



Understanding Pornography Law in India: A Paradox

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Abstract: Recently Indian Government ban about 827 porn sites for the reasons varying from morality obscenity to prevention of child pornography. Although the regulation of pornography and specifically curbing child pornography is not per se an issue, however, it is the notion of morality and the perception of obscenity and the right of individual choice that could be relatable to Article 21 i.e. Right to Life of the Indian constitution despite of the reasonable restriction under Article 19 (2) of the Indian Constitution and Sec 67 of the Information Technology Act, 2002. The tussle between obscenity and morality is not a new phenomenon. However, it is a paradox when it concerns the right of an individual to adult entertainment, freedom of speech and expression. It becomes pertinent to understand and analyze the conflict and the idiosyncrasy of the tussle between the wrong, right and Justice.

This paper shall understand the law and legislation that controls pornography in India. Thus the paper is divided into 3 parts, the first part understand the concept of morality, obscenity and pornography in respect of international reaction and jurisprudence. The second part of this paper explores and analysis the laws and judicial decision and reactions of the Indian judiciary in the light of the cultural, the third part of this paper explores the issues that faced by the Indian judiciary and legislation in terms of regulation pornography

Key words: pornography, law, India, comparison, legality

I. Introduction

Eroticism has been known to exist in the human civilization for centuries. There are many examples to corroborate the same from the archeological finding found amongst the ruins of pompeii to the now standing Kajoraho temples of India. Erotic art existed in almost all ancient, medieval and modern cultures and history. It is not the question of eroticism that creates the question of law and morality; it is that thin line that divides erotic art from pornography. The argument of the difference between eroticism and pornography has been waged many a times. Many believe that there is no difference between erotic art and pornography while quite a few academicians strongly argues that there is albeit a thin line of difference between eroticism and pornography.

In *Feminism, Moralism and Pornography*, Ellen Willis illustrates the difference between pornography and erotica asserting that 'erotica whose etymological root is *eros* expresses an integrated sexuality based on mutual affection and desire between equals and that pornography whose is a Greek root *porne* meaning prostitute reflects a dehumanized sexuality based on male domination and of exploitation of women"¹(222)

There are of course much critical arguments against pornography currently considered to dangerously promote violence against women and the exploitation of children.

The increase in crime against women and children have also lead many countries including India attempt to come up with laws which although tends to regulate pornography however plays with the line of individual choices and action.

It has been frequently alleged that the law has a peculiar blind spot when it comes to the recognition and prosecution in relation to pornography and it falls somewhere between the law for obscenity (of which pornography is an aggravated form in legal terms) and the certification guidelines² for cinematograph film³.

II. The Question of Obscenity, Morality in defining Pornography: International Jurisprudence

The concept of 'pornography' does not lend itself easily to definition. Justice Potter Stewart, US Supreme Court despairing the task of defining pornography once famously wrote: 'I shall not today attempt further to define the

¹ Ellen Willis, *Feminism, Moralism and Pornography*, 38,N.Y.L. Sch. L.Rev. 351 (1993)

² Films are either certified for universal exhibition (U), restricted to adults (A), universal exhibition with parental guidance for children less than 12 years old (UA), films for specialised audiences e.g. doctors (S)

³ Walter M. Kendrick, *The Secret Museum: Pornography in modern culture*, University of California Press, 1996. He also said that Pornography is a "thought structure" and "a melodrama" with new players in every age.

kind of material I understand to be embraced within the shorthand description ; and perhaps I could never succeed in intelligibly doing so. But I know when I see it'

Law in real sense does not allow a gut feeling in identifying impermissible content. General practice of the three part test is expected to be followed that content restriction must clearly defined in law including those relating to obscenity although international court have been fairly lenient in applying the test . European Court of Human Rights admitted that *'the impossibility off attaining absolute precision in framing of laws'*

Defining pornography within the framework of law and justice has been a difficult task for both International as well and domestic legal systems globally. In identifying and defining pornography thereby limiting or curbing away pornography has clashed with the right of an individual choice, the right of free speech and expression and has clashed with the very notion of 'Justice'. The link between law and justice is assumed to be self evident but in fact has been questioned by several critical and philosophical examinations of the law.

Derrida⁴ clearly distinguishes between law and justice – for him justice is always required immediately and a just decision must rend time and defy dialectics, unlike law. Yet justice is also always yet-to-come and it is has a hopeful and transformative potential for the recasting and refounding of law and politics each time. *"Perhaps, one must always say perhaps for justice"*. A connection is also drawn between the law's application of general norms and how it cannot speak to the particular, uniquely human aspects, while justice is particular.

In the Handyside case⁵, the European Court of Human Rightd (ECHR) permitted the British authorities to impose a ban on the publication called 'The Little Red Schoolbook' which amongst other encouraged 12-18 years old children to indulge in guilt free use of marijuana and sexual acts even at the cost of parent's disapproval. The ECHR attached great significance to the text that the booklet was clearly addressed to a young audience and contained *"sentence or paragraph that young people at critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them"*

In the later case by contrast, ECHR condemned the conviction of the vendor of erotic films for gay audience as violation of the right of freedom of expression.

Thus, the notion of law, Justice and the idea of delimiting pornographic material is yet to find a clear answer even with the international diasporas and jurisprudence.

III. Pornography, Law and the Paradox of India: Judicial scene

"(a) According to the learned Counsel for the petitioner, the meaning of the lyrics on the song is heroine telling the hero to become like an eight legged insect and walk through her entire body and asking him to go below, still below and still more below, which conveys vulgarity and obscenity.

(b) In reply to the same, learned Counsel for the third respondent would submit that the song has been penned by the greatest lyricist Mr. Vairamuthu and, as this is the imagination of the heroine, there is no trace of vulgarity.

(c) This reply is quite strange. There is no explanation by the learned Counsel for the third respondent as to why the heroine asks the hero to become like an eight legged insect and walk through her body and to go below and below and still more below on the body..." Ms. A. Arulmozhi vs. The Govt. Of India and Ors.⁶

In India, the *Hicklin's Test* is a left over from a colonial legacy is still used to determine what is obscene. The Hicklin test of obscenity⁷ is whether "the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." The test defines 'obscene' as all visual or written material that is *"lascivious or appeals to the prurient interest"*, and *has the capacity to corrupt those exposed to it*. These standards are relevant in the context of Internet governance as well.

New legislations enacted for the Internet under the Information Technology Act, 2000 also adopted the same definitions regarding obscenity or sexually explicit material, inheriting also the weight of precedents that have determined what is obscene. This definition of obscenity and the penalization under the Indian Penal Code, 1860 (sections 292 and 293) is further extended by other laws that prevent the distribution of such material such as The Young Persons Harmful Publication Act, 1956, Indecent Representation of Women (Prohibition) Act, 1986. The case that laid down the Hicklin test i.e., *R. vs. Hicklin*⁸ was about the mass distribution of inexpensive pamphlets called provocatively "The Confessional Unmasked" described how priests extracted erotic confessions from female penitents. The publication of the pamphlet was encouraged by the Protestant Electoral Union and used by them to discredit the Catholic Church. The Confessional Unmasked itself reads like a salacious expose of the Catholic Church. As per this book, the priest tells the female penitent – *"Thou tremblest; thou daarest not tell to this terrible God thy weak and childish acts. Well, then, tell them to thy father, an*

⁴ Derrida, Jacques, "Force of law: Mystical foundation of authority", Margins of Philosophy, The Chicago University Press, 1982

⁵ Handyside vs. The United Kingdom, (5493/72) [1976]

⁶ (2005) 3 MLJ 497.

⁷ The Hicklin test has been modified with reference to judgments such as *Miller v. California* 413 U.S. 15 (1973) and in India *K.A. Abbas v. Union of India* (1970) 2 SCC 780

⁸ *R. v. Hicklin* (1868), L.R. 3 Q.B. 360, Cockburn C.J.

indulgent father, who wishes to know them in order to absolve them ; come, then, child, come and speak that which thou hast never dared to whisper in thy mother's ear ; tell me ; who will ever know it!" . Thus, this case set down the tone of defining obscenity in India for more than a decade.

Pornography itself in its hard core explicit avatar has rarely been examined by the Indian courts, for its merits as either an artistic product or as to whether it could fall within the parameters of free speech. This however, has also meant that exhibition through small cinema halls and circulation of pornography through video and other new media forms, has been taking place allowing people to access such material.

In Ranjit D. Udeshi⁹ the Supreme Court drew difference between obscenity and pornography. It was held that *while pornography denotes writing, pictures etc intended to arouse sexual desire, obscenity may include publication not intended to do so but which have the tendency.* While both offend against public decency and morals, pornography is obscenity is more of an aggravated form¹⁰

The Indian courts are squeamish and culturally still shy of confronting the issue of pornography as was observed in the case of *Fatima Riswana v. Chennai & Ors.*¹¹ both the public prosecutor and counsel for the petitioners applied to the court for transfer to another (male) judge, to save the district lady judge from embarrassment of having to view certain CDs that are part of the evidence. The order for transfer was passed and the justification for this was that 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 in the course of the trial, therefore, for a woman Presiding Officer it would cause embarrassment."

In the case of *Anonymous v The Commissioner of Police*¹², yet another encounter takes place between the embarrassed law and the pornographic text. It is an encounter of two women advocates asked by the court to examine what movies are being exhibited at a specific theatre. In the peculiar clash of social mores that ensure who has access to pornography and the law that ensures equal access to all legally sanctioned media to everyone, the movie theatre was held responsible for violating the fundamental right of women to have access to their premises – and thus access to pornography.

India as of now does not have law which clearly bans or defines pornography albeit the increase in violence against women and sexual abuse of children has forced the Indian executive and legislature to enter in the forbidden territory of understanding, identifying and (banning!) pornography. However, attempt to control and regulate pornography has also brought in a myriad of issues ranging to violating the right of individual liberty, choice and freedom of speech and expression as enshrined under the Indian Constitution along with jurisdiction issue pertaining to website hosted via internet.

In the case of *Shankarsan Krishan Mundra vs. State of Maharashtra*¹³, the Bombay High Court held that the private viewing of a pornographic or obscene film within the confines of a bungalow does not amount to public exhibition and therefore would not attack Section 292 of the Indian Penal Code.

Moreover, Supreme Court of India has also time and again refused to bring in unwanted censorship that violates the very basic fundamental right of liberty, free expression including the viewing of pornographic or obscene material within the confines of personal space.

IV. Conclusion- Effective Dimensions of Pornography Law in India

In 2013 a Public Interest Litigation (PIL) ¹⁴was filed in the Supreme Court seeking ban on viewing of pornography and to make it a non bailable offence. Advocate Vijay Panjwani stated that the absence of any strict internet law make porn videos easily accessible to the public and about 20 crore of porn clippings and videos are either freely downloaded from the internet or converted into video CDs. According to the petition, kids can easily view graphically strong, brutal, violet and destructive *adult content* that is not only posing danger to the entire society, but also to public order in the country.

In August 2015, Indian executive declared a ban on a total of more than 700 internet sites which contained obscene and pornographic material. The Supreme Court however came down heavily on the Centre declaring that such action could lead to a more serious repercussion wherein that blocking such sites will also block meaningful literature which will be of greater harm to the public.

Despite of every argument of safeguarding individual's right of liberty, speech , expression and choice, it cannot be denied that pornography has its dangers and disadvantages. At this moment, Indian alone cannot tackle the issue of child abuse and violence against women. Any law that it intends to draft must be made in sync with the global requirement and collaboration. Constant monitoring of sites that promote child related crimes could only be controlled with aid of international agencies and various multi level assistance by various government and non government organizations and associations. Regulating pornography and drafting law although is only one

⁹ AIR, 4128, para. 110

¹⁰ Ibid, (AIR) 885, para.7

¹¹ *Fatima Riswana v. State Rep. By A.C.P., Chennai & Ors.* Case No.: Appeal (crl.) 61 -62 of 2005.

¹² *Anonymous Letter-Un-Signed vs The Commissioner of Police and Ors.* on 26 December, 1996

¹³ WP (Cri) No. 1580 of 2010, decided on 24-11-2010 (Bom)

¹⁴ AIR 1965 SC 881: (1965)1 SCR 65

side of the coin nonetheless coming with a legal regime could be the first step towards enjoying eroticism without hampering the social and moral fabric of a civilized society

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