video that was produced by using this application. After the issuance of an interim order, Tik Tok deleted over six million videos that were obscene or inappropriate. The High court sought a response from the Union of India upon its failure to enact an online privacy law for children equivalent to that in the United States.

The Interim Order of Madras High Court was challenged before the Supreme Court of India by M/s Byte Dance. The Petitioner argued that the content posted on the Tik Tok app was blasphemous, filthy and had pornographic overtones. Tik Tok is widely popular among teenagers who become vulnerable to cyber bullying as their mental health is adversely affected because they are exposed to such explicit and distressing content. The petitioner claimed that several deaths

⁵⁰ W.P. (MD) No. 7855 of 2019.

have been reported because of the use of Tik Tok. As per the petitioner, the Tik Tok hosted obscene clips and inappropriate content, the interim stay should not be revoked.

The respondent Byte Dance argued that the app had a robust mechanism to deal with complaints in respect of inappropriate content. At the initial stage, this is achieved through an artificial intelligence moderation machine and at the latter stage human moderation act as a filter to delete inappropriate content. When any complaint is reported the Grievance officer of the Respondent app would direct to conduct an inquiry in the matter. As per the Respondent the Interim order passed by the Madras High Court violates Article 19 (1) (a) of the Indian Constitution that guarantees free speech and expression and hence the interim order to ban Tik Tok out to be vacated. Further the Respondent claims that such an interim order to ban their app have caused an irreversible loss in financial investment, employment and goodwill of the company.

On 16th April 2019, Madras High Court appointed Amicus Curiae to evaluate the implications of the application. The Amicus Curiae submitted that the Information Technology Act, 2002 read with the Rules and Regulations were comprehensive to deal with the issue. Section 67 (A) and Section 69(A) and the Information Technology (Procedure and Safeguards for Blocking for Access of the Information by Public) Rules, 2009 and the Information Technology (Intermediaries Guidelines), Rules 2011 are adequate laws to tackle the infringing intermediaries who failed to act or respond to a grievance regarding any inappropriate content, shared on Tik Tok App. Later on 24th April 2019, the Madras High Court set aside its interim order to ban Tik Tok as the High court was convinced that the Respondent is well equipped having Machine Moderation and Manual Moderation techniques to deal with obscene and pornographic content produced and shared through Tik Tok app. The High Court of Madras accepted the affidavits (undertaking) filed by Tik Tok and Byte Dance to ensure that any inappropriate content would be immediately filtered and if the respondent breaches their undertaking they would be held liable for the contempt of court.⁵¹

[IV] CONCLUSION AND SUGGESTIONS

⁵¹ Case Analysis of Muthukumar v. Telecom Regulatory Authority of India & ors., *available at*: <https://globalfreedomofexpression.columbia.edu/cases/muthukumar-v-telecom-regulatory-authority-of-india-ors/> (Visited on July 1, 2022).

It is a preconceived notion that cyber pornography is mostly shared and watched among males. However, in this dynamic world, sex has gone beyond the purpose of reproduction and is now perceived as sexual pleasure. Females have become sensitive and conscious to explore their sexuality and hence they too engage in watching cyber pornography. This generation is the first generation to have experienced the darker side of cyberspace as these people are also lucky and privileged enough to experience advancement in technology, simultaneously. This finding may only point towards the development of technology and the availability of electronic devices and the ineffective age verification mechanism of porn websites at an early age that leads to exposure to cyber pornography. It is important to know how a person comes to know about cyber porn. In India, children never confine themselves to discuss sex with their parents or teachers or any other elder person who holds an authoritative figure in their life. The only fount of knowledge of cyber porn may come from a self inquisitive mind that surf on the net or friends or siblings/cousins. In exceptional cases, a person may know about pornography when an adult deliberately shows pornography to sexually abuse such a child. There may be a situation wherein a person gets to know through his friends and after knowing he may not be willing to dive deeper, however, due to peer pressure he is likely to participate, to share his experience adding up to the premature discussion.

In 9th grade, under Biology subject, students are introduced to Human Reproductive Process. In many schools even today, teachers are reluctant to teach this topic and expect students to self-study. The unwillingness of a knowledgeable person to guide the naïve students often leads to more curiosity amongst adolescents. What happens biologically inside of a human body is different from what is supposed to be done to trigger such a biological process. This practical aspect is what interest more adolescents as in teenage they undergo many body reformations. The whole discussion of cyber porn takes place between people who are closely associated with each other. In this social circle, the sender and the receiver both exchange restricted knowledge and are ignorant of the potential harm that they are exposing themselves to. Some people who abstain from watching virtual pornography may feel morally guilty and perceive the entire concept as immoral or they may not be genuinely interested or they may have adopted a realistic approach and is aware how a sexual intimacy should be like and do not wish to trap themselves in this time consuming

sexual fantasies. Porn's addictive nature has a scientific basis, with dopamine hormone release serving as one of the methods of creating the transmission pathway to the brains pleasure regions.⁵² Porn addiction is a serious issue. Inability to control the consumption of cyber porn and interference of sexual fantasies makes a person incapable to maintain healthy relations and his porn addiction becomes a hurdle in achieving the desired goal. A person will fail to concentrate as his mind will drive him towards endless surfing porn.

Pornography as a visual misrepresentation of sexuality that distorts a person's understanding of sexual relations by objectifying them, resulting in changes in sexual attitudes and behaviour. Men who watch pornography regularly are more accepting of deviant sexual behaviours, sexual violence, promiscuity and even rape. Furthermore, men come to label women and even children as a mere sex objects or rather as commodities or a means for their sexual pleasures rather than perceiving women and children as individuals with inherent dignity. Pornography also raises the likelihood of developing sexually transmitted diseases or becoming a parent to an illegitimate child because of the increased sexual permissiveness it promotes. Penetrating sex education in the academic curriculum will substantially restrict teenagers from drowning in unrealistic sexual fantasies and will help them to understand the meaning of real sexual intimacy. Cyber porn is not established to educate the masses on what is the correct method to perform sexual intercourse. Pornography is a huge profit-making industry and its only aim is to maximize profit. Pornography industries make a profit out of the flesh trade. They offer various unlimited sexual fantasies such as brutal sex, incest, bestiality, child pornography etc., which may be overwhelming for the consumers' conscience. Sex education programmes in India are operative in many schools. The true purpose of sex education would be fulfilled only when most of the students' inquisitive questions are answered without being hesitant and judgmental.

Due to easy accessibility, consumption of cyber pornography has significantly increased sex crime. Over the past few years, India has witnessed a sharp rise in sexual violence cases. A person who advocates that cyber pornography do not have any correlation with people who commit sex crime needs to read news related to rapes. Earlier it was shocking but now even minors are committing

⁵²Effects of Pornography, *available at*: http://marrpedia.org/effects_of_pornography (Visited on July 1, 2022).

rape on children. From where does a minor get to know about sexual intercourse and how he becomes so courageous to commit such a heinous offence?

Child pornography laws are very stringent in India however India does not have Anti- Pornography act. In *Re v. The State of Uttarakhand & ors.*⁵³, Uttarakhand High Court has directed Ministry of Electronics and Information Technology to ban 857 websites. MEITY has asked Department of Telecom to block 827 websites and DoT further directed Internet Service Providers to take necessary actions for blocking those websites. DoT instructed ISPs to disable those websites that holds Child Pornographic content⁵⁴.

It is mandatory for porn websites to enable age verification tool before any person gains access. However that is ineffective as a person just need to click “I am above 18 years” and he is able to view the content. The user must have attained the age of majority in his jurisdiction. This policy basically shifts the responsibility on the consumer and the porn company disclaims any responsibility or liability for any misrepresentation regarding the user’s age.

The porn company also urges the parents to implement parental control protection (filtering service) to help limit minor access to explicit material. Parental control software can effectively block most of the adult content websites. Further such porn company also condemns child pornography and asserts that they advocate zero tolerance policy for pornographic material involving minors and regarding pedophile or any pedophile activities. Pornography is something that everyone indulges in but nobody confesses to because of the guilt and shame that is attached to it. Pornography is considered to be immoral because sexual intimacy in its purity does not demand anybody to perform vulgar acts and unnatural sex. Women are portrayed in an undignified manner as mere sex objects to listen to the commands of their master only to get sexually abused. Pornography is a sensitive topic and most people shun away from even building up a social dialogue. However, the contemporary generation does not hesitate from acknowledging the ever-growing cyber porn addiction. Sexual offences are one such crime that has prevailed in all societies

⁵³ W.P. (PIL) No. 158 of 2018.

⁵⁴ Here is the full list of 827 porn websites blocked by Dot, *available at*: <https://indianexpress.com/article/technology/tech-news-technology/here-is-the-full-list-of-827-porn-websites-banned-by-the-dot-5421127/> (Visited on July 1, 2022).

for ages. With the advancement of science and technology the complexities of life have enormously multiplied. The incident of sex delinquency has become too common. Pornography potentially shapes sexual attitude in men and often develop a sexual desire for coercion as they imbibe predatory sexual behavior. Children are exposed to pornography at an increasingly early age. Children are being transformed into living advertisements by a pornified industry. Porn is a censored topic yet sensational. These attributes of pornography make it an interesting topic to discuss among children who hit puberty. To locate the source of exposure we need to understand and study the social background of the society where research is conducted. In Indian society elders do not guide young generations due to which that is a huge gap to address the increasing over indulgence in sexual activities.

India is famed as the land of the Kama Sutra yet we are extremely reticent to open a pensive dialogue to guide adolescents when they are caught up in the web of a complicated sexual muse. The change will occur only when the society stops attaching vulgarity to sex and rather starts explaining its consequences if performed at pubescent age just to explore the realm of sexual pleasures. Suppression of facts always feeds a curious mind. If adults fail to explain biological changes occurring during puberty and censor inquisitive minds, this attitude of adults will surely turn adolescents into cyber pornography. Laws are generally meant for meeting the needs of society and it is, therefore a dynamic concept that changes with the changing need of the society. To penetrate any prohibitive laws, the law makers need to study the society very closely as such penal laws have potential to make any citizen into an offender. Sex related activities are attached with shame and embarrassment if at any point of time such anti pornography laws are introduced and people are nabbed to watch pornography privately, their family reputation will be tarnished. A thoughtful measures need to be consider in this aspect.

There is a correlation of consumption of pornographic content and rapid increase in sex crime. A famous example to trace correction between pornography and increasing rape cases can be understood by reading the statement of *Theodore Robert Bundy* infamously known as Ted Bundy who confessed to 30 homicides that he committed in several states of America in four years ranging from 1974-78. Further, he also admits how pornography has turned him into a brutal sex offender and a serial killer. Ted Bundy in 1989 with an interview with Dr James Dobson, just before his

execution recorded his statement stating that, *“My experience with pornography that deals on a violent level with sexuality are that once you become addicted to it and I look at this as a kind of addiction- I would keep looking for more potent, more explicit, more graphic kinds of materials. Until you reach the point where pornography only goes so far. You reach that jumping-off point where you begin to wonder if maybe actually doing it will give you that which is beyond just reading about it or looking at it.”*⁵⁵

Porn addiction has a deleterious effect on a person’s mental ability to manage their emotions, their want to use the stimulus again and again, and their desire to be susceptible to the stimuli receptive to deter disruptive behaviour. Pornography’s addictive nature has a scientific basis, with dopamine hormone release serving as one of the methods for creating the transmission pathway to the brain’s pleasures regions. A man when consuming such videos forms a sexual attitude that women are supposed to be treated in a degrading manner and this is an acceptable behaviour because the porn star in the video is enjoying such brutal sex and so shall his mate. He may be unaware of the truth that the women who are performing may be suffering from economic crises or they may be victims of the flesh trade. Consequently to the advancement of information technology and computer network, a variety of legal issues related to the misuse of the Internet as digital processing devices such as cyber pornography need to be tackled through the instrumentality of the law. Since cyber space has no geographical boundaries, it poses a big challenge before the law enforcement agencies for regulating cyber-space transactions of citizens within a country’s territorial jurisdiction.

Cyber space has evolved as a favorable mode for conducting various nefarious activities which may only be effectively dealt by international cooperation. The principle of “dual criminality” proves to be an escape route for perpetrators of cyber crime. Therefore, uniformity of laws worldwide for cyber crime has become essential. It is a general principle that, Internet users are subjected to the laws of the State within which they administer; this general rule runs into conflict when the disputes become international. Because of the heterogeneous nomenclature and difficulties to

⁵⁵ International Journal of Emergency Mental Health and Human Resilience, available at: <https://www.omicsonline.org/open-access/the-role-of-pornography-in-sexual-offenses-information-for-law-enforcement-1522-4821-17-148.php?aid=37889> (Visited on: July 3, 2022).

detected the source of such unethical practice, many cyber offenders are misusing technology for committing a variety of crimes that need to be prevented by effective law and regulatory measures.

Watching pornography privately is protected under Article 21 (Right to Privacy) but if watched in public is considered an offence. Prostitution is legal in India, however, its related activities are illegal such as soliciting, owning or managing a brothel, child trafficking, pimping and pandering, similarly a person may watch internet pornography but cannot involve in any of its production or distribution processes. As per Justice R. Bhummathi, offences against women are not a women's issue alone but it is a human rights issue. The increased rate of crime against women is an area of concern for lawmakers and it points out an emergent need to study in-depth the root of the problem and remedies the same through strict law and order regime. There are numerous legislations and penal provisions to punish sexual offenders or those committing violence against women. However, it becomes important that gender justice does not remain only a hollow slogan⁵⁶.

Consumption of cyber porn has sharply increased when the Indian market got flooded with Chinese smart phones at affordable prices. To add a cherry on the cake this consumption was further increased when Jio internet service, erected a 4G network and initially started giving free internet plans and later on drew up attractive data packs. People switched to cheaper bulky data plans with huge data limits for users. These fertile conditions serve them an opportunity to endlessly surf cyber porn. The research scholar draws up a narrow view considering a sharp rise in sexual crimes and states that bulky internet packs, affordable Chinese mobile and unlimited Wifi plans have encouraged youth to engross in watching cyber porn to put out the fire of sexual intrigue. Remarkably as everyone has witnessed in the past two years mother Earth was under lockdown mode and the only means by which education may be likely to be dispensed was through smartphones, computers, laptops and tablets with strong internet connectivity. As education goes online, children are often not supervised by their parents or guardians; under such circumstances, exposure to cyber porn at an early age runs a great risk. During the Covid19 lockdown, there was a spike in the number of cases of Pedophiles in the State of Kerela. Over 300 Pedophiles have been nabbed down for uploading and downloading Child Sexual Abuse Material (CSAM) through the

⁵⁶ Mukesh v. State (NCT of Delhi), (2017) 6 S.C.C. 1 paragraph 520.

internet. These Pedophiles are arrested by the Countering Child Sexual Exploitation (CCSE) Team of the Kerala Police.⁵⁷ Kerala State Police are using cyber-surveillance software sourced from Interpol to track online child pornography. Most of the paedophiles who are arrested for uploading and downloading child pornography do not even accept their conviction as correct. Citizens lack awareness of what is illegal to watch on cyber space⁵⁸. As watching child pornography privately amounts to offence, the question arises, how come the authorities come to know about an act that happens inside four walls? Indian Express carried a news report quoting a police officer warning citizens that they must understand that activities on cyber space are always scrutinized. There is an international NGO called National Center for Missing and Exploited Children (NCMEC) and it maintains a Cyber Tipline. There is a Memorandum of Understanding between the National Crime Records Bureau (NCRB), India and NCMEC, USA and that provides access to the material available with NCMEC⁵⁹.

Easy access to cyber pornography has led to an increase in a sex crime. This statement is evident from the fact that many minors are convicted on rapes charges. The Juvenile Justice (Care and Protection of Children) Act 2015,⁶⁰ defines a child in conflict with the law as a person who is under the age of 18 years and is found to have committed an offence. The Age of consent to engage in sexual activities in India is 18 years. Under JJ act a minor between 16 to 18 years of age who commits heinous crime such as rape is convicted as an adult. Cyber space has newly evolved a discrete form of offending behaviours that might have unique etiological determinants and requires a unique form of intervention and management. The internet may permit a sex offender to collect data of potential victims and hook up in conversations that may instill trust and desensitize a minor

⁵⁷ Kerala Police say rise in number of those viewing child porn amid lockdown, 300 people identified, *available at:* <https://www.news18.com/amp/news/india/kerala-police-identifies-about-300-people-watching-child-pornography-online-amid-covid-19-lockdown-2583373.html> , (Visited on July 4, 2022.)

⁵⁸ Mounting Shame: Child Pornography Cases rising in Kerala, *available at:* <https://www.newindianexpress.com/cities/kochi/2022/feb/26/mounting-shame-child-pornography-cases-rising-in-kerala-2423781.html> , (Visited on July 4, 2022).

⁵⁹ P.G. Sam Infant Jones v. State, CRL OP (MD) No. 7426 OF 2021.

⁶⁰ Juvenile Justice (Care and Protection of Children) Act 2015 (Act 2 of 2016)

to erotic chats. The detection and prosecution of cyber sex offences pose a considerable challenge for law enforcement and require substantial international collaboration.⁶¹

Have you ever imagined a world without pornography? Pornography isn't the root cause of all the social evils but there is no doubt that the world would be a better place to live without it. After all, ignorance is bliss.

REFERENCES, BIBLIOGRAPHY, AND WEBLIOGRAPHY

[A] TEXTBOOKS

- 1 Prof. N.V. Paranjape. *Criminology and Penology (including victimology)*, page no. 172, (Central Law Publication, Ed.18th, Reprint 2021).
- 2 P. S. Atchuthen Pillai and K. I. Vibhute, *PSA Pillai's Criminal Law*, LexisNexis, Ed.18, 2017).
- 3 Melinda Tankard Reist and Abigail Bray (Eds.), *Big Porn Inc: Exposing the Harms of the Global Pornography Industry*, (Spinifex Press, 2011).
- 4 Patrick Carnes, *Out of the Shadows: Understanding Sexual Addiction*, (Hazelden, Ed. 3rd, 2001.)
- 5 Geoffrey R. Stone, *Origin of Obscenity* 31 NYU REV. L. SOC. CH. 711, 712 (2007)
- 6 G. Robertson, A. Nichol, *Media Law* (4th Edn. 2002) 156.
- 7 Dr. S.R. Myneni, *Criminal Psychology*, (New Era Law Publication, Faridabad, 1st Edn., 2018.)
- 8 Dr. Sukanta K. Nanda, *Media Law*, (Central Law Publications, Prayagraj, 2nd Edn., 2021).
- 9 Madhavi Goradia Divan, *Facets of Media Law*, Eastern Book Company, New Delhi, 2nd Edn, 2013, Reprinted, 2021).

⁶¹ The Internet and Sexual Offending: An International Perspective, available at: <https://core.ac.uk/download/pdf/1645798.pdf> , (Visited on July 5, 2022).

[B] WEBSITES

- 1 The Regulation of internet pornography: What a survey of under -18s tells us about the necessity for and potential efficacy of emerging legislative approaches, *available at:* https://www.researchgate.net/publication/351348341_The_regulation_of_internet_pornography_What_a_survey_of_under18s_tells_us_about_the_necessity_for_and_potential_efficacy_of_emerging_legislative_approaches (Visited on June 23, 2022).
- 2 Problematic Pornography Use: Legal and Health Policy Considerations, *available at:* <https://link.springer.com/article/10.1007/s40429-021-00390-8> (Visited on June 23, 2022.)
- 3 Internet Pornography Usage among today's adolescents: Clinical implications, assessment, and management, *available at:* <https://iisb.org/pdf/june2020/5.%20Internet%20pornography%20usage%20among%20today's%20adolescents-Clinical%20implications,%20assessment,%20and%20management.pdf> (Visited on June 23, 2022).
- 4 The Effects of Pornography on Children and Young People, *available at:* <https://aifs.gov.au/publications/effects-pornography-children-and-young-people> , (Visited on June 24, 2022).
- 5 Information Technology Act of 2000, *available at:* https://www.indiacode.nic.in/bitstream/123456789/13116/1/it_act_2000_updated.pdf (Visited on June 25, 2022).
- 6 Protection of Children from Sexual Offences of 2012, *available at:* <https://legislative.gov.in/actsofparliamentfromtheyear/protection-children-sexual-offences-act-2012> ,(Visited on June 25, 2022).
- 7 The Indian Penal Code 1860, *available at:* <https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.iitk.ac.in/wc/dat>

- a/IPC_186045.pdf&ved=2ahUKEwiKkafXi9_2AhWPCd4KHd49B2EQFnoECCMQAQ&usg=AOvVaw3Xfb8eGall-JNeQVo5Knda , (Visited on: June 26, 2022).
- 8 The Indecent Representation Of Women (Prohibition) Act, 1968, *available at:* https://legislative.gov.in/sites/default/files/A1986-60_0.pdf , (Visited on: June 27, 2022).
- 9 The Young Persons (Harmful Publications) Act 1956, *available at:* https://www.google.com/url?sa=t&source=web&rct=j&url=https://legislative.gov.in/sites/default/files/A1956-93_0.pdf&ved=2ahUKEwi_xsSIjN_2AhUIe94KHVb0DoQQFnoECAMQAAQ&usg=AOvVaw0nZrS9w3ZMo7GfUtlJ_B14 , (Visited on June 27, 2022).
- 10 Kamlesh Vaswani's Copy of Petition, *available at:* <https://docs.google.com/file/d/0B-eIXh7NmVmbGNXT1BraHF5RUU/edit> (Visited on June 29, 2022).
- 11 Case Analysis of Muthukumar v. Telecom Regulatory Authority of India & ors., *available at:* <https://globalfreedomofexpression.columbia.edu/cases/muthukumar-v-telecom-regulatory-authority-of-india-ors/> (Visited on July 1, 2022).
- 12 Effects of Pornography, *available at:* http://marripedia.org/effects_of_pornography (Visited on July 1, 2022).
- 13 Here is the full list of 827 porn websites blocked by Dot, *available at:* <https://indianexpress.com/article/technology/tech-news-technology/here-is-the-full-list-of-827-porn-websites-banned-by-the-dot-5421127/> (Visited on July 1, 2022).
- 14 International Journal of Emergency Mental Health and Human Resilience, *available at:* <https://www.omicsonline.org/open-access/the-role-of-pornography-in-sexual-offenses-information-for-law-enforcement-1522-4821-17-148.php?aid=37889> (Visited on: July 3, 2022).
- 15 Kerala Police say rise in number of those viewing child porn amid lockdown, 300 people identified, *available at:* <https://www.news18.com/amp/news/india/kerala-police-identifies-about-300-people-watching-child-pornography-online-amid-covid-19-lockdown-2583373.html> , (Visited on July 4, 2022.)

- 16 Mounting Shame: Child Pornography Cases rising in Kerala, *available at:*
<https://www.newindianexpress.com/cities/kochi/2022/feb/26/mounting-shame-child-pornography-cases-rising-in-kerala-2423781.html> , (Visited on July 4, 2022).
- 17 The Internet and Sexual Offending: An International Perspective, *available at:*
<https://core.ac.uk/download/pdf/1645798.pdf> , (Visited on July 5, 2022).

[C] ACTS

National

- 1 The Constitution of India, 1950
- 2 The Information Technology, Act 200 (Act 21 of 2000).
- 3 The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012).
- 4 The Indian Penal Code, 1860 (Act 45 of 1860).
- 5 The Indecent Representation of Women (Prohibition) Act, 1986 (Act 60 of 1986).
- 6 The Young Persons (Harmful Publication) Act, 1956 (Act 93 of 1956).
- 7 The Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958)
- 8 Juvenile Justice (Care and Protection of Children) Act 2015 (Act 2 of 2016)

International

- 1 United States Code, 1461
- 2 The Communications Decency Act of 1995 (47 USC, §223)
- 3 Child Pornography Prevention Act 1996
- 4 The Children's Online Privacy Protection Act of 1998