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**LEGALITY OF PORNOGRAPHIC CONTENT DISSEMINATION IN INDIA:
A Critical Analysis**

Vaishnavi Bansal & Ishita Agarwal

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LEGALITY OF PORNOGRAPHIC CONTENT DISSEMINATION IN INDIA: A Critical Analysis

*Vaishnavi Bansal & Ishita Agarwal**

[Abstract: The pornographic industry in India is yet to see the light of the day, but on the flip-side, India is the third-largest country in terms of access to the pornographic material. The unidirectional debate, to the legislature's advantage, has completely averted the consciousness from the lacunae that marks the Indian legislative and policy framework on porn. The paper tries to highlight the pernicious power of pornographic materials on young minds and how, once exposed it leads to the habituation under Section II. The elaboration on the laxity of the Indian laws in regulating porn is discussed in Section III, where the various laws have been elucidated to testify for the insufficiency. This section also describes the journey of the notion of obscenity in India and the constitutional dilemma. The law deficit and unregulated pornographic material circulation on social media have been discussed under Section IV, which also focuses on whether the complete ban can be seen as a solution against the right to privacy. Highlighting the need for express legislation Section V puts forth specific regulations that need to be incorporated in law.]

I

Introduction

The policy approach, of Indian law, towards porn video dissemination through the internet is in a state of flux. There is a case pending in the Supreme Court of India, namely, *Kamlesh Vaswani v. Union of India* on the issue.¹ The judgment is expected to be decisive in deciding the broad policy, on pornographic materials and its dissemination through the internet in India. In other words, the decision of the Supreme Court might either lead to the downfall of the Indian porn sector (which has not seen the light of the day)² or pave way with respect to porn regulation in

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¹ *Kamlesh Vaswani v. Union of India*, W.P. 177/2013 (SC) (Pending).

² Nandita Singh & Priyamvada Grover, *Why it's time for India to have its own porn star*, The Print (Dec. 29, 2018) available at: <https://theprint.in/features/why-its-time-for-india-to-have-its-own-porn-star/170447/>.

India. The verdict would find its place in history, to bring to light, the insufficiency of Indian laws in dealing with porn dissemination through the medium of internet

The first roadblock in this process of drafting legislation is defining 'Pornography'. Though the origin of pornography is quite simple, its current ambit presents a dilemma. The word *pornography* comes from the Greek *pornographos*, literally meaning writing about prostitutes.³ The definition of pornography is as elusive as the referent is pervasive.⁴ The first known use of the word to describe something similar to pornography, as understood today was in the eighteenth century when the city of Pompeii was discovered.⁵ The entire city was full of erotic art and frescoes, symbols, inscriptions, and artifacts that were regarded by its excavators as pornographic.⁶ All these finds were kept at the Secret Museum and only men of a certain upper class were allowed and 'trusted' to have access to these objects, and not the 'easily corruptible rabble or women'.⁷

In India, however, the issue of pornography is more of a contemporary origin rather than a deep-rooted historical issue. This is because India's past with 'sex' and 'pornography' has largely been unproblematic and more commonly acceptable. Eroticism in ancient India was a well-studied subject as shown by the Kamasutra, written by Mallanaga Vatsyayana during the 2nd-5th century. It was considered to be an integral part of adult education at that time.⁸ However, major changes occurred following the British entry and drafting of the Indian Penal Code by Lord Macaulay wherein Indian culture was admixed with the Victorian system of ethical and moral standards. This coalescence is the genesis of the contemporary divide that exists between the Pornography *liberalists, conservatives* and *feminists*. The conservatives advocate for a complete ban on pornography while the liberals consider porn as an 'expression' and condemn all forms of intervention by the State in matters concerning individual freedom.⁹

While the feminist notion of pornography is based on the dictum, *pornography is the theory-rape is the practice*.¹⁰ Through the lens of the progressive feminist movement, which is hailed as the most relevant movement on gender equality, 'pornography' is considered as the explicit representation of sexual behaviour characterised by

³ Lynn Hunt, INTRODUCTION TO THE INVENTION OF PORNOGRAPHY 13 (1993).

⁴ Michael C. Rea, *What Is Pornography?* 35(1) NOUS 118 (2001).

⁵ Sarah L. Robinson, *Defining Pornography*, 1 SOC. SCI. J. 10 (2010).

⁶ *Id.*

⁷ Walter M. Kendrick, THE SECRET MUSEUM: PORNOGRAPHY IN MODERN CULTURE (1996).

⁸ Suresh Bada Math, *Sexual Crime in India: Is it Influenced by Pornography?* 36(2) INDIAN J. PSYCHOL. MED. 147 (2014).

⁹ Vallishree Chandra and Gayathri Ramachandran, *The Right to Pornography in India: An Analysis in Light of Individual Liberty and Public Morality*, 4 NUJSL. REV. 323 (2011).

¹⁰ R. Morgan, *Theory and practice: Pornography and rape* in TAKE BACK THE NIGHT 134-40 (L.J. Lederer (ed.) 1980).

*degrading and demeaning portrayal of the role and status of the female.*¹¹ This can be roughly construed as a behaviour that is intentionally injurious, hurtful, physically or psychologically coercive, or which disregards or denigrates the desires and experiences of the other, thereby treating the other as 'a mere sexual object to be exploited and manipulated sexually'.¹² They do not refer to the broad range of sexual materials, that is commonly, and more casually, referred to as pornography, but rather the content is considered pornographic when it subordinates women.¹³

The unidirectional debate, to the legislature's advantage, has completely averted the consciousness from the lacunae that marks the Indian legislative and policy framework on porn. The paper tries to highlight the pernicious power of pornographic materials on young minds and how, once exposed it leads to the habituation under Section II. The elaboration on the laxity of the Indian laws in regulating porn is discussed in Section III, where the various laws have been elucidated to testify for the insufficiency. This section also describes the journey of the notion of *obscenity* in India and the constitutional dilemma. The law deficit and unregulated pornographic material circulation on social media have been discussed under Section IV, which also focuses on whether the complete ban can be seen as a solution against the right to privacy. Highlighting the need for express legislation Section V puts forth specific regulations that need to be incorporated in law.

II

Porn's pernicious power of perpetuation

Porn showcases and reinforces many facets of an individual's preferences and perceptions like sexual adventure, sex for mere pleasure, casual sex, anonymous sex, group sex, voyeuristic sex, violent sex, public sex, etc.¹⁴ Our society finds itself incapable to answer the ethical aspects of these acts unanimously, because there are no objective criteria to determine the 'right' and 'wrong' in such cases.

There cannot be definite social norms, especially in a diverse country like India, however, the empirical discernment provides that pornography provides a commanding sexual stimulant or aphrodisiac effect, followed by sexual release. Over time people experience an escalation in the pleasure involved with the release

¹¹ Mary Joe Frug, *A postmodern feminist legal manifesto*, 105 HARV. L. REV. 1045 (1992).

¹² H.E. Longino, *Pornography, Oppression and Freedoms: A Closer Look* in TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 42-43 (L. Lederer & A. Rich, eds., 1980).

¹³ Alisa L. Carse, *Pornography's Many Meanings: A Reply to C.M. Concepcion*, 14(1) HYPATIA 101 (1999).

¹⁴ Lisa Duggan, Nan Hunter, and Carol Vance, *Feminist Antipornography Legislation* in MORALITY IN PRACTICE 326 (James P. Sterba, ed., 1993).

and start showing a need for more explicit & deviant matter to meet their sexual needs.¹⁵ The interpretation of some pornographic materials, which exhibit highly violent and eroticised male-dominated abuse of women, can lead to the germination of a harmful mindset in society. A recent study of 'adolescent porn use' concluded that the major messages interpreted from porn are male domination, hyper-masculinity, and to give male sexual pleasure the top priority.¹⁶ Such visual stimulation normalises all forms of acts for sexual gratification and reinforces the norms of male domination and abuse in our heterosexist society.¹⁷ This stereotypical mindset was evidenced in a recent film titled '365 days', which reinforced the idea of women craving domination.¹⁸ People do wish to emulate what they see, and hence broadcasting of this film was followed by numerous TikTok short videos, where women exhibited sexual bruises, in imitation to the glorified violent sex scenes in the film. This typecast is further problematic as it incentivises men to use force on women, with the general pre-established notion that women covertly want to engage in such acts.¹⁹

It suggests that the widespread consumption of pornography mainstreams the notion of innate misogyny and female inferiority in the sexual sphere and justifies acts of sexual violence committed against them by painting it as normal.²⁰ It further lowers the inhibitions on aggression by men against women, increases acceptance of women's sexual servitude, increase sexual callousness toward women, decreases the desire of both sexes to have female children, increase reported willingness to rape, and increase the belief in male dominance in intimate relationships.²¹

Moulding the young minds

Pornography positions itself as being representative of reality, the way, sexual relations normally take place.²² Its viewership is highest among teenagers, who are

¹⁵ Ankur Singhal, *Legal Status of Pornography in India*, 2 IJLMH 1 (2018).

¹⁶ E.F. Rothman, C. Kaczmarzky, N. Burke, E. Jansen, & A. Baughman, *Without Porn... I Wouldn't Know Half the Things I Know Now: A Qualitative Study of Pornography Use Among a Sample of Urban, Low-Income, Black and Hispanic Youth*, 52(7) J. OF SEX RES. 736 (2015).

¹⁷ *Supra* note 13.

¹⁸ Wendy Squires, *Is it any wonder society is so screwed up about sex?*, THE SYDNEY MORNING HERALD (Jun. 26, 2020) available at: <https://www.smh.com.au/culture/movies/is-it-any-wonder-society-is-so-screwed-up-about-sex-20200625-p5566b.html>.

¹⁹ Georgia Aspinall, *This Disturbing Viral TikTok Proves Exactly Why 365 DNI Is So Damaging for Young People*, GRAZIA (29 Jul., 2020) available at: <https://graziadaily.co.uk/life/in-the-news/sex-scene-365-dni-film-boat-michele-morrone/>.

²⁰ Carolyn Bronstein, *BATTLING PORNOGRAPHY: THE AMERICAN FEMINIST ANTI-PORNOGRAPHY MOVEMENT* 9 (2011).

²¹ Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B. U. L. REV. 793 (1991).

²² Ann Ferguson, *Pleasure, Power and the Porn Wars*, 3 WOM. REV. BOOKS 11 (1986).

most vulnerable to peer influences. They may be easily influenced by such materials as to how sexual activity should take place.²³ This is evidenced by the research surveys which reflect that, 1 out of 10 purchases by young adults are now for the fauxcest titles²⁴ and as is common knowledge that anything which a human mind sees, is capable to mould it and influence its way of thinking and being, causing immeasurable repercussions on the society over a substantial period of time. This is corroborated by the results which exhibit an increasing inclination to act out behaviours viewed in pornography.²⁵

Taboo: Limited to the fake portrayal

It is a common misconception that porn allows consumers to explore taboo fantasies, essentially keeping it *fake* so as to withhold the viewers from acting on those fantasies in real life. However, as the research shows, the truth is actually the opposite; porn influences consumers to be aroused by what they see on screen, so much so that many consumers' try to transfer these fantasies into the real life, even if those *fantasies* are abusive or dangerous. The fact is, casual pornography use has the power to change ideas and attitudes.²⁶

Once consumers start watching extreme and dangerous sex acts, it may start to seem normal, acceptable, and more common than they really are.²⁷ It is proved that for high-frequency consumers, these materials increase self-reported sexually aggressive behaviour.²⁸ A study revealed that people exposed to significant amounts of porn, eventually came to believe that acts such as sex with animals and violent sex were twice as common as those who were not exposed to porn to such an extent.²⁹ And when people consider a behaviour to be normal, they're more likely to try it.³⁰ In yet another study, where the experimental subjects were exposed to repeated presentations of hard-core non-violent pornography over 1-2 months, they

²³ *Id.*

²⁴ *Id.*

²⁵ *Cyber Law Introduction*, CyberlawsIndia.net, available at: <http://www.cyberlawsindia.net/index1.html> (last visited 01 Aug, 2020).

²⁶ J. Peter & P.M. Valkenburg, *Adolescents and Pornography: A Review Of 20 Years of Research*, 53(4-5) J. OF SEX RES., 509 (2016)

²⁷ D. Zillmann, *Influence of Unrestrained Access to Erotica on Adolescents and Young Adults Dispositions Toward Sexuality*, 27(2 Supp.) J. OF ADOLESCENT HEALTH, 41 (2000).

²⁸ James V.P. Check & Neil M. Malamuth, *Pornography and Sexual Aggression: A Social Learning Theory Analysis*, 9 COMM. Y.B. 181 (1986).

²⁹ *Supra* note 27.

³⁰ U.S. Senate, *Hearing on the Brain Science behind Pornography Addiction*, (Nov. 18, 2004), MA. Layden, Committee on Commerce, Science, And Transportation, Subcommittee On Science And Space.

gradually developed a callousness towards women/ girls/ children and trivialised rape as a criminal offence, and to some, it was no longer a crime.³¹

The reiteration of the detrimental effects of pornography is to draw attention to the fact that there should exist an explicit classification of porn based on the capacity of reinforcement of extreme sexual acts which can only be construed as a crime. The authors concede that this might open the scope of subjectivity, however, in India, where still, there has been no legislative distinction in pornography, a classification might be a step forward, albeit small, towards a more contemporary-conscious regulatory mechanism.

III

Lackadaisical porn laws in India: Absent in Letter as well in Spirit

Statistics suggest that Indians are among the largest consumers of pornography in the world and with the increased internet penetration, this consumption has further increased.³² Hence, it is surprising that the current legal stance on pornography in India is Delphic owing to the 'institutional apathy' and conflicting traditional beliefs and societal anathema.

Progression of notion of Obscenity

The test of obscenity has progressed from categorisation on the basis of the *most vulnerable actor*³³ to the *average person's test*.³⁴ In India, old doctrines such as the Hicklin Test, left from the colonial legacy is still used to determine obscenity. The Hicklin test of obscenity is based on 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*.³⁵ A more defined criteria was laid down in the case of *Aveek Sarkar v. State of West Bengal*,³⁶ which revolved around a picture of a famous male tennis player posing nude with a woman while covering her breasts with his arm on a magazine cover. This case marked the arrival of the concept of *contemporary community standards* into Indian jurisprudence on obscenity.

³¹ *Supra* note 1.

³² Ananya Bhattacharya, *Cheap data is fuelling a porn boom in India*, QUARTZINDIA (25 Jan, 2018) available at: <https://qz.com/india/1187963/jio-beta-cheap-data-is-fuelling-a-porn-boom-in-india/>.

³³ *Ranjit Udeshi v. State of Maharashtra*, AIR 1965 SC 881.

³⁴ *DG Doordarshan v. Anand Patwardhan*, (2006) 8 SCC 433.

³⁵ Namita Malhotra, *The World Wide Web of Desire: Content Regulation on the Internet*, APC ISSUE PAPERS (2007) available at: https://www.apc.org/sites/default/files/webOFdesire_EN_0_0.pdf.

³⁶ (2014) 4 SCC 257.

This requires the courts to determine whether the effect of any material, taken as a whole, was to offend the contemporary community standards on sexual depiction.³⁷

The slippage between *obscene* and *pornographic objects*, was highlighted in *Pratibha Naithani v. Union of India*,³⁸ where it was argued that the English movie channels should be pulled off the air for broadcasting adult content, and controls should be put on these channels (censoring bad language, timings of adult movies, etc.). This case exemplifies the blurry borders of obscenity as a category - whereby innocuous objects are pointed at, as aspects of sleazy modernity that are separate from Indian culture, and thereby rendered obscene.³⁹

Opaque system and leaked orders

An order (leaked) dated July 31, 2015, by the Department of Telecommunications (DOT) revealed that Indian Internet Service Providers (ISP) had been directed to block access to a list of 857 porn websites⁴⁰ as *they relate to morality, decency as given in Article 19(2) of the Constitution of India*.⁴¹ The ban was implemented under section 79(3)(b) of the Information Technology Act, 2000 which provides for *exemption from liability of intermediary*.⁴² The implementation of ban under this provision was dubious as section 69A had been inserted for the specific purpose of authorising the blockage of online content in the public interest.⁴³ The block came as a surprise⁴⁴ as it directly contradicted the government's stance in the *Kamlesh Vaswani* petition, whereby they argued that mass blockage of porn websites would be highly impractical and tantamount to violation of the Constitutional rights to free speech and privacy.⁴⁵

This reflects the ambiguous government standpoint, which oscillates in accordance with the interests involved. What further exacerbates the problem is that such orders are shielded by the usage of sections such as section 79 of the IT Act, 2000 which

³⁷ Gautam Bhatia, *Obscenity: The Supreme Court discards the Hicklin Test*, INDIAN CONST. L. & PHIL. (07 Feb., 2014) available at: <https://indconlawphil.wordpress.com/2014/02/07/obscenity-the-supreme-court-discards-the-hicklin-test/>.

³⁸ AIR 2006 (Bom) 259.

³⁹ Namita Malhotra, *Pornography & The Law*, available at: <https://www.google.com/search?client=safari&rls=en&q=Pratibha+Naithani+v.+Union+of+India+namita+malhotra&ie=UTF-8&oe=UTF-8#>

⁴⁰ Department of Telecommunications, *Ban on Pornographic Websites*, Notification No. 01-GL/2015/43, Ministry of Communications and Information Technology, GOVERNMENT OF INDIA (13 Jul., 2015) available at: - https://sflc.in/sites/default/files/wp-content/uploads/2015/08/2015-07-31_DoT-block-order-decency.pdf.

⁴¹ *Id.*

⁴² Information Technology Act 2000, section 79(1)(3).

⁴³ Information Technology Act, 2000, section 69A.

⁴⁴ SFLC (08 Apr., 2014) available at: <https://sflc.in/dot-orders-blockage-porn-websites>.

⁴⁵ *Supra* note 1.

does not prescribe a particular procedure for the formulation and enforcement of such orders,⁴⁶ as opposed to section 69 which provides for a systemic mechanism.⁴⁷ Thus, the government's operation in the arena of digital blocking is best described as *opaque* where the actions are undertaken arbitrarily without any public information and justification and within the close quarters of governmental offices.

The (Non) Law

Every incident related to the dissemination of pornography in India is characterised by the statement – *There is no specific legislation regulating porn in India*. This raises a question for identifying a reason to this effect, especially in the wake of the fact that almost every country has a legislative policy that comprehensively deals with pornography. In India, although, there are some provisions in certain acts, however, these are not exhaustive enough to accommodate all the scenarios which have now emanated in the pornography sector and are essentially a predominant interpretation of the existing laws in the expansion of their scope.⁴⁸ A brief discussion on the various legal provisions follows –

1. *Provisions of the Information Technology Act, 2000* – Cyber Pornography is neither banned nor legalised under the Information Technology Act, 2000 (hereinafter referred to as “IT Act”). This Act prohibits the production and distribution of cyber pornography but does not prohibit the viewing or downloading of pornographic content if it is not child pornography.⁴⁹ section 67A of the IT Act makes publication, transmission, and causing to be transmitted and published any material containing sexually explicit act or conduct punishable with imprisonment up to 5 years and a fine up to ₹10 lakhs⁵⁰ and section 67B(b) makes the collection, browsing, downloading, exchanging material in any electronic form depicting children in an obscene or indecent or sexually explicit manner, an offence punishable up to 5 years of imprisonment.⁵¹

These provisions although penalize obscene information in electronic form, do not exclusively focus on the sexually explicit content, especially in consideration of the fact that IT Act was introduced with the legislative intent of promoting e-commerce, as is evidenced by the preamble to the IT Act.⁵² The mere attribution of a few provisions to the regulation of pornography might not be sufficient for establishing a constructive operational mechanism for regulating porn. In this digital age, where the circulation of pornographic

⁴⁶ *Supra* note 43.

⁴⁷ Information Technology Act, 2000, section 69A.

⁴⁸ *Supra* note 39.

⁴⁹ Information Technology Act, 2000, section 67, 67A, r/w 67B.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Information Technology Act, 2000, *Object and Reasons*.

material and the porn itself is not limited to the conventional technologies and forms, the IT Act appears to be perfunctory, while superficially dealing with pornographic material. This is evidenced by the general phraseology of related provisions, which casually encompass the regulation of all the heinous forms of pornography in a sub-section.⁵³ Hence, the authors put forth the argument that the IT Act, read in conjunction with the other laws (discussed below), is not sufficient to govern the wide expanse of the ever-expanding porn sector.

2. *Indian Penal Code, 1860: Obscenity = Pornography* – There is no specific provision related to pornography in the Indian Penal Code, 1860 (hereinafter referred to as “IPC”) but it is brought within the ambit of section 293 which deals with obscenity and imposes criminal liability for sale, distribution, etc. of obscene materials.⁵⁴ It was in the case of *Ranjit D. Udeshi v. State of Maharashtra*,⁵⁵ that court recognised and brought pornography within the purview of this section. According to Justice Hidayatullah – *There is, of course, some difference between obscenity and pornography in that the latter denotes writings, pictures, etc. intended to arouse sexual desire while the former may include writings, etc. not intended to do so but which have that tendency. Both, of course, offend against public decency and morals but pornography is an obscenity in a more aggravated form.*⁵⁶

The first roadblock in effective implementation of this section is the undefined concept of ‘obscenity’. The law must at the minimum, provide the basic definition of the word which it seeks to regulate. What furthers the incertitude is the fact that the notion of obscenity is based on *community standards*, determination of which, is in itself an uphill battle in a diverse country like India where there exists a multitude of such communities and sundry ethical standards.⁵⁷ Furthermore, in light of Justice Hidayatullah’s statement, even though there exists an overlap between obscenity and pornography, legislature cannot generalise both under the same head with the presumption that the existing regulations on one facet will derivatively be sufficient to regulate the other, evidently in the fast-changing and transmuting facet. Hence, although pornography is impliedly encompassed within the ambit of IPC, there still exists lacunae because the limited scope completely fails to take into account the vast and varied nature of contemporary pornography and its dissemination.

⁵³ Information Technology Act, 2000, section 67B.

⁵⁴ Indian Penal Code, 1860, section 293.

⁵⁵ AIR 1965 SC 881.

⁵⁶ *Id.*

⁵⁷ PSA Pillai, CRIMINAL LAW 703 (2009).

3. *Constitutional Dilemma: Privacy v. Morality* – In a democratic country like India,⁵⁸ which is based on constitutional democracy, no individual can be coerced or forced, as to what lifestyle or way of life one should follow or live.⁵⁹ This brings out the dilemma regarding the constitutionality of pornography in India. Article 21⁶⁰ encompasses a variety of rights delineated to its citizens, including the right to privacy⁶¹ and the right to information,⁶² in reliance of which, pornography should be allowed in India. If in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy.⁶³

However, these rights are not absolute and are hence qualified under Article 19.⁶⁴ Firstly, to prove restriction on pornography to be valid under the test of *reasonable restrictions* given under Article 19(2), it must be proved that it comes within the right of speech and expression. This right has been given a broad interpretation by the judiciary, as any '*expressive content*' in a verbal or a non-verbal form has been brought within the scope of Art 19(1)(a).⁶⁵ Hence, pornography is indeed encompassed in the right to freedom of speech and expression and the state may make a law imposing reasonable restriction on its dissemination. Even provisions like Article 14⁶⁶ for equality, Article 15⁶⁷ against the prohibition of discrimination, Article 23⁶⁸ prohibiting traffic in human beings and forced labour, Article 39(f)⁶⁹ providing opportunities and facilities for the Women/Children to develop in a healthy manner and conditions of freedom and dignity and that childhood should be protected against exploitation and against moral and material abandonment, can be invoked in consideration of the inhumane treatment meted out to women working in porn industry.

In this debate, liberals advocate that under the fundamental right to privacy, individuals are free to watch porn within the four walls of their house and the government cannot adopt a paternalistic attitude to the extent of regulating an individual's behaviour in his private space, the conservatives condemn the

⁵⁸ Constitution of India, 1950, *Preamble*.

⁵⁹ Constitution of India, 1950, articles 19 & 21.

⁶⁰ *Id.*

⁶¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

⁶² *Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal*, AIR 1995 SC 1236.

⁶³ *Naz Foundation v. Government of NCT of Delhi*, 2009(160) DLT 277.

⁶⁴ Constitution of India 1950, article 19.

⁶⁵ V. N. SHUKLA'S CONSTITUTION OF INDIA 350-373 (M.P. Singh, ed., 2017).

⁶⁶ Constitution of India 1950, article 14.

⁶⁷ Constitution of India 1950, article 15.

⁶⁸ Constitution of India 1950, article 23.

⁶⁹ Constitution of India 1950, article 39(f).

very concept of the porn, contending that it stands against the moral-ethical fabric of the country. Therefore, it can be concluded that there is no concrete constitutional interpretation is present yet on the matter, which makes the much-awaited judgment on the petition filed by *Kamlesh Vaswani*⁷⁰ even more crucial in the understanding of the constitutional stance on pomography.

4. *Provisions under other laws* – There are other statutes which are argued to be ancillary and encompassing within their ambit the regulation of pornography. section 4 of the Indecent Representation of Women Act⁷¹ can be textually interpreted to bar any picture, film, etc. that represents women in an indecent manner however it can be identified that the scope of this legislation is limited only to the mainstream depiction of women such as the regulation of advertisements. This provision has not ever been applied in the context of pornography.⁷² Young Persons Harmful Publications Act 1956, in its provision attempts to provide scope for punishment of any material of a repulsive or horrible nature; in such a way that the publication as a whole would tend to corrupt a young person into whose hands it might fall, whether by inciting or encouraging him to commit offences or acts of violence or cruelty or in any other manner whatsoever.⁷³ This provisions can also be interpreted to include pornographic materials within its scope. However, the provision appears to be perfunctory in the regulation of written porn as is evident by the minimal instances of legal action against the virtually published sex stories based on violent ‘masculine’ behaviour. Thus, there exists laws in India imposing collateral qualifications and regulations on pornography but no law is evidently sufficient to include the various facets of a comprehensive and fast-changing subject matter like pornography and its dissemination over internet.

Thus, it is clear that there is dearth of a comprehensive legislative approach in India to regulate pornography. Further, the existing provisions relate to the dissemination of pornography in a far-fetched manner and do not provide a harmonised procedure of regulation. This leaves much scope for abuse of the law and those who wish to indulge in such acts consensually are further prohibited from their freedoms (either the freedom of speech and expression or the freedom of profession). Thus, the importance of harmonised regulation in this regard becomes crucial as a way forward.

⁷⁰ *Supra* note 1.

⁷¹ The Indecent Representation of Women Act, 1986, section 4.

⁷² Monika Gulati & Prof. Syed Mehartaj Begum, *Advertisement and Dignity of Women in India: A Study of Indian Print Advertisement Laws*, 5(4) J. BUS. THEORY & PRAC. 315 (2017).

⁷³ Young Persons Harmful Publications Act, 1956, section 2.

IV

The Legal Vacuum: The Unsettled Fate of Pornography

The questions that lie at the heart of the article are, do the existing provisions of law accommodate the changing realities of the pornography? Are the laws still plagued with the conventional hesitancy (and taboo) that accompanies the topic of 'sex' in India? Is this prudish attitude affecting the legislature's duty of filling the legal void of pornography regulation?

Time and again, the need for effective porn laws have been highlighted through numerous dismissed petitions and adjourned case hearings. This is reflective of the traditional judicial and legislative pattern of tiptoeing around the conventional topic of 'sex' that should ideally remain behind the *closed doors*. This puritanical attitude is not merely speculative, on the authors' part, but is evidenced by the proceedings of the case of *Fatima Riswana v. Chennai & Ors.*,⁷⁴ where the lawyers appealed for transfer of the case to a male judge as the *said trial would be about the exploitation of women and their use in sexual escapades by the accused, and the evidence in the case is in the form of CDs. and viewing of which would be necessary for the course of the trial, therefore, for a woman Presiding Officer it would cause embarrassment.*⁷⁵ This concretely manifests the piteous condition of the systemic dealings with regard to pornography, where individuals and institutions who are entrusted with the task of framing and interpreting laws are governed by such hackneyed perceptions. Hence, the authors reflect upon some of the more significant contemporary petitions, which sought to highlight the inadequacy of the laws governing pornography and challenged the current legislative stance.

Turning a blind eye: Pornographic material on social networking platforms

In contemporary digital era, with the facility of *forwards* and *shares* on social media platforms like Facebook, WhatsApp, information dissemination in a fraction of second has become the new normal. This has opened up new fora for circulation and distribution of pornographic material, sexually graphic, and violent images, among other information. The pivotal question which arises here is whether such circulation and distribution are subject to the laws that regulate porn? If not, are the social networking platforms simply slipping through the cracks of the pornographic content regulation in India?

⁷⁴ *Fatima Riswana v. State Rep. By A.C.P., Chennai & Ors.*, Appeal 61-62 of 2005.

⁷⁵ *Id.*

In the case of *Prajwala v. Union of India*,⁷⁶ the petitioner highlighted the lacuna of unregulated circulation of pornographic material on social networking platforms by arguing that there is no express provision in IT Act which specifically deals with the circulation of such sensitive information and media. The petitioner pleaded for a change in the policies and the approach of both the government and private organisations and intermediaries with respect to dissemination and dealing in videos and images containing sexually explicit content such as videos of rape/ gang-rape of women and children.⁷⁷

This petition highlighted the unregulated digital vortex which exists with regard to such circulation. It was followed by the formulation of a committee under the chairmanship of Dr Ajay Kumar.⁷⁸ The committee proposed exhaustive measures like formulation of specific parameters for identification of such content to ensure expeditious identification and removal, development of a centralised agency to maintain and verify the hashes of all known imagery.⁷⁹ The comprehensive recommendations should have ideally led to swift legislative action, in formulating provisions which could accommodate such unfathomable digital facets of pornography circulation. However, the case was marred by the stagnant committee-culture in India, where reports and recommendations are merely treated as *obiter*.

The conundrum of the complete ban

In 2013, Kamlesh Vaswani filed a petition in the Supreme Court on which final decision is still pending as on November 2020, challenging sections 66, 67, 69, 71, 72, 75, 79, 80 and 85 of the Information Technology Act, 2000 as ultra-vires Articles 14, 19, and 21 of the Constitution of India.⁸⁰ He called for the revocation of the immunity granted to the Internet Service Providers against third party content in certain circumstances.⁸¹

The petitioner argued that most offences committed against women/ girls/ children are fuelled by pornography. *The worrying issue is the severity and the gravity of the images is increasing. It is a matter of serious concern that prepubescent children are being raped.*⁸² It was further argued that porn amounts to the encroachment of fundamental rights of 75% of the Indian population including women, girls, and

⁷⁶ (2018)15 SCC551.

⁷⁷ Raghav Kansal & Arnab Chakraborty, *Sexual Privacy and its Violation: A Desperate Need for Legislation*, THE LAW BRIDGE PUBLISHERS (27 Sep., 2019) available at: <https://thelawbrigade.com/constitutional-law/sexual-privacy-and-its-violation-a-desperate-need-for-legislation/>

⁷⁸ (2018)15 SCC551.

⁷⁹ *Id.*

⁸⁰ *Kamlesh Vaswani v. Union of India*, W.P. 177/2013 (SC) (Pending).

⁸¹ Information Technology Act, 2000, section 79.

⁸² *Supra* note 80.

children as pornography reinforces and normalises certain criminal acts in offenders' minds, in corroboration of the fact that a sexual offender or rapist achieves his gratification, not from sexual release alone but also from the thrill of domination, control, and power.⁸³ Pornography was termed as the commercial exploitation of sex which is a *trade more deadly than potassium cyanide with countries like the US*.⁸⁴

The petitioner further argued that since in India, only distribution, production, and downloading of porn is considered a crime⁸⁵ while watching, collecting, or storing is exempted, its proliferation is largely unchecked and hence the petitioner prayed for a complete porn ban. The authors are of the opinion that the petitioner's call for a total ban is an extreme measure and does cause invasions of fundamental rights and liberties as it is in direct violation of Article 19 of the Constitution, which empowers the citizens with the right to freedom of expression.⁸⁶ His demand for a blanket ban on the consumption of pornography in private spaces and the exaggeration of claims without any semblance of authority does discredit his argument to a large extent. Further, it is the harsh reality that a total ban will not lead to the porn industry being wiped out, rather, it'll make it even more unsafe for porn actors to seek any redressal in case of unfair practices or abuse against them.⁸⁷ An unregulated porn industry working much like the other illegal trades is only going to further harm the society.⁸⁸

The reference to the petition was not to merely analyse the constitutionality of the ban, as has already been elaborated in the preceding section of this article, but to highlight the sheer callousness of the legislature and judiciary in dealing with cases that have time and again, attempted to bring into light, the stark inadequacy of the Indian laws to regulate pornography. The petitioner's demand for complete ban, may be violative of the constitutional provisions, but it nonetheless played a significant role in illuminating the absence of a law that specifically deals with pornography and the legislative disregard for extreme and violent content of porn and its role in the structuring of people's mental fabric.

Although India as a country has entered into the digital era, our porn laws are stuck in the century's old framework. The current law controlling the fate of pornography and its actors stems out from the Victorian law which was enacted in 1860,⁸⁹ and is

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Constitution of India 1950, article 19.

⁸⁷ Guest Writer, *Ethical Porn: An Alternative to Mainstream Porn*, FEMINISM IN INDIA (30 Apr., 2020) available at: <https://feminisminindia.com/2020/04/30/ethical-porn-alternative-mainstream-porn/>.

⁸⁸ *Id.*

⁸⁹ *Id.*

long overdue for a change in that regard. The Victorian era is often characterised as an era of repression of sex and sexuality, of policing of statements and setting up of rules about where, to whom and in the context of what kind of social relations sex could be talked about.⁹⁰ However, in the contemporary era, with the evolving perceptions and the media innovations bringing a plethora of opportunities to consume pornography, it becomes indispensable to modify the existing laws and regulations shaping the future of the industry⁹¹ and its impact on the minds of the public writ large.

There is an obvious failure of the law, as an instrumental or constitutive force, to regulate obscenity or harmful content, either in its attempts to define it in isolation from other social and moral meanings, or in the use of obscenity laws to police sex and sexuality and encroach on freedom of expression.⁹² There is a need to turn away from finding an answer in the instrumental and constitutive elements of the law and to look at organic laws embedded in the practices of people, while respecting their privacy.⁹³

V

A Tailored Law for India

If the human race would have limited its sexual interest to procreation only, we would not have pornography, so pornography is distinctly a human aspect.⁹⁴ While a complete ban seems not to be a solution, therefore, it is apparent that the legislature cannot just do away with porn and what is needed is tactical regulation, which is evidently lacking in the Indian porn law.

The right to freedom of speech and expression as envisaged under Article 19(1)(a)⁹⁵ of the Constitution is not an absolute right⁹⁶ and hence does not warrant the porn sites, in the exercise of their right, to screen such pornographic material which becomes a breeding ground for sexual predators and rapists. Article 19(2) enables the state to impose reasonable restrictions on certain grounds.⁹⁷ Against this *constitutional* backdrop, the authors put forth some legislative propositions, which adhere to the test of reasonable restrictions in the interest of *public order*. The term

⁹⁰ *Supra* note 35.

⁹¹ Satyaki Datta, *Need for Personal Space: Legalizing Pornography in India*, 8(3) MEDIA WATCH (2017).

⁹² *Supra* note 35.

⁹³ *Id.*

⁹⁴ Sarah L. Robinson, *Defining Pornography*, 10(1) SOC. SCI. J. (2010).

⁹⁵ Constitution of India, 1950, article 19.

⁹⁶ *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*, (2015) 6 SCC 1.

⁹⁷ Constitution of India 1950, article 19(2).

public order generally means the maintenance of the general idea of the society relating to normal social behaviour, incorporating within it the moral values that the society follows.⁹⁸ It encompasses publishing of obscene material on the internet, as well as major crimes like rape.⁹⁹ As already mentioned that studies have found a positive association between violent pornography and attitudes supporting violence against women.¹⁰⁰ Hence, reasonable restrictions can be imposed on violent and explicit pornography as it has the potentiality of threatening public order. Porn is characterised by women performers being addressed with many derogatory terms and being portrayed in a way that sex was inevitable because of their *solicitation*. This leads to a tacit 'internalisation' of the myths around rape, victim shaming and blaming and sexual excitement to images and videos of rape.¹⁰¹ It is the *modus operandi* of such a portrayal that institutes the difference between rape and sex.

Legal v. illegal porn

The authors are of the view that there is a need for an express legislation which provides for legal classification of pornographic material with the legislative intent of facilitating filtration of such porn which portrays violation of the autonomy of any individual and has the potentiality of reinforcing ill practices in society. This involves 'porn' which showcases extreme sexual fantasies and normalises incest, forced sex, violence, etc. The proposed classification could be in the same vein as has been made in the provisions of UK's Video Recordings Act, 2010 which classifies videos on the basis of 'video nasties', a colloquial term for a list which encompasses videos which depicts excessive human sexual activity or acts of force or restraint associated with human genital and urinary organs, mutilation or torture of humans, and techniques likely to be useful in the perpetration of criminal acts or illicit activity.¹⁰² This classification of videos presents a comprehensive and tactful legislative stance, where *video nasties* are prohibited, and exemption is given to videos related to sports, religion, music, and videos, which taken as a whole, are designed to inform, educate, or instruct.¹⁰³ Hence, the authors are of the view that porn in India should be classified in the same manner, albeit tailoring it in accordance with the ethno-legal fabric of the country. Such classification will ensure

⁹⁸ Malika Tiwari, *Analysis of Public order as a ground for reasonable restriction*, FAST FORWARD JUSTICE (21 May, 2019) available at: <https://fastforwardjustice.com/analysis-of-public-order-as-a-ground-of-reasonable-restriction-article-191a/>.

⁹⁹ *Id.*

¹⁰⁰ G.M. Hald, N.M. Malamuth, C. Yuen, *Pornography and attitudes supporting violence against women: Revisiting the relationship in nonexperimental studies*, 36 AGGRESSIVE BEHAV. 14 (2010).

¹⁰¹ *Supra* note 87.

¹⁰² Video Recordings Act, 2010 (United Kingdom).

¹⁰³ *Id.*

that extreme and violent pornographic content is declared illegal and punishable. The authors further seek to propose certain other tactical regulations that will maintain the fine line of balance between the freedom of expression and the restrictions imposed on the basis of legal moralism.

Regulated production: Bringing light to the blind spot

The authors divert from the common understanding on the facet of pornography production and contend that it, in fact, should be permitted. We cannot escape the harsh reality that in India, in spite of the absolute ban on the production, 'porn' is still being illegally produced by small media houses, modelling agencies, massage parlours, etc. Such production circumvents the ban or the minimal regulation of pornography dissemination in India, in the exploitation of the internet's global nature, as most of these videos are posted by the use of foreign domains and servers.¹⁰⁴ The illegal production is furthermore incentivised by the increasing demand and popularity for *Indian porn* or *Desi porn*, as they are colloquially known. The producers are being funded by the huge sums of money from foreign clients in Saudi Arabia, Dubai, Russia, and the United Kingdom.¹⁰⁵ Thus, we cannot shy away from the fact that even after the stringent legal stance against porn production, it is still transpiring. However, the illegal production might be the lesser evil in the face of abominable exploitation of workers in the porn industry, who might not even merit being labelled 'workers' as it has a connotation of voluntariness, which in the majority of times, they are not even entitled to.

There are numerous instances showing several porn actors who had concurred to a facile ingress but an arduous or proximately infeasible exit.¹⁰⁶ They are tricked into pornography under the guise of modelling contracts, which often later prove to be iron-clad and hence, unbreachable. These actors are then bound, battered, tortured, harassed, raped, and sometimes killed; or, in the glossy men's entertainment magazines, *merely* humiliated, molested, objectified, and used¹⁰⁷ to cater to the perceived viewers' needs. Such performers exist in the legal vortex characterised by institutional apathy. According to the legislature, since there is an imposition of ban on porn production, production is not taking place, on paper. However, this ban, as evident, is not acting as a hindrance in production. It rather leaves the performers vulnerable to exploitation, as the ban and the ensuing unregulated production devoid from a proper redressal mechanism. Such legislative oblivion leads to porn actors being ensnared in the quandary of on-paper presumptions and the reality.

¹⁰⁴ *Supra* note 2.

¹⁰⁵ *Id.*

¹⁰⁶ Caitlin Bancroft, *Porn stars can't leave the industry, and here's why*, MIC (02 Oct., 2013) available at: - <https://www.mic.com/articles/66025/porn-stars-can-t-leave-the-industry-and-here-s-why>.

¹⁰⁷ Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991).

The only way to eschew this situation could be the congruous regulation of the production process, preserving the workers from all forms of torture and abuse.

The authors hold the view that it is high time that porn production should be included under the freedom of speech and expression under Art 19(1)(g).¹⁰⁸ This should be subject to restrictions such as where the profession chosen is so inherently pernicious that nobody can be considered to have a fundamental right to carry on such business, trade, calling or profession like gambling, betting or dealing in intoxicant or an activity injurious to public health and morals.¹⁰⁹ However, the production of pornography in accordance with the undermentioned classification with the enforcement of proper safeguards should not come under the restrictions. It has been held by the court in the case of *B.P Sharma v. Union of India*, that Article 19(1)(g) should not be violated on grounds which are not established to be in the public interest or just on the basis that it is permissible to do so.¹¹⁰ For placing a complete prohibition on any professional activity, there must exist some strong reason for the same with a view to attain some legitimate object and in case of non-imposition of such prohibition, it may result in jeopardising or seriously affecting the interest of the people in general and specifically those involved in such activities.¹¹¹ However, the 'strong reasons' dissipate if proper regulation of porn production is enforced. It is also to be kept in mind that a complete ban on any activity (having the effect of infringing the fundamental rights) must be proportional to the objective in mind and it might be difficult for the legislature to justify a complete ban and maybe subjected to constitutional challenge with the passage of time.¹¹²

Further, since it is stipulated that main purpose of the restrictions is to strike a balance between individual rights and social control,¹¹³ the social control against the background of the hereinafter proposed porn classification and regulation, can indeed be exercised. It has been held that in order to judge the reasonableness of the restrictions, no abstract or a fixed principle can be laid down so as to be of universal application.¹¹⁴ Hence, the transmuting social conditions and the incrementing acceptance of pornography in Indian society should be taken into account and hence porn production should be sanctioned.

The sanctioned allowance of the production might bring the illegal producers under the radar of the Government and provide a legal outlet for such undertakings

¹⁰⁸ Constitution of India 1950, article 19.

¹⁰⁹ *B.P. Sharma v. Union of India (UOI) and Ors.*, 1995 IAD (Del.) 439.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Anuradha Bhasin v. Union of India*, (2020) SCC Online SC 25.

¹¹³ *Supra* note 109.

¹¹⁴ *M.R.F. Ltd. v. Inspector, Kerala Government and Ors.*, AIR 1999 SC 188.

including the performers who are now entangled in the cog-web of pornographic content vacuum.

One of the most effective ways to regulate it would be through formulation and implementation of express legislation which provides stringent parameters for determination of pornographic material as legal, followed by the formation of a centralised Certification Board (under the charge and control of the Ministry of Home Affairs or any other ministry considered to be befitting) which would devise minimum ethno-legal qualifications and certifications for establishment of a legitimate porn production company. The *sine qua non* provision for certification should be employment of contracted porn actors, where the contract conforms to the basic requirements of a valid contract under section 10 of the Indian Contract Act, 1872.¹¹⁵ This stipulation is the key to ensure that the actors involved are acting on 'free consent' and are 'parties competent to contract',¹¹⁶ hence alleviating the chances of exploitation of non-consensual and minor performers. Further, the contractual obligations will also facilitate the actors with a proper redressal mechanism. The certification and registration of a production company, would be a step forward in ensuring that their activities fall within the legal framework of the country.

Majority Affirmation

Over-exposure to porn at an early age poses grave consequences, where in today's increasingly digital world, everybody, especially the youth of the country, has easy access to the internet. It is all the more disconcerting in wake of the fact that the internet is plagued with unsolicited pop-up porn ads, which are shown without a browser's permission and usually display sexually explicit images to entice viewers. Hence, minors' access to porn is literally a click away and the laxity of the Indian porn regulation, failing to provide any mechanism of age-verification further facilitates the accessibility to such contents.

According to some studies, early exposure to pornography and other explicit material may increase the risk of a child becoming a victim of sexual violence or acting out sexually against another child.¹¹⁷ For some such children, habitual use of pornography may prompt a desire for more violent or deviant material, including depictions of rape, torture, or humiliation.¹¹⁸ In light of such research, the imminent need for the formulation of an age-verification mechanism becomes apparent. This could be outlined, following the pattern of the Adult Verification System (AVS) as

¹¹⁵ Indian Contract Act, 1872, section 10.

¹¹⁶ *Id.*

¹¹⁷ Carolyn C. Ross, *Overexposed and Under-Prepared: The Effects of Early Exposure to Sexual Content*, PSYCHOL. TODAY (13 Aug., 2012) available at: <https://www.psychologytoday.com/us/blog/real-healing/201208/overexposed-and-under-prepared-the-effects-early-exposure-sexual-content>.

¹¹⁸ *Id.*

was proposed under the UK Digital Economy Act.¹¹⁹ It prohibited viewers from accessing pornographic pictures, video, and text unless they can prove they are over 18. The basic requirement for implementation of the policy was to show a static landing page when a porn website is opened so that the site doesn't show any explicit images.¹²⁰ It is only when the viewers affirm their majority, will the porn sites be opened. It was touted as a revolutionary step that prompted countries like France to probe into constructive verification systems.¹²¹ Though, on the other hand, it is conceded that the verification system might need to be tailored according to India's socio-cultural environment and also to overcome the data privacy and security concerns that marred the AVS.

Middlemen and proxy vortex

Virtual Private Networks (hereinafter referred to as VPN) allows users to access content that might be banned locally, in a way that is secure and anonymous.¹²² It essentially veils the identity of internet access, in accession of proscribed data and hence, might pose a challenge to the effective implementation of regulations based on the above-mentioned classification. This is evidenced by the accession of banned porn sites through VPNs, proxy servers, or alternate browsers in India.¹²³ This has long been proved to be a roadblock in the imposition of any semblance of regulation. Hence, the need for devising a method to counteract such consequences, before regulating the porn sector, seems pressing.

This can only be done by the establishment of a dedicated surveillance infrastructure which facilitates digital filtering and prevents the access to the unknown VPNs and proxy servers. It should be followed by the creation of a Certification Board, which functions in accordance with the above-mentioned legislation formulating the classification. Only certified porn videos should be allowed to be accessed. This might seem utopic, however, it, in fact, is not. India no longer remains a tech-backward country and is one of the global forerunners in technological development and hence, has the technical know-how to create such surveillance networks as has already been developed in other countries. In US, also there is now a move to introduce very stringent and mandatory data retention laws for internet

¹¹⁹ Digital Economy Act, 2010 (United Kingdom).

¹²⁰ Matt Burges, *This is how age verification will work under UK's porn law*, WIRED (20 Jun., 2019) available at: <https://www.wired.co.uk/article/uk-porn-age-verification>.

¹²¹ Matt Burges, *Inside the messy collapse of the UK's unworkable porn block*, WIRED (23 Oct., 2019) available at: <https://www.wired.co.uk/article/uk-porn-ban-digital-economy-act>.

¹²² India Today, *No ban on porn if Indians use VPNs*, INDIA TODAY (04 Aug., 2015) available at: <https://www.indiatoday.in/technology/news/story/no-ban-on-porn-if-indians-use-vpns-govt-286382-2015-08-04>.

¹²³ Sohini Mitter, *India attempts to curb porn – is it working and what it means for Reliance Jio and other telcos*, YOURSTORY (06 Nov., 2018) available at: https://yourstory.com/2018/11/india-bans-porn-working-means-reliance-jio-telcos/amp?utm_pageloadtype=scroll.

service providers (ISPs) to help in tracking and capturing paedophiles¹²⁴ which can be modified to cater India's needs. Even Pakistan, which is not exactly considered as a tech-advanced country, has tried to counter the particular problem by developing a new model under which the Pakistan Telecommunication Authority with the assistance of Interpol restricted access to around 11,000 proxy servers.¹²⁵

Further, the establishment of such a filtration system does not stand in violation of the principle of net neutrality as the doctrine of *parens patriae* sanctions a state to bring an action on the behalf of its citizens in order to forfend its quasi-sovereign interest in the health, comfort, and welfare of its citizens¹²⁶ and such action indubitably stands in the welfare of citizens. The authors here are not advocating for the opaque system of digital blocking as currently is followed in the country,¹²⁷ but rather a transparent system where public information is made available regarding the blocked porn sites, in pursuance of the regulation of violent and explicit pornographic material.

Keeping up with technological advancement

The aforementioned Certification Board should also function to formulate a digital committee that fashions a flexible and updatable 'hash bank'¹²⁸ in the evaluation of the new and atypical types of pornography, which does not conform to the pre-established classification of legitimate porn. This is significant as in the current technical age, ineludible innovation might lead to the modelling of certain such pornography, which will be able to circumvent the static lists and classifications. For instance, the development of a relatively new type of pornography, poser pornography which uses much advanced technology and facilitates the creation of pornographic content with the use of 3D computer graphics, representing people engaged in various sexual acts who are made to act on the directions of the programme maker or any person authenticated by the programme to give such directions.¹²⁹ It is found that even the bodies of famous celebrities are also designed by them without their consent. India, which is plagued by the stagnancy of Victorian laws is not able to accommodate such types of pornography as it does not fit into

¹²⁴ *Supra* note 35.

¹²⁵ Hija Kamran, *PTA restricts access to 11,000 proxy servers; aims to regulate VPN use in Pakistan 'through a new model'*, DIGITAL RTS. MONITOR (19 Jul., 2019) available at: <https://www.digitalrightsmonitor.pk/pta-restricts-access-to-11000-proxy-servers-aims-to-regulate-vpn-use-in-pakistan-through-a-new-model/>.

¹²⁶ Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847 (2000).

¹²⁷ Chinmayi Arun, *Using law to bully comedians*, THE HINDU (16 Feb., 2015) available at: <https://www.thehindu.com/opinion/op-ed/comment-using-law-to-bully-comedians/artide6898848.ece>.

¹²⁸ *Supra* note 78.

¹²⁹ *Id.*

the pre-ordained rigid mould of 'pornography', and hence are legally overlooked and exist in the unregulated lawless vortex.

Avenging the revenge

Digitisation in India has led to increase in access to technology,¹³⁰ making women more vulnerable to virtual abuse, especially in the wake of proxy servers and fake profiles. Revenge porn¹³¹ is one such cyber-crime that has become too common in our society. These cases are most often seen when a relationship between two people comes to an end, and the jilted party proliferates such content as a means of seeking revenge on a former partner.¹³² The Indian law does not explicitly recognise 'revenge porn' as a crime, there is no provision making it mandatory for the police to assign a female officer to such cases, victims often deem any pursuit of justice, not just futile, but risky as well.¹³³

The need for formulation of an express provision becomes more apparent in wake of the fact that section 79 of IT Act exempts ISPs from its liability if it proves its ignorance and due diligence.¹³⁴ Against this background, websites and service providers have no legal obligation to remove non-consensual pornography unless it otherwise violates copyright or federal criminal laws.¹³⁵ The new IT Rules¹³⁶ can be seen as a step in this regard, where it puts an extra duty to disclose the first originator.

Hence, the course of action should be legal recognition of 'revenge porn' as a crime and formulation of an express provision which deals with it explicitly. This could be in similar vein as is the pattern followed by British legal system, where an express criminal provision has been framed to deal with *disclosure of private sexual photographs and films without the consent of the individual depicted and with the intent to*

¹³⁰ Aditya Krishna, *Revenge Porn: Prosecution Under the Current Indian Legal System*, THE CRIM. L. BLOG (NLUJ, 13 Apr., 2020) available at: <https://criminallawstudiesnluj.wordpress.com/2020/04/13/revenge-porn-prosecution-under-the-current-indian-legal-system/#:~:text=None%2520the%2520less%252C%2520at%2520present,the%2520nuances%2520of%2520revenge%2520porn.>

¹³¹ It is "sexually explicit images of a person being posted online without that person's consent especially as a form of revenge or harassment." Merriam-Webster Dictionary.

¹³² Mirror Now Digital, *Revenge porn: How it destroys lives -- and how to deal with the menace*, MIRRORNOWNEWS (06 Feb., 2020) available at: <https://www.timesnownews.com/mirror-now/in-focus/artide/revenge-porn-how-it-destroys-lives-and-how-to-deal-with-the-menace/550397>.

¹³³ *Id.*

¹³⁴ Information Technology Act, 2000, section 79.

¹³⁵ Ballotpedia, *Nonconsensual pornography (revenge porn) laws in the United States*, available at: [https://ballotpedia.org/Nonconsensual_pornography_\(revenge_porn\)_laws_in_the_United_States#cite_note-faq-1](https://ballotpedia.org/Nonconsensual_pornography_(revenge_porn)_laws_in_the_United_States#cite_note-faq-1) (last visited 10 Aug., 2020).

¹³⁶ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

cause distress,¹³⁷ however tailoring it in accordance to India's socio-legal fabric. Further, the authors are of the opinion that since the crime of 'revenge porn' has priorly been a lawless situation and failed a multitude of victims in dispensation of justice, the law made, should have retrospective application.

Written off

There seems to be a legal void with regard to the written form of pornography. The influence of unregulated sexually graphic written words cannot be undermined as it has the same, if not greater influence on the reinforcement of a particular mindset. Although it is impliedly considered to be regulated under the provisions governing pornography, however, no such particular provision has been introduced for express regulation of written porn. It is not reasonable to merely sub-categorise the written 'sex stories/ porn' under the broad general provisions of pornography. The legislature should address the difference in modalities of visual and written forms of pornography and accordingly the distinct challenges it poses. A provision similar to the filtration system, under the aegis of the aforementioned digital committee, based on particular keywords like 'child sex', 'incest', 'forced sex' should be formulated, which further takes into account, the fact of multiple languages and dialects. This system should be updated, in the same fashion as the 'hashbank', in accordance with which search engines might be directed to expand the list of keywords.¹³⁸ Implementation of a framework aimed at regulating sexually explicit videos might prove to be futile if the sex stories provide a reprise to the people inclined towards indulging in such acts. Hence, 'written porn' should not be merely swept under the notional legislative rug of broad ambits and regulations.

VI

Conclusion

Sexual explicitness and eroticism have been a part of human life since long back. From the Kama Sutra and explicit murals in the Indian subcontinent,¹³⁹ sex as being integral to love, in Sumerian and Babylonian literature, sexual explicitness was a widely prevalent form of artistic expression.¹⁴⁰ The starting point of the consideration of sex as a taboo was the western school of thought which defined sex

¹³⁷ Criminal Justice and Courts Act 2015, section 33 (UK).

¹³⁸ *Supra* note 78.

¹³⁹ Ben Grant, *Translating The "Kama Sutra"*, 26 TH. W. QUART. 509 (2005).

¹⁴⁰ Siddharth S. Aatreya, *Obscenity and the Depiction of Women in Pornography: Revisiting the Kamlesh Vaswani Petition*, 13(1) NALSAR STUD. LAW REVIEW 1 (2005).

and all the things associated with it as a sin in the bible.¹⁴¹ Hence, in India, public moral perturbation with sex and depictions of sex have subsisted for decenniums, despite Indian art's long and dotting relationship with sex and eroticism. However, the scenario is ever transmuting and the treatment of sex, especially, sex in the public sphere in India has changed over the decades.¹⁴² People are becoming more receptive to these ideas however are still majorly influenced by puritanical notions, confining the discussion to the four walls of their house and brushing such topics under the carpet when public address is required, thus making a law on a subject which is refrained from being even discussed in public is a herculean task for the legislature.

Statistics reflecting people's inclination towards sexually violent and explicit pornographic materials presents an alarming situation, in light of the research studies highlighting the impact of such material on the indoctrination of the human mind. The relationship between porn viewing and the crimes against women resulting from it has been recognised all over the world and countries like the UK have already been trying to bring advanced and comprehensive laws on the subject matter. Even in the economic terms, the business of the pornographic industry is in millions and more than this are the stories of abuse and molestation of the workers of the industry. Thus, considering the prevalent scenario, the desideratum of a comprehensive law in India is indisputable but the most crucial part of it is to draft a law that is both progressive and protective against the harms.

¹⁴¹ What Does the Bible Say About Premarital Sex (Sex Before Marriage, Sex Without Marriage)? available at: https://www.christianbiblereference.org/faq_premaritalsex.htm. (last visited 10 Aug., 2020).

¹⁴² Geetha Hariharan, *Our unchained Sexual Selves: A case for the liberty to enjoy pornography privately*, 7(2) NUJS L. REV. 89 (2014).