

# OUR UNCHAINED SEXUAL SELVES: A CASE FOR THE LIBERTY TO ENJOY PORNOGRAPHY PRIVATELY

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*The article provides a response to the writ petition pending before the Supreme Court in Kamlesh Vaswani v. Union of India, which seeks to ban pornography in its entirety. A problematic part of the petition is its prayer to criminalise private consumption of pornography as well as the prayer seeking that intermediaries ban pornography. Systematically critiquing the arguments presented in the petition, the author points out that most claims made in the petition are speculative and uncorroborated. More importantly, any paternalistic State intervention, based on the petition, would lead to the curtailment of constitutionally guaranteed liberties and freedoms of citizens. Presenting socio-legal arguments based on the larger contours of liberal constitutional theory, the author argues that the privacy and free speech provisions in the Constitution of India are broad enough to protect private viewership of pornography.*

## I. INTRODUCTION: KAMLESH VASWANI'S FEARS OF A PORNOGRAPHIC STATE

Ought India ban pornography entirely? Should we criminalise those – the recreational, the experimental, the exploratory, the deviant, the criminal – that watch pornography in private? Our sexual choices already stand subordinated to social mores; are we to vest the State and private intermediaries with that power as well? An ongoing public interest petition at the Supreme Court,<sup>1</sup> filed in 2013 by Indore-based advocate Kamlesh Vaswani ('the Vaswani petition' or 'the petition'), raises these questions.

For Vaswani, the answers are clear. Pornography leads to increasing sexual violence against women and children, he alleges. The easy availability of pornography on the Internet has fuelled a 'pornography addiction' in India, which corrupts and pollutes India's culture and values, and becomes a 'basis for unequal treatment of women'.<sup>2</sup> And so, with conviction, if not clarity or

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<sup>1</sup> Kamlesh Vaswani v. Union of India, (2014) 6 SCC 705 (A widely circulated version of the petition is available at [https://docs.google.com/document/d/1ZyBevXbdC-FXzkSNA9itU5oFjhwO7CNSmZ7\\_H0Ji\\_B0/edit](https://docs.google.com/document/d/1ZyBevXbdC-FXzkSNA9itU5oFjhwO7CNSmZ7_H0Ji_B0/edit) (Last visited on March 1, 2015)).

<sup>2</sup> *Id.*

coherence, Vaswani prays that the Supreme Court criminalise all consumption of pornography as a cognisable, non-bailable offence. He also prays that the Court strike down a crucial section of the Information Technology Act, 2000 (as amended in 2008) ('IT Act') that grants intermediaries (Internet Service Providers and the like) immunity against third party content under certain circumstances.<sup>3</sup> For Vaswani, the intermediaries that provide us Internet access ought to be responsible to stem the inflow of porn. Convinced that the existing law is a straw doll against the "growing problem of pornography", Vaswani urges that the Supreme Court strike down several sections of the IT Act,<sup>4</sup> and direct the Indian Government<sup>5</sup> to draft a national policy and action plan to address the problem of pornography, and enact a separate, comprehensive legislation to tackle the same.

Nevertheless, the petition raises multiple issues that rightly call for the Supreme Court's attention. It points out a lack of definition, which makes difficult, the identification of pornography and pornographic content in India.<sup>6</sup> §292 of the Indian Penal Code, 1860 ('IPC'), while including pornography

<sup>3</sup> Information Technology Act, 2000, §79: "Exemption from liability of intermediary in certain cases.—

- (1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third-party information, data, or communication link hosted by him.
- (2) The provisions of sub-section (1) shall apply if—
  - (a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored; or
  - (b) the intermediary does not—
    - (i) initiate the transmission,
    - (ii) select the receiver of the transmission, and
    - (iii) select or modify the information contained in the transmission;
  - (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.
- (3) The provisions of sub-section (1) shall not apply if—
  - (b) the intermediary has conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act;
  - (c) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner;

*Explanation* — For the purpose of this section, the expression 'third-party information' means any information dealt with by an intermediary in his capacity as an intermediary."

<sup>4</sup> The petition prays that the Supreme Court strike down §66, §67, §69, §71, §72, §75, §79, §80, and §85 of the IT Act as *ultra vires* Part III of the Constitution, in terms of Arts. 14, 19 and 21.

<sup>5</sup> The Ministry of Information Technology, the Ministry of Information and Broadcasting, and the Ministry of Home Affairs are respondents in the petition, along with the Internet Service Providers Association of India.

<sup>6</sup> The law requires more than a subjective certainty of recognition. "I know it when I see it", while sufficient for Potter Stewart, J. in *Jacobellis v. Ohio*, 378 US 184 (1964), is not the legal standard in India.

within its contours,<sup>7</sup> does not set forth a method to independently identify pornography; its method is a case-by-case identification by the courts. In this light, the Vaswani petition's prayer that intermediaries should block online porn is problematic. It leaves the decision of 'what constitutes porn' in the hands of the private intermediary.

Intermediaries, however, are granted conditional immunity for all third-party content under the amended §79 of the IT Act. That is, intermediaries abiding by the due diligence requirements under §79 are exempt from liability. But the acts of "publishing or transmitting of obscene material" or "material containing sexually explicit act" in electronic form are criminal offences.<sup>8</sup> The Vaswani petition desires that this immunity be removed as well. What this portends for freedom of expression and the diversity of online content is troubling.

To us, the Vaswani petition may seem like the product of concern and moral dismay, expressing consternation over the perceived penetration and harmful effects of pornography in India. It is exactly that, and that is precisely why its claims must be considered with caution. Popular moral concerns can, under the Constitution, displace constitutionally protected liberties,<sup>9</sup> but ought to do so only under compelling circumstances, and in a narrowly tailored manner.

The Vaswani petition strays in its prayer for the criminalisation of all consumption of pornography, whether by public display or private viewing. Without discounting the relevance of all the other issues raised, this prayer, seeking prohibition and criminalisation of all pornography-consumption, poses dangers to our liberties that ought to be addressed. In particular, I wish to interrogate the permissibility of private consumption and enjoyment of pornography in light of the rights guaranteed under Articles 19(1)(a) and 21 of the Constitution of India, no matter what the popular moral censure. I argue that the Constitution guarantees an as-yet-unarticulated liberty of private consumption, which is not eroded by Vaswani's arguments of cultural blight and dubious personal harm. In a decade of book-bans,<sup>10</sup>

<sup>7</sup> Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881, ¶7 ("[...] pornography is obscenity in a more aggravated form").

<sup>8</sup> See Information Technology Act, 2000, §67, §67A, and §67B.

<sup>9</sup> See Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881, ¶8 ("This freedom of Article 19(1)(a) is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality").

<sup>10</sup> See, e.g., Al Jazeera, *Penguin India to recall book on Hinduism*, February 11, 2014, available at <http://www.aljazeera.com/news/southasia/2014/02/india-book-ban-sparks-controversy-2014211163539852854.html> (Last visited on May 5, 2014); N. Kalyan Raman, Caravan Magazine, *Why Perumal Murugan's "One Part Woman" is Significant to the Debate on Freedom of Expression in India*, January 13, 2015, available at <http://www.caravanmagazine.in/vantage/why-perumal-murugans-one-part-woman-significant-debate-freedom-expression-india> (Last visited on March 1, 2015).

cinema censorship,<sup>11</sup> and Internet sanitisation,<sup>12</sup> where individual liberty has been forfeited to assuage an amorphous society's hurt sentiments, a restatement of these liberties – and the good sense of their preservation – is essential.

In pursuit of this aim, Part II of this paper takes a fine-toothed comb to the Vaswani petition, identifying its stated justifications for prohibition and criminalisation of private consumption of pornography, and also articulates the issue at hand. Part III locates the basis for the liberty of private consumption in a marriage of the Court's jurisprudence in Articles 19(1)(a) and 21. It also explores the good sense of retaining the said liberty, and concludes that despite societal reservations about pornography, one's liberty to enjoy pornography privately (alone or in consensual company) ought to be preserved.

## II. WHY PROHIBIT PORNOGRAPHY? THE VASWANI PETITION ANSWERS

Bids to criminalise consumption of pornography are not new.<sup>13</sup> However, having succeeded in gathering the Supreme Court's attention on porn, the morality of its consumption and the effectiveness of seeking an end to intermediary liability, the Vaswani petition's understanding of pornography and its impacts, becomes crucial.

For the Vaswani petition, the sole story of pornography is dark and heavy; it is “graphic, violent, brutal, deviant, and destructive.”<sup>14</sup> The petition's allegations about the impact of pornography are of three kinds, all of which support its prayer for prohibition and criminalisation. *First*, the petition alleges direct harms from ‘increasing’ availability of pornography. It insists that pornography fuels sexual violence and crimes against women and children. Neglecting abundant studies that refute causal links between pornography and sexual violence,<sup>15</sup> the petition indulges in a long, unsupported and unrelated

<sup>11</sup> See, e.g. Live Mint, *Nandini Ramnath, Santosh Sivan's "Inam" pulled from cinemas after Tamil groups protest*, March 31, 2014, available at <http://www.livemint.com/Leisure/15aF0vs-v2Wz62Ony39onnK/Santosh-Sivans-Inam-pulled-from-cinemas-after-Tamil-group.html> (Last visited on May 5, 2014).

<sup>12</sup> See Google Transparency Report: India, available at <http://www.google.com/transparencyreport/removals/government/IN/> (Last visited on May 5, 2014).

<sup>13</sup> See India Today, *Parliamentary committee to look into cyber porn and ways to check its usage and distribution*, July 1, 2013, available at <http://indiatoday.intoday.in/story/parliamentary-committee-cyber-porn-ways-to-check-usage-distribution-india-today/1/290860.html> (Last visited on May 5, 2014).

<sup>14</sup> *Kamlesh Vaswani v. Union of India*, (2014) 6 SCC 705. Newspaper reports and blogs similarly rely on this version, see Manish & Sarvjeet Singh, *What's problematic with Porn Ban?*, May 3, 2014, available at <https://ccgnludelhi.wordpress.com/2014/05/03/whats-problematic-with-porn-ban/> (Last visited on May 6, 2014).

<sup>15</sup> See Math, Vishwanath et al., *Sexual Violence in India: Is it Affected by Pornography?*, 36(2) INDIAN JOURNAL OF PSYCHOLOGICAL MEDICINE 6 (2014); Berl Kutchinsky, *Pornography and rape: Theory and practice?: Evidence from crime data in four countries where pornography*

exposition of criminal psychology<sup>16</sup> and sporadic statistics such as the brutal gang rape of the physiotherapy student in Delhi.<sup>17</sup> Indeed, it goes so far as to say that offenders gather sexual release from the “thrill, domination and power” of crimes that pornography goads them to commit, and suggests that such “pornography addicts” and offenders require psychosocial counselling.

The petition’s recognition of the harms of child pornography is also important,<sup>18</sup> but these are drowned out by generalised statistics and dubious inferences. For instance, the petition refers to an unsupported fact that a new porn video is manufactured every 39 minutes (somewhere in the world? in the United States? in India?), that every second, USD 3075.64 is spent on pornography, 28258 Internet users view pornography and 372 Internet users type adult search terms into search engines. These statistics may seem staggering and perturbing, but they must be dealt with caution. Not only does the petition neglect to mention its sources, but in any event, methods of gathering data and statistical analysis, not known to lay readers, are crucial in determining their relative truth. In sum, statistics may support general propositions, but remain inconclusive.

Second, the petition emphasises that, availability and consumption of porn leads to ‘moral and cultural pollution’ in Indian society, and offers this as a justification for a pornography ban. Though it can be privately and consensually consumed, the petition alleges that “pornography cannot be considered to be a self-regarding activity because it brings sex into public sphere”, and puts “peace of mind, health and wellness, happiness and human potential” at risk. In this, the petition reveals its vision for a moral paternalistic ban on porn, where the immorality itself is sufficient cause for prohibition.<sup>19</sup> And throughout, it relies on the conviction that pornography – the very thought of it – is immoral. “Pornography is like moral cancer that is eating our entire society at every second across country”, it alleges. Noting that “mental images can

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*is easily available*, 14(1) INT. J. OF LAW & PSYCHIATRY 47 (1991); Joseph E. Scott & Steven J. Cuvelier, *Violence and Sexual Violence in Pornography: Is it really increasing?*, 22(4) ARCHIVES OF SEXUAL BEHAVIOUR 357 (1993).

<sup>16</sup> Curious passages relate the mentality of impulsive and ritualistic offenders, paedophiles and sexual sadists, unsupported by evidence.

<sup>17</sup> See Krishna Pokharel et al., The Wall Street Journal, *New Delhi Attack: the Victim’s Story*, January 9, 2013, available at <http://online.wsj.com/news/articles/SB10001424127887323482504578227751166162988?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424127887323482504578227751166162988.html> (Last visited on May 6, 2014); Jason Burke, *Delhi Rape: how India’s other half lives*, The Guardian, September 10, 2013, available at [http://www.theguardian.com/world/2013/sep/10/delhi-gang-rape-india-women?CMP=twt\\_gu](http://www.theguardian.com/world/2013/sep/10/delhi-gang-rape-india-women?CMP=twt_gu) (Last visited on May 6, 2014).

<sup>18</sup> See Cass R. Stein, *Pornography and the First Amendment*, 1986(4) DUKE LAW JOURNAL 589 (1986) (For a more detailed understanding); Neil Malamuth & Mark Huppín, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REVIEW ON LAW & SOCIAL CHANGE 773 (2007).

<sup>19</sup> Joel Feinberg, *Pornography and the Criminal Law*, 40 UNI. OF PITT. L. REV. 567 (1979).

never be erased”, the petition lists out immoral lessons that pornography may teach children.

Its moral discomfort with pornography is best represented by this passage that adequately reflects fears of ‘commodification’ and ‘desensitisation’ of sex: “[...] notions of family control over a child’s introduction to sexuality as children learns by these that sex is public, that sex is commercial and that sex can be divorced from any degree of affection, love, commitment or marriage is the wrong message at the wrong time.”<sup>20</sup>

On a related, third note, the petition also alleges that pornography induces ‘unequal treatment of women’, objectifying and commodifying women. It states that most sexually explicit material is ‘degrading’, depicting women in ‘humiliating’, subordinate positions in relation to men, also as “existing solely for the sexual satisfaction of others.” Importantly, it notes that such continuing perception of women may legitimise their subordination and ill-treatment. These are real and compelling concerns,<sup>21</sup> but they must be weighed and balanced with the liberties guaranteed by the Constitution.

These concerns of the Vaswani petition are hardly new. In India, public moral perturbation with sex and depictions of sex have existed for decades, despite Indian art’s long and loving relationship with sex and eroticism.<sup>22</sup> The IPC’s colonial underpinnings gave us §292, the provision that criminalises manufacture, sale, distribution, public exhibition, import or export of ‘obscene material’. Through a series of decisions, the Supreme Court arrived at a definition of ‘obscenity’, which is the “[...] treatment of sex in a manner offensive to public decency and, judged by our national standards, considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result.”<sup>23</sup>

Later cases have upheld artistic or literary merit – “so preponderate as to throw the obscenity into a shadow”<sup>24</sup> – of impugned publications, and drawn important distinctions between obscenity and vulgarity,<sup>25</sup> and the healing “aesthetic touch” that frees nudity from the humiliating shackles of obscenity.<sup>26</sup>

<sup>20</sup> Kamlesh Vaswani v. Union of India, (2014) 6 SCC 705 ¶36.

<sup>21</sup> See ANDREA DWORKIN, MEN POSSESSING WOMEN (1981); Catherine MacKinnon, *Not a Moral Issue*, 2(2) YALE LAW & POLICY REVIEW 321(1984).

<sup>22</sup> See Michael Rabe, *Sexual Imagery on the “Phantasmagorical Castles” at Khajuraho*, 2(2) INT. J OF TANTRIC STUDIES (1996).

<sup>23</sup> Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881.

<sup>24</sup> K.A. Abbas v. Union of India, AIR 1971 SC 481.

<sup>25</sup> Samaresh Bose v. Amal Mitra, AIR 1986 SC 967.

<sup>26</sup> See Maqbool Fida Husain v. Rajkumar Pandey, 2008 Cri LJ 4107 (Del); Raj Kapoor v. State, AIR 1980 SC 258.

More recently, in *Aveek Sarkar v. State of West Bengal*<sup>27</sup> ('Aveek Sarkar'), the Supreme Court has discarded the earlier, Hicklin test adopted in *Ranjit Udeshi v. State of Maharashtra*<sup>28</sup> ('Ranjit Udeshi'), which had focused the depraving or corrupting influence on "lascivious, prurient or sexually precocious minds" by individual or partial aspects of an allegedly obscene object. Through *Aveek Sarkar*,<sup>29</sup> the Supreme Court has established a more rounded 'community standards' test. Particularly, the Supreme Court states that nudity is not *per se* obscene, "unless it has the tendency to arouse feeling or revealing an overt sexual desire". A public message, such as the anti-racial message in *Aveek Sarkar*,<sup>30</sup> may absolve nudity from the charge of obscenity. Applying a standard similar to that put forth by the appellant in *Ranjit Udeshi*,<sup>31</sup> the Supreme Court states, "Only those sex-related materials which have a tendency of 'exciting lustful thoughts' can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards."<sup>32</sup>

Thus, the treatment of sex – and especially, sex in the public sphere – in India has changed over decades. The Court has continually upheld the importance of the guarantee in Article 19(1)(a) for those who are gifted with the ability to think 'out of the box',<sup>33</sup> and also peppered its memory with Indian art's liberal sexual perspectives.<sup>34</sup> At the same time, the Court has accepted 'public decency and morality' under Article 19(2) as a valid justification to 'restrict' manufacture, sale, distribution, public exhibition, etc. of obscene material.<sup>35</sup> Pornography, considered an aggravated form of obscenity,<sup>36</sup> is subject to the same restrictions.

I do not contest these restrictions on sale, public display, etc. of pornography. However, the private consumption of pornography (and the question of criminalisation) is an extension of these views of the Court. While there exist fitful decisions from the judiciary where private viewing of pornography have been permitted,<sup>37</sup> in the Vaswani

<sup>27</sup> *Aveek Sarkar v. State of West Bengal*, AIR 2014 SC 1495.

<sup>28</sup> *Ranjit Udeshi v. State of Maharashtra*, AIR 1965 SC 881.

<sup>29</sup> *Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257.

<sup>30</sup> *Id.*

<sup>31</sup> *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881.

<sup>32</sup> *Aveek Sarkar v. State of W.B.*, (2014) 4 SCC 257, ¶23.

<sup>33</sup> *MAQBOOL FIDA HUSAIN v. Rajkumar Pandey*, 2008 Cri LJ 4107 (Del).

<sup>34</sup> *Id.*, (The Court said, "[...] the literature of India, both religious and secular, is full of sexual allusions, sexual symbolisms and passages of such frank eroticism the likes of which are not to be found elsewhere in world literature").

<sup>35</sup> *RANJIT D. UDESHI v. State of Maharashtra*, AIR 1965 SC 881, ¶8 (§292 of the IPC, manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality).

<sup>36</sup> *Id.*, ¶7 ("Pornography denotes writings, pictures, etc. intended to arouse sexual desire [...]").

<sup>37</sup> *See, e.g.*, *Chandrakant Mansaram More v. STATE OF MAHARASHTRA*, WP (Cri.) No. 1577 of 2010 (Bom), (*per* Tahilramani, J.) (Five petitions were heard together, one of which is cited above).

petition,<sup>38</sup> one hopes the Court will further evolve the balance between public morality and private liberties, and the extent to which alleged societal majorities – and the law – may dictate individual moral preferences.

### III. PRIVATE PORNOGRAPHIC SELVES: A LIBERTY TO CONSUME PORN IN PRIVATE

By seeking prohibition and criminalisation of private consumption of pornography, the Vaswani petition raises questions of whether the State may regulate private acts, and on what grounds. This part addresses this question by delving into the jurisprudence of the right to privacy under Article 21 of the Constitution and locating the liberty a person requires to consensually consume pornography in private, and also explores the rationale for retaining such a private liberty.

#### A. LIBERTY TO ENJOY PORNOGRAPHY

Two questions arise before one may deduce a constitutionally protected liberty for private consumption of pornography. *First*, whether the ambit of the right to privacy under Article 21 includes personal sexual proclivities; *second*, whether the enforcement of public morality constitutes a sufficient ‘compelling interest’ to justify censorship and criminalisation.

In a set of five petitions jointly heard by the Bombay High Court, it has been held that private viewing of pornography does not constitute an offence under §292 of the IPC. In *Chandrakant Mansaram More v. State of Maharashtra*<sup>39</sup> (and other petitions), the Lonavala police received information regarding a party at a private bungalow in the jurisdiction. According to the complaint, a number of men and women were intoxicated and watching obscene films on laptops, as well as engaging in ‘obscene dances’. The police charged the individuals under §292 of the IPC and §65(c) and §82 of the Bombay Prohibition Act, 1949. The petitioners sought the quashing of the FIR. On the question of whether private viewing of obscene films constitutes an offence under §292 of the IPC, Tahilramani, J. held that, “*simpliciter* viewing of an obscene object is not an offence under clause (a) of §292.” In holding that mere possession or viewing of a ‘blue film’ is not punishable under §292, the Bombay High Court followed the view of the Madras High Court in *V. Sundarrajan v. State of Madras*<sup>40</sup> and the Rajasthan High Court in *Jagdish Chavla v. State of Rajasthan*.<sup>41</sup>

The decision is available on the website of the Bombay High Court, and is on file with the author).

<sup>38</sup> Kamlesh Vaswani v. Union of India, (2014) 6 SCC 705.

<sup>39</sup> Chandrakant Mansaram More v. State of Maharashtra, WP (Crl.) No. 1577 of 2010 (Bom).

<sup>40</sup> V. Sundarrajan v. State of Madras, Cri PC No. 376 of 1978.

<sup>41</sup> Jagdish Chavla v. State of Rajasthan, 1999 Cri LJ 2562.



While the Bombay High Court's decision did not enter into the question of Article 21, and a right to view pornography in private, it established the state of the law under §292. However, the Bombay High Court's view may be squared with the right to privacy and private decisions regarding family, sex and procreation under Article 21 of the Constitution.

The right to privacy falls within the ambit of the 'right to life and personal liberty' under Article 21 is no longer *res integra*. In *Kharak Singh v. State of U.P.*,<sup>42</sup> where the constitutional validity of Chapter XX of the Uttar Pradesh Police Regulations conferring powers of surveillance on police officers was in question, the majority was faced with the task of interpreting the term 'personal liberty' under Article 21. The Court found personal liberty to be a 'compendious term', which includes "within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1)."<sup>43</sup> Accepting Field, J.'s observation in *Munn v. Illinois*<sup>44</sup> that life is "more than mere animal existence", the majority found that Article 21 "assure(s) the dignity of the individual" and "therefore of those cherished human values as the means of ensuring his full development and evolution."<sup>45</sup> Indeed, Subba Rao, J., in his minority opinion, noted that, "nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy."<sup>46</sup>

This broad, residual interpretation of Article 21 was carried forward by the Court in *Gobind v. State of M.P.* ('Gobind'),<sup>47</sup> where it held privacy to be a fundamental right implicit in the concept of ordered liberty under Article 21. Though reluctant to engage in an expansive interpretation of a right not explicit in Article 21 (and at the time, not widely accepted), the Court in *Gobind*<sup>48</sup> nevertheless explored the contours of the right to privacy. It included in privacy's ambit, albeit non-exhaustively, personal intimacies of the home, family, marriage, motherhood, procreation and child-rearing. That privacy, once characterised as the "right to be let alone",<sup>49</sup> includes the personal intimacies listed above, was affirmed in *R. Rajagopal v. State of T.N.*<sup>50</sup> ('Rajagopal'), and remains the law to this day.<sup>51</sup>

<sup>42</sup> *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295.

<sup>43</sup> *Id.*, ¶16.

<sup>44</sup> *Munn v. Illinois*, 94 US 113, 142 (1876).

<sup>45</sup> *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295, ¶13.

<sup>46</sup> *Id.*, ¶28.

<sup>47</sup> *Gobind v. State of M.P.*, AIR 1975 SC 1378.

<sup>48</sup> *Id.*

<sup>49</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4(5) HARVARD LAW REV. 193 (1890).

<sup>50</sup> *R. Rajagopal v. State of T.N.*, AIR 1995 SC 264.

<sup>51</sup> *People's Union for Civil Liberties (PUCL) v. Union of India*, AIR 1997 SC 568; 'X' v. Hospital 'Z', AIR 1999 SC 495; *Sharda v. Dharmpal*, (2003) 4 SCC 493; *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5.

The right to privacy, in India, is not merely the right to be free of governmental interference. Following the affirmation of the comprehensive, residual nature of ‘personal liberty’ in *Maneka Gandhi v. Union of India*,<sup>52</sup> the Supreme Court in *Rajagopal*<sup>53</sup> acknowledges a wider ambit of the right, referring to decisions of the Supreme Court of the United States on the constitutionally guaranteed autonomy to choose contraception,<sup>54</sup> abortion,<sup>55</sup> methods of procreation,<sup>56</sup> and family relationships.<sup>57</sup> The right to life and personal liberty became deeply imbued with the right to live with dignity, which included “the bare necessities of life such as adequate nutrition [...] and facilities for reading, expression oneself in diverse forms [...]”<sup>58</sup>

A further, clearer expansion of Article 21 in the context of sexual preferences and liberties came with the celebrated decision of the Delhi High Court in *Naz Foundation v. Govt. of NCT of Delhi*<sup>59</sup> (‘Naz Foundation’). Affirming the decision of the United States Supreme Court in *Planned Parenthood v. Casey*,<sup>60</sup> the Delhi High Court adopted a powerful quote, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define personhood were they formed under compulsion of the State.”<sup>61</sup>

This liberty, sensitively and empathetically expanded by the Delhi High Court, includes within it the choice of sexuality, sexual identity, and preference, and of ‘partners, real or imagined’.<sup>62</sup> At its core is the recognition of individual, personal liberty to choose whom to enter into romantic relationships with (and whether, at all), whom to have sex with, how to have sex, and whether in pursuit of sexual pleasure,<sup>63</sup> pornography or erotica is to be a welcome companion. Article 21 guarantees the freedom, ensconced in the garb of privacy and personal liberty, to choose all manners of pursuit of consensual

<sup>52</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

<sup>53</sup> *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632.

<sup>54</sup> *Griswold v. Connecticut*, 381 US 479 (1965); *Eisenstadt v. Baird*, 405 US 438 (1972).

<sup>55</sup> *Roe v. Wade*, 410 US 113 (1973).

<sup>56</sup> *Skinner v Oklahoma*, 316 US 535 (1942).

<sup>57</sup> *Prince v. Massachusetts*, 321 US 158 (1944).

<sup>58</sup> *Francis Coralie Mullin v. Union Territory of Delhi*, (1981) 1 SCC 608.

<sup>59</sup> *Naz Foundation v. Govt. of NCT of Delhi*, (2009) 160 DLT 277 (While the decision has been overturned by the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*, AIR 2014 SC 563, the ambit of the privacy right, or indeed, the fact of its infringement by §377 of the IPC, was not disputed. In any event, the Supreme Court has currently admitted a curative petition, rehearing salient points in *Koushal*).

<sup>60</sup> *Planned Parenthood v. Casey*, 505 US 833 (1992).

<sup>61</sup> *Naz Foundation v. Govt. of NCT of Delhi*, (2009) 160 DLT 277, ¶34.

<sup>62</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1998 ZACC 15.

<sup>63</sup> A right doubtless afforded by the procreative freedom in married and unmarried relationships endorsed by the Supreme Court in *Gobind v. State of M.P.*, AIR 1975 SC 1378 and *R. Rajagopal v. State of T.N.*, AIR 1995 SC 264.

sexual pleasure, free of impositions of governmental or societal viewpoints.<sup>64</sup> This includes the choice to privately enjoy pornography (alone or in consensual company).

Finally, on whether public morality may validly restrict the freedom to enjoy porn. The Court in *Gobind*<sup>65</sup> observed that constitutionally protected liberties of the individual, his personality, and all things ‘stamped with his personality’ are free of official interference in the absence of a ‘reasonable basis for intrusion’. Any such intrusion must satisfy a “compelling State interest”;<sup>66</sup> the burden for whose satisfaction lies upon the State, given that a call to prohibit and criminalise private consumption of pornography violates Article 21, and is not supported by the restrictive approach adopted in light of public morality. The State must also show that such prohibition and criminalisation are the narrowest possible methods to eradicate a perceived ‘problem’ of pornography.<sup>67</sup> In my view, this is an impossible burden to fulfil, as criminalisation is the last resort of the State.<sup>68</sup>

Thus, by protecting personal intimacies of the home and by extension, sexual preferences, Article 21 is in favour of a liberty for the private, consensual consumption of pornography. Not only is this the right interpretation, but also it is a right that it should be so.

## B. IN DEFENCE OF PORNOGRAPHIC SELVES?

In this section, I explore the rationale for such a permissive liberty for private pornographic consumption, and question whether it is ‘good’ to retain the same. Alternatively, one may ask whether the State ‘ought to’ permit such private consumption. This question necessarily takes us beyond the realm of the law, and introduces moral and social realities and norms. While I will be guided by scholarship, and ideals of a liberal society, I wish to map these against my limited experience and of those around me.

Is the permissiveness advocated in the previous section in line with India’s social realities? Is it desirable that this individual liberty to enjoy pornography trump societal concerns of cultural pollution and increasing male-female inequality, albeit in a limited manner? I can hardly presume to speak for the whole, or perhaps even the majority, of India’s population, but I shall endeavour to provide a balanced lens to think with.

<sup>64</sup> See Elena Kagan, *Regulation of Hate Speech and Pornography after RAV*, 60 UNIV. OF CHICAGO L. REV. 873 (1993) (On the importance of viewpoint neutrality).

<sup>65</sup> *Gobind v. State of M.P.*, (1975) 2 SCC 148.

<sup>66</sup> *Selvi v. State of Karnataka*, (2010) 7 SCC 263 (Affirmed in).

<sup>67</sup> *Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 1.

<sup>68</sup> Dan M. Kahan, *What do alternative sanctions mean?*, 63(2) UNIVERSITY OF CHICAGO LAW REVIEW 591 (1996).

In the debates of the Constituent Assembly, it was idealised that “freedom of speech lay at the foundation of all democratic organisation.”<sup>69</sup> The risk of this freedom’s abuse is amply recognised, for the Parliament and the courts have long emphasised the limits of free expression.<sup>70</sup> However, as a starting point, I refer to the ideal of freedom of expression articulated by the Court in *Bennett Coleman v. Union of India*<sup>71</sup> (‘Bennett Coleman’). For the Court, freedom of expression was not merely an individual good, protected for individual fulfilment and the attainment of truth. It was and is also a social good, necessary “for participation by members of the society in political or social decision-making” and to maintain “the balance between stability and change in society.”<sup>72</sup> The Court was persuaded that free expression in a marketplace of ideas was the “best process for advancing knowledge and discovering truth”, and to reach a “general or social judgment” on any matter.<sup>73</sup>

In unpacking the Court’s ideal, one finds the emphasis on individual and societal progress, through exposure to ideas in John Stuart Mill’s marketplace. Therefore, there is a presumption for free expression (in this case, of pornography), unless countervailed by societal interests.<sup>74</sup> In this view, private exploration and enjoyment of pornography would aid equally in individual and societal fulfilment, in the discovery both of their own sexual selves and sexual practices for society at large. Indeed, we need not all conform to a vocal majority’s conception of ideal sexuality, and the Constitution admits our diversities.<sup>75</sup>

However, our enjoyment of pornography may be trumped by countervailing public morality, which validates the IPC and IT Act’s restrictions on manufacture, sale, public display, transmission, etc. of obscene or pornographic content. Such restriction, including of age limits,<sup>76</sup> and non-legal methods of familial control and social disapprobation are amply justified. But to justify legal censorship, in a society where a presumption exists in favour of liberties, it must be shown that the potential harm from pornography is ‘grave and uncontroversial’.<sup>77</sup>

Dworkin, analysing the UK’s Williams Report on Obscenity and Film Censorship (‘Williams Report’), states that some restrictions on pornography are permissible if the anticipated harms are any of the three kinds, *first*,

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<sup>69</sup> CONSTITUENT ASSEMBLY DEBATES, Vol. VII, 749 (1948-49).

<sup>70</sup> See, e.g., RANJIT D. UDESHI v. State of Maharashtra, AIR 1965 SC 881.

<sup>71</sup> *Bennett Coleman v. Union of India*, (1972) 2 SCC 788.

<sup>72</sup> *Id.*, ¶153.

<sup>73</sup> *Id.*

<sup>74</sup> T.R.S. Allan, *A Right to Pornography?*, 3(3) OXFORD JOURNAL OF LEGAL STUDIES 376, 379 (1983).

<sup>75</sup> National Legal Services Authority v. Union of India & Ors., (2014) 5 SCC 438.

<sup>76</sup> Indian Penal Code, 1860, §293.

<sup>77</sup> Ronald Dworkin, *Is there a right to pornography?*, 1(2) OXFORD JOURNAL OF LEGAL STUDIES 177, 179 (1981).

it may be a direct personal harm (such as the increase in sexual violence alleged by the Vaswani petition, which stands refuted); *second*, it may present a 'special danger of cultural pollution' that may impede individual and societal development (such as the cultural decay feared by the petition); or *third*, if restrictions will adequately address a feared harm, but not lead down a slippery slope towards absolute censorship (§293 of the IPC, identifying an age limit, and prohibitions of child pornography in any form, are examples).

Addressing the first direct harm, the Vaswani petition alleges that the direct harms of pornography justify prohibition of the same. At the heart of this justification is the assumption that the availability and consumption of pornography is the cause for increased sexual violence and crime.<sup>78</sup> Taken at face value, this may seem like a valid justification.<sup>79</sup> Indeed, the feminist critique of pornography emphasises the sexual inequality entrenched by porn, and indicates the brutality of female treatment in pornography.<sup>80</sup>

However, studies show that evidence of increased sexual violence caused by pornography is, at best, inconclusive, and scholars sympathetic to the feminist critique accept the same as well.<sup>81</sup> Indeed, the Williams Report, addressing these very concerns, found "no persuasive evidence of this causal influence."<sup>82</sup> As such, the argument of increased sexual violence is, by itself, inconclusive and insufficient to justify prohibition and criminalisation of pornography. Other educative methods may be necessary to address the problems identified by the feminist critique, but a blanket ban or censorship tips the balance towards unreasonableness.

The second justification of cultural pollution revolves around the offensiveness caused due to the availability and consumption of pornography. At the outset, it is important to question whether the offence felt by pornography-teetotalers, such as the petitioner, at the mere thought of others enjoying pornography, is sufficient justification for censorship.<sup>83</sup> While the teetotalers may 'think' that pornography is, say, degrading, censorship on these grounds would stand in summary violation of Mill's conception of freedom of thought

<sup>78</sup> Kamlesh Vaswani v. Union of India, (2014) 6 SCC 705 (The petition notes, "As far as latest Delhi heinous gang rape case and crime against women/girls/children is concerned, petitioner strongly believes that most of the crime against women/ girls/children are committed by offenders fuelled by pornography").

<sup>79</sup> See Thelma McCormack, *Machismo in Media Research: A Critical Review of Research on Violence and Pornography*, 25(5) SOCIAL PROBLEMS 544 (1978).

<sup>80</sup> Eric Hoffman, *Feminism, Pornography and Law*, 133(2) U. PEN. L. REV. 497, 514 (1985).

<sup>81</sup> See Rae Langton, *Whose Right? Ronald Dworkin, Women and Pornographers*, 19(4) PHILOSOPHY & PUBLIC AFFAIRS 311, 327-28 (1990).

<sup>82</sup> Dworkin, *supra* note 77, 180.

<sup>83</sup> That this is sufficient for 'restrictions', at least in the Indian context, is clear from the Supreme Court's jurisprudence on obscenity.

and expression.<sup>84</sup> This view is echoed in Gobind<sup>85</sup> in its rationale for protecting privacy. In Gobind,<sup>86</sup> the Court recognises that we may legitimately indulge in activities in the privacy of our homes (or other space where we have a reasonable expectation of privacy),<sup>87</sup> that cause offence from the mere thought of others' unseemly indulgences and no other established harm.

It is at this juncture that a distinction between public and private spheres of pornography-viewing<sup>88</sup> becomes relevant. Others may not object to our enjoying pornography in private (as we are permitted to do by the presumption and establishment of liberty), unless such display invades their public and private space. The majority's 'moral' choices need not become ours – and society 'ought not' have the right in law to dictate so. As Dworkin says, and the Supreme Court agrees through its dictum in Ranjit Udeshi,<sup>89</sup> pornography causes an offence that is "freighted with moral convictions,"<sup>90</sup> but mandating by law, the cultivation of a morality that conforms to the majority's morality is both violative of all our liberties of thought and expression, and privacy. As the Delhi High Court has championed, thought-control is alien to us,<sup>91</sup> and the rationale for protecting privacy is that a sanctuary may be obtained, where we may "desist for a while from projecting on the world the image they want to be accepted as themselves."<sup>92</sup>

Unless pornography is, in fact, degrading, censorship of pornography, coupled with criminalisation of its private enjoyment, violates the private liberty granted by Article 21. While feminist critiques of pornography do point out such degrading harm,<sup>93</sup> a decision of absolute censorship must consider whether, in our community, suppressing pornography may worsen outcomes than permitting private enjoyment. In a year crucial for alternative sexualities, we must also ask whether pornography has a social utility for marginalised sexualities,<sup>94</sup> and whether Article 21 protects their right to enjoyment of the same.

<sup>84</sup> JOHN STUART MILL, *ON LIBERTY* 26, 54-56, 103, 110 (1909).

<sup>85</sup> Gobind v. State of M.P., (1975) 2 SCC 148.

<sup>86</sup> *Id.*

<sup>87</sup> People's Union for Civil Liberties (PUCL) v. Union of India, AIR 1997 SC 568.

<sup>88</sup> Thomas I. Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3(1) *YALE LAW & POLICY REVIEW* 130, 139-40 (1984).

<sup>89</sup> Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881.

<sup>90</sup> Gobind v. State of M.P., (1975) 2 SCC 148, 188.

<sup>91</sup> Maqbool Fida Husain v. Rajkumar Pandey, 2008 Cri LJ 4107 (Del).

<sup>92</sup> Gobind v. State of M.P., AIR 1975 SC 1378, ¶27.

<sup>93</sup> See David Dyzenhaus, *John Stuart Mill and the Harm of Pornography*, 102(3) *ETHICS* 534 (1992).

<sup>94</sup> See Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47(4) *STANFORD LAW REVIEW* 661 (1995).

## IV. CONCLUSION

The Vaswani petition in the Supreme Court raises an important question : ought the Supreme Court or Parliament extend its authority to ban pornography online, and criminalise private viewing or enjoyment of the same? The Vaswani petition argues that the spread of pornography like a ‘moral cancer’ is directly responsible for increased violence against women, and a possible breakdown of family or cultural values in the society. It therefore prays that the Supreme Court direct the government to criminalise private viewing, order Internet intermediaries to block or take down pornographic content, and create a national policy to tackle the problem.

While the Vaswani petition echoes valid concerns regarding the portrayal of women in pornography, its arguments correlating increased sexual violence and consumption of pornography are misguided. Several studies, including a 2014 study at NIMHANS, Bangalore, show that a correlation between pornography and sexual violence is inconclusive. At the same time, §292 does not criminalise private viewing of pornography; it leaves the liberty of private consumption open to the viewer without placing overt control.

The right to privacy under Article 21 of the Constitution, construed imaginatively, supports this view. The jurisprudence of the Supreme Court shows that certain spheres of life are outside the area of governmental interference. Family, procreation, child-rearing, and sexual orientation are among these. The choice of a sexual partner, too, is within one’s private autonomy of choice, as the Delhi High Court stressed in *Naz Foundation*.<sup>95</sup> The choice of private consensual enjoyment of pornography, in the absence of harm to persons involved, also falls within the ambit of Article 21. However, the involvement of children, being below the age of making consensual decisions regarding sex, in pornography (for production or viewing) is and should remain outside the scope of this privacy right.

As a final caution, wholly censoring pornography’s offence may lead to a slippery slope that defies valleys and justifies increasing censorship. In the recent past, we have seen examples of this ilk. These include arrests for offences under §66A of the IT Act,<sup>96</sup> bans on books hurting majority religious sentiment,<sup>97</sup> and censorious bans and filters on websites.<sup>98</sup> Unless restrictions

<sup>95</sup> *Naz Foundation v. Government of NCT of Delhi*, (2009) 160 DLT 277.

<sup>96</sup> Aparna Vishwanathan, *The Hindu An unreasonable restriction*, February 20, 2013, available at <http://www.thehindu.com/opinion/lead/an-unreasonable-restriction/article4432360.ece> (Last visited on May 16, 2014).

<sup>97</sup> Wendy Doniger, *The New York Times, Banned in Bangalore*, March 6, 2014, available at [http://www.nytimes.com/2014/03/06/opinion/banned-in-bangalore.html?\\_r=0](http://www.nytimes.com/2014/03/06/opinion/banned-in-bangalore.html?_r=0) (Last visited on May 16, 2014).

<sup>98</sup> Angela Saini, *The Guardian, Internet censorship could damage India’s democracy*, February 7, 2012 available at <http://www.theguardian.com/commentisfree/2012/feb/07/>

are balanced with liberties and moulded with caution, we stand to lose the ebullience of expression so carefully crafted into our Constitution.