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**PORNOGRAPHY AND OBSCENITY:**  
**LEGISLATIVE & JUDICIAL APPROACHES**

**Abstract**

*Pornography and other forms of sexual and provocative content as expressions of art have invariably been viewed in a reproachful manner, both by the Indian society at large and the legal systems of the country. This should not come as a surprise in a nation that considers most sex related topics taboo. It then, is also conceivable that the legal outlook of the country towards sexually explicit content is not just dismissive, but also repressive. However, the objective of the laws surrounding the subject is more than just to restrict viewership of obscene material. These laws also play a big role towards an attempt to provide a safe environment for children to grow and prosper and to protect them from sexual exploitation in the form of pornographic material involving children.*

**Keywords**

Pornography; obscenity; child pornography

**Introduction**

This research paper aims to analyse the various approaches the legislative and judicial systems of India have taken to restrict the growth of obscene and pornographic content and to provide for stricter punishments for all aspects related to child pornography. This analysis will also attempt to predict the standpoint of the legal systems of the country in the near future by examining how it has evolved over the past few decades.

## **Statutes Governing Pornography and Obscenity**

### *The Indian Penal Code, 1860*

The Indian Penal Code, enacted in 1860 criminalised the expression of obscenity through the means of “*book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object*”. Section 292 (1) declared such material to be obscene, “*if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.*”<sup>1</sup>

It is of importance to note here the phrase, “corruption of persons” because the law here is seemingly trying to enforce moral perspectives on the citizens of the country. There is no objective, commonly agreed upon definition of what “corruption of persons” is, nor does the Indian Penal Code define it for the purposes of this section.

Additionally, Section 293 of the Indian Penal Code makes it an offence to sell or distribute any obscene material or object to “young persons” i.e., persons below the age of twenty years. Interestingly, this section uses the term “young persons” and the age limit of twenty years, instead of the term “minor” and the age limit of eighteen years which is more commonly observed for the purpose of distinguishing a juvenile from an adult.

Section 294 of the Indian Penal Code penalises the commission of an obscene act or the performance of any obscene song, ballad, etc. in any public place.

### *The Information Technology Act, 2000*

After access to the internet became easier and its usage by the general public increased, distribution, transmission and consumption of pornographic material through this new medium also consequently increased. As a result of the introduction of a better medium to publish and transmit pornography, the need for new laws around adult content on the internet was felt because of the growing misuse of this medium to publish child pornography and other forms of involuntary pornography.

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<sup>1</sup> The Indian Penal Code, 1860, § 292, No. 45, Acts of Parliament, 1860

Resultantly, the Information Technology Act of 2000 addressed these issues in the form of a complete prohibition on publication or transmission of obscene and sexually explicit material and a blanket ban on all aspects concerning child pornography, including production, transmission and consumption of material depicting children in a sexually explicit manner. Section 67 of the act provides for “*punishment for publishing or transmitting obscene material in electronic form*”<sup>2</sup> and Section 67A makes a provision for “*punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form*”. Section 67B dictates punishments for all offences related to child pornography.

With regards to involuntary pornography including images and videos of people’s private areas taken without their consent or knowledge, Section 66E prohibits the capture, publication and transmission of such material under circumstances that violate the person’s privacy.<sup>3</sup>

#### *Protection of Children from Sexual Offences Act, 2012*

The third chapter of the Protection of Children from Sexual Offences Act, 2012 is dedicated to offences related to child pornography. Section 14(1) states the punishment for using a child for pornographic purposes<sup>4</sup> and Section 15 lays down the punishment for storage of pornographic material involving a child.

Notably, Section 42 of this act has also made a provision where if an offence is committed under this act and Sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 2 [376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], 376E or Section 509 of the Indian Penal Code, 1860, then that punishment which is greater in degree shall be awarded.<sup>5</sup>

#### *Indecent Representation of Women (Prohibition) Act, 1986*

This act prohibited the representation of women in an indecent manner in the forms of advertisements, any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form.

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<sup>2</sup> The Information Technology Act, 2000, § 67, No. 21, Acts of Parliament, 2000

<sup>3</sup> The Information Technology Act, 2000, § 66, No. 21, Acts of Parliament, 2000

<sup>4</sup> The Protection of Children from Sexual Offences Act, 2012, § 14, No. 32, Acts of Parliament, 2012

<sup>5</sup> The Protection of Children from Sexual Offences Act, 2012, § 42, No. 32, Acts of Parliament, 2012

Section 2(c) of the act defined “indecent representation of women” as “*the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals*”.<sup>6</sup>

### **Consumption of Pornographic Content Privately: Legal or Illegal?**

Neither the Information Technology Act, 2000, nor the Indian Penal Code, 1860 expressly make it illegal to view or consume pornographic content in any form. In 2015, while hearing a plea seeking a ban on pornographic websites, the Supreme Court observed that a restriction on the consumption of pornography may be considered a violation of a person’s fundamental right to life and personal liberty under Article 21 of the Constitution.<sup>7</sup>

The Madras High Court, in *P.G. Sam Infant Jones v. State*, stated that viewing pornography privately will not constitute an offence since an offence is an act that is forbidden by law and made punishable as per the definition of an offence, given in Section 40 of the Indian Penal Code, 1860. Since the act of viewing pornographic content in private has not been expressly prohibited by any law, it cannot be said to be against the law.<sup>8</sup>

### **Pornography As a Profession and Article 19(1)(g)**

It is valid to wonder whether the restrictions that are put in place to prohibit the production, distribution and sale of pornographic content would be a violation of a citizen’s fundamental right to practise any profession or to carry on any occupation, trade or business under Article 19(1)(g) of the Constitution of India. The Supreme Court of India addresses this in *Khoday Distilleries Ltd. and Ors. v. State of Karnataka and Ors.* It observed that the fundamental rights granted to the citizens are not absolute in nature and that Article 19 of the Constitution has to be read in whole and in a contextual manner. The court observed that a citizen has no right “*to carry on business of exhibiting and publishing pornographic or obscene films and literature*”

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<sup>6</sup> The Indecent Representation of Women (Prohibition) Act, 1986, § 2, No. 60, Acts of Parliament, 1986

<sup>7</sup> HT Correspondent, *It's legal to watch porn in the privacy of your house, says SC*, HINDUSTAN TIMES, (Jul. 9, 2015, 06:31 PM IST), <https://www.hindustantimes.com/india/it-s-legal-to-watch-porn-in-the-privacy-of-your-house-says-sc/story-WSre0BXJDfHbErouNgmdtK.html>

<sup>8</sup> *P.G. Sam Infant Jones v. State*, 2021 SCC OnLine Mad 2241

because it is an activity that is “inherently vicious” and would fall under an implied restriction provided for under Article 19(6) of the Constitution.<sup>9</sup>

### **Notable Judicial Observations**

#### *Aveek Sarkar v. State of West Bengal*

The Supreme Court of India in this case observed a critical viewpoint with regards to the concept of obscenity and the evolving nature of what is understood to be obscene in society. The court cited *Ranjit D. Udeshi v. State of Maharashtra*<sup>10</sup> and took into account its indication that with time, the concept and definition of obscenity would keep changing and that something that might be considered “obscene” at one point of time would not be considered so in the future.

The court rejected use of the Hicklin Test, which was previously used to determine “what is obscenity” because this test does not view material in context of the larger piece of material that it was a part of, and declared publications obscene based on isolated elements. Further, it decided to use the community standard test as it was deemed to be more adaptive to the dynamic nature of definitions of terms like obscenity.

#### *Ryan John Michael Thorpe vs The State of Maharashtra*

The laws surrounding pornography and obscenity came into larger public and media discussions when known businessman Raj Kundra and husband of actress Shilpa Shetty was arrested in relation to accusations of production, marketing of pornographic films and their distribution and publication through mobile applications. Kundra, along with co-accused Ryan Thorpe, has been charged with Sections 354(c), 292, 293, 430 of the Indian Penal Code, 1860, Sections 66(E), 67, 67(A) of the Information Technology Act, 2000 and Sections 3, 4, 6, and of the Indecent Representation of Women (Prohibition) Act, 1986.

While the matter is still sub judice as of February 2022, Kundra has been granted anticipatory bail in September, 2021.<sup>11</sup>

### **Additional Measures Taken by the Government**

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<sup>9</sup> Khoday Distilleries Ltd. v. State of Karnataka, (1995) 1 SCC 574

<sup>10</sup> Ranjit D. Udeshi v. State of Maharashtra, (1965) 1 SCR 65

<sup>11</sup> Ryan John Michael Thorpe vs. The State of Maharashtra (07.08.2021 - BOMHC) : MANU/MH/3023/2021

In 2015, the Department of Telecommunications of the Government of India, through an order directed internet service providers across the country to ban 857 websites that hosted pornography.<sup>12</sup> The Government said this order was issued in order to “protect social decency” and in the interest of “morality and decency” as a reasonable restriction through Article 19(2). The Government also cited Section 79(3)(b) of the Information Technology Act to hold these internet service providers responsible for providing access to such websites. Section 79 of the Information Technology Act, 2000 provides for cases where an intermediary, such as an internet service provider shall or shall not be held liable for material hosted by him. Section 79(3)(b) states: *“upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.”*

In 2018, the Uttarakhand High Court issued an order that asked the Government to all internet service providers in the country to strictly adhere to the Government order issued in 2015 and warned them of suspension of licence under Section 25 of the Information Technology Act, 2000.

### **Conclusion**

It is evident from the numerous judgements by the Indian judiciary that the judicial system’s view on how obscenity is perceived has transformed from being orthodox and conservative, to now becoming more broad-minded. At the same time, the law has also become more severe and uncompromising on child abusers and much needed laws to criminalise those involved in the publication and consumption of child pornography. The only factor that seems to be lacking currently is consistency between the standpoints of separate courts and judgements. However, that is to be expected in a country that is still undergoing a cultural evolution.

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<sup>12</sup> India Today Tech, *Ban porn sites or lose license: High Court to ISPs*, INDIA TODAY, (Sept. 28, 2018, 16:42 IST), <https://www.indiatoday.in/technology/news/story/ban-porn-sites-or-lose-license-high-court-to-isps-1351836-2018-09-28>