

THE RIGHT TO PORNOGRAPHY IN INDIA: AN ANALYSIS IN LIGHT OF INDIVIDUAL LIBERTY AND PUBLIC MORALITY

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Sex is a controversial subject in the social fabric of India, often being linked to immoral and prurient values. The current laws criminalise selling, distributing and publicly displaying obscene or pornographic material. The primary concern underlying this is safeguarding of public morality and decency. But such laws lead to the violation of individual liberty and moral independence of a person who wishes to enjoy pornography as his right to view, read or enjoy pornography (that could be read into his freedom of speech and expression, and/or the right to privacy under the Indian constitution) is curtailed. This article tries to ascertain if there are certain identifiable standards of obscenity which could be applied to an analysis of a right to pornography. Substantively, however, this article undertakes an exercise in achieving a balance between arguments of public morality and individual liberty and to also address the larger question of whether legalisation of pornography is a viable option in the present Indian society.

I. INTRODUCTION

Sex is seen as a forbidden subject in the social fabric of India, being linked to immorality, indecency etc. The Indian legal system has, to a large extent, upheld this social 'morality' and made provisions in this regard.¹ One such provision is the criminalization of pornography. Can a government legitimately prohibit citizens from publishing or viewing pornography, or would this be an unjustified violation of basic freedoms? This question lies at the heart of a debate that raises fundamental issues about when, and on what grounds, the

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¹ See e.g. The Post Office Act, 1893 (prohibits obscene matters being transmitted through post); The Sea Customs Act, 1878 (prohibits the import of obscene literature); The Dramatic Performances act, 1876 (prohibits obscene plays); The Cinematograph Act, 1952 (makes provisions for censorship of films); The Press Act, 1951 (prohibits grossly indecent, scurrilous or obscene publications); The Indecent Representation of Women (Prohibition) Act, 1986 (prohibits obscene photographs of women).

State is justified in using its coercive powers to limit the freedom of individuals. This will be the central point of inquiry in this article.

The traditional debate surrounding pornography, particularly in Western societies, has seen religious conservatives, feminists and liberals as the main players. Many conservatives and feminists believe they can both define and justifiably condemn pornography since according to them it lacks intellectual or aesthetic merit, is harmful to the viewers and damages the moral fabric of the society.² Their attacks on pornography attempt to deny pornographic expression as a type of communication or transmission of ideas.³ Their ideological opponents argue that pornographic material is often great art or at least makes a positive contribution to sexual freedom and liberation.⁴

This article seeks to contextualise this debate in the Indian scenario in order to examine the validity of censorship laws adopted by the Government. Part I of this article will highlight the problems with the Indian penal system's definition and treatment of pornography and obscenity. In part II, some of the normative and philosophical questions about regulating pornography will be examined. Part III of this article will deal with the Constitutional protection granted to pornography in other jurisdictions. Some of the constitutional questions regarding free speech as well as individual liberty will be raised in the Indian context to argue that criminalisation of all forms of pornography constitutes a violation of these constitutional mandates. The article will conclude that even in this twenty first century the law governing sale of pornography are based on the nineteenth century concept of morality and that the inadequacy of the statutes, in fitting in the freedom of speech and expression of the producers of the pornographic material and the individual liberty of the viewer has aroused the need to decriminalise pornography.

II. CRIMINALISATION OF PORNOGRAPHY

Sexual depictions which constitute “pornography” or “obscenity” have not only given rise to an extremely profitable business,⁵ but are also the object of regulatory concern by the government and important movements in the society.⁶ The debate about pornography begins with one fundamental question: What is it?⁷

² Wolfson, *Eroticism, Obscenity, Pornography and Free Speech*, 60 BROOK. L. REV. 1037, 1038, (1994 – 1995).

³ Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1564 (1988).

⁴ *Id.*, 1580 – 81.

⁵ See *infra* text accompanying notes 41-43.

⁶ Wolfson, *supra* note 2, 1037.

⁷ James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153, 1156 (1993).

The word “pornography” comes from the Greek “*pornographos*” literally meaning writing about prostitutes.⁸ One of the commonly accepted definitions of “pornography” in modern times defines it as sexually explicit material (verbal or pictorial) that is primarily designed to produce sexual arousal in viewers.⁹ When value judgments are attached to this definition, pornography is perceived as sexually explicit material designed to produce sexual arousal in consumers that is bad in a certain way.¹⁰ There are many approaches to define pornography such as any sexually explicit material that is bad, although a particularly dominant approach has been to define pornography in terms of obscenity.¹¹ This is also the practice followed in India, where pornography is seen as an aggravated form of obscenity.¹²

Though there is no specific provision in any statute that directly deals with pornography, it has been brought within the purview of §292¹³ dealing with obscenity in the Indian Penal Code, 1860 (‘IPC’) that imposes criminal liability for sale, distribution etc. of obscene material.¹⁴ This section was introduced by the Obscene Publications Act, 1925 to give effect to Art. I of the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications signed by India in 1923 at Geneva.¹⁵ Pornography has also been prohibited under the Information Technology Act, 2000¹⁶ (‘IT Act’)

⁸ LYNN HUNT, INTRODUCTION TO THE INVENTION OF PORNOGRAPHY 13 (1993), as cited in Wolfson, *supra* note 2, 1038.

⁹ Stanford Encyclopaedia of Philosophy. *Pornography and Censorship*, May 5, 2004, available at <http://plato.stanford.edu/entries/pornography-censorship/> (Last visited on September 30, 2010).

¹⁰ *Id.*

¹¹ *Id.*

¹² Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881, ¶8 (*per* Hidayatullah, J.): “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 obscenity in a more aggravated form.”

¹³ IPC, 1860, §292(2)(a): “Whoever - sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.”

¹⁴ *Supra* note 12.

¹⁵ K.D. GAUR, A TEXTBOOK ON THE INDIAN PENAL CODE 363 (2006).

¹⁶ IT Act, 2000, §67:Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

and the Indecent Representation of Women (Prohibition) Act, 1986¹⁷ ('IRWP Act').

The word obscene has not been defined in IPC as the concept of obscenity differs from society to society and from time to time.¹⁸ The test of obscenity has been given in §292(1) of IPC¹⁹ which is based on an 1868 English decision²⁰ in the *Hicklin Case*²¹ where the test for obscenity was laid down by Cockburn, C.J. as follows:

*"...the test of obscenity is this, 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. ... it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."*²²

Since terms like 'obscene', 'deprave', 'corrupt' and 'impure and libidinous nature' have been left undefined, the scope to interpret the same can range from the conservative to the liberal.²³ The test has been adopted by the Indian courts in many cases relating to obscenity and restriction of freedom of speech and expression on the grounds of decency and morality. In one such case,²⁴ the appellants were convicted under §292 of the IPC for selling and possession with the intention to sell an obscene book, *Lady Chatterley's Lover (unexpurgated edition)*. The court after taking into consideration the *Hicklin* test of obscenity held that:

"In our opinion, the test to adopt in our country (regard being had to our community mores) is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression, and

¹⁷ The IRWP Act 1986, §4: No person shall produce or cause to be produced, sell, let to hire, distribute, circulate or send by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form.

¹⁸ PSA PILLAI, CRIMINAL LAW 701,703 (K. I.Vibhute ed., 2009).

¹⁹ Indian Penal Code, 1860, §292(1): A book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

²⁰ GAUR, *supra* note 15, 363.

²¹ R.v. Hicklin, (1868) LR 3 QB 360.

²² *Id.*

²³ Shohini Ghosh, *Looking in Horror and Fascination: Sex, Violence and Spectatorship in India in SEXUALITY, GENDER AND RIGHTS 3-5* (Geetanjali Misra, Radhika Chandiramani eds., 2005).

²⁴ *Supra* note 12.

*obscenity is treating with sex in a manner appealing to the carnal sides of human nature, or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc. are matters for consideration in each individual case.*²⁵

The Court also stated that the freedom of speech and expression as envisaged in Art. 19 of the Indian Constitution is subject to reasonable restrictions on the grounds of public interest such as interest of public decency and morality and therefore §292 which promotes public decency and morality cannot be held to be unconstitutional.²⁶

In judging the question of obscenity the judge is expected to first place himself at the position of the author/producer and see if the author/producer has conveyed anything of literary and artistic value, and then he has to place himself in the position of the reader/viewer of all age groups in whose hands the material in question is likely to fall so as to understand the possible influence the material can have on its reader/viewer.²⁷ The judges have to consider whether the author/producer was pursuing an honest purpose and ideas or whether it was merely a camouflage.²⁸ The question, however, arises as to the influence of the judge's subjective or personal opinion while making such objective analysis.²⁹

It has also been argued that the morality that is being considered in the IPC has little to do with any Indian tradition, but has been influenced by British rulers' Christian morality.³⁰ According to this morality, sex is a sin and is inherently dirty and the only kind of permissible, yet unmentionable sex is that within marriage and that too for procreation alone.³¹ The IPC was framed in 1860, when this version of morality was imposed on Indians by the British through various means including laws. This has been reflected in §292(1) of the IPC³² where "obscenity" has been explained as that which is "lascivious or appeals to the prurient interest or tends to deprave or corrupt persons"³³

The IRWP Act defines 'indecent representation of women' as the depiction of the figure of women as to have the effect of corrupting public

²⁵ *Id.*, ¶22.

²⁶ *Id.*, ¶8-9.

²⁷ Chandrakant Kalyandas v. State of Maharashtra, (1969) 2 SCC 687: AIR 1970 SC 1390.

²⁸ Regina v. Martin Secker and Warburg, [1954] 2 All ER 683.

²⁹ Samaresh Bose v. Amal Mitra, (1985) 4 SCC 289: AIR 1986 SC 967.

³⁰ Madhu Kithwar & Ruth Vanita, *Using Women as a Pretext for Repression: Indecent Representation of Women (Prohibition) Bill*, available at <http://www.csesarchive.org/data-archive/otherfiles/UGDCM2-128/file> (Last visited on October 3, 2010).

³¹ GEORGE BESTIALLE, THE ACCURSED SHARE: VOL.II THE HISTORY OF EROTISM 134 (1976) as cited in Wolfson, *supra* note 2, 1037, 1044.

³² *Supra* note 16.

³³ Kithwar & Vanita, *supra* note 30.

morality.³⁴ Thus the objective of such regulation of indecent representations as in pornographic materials is closely tied to the morality which in turn is automatically assumed to be predefined and commonly agreed upon.³⁵ §5 of the IRWP Act gives wide-ranging powers to ‘any gazetted officer’ whereby he can, with a warrant, enter and search anyone’s residence and seize anything he thinks is indecent, including pornographic material.³⁶ The power to exempt the material on grounds of being literary, artistic, scientific or religious has been vested with such Officer and even if the court later decides that the seizure was wrong, §9 of IRWP Act protects the officer from any legal action.³⁷ Thus, a government officer is empowered to harass any citizen, and the citizen has no way to seek redressal.³⁸

As soon as a law is passed declaring a certain activity to be ‘criminal’, people engaged in it tend to operate underground.³⁹ Same is the case with pornography. It can also lead to abuse of power by the police and government officials who work in collusion with the violators of law.⁴⁰ This is evident from the thriving black market for pornography. Quoting various studies done in the past, the Indira Gandhi Institute of Development Research (IGIDR) estimates that India’s black economy is around 18-21 percent of the GDP (gross domestic product).⁴¹ From this, tax evasion accounts for only part of the black economy

³⁴ IRWP Act 1986, §2(c): ‘indecent representation of women’ means the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals.

³⁵ Ghosh, *supra* note 23, 3-5.

³⁶ IRWP Act 1986, §5(1): “Subject to such rules as may be prescribed, any Gazetted Officer authorised by the State Government may, within the local limits of the area for which he is so authorised.-

- (a) enter and search at all reasonable times, with such assistance, if any, as he considers necessary, any place in which he has reason to believe that an offence under this Act has been or is being committed;
- (b) seize any advertisement or any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which he has reason to believe contravenes any of the provisions of this Act;
- (c) examine any record, register, document or any other material object found in any place mentioned in clause (a) and seize the same if he has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act:

Provided that no entry under this sub-section shall be made into a private dwelling house without a warrant: Provided further that the power of seizure under this sub-section may be exercised in respect of any document, article or thing which contains any such advertisement, including the contents, if any, of such document, article or thing if the advertisement cannot be separated by reason of its being embossed or otherwise from such document, article or thing without affecting the integrity, utility or saleable value thereof.”

³⁷ Kithwar & Vanita, *supra* note 30.

³⁸ *Id.*

³⁹ Kithwar & Vanita, *supra* note 30.

⁴⁰ *Id.*

⁴¹ ENS Economic Bureau, *Black Market Constitutes nearly 18-21% of the India’s GDP*, August 2, 1999 available at <http://www.indianexpress.com/ie/daily/19990822/ibu22050.html> (Last

whereas the major black income is generated from illegal activities such as smuggling, trafficking in illicit drugs, pornography and gambling.⁴² This black market for pornography or obscenity has become a multi-billion dollar industry even outside India.⁴³

III. PHILOSOPHICAL DEBATES SURROUNDING PORNOGRAPHY

The traditional debates about pornography in western societies have taken place between the conservatives advocating for a complete ban on pornography and the liberals condemning all forms of intervention by the State in matters concerning individual freedom. A strong attack has also been levelled by feminists who view pornography as a male weapon used for the establishment and maintenance of a paternalistic society. These arguments will be explained in some detail in the ensuing paragraphs to put the debate surrounding pornography in context before examining the Constitutional framework.

By pornography, conservatives usually mean simply sexually explicit material (either pictures or words), since conservatives typically view all such material as obscene.⁴⁴ According to them, the State is justified in using its coercive power to uphold and enforce a community's moral convictions and to prevent citizens from engaging in activities that offend prevailing community standards of morality and decency (known as 'legal moralism').⁴⁵ Governments also have a responsibility to prevent citizens from harming themselves. This view that the State is entitled to interfere with the freedom of mentally competent adults against their will for their own good is often called 'legal paternalism'.⁴⁶

Unlike moral conservatives, who object to pornography on the grounds of the obscenity of its sexual explicit content and its corrosive effect on the conservative way of life, the primary focus of the feminist objection to pornography is on the central role that pornography is thought to play in the exploitation and oppression of women.⁴⁷ Feminist arguments against pornography focus on its role in reinforcing sexist views and attitudes, which, on one

visited on October 3, 2010).

⁴² *Id.*

⁴³ NEW YORK TIMES, *Despite U.S. Campaign, A Boom in Pornography*, July 4, 1993 as cited in Wolfson, *supra* note 2, 1044.

⁴⁴ Stanford Encyclopaedia of Philosophy, *supra* note 9.

⁴⁵ J. FEINBERG, SOCIAL PHILOSOPHY 36 – 54 (1973) as cited in Joel Feinberg, *Pornography and the Criminal Law*, 40 U. PITT. L. REV. 567, 574 (1978 – 1979).

⁴⁶ *Id.*

⁴⁷ Catharine A. Mackinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 18(1985): Pornography is neither harmless fantasy nor a corrupt and confused misrepresentation of an otherwise natural and healthy sexual situation. It institutionalizes the sexuality of male supremacy, fusing the erotization of dominance and submission with the social

level, simply fail to treat women as serious human beings and, on another level, sanction and perhaps promote violence against women.⁴⁸ Anti-pornographic feminists focus on its ideological role in maintaining gender relations that harm the status of women generally as well as individual women victimized by the violence that is sanctioned and encouraged by pornographic materials.⁴⁹

The most notable arguments against state intervention and regulation come from liberals. For liberals, there is a very strong presumption in favour of individual freedom, and against state regulation that interferes with that freedom.⁵⁰ The only grounds that liberals typically regard as providing a legitimate reason for state restrictions on individual freedom is in order to prevent harm to others.⁵¹ Liberals have traditionally defended a right to pornography on three main grounds. Firstly, on the grounds of freedom of speech and expression, which protects the freedom of individuals (in this case, pornographers) to express their opinions and to communicate those opinions to others, however mistaken, disagreeable or offensive others may find them.⁵² Secondly, liberals have defended a right to pornography on the grounds of a right to privacy (or “moral independence”),⁵³ which protects a sphere of private activity in which individuals can explore and indulge their own personal tastes and convictions, free from the threat of coercive pressure or interference by the state and other individuals.⁵⁴ Lastly, neither the expression of pornographic opinions, nor the indulging of a private taste for pornography, causes significant harm to others, in the relevant sense of ‘harm’ (i.e., crimes of physical violence or other significant wrongful rights-violations).⁵⁵ Hence, the publication and voluntary private consumption of pornography is none of the state’s business.

These three central ingredients in the liberal defence of pornography find their classic expression in a famous and influential passage by John Stuart Mill,⁵⁶ which reads as follows:

The only principle for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully

construct of male and female....Men treat women as who they see women as being....Men’s power over women means that the way men see women defines who women can be.

⁴⁸ Eric Hoffman, *Feminism, Pornography and Law*, 133 U. PA. L. REV. 497, 499 (1984-1985).

⁴⁹ *Id.*

⁵⁰ See generally Stanford Encyclopaedia of Philosophy, *Liberalism*, September 16, 2010, available at <http://plato.stanford.edu/entries/liberalism/> (Last visited on September 30, 2010).

⁵¹ See *infra* notes 56-57.

⁵² Stanford Encyclopaedia of Philosophy, *supra* note 9.

⁵³ See *infra* text accompanying note 67.

⁵⁴ See generally Ronald Dworkin, *Is there a Right to Pornography*, 1 OXFORD J. LEGAL STUD. 177 (1981).

⁵⁵ Stanford Encyclopaedia of Philosophy, *supra* note 9.

⁵⁶ See generally JOHN STUART MILL, ON LIBERTY (1975).

be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of any one for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.⁵⁷

The central claim is that society is justified in interfering with the freedom of mentally competent adults to say and do what they wish *only* when their conduct will cause harm to others. This has come to be known as the ‘liberty principle’ or ‘harm principle’; and it forms the cornerstone of the traditional liberal defence of individual freedom.

The issue of primary importance in this entire debate is this: Why should a legal system protect pornographic material from censorship? The immediate response to this question would lie in Mill’s attractive theory about the general value of free expression: Society has the most chance to discover the truth, not only in science but about the best conditions for human flourishing as well, if it tolerates a free market – place of ideas.⁵⁸ This idea was further refined in the Report of the Committee on Obscenity and Film Censorship (also known as the “Williams Report”) which was tabled in 1979 in the UK to examine the laws dealing with censorship of obscene and indecent material. The Report states that since human beings are not just subject to their history but aspire to be conscious of it, the development of human individuals, of society and of humanity in general, is a process itself properly constituted in part by free expression and the exchange of human communication.⁵⁹ If we recognize this general value of free expression, we should accept a presumption against censorship or prohibition of any activity when that activity arguably expresses a conviction about how people should live or feel, or opposes established or popular convictions.⁶⁰ This presumption might be overcome by showing that the harm caused by the activity is grave; however, such a strong presumption is nevertheless necessary to protect the long term goal of securing, in spite of our ignorance, the best conditions that we can for human development.⁶¹

⁵⁷ *Id.*, 15

⁵⁸ See generally MILL, *supra* note 51.

⁵⁹ Report of the Committee on Obscenity and Film Censorship, 55, as cited in Dworkin, *supra* note 54, 179.

⁶⁰ *Id.*

⁶¹ *Id.*

Another argument for protecting pornographic material, other than the inherent value of free speech, is the inherent value of such material itself. Some feminists argue that pornography is an important form of sexual expression that does not harm women, and may even benefit them by liberating women and women's sexuality from the oppressive shackles of tradition and sexual conservatism.⁶² Pornography, on this view, is an important tool for exploring and expressing new or minority forms of female sexuality.⁶³ Far from making downtrodden victims of women, pornography may have a vital role to play in challenging traditional views about femininity and female sexuality and in empowering women, both homosexual and heterosexual, to shape their own identities as sexual beings.⁶⁴

Having a system of complete censorship of all pornographic material clearly undermines the value of these arguments and it is further mystifying as to whether these arguments have ever been considered in the Indian context.

IV. LOCATING A RIGHT TO PORNOGRAPHY WITHIN THE CONSTITUTIONAL FRAMEWORK

The entire gamut of Indian legislations dealing with obscenity has been upheld as valid under Art. 19(2) of the Indian Constitution which allows for the State to impose reasonable restrictions on the Right to freedom of speech and expression on grounds of *inter alia* public order, decency and morality.⁶⁵ The only judicial pronouncement⁶⁶ on the issue of the clash between obscenity and freedom of speech and expression recognized that the cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions and for the advancement of human knowledge.⁶⁷ The Court, however, went on to uphold the validity of §292 of the IPC⁶⁸ on the ground that it manifestly embodies a restriction in the interest of public decency and morality and the law against obscenity, of course, correctly understood and applied, seeks no more than to promote these values.⁶⁹

This approach by the Legislature as well as the Judiciary has completely failed to demonstrate how private use and enjoyment of pornographic material violates public decency and morality. The theoretical basis for this

⁶² D. CORNELL, FEMINISM AND PORNOGRAPHY, (2000) as cited in Stanford Encyclopaedia of Philosophy, *supra* note 9.

⁶³ Stanford Encyclopaedia of Philosophy, *id.*

⁶⁴ *Id.*

⁶⁵ The Constitution of India, 1950, Arts. 19(1)(a), 19(2).

⁶⁶ Ranjit. D. Udeshi v. State of Maharashtra, *supra* note 12 (reaffirmed in Chandrakant Kalyandas Kakodkar v. State of Maharashtra, *supra* note 27).

⁶⁷ *Id.*, ¶9.

⁶⁸ See generally text accompanying notes 24 – 26.

⁶⁹ *Supra* note 12.

approach seems to be grounded in the harm principle,⁷⁰ but the State has failed to demonstrate what kind of harm, if any, is caused by the private actions of consenting adults in manufacturing and viewing pornography. The State has also failed to demonstrate the inherent immorality of sexual expression and sexual stimulation through pornographic works. As stated previously, pornography, in its limited acceptable meaning, can serve as a positive contribution towards sexual freedom and liberation⁷¹ of individuals, which would ultimately lead to the healthy development of adults in the society. In the absence of any such exposition, the right to moral independence⁷² is violated by legislation whose only justification is the pain and disgust experienced by some people when others read or enjoy pornography.⁷³

In India, our Constitution does not contain a specific provision as to privacy but the right to privacy has been spelt out by our Supreme Court from the provisions of Art. 19(1)(a) dealing with freedom of speech and expression, Art. 19(1)(d) dealing with right to freedom of movement and from Art. 21, which deals with right to life and liberty. In *Govind v. State of MP*,⁷⁴ Mathew J. developed the law of privacy. The learned Judge held that privacy claims deserves to be denied only when important countervailing interest is shown to be superior, or where a compelling state interest was shown.⁷⁵ If the court then finds that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test.⁷⁶ Then the question would be whether the state interest is of such paramount importance as would justify an infringement of the right.⁷⁷ In *Naz Foundation v. Government of NCT of Delhi*,⁷⁸ the Delhi High Court took the right of privacy to a new level. The Court held that privacy recognises a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.⁷⁹ The way in which one gives expression to one's sexuality is at the core of this area of private intimacy.⁸⁰ If, in expressing one's sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy.⁸¹ Now, since manufacturing and viewing of pornography are medium

⁷⁰ See generally text accompanying notes 51, 52.

⁷¹ See generally text accompanying notes 57 - 59.

⁷² Dworkin, *supra* note 54, 194: "People have a right not to suffer disadvantage in the distribution of social goods and opportunities, including disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong."

⁷³ *Id.*

⁷⁴ (1975) 2 SCC 148.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ (2009) 160 DLT 277.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

of expression of one's sexuality, it must fall within the ambit of right to privacy, provided it is manufactured and viewed privately by consenting adults and thereby not causing any harm to the others.

The other reason for these legislations abrogating individual freedom and autonomy is their treatment of sexually explicit material, that is, bringing everything under the overarching umbrella of 'obscenity' without differentiating between private and public consumption of such material, as well as the content of such material which usually ranges from sexual eroticism, obscenity, pornography, violent and demeaning pornography and child pornography. Identifying this difference in degree could very well be the solution to some of the problems highlighted above. To call something obscene, in the standard use of that term, is to condemn that thing as blatantly disgusting.⁸² The corresponding term pornographic, on the other hand, is purely descriptive referring to sexually explicit writing and pictures designed entirely and plausibly to induce sexual excitement in the reader or observer.⁸³ To use the terms "obscene" and "pornographic" interchangeably, is to beg the essentially fundamental and controversial question of whether any or all pornographic materials are really obscene.⁸⁴ Essentially, whether any given acknowledged bit of pornography is really obscene is a logically open question to be settled by argument and not by a definitional fiat.⁸⁵

Ideally, two issues should be examined by courts when dealing with the issue of pornography: whether pornography should be construed as speech intending to communicate ideas, and whether the freedom of speech and expression of persons engaging with pornographic material should be weighed against other rights and interests.⁸⁶

Some jurisdictions like Canada, the US, UK etc. have at least tried to tackle some of these issues through their legal regimes. The US Supreme Court in *Miller v. California*⁸⁷ laid down the 'contemporary community test' to define an obscenity offense, which allowed the state considerable latitude while making laws on obscenity keeping in mind the understanding of the community. Applying this rule, the court⁸⁸ held that in the absence of distribution of the obscene material to minors or the obtrusive exposure of it to unwilling

⁸² Feinberg, *supra* note 45, 573.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ SUSAN M. EASTON, THE PROBLEM OF PORNOGRAPHY 91 (1994).

⁸⁷ 38 L Ed 2d 128; 413 US 15 (1972) 413 US 25 (1973).

⁸⁸ *Billy Jenkins v. State of Georgia*, 41 L Ed 2d 642; 418 US 153 (1973).

adults, the First⁸⁹ and the Fourteenth⁹⁰ Amendments of the US Constitution prevents the state and federal governments from any attempt to wholly suppress or ban sexually explicit materials merely on the basis of their 'obscene contents'. The concept of 'contemporary community test' was first acknowledged in Indian scenario in the Indian Supreme Court decision, *Ajay Goswami v. Union of India*.⁹¹ In this case the court held that the test of 'community mores and standards' is outdated in the context of the internet age which has broken down traditional barriers and made publications from across the globe available with a click of the mouse and hence in judging whether a particular work is obscene regard must be had to contemporary mores and standards.

Constitutional law can be many things, but most of all it can be an agent of change. Ultimately, it determines the way we organize our lives, socially and politically. It provides us with insights to help us understand and define our society and where it is heading. It is intimately concerned with giving meaning to ourselves and our relations with others.⁹² It is hoped that this revolutionary role of constitutional law is kept in mind by courts before making value judgments on certain types of human behaviour and deciding cases in a manner threatening to individual autonomy.

V. CONCLUSION

The impact of obscenity laws in India can be seen in the unfettered discretion exercised by the Government to ban films, books and other materials on the pretext of immoral or objectionable content. The most glaring instance of obscenity laws being used to subvert individual freedom was found in the *Ranjit Udeshi* case⁹³ where the sale of *Lady Chatterley's Lover* (*unexpurgated edition*) was banned and the appellants who were selling the books were imprisoned. *The Vagina Monologues*, an episodic play by Eve Ensler that explores female sexuality through individual women telling their stories in the form of monologues, was banned from being shown in Chennai as the Chennai Police found parts of the script 'objectionable' that could disrupt 'public order'.⁹⁴ *Kamasutra: A True Love Story*, a film by Mira Nair, had 40 cuts from the original version as prescribed by the Indian Censorship Board because

⁸⁹ 1st Amendment, The Constitution of the USA: "Congress shall make no law abridging the freedom of speech or of the press."

⁹⁰ 14th Amendment, The Constitution of the USA: "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens...nor shall any state deprive any person of life, liberty, or property, without due process of law."

⁹¹ (2007) 1 SCC 143.

⁹² Patrick Macklem, *Constitutional Ideologies*, 20 OTTAWA L. REV. 117, 119 (1988).

⁹³ *Supra* note 12.

⁹⁴ BBC News, *Vagina Monologues hits India trouble*, March 11, 2004 available at http://news.bbc.co.uk/2/hi/south_asia/3501034.stm (Last visited on October 3, 2010).

of its 'sensuous' contents before it could be shown in Indian theatres.⁹⁵ Even the film *Bandit Queen* by Shekhar Kapur, based on the real life story of a dacoit Phoolan Devi ran into trouble when Delhi High Court banned it for its obscene content; however the Supreme Court overruled it and granted it a certificate of exhibition A (i.e. adult films).⁹⁶ The most recent and notorious use of such paternalistic interventions by the State occurred when the Government banned the cartoon – porn site *Savita Bhabhi*⁹⁷ which is an adult cartoon strip featuring a married Indian woman's sexual adventures.

Be it in any of the cases discussed above, the decency and morality of society that is affected by the obscene material is the fulcrum of the Courts argument. But the morality that these courts stress upon seems more like an illusionary, predefined concept that everyone has agreed upon. The questions as to what exactly constitute this morality, and who set the principle to determine it has been left unanswered. The line demarcating the 'decent' from the 'obscene' is still vague. The statutes, be it IPC or the IRWP Act has merely copied the age-old English Law and the set of morals they were then based upon. The laws in England have changed but the Indian law still remains stagnant. The growth of black market for pornographic materials has clearly shown the ineffectiveness of these laws.

The assumption that human behaviour can be generalized into natural universal laws is being challenged by the analytical approach which favours context rather than detached objectivity. It does not accept that certain truths exist and that it is futile to try and change them. It is hoped that by expanding the perimeters of the discussion, previously hidden underlying facts and issues will be exposed. As a result, decisions as to which facts are relevant, how the issues are framed, and which legal principles are binding should change. The goal of a more humane and egalitarian society requires new ways of talking about the problems of free expression; otherwise we will find the progressive tools of an earlier era turned against progress.

⁹⁵ BBC News, *India's Chief film Censor Quits*, July 22, 2002 available at <http://news.bbc.co.uk/2/hi/entertainment/2144603.stm> (last visited on October 3, 2010).

⁹⁶ *Bobby Art International v Om Pal Singh Hoon*, (1996) 4 SCC 1.

⁹⁷ *Government Bans Popular Toon Porn Site Savitabhabhi.com; Mounting concern over Censorship*, June 25, 2009, available at <http://contentsutra.com/article/419-govt-bans-popular-toon-porn-site-savitabhabhi.com-mounting-concern-over/> (Last visited on October 3, 2010).