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# **THE PORNOGRAPHY DEBATE** **IN THE INDIAN SETTING:** **INDIVIDUAL LIBERTY V.** **PUBLIC MORALITY**

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Sex is considered to be taboo in India. Despite great strides being taken to raise awareness about pertinent themes such as sex education, it is still considered an aspect of ethics. Due to this notion, there exists a lot of controversy surrounding the subject matter of pornography. In the status quo, the manufacture and selling of pornography are prohibited by the laws of India. This is due to the fact that sexually explicit content like pornography is viewed to be a hurdle in ensuring public morality and decency. Furthermore, they depict women in a shameful manner. The moral dilemma of banning pornography to ensure greater societal good is a talking point. The laws prohibiting pornography can also be viewed as violative of an individual's right to free speech and privacy, as enshrined by the Indian Constitution. The laws governing pornography are very ambiguous in theory. There is a lack of clarity on the meaning of relevant words like 'morality', 'decency', and 'obscenity'. This allows the Court to decide on cases involving issues of pornography arbitrarily. This article tries to analyse the disputed grey areas of pornography, such as its definition, legalisation, implementation and diverse perspectives. The authors have attempted to analyse the lacuna in Indian pornography laws to establish a

more precise understanding through this article.

**Keywords:** Pornography, individual freedom, public morality, obscenity, sexual exploitation of women, pornography debate

## STATEMENT OF PROBLEM

The legalisation of pornography is arguably a highly debated issue. The liberal perspective states that pornography should not be banned for the exact purpose of protecting free speech and expression as well as the right of privacy of consenting individuals. Furthermore, pornography safeguards the sexual autonomy of an individual. Conservatives and Feminists differ with this view. Their main objection is the interference of pornography with the sound standards of polite society. They also argue that pornography shows women in a humiliating manner. This difference in opinion has led to an intense debate. In a jurisdiction like India, it is important to establish a clearer understanding of the jurisprudential status of pornography. No law directly speaks about pornography. However, the Indian Constitution, The Indian Penal Code and the Indecent Representation of Women (Prohibition) Act makes indirect references to it. In cases dealing with pornography, words like 'morality', 'decency', and 'obscenity' are brought to the foray. However, these words are subjective and do not have a clear definition. Their meanings are often sought from already established age old judgements that do not cater to the current contemporary society. In this regard, Indian laws are lacking. Due to this, the burden is on the Court to decide prudently on cases related to pornography. It is important to clearly define and draw a line between free speech and public morality or decency with respect to pornography.

## RESEARCH METHODOLOGY

The research methodology adopted by the researcher is a doctrinal and analytical form of research. This methodology was employed in order to analyse the current status of pornography in Indian law and to understand the arguments put forwards by the supporters and opposers of pornography. Throughout the course of the research, the researcher has referred to both primary and secondary sources of information such as legislations, case laws, rules, books, articles, research papers and websites. The keywords used by the researcher to source reading material

include:

1. Meaning of Pornography
2. Understanding the viewpoints to pornography
3. The Pornography Debate
4. Pornography in Indian Law
5. Individual Freedom and Pornography
6. Morality, Decency and Obscenity and Pornography

## INTRODUCTION

Pornography and obscenity raise difficult questions of jurisprudence. Each of these topics involves a complex debate with a mixture of questions and philosophies. On one hand, pornography can be viewed through a liberal lens, in which individual freedom supersedes all others. As John Stuart Mill states that the role of law must be confined to preventing harm to any person. Unless it can be proved that pornography causes harm to another, it should not be bound by legal restrictions. This argument is not accepted by those on the other end of the spectrum. Their primary concern is the disruption of public morality. Furthermore, feminists argue that the porn industry is discriminatory towards women. Though women are shown to ostensibly take part in the industry, the ground reality is very different. Most porn videos show women in a dehumanised and demeaning manner, submissive to her male counterpart. The pornographic industry is also largely run by capitalistic men who work for their own profits. These individuals maintain a hierarchy of power in their industry which results in women being denied equality and being objectified in the eyes of the society. This article seeks to analyse the debate of pornography and its legalisation with reference to the Constitution of India. The paper is divided into four parts – (i) defining pornography; (ii) understanding the pornography debate; (iii) assessing pornography with reference to the Constitution of India and related case laws; and (iv) concluding remarks.

### I. DEFINING PORNOGRAPHY

Before we debate the legalisation of pornography, it is important to understand its meaning. Pornography is a self-defining concept but the fact that it is linked to sexual pleasure or arousal makes it a subjective term. It is difficult to determine what constitutes pornography. To

understand this better consider the following situations. If a director of a movie chooses to show his actors nude for 20 seconds, will it constitute pornography? Or will a picture of a child fully clothed, yet arousing a paedophile be considered porn? Or yet, can parents be made liable for making pornographic material if they have pictures of their child naked?

The word pornography is derived from two words. The first root word is ‘porno’ which means prostitution or female captivity or whores<sup>1</sup>. This is proof enough that the word pornography does not seek to encompass consensual sex or mutual love. Instead, it refers to the total domination and sexual violence against women. The second root word is ‘graphos’ which means to write about. Here too, we notice the connotation of the word to the objectification of women and voyeurism.<sup>2</sup> Compare this with erotica which comes from ‘eros’ meaning passionate and intimate love. Erotica allows for free will, positive choice and genuine love.<sup>3</sup>

In contemporary society, with its advanced technology, the types and methods of publishing pornographic content have drastically increased, reaching beyond the scope of the traditional ‘graphos’. Yet, the content, meaning, depiction of women’s sexuality and their value remain the same.

It is evident from the above explanation that pornography refers to what is wrong with it – the portrayal of women in a degrading manner. This definition has been widened to include other vulnerable groups like children.

## II. UNDERSTANDING THE PORNOGRAPHY DEBATE

The debate surrounding pornography involves three main stakeholders – liberals, conservatives and feminists. While conservatives and feminists hold the same notions about pornography, their reasoning largely differs.

Traditional conservatives argue for the complete ban on pornography. According to them,

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<sup>1</sup> The word ‘whore’ as the meaning of ‘porno’ was put forth by leading feminist scholar Andrea Dworkin in her work titled ‘Pornography: Men Possessing Women’.

<sup>2</sup> Catharine MacKinnon & Andrea Dworkin, “Appendix: The MacKinnon/Dworkin Pornography Ordinance” *11 William Mitchell Law Review* 119-121 (1985).

<sup>3</sup> Gloria Steinem, “Erotica and Pornography: A Clear and Present Difference” *Take Back the Night: Women on Pornography* 35-37 (New York: Morrow, 1980).

pornography refers to any sexually explicit material which is obscene. Conservatives justify the State's interventions in and complete ban of pornography as necessary because it disrupts the standards of a polite society that has evolved over time. This view is referred to as legal moralism.<sup>4</sup> This group also maintains that non-procreative sexual intercourse as shown in pornographic videos corrupts its viewers. Conservatives believe in the philosophy of legal paternalism, by which the State has the power to curb the freedom of duly consenting adults for their own good.<sup>5</sup> The contention of conservatives and right-wing extremists is based on religious values where sexuality, especially female sexuality is completely hidden.

Unlike moral conservatives who believe that pornography should be banned due to its immoral and indecent nature, feminists, especially radical feminists hold a different point of view. They argue that pornography is inherently built on the oppression and harassment of women. The message of pornography influences the way in which its viewers treat women. According to feminists, pornography is built on a double faceted mechanism – one that works to portray women in a submissive manner and another that seeks to further violence against women. As feminism is built on the ideals of equity and collaboration among all genders, feminists believe that pornography does not help in furthering this objective in any way.

While conservatives and feminists argue that pornography should be banned on their respective grounds, liberals believe that it should be met with the least sanctions and regulation. According to liberals, an individual's freedom cannot be compromised at any cost unless it is causing harm to their person. They frown upon the intervention of the State and relegate its duty to merely maintain a welfare society. Liberals defend pornography by employing a threefold reasoning based on the philosophy of liberal scholar John Stuart Mill. Firstly, a ban on pornography violates the freedom of speech and expression of consenting adults. They believe that free speech or actions cannot be restricted even if the second person finds it offensive, vulgar or disagreeable. Free speech and expression mean that there should not be censorship or rule that directs the manner in which people ought to speak, think or express themselves. These restrictions can be brought to play only if there is harm to any individual. Yet, it should be the last recourse to preventing harm resulting from free speech. Secondly,

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<sup>4</sup> Joel Feinberg, "Pornography and the Criminal Law" 40 *U. Pitt. Law Review* 567-574 (1978 – 1979).

<sup>5</sup> *Id.*

liberals argue that an interference of the State in pornography violates the freedom of privacy of adults. Privacy or moral independence as referred to by them protects the rights of an individual to explore his interests and sexuality in private without being afraid of any threat, coercion or deterrence from the State. Lastly, neither the production nor distribution of pornographic content causes harm to anyone.<sup>6</sup> It is built on a system of voluntary consent, i.e., the adult actor's consent to being filmed and the viewer's consent to consume such content. It is not the duty of the State to interfere in a process that is self-regulating. It is pertinent to note here that not all liberals share this same view. Many liberals like Ronald Dworkin believe that pornography is wrongfully being justified on the grounds of removal of censorship that should only be restricted to political and social dissent.<sup>7</sup>

Though it has been stated earlier that many feminists denounce pornography, there are a few that actually support it. This group of feminists believe that pornography allows a woman to explore her sexuality and enhance her right to sexual autonomy. Furthermore, it allows them to break the shackles of societal standards set by moral conservatives about the secrecy of women's sexuality.

Each of the arguments presented above is justified in its own sense. The pornography debate is largely argued by individuals on either side of the political spectrum. Feminists hold differing views – some support pornography, while some outrightly oppose it. For one thing, it is clear that if pornography were completely banned, there would be no space for such philosophical and political discourse.

### **III. ASSESSING PORNOGRAPHY WITH REFERENCE TO THE CONSTITUTION OF INDIA AND RELATED CASE LAWS**

Article 19(2) of the Indian Constitution deals with obscenity. This Article lays down that the State has the power to reasonably restrict free speech and expression on the grounds of public

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<sup>6</sup> Here, the word 'harm' refers to crimes of physical violence or other wrongful actions that causes damage to the person or property of an individual.

<sup>7</sup> Ronald Dworkin, "Liberty and Pornography" *The New York Review* 12-15 (August 15, 1991).

morality and decency.<sup>8</sup> There exists a fine line between the two. In the case of *Ranjit D. Udeshi v. State of Maharashtra*<sup>9</sup>, the Court answered the question on the clash between free speech and reasonable restrictions to it. It noted that the essence of democracy is free speech; however, it can be exercised only while criticising the political or social set up of the country or to further human intellect. Therefore, the Court upheld Section 292 of the Indian Penal Code<sup>10</sup> as it fits correctly within the restrictions provided to free speech under Article 19(2). The principle set down, in this case, was also noted in the case of *Chandrakant Kalyandas Kakodkar v. State of Maharashtra*.<sup>11</sup>

Unfortunately, in India, the legislature, as well as the judiciary, have not successfully explained how the consumption of porn in private is against public morality or decency. The State's action against pornography in India seems to stem from the reaction to the harm principle<sup>12</sup>. However, the State has not clearly established how pornography which involves consenting adults performing sexual acts in private harms another. Furthermore, the State has not provided an understanding of the immorality of sexual freedom and expression. As has been previously stated, pornography can have positive contributions as it can be a means of sexual liberation. It can help in the growth of a healthier society. By restricting it on the grounds that some people do not like it because they find it immoral or dirty, would essentially mean that the State is ready to compromise on the rights of many due to the uncomfortability of a few.

Another aspect of pornography that our Constitution has a lack thereof is an explicit right to privacy. In the past, the Supreme Court has held that the Right to privacy is a fundamental right that can be interpreted from Article 19(1)(a)<sup>13</sup> which talks about freedom of speech and expression, Article 19(1)(d)<sup>14</sup> which talks about freedom to move freely, and Article 21<sup>15</sup> of the Indian Constitution which deals with the rights to life and personal liberty. A law to privacy was developed by the Bench in the case of *Govind v. State of M.P.*<sup>16</sup> The Supreme Court in

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<sup>8</sup> The Constitution of India, art. 19(2).

<sup>9</sup> 1965 AIR 881.

<sup>10</sup> The Indian Penal Code, 1860 (Act 45 of 1860), s. 292.

<sup>11</sup> 1970 AIR 1390.

<sup>12</sup> The harm principle is a concept put forward by John Stuart Mill which states that all actions not harming the body or property of oneself or another should not be met with regulation.

<sup>13</sup> The Constitution of India, art. 19(1)(a).

<sup>14</sup> The Constitution of India art. 19(1)(d).

<sup>15</sup> The Constitution of India, art. 21.

<sup>16</sup> 1975 AIR 1378.

this case opined that the privacy of an individual can be compromised only in situations of genuine State interest. It is the duty of the Court to assess the facts and circumstances of the case to determine whether the privacy of an individual can be breached, as it is a guaranteed fundamental right of the citizens.<sup>17</sup> The privacy law in India was further widened in the case of Naz Foundation v. Government of National Capital Territory of Delhi.<sup>18</sup> In this case, the Court stated that the right to privacy is that right that enables an individual to keep themselves in a realm of intimacy and autonomy in order to develop themselves as well as their relationship with others, without the interference of anyone else.<sup>19</sup> The right to sexual freedom is a right of privacy whereby an individual can explore his sexuality without any interference by the State or the outside community. Disruption of the morality of a select few cannot amount to a genuine interest of the State to violate the right to privacy. Furthermore, there is no harm caused as only consenting adults take part or readily consume pornographic material. By evaluating the judgements on privacy given by Courts in India it can be said that an intervention of the State on regulating or banning pornographic material can amount to a breach of the citizens' fundamental right.

One of the key reasons for the said legislations to treat pornography as immoral and indecent is the lack of a clear definition. Every sexually explicit material, including pornography, erotica, child pornography, etc. are included under the ambit of 'obscene'. Additionally, there is no differentiation between content that is privately or publicly consumed. This failure of the legislatures can consequently compromise the rights of free speech and privacy of an individual. Nowadays, pornography and obscenity are used interchangeably, even though they mean completely different things. This begs the question – can all kinds of pornography be considered as obscene? To label anything obscene in the traditional sense means to criticise it as openly repulsive. Pornographic, on the other hand, is a purely descriptive term that refers to sexually explicit material that is intended solely and reasonably to elicit sexual enjoyment in the viewer. Essentially, whether any specific piece of pornography is truly obscene is a logically open subject that must be resolved by debate rather than a definitional decree.

Due to the lack of a definitive legislative material concerning pornography, the onus of determining cases related to it falls on the Court. It is the duty of the Court to determine whether

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<sup>17</sup> *Id.*

<sup>18</sup> 2018 SCC OnLine SC 1350.

<sup>19</sup> *Id.*

pornography is intended to corrupt public morale or is just a platform to express ideas. The Court should also draw a line between the freedom of speech and expression and freedom of privacy of duly consenting adult actors and the audience that consumes pornographic material and the morals of a select few.

Many nations like the United States of America, the United Kingdom, and Canada have made efforts to implement progressive legislations for pornography. In the landmark judgement of *Miller v. California*<sup>20</sup>, the Supreme Court of the United States put forth the ‘contemporary community test’. This test enables the State to make rules and laws on obscenity depending on the thought process of the current society. By applying this test to the instant case, the Court noted that unless pornographic material was being distributed to children or to non-consenting adults, the State cannot bar sexually explicit content merely because some individuals find it obscene. The verdict given by the Court is in line with the First<sup>21</sup> and Fourteenth<sup>22</sup> Amendment of the US Constitution. The ‘contemporary community test’ was adopted by the Supreme Court of India in the case of *Ajay Goswami v. Union of India*<sup>23</sup>. In this case, the Court took cognizance of the advanced technological advancements and stated that the earlier tests were redundant as content from across the globe was easily available to the citizens readily. Hence, if society is accepting such content, then their freedom to do so must be taken into due consideration.<sup>24</sup>

The Constitution of India is a sacred text that protects the rights of Indian citizens. It gives us an understanding of who we are as the citizens of this country. It defines our social, political, economic and cultural surroundings. The Constitution does not directly refer to the production and distribution of pornographic material. It is the duty of the Court to determine the legality of pornography on a case-to-case basis while balancing the freedom of speech and privacy rights of some individuals on one hand and public morality and decency on the other.

## IV. CONCLUSION

There have been unfortunate instances in the past where obscenity has been wrongly interpreted

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<sup>20</sup> 413 US 15.

<sup>21</sup> Constitution of the United States, 1788, amend. I.

<sup>22</sup> Constitution of the United States, 1788, amend. XIV.

<sup>23</sup> 2006 SCC OnLine SC 1389.

<sup>24</sup> *Id.*

to curb the freedom of speech of citizens. In the Ranjit Udeshi Case, the edition of Lady Chatterley's Lover was banned and the appellants who were found guilty of its sale were imprisoned. The movie Bandit Queen, depicting the life of dacoit Phoolan Devi met with controversy and was granted an adult certificate (A) for a single nude scene.

The above instances have resulted from the Court's opinion that obscene material disrupts public morality. However, public morality is a subjective term and its meaning is largely based on what has already been agreed upon decades ago. There is also no clear difference between what constitutes as obscene and decent. The Indian Penal Code and the Indecent Representation of Women (Prohibition) Act are merely reproduced versions of age-old English laws. The rise in pornography black material is evidence enough of the loopholes in these legislations.

The bitter truth about pornography is that it is not the only institution promoting gender inequality. In fact, discrimination against women is sustained by much larger institutions and industries. Gender imbalance is deeply ingrained in the minds of the society. The reason why pornographic material is in high demand is because it furthers this inequality, something its viewers are already accustomed to. Prohibiting one narrowly defined category of representations cannot overturn the complex process of gender discrimination. Moreover, there are compelling reasons to suppose that outright prohibition would be ineffective and even counterproductive.

We cannot discount the fact that pornography is a serious issue threatening the status of women in our country. However, we must also accept the grave truth that law cannot reverse a cultural obsession with sex and gender discrimination. Pornography will continue to exist in the status quo no matter what. This does not mean that we sit silent. Active discussion and debate about pornography can help us reassess our cultural values. Law should act in a regulatory manner and construct the socially unacceptable to increase accountability of female exploitation.

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