

SHOULD PORNOLOGY BE LEGALLY BANNED IN INDIA?

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Abstract

The following paper discuss about the resent attempt of government to ban pornography in India by putting a ban to 857 porn websites.

It discusses about the reasons in the opinion of authors of why porn must be ban and why it must not be ban in India.

The reasons given for banning pornographic content was due to culture and moral value in India from ancient period, it opposes the theory of feminist jurisprudence wherein men subdue women to fulfill their sexual desires, it increases crime rates with special emphasis to sexual abuse and harassment to women leading to cases like rape, pornography promotes prostitution and creates hub for human trafficking as it encourages women to sell themselves or offer their body for sexual intercourse.

The reasons given for not banning pornography is because it violates the fundamental right to choose and right to privacy, it promotes gender equality as both male and female get pleasure from sex, it is technically not possible due to wide pornographic content available, it is a good source of knowledge and promotes ex education, further banning pornography would not reduce the crime rate rather create curiosity giving way for more crimes.

At the end, the author of this paper includes certain recommendations to such a sensitive matter.

What is pornography?

Any sort of exposure, through media, material, books or any other platform, to any sexual activities or explicit showing off the internal gender differentiated biological organs to arouse is known as pornography

The legal perspective of pornography was given by united states of America as pornography are the pictures and/or writings of sexual activity intended solely to excite lascivious feelings, of a particularly blatant and aberrational kind such as acts involving children, animals, orgies, and all types of sexual intercourse. The printing, publication, sale and distribution of "hard core" pornography is a either a felony or misdemeanor in most states. Since determining what is pornography and what "soft core" is and "hard core" is subjective questions to judges, juries and law enforcement officials it is difficult to define, since the law cases cannot print examples for the courts to follow.

However there are many definitions derived in general to explain the concept of pornography. One of them is given by Merriam Webster¹, he said that "pornography is anything that: the depiction of erotic behavior (as in pictures or writing) intended to cause sexual excitement, or: material (such as books or a photograph) that depicts erotic behavior and is intended to cause sexual excitement, or: the depiction of acts in a sensational manner so as to arouse a quick intense emotional reaction the pornography of violence."

Oxford dictionary² gave definition of pornography as, "Printed or visual material containing the explicit description or display of sexual organs or activity, intended to stimulate sexual excitement." Collins dictionary³ wrote as, "Pornography refers to books, magazines, and films that are designed to cause sexual excitement by showing naked people or referring to sexual acts."

According to an American handbook⁴, "Pornography" (or "porn") usually refers to representations designed to arouse and give sexual pleasure to those who read, see, hear, or handle them." It indicates that "what may seem pornographic to one person will not necessarily seem to another."

¹ <https://www.merriam-webster.com/dictionary/pornography>

² Oxford dictionary

³ Collins dictionary

⁴ Frontline

The word pornography, derived from the Greek word 'Porni' ("Prostitute") and 'Graphein' ("to write"), was originally defined as any work of art or literature depicting the life of prostitutes.

There are temples for representation of Kamasutra in India through statues such as those in Khajuraho.

Should Be Banned

Although we live in a modern era, but talking about sex with our parents would lead to an uncomfortable scenario for most of us. This is because of the moral values and ethics that I parents expect us to follow. Even knowledge pornography affects our values making us shameful.

Government of India took a step to ban 857 porn websites with effect from July 31. The idea of such a ban came when a professional lawyer Kamlesh Vaswani filed a public interest litigation in the supreme court in the case of *Kamlesh Vaswani v/s. Union Of India And Ors(2013)SC* for banning of the pornography and making a separate branch to handle the affairs of pornographic material as cyber crimes could not alone handle the cases related to such content in such a public interest litigation advocate Kamlesh said that, "Nothing can more efficiently destroy a person, fizzle their mind, evaporate their future, eliminate their potential or destroy society like pornography,"

The center was more favoring for banning of an erotic content. Vaswani's lawyer Raj Panjwani said that, "It is a welcome step. The government should continue to ban websites".

Pornography also promotes illegal activities as it influence and arouse a person to act in a sexual behaviors or to imitate the actors whom they watch which leads to curiosity due to the addiction of watching porn. It could lead to extensive violation of women legal rights, women harassment, child abuse and encourages the activities of brothels.

Here are some of the reasons of why porn should be banned in India:

- **Moral Values**

To explain moral values as a constraint let us evaluate a situation where in a child is watching porn and he had a constant fear of his parents catching him while he is watching it on his

computer mouse on the cross option. If he would be caught by his father in such a situation then his answer would obviously not be “dad I am watching porn”,

If you would have asked an aged person where porn must be ban or not, then he/she would be shocked if there was any need for such a question and would obviously reply that it must be ban and the reason for it would be that it affects morality

Morals are converted into laws. It has been proven through that the ancient legal system that legal structure has been created from the natural laws. Natural laws are those which were well accepted in the society since they exist from so many years as they have morals. In India, pornography is treated as immoral. Porn defiantly murders the morality of the natural laws, yet watching porn is legal in India.

It is not astonishing that statistically, India ranked third country in watching porn⁵, this attracts the youth. The fact to be considered here is that the youth had been so obsessed with porn, they become influenced by it and they do not have the freedom of their opinion as they would always defend for not banning porn. They would have a perverted behavior. It is because porn is an addiction and captures the mind. While some of the children, with strict parents would not get captured into such a trap.

It is to be noted that watching porn in public is not allowed, however the question arose whether watching porn at home was to be allowed or not. It is to be noted that in the case of, *Justice K.S. Puttaswamy (Retd) ... v/s. Union of India and Ors*⁶, a lawyer named Aryama Sundaram who represented Maharashtra government in the case of privacy commented that watching porn inside homes is not a fundamental right that every Indian must claim and must be illegal in India. He further asked from the jury of 9 bench, “Can I come to court and say I have a fundamental right to watch pornography in my home?” The question was answered by Justice Jasti Chelameswar, who is a part of 9-judge bench as, “Why not?”⁷

However, there are some restrictions provided by law to safeguard these moral values, since pornography is legal to watch but illegal to share. This is somehow ironical as both of them falls into the same terminology as pornography. According to Section 67 of Information

⁵www.Indiatimes.com

⁶*Justice K.S. Puttaswamy (Retd) ... v/s. Union Of India and Ors.* on 24 August, 2017

⁷www.indiatoday.in

Technology Act 2000, Punishment for publishing or transmitting obscene material in electronic form are:-

- i. Imprisonment for three years
- ii. Fine of five lac rupees
- iii. For subsequent conviction imprisonment for five years and also with ten lac rupees fine.⁸

And according to Section 293 of Indian Penal Code 1860 Sale, etc., of obscene objects to young person would be punishable with,

- i. Imprisonment for three years
- ii. Fine of two thousand rupees
- iii. For subsequent conviction imprisonment for seven years and also with five thousand

By such laws The Central government ordered for 857 websites that contained pornographic material to be blocked from 31 July as it was in contravention with section 79(3)(b) of the IT Act and it also violated "morality and decency".⁹

But it was not possible barring much public opinion as to the need of banning and whether government had the proper authority of banning such porn websites. Public considered this to be a vague decision by the government as it tried to moral policing India which is constantly in the top 10 countries to watch.

But, government of India indeed have a right to put ban according to article 19(2)¹⁰ which allows the State to impose such restrictions "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence". Even police had the authority to arrest the person with offensive content upon the social media.¹¹

Even though they had the legal authorities to make such a decision and ban pornography on the moral grounds, but, public outrage made it a failure, also there are millions of porn

⁸Information Technology Act 2000

⁹Kamlesh Vaswani v/s Union Of India And Ors (2017) SC

¹⁰The Constitution Of India

¹¹Article 66(a) IT Act 2000

websites which produces free content and it is impossible for the government to put a ban upon each and every site. So, government could only come to a conclusion of banning the child pornography.

- **Against feminist jurisprudence**

There are many cases which reveal that pornography is against the women rights and it leads to a vast discussion in proving the humiliation suffered by the women. There are many sources of media through which the pornographic content could be transferred from one person to another, and if such is done by sending such content to a female in mala fide, then it may lead to serious problem to women's dignity such as, recently a 21 year old engineer student was arrested in sending obscene content to a women on whatsapp.

In the case of *Avnish Bajaj v/s State(2008)DHC*, the plaintiff, who was CEO of baze.com was arrested, In making an advertisement to sell DPS sex scandal video, under section 67 of the information technology act,2000. The video was however not uploaded on the portal. The Delhi high court released him on the background of intermediately guidelines which were passed in the year 2011 whereby an Intermediary's liability would be absolved if they exercised due diligence to ensure obscene content is not displayed on their portal.

In another case a 29 year old male, Rajesh Ghambir was arrested in sending obscene photos to minors girls of age varying from 9 years to 16 years along with the abusive language. He was arrested when one of the girl's mother lodged a complaint at Ashok Vihar police station on September 22. Gambhir had sent morphed pictures of the class IX student to her phone via WhatsApp.¹²

Through police investigation it was found that he was an owner of the mobile shop, which sells sim cards also, he hacked many ids of parents and used fake identity sim card to transfer such offensive content.

Seeing such an adverse situation, there came a need to ban pornography as these were harmful for females; also, considering the fact of growing rape cases it becomes unbearable to maintain the standards of feminist jurisprudence in India.

Canada however once tried to ban pornography upon such a pretext that it was creating harm to the females in the society, and was against their rights. This could be understood from the

¹²<https://www.ndtv.com>

case of *R. v/s Butler*, [1992] 1 S.C.R. 452, it was held that Canadian obscenity law violated Canadian citizens' rights to free speech under the Canadian Charter of Rights and Freedoms if enforced on grounds of morality or community standards of decency; but that obscenity law could be enforced constitutionally against some pornography on the basis of the Charter's guarantees of sex equality.¹³

In the case of Robinson v/s Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991),¹⁴ a woman was sexually harassed at the workplace. The federal district court of the United States of America ordered a ban on "displaying pictures, posters, calendars, graffiti, objects, promotional materials, reading materials, or other materials that are sexually suggestive, sexually demeaning, or pornographic, or bringing into the JSI [the employer's] work environment or possessing any such material to read, display or view at work." "A picture will be presumed to be sexually suggestive if it depicts a person of either sex who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body."¹⁵

This judgment was indirectly anti-pornography feminist analysis as counsel Legal Momentum was historically associated with the National Organization for Women (NOW), a leading feminist organization, suggesting that counsel was likely to have had knowledge of the feminist theory.¹⁶

This case relates us to the fact that another reason for banning pornography is that it leads to sexual abuse and harassment, as under the above case there was sexual harassment at workplaces.

- **Sexual abuse/ harassment**

When porn is watched by a male, it arouses them and they feel to imitate like the actors in the porn video, which increases their level of obsession for a sexual intercourse. This demand increases and the men are provoked to indulge into harassing and abusing women. The worst outcome of it is rape. Owing to the adverse situation of safety of women, bringing India to

¹³<https://scc-csc.lexum.com>

¹⁴Records from US District Court for the Middle District of Florida

¹⁵*Robinson v/s Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991)

¹⁶Legal momentum- the women's legal defense and education fund

the first portion, where women are found to be unsafe due to increasing rape cases with newspapers flooded with cases every day.

Sexual abuse was one of the reasons for government of India to ban of porn in India.

“Women in Indian society have been victims of ill treatment, humiliation, torture, and exploitation as long as written records of social organization and family life are available. These records are replete with incidents of abduction, rape, murder and torture of women. But, regrettably, female victims of violence have not been given much attention in the literature on social programs or in literature on social crimes.”¹⁷

Advocate Kamlesh Vaswani, on whose petition before the Supreme Court the whole ban came about, had argued that crime against women and children which is “majorly influenced” by such porn videos is on the rise.¹⁸

Pornography diverts minds of people leading to cases like Vishaka V/s State Of Rajasthan (1997) VII AD SC 53; in this case, the Supreme Court held that sexual harassment includes such unwelcome sexually determinant behavior which is incorporated by their urge need of porn through pornography. Such includes as:

- i. Physical contact and advances;
- ii. A demand or request for sexual behaviors;
- iii. Sexually colored remarks
- iv. Showing pornography;
- v. Any other unwelcome physical, verbal, non-verbal conduct of sexual nature

Section 375 of the IPC, defines rape as any involuntary and forceful penetration without the woman’s consent into the woman’s body parts like the vagina, urethra, mouth or anus.¹⁹

As per the report of crime bureau record of central home ministry²⁰, crimes against women increased to a greater extent in the year 1993-1994 due to influence of pornography. As per the report, in India on an average,

- i. Every day for every six minutes one atrocity is committed against women;

¹⁷Prof. Ram Ahuja- “*violence against women*” [1998] pg 11

¹⁸<https://indiankanoon.org>

¹⁹Indian penal code, 1860

²⁰Report in ” *Udayavani*” Kannada daily, dated 27 February 1994

- ii. For every 44 minutes a woman is kidnapped;
- iii. For every 47 minutes a woman is raped;

The same report says that crime against women has increased 2 times in the last 10 years; instances of rape by 400% in the last two decades; instances of kidnapping and blackmailing women by 30% between 1974 and 1993. In 1993 alone about 82,818 instances of crimes against women were registered. Many cases were not registered. It is said that only 10% cases were registered.

Before the rise of *Nirbhaya case*, the definition of rape was only related to sexual intercourse, but after the case, in 2013, the definition of rape was amended in Indian penal code as given above (under IPC), which was a broader definition. That dark fateful night gave many awakening calls toward the growing percentage of sexual abuse and rape cases in India and thereby nearly 34,000 rape complaints and 84,000 sexual harassments cases were registered in 2015 and modified laws were made.

Article 39(e)²¹ seeks the state to see that the health and strength of men and women workers is not abused, and article 51-A (e)²² says that it shall be the duty of every citizen in India to renounce practice derogatory to the dignity of women.

- **Promotes prostitution and human trafficking communities**

As per section 2(f) of the Immoral Traffic Act, prostitution means “the sexual exploitation or abuse of persons for commercial purposes, and the expression prostitute shall be constructed accordingly.”²³

According to section 372 of Indian Penal Code, 1860, prostitution is “the act of female offering her bodies for promiscuous sexual intercourse for hire, whether in money or in kind.”²⁴

A public prostitute is a woman who is a prostitute by profession and whose trade is to let out her body on hire to all visitors or to all visitors of a specified class.²⁵

Pornography encourages prostitution as a part of it. Prostitution is not legalized in India, and thus it is ironical for prostitution to be illegal and pornography to be legal. Pornography is

²¹ The constitution of India (directive principles)

²² The constitution of India (fundamental right)

²³ Immoral Traffic Act, 1956

²⁴ Indian penal code, 1860

²⁵ Dr. SR Myneni – “sociology”; chapter- “women and society”, pg 493

considered as a taboo as it promotes the business of public prostitutes and thus, prostitution is considered as a black spot on the India society.

Supreme court in the case of *Vishal Jeet v/s Union Of India (1990)3SCC*, held that, "prostitution always remain as a running sore in the body of civilization maligning the society are so notorious and frightful that none can gainsay it. This malignancy is daily and hourly threatening the community at large: slowly but steadily making its way onwards leaving a track marked with broken hopes. Therefore, the necessity for appropriate and drastic action to eradicate this evil has become apparent."

Such prostitution business being influenced by pornography leads to the formation of sex trafficking community such as brothels.

Human trafficking is illegal in India as per article 23 of the constitution of India and is also an offence under the provisions of Immoral Traffic Act, 1956. The Act prohibits the traffic in human being which means that buying and selling of human being is illegal.

These human trafficking communities most of the times kidnap and abducts women, then compelling her by force to fulfill the sexual desires of people. The main cause for the creation of such sexual desire is pornography itself.

Should not be banned

Banning pornography in India had been a failed experiment due to an outrages public opinion to condemn the order of such a ban. There were many criticizing questions raised such as: What was the government thinking bringing about the idea of banning porn? Did the government have the authority to impose such a ban? And had through such an order, their right to freedom of choice and right to privacy been affected?

It was considered to be a vague move on the part of the government to moral policing of the country by intruding into the public's privacy. It also lacked legal backing.

Due to the public fury for the ban, the government of India only came to a conclusion to ban child pornography

Some of the reasons of why pornography must not be banned India are as follows;

- **Right to privacy**

“A nine-judge Constitution Bench of the Supreme Court on August 24 ruled that right to privacy is “intrinsic to life and liberty” and is inherently protected under the various fundamental freedoms enshrined under Part III of the Indian Constitution.”²⁶

The order of banning pornography cannot be passed since it opposes the right to privacy of a person to which, former chief justice of high court of Kerala and Chhattisgarh said ,HL Dattu, on July 5 2018 that, "Such interim orders cannot be passed by this court. Somebody can come to the court and say 'Look, I am an adult and how can you stop me from watching it within the four walls of my room? It is a violation of Article 21 (right to personal liberty) of the Constitution. Yes the issue is serious and some steps need to be taken. The Centre has to take a stand, let us see what stand the Centre will take."

Right to privacy allows a person to watch porn in privacy without any disturbance or fear of law. It lets a person to enjoy his right and give him liberty to access the pornography as per their desires.

“Right to privacy is integral to fundamental right to life under Article 21 of the Constitution. SC has also upheld it several times including in this case. It includes access to any adult content by adult persons that is why Parliament also opted not to make any law criminalizing watching porn. You should realize that the country’s Chief Justice also upheld the crucial right,” said Pavan Duggal.

One of the main legal reasons for government failing to ban porn was due to right to privacy given as a fundamental right to all Indian citizens. Therefore, on such a pretext the intention of government for banning of porn held only as a paper as it suffered through much opposition on the grounds of one’s privacy.

It had been already discussed that when advocated Sudaram, put up the question on the matter whether watching porn inside four falls is legal or not, then, he received the answer from one of the jury member that he was defiantly allowed to do so because of his right to privacy in the case of *Justice K.S. Puttaswamy (Retd) ... v/s Union Of India And Ors. on 24th August, 2017.*

²⁶ <https://www.thehindu.com>

- **Promotes gender equality**

The concept of feminist jurisprudence did not logically sound correct, the opinion only consisted of self-interest, and rather, pornography promotes gender equality.

Being a part of the patriarchal society, women who desire to watch porn or even think about taking pleasure are considered to be prostitutes and sluts, but that's not true!

Porn is which gives pleasure to both men and women. Even watching porn together makes them realize that both of them need to be satisfied with the pleasure of porn. It further strengthens their love.

According to Dr. Simon Lajeunesse, "who do not watch porn, do not exist."

Although this thought may look vague, but he clearly defines the trend of both male and female watching porn today. Giving a clear view that now porn is not restricted only for men and women do not only play a role to satisfy their sexual needs, but to have pleasure.

Since, pornography is legalized in India. Further, article 14 of the Indian constitution states that, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."²⁷ Therefore, the access of porn is available to both men and women.

- **Technically not possible**

There are many porn websites on internet and it is not possible to ban all of them. The government of India only focused to ban just a handful of hundreds. The best example is when United States of America and china wished to ban porn, but they could only ban child pornography. But now, United States of America had legalized porn and had been a hub of pornography. Just like in India, banning of pornography was a failed experiment; however the order of Supreme Court in the case of *Kamlesh Vaswani v/s Union Of India And Ors(2017)SC* for banning child pornography was appreciated and welcomed.

The person who has a cause and is curious for pornography, a ban could not stop him, and he could easily by pass the ban with a free web-based proxy such as www.hide.me. Then there

²⁷ The constitution of India

are VPNs, which are virtual and secure tunnels that people can use to access almost any content on the web.²⁸

There is only a list of URLs with the government to ban, it can only stop the person to step into those websites, however minor changes would easily make the viewers access to porn.

Although more robust and deeply filtered software could be adopted for banning which are used in countries like China and Saudi Arabia, but this method would be more expensive and difficult to maintain.

Through the banning of porn websites, government only aimed to put a ban on the cyber pornography, however, pornography is a complete branch of sexual activities and content and it would be impossible to govern the ban on pornography as a whole.

“Cyber experts reiterated that banning the porn sites is an absolutely useless exercise. Most of these websites are used to host or serve adult content but some, like 9Gag TV, are just plain humor and meme sites which often share innocuous jokes with the users” Mentioned by India today

- **Source of knowledge**

Although, its 21 century but we still feel shy even if the word sex is only mentioned by someone. Many parents do not open up with their children for a sensitive conversation upon porn. Therefore, in such a reserved culture, porn acts as a source of information for teenagers about sex. Their sense of curiosity opens them to sex education. But even sex education is not much encouraged in India. Our culturist government even opposes the idea of sex education as it could be made clear from last year by union minister Harshvardhan.

Knowledge about sex is important as it is a tool for procreation. Through porn, an individual explores one's own sexuality and develops fantasies for other gender. Moreover, there are various sex related diseases which must be in knowledge. Moreover it is also important for the development of medical science in the field of gynecology.

- **Banning pornography would not reduce the crime rate**

Another crucial reason for banning porn in India was due to increase in crime rates with special emphasis on sexual abuse, rape and prostitution.

²⁸ <https://www.Indiatoday.in>

Firstly, pornography is not the only reason and secondly banning pornography for such a reason is not reasonable.

According to a cyber-lawyer, Pavan Duggal, said, "By using proxy servers you can access blocked sites of all websites located outside India. Blocking orders act as a catalyst for increasing traffic? You are increasing peoples' curiosity and it will not be a successful initiative."

Banning of porn would lead to curiosity and thus increasing the crime rates, rather than reducing them.

This could be proved by the experience of countries like Czech Republic, Denmark and Japan who have bulk of porn content available and pornography is practiced openly, thus, there is decreasing number of crime rates.

According to a women activists, Arundhati Ghosh, "The more repressed a society is, the more the acts of sexual violence. If you see examples of Congo, Somalia, Afghanistan, Pakistan and India - these are places (where) sexuality is not out in the open and acts of sexual violence are high,"

Recommendations

- Recommends the government of India, to allow the access of pornographic content only to adults, "Every person domiciled in India shall attain the age of majority on completion of 18 years and not before,

(REASON; this would not encourage child pornography. This would be a successful initiative as it is in Canada, where sale of pornographic content is legal but only through the licensing policy where a person needs to prove that he is an adult.)

- Encourages for an open discussion upon both cyber pornography and non-cyber pornography, which helps in reducing the curiosity and enthusiasm, and rather promote sexual education,

(REASON: this would make the teenagers aware about the sex education and would decrease the crime rates as an experience of Japan, Denmark and Czech Republic, which had already been discussed.)

²⁹ Indian Majority Act, 1875

- Requests for a proper legal framework and introduce beneficial clauses for pornography rather than putting a ban to it; the legislation must bring some legality into this matter.

(REASON: banning pornography had already been considered as a vague decision, and there are no proper guidelines through which legalization of pornography is governed. The legal framework could be drafted considering the clauses of The Obscene Publications Act, 1964, 1959, and The Indecent Displays (Control) Act, 1981 of United Kingdom.)

