IMPACT OF INFORMATION TECHNOLOGY ON THE LEGAL CONCEPT OF OBSCENITY

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(LAW)

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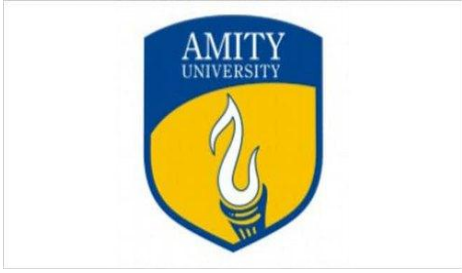

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CHAPTER 6

CONCLUSION AND SUGGESTIONS

1. FINDINGS

An extensive study of the legal concept of obscenity has been carried out in this research. The main aim of the study was to analyse whether the development of information technology has in any manner impacted the legal concept of obscenity. The research was faced with certain hurdles and limitations especially due to time constraints and sensitive nature of the topic under study. But despite these constraints, the research has been a success and has not only reached its aims and fulfilled its objectives but it also arrives at some practical solutions in the age of information technology.

The study encompasses a doctrinal analysis of the legal concept of obscenity through jurisprudential analysis, comparison of legislations and official documents. A study of important case laws under the legal system of UK, USA, Canada and India was also undertaken. Case laws offer a significant scope for analysis, as much of the legal concept of obscenity has been developed by way of judicial decisions rather than legislations. This chapters critically analyze the regulation of obscene content– uncovering the gaps in the legislative and judicial approach and how these are becoming ineffective in the age of information technology.

Since cyber world is different from the real world the researcher has examined as to why we need a different approach to tackle obscenity in the public domain. Under each chapter an extensive study has been carried out including all possible dimensions of the subject. Each chapter has a separate conclusion which helps in consolidation of the analysis at the end of this study. This has helped in systematically arriving at the final conclusion and suggest appropriate solutions to the problems. This part of the study

finally winds up the study and incorporates findings, testing of hypothesis and suggestions. research

The study arrives at following findings:

i) THE DOMAIN OF LEGAL OBSCENITY LARGELY CONSISTS OF SEXUALLY-EXPLICIT CONTENT WITHOUT ANY SOCIAL VALUE

Since the concept of obscenity is not a static one and changes according to the changing mores of time and place, it was analyzed from different perspectives so as to arrive at the essence and gist of the concept. The etymological, cultural, religious, historical, anthropological, social, conservative, liberal, feminist and legal angles of the concept of obscenity were explored. During the study it came to be realized that public morality and 'permissible norms of sexual behavior in public life' plays a crucial role in the determination of obscenity.

On the basis of detailed examination, the researcher arrives at the conclusion that the concept of legal obscenity is nothing but a legal restraint on how human sexual life is to be regulated in public domain. Usually in most societies or rather all societies, human choice is not left unbridled and unregulated in matters relating to sex. The individual preferences related to 'public display of sex' are restricted by the dictates of the society they live in. These social dictates take the form of public standards of decency. Any violation is looked down upon as embarrassing or rather shameful and also fit for social condemnation.

An 'overt display of sex' or 'sexual-explicitness' of extreme kinds is against the norms of society and thus termed unlawful under the obscenity laws. Usually the terms *'prurient interest'* or 'lustful' are used to indicate 'obscenity'. So obviously the meaning of the word 'obscenity' centers around these terms. But the problem with the use of this terminology in the definitions is that it tends to render it vague and ambiguous. Ordinarily, wherever 'sex' is linked to some human relations and emotions such is

marriage or love, etc. then it is not looked down upon as 'lustful' or 'dirty'. But even in these socially acceptable relations where 'sex' is ordinarily accepted as the norm, its display in public life is a tabooed subject. 'Sex' side of life is usually preferred as a very personal and private aspect of human lives.

The display of these emotions in public is usually forbidden in civilized societies. Therefore any depiction of 'sex' is not meant for public domain and is usually relegated to the private domain. Accordingly, private possession of obscene content is not illegal in most legal systems. Therefore obscenity law becomes operative only when such content or acts cross the limits of privacy and ventures into the public domain or gets circulated. Law merely prohibits circulation or dissemination or display of obscenity.

Although in the ordinary sense of the term, 'obscenity' may be expressed by people in different connotations but in legal sense of the term it is largely restricted to 'sexually-explicit' content meant for the purpose of arousal of lustful desires. But when the sexually-explicit content has some value to the society, such as for the purpose of health, education, art, medicine, scientific, historical, religious etc. then such a content is not designed for sexual arousal and is then not considered legally obscene. For instance education on menstrual hygiene, family planning or AIDS is not considered 'obscene'.

Even religious and historical art may be saved from condemnation on the ground that it arouses emotions which are beyond desire. The effect of religious and historical art is a sense of admiration, aesthetic, spiritual, reverence and detachment but not lust. *Khajuraho* and other similar ancient art forms depict love and sex as sacrosanct and a compulsory part of family life for the continuity of human race.

There the depiction of woman is not for exploitation or lust, instead she is revered and respected for being a symbol of fertility and motherhood and an important part of human existence. Here 'sex' and marital bliss is a celebration and not exploitation. Vatsayayana's *Kamasutra,* is an oldest Hindu text or treatise on 'sex' or erotica. It preaches, intimacy, restraint, control of passions, respect for the partner, emotionally

fulfilled life, the good and the bad side of 'sex', and an understanding of bodies, etc. Taken as a whole, such content cannot be termed obscene.[328]

When the purpose of 'sexual depiction' is purely lustful, commercial, vindictive, violent, abusive and debasing, it is no longer justified socially as well as legally. There is no positive contribution of such content to the society. Instead of tending to gentle human emotions and feelings it may end up in endorsing a culture of vulgarity, violence, brutality and exploitation for 'sex'. Such a depiction portrays an inhuman and uncivilized culture where 'sex' becomes a tool for exploitation and earning profit. Decency is the prime requirement for a civilized social order. Over exposure to sex diverts the energies of the people to unproductive ends. Therefore efforts of society are justified to discourage and prevent excessive preoccupation with sex.

Civil society cannot afford to be indifferent towards the various forms and degrees of human sensuality which may emerge within it. It has a stake in the encouragement of some kinds of pleasures and desires and the discouragement of others as part of social norms. There can be no absolute separation between the political and the sensual sides of life. Government can also not remain unconcerned towards the sensual side of life. Harry M. Clor mentions that a society where the population is merely devoted to the satisfaction of sexual cravings and personal gratifications may represent 'sexual freedom' but not 'real democracy'.[329]

Thus the main purpose of obscenity law is to keep a check on exploitation of sex for commercial or criminal activities. Also it ensures a disciplined society where passions and desires are kept under control. Only in such a disciplined society, there will not be over-indulgence in sex, women will feel safe, health of the population would be ensured through safe sex, there will be respect for marital relations and legitimacy of the off-springs would be ensured. That does not mean that these social and legal parameters

[328]Why Kamasutra is not all about sex", https://timesofindia.indiatimes.com (visited on September 20, 2019).
[329]Harry M. Clor, *Obscenity and Public Morality* 200-201 (The University of Chicago Press, 1969).

need to tilt towards the extreme end of total prohibition or restrictions. Some kind of balancing act would do to maintain the dignity of human existence in a civilized society.

ii) OBSCENITY IS NOT A LEGALLY PROTECTED SPEECH

Many supporters of free-speech would argue that this sexual content is a part of constitutional freedom. But the problem is that free speech in no way envisages 'obscene and pornographic' content as part of this cherished freedom. Such an extended interpretation of 'free speech' seems too far-fetched. Even historically speaking, the idea of 'free speech' was associated with political liberation rather than sexual liberation of mankind in all major legal systems of the World.

According to Mill's doctrine, in a civilized society, the only rightful purpose for exercise of power upon any individual without his willingness is for the prevention of harm to others. It cannot be done for his own benefit, whether physical or moral. He cannot be made to do or refrain from doing something which others think would be wise to do or would be for his own good in other's opinion. But Mill also imposes a condition for the applicability of this doctrine only to human beings in the maturity of their faculties. He makes exemption only for children and backward societies in whose case this doctrine would not apply.[330]

The main emphasis of *Mill's* doctrine is that laws in general may be used to punish only those public acts which are injurious to public peace and security and not those that are injurious to personal ethics and moral standards. Law cannot be used to impose moral or ethical standards in society. But at the same time he affirms that the legal control of harmful acts of personal nature is justified in case of children and backward societies. It is submitted that India has a pluralistic society with a vast majority of socially and educationally backward class population. They may not be having their

[330] John Stuart Mill, *On Liberty,* Chapter 1 in H.L.A HART, *Law, Liberty and Morality,* 4 (1963), Reprint (1969).

reasoning faculties adequately developed as to decide what is best in their interest. They would obviously fall within the excluded class of *Mill's* doctrine.

The paternalistic approach of the State in restricting free speech on grounds of morality and decency is a political function of the State. Every State would naturally be interested in ensuring the well-being of its citizens which in turn depends upon their thoughts and beliefs. Law is not meant to merely prevent the crime and catch the offenders. It has a much wider responsibility. Character buiding, discipline and encouragement of good behavior amongst the public is also its important purposeA disciplined society is in the interest of the developmental goals of the State. Lord Devlin was also of the view that a society may rightfully take steps for the preservation of its own existence which could be jeopardized by immorality including private sexual immorality.[331]

The vulnerable and weaker sections of the society cannot be left to their fate. It is the duty of the State to ensure a kind of environment where there is no exploitation of the weaker sections of the society. Perhaps the reason for restriction on free speech also lies in the interest of State to protect its citizens from over indulgence. The paternalistic approach of the State is also supported by Lord Devlin where he reasons that unlimited engagement in vice may weaken individual who then does not remains of any use to the society and when quite a good number of individuals get so weakened the whole society may ultimately become weak and perish.[332]

It may be emphasized that implementation of ethical standards is an essential purpose of law making.[333] It is the duty of the State to ensure that the vulnerable class in the society is protected from any kind of harm – whether physical or moral. Moreover, in the age of internet when children and adolescents have easy access to mobile phones and computers, State needs to step in to prevent them from causing any harm to themselves

[331]*The Enforcement of Morals*, pp.13-14 as cited in H.L.A HART, Law, Liberty and Morality, 19 (1963), Reprint (1969).
[332]Devlin, "The Enforcement of Morals", p.111 in Harry M. Clor, *Obscenity and Public Morality* 187 (The University of Chicago Press, 1969).
[333]Harry M. Clor, *Obscenity and Public Morality* 176-177 (The University of Chicago Press, 1969).

because of exposure to obscene content. Also the interest of rural and backward communities would justify imposition of morality through obscenity laws. Therefore in India, reasonable restriction on the circulation or transmission of obscene content is justified and is in accordance with *Mill's* doctrine. But at the same time a complete ban on all sexually-explicit content would not be the right choice.

Ideally, a democracy is understood as a form of government where there is sovereignty of citizens. This sovereignty assumes that the citizens have access to information on the basis of which they are able to take independent decisions. They have freedom to choose while electing their representatives who ultimately form the government. This autonomy of the citizens is the hallmark of a true democracy. It is this right to know and freedom to vote and elect which is the foundation of a democracy.

Obscenity is not a protected speech under the Constitution of United States as held in *Roth* v. *United States*[334]. It was clarified by Justice Brennan in this case that the First Amendment aims to ensure unfettered interchange of ideas in order to bring about of political and social changes as per the people's desire. It was asserted that all ideas with the slightest redeeming social importance would be included as part of the Amendment.

In the landmark case *Miller* v. *California*[335]where it was reaffirmed by the Supreme Court of United States that commercial exploitation of obscene material cannot be equated to free and robust exchange of ideas and political debate and demeans the high purposes of the historic struggle for freedom. It was asserted that right to free speech is not absolute and is subject to limitations for the maintenance of law and order, security and social progress.

This notion of 'free speech' envisages a two-way communication and discussion between the 'government' and the 'governed'. It also allows formulation of a strong opposition which is vital to the proper functioning of a government in a democracy.

[334]*Roth* v. *United States* 354 U.S. 476 (1957).
[335]*Miller* v. *California* 413 U.S. 15 34 (1973).

Freedom of speech has been accorded in democracies to attain the higher purposes of political autonomy and governance of society free from dictatorship and autocratic rule. This kind of political say in the functioning of government is in accordance with the democratic ideals. But democratic decision making would in no way require exposure to sexually-explicit content or pornography or any other sexual content.

Freedom of speech does not mean unrestricted exhibition and circulation of 'lustful sexual content' in the public domain under the pretext of free speech. It would be totally erroneous to extend free speech to include pornography or any similar content by any stretch of imagination. This would be an incorrect interpretation of freedom of speech. A commercialized version of sexual content produced and distributed solely for the purpose of 'sexual stimulation' would not qualify for protected speech at all.

'Sexual expression' is basically non-political in character while protection of free speech is political in nature. Accordingly, the Constitution framers in India had imposed reasonable restrictions on freedom of speech and expression under Article 19(2) of the Constitution. The restriction on freedom of speech and expression on grounds of 'decency and morality' justifies obscenity laws in India.

Thus restriction on obscenity is a pre-requisite of free speech in order to maintain societal balance. Freedom can be broad but not boundless otherwise it may create havoc. Men in a free society do need some sort of guidance or standards in respect of moral issues in the society. It is submitted that freedom of speech can never be absolute. If every person starts acting according to his or her own free will then the society may end up in having no freedom at all. Freedom of speech is not just complete and unbridled freedom to do as we please, but actually implies "rational freedom" which is the sole aim of a democratic society.

iii) 'COMMUNITY STANDARDS' TEST IS INAPPLICABLE IN CYBER AGE

The 'community standards' formula of the *Miller* test takes into account the consensus within a community at local level only. It may not be properly applicable at State or National level where there could be lack of consensus on sexual matters and issues related to public decency. In a pluralistic society, people's perception on obscenity standards differ considerably. *Miller* test may also be improper to apply in case of cyber obscenity as the community in that case is a global one and consists of people who have different tastes and perceptions as regards acceptance of sexual content.

Miller speaks of *'contemporary community standards'* which is imprecise and lacks objectivity. As *'community standards'* keep changing from place to place and time to time and therefore this again results in subjective evaluation of 'obscenity'. Also, it may be noted that both *Roth* and *Miller* do not clarify the meaning of 'obscenity' but rather stress on 'social value' of the content. The expression 'community standards' became more and more complicated with increasing technological advancements especially the information technology.

The *Miller* test left it to the discretion of local communities to set up their own standards of obscenity. But the technological advancements undermined the power of the courts to impose local community standards of obscenity in the globalized world. The high-tech modes of transmission of information and communication have enabled easy dissemination of sexually explicit materials on person to person basis without the knowledge of official agencies. Thus with new technologies, imposition of community standards became impractical.

When *Miller* test talks contemporary community standards, it leaves us with obscurity as these standards are not constant even within one geographical community let alone the global community in a cyber world. The cyber world is a pluralistic world which comprises of users who do not share common moral or social background. Even

their legal norms differ considerably and their tolerance levels of sexual-explicitness would not be the same. As a result, application of '*community standards'* in the cyber age would not be a feasible option.

The first prong of *Miller* test addresses the work in the nature of *prurient interest* according to the prevalent community standards as applicable to the average person. Then the second prong of *Miller* test further confirms the prohibition applies to a *patently offensive sexual conduct.* Finally the third prong allows protection of *serious, literary, artistic, political or scientific* works.

It would therefore mean that though law aims to keep a check on *unwanted sex* in public space, it is not totally against depiction of 'sex' in public life. Those depictions that have some redeeming value in terms of art, literature, politics or science may be allowed. The test however, gives no criteria to judge this redeeming value and leaves it to the discretion of the judge and thus offer a subjective basis of judging obscenity. An expert opinion in this regard would also be subjective.

Compared to the rise of other communication technologies, the Internet has expanded at a phenomenal rate. In its wake there are many questions to be solved. One of the most discussed is regulation of sexually explicit material. The legislative and judicial interventions in controlling and regulating the obscene content in public domain have been at work since long. But none including the *Miller* test seems to be quite effective in controlling cyber obscenity.

iv) 'SEXUALLY-EXPLICITNESS' IS A *UNIVERSAL PHENOMENA* IN CYBER AGE

The general public perception about obscenity has changed with time. History of mankind has witnessed a constant change in social acceptance of fashion, films, styles, art, etc. which may have been thought of as 'obscene' initially but with the passage of time these have now found acceptance. With the growth of information technology and

associated cultural exchanges, there is a simultaneous growth in acceptance of 'adult' content by the masses.

There is a general atmosphere of openness in contrast to the previous era of secrecy and privacy. Any work that talks of 'sex' is not seen as *poison* any more as was done in Comstock's time. The judiciary could not remain oblivious of the factual situation. As a result judicial development of the concept of obscenity has also moved on to determine obscenity on the basis of contemporary community standards. A slightest redeeming social or artistic or scientific value would save the work from getting banned.

The internet has helped in the growth of sexually-explicit content in the public domain. The opposite of this also true i.e. sexually-explicit content has enabled the growing popularity of the internet. Therefore internet and sexual-explicitness are complementary to each other. Easy transmission, user friendly mechanism and cost-effectiveness of online transmission has made this possible.

Also there is no threat of detection or prior-checks as in case of other media. Privacy of the sender and the receiver is also ensured which is not possible in case of physical exchange of content. All these aspects of technology has resulted in unlimited growth of sexual-explicitness.

The growth of information technology has also resulted in increased claims on pornography in the name of free speech.[336] Sexual revolution assisted by internet is obvious throughout the world. The IT enabled free speech has taken the world to a new existence viz. social media, *Facebook, Whatsapp, Instagram,* etc. where a lots of sharing of ideas, views and information takes place. This free speech in the cyber world hardly knows no physical limitations or geographical boundaries.

[336] Joan Mason Grant, Pornography Embodied – From speech to sexual practice", 152 (Rowman & Littlefield Publishers, Inc., USA, 2004).

People have suddenly been introduced to a new mechanism of expression without any physical contact with the cyber community. As a result the user feels less inhibited and more comfortable in expression of intimate desires. Cyber world gives an illusion of privacy though actually it is the privacy that is at stake. Amateur sexual content can be easily produced and uploaded online without much investment and hassles.

Economic considerations of online sexual content cannot be ruled out. Governments all over the world are struggling hard to tame the internet but with growing technological advancements, this is a big challenge. India is no exception to this technological revolution.

E-mail also offers another popular mode of communication and information sharing through the medium of internet. Messages, file attachments and images irrespective of the size can be easily transmitted from one E-mail account to another. This method of transmission is faster and confidential as compared to the physical delivery of material in the earlier times. Now the delivery of message is more on a person to person basis without the intervention or help of a postal carrier.

The E-mail message reaches its destination – safe and undetected with anonymity of the sender and the receiver ensured. The latest mobile devices and handsets have enabled users to send e-mail messages even while on the move. Therefore if any sexually-explicit content is exchanged between two or more persons by way of e-mails then there is no mechanism to keep constant and regular checks on any of these transmissions.

v) INFORMATION TECHNOLOGY HAS DILUTED THE LEGAL CONTROL OF OBSCENITY

Just like other forms of broadcast and television media such as radio and cable television, internet too has a pervasive presence in our homes and work spaces. As the information technology has taken over the world in an unprecedented manner, computers,

laptops, smartphones have become a mandatory part of today's life. These devices are not only in use by the educated class but are also commonly used by the illiterate ones. Even children of all age groups are dependent on smart phones and other such devices for their day to day activities.

Internet has become accessible to one and all irrespective of their age. Also internet has become a mandatory requirement of the modern lifestyles. There cannot be effective restriction on the age of a user as the Internet does not distinguish between an adult and a non-adult while allowing access to the cyber world. Not only this increases the risk of children getting prematurely exposed to 'sex' but there is equally great risk of their falling into the trap of online sex predators.

As an internet user, the individual becomes a global citizen as part of the cyber community. It becomes all the more difficult to keep a check on obscene content when it is not legally banned in all countries of the world to which the users physically belong. For instance, if a movie or book is banned on account of obscenity in India, it can be easily downloaded online from foreign websites where there is no such ban. This results in failure of domestic laws to curb obscenity.

Thus, broad parameters of obscene and non-obscene have become incomprehensible in the online world. In such a scenario, the legal ban of obscenity becomes weak and meaningless. It is submitted that if people are able to watch online porn or other adult content without much restriction then this indicates that the legal control of obscenity has become diluted and is not workable any more.

It may be pointed out that free adult sites are available in huge numbers on the internet. The free adult sites provide almost 70 to 80 percent of the total adult content available online. These sites are used as bait for pay sites and make their money by successfully guiding viewers to premium services on other sites.[337] The online

[337]Yogesh Barua and Denzyl P. Dayal, *Cyber Crimes – Notorious Aspects of the Humans and the Net* (Dominant Publishers and Distributors, New Delhi, Volume three, First edition 2001).

availability of rape videos on porn sites are also indicative of poor global trends in the legal control of obscenity.[338] Even in India, there have been reports of online sale of rape videos and use of the same to further blackmail and exploit the victim.

In addition to this, there exists a wide variety of sexually-explicit material available on the internet sites. The availability of online semi-nude and nude images to hard-core sexual content makes the task of demarcating the legal boundaries of 'obscenity' all the more difficult. This wide-ranging variety of online sexual content combined with the subjectivity of the legal definition of 'obscenity' provides ample scope for perplexity. It is quite possible that easy accessibility and availability of such a huge variety of sexual content in the public domain conveys the impression of its legality to the common man. Since what is easily available might have been legally permitted also.

Even the law in India seems to be unclear as to where to draw the line. It is still stuck in the ancient terminology for defining obscenity. 'When the researcher accessed the official website of cyber cell of Delhi Police it was noticed that the list of cybercrimes given therein nowhere mentions cyber obscenity even though the Information Technology Act 2000 clearly treats this as a crime.' [339]

The official statistics hardly indicate any crime registered under section 292 of the IPC in the past few years which also indicates that the printed version/books/cinematic version of sexual content is not much of an issue in the contemporary times. Perhaps it is also because in all such forms, a pre-check or pre-censorship is possible and what comes in public domain is only that which is legally permissible. But the same is not the case with cyber obscenity where pre-censorship is hardly possible.

In the printed form obscene books and magazines and videos could be seized and destroyed while complete removal of the objectionable content from the cyber world may

[338] www.raped-tube-tube.com/movie/irakrapeo1.shtml ; www.raped-tube.com/movie/islamic_rape.shtml as mentioned in Margret Grebowicz, *Why Internet Porn matters* 97 (Stanford University Press, California, 2013).
[339] www.cybercelldelhi.in/ (visited on August 18, 2018).

not be possible it gets shared to millions within a second. The widespread availability, easy accessibility, fast dissemination of obscene content combined with technical complexities have *virtually diluted* the legal control of cyber obscenity.

vi) INFORMATION TECHNOLOGY HAS TRANSFORMED 'OBSCENITY' FROM FANTASY TO REALITY

In the printed versions of pornography, the scenes and characters were mere imagination of the writers and the readers sexual appetite was fulfilled by through the fantasized version of 'sex'. Even in the idolized versions in nude art forms, the depictions were purely imaginary in nature. Then pornography moved to films and videos the sexual fantasy transformed into real acts depicted on the screen. But till this time the audience involvement with pornography remained through the screen.

Due to the developments in information technology, especially the internet, the pornography has taken up the online version where real actors are used for filming the obscene content. Even 'live sex' shows produced through use of web-cameras are available online. Sexually-explicit content is not merely confined to speech or ideas but to real action, real prostitutes performing sex before cameras including live performances. 'Candida Royalle, a feminist says that "pornography [is] like looking at prostitutes. It [is] just another version of prostitution. Instead of being with a prostitute….you look at a prostitute."[340]

The audience themselves can become producers of obscene content and circulate the same without much hassles within the comfort of their homes. A thing which was a mere fantasy in the print medium has become a 'live version' in the online form. Moreover, it is submitted that pornographic depictions cannot be equated with speech as it does not convey anything to the user and merely assists in sexual arousal.

[340]Shannon Bell, Reading, Writing, and Rewriting the Prostitute Body (Bloomington: Indiana University Press, 1994), 138. in Joan Mason Grant, Pornography Embodied – From speech to sexual practice", 125 (Rowman & Littlefield Publishers, Inc., USA, 2004).

The pornographic content which was in a mere narrative form in the printed version has turned into real performance. This real performance is not only uninhibited, but also crosses all barriers of human dignity for e.g. violent abusive sex, child porn, rape clips and beastiality. The new and latest versions of information technology have resulted in radical transformations in the way pornography and adult content is produced and consumed. Mobile technology has made things easier for circulation and transmission of amateur porn. There is no exact differentiation between consumers and producers as the user can be both at the same time.

vii) SEXUALITY VS. MORALITY IS AN ONGOING CONFLICT

Wolfenden Committee recommended that the realm of 'private morality' should not be intruded upon by law.[341] Both Hart and J. S. Mill were also not in favour of unnecessary regulation on ground of morality. However, Devlin was not so convinced and was of the view that common morality is the prime requisition for keeping the societal bonds intact. Thomas Aquinas had remarked, "mankind ought not only to be multiplied corporeally, but also to make spiritual progress."[342]

It is submitted that it may not be proper to say that law need not interfere in the personal lives of its citizens. Privacy needs to be respected but not at the cost of waywardness and indiscipline. Every nation would cherish a healthy and morally upright citizenry who can positively contribute to its growth. No doubt, law cannot compel citizens to be morally good but it can surely be guiding lamp for the prevention of evil-doings and it can promote moral improvement by setting up a legal requirement of high standards in public life.

The legal prohibition of public indecency may not be for the reason of its immorality but surely for the reason of its offensiveness to others. The law seeks to address the issue of non-voluntary exposure to such content and its offensiveness to the

[341] www.glbtqarchive.com/ssh/wolfenden_report_S.pdf (visited on July 9, 2017).
[342] V. D. Mahajan, *Jurisprudence and Legal Theory*, 694 (Eastern Book Company, Lucknow, 2008).

non-consenting persons. However, the role of moral consideration in formulation of obscenity laws cannot be denied altogether. Although law making may server other purposes also, but implementation of community ethical standards is an important purpose of legislations. Interest of the society lies in that freedom where thought and expression is not curbed as to ensure the path of progress and intellectual growth in the minds of individuals in order to secure benefit of all.

Society may also be reasonably interested in the protection of children and youth against subtle maneuverings of pseudo- artists and criminal elements whose sole interest may be for selfish purposes. 'The question is not whether this should be done; the question is how it should be done so that there may be a harmonious conciliation between divergent claims all of which are to the benefit of the society.'[343]

Nation's progress lies in ensuring freedom of speech and expression of the masses but at the same time it also lies in ensuring that the children and youth are guarded against exposure to harmful and obscene content. In *FCC* v. *Pacifica*[344], the United States Supreme Court recommended prohibition of 'indecent' material even if it is non-obscene, in case these are accessible to the non-adults. The purpose of legal curbs is not to inhibit society's progress and intellectual activity of any kind. Rather it is done to protect the young minds from direct or indirect attempts to degrade and dehumanize them. Young minds may not be trained to differentiate between the good and the bad. It is here that we need the interference of law.

In the wake of phenomenal growth of online sexually-explicit content, there are several arguments in favour and against of its regulation by the State. While liberals and those in favour of online pornography may want the same to be allowed in the name of 'sexual liberation' while conservatives may want it to be restrained on grounds of morality. Proponents of regulating sexual material claim potential of online obscene

[343]A. K. Sarkar, *The Law and Obscenity* 46 (N. M. Tripathi P. Ltd. Bombay, 1967).
[344]*FCC* v. *Pacifica*, 438 U.S. 726 (1978).

material to cause harm to women and children. On the other hand, those in favour of an unregulated Internet often justify their claim on the basis of free speech.

The proponents of online porn do not consider it as regressive and back it not because of its popularity and easy accessibility but more so because of its claim to free society and increased democratization. Although this claim to freedom through online porn culture is questionable as it may actually end up in substantive inequality.

The proliferation of structures of pornographic practices in the garb of free speech ends up in disparity in relations across gender, race and class. Such cogent forces operating in the society in intimate contexts tend to normalize inequality in such a manner that it may be difficult to dislodge them by way of legal intervention. Since it is omnipresent, therefore simply blocking some porn sites here and there won't work.

Sexual desire is but a natural side of human nature and what is needed is to *tame* this desire rather than curb it. Time has come to accept that we cannot just legislate saying that this is prurient or that it is depraving and corrupting or it has no social or historical value. Perhaps the pornographic practices in society can be best dealt by way of educational initiatives. The public narrative on sexuality would do best to avoid strict moral discourse and acknowledge sexual desire and pleasure as innate to social, cultural and political existence of humans.

viii) OBSCURE DEFINITION OF 'OBSCENITY' RESULTS IN UNDUE HARASSMENT OF ARTISTS

Most of the case laws on obscenity in India remain restricted to objections on Bollywood movies or works of art or nude or semi-nude pictures. But they either seek reprieve under the exceptional clause or take the defense of surrounding circumstances and storyline or facts which cannot be altered.[345] Ultimately there is huge loss to the court

[345] *Aveek Sarkar* v. *State of W.B.*, (2014) 4 SCC 257; *Bobby Art International* v. *Om Pal Singh Hoon & Ors.*, AIR 1996 (SC) 1846.

as well as the movie-makers and artists in terms of time, money. This also leads to victimization of genuine artists. All this happens because the common man's perceptions of 'obscenity' is subjective and the legal definition of obscenity does not offer much clarity.

In the age of fashion and sexual liberation, vague definition of obscenity would result in unnecessary litigation and increasing the workload of the Courts. Ambiguity in law also encourages moral policing by over-enthusiastic and over-sensitive persons. They may express their anguish through vigilantism, destruction of property and other violent means. The lengthy and cumbersome court trials result in unfair prosecution of the artists and film makers.

Therefore it becomes all the more necessary that obscenity laws should refrain from using complicated and obscure terminology which create scope for confusion and subjectivity. The law must clearly state what it will not allow so that the people know what they can or cannot do. This will help them realize their legal limits more clearly and elicit better enforcement of laws.

Obscenity laws represent the moral tolerance of the community in respect of matters related to sex. These laws draw a line of demarcation between that which is permissible and that which is not. Minor anomalies in this regard may not invoke the wrath of the community and may even be ignored but a general awareness as to the distinction between the good and bad is generally there.

Reasonable clarity and precision in the language of the law is important for creating this awareness amongst the masses. Otherwise the law may become a tool for harassment of artists and film makers.

2. TESTING OF HYPOTHESIS

The researcher embarked upon this journey with following two hypothesis:

1. The development in Information Technology has diminished the legal control of obscenity.
2. Cyber obscenity is beyond the reach of *Miller* test.

Now at the end of this research, it would be appropriate to test the above hypotheses one by one in order to check their veracity.

TESTING OF HYPOTHESIS 1:

There is a huge availability of online sexually-explicit content ranging from nudity, pictures, depictions of heterosexual and homosexual intercourse, bestiality, live-sex shows via web-cameras, sex chat and child pornography. Such content was not so easily accessible or procurable in the pre-internet age as it is now, especially due to popularization of internet usage through computers, smartphones, laptops and other hand-held devices. What was earlier a private possession is now in the public domain in cyberspace.[346]

Governmental control in keeping a check on obscene content is usually done by blocking of websites or penalizing the intermediaries. But apart from the websites, there are many other aspect of the Internet that are widely used. Also when one site gets blocked many more may open up without delay. The internet users can exchange information in innumerable ways by use of computers as well as hand-held devices including the smartphones. These instant messaging services can have but a limited governmental check.

[346] Also see Scotland, Consultation: On the Possession of Extreme Pornographic Material (2005) available at news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_08_05_porn_doc.pdf (accessed on August 17, 2018).

Not long ago, Delhi Police sought to procure 'porn sticks' – a kind of software to enable it to detect porn images, videos and chats even if these have been deleted. These were to be used for checking laptops, etc. during random checks by police at traffic intersections.[347] However, this is not a practical solution to keep a check on cyber obscenity. It may be practically impossible for the police force to detect each and every computer or handset in the city.

Fresh curbs on *WhatsApp* in India includes limiting simultaneous message forwarding to just five users at a go. But even that has only a very limited check as each one of those five receivers can forward it to another five and so on. Even a single message posted online has the potential to reach millions in no time.

Recently the Supreme Court of India imposed fines on intermediaries for their failure to restrain online rape videos, violent sex and child pornography. The government informed that the beta version of online cybercrime reporting portal has been set up will be launched soon.[348] The concern of the court and the government indicates that the present legal checks are not sufficient to meet the new challenges posed by cyber obscenity.

There have also been reports of a new 21st century crime called *'sextortion'* or *'sexual extorsion'* through cyber-blackmail. It is becoming more common in India. 'A Pan-India survey by Microsoft last year revealed how widespread the problem is. Around 77% Indians reported their concerns on unwanted sexual solicitation, sexting, revenge porn or sextortion. Fear and shame results in poor reporting of such crimes.'[349]

It was reported by a leading newspaper that there is an upward trend on e-sales of sex products in small towns in India. Sexologist Dr. Shirish Malde attributed this

[347]Ref. The Times of India, January 27, 2016.
[348]Dhananjay Mahapatra, "SC fines tech giants 1L each for dragging feet on porn", The Times of India, May 2018.
[349] The Times of India, July 8, 2018.

findings to the vast reach of internet and globalization.[350] Only recently, it was also reported that five boys aged 9-14 years raped an 8 year old girl after watching porn video on a mobile phone.[351]

Crime against women through use of mobile phones and internet are also a cause for concern. A transmitted message could be embarrassing, degrading and troublesome especially to women. Even the daughter of former President of India, Ms. Sharmistha Mukherjee, was not spared. She received obscene messages on Facebook. The alleged harasser used the social networking site's messaging service to send these obscene messages in Bengali language.[352]

Morphing, sexting, obscene messages, cyber stalking, revenge porn, voyeurism, etc. as a tools of victimization and sexual harassment have become quite common. These new kinds of crimes that were unknown before are indicative of diminished legal control of obscenity in the age of internet.

Despite the measures being taken by the Government to block the porn sites and make new laws, the legal control of cyber obscenity is getting diminished with the proliferation of sexually-explicit content on the internet. In a first case of revenge porn in India, reported in Bengal few years back needs mention where the accused was jailed for five years.[353] Due to sensitive nature of cases pertaining to women's reputation in the society, there is poor reporting and the culprits go scot free without getting caught and continue to prey unsuspecting females.

[350] The Times of India, December 28, 2015.
[351] The Times of India, July 17, 2018.
[352] "Harasser's dad said sorry: Sharmistha" *The Times of India* p.3, August 17, 2016.
[353] *State of West Bengal* v. *Boxi* available on https://globalfreedomofexpression.columbia.edu/cases/state-of-west-bengal-v-boxi (visted on July 20, 2019).

Table 9

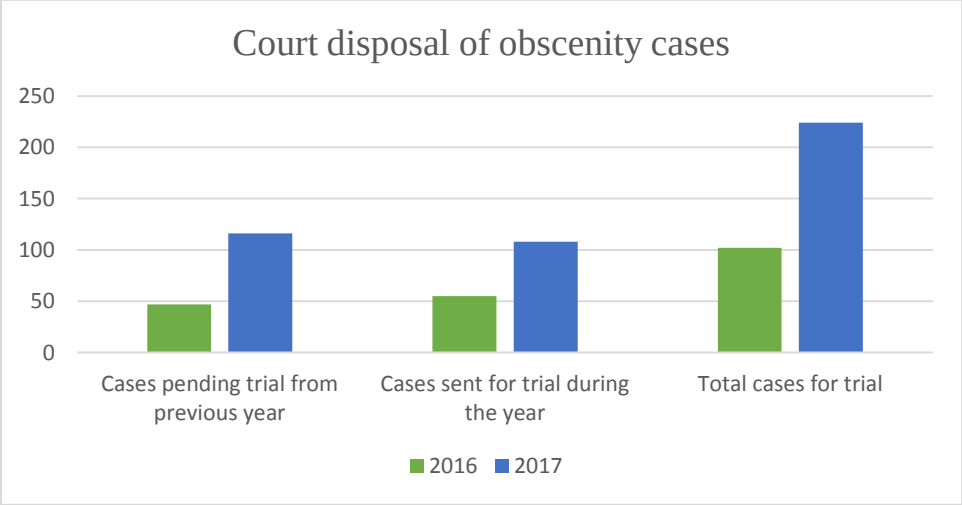
Court Disposal of Cyber Obscenity Cases in Metropolitan Cities in India

(As Per NCRB Report 2017 & 2018)

Year	Cases pending trial from previous year	Cases sent for trial during the year	Total cases for trial
2016	47	55	102
2017	116	108	224

Figure 9

Court Disposal of Cyber Obscenity Cases in Metropolitan Cities in India (As Per NCRB Report 2017 & 2018)



The above data indicates an upwards trend in obscenity trials under section 67 and 67A of the I.T. Act in the year 2017 as compared to the year 2016. This growth in reported cases indicates the inadequacy of legal control of technology-driven obscenity. Also these figures may be less than the actual figures of the crime rate of cyber obscenity possibly due to lack of reporting and those that missed detection.[354]

[354] ncrb.gov.in (visited on September 23, 2019)

Table 10

Disposal of Cyber Obscenity Cases by Police

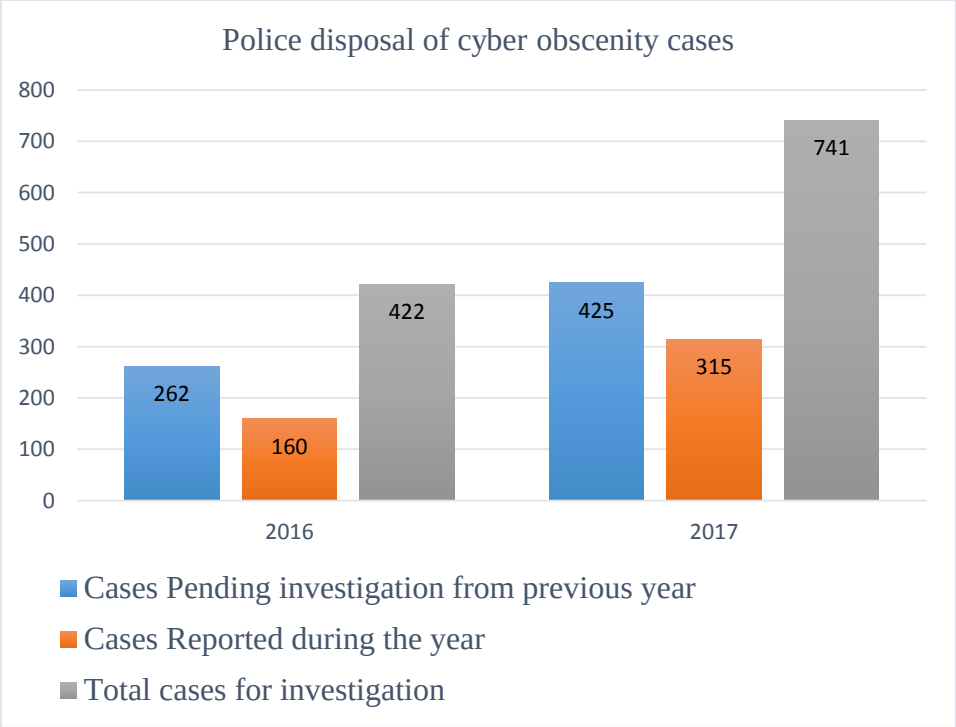
in Metropolitan Cities in 2017 (As per NCRB Report 2018)

Year	Cases pending investigation from previous year	Cases reported during the year	Total cases for investigation
2016	262	160	422
2017	425	315	741

Figure 10

Disposal of Cyber Obscenity Cases by Police

in Metropolitan Cities in 2017 (As per NCRB Report 2018)



- The above comparative chart of cyber obscenity cases for the year 2016 and 2017 for police disposal indicates the upward trend in the crime rate and disposal rate.

- Not only is there an increase in pendency but also an increase in fresh reported cases thereby resulting in overall increase in number of cases for police disposal.

- This increasing trend indicates that the inadequacy of present laws to deal with the crime of cyber obscenity.

Table 11

Cases on E-Publication/E-Transmission of Obscene Material

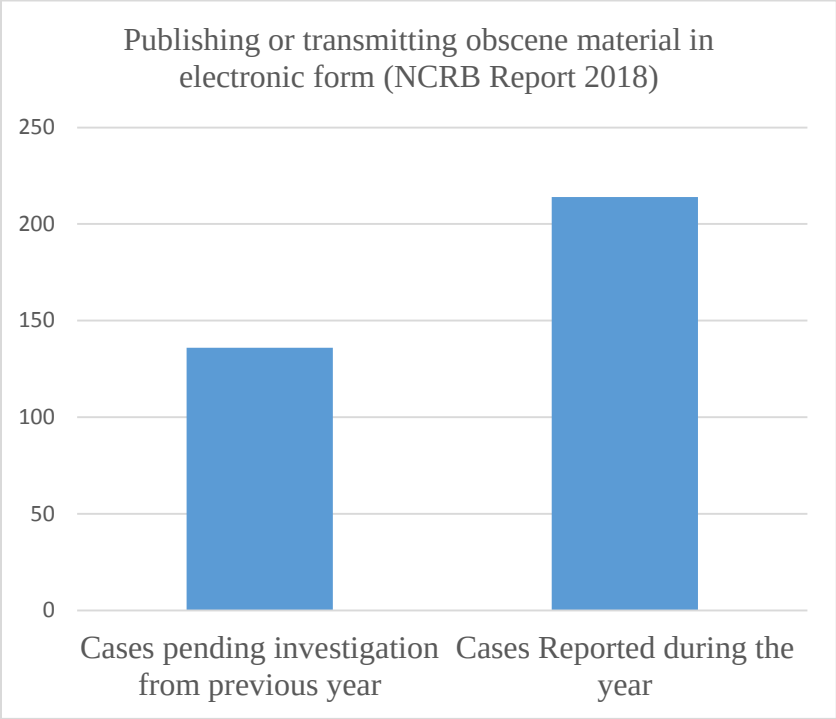
For the Year 2017 (NCRB Report 2018)

Pending cases	**Number of cases**
Cases pending investigation from previous year	136
Cases reported during the year2017	214

Figure 11

Cases on E-Publication/E-Transmission of Obscene Material

For The Year 2017 (NCRB Report 2018)



The above data indicates around 54% fresh additions to the number of cases pending investigation in the previous year i.e. 2016. This is a substantial growth in the number of reported cases regarding online obscene transmissions.

This increase in reported cases may be attributed to the ever-increasing number of digital population i.e. with the increasing use of information technology especially the internet, there is a simultaneous growth in obscenity related offences.

Table 12

Police Disposal of Cases on Voyeurism in Metropolitan Cities

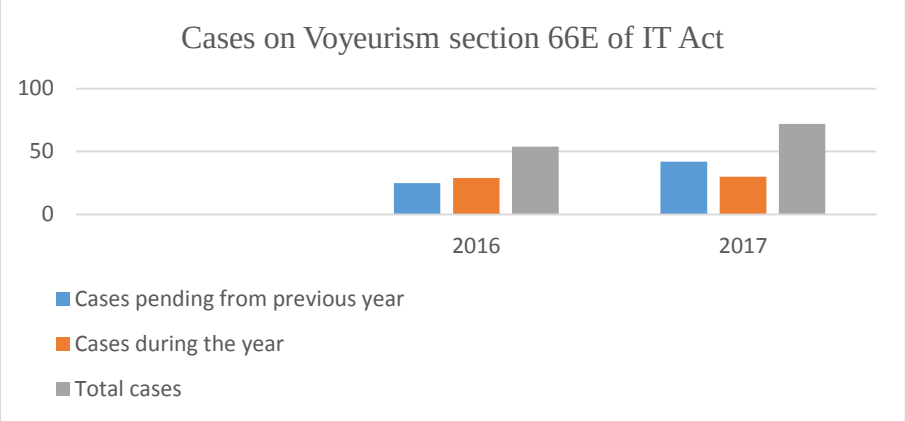
For the Year 2016 and 2017 (as per NCRB Report 2017 & 2018)

Year	Cases pending investigation from previous year	Cases reported during the year	Total cases for investigation
2016	25	29	54
2017	42	30	72

Figure 12

Police Disposal of Cases on Voyeurism in Metropolitan Cities

For the Year 2016 and 2017 (as per NCRB Report 2017 & 2018)



The above data indicates that in comparison to the year 2016, there is a growth in the cases of voyeurism i.e. IT assisted violation of privacy under section 66E of the Information Technology Act, 2000 (amended in 2008). Also there are 30 fresh cases on violation of privacy under section 66E in 2017 out of which 22 nos. are from Bengaluru only, the IT hub of India. This is again indicative of the casual link between growth of information technology and cyber obscenity and thus points towards diminished legal control of obscenity and rise of new kinds of cybercrimes.

HYPOTHESIS 1 PROVED

TESTING OF HYPOTHESIS 2

The *Miller* test through its criteria of 'community standards' test limits the applicability of this definition to geographical limits only. It fails to address the issues pertaining to cyber obscenity where the 'community' is not confined to territorial boundaries. But cyberspace has no such boundaries. Every nation has its own domestic laws which governs the conduct of its citizens in the physical world. As the understanding of obscenity varies from place to place, a content may be 'obscene' in one nation at a particular time but not in another at the same time. These standards may even vary in different parts of the same State.

Thus 'community standards' test which perhaps could be workable in a physical community identifiable by a geographical boundary would not give same result if applied to the cyberspace. Also it is not clear as to which laws would apply in such a situation – the point of transmission or the point of receiving when the two ends of transmission are in different States. In the case of the novel, *Lady Chatterley's Lover,* England and Canada allowed it as 'not obscene'. The American legal system also permitted the same and lauded it as 'one of the great work of the era'. However, Japan and India banned the novel (unexpurgated edition).[355]

Now suppose in the present times, the online copy of this novel is made available on a website or by an e-mail on payment or otherwise by an American website for anyone and an Indian national makes access to the same. Then in such a situation what will be the contemporary community standards – American or Indian? Applying *Miller* test and banning the entry of novel would have been understandable in the case of 'hard copy' in the physical world but not in the cyber world.

Another Indian case on point is *Sukanta Haldar* v. *State*[356]. In this case, Justice Mukherjee asserted that the idea as to what comprises obscenity may vary according to

[355] A. K. Sarkar, *The Law and Obscenity* 50 (N. M. Tripathi P. Ltd. Bombay, 1967).
[356] *Sukanta Haldar* v. *State* AIR (39) 1952, Cal 214.

age, region and particular social conditions. He was also of the view that there cannot be an immutable standard of moral values. Thus, the test of *'community standards'* is subjective and cannot be applied with certainty in the cyber world which has no territorial regional boundaries. Even the social background of Internet users may not be the same. *Miller* test cannot be applied in such a situation.

In *United States* v. *Thomas*[357] a Californian couple was prosecuted a *Milptas,* for transmission of obscene materials. The trial of the case did not take place at the point of sender but in the jurisdiction of the place of receiving the content. The accused then appealed against their conviction on the ground that the standard applied need to be that of their business location or of cyberspace. Their appeal stood rejected. The Thomas family acted under the belief that their material was not illegal as they bought the same from pornography stores in San Fransisco.

It may not be possible for the content providers catering to a global audience on the internet, to know the physical location of the users in cyberspace. Also it would be unreasonable to presume that they would be aware of the community standards of all the places where their content is accessed. Although the location of the user computer network may be an indicated by the URLs, but it may happen that a user is using an account that has nothing to do with his location in the real world. Applying the community standards to either end of the transmission where one may be most permissible and the other may be most conservative, may not offer a workable and just solution. This could be misused by an operator by shifting his base location according to his convenience.

In *Ajay Goswami v. Union of India.*[358] the Supreme Court of India expressed its reservations in the application of 'community standards' test. Highlighting the limitations of this test, the court held the test of 'community mores and standards' as obsolete and outdated in the cyber age when the traditional barriers have been broken

[357] *United States* v. *Thomas* 74 F.3d 701, 706. (6th Cir. 1996).
[358] *Ajay Goswami v. Union of India* (2007) 1 SCC 143.

down. The publications from across the globe are made available with a click of the mouse and hence in the determination of whether a particular work is obscene or not, it is important to consider 'contemporary mores and standards.

Even knowing the location of the user would not offer much help in pluralistic societies where the perceptions of decency and obscenity vary considerably even within the geographical community. *Miller* test based on 'community standards' is not feasible in the cyber world. In *R.* v. *Perrin,*[359] the Court of Appeal in the UK held that 'publication' takes place when images are accessed in the United Kingdom and on this basis the accused was convicted. But if we take point of access as the place of publication then this would subject all foreign contents to the domestic laws which would result in inequities and injustices.

Therefore a consensus is needed internationally to resolve such issues. The laws may be different in different points of users. For instance in a State which is at the point of transmission pornography may be perfectly legal while it may be illegal at the point of receiving in a different State where it may become a criminal offence. It becomes a problem for the law enforcers to resolve such issues. The *Miller* test may not be of any help in such cases and may result in injustice if applied. Unless and until there is harmonization of laws in the cyberspace and there is cooperation of the States at international level, we may not have any immediate solution to such issues.

HYPOTHESIS 2 PROVED

[359](2002) EWCA Crim 747 as cited in Talat Fatima, "Possession Offence: A paradigm shift in online obscenity Laws – a probe", XXVIII-XXIX DLR 248-49 (2006-07).

3. SUGGESTIONS

On the basis of this study, the researcher proposes following suggestion to control cyber obscenity:

i) RATIFICATION OF CYBERCRIME CONVENTION

The Convention of the cybercrime also known as the Budapest Convention is the first international treaty on cybercrimes particularly child pornography and violations of network procedures amongst others. Pursuance of a common criminal policy for the protection of society from cybercrimes is the main objective of the Convention as set out in the Preamble. This aim is sought to be achieved by adoption of appropriate legislation and through international cooperation.[360]

India has so far not adopted the Convention though the matter is under consideration. It is important to realize that cyber pornography especially child pornography cannot be tackled single-handedly. We need a strong policy and international cooperation in order to deal with it. Till then the provisions of the Conventions may be taken as guiding principles to handle the related issues. There is a need to develop mutual understanding of the sensitivities of the local population of different countries towards sexual content. Efforts should be made by the liberal nations to respect the traditional norms of conservative societies

Cross-border issues and those pertaining to cyber obscenity could be resolved in a much better way through international cooperation only. The issue of jurisdiction can also be addressed through a global approach rather than domestic approach. A consensus in this regards can only be developed by deliberations and discussions at international level so as to arrive at a common understanding of the issues concerned.

[360] https://www.coe.int visited on June 9, 2018.

ii) EQUIVALENCE IN LAWS FOR ONLINE AND OFFLINE ACTIVITIES

It is increasingly being accepted by the lawmakers, worldwide that all laws and regulations should be equivalent online and offline. In other words, the legal principles which regulated an online activity should be the same as those which applied to the equivalent offline activity. This view is in consensus with the Bonn Ministerial Conference Declaration of 6-8 July 1997 in its principle 22.[361]

This does not imply that the online laws should be a verbatim of the offline laws. But this actually means that in principle, the duties imposed upon the internet users should be the same as those in the physical world. The understanding of what constitutes an offensive activity is made known in clear terms so that the same norms apply to both the cyber world and the physical world. Law cannot afford to be vague, ambiguous or overlapping.

Section 292 of the IPC came into existence in the pre-internet era and lacks credibility to meet the requirements of cyber obscenity. Although we have specific laws for this online version of obscenity but the gap in online and offline version is a contentious one. There is no parallel offline laws in sync with section 67A and 67B i.e. Sexually-explicit content and child pornography which cannot be ignored.

The researcher submits that in India, we need to apply this principle of equivalence to the 'obscenity' laws to ensure better understanding and acceptance by the internet users. The Indian law as regards the information technology through its section 67A and 67 B of the IT Act already bans sexually-explicit content on the internet and online child pornography respectively. But it is surprising that till date there is no analogous law under the Indian Penal Code.

[361]Chris Reed, *Making Laws for Cyberspace* 106 (Oxford University Press, U.K. First edn., 2012, Reprinted 2013).

iii) IMPOSITION OF STRICT RESPONSIBILITY ON THE SERVICE PROVIDER AND COMPLAINT MECHANISM

Many countries impose liability on internet service providers including India. It is the duty of a service provider to ensure that there is no flouting of local laws and rules while imparting the services. Service provider is thus required to ensure adherence to local laws of the nations. We may also take the example of Australia to make suitable provision for classification of websites on the basis of violent and sexual content.

Sites whose rating indicates significant violent or sexual content are censored in Australia and breech of law is punishable with fines upto $27,500 per day of violation. The government of Singapore too has a licensing scheme requiring all Internet service providers and content providers to remove all sexually explicit material. In China filtering software is used by the Internet cafes to blocks the banned sites.[362]

On the similar lines, India may also require intermediaries to make classification of sexual and violent content and impose censorship of the banned sites. They need to equip themselves with the technical know-how and suitable manpower to deal with such offensive online activities. In case of hosting of rape videos, the Courts must not hesitate to impose criminal liabilities on the regional directors and their staff.

The Australian system also provides for a community advisory body called *NetAlert* for the purpose of promoting cyber awareness reporting deviators. There is need for a similar organisation in India for the promotion of cyber awareness and online ethics. An online complaint mechanism for the internet users has been put in place where the users can bring to the knowledge of service providers any violation of local laws. Adequate publicity needs to be given in respect of this online complaint mechanism on the search engines itself so that the users are encouraged to send their feedback or any complaint thereon. The identity of the complainant must be kept confidential.

[362]See Amy E. White, *Virtually Obscene: The Case for an Uncensored Internet* 20-21 (McFarland & Company Inc., Publishers, Jefferson, North Carolina, 2006).

iv) ROBUST ENFORCEMENT MECHANISM

Technically trained and well-equipped police force, well-versed in dealing with cyber obscenity needs to be deputed in cyber cells at district and national levels. For this technocrats may be employed as part of police force who may then be vigorously trained on regular basis in the nuances of blocking, investigation and evidence-collection mechanism. Weak investigations enhances the chances of prosecution failures which do not end up in conviction of offenders. Dealing with cybercrimes needs technically upgraded police force which is able to deal with the constantly changing technological advancements.

We may take the examples of other nations to set up a strong enforcement mechanism against cyber obscenity. For example, in Iran, a large red icon pops up on computer screens if anyone tries to access online pornography. In Syria, a note from the filters is displayed while Arab nations display "blocked" or "page not found" in case an Internet user makes an attempt to access cyber pornography. The Middle East countries except Lebanon, Morocco, Jordon and Egypt, have stringent filters against cyber pornography. In China, the agencies that keep a watch over the Net employ over 30,000 people to check out and trace offensive content on web sites, blogs, and chat rooms. In the U.S. the entire CIA employs an estimated 16,000 people.[363]

How serious are we in India to curb sexually offensive content can be gauged by the simple fact that the Delhi Police Cyber Cell website displays a lackadaisical attitude and casual approach as regards cyber obscenity creating an impression to the public that it may not be an offence after all to engage in online obscenity. This is a serious lapse on part of Delhi Police when our Information Technology Act, 2008 mentions this as an offence under sections 67, 67A and 67B. India's cyber cell police force can be estimated to only a few thousands in all and many of them may not be having the technical

[363] Amy E. White, *Virtually Obscene: The Case for an Uncensored Internet* 22 (McFarland & Company Inc., Publishers, Jefferson, North Carolina, 2006).

expertise required to man such positions. Lack of adequate and trained manpower is a major obstacle towards legal control of cyber obscenity. Regular trainings and technical upgradation of the police force would go a long way in tackling cyber obscenity.

v) STRICT SURVEILLANCE AND GOVERNMENT CONTROLLED GATEWAYS

In India, the cyberspace is governed by cyber laws and regulations as provided under the Information Technology Act, 2000 alongwith the amendments introduced by way of Information Technology (Amendment) Act, 2008. Though governmental endeavours in keeping a check on internet content are there but they stand nowhere as compared to other nations. India is still far behind in making some definite and determined efforts in keeping a check on cyber obscenity. There is a need to have government-controlled gateways or check points through which all Internet content must pass before it reaches the public.

Laws in China require Internet cafes to use filtering software that blocks the nearly 500,000 sites banned by the Chinese government. In China there are few Internet access points and all content must pass through government-controlled gateways. By the use of these gateways, the government openly filters sites it believes to contain questionable materials. On the similar lines, all adult sexual content may be made to pass through government controlled gateways and only that content which is non-violent and confirms to legal standards may be given certification for adult viewing.

Even this certified content needs to be allowed restricted access, only to adult population, who opts voluntarily for such viewing. Public access to such adult content may be allowed only strictly under government controlled e-portal linked to Aadhar card and mobile number of the user to ensure that only adult viewers have access to the same, subject to the undertaking by the users that they will not further transmit the same to anyone.

vi) IMPOSITION OF RESTRICTIONS ON UPLOADING ADULT CONTENT

In India, users including children and adolescents, are free to exercise their discretion regarding access to offensive or pornographic content that is available online. As a result, even the children are able to access the content meant for adults only. The cyber world is a free zone for all irrespective of the age of the user.[364] Anyone can access anything available online with much of the sexual content free of cost as a bait to trap the ignorant and innocent users.

The users are able to upload any type of content even though it may not be for universal viewing. Such irresponsible online behavior needs to be kept under check. In several countries, even users are held liable for any irresponsible use of internet. France also holds the users accountable for the content posted by them on the Internet. For this purpose, a user obtaining a license may be required to post content online and also thereby agree not to post the banned or prohibited material.

A similar licensing system needs to be introduced in India where users may be required to obtain a license for uploading of any adult content online. A civil society encompasses a disciplined and morally grounded sex life of individuals and not merely sex hungry selfish persons engrossed in personal enjoyment and expression without any concern for others in the society. Democratic freedoms entail fruitful and positive participation of its citizens in the governing process.

For this participation, we need a disciplined community where the individual do not excessively indulge in the sensual side of life and sexual passions of people are kept reasonably under check. Freedom entails responsibility to act within the limits imposed by law. Freedom without responsibility may lead to anarchy and disorder which is against the basic tenets of democracy. Accordingly, internet freedom requires the users

[364]The Times of India, July 17, 2018.

to act in a responsible manner and not do anything unlawful. Therefore, there needs to be a provision in law to penalize unauthorized uploading of obscene content.

A proposal of imposing a legal ban on extreme pornography is under active consideration in Scotland. It proposes to prosecute both distributors and consumers of Internet pornography.[365] Then there are other countries too, where internet users are held accountable for any online offensive content. 'Accountability for objectionable content is imposed on both ISPs and Internet users in Singapore. Sexually-explicit material is covered under this objectionable content. Online sex related discussions are illegal in Saudi Arabia and Iran.'[366]

Countries like Iceland, have made initiatives to impose strict ban on hardcore, violent pornography in order to protect the children from its devastating effects.[367] On the same lines, users of hardcore and violent pornography in India need to be held liable as partners in crime of cyber obscenity.

A citizen of India is under fundamental duty to renounce practices derogatory to the dignity of women. Also it the fundamental duty of citizens to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavor and achievement.[368] But this duty on part of citizens cannot be presumed and taken for granted. Nor can the discipline and conformation to virtues in public life by the citizens be left to chance circumstances.

The community or the civil society may need the support of legal and political guidelines to impose the desired norms and standards of behavior in public life.In

[365]Scotland, Consultation: On the Possession of Extreme Pornographic Material (2005) available at news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_08_05_porn_doc.pdf (visited on August 17, 2018).
[366]Amy E. White, *Virtually Obscene: The Case for an Uncensored Internet* 21 (McFarland & Company Inc., Publishers, Jefferson, North Carolina, 2006).
[367]Halla Gunnarsdóttir, "A Legal Ban on Violent Internet Pornography would benefit children and is not Censorship" in Margaret Haerens and Lynn M. Zott (eds.), *Internet Censorship: Opposing Viewpoints* 188-189 (Greenhaven Press, Farmington Hills, 2014).
[368]Article 51A of the Constitution of India

addition to legal and political principles, communal morality takes inspiration from a variety of factors such as economic, social and psychological, educational, etc. and assimilates these for public compliance. But since these factors lack stability, therefore law and political agencies need to take a lead for the imposition of public standards.

vii) A REFORMED DEFINITION OF OBSCENITY: NEED OF THE HOUR

There are several discrepancies and incongruities in the Indian obscenity laws in the present form which need to be addressed. Only a well drafted law can help law enforcers to clearly identify the law breakers and bring them to book. In the absence of clearly defined parameters, the real culprits may get away and innocent may get trapped.

The present definition of obscenity given in section 292 of the Indian Penal Code, 1860 and section 67 of the Information Technology Act, 2000, is founded upon the outdated notions of obscenity as given in the *Hicklin* version. It still uses the obsolete, outdated vocabulary which conveys nothing to the internet users, enforcement official, or anyone who wants to know as to what amounts to 'obscenity' in India. The foreign nationals visiting India also remain clueless about the legal repercussions of their online interactions while they are in India.

As the *Hicklin* test itself is vague and ambiguous, obviously the law based on this test also suffers from the same drawbacks. No clear-cut demarcation could be drawn between obscene and non-obscene content on the basis of this test. Therefore there is an urgent need to bring in reforms in the language of the law so as to clearly demarcate obscene from non-obscene.

The researcher makes the following important observations and findings and makes simultaneous comments for improvements needed thereon:

(a) THE DEFINITION OF 'OBSCENITY' GIVEN UNDER SECTION 292(1) IPC AND SECTION 67 OF THE I.T. ACT IS ALMOST IDENTICAL AND OUT-DATED.

Comments: As already discussed in previous chapters two and three, the definition provides no clarity as to what constitutes obscenity. Not only is it archaic but also vague and elusive. It complicates rather than resolves the problem of obscenity. According to this definition the court first has to find out the effect of the material on the persons who are likely to read, see or hear that matter. [369]

The use of ambiguous terms renders uncertainty to the present law. The purpose of law is not to find depraved and corrupt persons due to the effect of the impugned content because that would be nearly impossible to find out in the first place. Also what is lustful to one person may be embarrassing or even disgusting or anti-erotic effect to another. Therefore, this legal mechanism to determine obscenity is fraught with serious problems.

Further, the use of ambiguous terminology is a major hindrance to the efficacy of obscenity laws. This lack of clarity also raises suspicion and doubts in the minds of the enforcement officials whether to book a person under obscenity laws or not. A clear language can pave way for better understanding and interpretation of laws thereby preventing unnecessary litigation and unjust decisions. Hence there is an urgent need to change the existing language of section 292 of Indian Penal Code and section 67 of the Information Technology (Amendment) Act, 2008.

[369] Section 292 (1) of IPC 1860 and Section 67 of I.T. Act 2000

(b) UNDER THE I. T. ACT 'OBSCENITY' MEANS SOMETHING DIFFERENT THAN 'SEXUALLY-EXPLICIT'.

Comments: As can be seen that under the I. T. (Amendment) Act 2008, there are two separate provisions dealing with 'obscenity' and 'sexually-explicit' content. While section 67 prohibits 'obscenity', section 67A prohibits 'sexually-explicit' material.[370] These two distinct provisions indicate that 'obscenity' is something different than 'sexually-explicit'. But the examination of legislative and judicial approach indicates that the legal obscenity has to be found within the domain of 'sexually-explicit' content only and it is not something beyond that. Actually 'sexually-explicit' content is a genus and obscenity is one of its species. 'Sexual-explicitness' is a very wide term and 'obscenity' needs to be confined only to its extreme versions.

After thorough examination and in-depth exploration of the concept of 'obscenity' from different perspectives in chapter two of this study, the researcher was able to narrow down to obscenity as 'sexually-explicitness' related to display of sexual organs and depiction of sexual intercourse of any kind as legally obscene without any authorized social purpose or value. Obscenity needs to be restricted to this part of sexual explicitness. Any other interpretation of the law would be too problematic and wide to implement making the law ineffective.

These days there are hardly any case laws on 'obscenity' in India. Most of the leading case-laws in India pertain to Bollywood movies but even those movies were allowed later after some kind of justification. Perhaps there was a time when even portrayal of romantic scenes in Indian cinema was symbolic and not direct. But now with the changing times, there is wide public acceptance of beauty contests, portrayal of romantic scenes, kissing scenes, and even adult content in the Bollywood movies although subject to the approval of Censor Board of Film Certification.

[370] Section 67A of the I.T. Act 2000 (as amended in 2008): Punishment for publishing or transmitting of material containing sexually-explicit act etc. in electronic form

In these changing times, the meaning of 'obscenity' cannot be anything other extreme forms of 'sexually-explicitness' especially pornography. This is the only mischief that the obscenity law is aimed at and nothing else. The need of the hour is to come up with an improved definition of obscenity and categorically mention what is not to be allowed legally so that the law enforcers are not left guessing as to what to allow and what to restrain. That would make the law more effective. It will also save the precious time of the court and avoid unnecessary litigation.

(c) THERE IS NO PARALLEL PROVISION FOR SECTION 67A UNDER THE INDIAN PENAL CODE

Comments: There is no legal provision under the Indian Penal Code which is on the same footing as section 67A of the I. T. (Amendment) Act, 2008. This leaves a gap between offline and online legal provisions. For a common man the understanding of the offensive act should be the same whether offline or online. Thus we need to have a provision under the IPC which is in consonance with Sec 67A of the I.T Act.

Moreover, the present definition of obscenity offers no 'fair warning' to the distributors and users of the obscene content. This would also lead to the ignorant masses getting caught unawares as ignorance of law is not an excuse. For the purpose of resolving all these legal issues, the researcher proposes following reforms in the existing definition of 'obscenity' under Section 292(1) and Section 67 of the I.T. Act.

(d) PROPOSED DEFINITION OF 'OBSCENITY'

Whoever depicts or represents or displays or transmits or publishes or causes to depict or display or transmit or publish, sexually-explicit material or act such as display of sexual or excretory organs or sexual act with the intention of causing sexual harassment or promoting sexual violence or arousal for sexual intercourse (homosexual or heterosexual), bestiality, pornography or in any other form to any person or in public domain would be deemed to have committed the offence of obscenity unless the same is

officially authorized or licensed by the Government of India or any of its agencies, for any of the purposes listed below:

i) Historical purposes (any publication, depiction or representation of historical monument within the meaning of the 'Ancient Monuments and Archaeological Sites and Remains Act', 1958)
ii) Educational material for schools/colleges
iii) Medical or scientific purposes
iv) Research purposes
v) Art or Cinematographic purposes

Explanations:

(i) Mere nudity will not be deemed to be obscene for the purpose of this section.
(ii) Any publication, depiction or representation of any historical monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 shall be deemed to be obscene if the publication or depiction or transmission is done with the intention of promoting sexual harassment or sexual violence or sexual arousal.

In the above reformed definition, the use of expression 'officially authorized or licensed' would ensure that internet users in their private capacity are not authorized to upload or transmit any sexually offensive content through online medium. The definition covers 'rape films or clips, (i.e. sexual violence) which are circulated online or offline. Merely mentioning 'sexually-explicit content' is a very vague term and wide in connotation.

The proposed definition also imparts certainty and subjectivity to the definition of 'obscenity' which is missing in the present definition. This would also give sufficient and fair warning to the internet user or distributor of such content. The proposed definition also restricts the scope of legal obscenity which is otherwise very wide in its present form. With the increase in punishment and the serious nature of offence, the offence also needs to be converted from bailable to non-bailable offence triable by Sessions Court

viii) STRUCTURED SEX EDUCATION IN SCHOOLS

In the present age of information technology when youngsters and children are compulsorily exposed to internet, there is a great influence of online content on the innocent young minds. This online exposure also entails a possibility of accessing online porn or other adult content by youngsters and children. Even primetime television is laden with sexually suggestive and provocative content. Teenagers are curious about their bodies and sexuality as part of natural growth process and development.

So in the absence of any proper guidance they could easily resort to unhealthy practices and even heinous sexual crimes without an understanding of the consequences. There have been reports of rape by children below the age of 7-9. Children as young as 4 year olds have been booked for sexual abuse of other children. In some of these incidents, the immediate trigger was a porn film watched by these children on mobile phones.[371]

Some psychologists are of the view that reserved behavior of parents about sex may backfire.[372] Therefore it may not be advisable to completely ban sex-talk at home and school otherwise children especially teenagers may turn to other unauthorized sources to quench their curiosity and may end up getting harmed. A balanced requisite information needs to be provided to the curious young minds in an appropriate manner.

Parental control on internet usage by children has become limited in the era of movable devices and smart phones where filters, etc. would not work. Therefore it has become imperative that parents interact with children on topics related to sexual health and internet usage as a normal discussion. We need to talk to children on such sensitive issues in the interest of their safety and well-being.

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[371] See Arpan Tulsyan, "Children and sexuality: How to counterbalance misinformation from internet, TV, smutty magazines" Times of India, p. 16, July, 31, 2018.

[372] Amy E. White, *Virtually Obscene: The Case for an Uncensored Internet* 84 (McFarland & Company Inc., Publishers, Jefferson, North Carolina, 2006).

Also the government authorities in India need to wake up to the reality and address such issues through a way laid out, comprehensive and planned curriculum on sex education in schools from an early age. Sex education in schools need not be restricted to mere menstrual hygiene or reproductive system chapters in biology classes. Respect for opposite sex and their bodies need to be inculcated at an early age.

Since pornography is all pervasive in the age of information technology, there is an urgent need for systematic sex education that needs to be focused on sexual practices. We may also adopt academic techniques from countries like Denmark and Netherlands which have set good examples in imparting sex education as part of compulsory school curriculum.[373]Sex education begins quite early in schools in Netherlands. Children as young as four years are involved in discussions on their bodies in class. By the time they enter teens, they are engaged in formal sex education with focus on positive relationships and use of contraceptives.

Sex education is a mandatory part of school curriculum in all Dutch schools. Since 2012, age-appropriate sex education – including gender identity issues – is compulsory in all Dutch schools. Not surprising then that Dutch youth have the lowest teen pregnancy rates in Europe. In Amsterdam, the school curriculum on sex education is based on the developmental needs of the students. For students aged 8-11 years, their focus is on changes that occur during puberty. Classes are conducted separately for boys and girls and are done in small groups, several times per year. Classes may incorporate educational TV clips/videos segments and generally allow for classroom discussion. Parents are also kept informed in advance about the issues that are to be discussed in the class.[374]

[373]Arpan Tulsyan, "Children and sexuality: How to counterbalance misinformation from internet, TV, smutty magazines" Times of India, p. 16, July, 31, 2018.

[374]"Sex Education in the Netherlands/Amsterdam Mamas" available at https://amsterdem-mamas.nl/articles/sex-education-netherlands (visited on August 1, 2018).

Health and sex education is a compulsory subject in the primary and lower education in Denmark. Students are able to learn how to be healthy at physical and mental level. They are also taught the meaning of respectful and loving relationships with peers, friends and family. Once students enter fourth grade, sex education focuses on identity, puberty, gender, feelings and family. Social media and boundaries have been added topics of discussion in recent years. The last three years of sex education emphasizes adolescent youth, sex and sexuality, pregnancy and contraception.[375]

Perhaps children may not take recourse to online porn or sexual content if their sex related concerns and issues are genuinely taken care of by a medical expert in school. Obviously their level of curiosity pertaining to sexual matters would decline when such issues are addressed in the class. With the rising instances of child sex abuse both online and offline, this kind of education would also go a long way in helping children open up about their experiences and problems without any feeling of guilt.

Along with the health education, basic knowledge of cyber laws and legally-acceptable behavior may also be discussed. This way they will be better equipped to access the cyber world safely and will not fall into any online trap of inappropriate online content or child abusers. The school curriculum may also include guidelines for safe use of internet and social media. The Indian education system needs to be reviewed and updated on similar parameters to equip the children and youth for the upcoming challenges in the internet age.

ix) IDENTITY VERIFICATION ON THE INTERNET

It is high time that identity verification be made mandatory for all internet users not only to control cyber obscenity but also due to rise in all kinds of online criminal activities. Although internet does not discriminate between persons, it would be a good

[375] cphnews.mediajungle.dk/archives/5087and https://www.ncbi.nlm.nih.gov/pubmed/12343172 (visited on August 1, 2018).

idea to make a compulsory identity check for accessing the internet every time when accessing the net. This can be done by linking with some government authorized identity card such as 'adhar card' or pan card, voter card and date of birth certificate, etc. so that the user is under pressure not to misuse online activity for illegal sexual activities.

Display of photograph of the user can also be made mandatory. This kind of identity verification would also keep children away from accessing adult sites by mistake or otherwise. One reference identity of adult may also be made compulsory under whose supervision the child is accessing the internet. These measures would go a long way in protecting the children and adolescents from unauthorized access to sexually-explicit or obscene content.

x) USE OF ARTIFICIAL INTELLIGENCE

Millions of contents and images are uploaded on the social media and internet every second. It is literally impossible to keep a track or check on this physically. We need equally fast technology to meet this challenge. Use of artificial intelligence and other latest software by law enforcers is one such possibility as it can be employed in spotting fake accounts, spam and even nudity. Around 99% of 583 million fake Facebook accounts, 837 million spams and 21 million nudity and sexual content with were accurately detected by making use of artificial intelligence.

Another challenge is the use of coded words or texts for engaging in criminal activities. In India, the code word for sexual solicitation on the facebook platform is *escort services*. And new codes are constantly evolving by those involved in such crimes to mislead the agencies. For this purpose, a close watch is kept on cultural trends.'[376]

Development of ethical and good online behavior is also significant. Bad behavior can also be clearly identified by use of artificial intelligence. Similarly online obscene content can also be easily detected. In the age of mobile technology, the

[376]The Times of India, New Delhi dated November 4, 2018.

traditional cyber security is becoming a challenging task. It is here that Artificial Intelligence can offer a viable option to the authorities.[377]

Our government agencies and law enforcement departments need to be upgraded technically so as to beat the mischief makers of the cyber world. For this their need to be a provision in the budget and annual plan of action with the help of best technical brains. Only a well-planned strategy to procure latest technology and software can yield the desired results. Half-baked efforts will not help as they have to deal with criminals who are technologically advanced.

xi) NAMING AND SHAMING

A very effective strategy to combat cyber obscenity could be 'naming and shaming' the offenders in public. This strategy of 'naming and shaming' of culprits who transmit obscene content in the public domain could be used to dissuade them. This would act as a deterrent for the masses and encourage them to behave decently online. For this there could be a provision on the police websites to give details of persons who had been convicted for transmission of sexually-explicit or pornographic content through computer, mobiles or any other form.

This would not only create awareness amongst the public to be wary of such persons in their day to day dealings online and offline. This may also bring about the much needed change in the mindset of internet users and social media users so as make them careful of what they share with others in the public domain.

xii) MULTIDIMENSIONAL STRATEGY TO COMBAT CYBER OBSCENITY

Finally, it is submitted that the control of cyber obscenity requires a 'multidimensional approach' viz. at educational, social, legal and international level. The

[377] "Will Artificial Intelligence remould the world of cyber security?" available at https://economictimes.indiatimes.com (last visited on Noember 7, 2018).

first and foremost requirement is to educate the masses regarding legally permissible use of information technology. At the school level, children need to be taught cyber ethics and respect for the opposite sex. The community may also play an important role in reporting the crime of cyber obscenity as and when it comes to their knowledge.

Police also needs to organize awareness camps to educate the masses on the legal perspective of cyber obscenity and related offences. Also the police websites need to be updated to indicate cyber obscenity as an offence. Training of police official in various aspects of information technology is needed so as to equip them to deal with cyber obscenity. Legislature also needs to bring in appropriate reforms in the legal definition of obscenity. Finally, the International community needs to have a balanced outlook towards the crime of obscenity so that the sentiments of the conservative societies are not overlooked at the cost of free speech on the internet.

The researcher concludes that the medium of information technology calls for a significant modification in the present legal concept of obscenity. Obscenity law which was somehow being legally managed in an obscure and subjective manner cannot afford to continue as such in the wake of new technology. The researcher arrives at this conclusion because the new medium has not only translated fantasy into realty but also to live sexual adventurism which is creating law and order issues especially pertaining to women and children.

In the present age of fashion and sexual revolution, the use of vague term are liable to be misused by the offenders and mischievous elements of the society and may also lead to unnecessary litigation. The golden rule is that the all laws may be drafted in such a manner as to take care of the mischief it seeks to address. Also all laws of the physical world may do well to correspond with the similar laws of the cyber world i.e. they may be worded as to convey a clear and similar meaning to the masses.

Needless to say, that the impact of visuals is much more than the printed material. Secondly, it is not subject to pre-censorship like other media. There is practically no

control on what content is transmitted or uploaded by the users. Also there are no age-bar restrictions on the internet. Banning child pornography on one hand and allowing children to venture into prohibited zones of sex and violence is like wanting to have your cake and eating it too. If the law is seriously concerned about the welfare of women and children, we need a better control mechanism and objectivity in the legal definition of obscenity. Law can be enforced better if its language is clear to all.

Arguments in favour of pornography and other similar versions are based on the premise that 'sexual act' between consenting adults should not be restrained. But it is submitted that 'consent' which forms the very basis of this assertion is itself a controversial subject. For, consent can be withdrawn any time, even at the last moment or it may have been by coercion, threat, drug-taking, or any other violent means, etc.

In pornographic films the actors are doing it at a cost, which itself is a sort of 'coercion'. In all these situations, the 'consent' of these persons gets tainted and is not due to 'free will' of these actors. So when the consent for 'sex' is not based on free will in these pornographic films, then obviously 'right to free speech' is at stake by not restraining these and not vice versa.

Even if one may argue that the actors are acting freely, even then it would be extremely difficult to accept that argument as there are no personal emotions involved in such commercial acts which increases the chances of the 'tainted consent'. Therefore the argument of 'consensual sex' is a very weak argument in the legal sense. Also, the law does not treat any immoral contracts as legal and 'commercial sex' falls in the category of immoral contract. Thus the consent of the parties is immaterial.

All the outcomes that the technology brings about may not be good for humans. For instance, we all know that the harmful impact of radiations on our health and all nations are trying their best to find solutions to reduce this impact. Similarly, the harms of online obscenity especially on children and women enjoins upon us a duty to find ways to lessen this damage in the best possible manner.