

BALANCING OF CONFLICTING RIGHTS: REGULATION OF CYBER PORNOGRAPHY

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Globalization means to develop and expand the technologies, business and services throughout the world. In the last few years globalization has been used as a means to boost up the technology advancement which resulted into better communication all over the world. With the advances in science and technology pornography has also extended its root specifically in the middle class families. Hence what was initially developed for and in the accessibility of aristocrats for their fascination has come into the reach of everyone having a cable line. Semi porn serials have entered into the holy vicinity of the family and the demand of the same is increasing rapidly. Computer revolution was also taking place side by side and the internet which finds its origin back to the US Department of Defense in the 1960s was started using as sharing data. Cyber technology developed from exchanging data to jerky videos. Today video recording is available in high definition quality. Had it been video clips of decent material, it would not have grabbed so much attention and faced the rage of government and part of the section of society but unfortunately technology with other people, also fell in the hand of pedophiles and other sexually disgusted people who started misusing the technology for their ulterior motives. Now pornography content is available in the market in number of ways ranging from still pictures to video clips. The internet also makes it possible to watch live sexual activities. Hence the pornography has come out from primitive statues to modern day high definition live performances in the four corners of our room¹.

¹ Dr. Amita Verma, *Cyber Crimes And Law* (Central Law Publications, Allahabad, 2009).

Controlling the information and expression of opinion disseminating within a society -- has been a trait of dictatorships throughout history. Thus, ideas have been vanquished under the guise of protecting three basic social institutions: the family, the church, and the state. The IT Ministry directing ISPs in India to block 857 websites for ostensibly containing pornographic content (though later government backtracked), is another instance of government arbitrariness. This order withered away the promise of a free and open internet which was given by the Supreme Court only a few months ago².

The main contentions of the opponents of pornography are that, they consider that there is a direct relationship between pornography and crime against women, and pornography is the reason of deterioration of standards of morality in the family and the society. They claim that pedophiles and sex predators distribute child pornography and captivate children in sexually explicit conversation and seek victim in chat rooms. Opponents of pornography demands to inculcate some family values of intimacy, marriage, sex and relationship in their children but instead of that what their children are learning from this industry is, violent sexual practices, particularly sexual assault against women. Children are exposed to soft-core pornography as well as hard core pornography. They think sex without responsibility is acceptable and do not offend standards of society. This may have dire consequences as the children will be vulnerable to many serious diseases including HIV of course. It is well known fact that impact of the things we conceive visually is very much higher than what we read in the newspaper and nobody can deny that children and youths do imitate the things they watch in the television or internet. They think that by copying the actors on the films they are joining hands with the west and America. They never pay heed to the consequences which will follow the event. Just as thirty second commercial make us buy one thing over another. Exposure to pornography will encourage them to have sex at such a young age and that too in a diabolic manner because they are exposed to hard- core pornography through

² “SC’s observations prompt Centre to block 857 porn sites”, *Times of India*, 3 August 2015.

the internet. During this period the mind of the youth is most vulnerable. It is the time they develop their sexual orientation, that for what things they should be sexually arouse. If at this stage value of love, family and respect for women are inculcated in the child's mind it will lead to healthy sex life. To the contrary if he is exposed to hard core pornography he will treat women only as an object of pleasure. He will not be sensitive enough about the social issues prevalent in the world such as rape, women subjugation, discrimination against women, *etc* and would be one of those criminals who commit atrocities against the women without any guilt in their mind.

Proponents of pornography on the other hand, deny these claims and demands there right to freedom of speech and expression and right to privacy and personal liberty assured by the Constitution of India itself under Article 19 (1) and 21 . They argue that by banning the sites the government is forcing them to watch stuff which is fit for children consumption only. They claim that if both the parties are consenting then they are not answerable for what they do in the four corners of their wall. They also deny the relation between pornography and atrocities against women. They claim it as a punishment without trial which violates the principle of rule of law which is claimed to be fundamental law of the land. Any kind of censorship is unacceptable to civil libertarians as it gags right to dissent and they demand regulation instead of prohibition.

The trend of judicial pronouncement in the matter of Cyber Pornography has remained dubious. When the Centre directed ISP's to block pornographic site in the wake of crime against women, Chief Justice of India HL Dattu remarked, "India can't do so". Saying total ban on sex sites would infringe right to privacy and personal liberty guaranteed by Article 21 of the Constitution of India and such eroticism is a personal choice. He stated³

³ *Kamlesh Vaswani v. Union of India and others* SC 2013.

supremecourtindia.nic.in/FileServer/2016-02-26_1456490615 accessed on 26th feb 2016.

“If someone comes to the court and say ‘Look, I am an adult and how can you stop me from watching it within the four walls of my room? It is a violation of Article 21 (right to personal liberty) of the Constitution’. Yes the issue is serious and some steps need to be taken... the Centre has to take a stand...let us see what stand the Centre will take”.

The pronouncement came as a result of Public Interest Litigation filed by advocate Kamlesh Vaswani, seeking the blocking of porn sites. Pleading for an interim order till the home minister took stand on the issue. It must be emphasized that the above observation of Supreme Court is in contrast with earlier order passed by Chief Justice RM Lodha in the same PIL during a hearing in August 2014, in which the then Chief Justice of India said that such raunchy sites need to be blocked and demanded strict laws to curb the menace

Justice Rohinton Nariman opined that it was “impractical to block two crore websites as then two crore more sites will surface. They pop up in foreign countries and are hydra-headed. So, only servers here will help⁴”.

Again on 2nd March 2016 the Supreme Court pronounced that “right to freedom of speech, thought and expression was not “absolute” and asked the Centre to take steps to block child pornographic sites and also to gradually consider steps to block all pornographic sites. A bench headed by Justice Dipak Misra also decided to hear a plea to make watching pornographic material in any form in public places a crime. Justice Misra also pointed out how efficiently the government had on its orders stopped Google, Yahoo and Microsoft from advertising kits for foeticide gender determination

⁴ Also visit <http://www.dailymail.co.uk/indiahome/indianews/article-3153957/Supreme-Court-says-India-t-ban-porn-CJI-says-total-ban-sex-sites-violate-privacy-personal-liberty>.

and displaying addresses of foreign clinics that provide assistance in the act which is an offence in India. ASG Anand said the center is in favour of banning child pornography sites only and did not want to act like a moral policing. But the court directed the center to develop a mechanism for blocking all porn sites with the help of Information Technology experts and service providers⁵.

From the above discussion at least this can be concluded that both center and the court have not reached at a definite solution to curb the menace. Again and again they are reverting back from their original statement. Both are the protector of fundamental rights and both have duty to maintain peace and security in the society and to safeguard every single individual from all kind of atrocities.

To tackle the menace of Cyber pornography many propose a prohibition on the dissemination of pornographic materials of all types⁶. Here we must admit that our fundamental rights are not absolute and they need to be tested on the touchstone of reasonable restriction. The state holds the right to restrict freedom of speech and expression on the ground of decency or morality under Article 19(2) of the Constitution of India. Hence the claim of civil libertarians is not tenable. Surely the pornographic would fail the standard of decency though it may pass the test of morality. Because morality has to be seen in the light of Constitution and not by the standard of random people as the opinion may differ from person to person⁷. Hence what all is not held immoral directly or indirectly by the Constitution of India would stand the test of morality. But we should not forget that right to freedom of speech and expression is the most precious right which needs to be expanded and protected by the state. It is a right which differ human existence from animal existence. It is a proof of our being alive in real

⁵Also visit <http://www.livelaw.in/block-child-pornographic-sites-explore-if-viewing-porn-in-public-can-be-prohibited-sc-to-centre/>

⁶ *Supra*, n.1.

⁷ *Naz Foundation v. Government of NCT of Delhi and others*, Jul 2009.
indiankanoon.org/doc/100472805/

sense, developing every single faculty of our body every second of the day. Freedom of speech and expression is not only confined to expressing one's thought or receiving and imparting information through electronic media⁸. It means and includes the right to say which nobody is ready to listen, where even the most annoying thoughts are allowed to be shared (obviously not at the cost of peace, security and stability of the society). Hence it must be kept in mind that embargo of this kind, will ultimately result into extension of underground activities, where it can neither be put under surveillance nor can it be regulated. In a recent episode when government banned the porno sites, black marketing of porno video shot up drastically⁹. People were ready to pay three times more to get the copy of it. Though our parliament is not ready to accept but data shows that India left behind Canada and stood at the third position after US and Britain in accessing one of the largest adult website porn hub¹⁰. Hence even if the government disables accessing of such sites the trafficker would evolve new methods of circulating the stuff in the market and would go scot free without even paying the tax for it. The circumstances would be burdensome. On one hand, government will be under duty to keep check on the activities and on the other hand, it will not get even a single rupee for providing the services. At least by holding the activities legal the government could utilize the tax to regulate the industry but after banning the sites, the government will be spending from its own pocket and the people hard earned money will be wasted to curb the menace. Also there is no denial of the fact that relationship between crime against women and pornography has not established yet.

The attention also must be brought to the fact that pornography content is available in numerous ways. Cyber pornography is only one of the means, and not the only means for the purveyors to expand their business outside the territories of its origin. If one of the ways is blocked they will move towards the other available mode or they

⁸ Secretary, Ministry I& B v. *Cricket Association of Bengal*, AIR 1995 SC.

⁹ "Porn DVD sales up, prices hit the roof", *Times of India*, 5th August 2015.

¹⁰ "Ban or no ban India watching porn", *The Times of India*, 12 Jan 2016.

may explore some new methods to disseminate the content.

Justice Bhagwati in *National Textile Workers Union v. PR Ramakrishnan*¹¹ observed that “we cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still, it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree it will shed the bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind”. In *Keshvanand Bharti*¹² case it was said “while restricting the present generation not to fetter the future generation by their wisdom the SC observed that no generation has monopoly of wisdom nor has it a right to place fetters on future generation to mould the machinery of government according to their requirements. If no provision were made for the amendment of the constitution the people would have recourse to extra constitutional method like revolution to change the constitution”. Hence the law must keep growing.

Law can be modified by two modes. First, law changes the society as law not only lays down the norms which are the aspiration of the people of a concerned society but it also lays down rules which society should adopt in the interest of its welfare. Hence even if the majority follows a practice which is derogatory to what provided in the constitution, it is the constitution which will prevail over the other and that is how *sati pratha* though followed in most of the parts of India was abolished by the Parliamentarians. Second, society changes the law according to its requirement.

¹¹ 1983 AIR 750 , 1983 SCR (3) 12

¹² *Keshvanand Bharti...v. State of Kerala*, 1973 SC.

Generally those laws are enacted by the legislatures which are demanded by the society. Jermy Bentham in his utilitarian theory said that law must be such which gives maximum pleasure to maximum members of the society. The process keeps revolving as the law is not static it grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality as propounded by great German jurist Savigny. Law is basically the reflection of opinion and ideologies of the citizen of a given country which keeps changing with the passage of time. When Constitutional Assembly was discussing on the point of flexibility of the constitution they retained the power of Amendment by inserting Article 368 of the constitution. It implies that even grund norm is subject to change as per the need of the society. Of course the amendment will be subject to basic structure of the constitution which is not amenable by nature.

It is a proven fact that Technology expands the boundary of the nation and law tries to strengthen the boundary to maintain peace and security and stability in the society. A consensual solution which balances the interest of both the sides without being unnecessarily restrictive is the need of the hour. Therefore the next main issue which needs our attention is, if there any way to regulate such sites? Specially, the sites which are flooded with child pornography?

The criteria to determine obscenity is different in different places, cultures and countries in this world. Even the criteria of criminality of obscenity is subject to change and changes from time to time. For instance, what may have been considered obscene in the 19th century may not be so in the modern times with the globalization of the world as one village particularly with the help of cyberspace and Internet which have no boundaries as there exists no uniform standard of morality, culture and decency. Presently Department of Telecom and Information and Broadcasting ministry has shown their inability in this regard, The **Internet Service Providers** are also now miffed at the government for putting the onus on them to identify websites and URLs that display

adult material featuring children. “We urge you to withdraw the said vague directive as it is not only confusing but also putting responsibility on ISPs, “ISPAI president Rajesh Chharia said in a letter to telecom secretary Rakesh Garg. Chharia said the ISPs do not have control over the content on websites and added that URLs can change the content at any moment without informing them¹³. The mobile operators also said it is “just not possible” to control pornography through the present move. “you shut down one website, another springs up”, Rajan Mathews director-general of cellular Operators Association of India(COAI)- which has member such as Bharti Airtel, Vodafone and Idea Cellular- said. “it is near impossible to curb pornography in this manner”.

The Additional Solicitor General L Nageswara Rao, representing the central government told the court that “We wish to have some control over the content of social networking sites but the hurdle is that all of them are headquartered overseas and content uploading is done abroad. There are jurisdictional issues. So we are planning to ask these sites to have a server in India too so that we can scan them”, Rao had said the issue would be taken up at a meeting of the newly-formed Cyber Regulatory Advisory Committee. A 2011 study of 184 Interpol countries showed 95 nations have no law addressing child pornography. Pavan Duggal also backed the idea of setting up servers in India as “greatly beneficial”. He said: “Making overseas-headquartered sites set up a server in India is essential to protect sovereign rights. It helps in removal of undesirable, illegal and unwarranted content and we can prevent undesirable data on Indians from being illegally transferred outside the country's territorial boundaries. Germany is already working in this direction”¹⁴.

From the above discussion it can be construed that though ISPs has expressed their inability but the central government has suggested a way to put at least

¹³ Pankaj Daval, “Selective porn ban implementable: ISPs”, *The times of India*, 6th Aug 2015.

¹⁴ *Supra*, n. 4.

some check over the situation. Through government affirmation and Supreme Court observation made in the light of female foeticide, it can be presumed that there is a possibility to curb the menace by taking a few further steps in the right direction. Though it will take time to find out the complete solution but try is a must. Till that time Government through treaties, convention or contract should force these search engines or sites to establish server in India too, to settle the dispute of jurisdiction. The Information Technology Act also should be amended to clear the ambiguity prevalent in the statute. The Act should be made more stringent to punish the offenders. Hence law can be used as a tool to bring social solidarity in the society and to balance the various conflicting interest of the society.

At the end it can be said that develop is the nation whose citizen have right to dissent, who have right to express themselves without fear of being put behind the bars. Which provides the environment of love and warmth, develop is the nation which understand the physical and psychological needs of its citizen without branding them to be sexually obsessed. Otherwise what is the difference between India and Taliban? Where human is not human but a mere substance. Let's pray for a country where understanding is the law and coexistence is our future plan.