PORNOGRAPHY NEEDS STRICT REGULATIONS IN INDIA

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ABSTRACT

Pornography is a global problem and those who engaged in the production, exhibition, distribution and consumption of pornography cause a serious impact on children and society at large. The literal meaning of the term 'pornography' is "describing or showing sexual acts in order to cause sexual excitement through books, films, etc". Pornography on the internet is available in different forms. These ranges from pictures, short animated movies, audio files and stories. The internet also makes it possible to discuss sex, see live sexual acts and screening of sexual activities from computer screens.

Pornography itself in its hard core explicit avatar has rarely been examined by the Indian courts, for its merits as either an artistic product or as to whether it could fall within the parameters of free speech. This however, has also meant that exhibition through small cinema halls and circulation of pornography through video and other new media forms, has been taking place allowing people to access such material.

Alteration of images on computer and the feasibility of creating computer-generated pornography pose challenges for courts and law enforcement officials throughout the world. . The reason for cyber pornography to be a big industry is that the easy, free, efficient, convenient and anonymous accessibility to pornographic material through internet: Further, the anonymity of the cyber pornography industry, global accessibility, problems of jurisdiction, different laws and standards of morality in different countries, which have made a mockery of laws and their enforcement

I. INTRODUCTION:

Defining pornography within the framework of law and justice has been a difficult task for both International as well and domestic legal systems globally. In identifying and defining pornography thereby limiting or curbing away pornography has clashed with the right of an individual choice, the right of free speech and expression and has clashed with the very notion of 'Justice'.

The argument of the difference between eroticism and pornography has been waged many a times. Many believe that there is no difference between erotic art and pornography while quite a few academicians strongly argues that there is albeit a thin line of difference between eroticism and pornography.

In *Feminism, Moralism and Pornography*, Ellen Willis illustrates the difference between pornography and erotica asserting that 'erotica whose etymological root is *eros* expresses an integrated sexuality based on mutual affection and desire between equals and that pornography whose is a Greek root *porne* meaning prostitute reflects a dehumanized sexuality based on male domination and of exploitation of women" [1]

The increase in crime against women and children have also lead many countries including India attempt to come up with laws which although tends to regulate pornography however plays with the line of individual choices and action. The concept of 'pornography' does not lend itself easily to definition.

II. PORNOGRAPHY IN INDIA: JUDICIAL RESPONSE:

5. India as of now does not have law which clearly bans or defines pornography albeit the increase in violence against women and sexual abuse of children has forced the Indian executive and legislature to enter in the forbidden territory of understanding, identifying and (banning!) pornography. However,

attempt to control and regulate pornography has also brought in a myriad of issues with violating the rights of individual liberty, under the Indian Constitution along Fatima Riswana V. State Rep. By A.C.P., Chennai & Ors. Case No.: Appeal (crl.) 61-62 of 2005.

6. Anonymous Letter-Un-Signed vs The Commissioner of Police and Ors. On 26 December, 1996.

with jurisdiction issue pertaining to website hosted via internet.

"The test defines *'obscene'* as all visual or written material that is *lascivious or appeals to the prurient interest*", and *has the capacity to corrupt those exposed to it*. These standards are relevant in the context of Internet governance as well.

New legislations enacted for the Internet under the Information Technology Act, 2000 also adopted the same definitions regarding obscenity or sexually explicit material, inheriting also the weight of precedents that have determined what is obscene. This definition of obscenity and the penalization under the Indian Penal Code, 1860 (sections 292 and 293) is further extended by other laws that prevent the distribution of such material such as The Young Persons Harmful Publication Act, 1956, Indecent Representation of Women (Prohibition) Act, 1986. The case that laid down the Hicklin test i.e., R. vs. Hicklin[2] was about the mass distribution of inexpensive pamphlets called provocatively "The Confessional Unmasked" described how priests extracted erotic confessions from female penitents.

In Ranjit D. Udeshi v State of Maharashtra[3], the facts are that the appellant, a bookseller, sold a copy of the unexpurgated edition of "Lady Chatterley's Lover". He was convicted under s. 292, Indian Penal Code. In the appeal to the Supreme Court he contended that : (i) the section was void because it violated the freedom of speech and expression guaranteed by Art. 19(1)(a) of the Constitution of India., (ii) even if the section was valid, the book was not obscene and (iii) it must be shown by the prosecution that he sold the book with the intention to corrupt the purchaser, that is to say, that he knew that the book was obscene. The observation of the supremecourt is (i) the section embodies a reasonable restriction upon the freedom of speech and expression guaranteed by Art. 19 and does not fall outside the limits of restriction permitted by cl. (2) of the Article. The section seeks no more than the promotion of public decency and morality which are the words of that clause. (ii) The book must be declared obscene within the meaning of s. 292, Indian Penal Code.

The word "obscene" in the section is not limited to writings, pictures etc. intended to arouse sexual desire. At the same time the mere treating with sex and nudity in art and literature is not per se evidence of obscenity. The test given by Cockburn C.J., in Queen v. Hicklin[4], to the effect that the tendency of the matter charged as obscene must be to deprave and corrupt those, whose minds are open to such immoral influences and into whose hands a publication of the sort may fall, so far followed in India, is the right test. The test does not offend Art. 19(1) (a) of the Constitution.

In judging a work, stress should not be laid upon a word here and a word there, or a passage here and a passage there. Though the work as a whole must be considered, the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort. In this connection the interests of contemporary society and particularly the influence of the impugned book on it must not be overlooked. Where, obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. It is necessary that a balance should be maintained between "freedom of speech and expression" and "public decency or morality"; but when the latter is substantially transgressed the former must give way. In other cases obscenity may be overlooked if it has a preponderating social purpose or profit.

In judging the obscenity of one book the character of other books is a collateral issue which need not be explored. (iii) The section does not make the book-seller's knowledge of obscenity an ingredient of the offence and the prosecution need not establish it. Absence of knowledge may be taken in mitigation but does not take the case out of the section. But the prosecution must prove the ordinary mens rea in the second part of the guilty act and it must be proved that he had actually sold or kept for sale the offending article. Such mens rea may be established by circumstantial evidence.

The Indian courts are squeamish and culturally still shy of confronting the issue of pornography as was observed in the case of *Fatima Riswana v. Chennai & Ors*[5]. both the public prosecutor and counsel for the petitioners applied to the court for transfer to another (male) judge, to save the district lady judge from embarrassment of having to view certain CDs that are part of the evidence. The order for transfer was passed and the justification for this was that the "said trial would be about the exploitation of women and their use in sexual escapades by the accused, and the evidence in the case is in the form of CDs. and viewing of which would be necessary in the course of the trial, therefore, for a woman Presiding Officer it would cause embarrassment."

In the case of *Anonymous v The Commissioner of Police*[6], yet another encounter takes place between the embarrassed law and the pornographic text. It is an encounter of two women advocates asked by the court to examine what movies are being exhibited at a specific theatre. In the peculiar

clash of social mores that ensure who has access to pornography and the law that ensures equal access to all legally sanctioned media to everyone, the movie theatre was held responsible for

violating the fundamental right of women to have access to their premises – and thus access to pornography. India as of now does not have law which clearly bans or defines pornography albeit the increase in violence. Against women and sexual abuse of children has forced the Indian executive and legislature to enter in the forbidden territory of understanding, identifying and (banning!) pornography. However, attempt to control and regulate pornography has also brought in a myriad of issues ranging to violating the right of individual liberty, choice and freedom of speech and expression as enshrined under the Indian Constitution along with jurisdiction issue pertaining to website hosted via internet.

In the case of *Shankarsan Krishan Mundra vs. State of Maharashtra*[7], the Bombay High Court held that the private viewing of a pornographic or obscene film within the confines of a bungalow does not amount to public exhibition and therefore would not attack Section 292 of the Indian Penal Code.

Moreover, Supreme Court of India has also time and again refused to bring in unwanted censorship that violates the very basic fundamental right of liberty, free expression including the viewing of pornographic or obscene material within the confines of personal space.

In 2013 a Public Interest Litigation (PIL) was filed in the Supreme Court seeking ban on viewing of pornography and to make it a non bailable offence. Advocate Vijay Panjwani stated that the absence of any strict internet law make porn videos easily accessible to the public and about 20 crore of porn clippings and videos are either freely downloaded from the internet or converted into video CDs. According to the petition, kids can easily view graphically strong, brutal, violet and destructive *adult content* that is not only posing danger to the entire society, but also to public order in the country.

In August 2015, Indian executive declared a ban on a total of more than 700 internet sites which contained obscene and pornographic material. The Supreme Court however came down heavily on the Centre declaring that such action could lead to a more serious repercussion wherein that blocking such sites will also block meaningful literature which will be of greater harm to the public.

The court always seems to imagine a deluge of pornographic content that exists beyond the exposure of this one (any) scandal that does find its way into the legal system. In a judgment that predates the digital deluge of pornographic and sex videos online, but seems to imagine this kalyug approaching (*Dharmendra Dhirajlal Soneji vs State of Gujarat*[8]) the court is actually called upon to decide whether a sentence of seven years imprisonment is too harsh for a case of rape of a minor girl (13 and a half years old) by a 20 year old, especially in the context of the flooding of the pornographic and obscene in society. The appeal is also assisted by the affidavit of the victim, who is now much older and married, and has 'gracefully stated' that she has "condoned the act of the accused as it happened in spur of moment because of the tender age and immaturity." Further, she says that the accused is now a happily married man, and if he serves a sentence of seven years, it would have an adverse and debilitating impact on his wife and children.

The counsel for both the accused and public prosecutor stressed on the availability of adult material easily via television including pornographic content. One of the final questions raised was that the court decide on if the State which is "oblivious to its duties to the problem of mental health of the people and in particular to that of unwary youth continuously being influenced, victimized and obsessed by obscene film and pornographic literature perennially streamed through some of the T.V. channels, polluting their clean consciousness, has it indeed any right to urge and press for the enhancement of sentence[9].

In another judgement – Kanhaiya v. State of Uttar Pradesh[10] where a minor child (of nine years old)was raped and murdered, the judgment also peculiarly focuses on the finding of hardcore pornography with the accused. The case is complicated by the presence of local leaders and caste politics and it is hard to ascertain from the distance of reading the text of the judgment whether the accused is guilty of non-consensual relations with a minor, and this constraint is part of reading all legal precedent. It is only possible to analyse the reasoning of the court and how they reached the final judgment. In this horrifying case where a nine year old girl went to the pond after her meal and her dead body was found the next day showing signs of having been raped, the judgment of the court turns on very peculiar factors. The extra judicial confession of the accused is to be considered reliable or not on the basis of the pornographic material that was seized from his house. This confession was allegedly made to a local leader, with whom the accused had no friendly relations and later the court finds this local leader's testimony unreliable because of criminal complaints against him. The court deliberates on whether the pornographic material was planted on the accused, whether it could be viewed on his TV set, whether he indeed knew the difference between cassette and CD and when admitting to having cassettes in his house with pornographic material, did that include CDs (as they are admittedly two different mediums or technologies). The underlying assumption of the court (and presumably most of the other actors in this particular case) is that the presence of pornography necessarily establishes the guilt of the accused of the rape and murder of the nine year old girl.

CONCLUSION:

On the internet, pornography is among the most profitable business. Ever since the enactment of the Information Technology Act, 2000, legal and Information Technology experts have been urging the Indian Government to amend the Act to include an array of cyber crimes, but the authorities turn a deaf ear. With the recent scandal of amateur sexual video clip made by two teenage students, the Government has set up a panel to review the six-year-old Information Technology Act, 2000, which regulates cyber crimes.

Despite of every argument of safeguarding individual's right of liberty, speech , expression and choice, it cannot be denied that pornography has its dangers and disadvantages. At this moment, Indian alone cannot tackle the issue of child abuse and violence against women. Any law that it intends to draft must be made in sync with the global requirement and collaboration. Constant monitoring of sites that promote. child related crimes could only be controlled with aid of international agencies and various multi level assistance by various government and non government organizations and associations. Regulating pornography and drafting law although is only one side of the coin nonetheless coming with a legal regime could be the first step towards enjoying eroticism without hampering the social and moral fabric of a civilized society Videos are often the result of sting operations by magazines, journalists or other interested parties and yet in the public furore of morals that are caused by a holy man and a respectable politician caught in the frame of such a video, there is little discussion of basic questions of violation of privacy and consent of parties. A deliberation in public or in courts, to some extent would also be relevant to ordinary people who have been captured in surveillance and hidden cameras and such videos too have been leaked into circulation.

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