

## PORNOGRAPHY AND LAWS: A COMPARATIVE STUDY OF INDIA & USA

### *Abstract*

*Pornography is an evil which prevails in our society and destroy our society. This paper is an attempt to study & analyse law & rules relating to the pornography & try to do a comparison between the laws in India & United States of America (One of the world strongest country in almost every aspect.*

**Key words:** Pornography, obscene, technology, law.

### **1. Introduction**

In the present era of globalization and information technology the word cyber space is gaining great importance and is in the knowledge of each and everybody ranging from young to old. The extensive uses of internet have resulted in speedy flow of information from one side of globe, thus reducing the world to a small village (globalized village)<sup>2</sup>. In the earlier days, computers were extensively used to store confidential data. The uses of computer increased with the passage of time and also lead to increase in the number of internet users. The rapid increased of the technology give new dimension to the crime called by the name pornography.

### **2. Pornography and Obscenity**

Technology and its increase usage expanded the ambit of the crime of obscenity. Today, pornographic material is freely available on the

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<sup>2</sup> V.Tayal, *Cyber Law Cyber crime Internet & E-Commerce*, Edn. 1<sup>st</sup>, Bharat Law Publication, Jaipur 2011, ix

internet thus bringing the flood of such material to the common vision with great ease and for no value. The term pornography when used in relation to an offence is not defined in any statute in India but the term obscenity has been explained in two statutes in India and these legislations depicts that obscenity in certain circumstances constitutes an offence. These legislations are Indian Penal Code, 1860 and the Information Technology Act, 2000. Although neither the Indian Penal Code, 1860 nor the Information Technology Act, 2000 defines what is obscenity.

### **3. Indian Penal Code, 1860 and the Information Technology Act, 2000.**

Section 292 of Indian Penal Code, 1860 and the Information Technology (Amendment) Act, 2009 has regarded obscenity as an offence. Traditional Indian law of obscenity is contained in sections 292-294 of Indian Penal Code, 1860. However, though the unamended Information Technology Act, 2000 was deficient in dealing with this crime but it was amended in the year 2009 in respect of obscenity and sex-related offences committed online. New sections were inserted thus including obscenity relating crimes in relation to the cyber crimes. Earlier, section 67 was the only section dealing with it which was insufficient to deal with the offence of obscenity. The wording of the section was like this that it was not doing any distinction between child pornography and mainstream pornography and regarded that the obscenity in any form on the internet is illegal. The Information Technology (Amendment) Act, 2009 has reformed the law of obscenity in India to a greater extent. The combined effect of Sections 66E, 67, 67A and 67B is that online obscenity has been brought within the legal regime and it also differentiates between child pornography and mainstream pornography. Section 67 which provides punishment for publishing obscene material in electronic form is punishable under section 67B. In section 292 of Indian Penal Code, 1860 as in relation to the offence of obscenity, to have the knowledge of an objectionable matter is not regarded as an ingredient of crime. The mens rea is required to prove in case of selling or keeping the objectionable matter. Regarding the possession of obscene material in India almost similar view was expressed by various High Courts and distribution thereof<sup>3</sup>.

Regarding the Possession of obscene material in United States of America's Supreme Court in 1969 has held that State laws making mere

<sup>3</sup> High Court of Bombay, Rajasthan and Madras. See for details: V.Sundarajan v. State of Madras Cri.P.C.No.379 of 1978 decided on 28.11.1979., Jagdish Chawla's (1999 Cri.L.J 2562)

private possession of obscene material a crime are invalid at least in absence of an intention to sell, expose or circulate the material. In United States, the Communications Decency Act, 1996<sup>4</sup> (CDA) differentiates between the mainstream pornography and child pornography. In United States of America pornography specific legislation, the Communications Decency Act, 1996 broadly aims at protecting children from exposure to indecent material and is the most successful and controversial effort so far<sup>5</sup>. Thus, the Communications Decency Act, 1996 prohibits a person in interstate or foreign communications who uses a telecommunication device<sup>6</sup> from knowingly making, creating or soliciting any comment, request, suggestion, proposal, image or other communication which is obscene or indecent, knowing that the recipient of the communication is under age of 18 years, regardless of whether the maker of such communication placed the call or initiated the communication<sup>7</sup>. However, in *Ranjit D. Udeshi vs State Of Maharashtra*<sup>8</sup> on 19 August, 1964 it was stated that to escape liability, the accused will have to prove his lack of knowledge. Under Section 4(1) of the Obscene Publications Act, 1959 of United States of America and under exception clause of Section 292 of Indian Penal Code, 1860 of India publications for public good are exempted from the mischief of the respective sections. Thus traditional obscenity laws, whether in India or United States of America, circumscribe the guilt to an area where the objectionable matter is not aimed at achieving public good or where it is not a piece of art, etc. None of the laws come up with a definite definition of the term obscenity.

#### 4. Child pornography

Every human being below the age of 18 years is known as child according to Indian Law<sup>9</sup>. Child Pornography refers to images or films depicting sexually explicit activities involving a child, as such, child pornography is a visual record of child sexual abuse. Abuse of the child occurs in the production of child pornography when sexual acts are

<sup>4</sup> 1996 (United States of America)

<sup>5</sup> 18 USC S. 1343, 185

<sup>6</sup> According to the government, "whatever meaning is encompassed by the term [telecommunication device]; it specifically 'does not include an interactive computer device' ". *ACLU v. Reno*, Civ. No. 96-963, Defendant's opposition to plaintiff's motion for a temporary restraining order (E.D. Penn. 14-2-1996); 47 USC S. 223(a)(1)(B). *Ibid.*

<sup>7</sup> *ACLU v. Reno*, Civ. No. 96-963, Defendant's opposition to plaintiff's motion for a temporary restraining order (E.D. Penn. 14-2-1996); 47 USC S. 223(a)(1)(B). *Ibid.*

<sup>8</sup> 1965 AIR 881, 1965 SCR (1) 65

<sup>9</sup> *Implementation Hand Book for the Convention on the Rights of the Child*, UNICEF, 1, [www.wcd.nic.in/crcpdf/crc-2.pdf](http://www.wcd.nic.in/crcpdf/crc-2.pdf)

photographed and the effects of the abuse on the child are by the wide distribution and lasting availability of the abuse. In both common usage and for research purposes, the word child in the phrase child pornography refers to prepubescent children, does not refer to post -puberty teenagers.

Child pornography is the consequence of the exploitation or sexual abuse committed against a child. It can be defined as any means of depicting or promoting sexual abuse of a child, including print or audio, centred on sex acts or the genital organs of children<sup>10</sup>.

### **5. Legal position of child pornography in India**

In India, there is no enactment which directly deals with the problem of child pornography. The law governing the issue of child pornography is same as for pornography and cyber pornography. The newly inserted section 67B of the Information Technology Act, 2000<sup>11</sup> covering depiction of children in sexually explicit act or conduct, etc. Not only the creation and transmission of child pornography is illegal in an electronic form but even browsing is also considered as illegal. A first offence of publishing, transmitting, creating, collecting, seeking, browsing, downloading, advertising, promoting, exchanging or distributing material, in any e-form depicting children in obscene, indecent or sexually explicit manner can interact up to five years in jail and a fine up to rupees five lakh and up to seven years in jail and fine up to rupees ten lakh in case of second offence.

Section 67 of the existing act deals with publishing obscene information in an electronic form. Earlier, the section specifically defines pornography or make it an offence and does not mention child pornography at all. But after the amendment, section 67B proposes specifically to punish involvement in sexually explicit online or electronic content that depict children. It is a non- bail able crime under the new act.

### **6. Legal position of child pornography in the United States of America**

In the United States of America, the first Amendment of Constitution laid emphasis on protection of right to privacy within four walls not affecting others. Title 18 of United States of America Code, section

<sup>10</sup> M.Narayan Bhatt, "Child Pornography: A potential Threat to the Future of Globe- A Global Overview" in V.Tayal, *Cyber Law Cyber Crime and E commerce*, 358

<sup>11</sup> Inserted by Act 10 of 2009 (w.e.f. 27-10-2009).

2252(a)(2)(A) defines child pornography as any visual depiction of sexually explicit conduct involving children. In 1994, Federal Bureau of Investigation (FBI) started preventive and controlling measures in the name of innocent images and arrested several people after search of 120 homes in 1995. There are several statutes in United States of America, which prohibits internet or online child pornography and are as follows: the Communication Decency Act, 1996; the Child Pornography Prevention Act, 1996; etc., under Title 18 of United States of America Code, section 2256 and the Child Online Protection Act, 1998; the Protection of Children from Sexual Predators Act, 1998 under Title 18 United States of America Code, section 302, etc.

In *Free Speech Coalition v. Reno*<sup>12</sup> a Circuit Court concluded that the definition of child pornography under the Act of 1996 is vague and too broad and also inconsistent with the first amendment. The Supreme Court upheld the Act of 1998 to protect minors from internet pornography in 2001 and the Congress adopted the Child Obscenity and Pornography Act, in 2002.

## 7. Child Pornography Prevention Act, 1996

The Child Pornography Prevention Act, 1996 was signed by the United States President. It was passed by the United States of America on September 30, 1996. It has been amended thereof with small changes. The new legislation expands the definition of child pornography. Section 3 of the 1996 Act adds a new sub-section to 18 U.S.C. 2256(8) which has redefined child pornography<sup>13</sup>. Section 2 of the 1996 Act includes important findings related to pseudo-photography and explains why it should be illegal.

The Children's Internet Protection Act, 2000 is one of the number of bills that the United States of America Congress has proposed in an attempt to limit children's exposure to pornography and explicit content online. President Bill Clinton signed it into law on 21 December 2000 and it was upheld by the Supreme Court of the United States of America on 23 June 2003. Children Internet Protection Act, 2000 (CIPA) is a federal law enacted by the United States of America. It is applicable over the Internet on school and library computers. Children's Internet Protection Act, 2000 (CIPA) imposes certain types of requirements on any school or library that receives funding for Internet access or internal connections

<sup>12</sup> No. 97-16536 (9th Cir. Dec. 17th, 1999). See also <http://www.cybercrime.gov>

<sup>13</sup> See for details S. 18 U.S.C. 2256(8) of Child Pornography Prevention Act, 1996.

from the e-rate program which means - a program that makes certain communications technology more affordable for eligible schools and libraries. In early 2001, the FCC issued rules implementing Children's Internet Protection Act, 2000 (CIPA)<sup>14</sup>.

In United States, child accessibility to porn sites is prohibited. In India, the browsing and downloading child porn images are also made punishable. In India the law relating to children came in Information Technology (Amendment) Act, 2009 but in the United States the privacy laws enacted specifically for the internet, the Children's Online Privacy Protection Act (COPPA) 1998.

CYBER PORN	<p>a. No such difference exists under Section 292 of Indian Penal Code, 1860. All types of pornography are illegal.</p> <p>b. Mere possession is not an offence.</p> <p>c. Publication or transmission under Section 67 of the IT Act is an offence.</p> <p>d. Under the IT (Amendment) Act, 2008, under Section 67-B, child pornography, its browsing, downloading, etc. has been also declared as an offence.</p>	<p>a. The Communications Decency Act of 1996 differentiates between mainstream pornography and child pornography.</p> <p>b. Possession of obscene material is not an offence.</p> <p>c. Publishing or transmission of obscene material is an offence.</p> <p>d. Child accessibility to porn sites is prohibited.</p>
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## 8. Conclusion

The pornography and obscenity are buzz words in the today's era because the monetary aspect of this market is valued in Billions of Dollars. The Indian laws neither Information Technology Act, 2000 nor Indian Penal Code, 1860 categorizes the pornography or obscenity. Every type of pornography is illegal in India but according to Information

<sup>14</sup> N. Kamath, *A Guide to Cyber Laws*, Universal Law Publishing Co. Pvt. Ltd. New Delhi 2004

Technology Act, 2000 merely possession of pornographic and obscene material is not an offence. Publication or transmission under section 67 of the Information Technology Act, 2000 is an offence. After the amendment in the Information Technology Act, 2000 under section 67B, child pornography, its browsing, downloading, etc. has been also declared as an offence. On the other hand there are different categories of Pornography in United States of America. The Communications Decency Act of 1996 differentiates between mainstream pornography and child pornography. Similarly as in India the mere possession of obscene material is not an offence in United States of America and publishing or transmission of obscene material is an offence. In United States of America the Child accessibility to porn sites is strictly prohibited. The penalties under the Communications Decency Act, 1996 include fines up to \$1,00,000 and two years imprisonment. In India, the Information Technology Act, 2000 imposes the penalties for the offence under this on first conviction with imprisonment upto three years and fine up to five lakh rupees and on second or subsequent conviction with imprisonment up to five years and fine up to ten lakh rupees. In addition to this a special act Child Obscenity and Pornography Act, in 2002 was passed in United States of America.

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## **PORNOGRAFIJA I ZAKONI: UPOREDNOPRAVNA STUDIJA: INDIJA & SAD**

### Rezime

Pornografija je zlo koje preovladava u našem društvu i koje uništava naše društvo. U ovom radu se čini pokušaj da se prouče i analiziraju pravo i zakonske odredbe koje se odnose na pornografiju, a, isto tako, i da se uporedi zakonodavstvo Indije i SAD u ovoj oblasti.

**Ključne reči:** pornografija, opscenost, tehnologija, zakon.

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