THE CRIME OF BEING OBSCENELY PRIVATE ON THE INTERNET: SECTION 67 AND 67A OF THE IT ACT, 2000

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Abstract—Privacy and protection of personal spheres of life is something that is highly valued by humans. The advancement of technology has resulted in us questioning whether technology is a threat or a possible solution to privacy. The technological overhaul of the 21st century mandated the government to recognise the virtual territory's need for regulation and legislation, which resulted in the enactment of the Information and Technology Act, 2000 (hereinafter 'IT Act'). The IT Act inadvertently mimicked the previous standards and regulations when it came to the penalisation of distribution of obscene content, and widely punished all publication and transmission of "obscene" content indiscriminately. The following paper is divided into two parts. Part one attempts to understand the concept of obscenity, publication & transmission as well as the Right to Privacy in the context of Sections 67 and 67A of the IT Act and looks at the role of communication through the internet in modern lives. Part two, further draws attention to the major lacunas that Chapter XI of the IT Act suffers from with respect to ambiguous drafting of the provisions and compares the Act with other democratic jurisdictions. This paper intends to shine a light on how certain interpretations of the legislation are open to dangerous violations of the right to privacy as recognised under Article 21 of the Indian Constitution. This paper also discusses the "Doctrine of Proportionality" or the theory of punishment with respect to Sections 67 and 67A of the IT Act and the interpretative gap left in those sections.

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INTRODUCTION

It is no surprise that our legislative and judicial orientation on the topic of sexual conduct is traditionally conservative, that is, it leans towards averting as much public conversation about it as possible and equates most conduct of sexual nature with immorality,[210] given the Victorian conditioning that Indian society chooses to abide by even after several years of decolonisation.[211] Holding on to these beliefs and governing ethically has proven to be a dubious task for the Indian Courts, especially in the context of internet and internet culture.

Another consequence of the information age is that the internet is an unforgivingly permanent record of every interaction it facilitates. Individuals of modern societies are constantly presented with new information that demands change which can be even about the most basic assumptions of life. Sometimes, these assumptions can be skewed in a direction that is dangerously leaning towards what is considered by society to be immoral. But people are entitled to re-invent themselves, reform and correct their mistakes.[212] It is privacy that nurtures this ability and removes the shackles of unadvisable things which may have been done in the past. While researching the impact of technology on the privacy of the individual, Rosenberg concluded that: "*Technology continues to be viewed as a threat to privacy rather than a possible solution.*"[213]

In this paper, the ethical questions related to the right to privacy of the individual which is threatened using technology will be discussed. Specific attention is given to the conflict between the Right to Privacy under Article 21 of the Constitution and the exchange of multimedia privately via electronic medium. The first part of the paper establishes the ambit of legal understanding of the vocabulary consequential and essential to discuss the issue at hand. The second part critically analyses the IT

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[210] Shashi Tharoor, *An Era of Darkness: The British Empire in India* (Aleph 2016).

[211] Lakshmi Iyer, 'The Long-term Impact of Colonial Rule: Evidence from India' (14 November 2002) <https://web.mit.edu/14.75J/www/iyer.pdf> accessed 16 February 2021.

[212] Ravi Antani, 'The Resistance of Memory: Could the European Union's Right to Be Forgotten Exist in the United States?' (2015) 30 Berkeley Tech LJ 1173 <https://lawcat.berkeley.edu/record/1126847> accessed 16 February 2021.

[213] Richard S Rosenberg, 'Free Speech, Pornography, Sexual Harassment, and Electronic Networks' (1993) 9(4) The Information Society 285.

Act's outlook on obscene content in literature or multi-media transmitted between two consenting adults in private behind the encrypted walls of a messenger/website.

UNDERSTANDING THE TERMS

Concept of Obscene

Black's Law Dictionary defines the word 'obscenity' to mean: "*character or quality of being obscene, conduct, tending to corrupt the public merely by its indecency or lewdness*".[214] The Indian judiciary, however, has chosen to keep the legal definition of obscenity open to interpretation, thereby, keeping the scope of the concept as wide as possible. One of the most popular tests for obscenity to this day was devised in *R. v. Hicklin*[215] in 1868 which stated that: "*The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall*." While this test is well respected, it does not end the debate on the question of obscenity – and has been criticised to be archaic.[216]

The test which found credibility with jurists after that is called the *Community standard test*, as mentioned in *Aveek Sarkar v State of W.B.*[217] While disregarding the constricted view of the Hicklin test, this test added the parameter of contemporary community standards as laid down in *Roth v United States*,[218] a 1957 case from the Supreme Court of United States. This test essentially allows the consensus of the public opinion into the courtroom on what obscenity is - and a room for its dynamic perception in culture.

The Roth Test, which is cited as a more relevant test by the Supreme court in *Aveek Sarkar v State of W.B.*,[219] is a three-prong test. *Contemporary community standards* are the first, the second prong being the material's necessity to be *patently offensive* and the third being *of no redeeming social value*. The Court's application of this test to define

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[214] *Black's Law Dictionary* (8th ed, Thomson West 2004).

[215] *Reg v Hicklin* (1868) LR 3 QB 360.

[216] Gautam Bhatia, 'Obscenity: The Supreme Court discards the Hicklin Test' (*Indian Constitutional Law and Philosophy*, 7 February 2014) <https://indconlawphil.wordpress.com/2014/02/07/obscenity-the-supreme-court-discards-the-hicklin-test/> accessed 16 February 2021.

[217] *Aveek Sarkar v State of W.B.* (2014) 4 SCC 257.

[218] *Roth v United States* 354 US 476 (1957).

[219] *Aveek Sarkar* (n 217).

obscenity under Section 292 of the Indian Penal Code, 1860 (*hereinafter* 'IPC') was for a particular work to "have a tendency to arouse feeling or reveal an overt sexual desire."[220]

USA looks at this in a very different light, where the threshold for legal obscenity is all that UK's laws account for and much more. The test devised in the matter of *Miller v State of California*[221] in 1973 frames the following parameters for the American courts to gauge obscenity.

- Whether *the average person, applying contemporary community standards*; would find that the work, taken as a whole, appeals to the prurient interest,
- Whether the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by the applicable state law,
- Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value

Published content or even transmitted content must meet all the three conditions in order to be declared criminally obscene when it pertains to legal adults. It is worth noting that *Memoirs v Massachusetts*[222] in 1966 already superseded the Roth test in the American jurisprudence, and *Miller v California*[223] articulated a new set of parameters as stated above. The major reasons given by the courts to abandon the Roth test were the tendency to equate sexual content to be obscene by default, and arousal itself was made grounds for content to be declared legally obscene.

The problem with the legal semantics of the word is that it remains confusingly broad and sticks intrinsically to the cultural fabric of different jurisdictions. There seems to be an objective description of what it is trying to prevent or shield the general public from, but very little agreement on how far and what presentation of such description is to be legally reprehensible. The legal understanding of obscenity still is a much debated and disagreed upon concept across the globe - adding to the muddy waters of governing with legislation as broad as Sections 67 and 67A for the Indian judiciary.[224]

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[220] Gautam Bhatia (n 216).
[221] *Miller v California* 413 US 15 (1973).
[222] *Memoirs of a Woman of Pleasure v Massachusetts* 383 US 413 (1966).
[223] *Miller* (n 221).
[224] Mahesh Menon, 'The Law of Obscenity in India: Archaic Laws and the Search for Judicial Standards of Determination by the Supreme Court of India' (SSRN, 27 April 2012) <www.ssrn.com/abstract=1990827> accessed 18 September 2020.

Concept of Publication & Transmission

Sections 67 and 67A of the IT Act categorically mentions publication and transmission before it criminalises them equally. However, there is a clear distinction between the two:

Section 66E of the IT Act describes the difference between publish and transmit. If the public does not have access to a certain message or electronic media i.e. if it is not intended for more than one person, it is not a publication but a transmission of the said information, and the remaining condition then becomes a publication.[225] However, this definition is very clearly restricted in its understanding and application to the section it is mentioned in.

It is worth noting that Sections 67 and 67A explicitly goes the length to treat transmission and publication of content as the same thing. The court and the legislation do seem to agree in a vocational exercise to discriminate between publication and transmission - but choose to ignore the difference between the two while reading the two sections.[226]

The point of contention remains that transmission is far more limited than a publication - to the extent that it is the difference between writing and publishing a book or writing and mailing a letter. The authors would also like to emphasise the importance of recognising the difference in gradation and degree of exposure and access in publication and transmission respectively. The inclusion of transmission in the same breath as publication feels like a disproportionate equivalency - one with the potential of disastrous and unfair punitive damages to otherwise upstanding members of society.

Concept of Right to Privacy

The juridical definition of privacy dictates that facts and information of an individual must be protected in isolation as well as a profession if it is to be recognised as a right.[227] The right to privacy essentially extends to protection over channels or mediums of communications where privacy can be established and ensured to individuals.

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[225] Information and Technology Act 2000, s 66E.

[226] Information and Technology Act 2000, ss 67 and 67A.

[227] J J Britz, 'Technology as a Threat to Privacy: Ethical Challenges to the Information Profession' (1996) <http://web.simmons.edu/~chen/nit/NIT'96/96-025-Britz.html> accessed 18 September 2020.

Privacy is an important right because it is a necessary condition for other rights such as freedom and personal autonomy. Privacy can be defined as an individual condition of life characterised by exclusion from publicity.[228] Such perception led the Supreme Court of India to show solidarity with the cause of protecting the right to privacy by recognising and protecting the individual's right to privacy under Article 21 of the Constitution as an intrinsic part of the right to life and liberty in *K.S. Puttaswamy v Union of India*.[229] Parallel to the European Court of Justice's judgement in the case of *Google Spain v Agencia Española de Protección de Datos and Mario Costeja González*;[230] the judgement even recognised the 'Right to be Forgotten' in the same breath, as intertwined with the right to privacy. The Supreme Court sees why some skeletons must be buried for a person to live with no stigma and why every person must get autonomy over how they are perceived.[231]

Justice Subba Rao's dissenting opinion in the matter of *Kharak Singh v. State of U.P.*,[232] recognised privacy to be essential for a person to flourish - and stated that arbitrary investigation, even by a body of the state, must not be encouraged. The words he used to pen down this message were borrowed from the case of *Colorado v Wolf*.[233] Further, the Supreme Court recognised the right to have a telephonic conversation with no interruption and respecting privacy in the matter of *Rayala M. Bhuvaneswari v Nagaphanender Rayala*.[234] Surveillance without due reason and process was deemed to be in violation of Article 21 of the Constitution. Divulging any private information even in the interest of due process was considered unnecessarily invasive and under most circumstances, unconstitutional - setting a precedent to create protection for privacy laws around communication by electronic medium.

CRITICAL ANALYSIS OF SECTION 67 AND 67A OF THE IT ACT, 2000

The IT Act was enacted by the Government of India to deliver and facilitate lawful electronic, digital, and online transactions, and to deter

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[228] J Neethling, J M Potgieter and P J Visser, *Neethling's Law of Personality* (Butterworths 1996).

[229] *K S Puttaswamy v Union of India* (2017) 10 SCC 1.

[230] C-131/12 *Google Spain SL and Google Inc v AEPD and Mario Costeja González* [2014] ECLI 317.

[231] Michael L Rustad and Sanna Kulevska, 'Reconceptualizing the Right to be Forgotten to Enable Transatlantic Data Flow' (2015) 28 Harv JL & Tech 349.

[232] *Kharak Singh v State of UP* AIR 1963 SC 1295.

[233] *Wolf v Colorado* 338 US 25 (1949).

[234] *Rayala M Bhuvaneswari v Nagaphanender Rayala* 2007 SCC OnLine AP 892.

and punish crimes like digital obscenity and voyeurism.[235] In order to meet this purpose, Chapter XI of the Act provides for the provisions (Sections 67 and 67A) related to offences of publication and transmission of obscene/sexually explicit material in electronic form.

While the intention of the provisions is justified, the practical application of the law is ambiguous, overarching and constitutionally untenable. Furthermore, it disregards the principle of proportionality.

Ambiguity and Lack of Clarity

Legal scholars have deliberated on the values that should guide statutory drafting. Amongst these, clarity of law, precise drafting, and avoidance of ambiguity are foremost.[236] These values, *inter alia*, further the principle of legal certainty which enables the subjects of the law to be made aware of their rights and liabilities.[237]

With respect to ambiguous drafting, Justice Stephens stated that "it is necessary to attain clarity, if possible, to a degree of precision to which a person reading in bad faith cannot misunderstand."[238] Thus, draftsmen should aim to provide meaning to those terms that foreseeably lead to inadvertent readings. The best way to prevent such semantic ambiguity is to define the terms comprehensively and clearly, reducing the amount of ambiguity left to the judiciary to resolve.[239]

Sections 67 and 67A of the IT Act states, "Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which is lascivious or appeals to the prurient interest[240] or contains sexually explicit act or conduct[241] shall be punishable." The terms 'publish' or 'transmit' find no description in the definition clause of the IT Act, thereby making it vague and resulting in criminalising consensual exchange of explicit information.

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[235] Pavan Duggal, 'Cyberlaw in India: The Information Technology Act 2000- Some Perspectives' (*Mondaq*, 6 September 2001) <www.mondaq.com/india/it-and-internet/13430/cyberlaw-in-india-the-information-technology-act-2000--some-perspectives> accessed 16 February 2021.

[236] Ann Nowak, 'Demystifying Ambiguity in Legislative Writing' (2016) 37 Statute Law Review 164.

[237] Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Routledge 2016).

[238] *Castioni, In re* (1891) 1 QB 149, 167.

[239] Stefanou (n 237).

[240] Information and Technology Act 2000, s 67.

[241] Information and Technology Act 2000, s 67A.

The texts describing sexual acts or organs, let alone multimedia through the electronic medium containing the same in a private chat could be illegal.[242] For example, in 2017, a staged YouTube prank about kiss-and-run was considered obscene when the footage was found on a public YouTube channel, even though it adhered to platform guidelines and the women in question were actors.[243] Similarly, comedians and actors involved in the AIB roast controversy were charged under section 67 and now struck down Section 66 A of the IT Act for vulgar jokes even after giving full disclaimer about the same.

A glaring aspect that emerges is that Section 67 and 67A criminalise even what may be obscene or sexually explicit conversation exchanged privately between two or more consenting adults. On the contrary, the law does not forbid persons from having an identical conversation, if it takes place without the involvement of any electronic medium.[244] The Parent Law for the offence that relates to obscenity, i.e., Section 292 of the IPC, does not criminalise any conduct that is obscene and private. However, when the same applies to the internet/electronic form of communication it is liable to be seen as an offence.[245] If A and B are engaged in obscene acts privately, it is not a crime under Section 292 of the IPC. However, if A and B engage in a similar conversation and exchange media using an electronic medium, it is considered obscene even if it is in the privacy of a virtual chat room.

In *Navtej Singh Johar v Union of India*,[246] the Supreme Court judgement read down Section 377 of IPC to not contain homosexuality in the ambit of "unnatural offences" given its conflict with Article 14 of the Constitution. It explicitly states that the human propensity to experience desire must be treated with respect and hence, consensual sexual relationships between adults should not be an issue of sanction or governance by the state. There is no room to actualise the idea of a dignified autonomous individual without 'an institutionalised recognition of privacy for an expression of love', and private communication over an electronic

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[242] Tanima Kishore and Anuj Kapoor, 'Beware! Even Private Obscene Messages Online Could Land one in Jail: Know about IT Act offences' (*Live Law*, 13 May 2020) <www.livelaw.in/know-the-law/even-private-obscene-messages-online-can-land-one-in-jail-know-about-it-act-offences-156682> accessed 16 February 2021.

[243] F P Staff, 'AIB roast: Police Register FIR Against Actors, Complainant's Lawyer Says show was 'Pre-Scripted'' (*First Post*, 13 February 2015) <www.firstpost.com/living/aib-roast-police-register-fir-against-actors-complainants-lawyer-says-show-was-pre-scripted-2096563.html> accessed 16 February 2021.

[244] *Nivrutti v State of Maharashtra* 2020 SCC OnLine Bom 410.

[245] Indian Penal Code 1860, s 292.

[246] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

medium should not be outside the ambit of this doctrine, even by virtue of vagueness.[247]

An essential ingredient for obscene publication to be penalised is its viewability and potential to cause a nuisance to the public - in absence of which it ceases to be a crime. This is an ingredient that Sections 67 and 67A of the IT Act explicitly fails to consider. The pivotal question being - why must there be a difference between a room in 3 dimensions locked by a latch and a room in the virtual world locked by encryption in relation to intimacy and crime?

While Lord Dunsany would have us to believe that "*contrast is the method of the dramatist*", it does help illustrate the point effectively.[248] Studying the literature around Section 67 and Section 67A of the IT Act, the ambiguity in it is more glaringly evident when compared to other judicial systems in the free world. The UK is the primary stone for comparison with India on obscenity law, because it is based on the skeleton of their legal framework that our entire legal system is based. A secondary comparison is also drawn with the Republic of Texas in the United States, as it is the oldest democracy that has practised separation of powers as we understand it today.

Private Obscenity and the UK

The United Kingdom has very clearly reserved the scope to criminalise publication, limited publication and transmission, and there is a fair amount of legislation commenting on the same:

Firstly, Section 2(1) of the Obscene Publications Act, 1959 is the applicable legislation to the publication of data likely to be obscene, where it criminalises publishing an article that's obscene or mere possession of an article that is obscene and is intended to be published for gain.[249] (Publish being the main word, where it means that it is in the public domain). Secondly, Section 127 of the Communications Act, 2003 directly criminalises the transmission and publication of any obscene or indecent matter using a public electronic communication network.[250] Further, Section 151 of the Communications Act, 2003 which is the Interpretation Chapter of the Act, insists that the electronic communication network be used

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[247] Shraddha Chaudhary, '*Navtej Johar v Union of India: Love in Legal Reasoning*' (2019) 12 NUJS L Rev 3-4.

[248] Dunsany and S T Joshi, *In the Land of Time, and Other Fantasy Tales* (Penguin Books 2004).

[249] Obscene Publications Act 1959, s 2(1).

[250] Communications Act 2003, s 127.

"*wholly or mainly for the purpose of making electronic communications services available to members of the public*."[251] Essentially, a public electronic communications network is any transmitter or transmission system (and associated equipment, software and stored data) used to convey signals (in all forms of conversion of data). This does not include restricted networks but only networks used by service providers who have members of the public as customers.[252]

Moreover, the Data Protection Act 1988 of the UK protects all images of people as personal data, and all information derived from their own images.[253] This law even recognises the existence and rightful need to protect the privacy of sensitive personal data under the Act which includes but is not limited to images or data relating to one's sexual life. The Act even leaves room to hold the data controller liable for processing the data with care and in a manner that is not "*causing or likely to cause substantial damage or substantial distress to him or another*." Personal data processed by an individual for the purposes of that individual's personal, family or household affairs for reasons that could range from logistical to recreational is exempted from the provision. However, the European Court of Justice has determined that posting material on the internet is not a part of one's personal, family or household affairs.

The historical parent of the Indian legal system does currently have a legal framework broad enough to consider the transmission of obscene material to be objectionable, their unwritten constitution has adopted the European Convention on Human Rights, Article 7 and 9 of which makes privacy a fundamental right.[254] Furthermore, the data holding private parties in the electronic data realm are also heavily regulated by the Data Protection Act, 1998. This effectively neuters any possibility for the penalisation of transmission of sexual content in any form over an electronic medium.

The core difference here, again, remains that the UK has various privacy laws and free speech laws protecting consensual and limited publication of sexual material as explicit as hard-core pornography. It also decriminalises and deems transmission of obscene content, created, and received with due consent between adults where no children are put in compromising positions, legal. There is legislation to criminalise reckless handling of obscene material, such as posting sexually explicit

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[251] Communications Act 2003, s 151.
[252] Communications Act 2003, s 127.
[253] Data Protection Act 1998.
[254] Human Rights Act 1998, c 42 sch 1 art 8.

pictures with no content discretion on a public platform like YouTube or Instagram, which makes transmission conditionally punishable.

The contrast of the British jurisprudence with the Indian legal standing on the issue is simple enough to be described in one word: specificity. Sections 67 and 67A have a vague and inconsistent understanding of obscenity in comparison, where hard-core pornography and an arousing description of sexual intercourse is likely to be filtered into the same realm. The UK, on the other hand, makes a strict recognition of gradation, and the courts act in a clear understanding of what limited publication can allow, and why consensual communication of information that is otherwise obscene if in public without discretion, is not the same as pornography.

Private Obscenity and Texas

The legislation in the State of Texas in the USA titled: "Unlawful Electronic Transmission of Sexually Explicit Visual Material", states:

> "*A person commits an offense if the person knowingly transmits by electronic means visual material that*:
>
> (1) *depicts: (a) any person engaging in sexual conduct or with the person's intimate parts exposed; or (b) covered genitals of a male person that are in a discernibly turgid state; and*
>
> (2) *is not sent at the request of or with the express consent of the recipient" 255*

The American Judicial System has used the Miller test,[256] as discussed earlier in the description of the concept of obscenity, as a yardstick to determine what must be considered criminally obscene. The elements in the legal framework and understanding coagulate to recognise the same elements for the criminalisation of obscenity as in the UK. It holds transmission of obscene content (e.g., pornographic material) that is consensually transmitted via an electronic medium to be private and legal. However, it goes into the description of imagery that is criminal if transmitted via an electronic medium non-consensually. The offence of transmission without consent is also considered a class C misdemeanour with a $500 penalty, a distinction made by the legislation to be a lesser offence than a more serious violation such as open-source publication without

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[255] Texas Penal Code, s 21(19)(b).
[256] *Miller* (n 221).

discretion.[257] It is worth noting that the Supreme Court's proclamations in *Aveek Sarkar v. State of West Bengal*[258] do push the jurisprudence of Indian Courts in a direction different from American Jurisprudence. As mentioned before, the court in this case prefers the Roth test over the Miller Test. The Roth test is a metric for gauging obscenity in the USA that has been rethought in the Miller test specifically. The emphasis of the court on 'the potential to evoke sexual desire' significantly widens the scope of interpretation of what it means to be obscene, only to add and recognise the contemporary community standard test, a goal that can be achieved with partial recognition while reading the Miller test for Sections 67 and 67A of the IT Act along with Section 292 of the IPC. However, these widened and dangerously volatile interpretations have been preferred over the more recent and apt American gradations in understanding obscenity.

Doctrine of Proportionality

One of the basic tenets in the study of penology has been that the punishment for the offender in case of a crime must be proportionate to the severity of the offence itself.[259] The most reductive example of this is how there is a minor fine for a traffic violation in case of non-statutory damage to a person or property, but somebody's death at your hands will bring punishment by imprisonment or death; again, depending on culpability.

The Doctrine of Proportionality further structuralises this and puts parameters of intent, consent, degree of damages, and arrives at tests to determine an individual's degree of culpability. The doctrine is commonly associated with the theory of punishment or the idea that people should receive the punishment that they deserve and no more.[260] The literature in support further goes to specify that nearly all jurisdictions, after considering the above-mentioned parameters, dictate whether an individual, if at all culpable, is relatively culpable (remoteness to the consequence of events)[261] or absolutely culpable (proximity to events and presence of intent).[262] Further, devised tests for the same ask

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[257] Texas Penal Code, s 21(19)(b).

[258] *Aveek Sarkar* (n 217).

[259] *Graham v Florida* 130 S Ct 2011.

[260] Andrew Von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press 2005); *Ewing v California* 538 US 11 (2003), 31.

[261] *Atkins v Virginia* 536 US 304 (2002), 317-21.

[262] Youngjae Lee, 'Why Proportionality Matters?' (2012) 160 U Pa L Rev 1835 <www.law.upenn.edu/journals/lawreview/articles/volume160/issue6/Lee160U.Pa.L.Rev.1835(2012).pdf> accessed 16 February 2021.

consequential questions like whether punishment attains a certain societal goal or is it just causing pointless suffering in the *Pointless suffering test* - which begs us to consider whether punishment achieves goals and discourages actual damage to the social fabric.[263]

In the *Puttaswamy case*,[264] Justice Sikri laid down a four-fold test to determine proportionality: a legitimate goal stage, rationale connection stage, necessity stage and balancing stage.[265] The message of the four-fold test to determine proportionality is to articulate instances where adjudication demands intervention and the degree of intervention that needs to be observed. It is clear that any law that governs obscenity is primarily targeted to maintain public order, a goal that private communication would fail by exclusion. The consenting adults who may publish this information or content with discretion and disclaimer would be providing for no social harm that actually results from such infringement on the right. In the event where there is malpractice, for example in the cases of revenge pornography or doctored obscene content, the victim is likely to be disproportionately held liable. Moreover, the ambiguity over the law to find a culprit and to determine the extent of their culpability is present in a reasonable standard and articulate definitions in better texts and in defining parts of section 66, which have been completely ignored in Sections 67 and 67A of the IT Act.

Considering the doctrine of proportionality, it can be interpreted how publication and transmission in the IT Act, as discussed above, are categorically equated to be the same thing under Section 67 and 67A, causing a twofold problem.

Firstly, there is an umbrella punishment, i.e., there is no room for gauging culpability by larger impact or intent for that matter. This is a grave lacuna in the law because it treats publication on an open-ended source and publication privately done to a curated audience (of as low as one person) as the same thing. While a large chunk of the argument is that transmission of obscene content should be respected just as much as an interaction behind closed doors; this flaw is more evident when the equivalency of punishment for publication and transmission is considered. This approach of an umbrella punishment for offences runs counter to

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[263] *Coker v Georgia* 433 US 584 (1977), 592.

[264] *Puttaswamy* (n 229).

[265] Aditya A K, 'Proportionality Test for Aadhaar: The Supreme Court's Two Approaches' (*Bar and Bench*, 26 September 2018) <www.barandbench.com/columns/proportionality-test-for-aadhaar-the-supreme-courts-two-approaches> accessed 16 February 2021.

jurisprudence that emphasises the need to consider the resulting consequence of an offence while meting out appropriate punishment.[266]

Secondly, there is the problem of inadequate punishment. As there is a lack of specific criminalisation and prosecution in cases such as that of revenge pornography; a crime typical for scorned lovers - where the offender publishes digitally recorded content of sexual nature in an attempt to defame the victim, who typically are women.[267] The crime by itself is still punishable under Section 67 and Section 67A[268] - the same law that punishes voluntary transmission of the content of similar nature; and is likely to find the upper limit of the punishments of these acts as the same. The problem of inadequacy of penalty goes to the root of the deterrent effect of the punishment itself.[269] Deterrence is the "*preventive effect which actual or threatened punishment of offenders has upon potential offenders*"[270] but Section 67 and 67A of the IT Act punishes revenge pornography and sexting near indiscriminately.

The reading of the law in the cases of revenge pornography shows a serious lack of consideration of the intent of publication of obscene material - and the aggravated nature of the offence in these cases. Sections 354, 354A, 500, 504 and 506 of the IPC which criminalise outraging the modesty of a woman, sexual harassment, defamation and criminal intimidation respectively help penalising revenge porn in the country currently.[271] But even with that, the standard judgement has imprisonment up to 5 years of jail time and compensation for the victim[272] - a sentence that does not even go to the full extent of the punitive end of the law. In contrast, the King County case with similar facts brought compensation with punitive damages worth 8.9 million USD, along with imprisonment - a much stronger deterrent precedent.[273]

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[266] John Boeglin and Zachary Shapiro, 'A Theory of Differential Punishment' (2017) 70 Vanderbilt Law Review 1499 <https://scholarship.law.vanderbilt.edu/vlr/vol70/iss5/3> accessed 16 February 2021.

[267] Matthew Hall and Jeff Hearn, *Revenge Pornography: Gender, Sexuality and Motivations* (Routledge 2018).

[268] Amartya Bag, 'Online Revenge Porn-Recourse for Victims Under Cyber Law' (*IP Leaders*, 29 November 2014) <https://blog.ipleaders.in/online-revenge-porn-recourse-for-victims-under-cyber-laws/> accessed 16 February 2021.

[269] Aakarsh Banyal and Atmaram Shelke, 'All Bark, No Bite: Section 11 of India's Animal Welfare Legislation' (2020) Statute Law Review <https://doi.org/10.1093/slr/hmaa017> accessed 11 January 2020.

[270] John C Ball, 'Deterrence Concept in Criminology and Law' (1955) 46 J Crim Law & Criminology 347 <https://scholarlycommons.law.northwestern.edu/jclc/vol46/iss3/5> accessed 16 February 2021.

[271] Indian Penal Code 1860, ss 354, 354A, 500, 504 and 506.

[272] *State of W.B. v Animesh Boxi* CRM No 11806 of 2017.

[273] Bill Moak, 'Revenge Porn is a Growing Threat' (30 June 2018) <www.clarionledger.com/story/news/2018/06/30/revenge-porn-used-shame-victims-extort

Furthermore, there is a gaping hole in the legislation that not only is likely to put a victim of revenge pornography in the way of a state's prosecution but also completely lacks recognition of the existence of doctored footage such as deep fakes. The American Deep Fake Accountability Act, 2019 is a good example of how the damages likely to be done by the technologies that produce dangerously replicant content that could be used as evidence for prosecution and the access to them is on an exponential rise. While Section 500 of the IPC[274] does criminalise defamation, the Indian Evidence Act, 1872, provides no direct parameters or guidelines for determining the authenticity of documentary evidence in the form of videos or photos or interactive files that are likely to be in question, especially in cases where distribution using technologies like seeding and blockchain is made possible.[275] Malicious uses of these technologies without legal accountability, or in a way that falsely prosecutes an innocent individual is meanwhile a wide gap in the jurisprudence over the issue.

CONCLUSION

The internet is a level of connectivity that has whiplashed our entire species into uncharted and unfamiliar territories of sociology, psychology, philosophy, and anthropology. The courts, being human institutions of acclaimed merit, are understandably challenged by this information age and have more than just this aspect of cultural shift to deal with in their duty to the people of the state. This paper intends to point out that our current understanding of obscenity is directly linked to *public display or public access of obscene material without consent or regulation*, but the room for prosecution exists even for the production of "obscene content" regardless of the intent for distribution.[276]

While no criticisable prosecutions in the violation of privacy have taken place so far; given the history of Section 66 of the IT Act and the misuse of its broad and vague terminology until the Supreme Court had to strike down 66A in 2015[277] - the dangers of the unclear ambit of Sections 67 and Section 67A are concerning. Law being misused for harassment through the process treatment by the powerful in the country, and another layer of private transmission of said obscene material

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money/735019002/> accessed 16 February 2021.

[274] Indian Penal Code 1860, s 500.

[275] Simran Jain and Piyush Jha, 'Deepfakes in India: Regulation and Privacy' (LSE Blog, 21 May 2020) <https://blogs.lse.ac.uk/southasia/2020/05/21/deepfakes-in-india-regulation-and-privacy/> accessed 16 February 2021.

[276] Stephan Ridgway, 'Sexuality and Modernity' (1997).

[277] *Shreya Singhal v Union of India* (2015) 5 SCC 1.

is likely to only add fuel to the fire.[278] The potential for prosecution and misuse of the sections in case of a sensitive data breach could be a blatant violation of the right to privacy and would be unconstitutional.

In the brave new world of a technological overhaul, the difference between a place in a conventional three-dimensional form of space and an online forum in the world of encryption behind the screen otherwise termed as cyberspace is barely etymological. Given the statistical data on unintended pregnancies in India in the last 10 years, surveys show a sizable growth in pregnancies out of wedlock. Even after sieving through the alarming and concerning number of teenage pregnancies this country has within wedlock every year[279] - which in this case just helps create room for the assumption that sexual relationships exist outside wedlock in this country as well. The COVID-19 lockdown and social distancing protocol create the perfect storm for this data to clash with the already prevalent possibility of sexting and sharing imagery that might depict nudity.[280] This means that up-standing members of society - that happen to be consenting adults - may face prosecution for an activity that was harming nobody but was instead a *de facto* crime because of uncertainty in the reading of the law and a certain risk of cultural taboo around the subject of sex in general.

Between the high-strung standards of western or Victorian modesty and near-utopian assumptions of society in naturism - obscenity is a culturally contextual topic that has been tricky to govern for ages, and the global culture of the internet complicates the process even further. In these times, the courts need to recognise the priority protection of privacy and autonomy of the individuals under its care while balancing the larger social well-being.

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[278] Gautam Bhatia, 'The Supreme Court and Memes, Indian Constitutional Law and Philosophy' (*Indian Constitutional Law and Philosophy*, 14 May 2019) <https://indconlawphil.wordpress.com/2019/05/14/the-supreme-court-and-memes/> accessed 16 February 2021.

[279] Nikita Mehta, 'Highest Number of Unwanted Pregnancies in India: WHO' (*Livemint*, 5 February 2015) <https://livemint.com/Politics/Pmc6dfvxZHRpAK7ruguXzM/Highest-number-of-unwanted-pregnancies-in-India-WHO.html> accessed 16 February 2021.

[280] Donald S Strassberg and others, 'Sexting by High School Students: An Exploratory and Descriptive Study' (2013) 42 Arch Sex Behav 15.