



## DEPARTMENT OF COMPUTER SCIENCE AND ENGINEERING

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An Assignment Report on

#### ***Obscenity and Child Pornography***

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## DEPARTMENT OF COMPUTER SCIENCE AND ENGINEERING



### CERTIFICATE

Certified that the Assignment report titled '**OBSCENITY AND CHILD PORNOGRAPHY**' is carried out by **PRIYANKA M B (1RV18CS123)** and **SHIVANI C H (1RV18CS154)** who are bonafide students of R V College of Engineering, Bengaluru, in partial fulfillment for the award of degree of BE of the Visvesvaraya Technological University, Belagavi during the year **2020-2021**. It is certified that all corrections/suggestions indicated for the internal Assessment have been incorporated in the report deposited in the departmental library. The report has been approved as it satisfies the academic requirements in respect of assignment work prescribed for the course by the department for the said degree.

**Signature of Course Incharge**

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# INTRODUCTION

Obscenity refers to a narrow category of pornography that violates contemporary community standards and has no serious literary, artistic, political or scientific value. The definition of obscenity still isn't clear. The concept of obscenity differs from nation to nation and it depends on the moral and cultural values that have shaped that country. Obscenity changes with time, values, society, popular culture etc. Something that was considered obscenity 30 years ago, might not be considered so now.

Obscenity is an offence in each of the seven continents of the world. However, the quantum of punishment and strictness of law vary from place to place. For example, in liberal countries like Japan have less stringent obscenity laws whereas the conservative countries such as Pakistan and Iran have extreme punishment for violation of such laws.

The invention of the printing press sowed the seed of modern obscenity law. There was the wide and easy distribution of sexually explicit material. The first person to be convicted on a charge of obscenity in England was bookseller Edmund Curll way back in the 1720s. He had published a new edition of *Venus in the Cloister*, a mildly pornographic work. His sentence (a fine and one hour in the pillory) was due to the fact that there was no specific law on the subject matter. Thereafter obscenity was recognized as an indictable misdemeanour under common law.

Child pornography, rather than other forms of pornographic content, has been the main concern and fear of legislators and parents since paedophiles started to use the Internet for circulating pornographic materials related to children. Paedophilia may be a form of expression involving fantasies and imaginings which may be explicitly important to minority sexual groups, the paedophiles. But while pornography may benefit from freedom of speech arguments and less severe laws, the line should be drawn with child pornography at least where physical harm to real children is involved as it almost inevitably will be with the production and use of child pornography.

Basically, Child Pornography is nothing but visual representation of sexually assaulting or abusing a child. It is a way of creating a black spot into the minds of young children which in reality creates a lot of hardships in the long run. Children are full of fun; they are colorful and full of life. An incident like this restricts their whole life like a live electric-wire and if they try to cross they will be burnt alive.

The two types of pornography receive no **First Amendment protection**: obscenity and child pornography. Sometimes, material is classified as "harmful to minors" (or obscene as to minors), even though adults can have access to the same material.

## Copyrighted Crimes: The Copyrightability of Illegal Works

Copyright law does not explicitly impose content-based restrictions on the copyrightability of works. As long as a work is original and fixed in a tangible medium of expression, it is entitled to copyright protection and eligible for registration, regardless of its content.

Thus, child pornography snuff films or any other original works of authorship that involve criminal activities are copyrightable.

Such work can be highly profitable for its makers even though society does not necessarily benefit from, and might even be harmed by, the work. Along with revenue from sales, the author of an illegal work may also be able to collect damages for infringement. This scheme does not benefit society and should be revised.

Imagine that a photographer takes an original pornographic photo of a child and registers it. After registration, the photo finds its way to the Internet and is downloaded by various users. Assume that all individuals who broke the law are convicted and incarcerated. While serving time, the photographer files multiple lawsuits for copyright infringement. Even if the photo is no longer available online, the photographer can sue for copyright infringement and receive damages. In this case, the convict can profit from her unlawful activity, while the victim receives no compensation. Society does not benefit. The content is criminal and should not be protected by law; instead, profits from the crime should be minimized.

## LEGAL PROVISIONS

The fundamental object and purpose of criminal law is not only to protect and to conserve the safety and security of primary personal rights of individuals, such as right to life, right to body, right to property, right to habitation, etc. but also to protect and guard public morals and public decency and to conserve the moral welfare of the State.

### A. Obscenity

The legal provisions related to obscenity, are mainly given under the **Indian Penal Code, 1860** (referred to as IPC) and the **Information Technology Act, 2000** (referred to as IT Act) as far as India is concerned.

The law does not clearly define what would constitute an obscene act, but it would enter the domain of the state only when it takes place in a public place to the annoyance of others. Temple art or nakedness of sadhus are traditionally outside the purview of this section.

#### **Indian Penal Code, 1860**

##### **Section 292**

**Clause (1)** states that the publication of a book, pamphlet, paper, writing, drawing, painting, representation, figure, etc., will be deemed obscene, if

- i. It is lascivious or
- ii. Appeals to the prurient interest
- iii. If its effect, or the effect of any one of the items, tends to deprave and corrupt persons, who are likely to read, see or hear the matter contained in such materials.

**Section 293** also bans the selling of obscene objects to young persons and prescribes punishments for the same.

**Section 294** of IPC punishes a person for committing an obscene act in public.

### **Information and Technology Act, 2000**

This Act gives provisions to prohibit obscene content in electronic form.

**Section 67** of IT Act gives punishment for publishing obscene material in electronic form.

The **Cable Television Network regulation Act, 1995**, prohibits the telecast of obscene content on television.

**Sections 4 and 5A of Cinematographs Act**, provides that the films should be examined before release

Any obscenity in electronic form can only be tried under the IT Act and not under IPC. The provisions of Section 292 are not applicable to works done in public interest such as in cases of science, literature or religious purposes. It also conflicts with Article 19(2) of the constitution which is about the freedom of speech and expression

## **B. Child Pornography**

### **Information Technology (Amendment) Act, 2008**

Till 2008, there were no specific laws governing the heinous crime of Child Pornography and if such kind of crimes used to take place then the obscenity laws were made to forward to cover up the issue. But in 2008, the Information Technology (Amendment) Act, 2008 came into force which tried to put an emphasis on the “child pornography” issue as well. So, in 2008 an incident took place which revolved around a child.

A case was filed in the High Court of Delhi, where a pornographic MMS of children was circulated online on a popular site. So, the offender was taken into custody under **Section 67** of the Information Technology Act, 2000 (under which it punishes a person for transmission and distribution of obscene material through electronic media platform) and also under **Section 292** of Indian Penal Code (Sale of obscene material).

### **Optional Protocol on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OP)**

This protocol draws special attention to the criminalization of these serious violations of children's rights and emphasizes the importance of increased public awareness and international cooperation in efforts to combat them.

Based on this protocol the offenders of child pornography can be penalised.

India gave its consent and signed the protocol on 15th November 2004 and ratified it on 16th August 2006.

This Protocol allows the Committee on the Rights of the Child to hear complaints that a child's rights have been violated. Children from countries that ratify the Protocol can use the

treaty to seek justice if the national legal system has not been able to provide a remedy for the violation.

## **Protection of Children from Sexual Offences Act, 2012 (POSCO)**

This act plays a pivotal role in criminalizing the offence of child pornography. The two legislations target different parts of child pornography.

**Section 67B** was incorporated to deal with the object of child pornography, it specifically criminalizes pornographic portrayal of a child.

**Section 14** of POSCO on the other hand chose to target the subject of child pornography. It forbids and criminalizes the utilization of the child for the purpose of pornography.

This eventually leads to two distinct forms of criminal liability. Whether or not the child is having consent is an absolutely irrelevant consideration while computing the offence of child pornography.

The act is gender-neutral for both children and for the accused. With respect to pornography, the Act criminalises even watching or collection of pornographic content involving children. The Act makes abetment of child sexual abuse an offence.

## **TESTS FOR OBSCENITY**

The test of obscenity has been laid by several countries based on certain moral principles and decency codes of the particular country.

### **A. Hicklin test**

The Hicklin's test was laid down in English law in the case of Regina v. Hicklin. The court held that all material tending to deprave and corrupt those whose minds are open to such immoral influences was obscene, regardless of its artistic or literary merit. On Application of Hicklin's test, a publication can be judged for obscenity based on the isolated part of the work considered out of the context. While applying Hicklin's test the work is taken out of the whole context of the work and then it is seen that if that work is creating any apparent influence on most susceptible readers, such as children or weak-minded adults.

### **B. Roth test**

In 1957, a new test was developed by US courts to judge obscenity in case of Roth v. United States. In this case it was held that only those materials which had the tendency of exciting lustful thoughts were found to be obscene and the same has to be judged from the point of view of an average person by applying contemporary community standards. This test was sharper and narrower than the Hicklin's test as it does not isolate the alleged content but limits itself to the dominant theme of the whole material and checks whether, if taken as a whole, it has any redeeming social value or not.

### **C. Miller test**

The Miller test, also called the three-prong obscenity test was established in 1973 in case of Miller v. California is the US Supreme Court's test to determine whether something is obscene. The Miller obscenity test asks:

- whether the average person, applying contemporary community standards,



- would find that material, taken as a whole, appeals to the prurient interest
- whether the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by law
- whether the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

India has adopted tests from other countries to determine the element of obscenity in its court cases. The tests have changed over time according to its adaptiveness in the continuously evolving society.

## CASE STUDIES

### 1. Case Study on child Obscenity

#### a. Case study 1: **Ranjit D. Udeshi v. State of Maharashtra**

**Petitioner:** Ranjit D. Udeshi

**Respondent:** State of Maharashtra

**Date of Judgment:** 19/08/1964

Indian Judiciary, for the first time defined obscenity in this case.

The constitutionality of **section 292 of the Indian Penal Code (IPC)**, which punishes the sale of obscene books, was upheld in this case. Ranjit D. Udeshi was one of the four partners of a firm that owned a book-stall. The partners were prosecuted under section 292 of the IPC for selling copies of an allegedly obscene book, **Lady Chatterley's Lover**, by DH Lawrence. Section 292 punishes any person who sells any obscene book or other material. Udeshi argued that section 292 is violative of the rights to freedom of speech and expression under article 19(1)(a) of the Indian Constitution and that the book is not obscene if considered as a whole.

In the 1965 judgement of this case, the SC had adopted the English Hicklin test which had raised a few problems. The Sec 292 of IPC required any material to be taken as a whole whereas the Hicklin test required the material content to be checked in isolation. So there was a conflict of interest between the two.

In this case Hon'ble Supreme Court observed that the test of obscenity is, whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to immoral influences, but the test of obscenity must agree with the freedom of speech and expression guaranteed under our Constitution.

**Judgment:** The Court examined the text of Lady Chatterley's Lover and concluded that it was obscene under Hicklin. The appeal against conviction was thus dismissed.

The conditions of the Hicklin test were liberalized and applied until the case of Aweek Sarkar.

## b. Case study 2: Aveek Sarkar v. State of West Bengal

**Appellants:** Aveek Sarkar

**Respondent:** State of West Bengal

**Date of Judgment:** 3 February, 2014

In 1994, **German magazine STERN** published an article with a picture of Boris Becker, a world renowned tennis player and his dark-skinned fiancée, German actress Barbara Feltus, covering her breasts with his hand. The article that contained the photograph portrayed Becker as an opponent of racial discrimination, and signified a choice of love over hatred.

The article along with the photograph was published in an Indian magazine **Sports World** and a Kolkata based newspaper **Anandabazar Patrika**. Aveek Sarkar, a lawyer filed a case under **Section 292 of IPC** against the newspaper and magazine alleging the photograph will corrupt and deprave the minds of the young and were against the cultural and moral values of society. He further alleged that both the publishing houses had published the photograph particularly with the intent of increasing sales. It was further contended that the accused should also be prosecuted under Section 4 of the **Indecent Representation of Women (Prohibition) Act, 1986** since the photograph prima facie gives a sexual titillation and its impact is moral degradation and would also encourage the people to commit sexual offences.

The respondents claimed that since there was no action taken against the sale of STERN in India, they reasonably assumed that the reproduction of the photograph was valid in the eyes of law. **Section 79** of the Indian Penal Code states that nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

The respondents then appealed before the High Court of Calcutta under Section 482 of the Code of Criminal Procedure for quashing the proceedings pending before the Alipore Magistrate Court. The court refused to quash the proceedings against which an appeal was preferred before the Supreme Court.

This judgment is particularly significant because it rejects the Hicklin Test as it is problematic in many respects. Due to this impact, the court adopted the Roth test (community standards test). The Court then had to examine the context in which the photograph appeared and the message it sought to convey.

**Judgment:** The Court found no offense under Section 292 of the IPC or Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

The Court reasoned that the photograph was not obscene because it did not excite sexual passion or tended to deprave or corrupt the minds of people in whose hands the magazine or newspaper may have fallen. The photograph and the article in which it appeared conveys the message of racial equality and promoted love and marriage between persons of different racial background

## 2. Case Study on child Pornography

### a. Case study 3: Jared Fogle Case

**Petitioner:** Jared Fogle

**Respondent:** United States Of America

**Date of Judgment:** 26/02/2018

Jared Fogle, who for years served as the spokesman for the sandwich chain Subway, is facing federal charges that he repeatedly paid to engage in sexually explicit acts with children and that he received and distributed child pornography, according to court documents.

#### The Crime

Jared Fogle faced charges for several different incidents. In addition to paying minors for sex, Fogle did so through interstate travel. There was also the issue of child pornography. In this child porn case study, there were 400 pornography videos in the defendant's possession. Fogle received many of those videos from the head of his own charity organization.

#### The Punishment

After his hearing, a judge sentenced Fogle to 188 months in prison. That works out to over 15 and a half years in a prison facility. However, Fogle could get out sooner. There is a 13 year minimum, which will then lead to parole. He has a lifetime of supervised release.

However, Fogle's lawyers hoped for a much less serious sentence. His lawyers requested a sentence of five years. Although the prosecutor wanted 12 years for Fogle, the judge felt that more time was necessary. It was a harsh punishment that came at the discretion of the judge.

In addition to ordering Fogle to serve prison time, the judge also ordered Fogle to pay restitution. He paid about \$1.4 million, which was split by the 14 victims of his crimes.

### b. Case study 4: Operation P-Hunt

- **5th Oct, 2020**
- **Thiruvananthapuram**

In a statewide crackdown on child pornography on social media, the police on Monday arrested **41 people including IT professionals**. As many as 268 cases were registered for circulating pictures and videos with child porn content through the WhatsApp and Telegram messenger services.

In the raids conducted at 326 locations across the state as part of Operation P-Hunt, 285 electronic devices including mobile phones, modems, hard disks, memory cards, laptops and computers with videos and pictures of children were seized.

The arrested were booked under the **IT Act and POCSO (Protection of Children from Sexual Offences) Act**. The accused were identified and arrested with the help of the Cyberdome of the state police and Interpol.

ADGP (Headquarters) and nodal officer of Cyberdome Manoj Abraham said the seized devices contained videos and pictures that appear to be of **children below the age of 15**. The arrested persons were found to be using all kinds of encrypted handles to upload and download such materials. Some are suspected to be involved in the trafficking of children as many chats to this effect were found on the confiscated gadgets.

Malappuram district tops the list with 47 number of cases, while the most number of arrests and raids were reported in Palakkad. A total of nine persons were arrested in Palakkad alone. The raids - led by IG (Crimes) S Sreejith - were carried out by the Countering Child Sexual Exploitation team with the support of the local police.

"The details of the other people involved in circulating images and videos of children are being collected. WhatsApp and Telegram groups are also being monitored. Continuing our policy of zero tolerance in such matters, stringent action will be taken against all individuals involved in the racket," Abraham said in a statement. A CCSE team official also said they have detected several groups on messaging service Telegram engaged in circulating child abuse material. The groups have been shut down with the help of Telegram and efforts are on to identify the group members and admins," said the official.

## **The regulations on Internet content in India:**

In India, the internet content is completely unregulated. The acceptable level of obscenity in films, photographs, paintings, and stories and novels, is not yet settled in India. There is no law or regulation that requires censorship of films and shows that are streamed online on the online video streaming platforms. An NGO has filed a petition in Hon'ble Supreme Court of India seeking framing of guidelines for the content on online video streaming platforms. The Supreme Court has issued notice to the Centre in response to this petition. This petition is filed for seeking guidelines in order to regulate the unregulated, uncertified, pornographic, obscene, sexually explicit, vulgar and profane content on these platforms.

However, as on date, the online platforms are free to provide contents but a proper disclaimer would be a check in favor of the content provider showing efforts to restrict the content to appropriate audience.

## **STATISTICAL ANALYSIS**

**India has emerged as one of the biggest contributors and consumers of child pornography** despite a crackdown against such material on the Internet.

Alarmingly, 35-38 per cent of the total porn uploaded on the web is related to children or teenagers. Analysis by cyber security experts showed that 35-40 per cent of content downloaded daily from India is pornography, which would be in several thousand terabytes.

*"The content and consumers of child pornography are growing at a sharp rate. There are no exact statistics but our findings show that search engines get over 1,16,000 queries every day related to child pornography. The volume of such content can be estimated as every second around 380 people are looking for 'adult' content on search engines. Around 25 per cent of all search engine queries are related to pornography which will be about 68 million search*

*queries a day,"* said Kislay Chaudhary, director of the Indian Cyber Army.

While there are studies that indicate risk factors that may increase the potential for exposure to sexual abuse, the ages and backgrounds of victims of sexual abuse know no bounds. Child sexual abuse images and videos found online involve both boys and girls from 0-18 years old. In their assessment of reports to their tipline, the **Canadian Centre for Child Protection** found that children under 12 years old were depicted in 78.30% of the images and videos assessed by their team, and 63.40% of those children were under 8 years of age. Among that same material, they found that 80.42% of the children were girls, while 19.58% were boys.

## CONCLUSION

Child pornography is not only a legal issue, but also a moral issue as it has the propensity to adversely alter a child's perception of humanity. The repeated circulation of pornographic content over the internet worsens the trauma of child victims by keeping the wounds fresh.

The International Centre for Missing & Exploited Children (ICMEC) analyzed child pornography laws in **184 Interpol-member countries** and found that more than half of them had no legislation directly addressing the problem of child pornography, and those countries where laws were in place were unsuccessful in dealing with it efficiently. As of now, only **45 countries** in the world have comprehensive laws to combat child pornography.

Despite having some international conventions in place, we, as a global community, have had setbacks in chalking out conclusive guidelines for their implementation. A universal global framework for the detection, assessment, and prosecution of online child pornography is the need of the hour, and it must be implemented as a principle of international law. The framework should be more inclusive and less dogmatic in its approach, and it should be one that reinforces redressal mechanisms through global cooperation and participation.

## SUGGESTIONS

It is the need of the hour that proper identification of the potential child abuser is implemented and along with it the sanction for the same should also be imposed on the wrongdoer. Some sort of fear needs to be created in the minds of the lawbreaker so that his hands shiver before committing such heinous crime. The Indian judicial system should aim at taking appropriate measures for the soon possible eradication of this dangerous social evil. And if the proper measures are not taken within a certain time period then the future of the country will be at risk and in the penultimate situation it might get doomed as well.

### **What should one do if they discover a suspected Child Pornography Website?**

If you come across a website that you believe is depicting child pornography, the first step is to contact your local law enforcement agency. While many of these crimes involve federal law, local authorities will know where to route the investigation.

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