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“Pornography” as a Right or as Violative of Rights?

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ABSTRACT

The researcher aims to analyse the question of whether pornography amounts to violation of human rights from a jurisprudential and legal perspective. The common definition of Pornography is that it is a “printed or visual material containing the explicit description or display of sexual organs or activity, intended to stimulate sexual excitement”. The definition of pornography itself is debatable as an attempt to define it has major social and legal consequences. The word ‘pornography’ is known to have Greek origin and is similar to the word ‘pornographos’ which means “the depiction of prostitutes, describing the life, manners, and customs of harlots and their patrons”. While analysing the concept of pornography as a right, it is curtailing a person’s right to freedom of speech and expression and right to privacy. But another perspective to be looked into is the obscenity of pornography that opposes the public policy by leading to harm to women, as a result of which it is debated to be essentially right to criminalise pornography because to preserve and maintain public morality and decency. The second aspect the researcher aims to analyse is how pornography is violative of human rights as it holds the potential to influence human behaviour leading to sexual violence in society especially to women. There is an increased demand by the public on account of violence to women to regulate pornography based on the perceived harm it inflicts on women. Pornography is considered to be a tool that portrays the domination of men over women and hence violating the equality of rights among them. The researcher in this paper mainly wants to draw out an analysis for and against pornography, violation of women’s rights and a concise picture of pornography law in India.

Keywords: *Pornography, Women, Right, Free Speech, Exploitation*

I. THE PORNOGRAPHY AS AN ARTISTIC EXPRESSION AND RIGHT

Pornography was defined before as an image of any kind that had been created or made wholly or partially for the arousal of sexual instincts in human beings. The sexual instincts in human beings have led their feelings to carve itself into different forms. Thus, when humans got a platform to exhibit or express their feelings, the expression of their innate sexual feelings also got expressed in artefacts, literature, paintings and so on.

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The idea of the right to people to create or obtain such contents are obtained on different assumptions. It is defended on the principle of personal or artistic expression or freedom to choose one's sexual lifestyle. The freedom of expression of a person is not limited only to statements made verbally but also gesture, acting, painting, literature. This freedom of expression is also wide enough to accept the creation of pornographic materials.

It is argued by some people that pornography has no value of the expression. There is scarcely any variance between marketing sex toys and giving a body through prostitution, or the act of sex itself. Catharine A. MacKinnon who is a law professor in the United States opines that, "In reality, pornography is a way of selling women and children: firstly, the real women or children are hired, secondly, they are used to produce sex materials which are sold to consumers. She asserts that the so-called "speech," the materials themselves, is a product of crimes against women and children." She further discusses this to unveil the problem of the freedom of this kind of speech where she explains that pornography is discarded summarily for it being an idea. She argues that it cannot be restricted to understand that it is merely a representation of an idea because such idea or better said 'fantasies' are performed by the actors involved in pornography.² Fantasies of a sick minded person may include harm and violence in a sexual act. Depiction of such act conveys and propagates normalization of such fantasies which is detrimental to the minds of the audience. One can conclude that this line of thought i.e it being an idea tries to decrease pornography solely to be a conduct with no implicit expression. But such argument cannot be squarely made applicable to contents containing contain verbal or written statements. Moreover, speech that is protected by law is not limited to written or verbal statement. Speech is of different forms. The assumption that sexually explicit materials in any genre are pure conducts without any hint of implicit opinion cannot be accepted.

It has been also argued by pro pornography activists that sexually explicit matter also has expressive content and should be protected under the free speech principle. It is however analysed that people who favour anti-pornography, do so with relation to their political and religious sentiments and dislike, and those who favour it do it out of sympathy. Sunstein³ agrees that a decision on regulating pornography can hardly be entirely neutral as it is inspired by the content of speech and social attitudes. Personal convictions in, say, morality or politics may not be the basis for determining legal issues. In its judgement, in the case of

² Catharine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT'L L. 993 (2005).

³ Sunstein CR, *Democracy and the Problem of Free Speech* (The Free Press 1993)

Dudgeon v. The United Kingdom,⁴ ECtHR confirmed this: “that some segments of society may be ‘shocked, offended or disturbed’ by homosexual conduct, but it must not lead to a conviction of that act as long as it happens between consenting adults.”

It is asserted that pornography is not only a sexual act satisfying the sexual needs of the audience but may also have an artistic value constituting speech and thus must be protected.

This view is counteracted by stating that a hardcore pornographic material with no verbal exchange displaying the sexual intercourse and the genitals of both sexes has no expressive content or artistic value. And it shall not constitute to be a speech and must not be protected under free speech principle.

There is a risk, it is argued, that sexually explicit material with literary value may be sacrificed if the prohibition of pornography is unconditionally allowed. For an example, if we consider an educational film regarding the regulation of sexual life during the period of pregnancy. The producer may wish to include sexual intercourse with the show of genitals and the act of penetration. Another example might be a pornographic film with a detailed explanation of how to enrich one’s sexual life. It is mostly subjective to determine whether a particular product has an expressive content. In order to obtain the result, they desire, judges could seek justification in any way; their personal feelings about the material in question might or might not allow its prohibition.

II. PORNOGRAPHY AS VIOLATION: HARM TO WOMEN AND CHILDREN

The feminism principle used to be mainly concentrated on the idea of, "a woman's body, a woman's right." With respect to rape, consent is still stressed upon and women’s right activists declare, "No means no." ⁵ Radical feminists opine that no woman of sound health would give consent to the practice of pornography. Thus, any women who consents to it is a woman who is wired to believe the dominion of men over women and that women are incapable of rendering consent. Children need special protection under the law. Children do not have the capacity to give consent for their engagement in pornography even on such occasion when there is no coercion. The mental and physical well-being of children and women must be taken care of by providing comparable care.

One of the sole reasons for demand to ban and regulate pornography is for the reason of harm that is inflicted on woman. It is claimed that pornography is a means by which men, for their own gratification, intrude on, possess and exploit women for profit. Women are brutalised,

⁴ Dudgeon v. United Kingdom, Appl No 7525/76, 5 ECHR 1981

⁵ Wendy McElroy, Banning Pornography Endangers Women, ISIL Pamphlet 2007

‘trussed, maimed, raped’ and these conditions are presented ‘as the nature of women’. The harm, it is claimed, may be inflicted on women on the street by those influenced by exposure to pornography or on those women involved with the production of pornography. It is also argued that pornography negatively influences the general perception on women and promotes the subordination of them. Naturally, the assumption of the correctness of this proposition would lead allowing of the prohibition of the sexually explicit materials to the extent that has been revealed by research. However, it is far from clear that there is enough neutral, reliable evidence proving a correlation between pornography and sexual crimes or cultural breakdown.

Pornography is one among the sex discriminative practices that leads to denial of opportunities to women in society. Pornography is a paramount cause for the creation and maintenance of sex being a tool for discrimination. Pornography has developed as a system to exploit and subordinate women. It is observed that, “The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; it promotes rape, battery, child abuse, kidnapping and prostitution and inhibits just enforcement of laws against such acts; and contributes significantly to restricting women in particular from full exercise of citizenship and participation in public life”⁶

The obviousness of pornography being harmful to children is evidenced by the fact of increasing number of countries making laws prohibiting the sale of pornography to children. Accurate clinical studies cannot be carried out in this regard. The ethics of research methodology morally bars any researcher from intentionally making the children be exposed to pornographic material to study the effect it has on them. Parental consent on the same is hard to obtain and studying of children with respect to pornographic material without obtaining consent from the parents is downright unethical.

It is claimed that women are used in a degrading manner in pornography. They only pretend to be getting pleasure, but actually they do not. Women do whatever is demanded from them to produce such materials. Mackinnon claims that the purpose of the dissemination of pornography and trafficking of women is to silence women.⁷ It is also claimed that pornography creates inequality between men and women. There is an assumption that women are unequally treated and subordinated during the process. By merging the sexuality and

⁶ American Booksellers, Inc. v. Hudnut, 598 F. Supp. 132 (1986)

⁷ Mackinnon C A, ‘Not a moral issue’ in D. Kelly Weisberg (ed), *Applications of Feminist Legal Theory to Women’s Lives* (Temple University Press 1996)

subordination, it creates an atmosphere well-fitted to a social structure of sexual inequality and, in the process, underpins the continued recurrence of that inequality.

III. PORNOGRAPHY: IN INDIA AND REGULATING LAWS

Laws on pornography varies from each country based on the mindsets of people and societal set ups. In India, the topic of sexual intercourse though is considered to be a big taboo, the audience of pornography is considerably high. There is no dedicated law on the same but there are several laws that governs the issue of pornography and its forms. These include the Information Technology Act, 2000⁸, Indian Penal Code, 1860⁹, POCSO Act, 2012¹⁰ and Indecent Representation of Women Act, 1986¹¹.

Firstly, under the Information Technology Act, Section 67 penalizes publishing or transmitting obscene material in electronic form, Section 67A deals with punishment for publishing or transmitting of material containing sexually explicit act in electronic form and Section 67B bans Child pornography. Secondly, under the Indian Penal Code, Section 292 and 293 of the Code deals with the law regarding sale of obscene books and the sale of obscene materials to young person. Section 354A of the code prohibits a man from showing pornographic material to woman forcibly. With respect to the POCSO Act, Section 13 of this Act forbids the usage of children in pornographic material and Section 14 prescribes the punishment for the same. Lastly under the Indecent Representation of Women Act, Section 3 of the Act places restriction on indecent representation of women in commercials and Section 4 of the Act bans any publication or sending of material through any medium where such content contains indecent representation of women.

Under Section 79 of the IT Act the intermediaries and the Internet Service Providers are accorded a safe harbour protection through which they enjoy exemption from such content that appear on their platforms. The law on intermediaries require them to draft a fail proof due diligence mechanism to avoid such content but there is no visible progress in this regard as such contents are still available largely on the platforms. The intermediaries are under an obligation to provide to the Court or the Government information on request but many a times this is not duly carried out, as such is hindered by high adherence to the right of privacy of an individual enabled through unbreakable encryption systems. Such an exemption is not given when the intermediaries fails to carry out such requests of deletion of content

⁸ Information Technology Act, 2000

⁹ Indian Penal Code, 1860

¹⁰ Protection of Children from Sexual Offences Act, 2012

¹¹ Indecent Representation of Women (Prohibition) Act, 1986

expeditiously or is involved in the commission of the offence. The guidelines¹² also require them to define to the users expressly the content that is allowed to be posted, used, shared or published in such platforms.

A model law on Child Pornography or Child Sexual Abuse Material was released by the International Centre for Missing and Exploited Children (ICMEC) in the year 2018. The law of child pornography in India significantly succeeds to match the model law. But there exist certain mismatches with respect to the provision under the IT Act and POCSO Act like differing definition of child pornography, possession is banned under POCSO but IT act extends to prohibit even browsing of child pornography. The inadvertent viewing can also prove to be a violation in a few cases. The model law requires mandatory reporting by the service providers and intermediaries but such a provision is not in strict form under the Indian law. Access to information is also a cumbersome process under the Indian law.¹³

Revenge porn is a recent phenomenon and is defined as “sexually explicit images of a person posted online without that person’s consent especially as a form of revenge or harassment”. A Sessions Court in West Bengal in a case decided over an instance of revenge porn and the perpetrator was made liable under Sections 354, 354A, 354C and 509 of the Indian Penal Code along with Sections 66E, 66C, 67 and 67A of the Information Technology Act.¹⁴ The court declared her to be a rape victim and asked the state government to award her compensation.

There had been several PILs¹⁵ that were instituted to have a concrete judgement on the issue of pornography in India. ¹⁶ There have been directions issued to Government to formulate methods but banning was not a feasible and final solution. However, in 2018 the Uttarakhand High Court ordered to ban porn sites and the Government initiated to direct the service providers to ban 827 websites. Network providers like Bharti Airtel, Reliance Jio, Vodafone restricted such content from their network.¹⁷

The basic law for pornography in India can be summarized as below:

- Act of watching pornography online or download of the same is not illegal.

¹² Information Technology (Intermediary Guidelines) Rules, 2011

¹³ R.K Vij, “India Must Review Its Law On Child Pornography And Address Gaps”, Outlook, (August 2 2020), <https://www.outlookindia.com/website/story/opinion-india-must-review-its-law-on-child-pornography-and-address-gaps/357863>

¹⁴ State of West Bengal v Animesh Boxi, C.R.M. No. 11806 of 2017, GR/1587/2017.

¹⁵ Kamlesh Vaswani v. Union of India & Ors. WP No. 177 of 2013

¹⁶ Jaskaran Singh Saluja & Rishab Lodha, “Pornography in India – A Moral Dilemma”, 2 IJLMH 4-6 (2018)

¹⁷ Priya Pathak, “Many porn sites are banned on Jio, Airtel in India, is it legal for people to access them despite ban?”, INDIA TODAY, (December 12 2018) , <https://www.indiatoday.in/technology/features/story/many-porn-sites-are-banned-on-jio-airtel-in-india-is-it-legal-for-people-toaccess-them-despite-ban-1408033-2018-12-12>

- Publication of pornography is illegal.
- Possession of pornographic material is not illegal subject to exceptions of child pornography.
- Any kind of electronic transmission of the same is restricted.¹⁸

IV. CONCLUSION

Judgments on the same explicit items may contrast from each other as indicated by political or philosophical perspectives which are held by the people of such countries. Significant imaginative or abstract materials may be yielded if their makers of pornographic content were deflected by over the top direction of obscenity. Although most pornographic materials do not touch upon matters of public interest, they are nevertheless expressions to be protected, albeit to a lesser degree than political speech.

The theory that pornography debases and subordinates' ladies, despite the fact that it might be the situation when the association is involuntary, disregards the way that there are ladies' women who voluntarily involve themselves in the making of pornography. Also, there are ladies who wilfully see obscenity. This supposition likewise disregards the way that there are sexually unequivocal pictures solely made by gay people or lesbians. It is hard to get a handle on how ladies can be subordinated in such cases.

The issue of show of sexually unequivocal material is obviously unmistakable from the aggregate restriction of obscene materials. Actually, there is nothing incorrect in ensuring children to be restricted from pornography nor in securing the individuals who might be antagonistically influenced by the dissemination of explicit materials or by adult entertainment centres.

Nonetheless, in doing this, it is important to note that such directions on the show and conveyance of sexually explicit materials and adult establishment are demarcated crisply so that this right of pornography, through restricted can be practiced while additionally securing the individuals who would prefer not to be presented to it.

The need of the hour is to make sure the availability of such content is in such a manner that the psychological development of an individual is not hindered and that materials inflicting harm or prone to influence harm on women, children or even men is viable to be traced and taken down. The technology laws be it India or any country is to be strengthened enough to

¹⁸ Ramanuj, Cyber Pornography Law in India- The Grey law decoded, Ipleaders, (March 5 2015), <https://blog.ipleaders.in/cyber-pornography-law-india/>

ensure taking down of content from national and international intermediaries.
