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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **REALM OF PRIVACY AND CONSENT IN** **DIGITAL AGE**

AUTHORED BY - MAHIMA KAPUR

## **ABSTRACT**

*The legislation motions protected under the Indian Penal Code is in serious question regarding private conversations in electronic form amidst two or more consenting adults, commenting derogatory as well as sexual remarks on other individuals. This pattern has continued wherein individuals are sexually objectified on online platforms. Similar messages if held to be toxic in nature are required to be condemned under the criminal law. Recently on 'Instagram', a social media platform, an alleged online group consisting of teenaged boys studying in various schools was exposed for creating a platform to share pictures of other minor girls and objectifying their looks and bodies. Furthermore, an FIR has been registered by the Delhi Police after Delhi Commission of Women took cognizance and filed a charge sheet in suo moto. Commission of such offenses shall be placed under the Indian Penal Code as well as the Information Technology Act. But are there any sections penalizing such action under our Indian Legislation? The present paper is an attempt to evaluate the law governing cyber obscenity in India.*

## **I. INTRODUCTION**

The World Wide Web and the Internet is a very complex network and is vulnerable to several illegal activities. We cannot judge obscenity in isolation. Obscenity is a wide-ranging and complex issue as it involves issues such as decency and morality which varies from society to society. The term 'Obscenity' applied in the legal sense usually poses an alarming threat to the Society. In our civilized society, any act or conduct of or work of obscenity is liable to be condemned and regulated in our legal system. It is recondit for the legislative committee to define the term 'obscenity' in summation and thereby to regulate it. Ideological and cultural differences are also causing factors behind its establishment in cyberspace. Most importantly the problem is of identification and culpability of the offender under our legislations. It is thus impossible for the



system to censor the amount of material readily available to users on the Internet. In related provisions, *publishing or transmitting obscene material on the electronic form* is a form of punishment under the Information Technology Act, 2000. It means the material that is lascivious in nature or tends to be of prurient interest. Such that it depraves or corrupts those who view, hear, or read the matter. Thus we can say that it is an offense to share or post obscene content on an online platform including it being in a private message.

*Standard tests by the Judicial courts for determining such expressions*

1. *Hicklin Test*: This test was established through the landmark case in the United Kingdom, Regina v. Hicklin which clarified that regardless of the artistic or literary value, all those materials tending 'to deprave and corrupt those whose minds are open to such immoral influences' would be termed 'Obscene'.
1. *Community Standard Test*: A material would be termed obscene if it has characteristics of a depraved mind and excites a sense of sexual passion in persons who are likely to see, hear, or read it. Currently, the Supreme Court conforms to this Test while accessing obscene material in law.

*Is it punishable to share on the internet a material depicting sexual acts ?*

The advancement in cyberspace has established an entirely new medium for the dissemination of any message, images, pictures including pornographic ones. Not only content has been criticized and prohibited by law, but also its ready availability for internet users. Under Section 67A of Information Technology Act, 2000, publishing or transmitting (or causing to do the same), any material in electronic mode that contains sexually explicit acts is considered a punishable offense in criminal law. The word 'sexually explicit' is nowhere mentioned in the section, however, Bombay High Court explained its essence briefly in '*JayKumar Bhagwanrao Gore v. The State of Maharashtra*'<sup>1</sup>.

In situations where there the material contains déshabille content as well can form the basis of the offense under Section 67 & 67A of Information Technology Act, 2000. In JayKumar Bhagwanrao, the Court included transmitting material containing nudity as an offense. It stated that it '*may be a*

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<sup>1</sup> 2017 Online SCC BOM 7283



*unilateral activity if not a bilateral activity*'. The motive of transmitting such material is crucial under Section 67A, for example, a picture depicting domination of nudity may stand more providence than showcasing a sexual activity in a film.

## **II. Indian Criminal System penalizes transmitting sexual content of minors on the Internet**

The provisions under Indian Criminal System classifies the transmitting of sexual content of minors on the Internet as an offence. It covers the following elements in the ambit of offence:

- Collection, distribution, downloading, seeking or any form of advertisement that promotes sexually explicit material of children (minors)
- Exploitation of children on electronic mode
- Inducing to form an online relationship of one or more children on sexually explicit acts
- Recording any sexual explicit abuse committed on children on a electronic form; it includes an act done by oneself

### *Graphic Material*

Graphic material promoting depiction of nudity or sexually explicit content on text is covered under Indian Criminal Law. As the Indian Penal Code describes the material as '*any material*'<sup>2</sup> There is no particular type of materials listed under the provision. Consequently, there is no uncertainty that devoid of pictures or videos can still be comprehended under the ambit of 'Material'.

### *Exceptions for punishment under provisions*

The material published or transmitted is in public good i.e is in the interest of science, literature, art or learning or other interests of general concern (heritage or religious purposes) shall be stipulated as an exception to the provisions of the offense.

### *Determining the word 'obscenity'*

As technology continues to evolve, the interpretation of the Supreme Court in cases involving obscenity exhibited on electronic form ( Internet). Stands as an adopted precedent on the

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<sup>2</sup> Section 67A, Information Technology Act, 2000

interpretation of special laws enacted to address specific offences that arise out of technological advancement.

The Supreme Court considers the provisions of both the IPC as well as the IT Act. In *Maqbool Fida Husain v Raj Kumar Pandey*<sup>3</sup>, on the internet an obscene painting was offered for sale, Delhi High Court held that the determination of the word '*obscenity*' is present in Information Technology Act as well as Indian Penal Code, therefore it was necessary to understand the broad parameters of law laid down by the court in India

The Supreme Court acknowledged the principle '*generalia specialibus non derogant*' held that Section 79 of Information Technology Act could not be neglected in deciding a criminal act on electronic record appearing with obscene content. An offender charged under the sections of the Information Technology Act would not denote that he would escape from the provisions mentioned under the Indian Penal Code.

This judgment solidifies the view that no enactment can be viewed in isolation. The offense under Section 292 of the IPC was read holistically with Sections 67, 79, and 81 of the IT Act. In reading the aforesaid provisions of the IPC and the IT Act together, the SC construed them harmoniously to give effect to the legislative intent. The IT Act provides for offenses that were not within the contemplation of the legislature at the time the IPC was enacted.

### **III. 'Obscenity', an ambiguity under Indian laws?**

The definition of the term '*obscenity*' holds the power of the legislature to regulate the worst forms of pornography for public welfare and yet does not deter freedom of speech and expression. Criminal culpability under the provisions of law is not suppressed on the ground that the receiver has no objections to the material with sexual content. No provision under the Information Technology Act as well as the Indian Penal Code protects consent adults from the offense of transmitting material depicting sexual content. Technically, the material so transmitted in a private conversation on the Internet between two consenting adults could also be a criminal act.

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<sup>3</sup> 2008CriLJ4107

Under the '*Sharat Babu Digumarti v. Government ( NCT of Delhi)*'<sup>4</sup>, the Supreme Court held that the offender cannot be punished for the same act under both the legislations i.e Information Technology Act, 2000 & Indian Penal Code. The court acknowledged the special provisions<sup>5</sup> of the IT Act and stated that the former shall have the overriding effect on the latter.

#### *Limitations on the interpretation of 'Cyber Stalking'*

In recent times, perpetrators have started to monitor the lives of one or more individuals on social media, forums, or even through emails for pleasure, harassment or to collect your data. Cyberstalking doesn't necessarily have to involve direct communication, some victims do not have the knowledge that they are being pursued. Most countries have *not adopted* specific laws or provisions to regulate cyberstalking, for instance, the United States of America and India does not entail 'cyberstalking' under Harassment and Anti - Stalking laws. In India, the related provision centers only on cyberstalking carried on by men<sup>6</sup>. There are no provisions under the Indian Criminal System to deal with cases involving cyberstalking by women<sup>7</sup>.

In 2001, India's first cyberstalking case was reported wherein the victim was objected to harassment and obnoxious language on the Internet<sup>8</sup>. This created an alarm for the legislative committee to implement laws to protect victims on electronic platforms as the only related provision to protect women was under the regulations of 'intended to insult the modesty of a woman'. Anonymous use of the Internet, though beneficial in many instances, also promises to create challenges for law enforcement authorities.<sup>9</sup>

#### *Delhi Public School MMS: A devastating violation of consent*

Circulation of pornographic clips of unsuspecting women on Multimedia Services through mobile phones is quickly emerging as another form of gender violence and cybercrime in the country. The Delhi Public School MMS video clip is still in the public consciousness. While this MMS was

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<sup>4</sup> (2017) 2 SCC 18

<sup>5</sup> Section 81, Information Technology Act, 2000

<sup>6</sup> Section 354D, Indian Penal Code, 1860

<sup>7</sup> Abhimanyu Mathur, *CyberStalking Law: III - to protect women, non existent for men*, Times of India, June 17, 2017

<sup>8</sup> Manish Kathuria Vs Ritu Kohli, C.C.No. 14616/2014

<sup>9</sup> L. Ellison & Y. Akdeniz, *Cyberstalking: The Regulation of Harassment on the Internet*, CRIMINAL LAW REVIEW-CRIME, CRIMINAL JUSTICE AND THE INTERNET 7 (Special ed. Dec. 1998).



circulated widely and eventually uploaded on the internet for public viewing, where it was caught, copied, and stored permanently, there were no special provisions protecting women from indecent representation in public. Moreover, the Delhi High Court did not convict the director of *Bazzee.com* as guilty for selling the video clip online for public enjoyment<sup>10</sup>. As the court did not recognize the automatic criminal culpability on the director where the company is an accused.

#### IV. QUESTION OF CULPABILITY IN DIGITAL REGION

To understand the criminal culpability in question on the electronic form it is necessary to deduce what does obscenity off-line means in a legal sense. Off-line obscenity generally relates to the language, literature, or representation dealing with erotic, pornographic, and sexually perverted subjects. The essential feature of determining a material in terms of obscenity lies in its effect on the mind of the viewer more than in any definable measure of the matter itself. None of the provisions under the Indian Criminal Legislation prohibits perpetrators from *sharing social media profiles of others on private messages* as an offense. Information Technology Act, as well as the Indian Penal Code, hold no restrictions on transmitting pictures or videos of other individuals on social media. On the contrary, the user agreement in specific cases under Intellectual Property Law (applying to relevant social media platforms), might consist of provisions for criminalizing such acts.

Common practices began in the form of harassment when social networking websites witnessed *fake profiles*. Given the magnitude of the number of fake profiles, it is necessary to view the legality and punishment for creating fake profiles. Cheating by personation is punishable under the Information Technology Act if there is a pecuniary benefit to the person making a fake account of another person<sup>11</sup>. This suggests that Indian Legislation System would not hold a person accountable for making his own profile as a fake profile for gaining pecuniary benefit.

In a recent update in *Bois Locker Room* incident, the officials have revealed that one of the alleged screenshots shared on Twitter had a conversation on Snapchat between few boys. According to the police, a fictitious name 'Siddharth' was used by a minor girl and further planned to sexually

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<sup>10</sup> Aynish Bajaj v. The State 2008 (105) DRJ 721

<sup>11</sup> Section 66-D, Information Technology Act, 2000

assault herself in the chats with the other boys in the alleged conversation. She later confirmed that she created a fake profile on social media applications to test the ‘*value and character of the boy*.<sup>12</sup>’ The provisions for punishing an individual through Section 66-A of Information Technology Act, 2000 requires the definition of ‘pecuniary benefit’ to be expanded.

The magnitude of punishment for a *passive member* in a group on social media sharing obscene pictures and videos of others should also be clarified under provisions of the Information Technology Act as well as the Indian Penal Code. Currently, there is no legislation to determine if a passive member stands accountable for being a participant in a social media group wherein obscene and prohibited content is being transmitted and published. A passive recipient if downloads such prohibited material shall not be accounted for by any criminal liability. Furthermore, no provisions under the legislation prohibit individuals from possessing prohibited material on their devices. On the contrary, the legislation strictly penalizes the seeking, downloading, or browsing of any material that portrays children in an obscene manner.

Currently, in criminal law, there cannot be any vicarious criminal culpability on the group administrators on the social media platforms wherein obscene material is published or transmitted unless it has been specified by the judicial courts<sup>13</sup>. Culpability in such matters shall be decided case to case. However, precociously there is no criminal culpability on the group administrators. In *Ashish Bhalla v. Suresh Chawdhry*, the Delhi High Court ruled against affixing any liability to the group administrator on social media platforms in a civil suit, wherein the matter in question would be in the ambit of defamation.

## V. CONCLUSION

*“It is observed even in the most carefully crafted legislation that enforcing a law in a virtual community creates unique problems never witnessed by law enforcement agencies.”<sup>14</sup>*

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<sup>12</sup> Abhay Parashar, *Bois Locker Room Case: Minor girl talked of her own rape, created fake snapchat ID, reveal police*, India TV News, May 11, 2020

<sup>13</sup> *R. Kalyani v. Janak C. Mehta*, (2009) 1 SCC 516

<sup>14</sup> B. Jensen, *Cyberstalking: Crime, Enforcement and Personal Responsibility in the Online World*, <http://www.law.ucla.edu/Classes/Archive/S96/340/cyberlaw.htm> (last visited May 1, 2013).

The advancement of science and the rapid growth of Information Technology has benefited all however given regard to the obscene material that could be published or transmitted on the electronic form, it is a complicated and difficult area since regulation and identification of obscenity on the Internet is very complex. The Internet has often condemned the availability of obscene and prohibited material in electronic form. After research, it is clear that cybercrimes are not bound by any region. Anyone around the world can access the Internet with their devices. It is not necessary for a potential offender to be within the jurisdiction where an offense is committed. This issue pertains to the international aspect of the Internet. It has been observed that the law which regulates obscenity all over the world finds itself difficult to have uniformity. Unidentified use of the Internet stands to be beneficial, however in many instances also engages to create challenges for law enforcement authorities. The virtual reality is a global medium of connectivity regardless of barriers, and this creates new possibilities for the internet user to explore. Effortless access to cyberspace denotes that distance is not an obstacle to the cyberstalker<sup>15</sup>. The internet is a 'Lawless' space creating barriers in applying legislations of a specific nation to the international domain, for example, the national harassment or stalking laws as cybercrimes in India.

*Emerging fundamental inquests on cybercrime:*

In India, due to the absence of judicial legal pronouncements, the scope of Section 67 of the Information Technology Act & Section 354 of the Indian Penal Code are unclear and require judicial interpretations. The offense related to minors<sup>16</sup>, however, is clearly explained and regulated. These sections regulate the offenses which act as commercial exploitation of such obscene material.

The cyber laws in India forbid two or more consenting adults from forming a conversation wherein the material published or transmitted is prohibited by law. On the other hand, the law failed to implement laws that prohibit the same act if committed without the involvement of any electronic medium.

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<sup>15</sup> L. Ellison & Y. Akdeniz, Cyberstalking: The Regulation of Harassment on the Internet, CRIMINAL LAW REVIEW-CRIME, CRIMINAL JUSTICE AND THE INTERNET 7 (Special ed. Dec. 1998)

<sup>16</sup> Section 67B, Information Technology Act, 2000



The law enforcement authorities have to engage in the concept of consent and privacy from the legislation provided under criminal law and broadly explain the following concerns :

- What concludes as an offense under Section 67 and 67A of Information Technology Act, 2000 and what is restored as freedom of speech<sup>17</sup> under the realm of privacy and encrypted messages.
- If group members on a social media application will be held accountable for the offenses under Section 67 and 67A of Information Technology Act if none of the participants had the motive to publicize or transmit the obscene material shared on their chat to the public. (In such situations wherein the conversations were made public by a non member) The legal implications on the individual (be it a member or non-member of the social media group) who publishes a private conversation containing obscene and sexually explicit content that was shared between two or more consenting adults.
- In relation to Article 19(2) of the Indian Constitution, *in the interest of decency or morality*, can Information Technology Act, 2000 criminalize private communications, in electronic form, through the means of reasonable restriction

The author believes that if the aforementioned issues are incorporated in the Information Technology Act, 2000 it would be an effective provision to deal with the issue of publishing and transmitting obscene material in electronic form<sup>18</sup>. It would control the actions of the perpetrators as it imposes rigorous punishment if found guilty. The new amendments in the Act shall cover almost every mode of electronic communication or computer resource using which the offender tries to pass derogatory remarks on obscene and prohibited material on an electronic form (even if in a private conversation).

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<sup>17</sup> Art 19 INDIA CONST.

<sup>18</sup> Section 67 & 67A, Information Technology Act, 2000