

# LEGALITY OF CENSORING CYBER PORNOGRAPHY

*Neha Kheria\**

## I. INTRODUCTION

Dig up the history and you will find footprints of pornography in every corner of the world. The development of science and technology has transformed those sexual explicit sculptures and paintings into high definition video clips and movies which are easily available on the cyberspace. The unhindered availability of porn on the internet has stirred up a moral debate and controversy regarding its legality throughout the world. In India also the Information Technology Ministry in the year 2015 directed the Internet Service Providers to block 857 websites for ostensibly containing pornographic content though later government backtracked that order. This is another instance where government used its power of censorship.<sup>1</sup>

Controlling the information and expression of opinion disseminating within a society has been a trait of dictatorships since time immemorial so it is not out of the blue we are witnessing work of arts, (including books, plays, films), radio programs, news reports, internet and other forms of communication austere been screened to maintain the legacy of orthodox conventions. Here we must admit that our fundamental rights were never absolute and they can be restricted on the ground of reasonable restriction.

The aim of this research paper is to provide insight into the laws governing cyber pornography. The Article further discusses the various test propounded by Courts in United Kingdom (hereinafter called UK), United States of America (hereinafter called US) and India to ascertain whether objectionable content is obscene or pornographic or not and in the end the research paper discusses the validity of those laws in light of one's right to privacy, personal liberty and freedom of speech and expression. Through this Article an attempt has been made to ascertain the legality of censoring cyber pornography. Various allegation made by proponents and opponents of cyber pornography have been weighed against each other to reach to appropriate conclusion.

## II. TUG OF WAR

The main contention of the opponents of pornography is that, they consider that there is a direct relationship between pornography and crime against women, and they believe that pornography is the reason of deterioration of standards of morality in the family and the society. They claim that pedophiles and sex predators distribute child pornography and captivate children in sexually explicit conversation and seek victim in chat rooms.<sup>2</sup> Opponents of pornography demands to inculcate some family values of intimacy, marriage, sex and relationship in their children but instead of that what their children are learning from this industry is, violent sexual practices, particularly sexual assault against women. Children are exposed to soft-core pornography as well as hard core pornography. They think sex without responsibility is acceptable and do not offend standards of society. This may have

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\* Metropolitan Magistrate/Civil Judge; Ph.D Scholar, Faculty of Law, University of Delhi, India; LL.B. and LL.M., Faculty of Law, University of Delhi, India.

<sup>1</sup>"SC's observations prompt Centre to block 857 porn sites" *Times of India*, Aug. 3, 2015.

<sup>2</sup> Amita Verma, *Cyber Crimes And Law* (Central Law Publications, Allahabad, 2009).

dire consequences as the children will be vulnerable to many serious diseases including HIV of course. It is well known fact that impact of the things we conceive visually is very much higher than what we read in the newspaper and nobody can deny that children and youths do imitate the things they watch in the television or internet. During this period the mind of the youth is most vulnerable. It is the time they develop their sexual orientation, that for what things they should be sexually arouse. If at this stage value of love, family and respect for women are inculcated in the child's mind it will lead to healthy sex life. To the contrary if he is exposed to hard core pornography he will treat women only as an object of pleasure. He will not be sensitive enough about the social issues prevalent in the world such as rape, women subjugation, discrimination against women, etc. and would be one of those criminals who commit atrocities against the women without any guilt in their mind.<sup>3</sup>

Proponents of pornography on the other hand, deny these claims and demand their right to freedom of speech and expression and right to privacy and personal liberty assured by the Constitution of India itself under Articles 19 (1) and 21. They argue that by banning the sites the government is forcing them to watch stuff which is fit for children consumption only. They claim that if both the parties are consenting then they are not answerable for what they do in the four corners of their wall. They also deny the relation between pornography and atrocities against women. They claim it as a punishment without trial which violates the principle of rule of law which is claimed to be fundamental law of the land. Any kind of censorship is unacceptable to civil libertarians as it gags right to dissent and they demand regulation instead of prohibition.<sup>4</sup>

### III. OBSCENITY AND PORNOGRAPHY

Word Obscenity is derived from the Latin *ob*, meaning “to”, and the term *caenum*, meaning “filth”. It is a legal term that is based on offence to accepted standards of decency or sexual morality. And the word Pornography is derived from the Greek *porne*, meaning “whore”, and *graphein* meaning “to write”. Pornography literally means the “writing of harlots” or “depictions of acts of prostitutes”.<sup>5</sup> For writers such as Gloria Steinem and others, it has come to mean materials intended to arouse sexual feeling that include sexist or violent elements.<sup>6</sup> The Williams Committee<sup>7</sup> defined pornography as *sexually explicit representation which has the function or intention of sexually arousing its audience*. The word ‘Pornography’ is different from the word ‘obscenity’ and should not be confused under the law. The standard measure of the word obscenity to determine criminality is different in different places, cultures and countries in this world. Even the standard of criminality of obscenity is changeable and changes from time to time. For instance, what may have been considered obscene in the 19<sup>th</sup> century may not be obscene in the modern times with the globalization of the world as one village particularly with the help of cyberspace and Internet which have no boundaries according to various countries.<sup>8</sup>

In Indian laws, nowhere the expression pornography is used. Even the legislatures in

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<sup>3</sup>*Ibid.*

<sup>4</sup>*Ibid.*

<sup>5</sup> Neil M. Malamuth, “Pornography” *Social Sciences* (1999), available at: <http://www.sscnet.ucla.edu/comm/malamuth/pdf/99evpc3pdf> (last visited on November 15, 2018).

<sup>6</sup>*Ibid.*

<sup>7</sup>Report of the Committee on *Obscenity and Film Censorship*, Her Majesty's Stationery Office, London, 103 (1979).

<sup>8</sup> Harish Chander, *Cyber Law and IT Protection* (PHI Learning Pvt. Ltd., Delhi, 2012).

the United States of America or the United Kingdom have not tried to give legal connotation to this term pornography. And it is impossible to find a definition of this term in the multi-cultural and multi-national environment of the Internet, the reason being that there exists no uniform standard of moral culture and ethics, and therefore there cannot be any uniform law in different cultures and countries in this world hence the term pornography and obscenity may be understood in their widest possible meaning.<sup>9</sup>

For the first time, the test of obscenity was held to have the tendency “*to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall*”.<sup>10</sup> It was understood that this test would apply only to isolated passages of a work. In the US a Superior Court held that the criterion for obscenity was not the content of isolated obscene passage but “*whether publication taken as a whole has a libidinous effect*”.<sup>11</sup> Thereafter the Supreme Court of the US gave a basic redefinition of obscenity which says that *whether, to the average person, applying community standard the dominant theme of material as a whole appeals to prurient interest*,<sup>12</sup> if yes then only the material can be said to be obscene.

After that in the year 1973, Chief Justice Burger of the US Supreme Court propounded a triple test for determining whether a work is obscene or not. The test is as follows:

- i. “That the average person, applying the contemporary ‘community standards’, would find that the work, taken as a whole appeals to the prurient interest.
- ii. That the work depicts or describes in a patently offensive way, sexual conduct specifically defined by state law or applicable law.
- iii. Whether the work taken as a whole lacks serious literary, artistic, political or scientific value”.<sup>13</sup>

In India the offence of obscenity is punishable under section 292 of the Indian Penal Code<sup>14</sup> and section 67 of the Information Technology Amendment Act.<sup>15</sup> Section 67 of the Information Technology Act is analogous to section 292 of the Indian Penal Code which is based on Hicklin Test in UK. Ironically this test has been abandoned by both US and UK way back in the year 1933 and 1954 respectively but our law makers in India are still glued to it. Consequently the novel “Lady Chatterley’s Lover” which was condemned as obscene by this court in *Ranjit D. Udeshi*<sup>16</sup> which was held to be not obscene in England by Central Criminal Court.<sup>17</sup> There the lordship instructed the jury to take into consideration effect of book taken as a whole, and not by selecting passage here and there and if effect is such that it tends to deprave and corrupt persons who were likely to read it<sup>18</sup> then only book can be held as obscene.

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<sup>9</sup>*Ibid.*

<sup>10</sup>*Regina v. Hicklin* 3 QB 360 (1860).

<sup>11</sup>*United States v. One Book entitled ‘Ulysses*, 72 NY 705 (1934).

<sup>12</sup>*Roth v. United States*, 354 US 15 (1973).

<sup>13</sup>*Miller v. California*, 413 US 15 (1973).

<sup>14</sup>The Indian Penal Code (Amendment) Act, 1925, No.8, Acts of Parliament, 1925 (India).

<sup>15</sup> Information Technology (Amendment) Act, 2009, No.10, Acts of Parliament, 2009 (India).

<sup>16</sup>*Ranjit D. Udeshi v. State of Maharashtra*(1969) 2 SCC 687.

<sup>17</sup>*R v. Penguin Books Ltd.*, 1961 CrL. LR 176.

<sup>18</sup>*Ibid.* To deprave means to make morally bad, to pervert, to debase or corrupt morally.

To corrupt means to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile.

Fortunately the community standard test found approval of the Supreme Court and in many judgments such as *Samaresh Bose v. Amal Mitra*<sup>19</sup> and *S. Khushboo v. Kanniammal*<sup>20</sup>, the court chose to depart from the *Hicklin* test and applied community standard to determine matter is obscene or not. Explaining the community standard test in *Aveek Sarkar v. State of West Bengal*<sup>21</sup> the Hon'ble Court held that *Hicklin* test is not the appropriate test to ascertain obscenity. The correct test to be applied is the community standard test. It was further held that once content is found to be obscene in the terms of section 292 IPC, it shall be determined that whether such impugned matter falls within the ambit of any of the exceptions contained in the section itself. The Court further clarified that a per se a nude/seminude picture of a woman can't be declared to be obscene unless there is a likelihood of it arousing feeling or revealing overt sexual desire. Particular posture and the background in which the picture was captured if gives reflection of depraved mind and suggests that the aim was to arouse sexual passion in person who are likely to see that picture. That only those sexual content which have a tendency of exciting lustful thought in the mind of average person, by applying contemporary community standards could be said to be obscene.<sup>22</sup>

Section 67A,<sup>23</sup> of the Information Technology Amendment Act, 2008, entails punishment for five years and with fine up to ten lakh rupees and on subsequent conviction, imprisonment for a term which may extend to seven years and also a fine which may extend to ten lakh rupees for publishing or transmitting material which is sexually explicit in an electronic form. The provision is vague as language employed in the section is full of ambiguity as what is sexually explicit is nowhere defined or explained.

Child pornography is a more serious concern in cyberspace. It is material that visually depicts children (real children as well as computer-generated depictions of children) under the age of eighteen engaged in actual or stimulated sexual activity which also includes lewd exhibition of the genitals.<sup>24</sup> In order to adhere to provisions of the International Conference on Combating Child Pornography on the Internet, Vienna, 1999,<sup>25</sup> our Indian Parliamentarians incorporated section 67B of the Information Technology Amendment Act.<sup>26</sup> It is specifically concerned with the obscenity & pornography of children below the age of 18 years. Unlike sections 67 and 67A of the Act, 67 B not only punishes publication and transmission of child pornography rather browsing and downloading of child pornography is also punishable.

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<sup>19</sup> (1985) 4 SCC 289.

<sup>20</sup> (2010) 5 SCC 600.

<sup>21</sup> (2014) 4 SCC 257.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Supra* note 15.

<sup>24</sup> "How Children Access Pornography on Net", available at: <http://www.protectkids.com/dangers/childaccess.htm>.

<sup>25</sup> International Conference on Child Pornography on the Internet, Vienna, 1999. International Conference on Combating Child Pornography on the Internet Vienna, September 29-October 01, 1999. The conference calls for the worldwide criminalization of the production, distribution, exportation, transmission, importation, intentional possession and advertising of child pornography. In addition to national legislation, efforts for an international instrument, such as the ongoing negotiation within the council of Europe on a Convention against Cybercrime are welcomed and encouraged. States, which have not yet done so, are called upon to enact appropriate legislation. States and regional and international institutions are encouraged to work towards harmonization of legislation. While recognizing some remaining difficulties concerning its definition, the conference identified international minimum standards concerning the prohibition of child pornography, in particular in its application to the Internet.

<sup>26</sup> *Supra* note 15.

Then we have section 66E of the Information Technology Amendment Act, 2008 that punishes capturing, publication or transmission of a private area of any person intentionally or with knowledge, irrespective of his or her gender without his or her consent, which lead to infringing privacy of that person.<sup>27</sup>

Then section 79 of Chapter XII of the Information Technology Amendment Act,<sup>28</sup> which absolves Network Service Provider from punishment for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.<sup>29</sup>

Section 69 A of the Information Technology Amendment Act,<sup>30</sup> says that where the Central Government or any of its officer authorized by it is satisfied that it is necessary or expedient in the interest of sovereignty with foreign States or public order<sup>31</sup> or, for preventing incitement to the commission of any cognizable offence relating to above, it may direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

#### IV. JUDICIARY ON PORNOGRAPHY

On the matter of cyber pornography the stand of Judiciary has remain dubious. In response to central government blocking the pornographic site, Former Chief Justice of India, H.L. Dattu remarked, “India can’t do so”. Saying total ban on sex sites would infringe right to privacy and personal liberty guaranteed by Article 21 of the Constitution of India and such eroticism is a personal choice. He stated<sup>32</sup> that stopping people from watching anything within the four walls of his room, would tantamount to infringing Article 21 of the Constitution.

It is noteworthy that this observation of Supreme Court is in contradiction with its earlier order passed by Former Chief Justice R.M. Lodha in the same PIL which was filed by Kamlesh Vaswani who seeks to ban pornographic sites. During the hearing in August 2014, Former Chief Justice stated “*that such raunchy sites need to be blocked and demanded strict laws to curb the menace*”.

According to Justice Rohinton Nariman it was “*impractical to block two crore websites as then two crore more sites will surface. They pop up in foreign countries and are hydra-headed. So, only servers here will help*”.<sup>33</sup>

In March 2016, the Supreme Court came up with a new order and declared as right to freedom of speech, thought and expression is not absolute therefore Centre should take

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<sup>27</sup>*Ibid.*

<sup>28</sup>*Ibid.*

<sup>29</sup>*Supranote 8.*

<sup>30</sup>*Supra* note 15.

<sup>31</sup> Public peace, safety and tranquility.

<sup>32</sup>*Kamlesh Vaswani v. Union of India and others*(2014) 6 SCC 705.

<sup>33</sup><http://www.dailymail.co.uk/indiahome/indianews/Article-3153957/Supreme-Court-says-India-t-ban-porn-CJI-says-total-ban-sex-sites-violate-privacy-personal-liberty.html#ixzz41oUq3t8k> (last visited on November 15, 2018).

necessary steps to block child pornographic sites and gradually consider blocking of other pornographic sites as well.

Bench of Justice Dipak Misra also decided that it shall entertain petition dealing with criminalization of consumption of pornographic material on which ASG Anand said the Centre has no inclination to act like a moral policing and that it is inclined to ban only those sites which contains child pornography though it is pertinent to mention here that the Court speaking through Justice Dipak Misra asked Centre to develop mechanism for blocking all such porn sites taking aid of Information Technology experts and Intermediaries.<sup>34</sup>

From the above discussion this can be easily concluded that even the Supreme Court Judges are not carrying a single opinion and they themselves are divided on the question of suppressing pornography.

#### **V. SHOULD GOVERNMENT BAN THE CYBER PORN SITES OR SHOULD THESE SITES BE REGULATED? A LEGAL ANALYSIS**

It is often suggested that to protect our women and children circulation of cyber pornography should be banned. Before taking into consideration this suggestion we need to remind ourselves that while the protection of women and children is paramount duty of any government but we should not forget that a civil society first right is to have right to freedom of speech and expression. It is through this right other rights can be claimed and made meaningful. Freedom of expression is to be prized as a condition of a free society. Censoring this right shall be unhealthy for any developing or developed society.<sup>35</sup>

It is also the claim of many civil libertarians that once the state is allowed to use the remote of censorship and ban the things, it shall prejudicially use that remote again and again to foist their whims and fancies upon us and god knows up to what extend and for what area the next bullet shall be triggered. Beef ban imposed in certain part of India to appease some political party is the latest example of government power of censorship. This culture of censorship is not prevalent only in India rather no government of any country in the world can pat itself for never using such authority over their subjects. This is how Canadian feminist managed to force government to amend law dealing with obscenity.

Censoring porn will result into pushing the multi-billion industry underground where it can no longer be put under surveillance and this is in addition to economy and monetary loss the country will suffer. Instead of it the government will be spending from its own pocket which in reality the pocket of the honest tax payers to put checks on this menace. The hard earned money of the people will be spent on strengthening investigation and prosecution system. Offenders look after and their maintenance are also responsibility of the state which further shrunken the resources of state. Once they get out from the jail they won't easily get the job and thereafter also the state will be paying money for their support. The activity ones become illegal will make criminals to all the actors voluntary working in the industry, this consequentially will shoot up crime rate in the society. Yesterday who were not culprits will be held offenders from the next day which will defame country's name throughout the world because of so called raised crime rate. Actor may leave this industry owing to its illegal nature which further will lure the dealers of the illegal industry to haul the girls through

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<sup>34</sup><http://www.livelaw.in/block-child-pornographic-sites-explore-if-viewing-porn-in-public-can-be-prohibited-sc-to-centre/>.

<sup>35</sup> Daniel Frederick, "Pornography and Freedom" 5(2)*Kritike* 84-95 (December 2011).

trafficking. To silence the police officers bribe would be offered to them and this is how corruption will expand. Trafficking corruption and black marketing all together will raise the crime rate in the country which will tarnish the image of the country internationally.<sup>36</sup>

It is also a known fact that if the risk is not to some innocent but to one who gives consent to other to harm him or her there the state has no authority to interfere of course subject to certain situations. Also for opponents, pornography is intolerable but the same is not the case with the defenders. For them it is a source of entertainment. Someone else definition of morality can't be imposed on others especially when it is a free democratic society.<sup>37</sup>

John Stuart Mill in his essay *On Liberty*<sup>38</sup> has explained when power can be exerted to restrict individual freedom of action. In his composition he has maintained that individual can't be held liable towards society as long as his action affects his own interest only but the moment his action ends up violating other rights or interest, legal or social sanction against that person shall be tenable.<sup>39</sup> Hence in the absence of harm to the society, activities performed for personal gratification can't be questioned.<sup>40</sup> Law can't be used as a weapon to restrict individual independent acts no matter how degrading or depraved the acts are, so long as they do not have the potential to harm others.<sup>41</sup> Therefore if the relationship between pornography and sexual violence can be established then only the shield of classic harm principle of J.S. Mill can be removed otherwise pornography will continue to enjoy the constitutional protection of right to liberty.

Pornography supporter, feminist author Nadine Strossen<sup>42</sup> states that, there is no credible evidence which substantiate causal relationship between availability of sexual explicit content and crime committed against women.<sup>43</sup>

Again it is further argued several times that on ground of morality the government has right to restrict freedom of speech and expression. Here it becomes necessary to clarify that wherever the word morality is used, the framers of our Constitution were talking about Constitutional morality. It is not public morality but Constitutional morality which empowers government to curtail our freedom of speech and expression. On this Naz Foundation Judgment<sup>44</sup> becomes relevant for our purpose in which it was held that popular morality or

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<sup>36</sup> John Arlidge, "The Dirty Secret that Drives New Technology: it's Porn", *The Observer* (March03, 2002) quoted in N Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights*(NYU Press, New York, 1995).

Mancur Olsen, *The Rise and Decline of Nations* (Yale University Press, New Haven, 1982); *Power and Prosperity* (Basic Books, New York, 2000).

<sup>37</sup> *Supra* note 2.

<sup>38</sup> JS Mill, "On Liberty" in M. Warnock (ed.), *Utilitarianism* 135 (Blackwell Publishing Ltd., Oxford, 2003) (2003) quoted in Steven Balmer, JR "The Limits of Free Speech, Pornography and the Law"<sup>1</sup> *Aberdeen Student Law Review* (July 2010).

<sup>39</sup> SM Easton, *The Problem of Pornography: Regulation and the Right to Free Speech*1(Routledge, Florence, 1994).

<sup>40</sup> R. Dworkin, "Is there a Right to Pornography?" 1(2) *Oxford Journal of Legal Studies*177-212 (1981).

<sup>41</sup> Steven Balmer, *supra* note 38.

<sup>42</sup> N. Strossen, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights* 75(NYU Press, New York, 1995).

TM Bruce, "Pornophobia, Pornophilia, and the Need for a Middle Path"<sup>5</sup> *American University Journal of Gender, Social Policy & the Law* 399(1997).

<sup>43</sup> *Supra* note 42.

<sup>44</sup> *Naz Foundation v. Govt. of NCT of Delhi* (2009) 166 DLT 277.

public disapproval is not a valid justification to restrict one's right to life under Article 21. In para. 79 the Court stated '*Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly*'.<sup>45</sup> That moral indignation howsoever strong might be does not provide any valid basis for overriding individual basic right of dignity and privacy and therefore Constitutional morality must outweigh public morality, even if public morality represents the perception of majority.<sup>46</sup>

Opponents in their next contention say that viewing pornography depraves and corrupts those who produce or consume it. Well if this is the problem then solution lies in allowing the individual to decide what is in their best interest. It is a matter of their choice to decide whether they are ready to expose themselves to take the risk or not. It is also a line of thought that politics, bureaucrats and corporate all are susceptible to corruption. Despite that we the citizen of this nation encourage and desire man of integrity to join this profession.<sup>47</sup> If these acts are not wrong how come watching and producing pornography can be wrong? It is all about exercising once right to life and liberty their right to freedom of speech and expression which should not remain in papers and must be given its logical conclusion.

Pro porno also argues that it is unfair to allege that pornography degrades women as, if the allegation has any substance it is for the women folk to decide as a consenting adult that degradation is worthwhile or not.<sup>48</sup> Also if the allegations are accepted to be true, censorship could be allowed only as the last resort where the government is left with no alternative but to ban it. However the problem before us can be resolved through regulation of pornography. Sex education perhaps can be used to minimize sexual assaults.<sup>49</sup>

It is further claimed that porn subjugates women, and such conviction inveterate gender inequality. If this contention considered being truthful, then answering to this problem lies in changing the mentality which can be made possible only by educating people and for which effectively exercising our right to freedom of expression is a must.<sup>50</sup>

Also if the allegation is raised against the message it delivers to the world at large, the answer lies in changing the message and for that suppression of speech does not provide us any solution rather expanding the speech, discussing the problem through debate and settling the matter through most agreeable thought is the need of the hour. If regularizing the industry can prominently handle the situation then why to waste our resources on first banning and then maintaining that ban?

Nobody doubts that statistics depict atrocities against women are not declining and certainly can sweep away any government if the government remains sleeping over women right to have protected and safe environment in the society. The data also reveal that substantial part of reported cases is flooded with sexual violence against women. Nobody questions their occurrence and it is rather shameful for the society to be witness of such

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<sup>45</sup>*Ibid.*

<sup>46</sup>*Ibid.*

<sup>47</sup>*Supranote35.*

<sup>48</sup> *Ibid.*

<sup>49</sup>*Ibid.*

<sup>50</sup>*Ibid.*

brutality but before deciding the future of pornography we must find out the role played by pornography in such crimes. Catharine MacKinnon, the American radical feminist herself has little proof to corroborate the fact that sexual assaults are the outcome of watching porn. Consuming violent pornography is found to be responsible for sexual offence in some of the cases but such instances are rare and certainly not such which could prove the link between the two.<sup>51</sup>

If we consider Justice Bhagwati suggestion in *National Textile Workers Union v. PR Ramakrishnan*<sup>52</sup> he observed that:

*“We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still, it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree it will shed the bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society then either it will stifle the growth of the society and choke its progress and if the society is vigorous enough it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind.”*

Also in *Kesavananda Bharti*<sup>53</sup> case, it was said by the Supreme Court that:

*“No generation has monopoly of wisdom nor has it a right to place fetters on future generation to mould the machinery of government according to their requirements. If no provision were made for the amendment of the constitution the people would have recourse to extra constitutional method like revolution to change the constitution”.*

Jeremy Bentham’s utilitarian theory says that law must be such which gives maximum pleasure to maximum members of the society. In view of German Jurist Savigny, *“law is not static. It keeps revolving. It grows with the growth of people, strengthens with the strength of people and finally dies when the nation loses its nationality”*. Law is nothing but reflection of its people belief, their opinion and ideology which keeps changing with the passage of time.

Also if it is claimed that pornography defiles children mind and is harmful for them. But driving car and consuming alcohol and cigarette is also unsafe for them despite this fact adults are allowed to drive cars and their having liquor and smoking is not prohibited generally. In fact government itself grant license to sell liquor and earn large revenue from this sector. Hence it is for the adult to be attentive and restrain children to come into contact with such things. In the same way parents may use filters or may download or buy software to manage the contents on the internet. This will prevent their children to come across any such pornographic video.<sup>54</sup>

## VI. CONCLUSION

The above discussion is forcing us to run over the middle road and balance the rights of adult as well as children in a way which take care of both of them needs. Without being

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<sup>51</sup>See *supranote*41.

<sup>52</sup>(1983) AIR 750, (1983) 3 SCR 12.

<sup>53</sup>*Kesavananda Bharti v. State of Kerala*(1973) 4 SCC 225.

<sup>54</sup>*Supranote* 41.

excessively restrictive and fulfilling everyone aspirations should be the aim of any government. Hence the stick of law should be moved judiciously. And from the result of various studies and researches conducted throughout the world it becomes pristine clear that imposition of general ban on all kind of pornography is not required. As in the opinion of Justice Felix Frankfurter, that would mean ‘reducing the adult population to reading only what is fit for children’<sup>55</sup> although there is found to be slightest tilt in causal connection of “violent porn” and crime against women. The majority of members of our society are believers of prevention is better than cure theory hence if there exist little merit in pornography itself then violent pornography offers none.<sup>56</sup> Any pornography that depicts an illegal act, whether, rape, assault or child abuse should not get the same protection as is offered to ‘regular’ pornography under freedom of expression.<sup>57</sup> Therefore, violent pornography needed to be banned as violent pornography is a mere camouflage, inherent to which is the year old patriarchal approach which violates women dignity in the name of sex and refurbish male dominance over women which they never want to give up. Censorship of this type of porn may appear to be harsh on mankind however in light of the apprehension of various scholars and philosophers and government obligation to make society safe and secure for women, ban at least against hard core porn is sustainable.<sup>58</sup> In the name of free speech, commission of crime cannot be sponsored. It is true that end result of violent pornography is not yet proved but violence from the very name of it is not allowed and cannot be allowed in any form. In no country freedom of speech is bestowed to the natives absolutely without any exception. Hence it can be curtailed on certain grounds provided in Article 19 sub clause (2) itself.<sup>59</sup> In view of *Deana Pollard* like speeding violent pornography is intrinsically hazardous, and therefore legislatures holds the right to channelize it efficiently without affording or forwarding any explanation about the proof of particular harm it may cause to the society.<sup>60</sup> Sexual violence as a form of speech has no substance in it which one should feel required to be protected from government intrusion. It’s true that suppressing porn will lead to expansion of black marketing and under-ground activities. It is important to understand that arbitrariness of any kind, whether it is of the government or the citizens of the state is not permissible. Violence through any medium can never be encouraged especially the one which reinforces rape myths and principle of inequality, which penetrates the belief of women to be subservient to men. Message need to be unambiguously delivered to the mankind that sexual violence is unacceptable and shall never be supported by the state despite the consequences state has to suffer. As reinstatement of peace and security of every single individual is state concern and to protect right of speech and expression of those who want to be entertained by it at the cost of infringing women right to be protected from any kind of violence inside and outside of the precinct of her house which is a façade of right to life, is untenable. When the two shall be weighed against each other obviously the later will get state protection.

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<sup>55</sup> *Butler v. Michigan*, 352 U.S. 380 (1957).

<sup>56</sup> *Supranote*41.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> The Constitution of India, 1950, art. 19, cl.1 and 2.

<sup>60</sup> D Pollard, “Regulating Violent Pornography” 125 *Vanderbilt Law Review* 141 (1990).