OBSCENITY AND THE DEPICTION OF WOMEN IN PORNOGRAPHY: REVISITING THE KAMLESH VASWANI PETITION

Siddharth S Aatreya*

ABSTRACT

India is widely regarded as one of the most unsafe countries in the world for women. Legislative efforts of increasing punishments for acts of sexual misconduct have had limited success in tackling this problem. Consequently, Kamlesh Vaswani's 2013 petition before the Supreme Court of India argued that a ban on pornography would attack the root of the problem – a culture that has normalized sexual violence and objectification of women. While the petition's prayer of seeking a ban on access to all pornography in India has faced wide criticism, this paper proposes a framework to address the harms accruing to women within the contours of the Indian Constitution. In doing so, it will locate these harms in Catharine Mackinnon's work, and then argue that a shift in India's approach to obscenity from an American-style offense to community standards approach to a Canadian-style objective harms approach is both possible under the Indian Constitutional scheme and would address these harms without creating an unreasonable restraint on free speech.

* Siddharth S Aatreya is a 5th year B.A.LL.B. (Hons.) student at the National Law School of India University, Bengaluru. He may be contacted at siddharth.aatreya@nls.ac.in.

TABLE OF CONTENTS

I. INTRODUCTION

Kamlesh Vaswani's 2013 petition before the Supreme Court of India, which called for a complete ban on accessing all pornography,[1] is a classic example of a problem-solution mismatch. Couched in hyperbole that, *inter alia,* refers to pornography as a "*moral cancer that is eating our entire society*",[2] are some legitimate, albeit poorly established concerns around the abuse of children and women who are the subjects of this pornographic content.[3] The solution it proposes to this (a complete ban on the consumption of pornography), however, leads to an excessive constraint on the freedom of expression guaranteed under the Constitution.[4] The petition has left the challenge of dealing with the harms it has highlighted within the contours of the Constitution open.

In the proceedings in court that have followed the presentation of the petition, inordinate focus has been placed on the harms of child pornography.[5] Consequently, it appears

[1] Kamlesh Vaswani v. Union of India, WP 177/2013 (Supreme Court, 30 August 2013). A copy of the petition is available at https://docs.google.com/file/d/0B-e-lXh7NmVmbGNXT1BraHF5RUU/edit (Last accessed May 1, 2018).
[2] *Ibid,* 6.
[3] *See generally* Geetha Hariharan, *Our Unchained Sexual Selves: A Case for the Liberty to Enjoy Pornography Privately* 7 NUJS L. REV. 89, 89-93 (2014).
[4] *Ibid,* 96.
[5] *Supra* note 1. On February 26, 2014, the Supreme Court passed orders in respect of an Interlocutory Application for intervention filed by the Supreme Court Women Lawyers' Association. In its prayer, the Association sought directions to protect *both women and children*, who it Identified as being victims of pornography. However, the court's order is limited to seeking a report on the measures being taken by the Government to protect children who appear in or are forced to consume child pornography. Similarly, in its most recent order in respect of the

that the concerns it raised around the depiction of women in pornography have been swept under the rug. Crucially, however, this has not been the case in other jurisdictions, whose Constitutional courts have developed rich jurisprudence on the trade-off between the harms of violent pornography and the freedom of speech and expression. In doing so, the Supreme Court of the United States and the Supreme Court of Canada have applied offence-based standard and a harms-based standard respectively.[6]

Comparing the standards adopted across the United States and Canada can help determine how the issues highlighted in the Vaswani petition can be tackled in India. Crucially, all three jurisdictions vest explicit constitutional rights to free speech and expression with their citizens – through the First Amendment to the Constitution in the United States, Sec. 2(b) of the Canadian Charter of Rights and Freedoms and Art. 19(1)(a) of the Indian Constitution. While the Canadian and Indian rights also come appended with the right for the State to place *reasonable restrictions* on these rights (Sec. 1 of the Charter and Art. 19(2) of the Constitution respectively), the American right is provided for in the absolute.

Despite the absence of a textual limitation on free speech under the American Constitution, its judicially developed restrictions on pornographic content adopt an offense-based approach to restricting pornography, focusing on whether a depiction offends the majority's sentiments. Interestingly, a similar approach has been adopted by Indian courts under Art. 19(2) in the context of pornographic/explicit content, despite the existence of a textual limitation allowing for "reasonable restrictions" on free speech rights. Per contra, Canadian courts have interpreted a similar textual limitation allowing "reasonable restrictions" in a harm-based fashion, focusing on the harms caused to women as a class of citizens by certain kinds of pornographic depictions.

Given the shortcomings of the American and Indian offense-based approach (since it allows extremely harmful pornographic depictions of women to flourish) and the textual Constitutional similarities between free speech rights in the Indian and Canadian Constitutions, this paper will argue that a shift from an American style offense-based to a Canadian style

above Interlocutory Application, passed on August 21, 2017, the court only sought a status report from the Government on the blocking of *child* pornography on the internet, with no mention whatsoever of the other kinds of pornography mentioned in the petition.

[6] Bret Boyce, *Obscenity and Community Standards* 2(33) YALE J. INT. L. 299, 302 (2008).

harm-based restriction on pornographic content is both possible and desirable under Art. 19(2) of the Indian Constitution. In doing so, it will demonstrate that the harms caused to women due to the proliferation of violent pornography pointed out in the Vaswani petition can be sufficiently addressed without placing unreasonable restraints on the right to free speech and expression in India.

This paper is divided into three parts. Part A will lay down the American offence standard for obscenity and demonstrate the manner in which this standard has been applied to violent pornography. Part B will compare this standard with the Canadian harms approach to obscenity, and demonstrate the manner in which the harms accruing to women out of violent pornography have been accounted for in it. Part C will locate these harms to women in the Indian Constitution, and argue that reading the statutory definition of obscenity in India in a manner that accounts for these objective Constitutional harms would address the Vaswani petition's concerns without unreasonably restricting the right to free speech and expression.

II. HISTORICAL DEVELOPMENT OF OBSCENITY

Sexual explicitness has not always been a ground for states to suppress speech. From the *Kama Sutra* and explicit murals in the Indian subcontinent,[7] to graphic depictions of sex as being integral to love in Sumerian and Babylonian literature, sexual explicitness was a widely prevalent form of artistic expression. As a consequence of this cultural acceptance of sexually explicit expression, seditious and blasphemous speech alone was banned and punished in the city-states of Greece and Rome, with no offence of "obscenity" that placed feters on sexually explicit speech.[8]

Obscenity first arose as an offence and a legitimate ground for the state to curb speech and expression in Britain. With this step, the State took on the burden to protect its citizens' religious sensibilities, through the enactment of a law in 1662 that prohibited the publication of any *"...offensive books or pamphlets wherein any doctrine of opinion shall be asserted or maintained which is contrary to the Christian faith".*[9] While armed to clamp down "un-Christian" expressions of sexuality, it wasn't until 1772 that Britain first convicted an

[7] *See generally* Ben Grant, *Translating/The "Kama Sutra"* 26 TH. W. QUART. 509, 511 (2005).
[8] Geoffrey R. Stone, *Origins of Obscenity* 31 NYU REV. L. SOC. CH. 711, 712 (2007).
[9] *Ibid.*

individual on these grounds. In *The King v Curll,*[10] the publication *Venus in the Cloister*, which graphically described scenes of voyeurism and female masturbation was challenged under this provision. The court held that the publication was punishable in common law for *"...weakening the bonds of morality"*. The punishment prescribed, however, was merely a modest fine.[11]

In the century following the *Curll* judgment, Britain saw obscenity convictions coupled with increasingly harsh punishments, but a curious lack of clarity on the exact elements of the offence. The same was clarified only in 1868, with the decision in *R v Hicklin*.[12] Per this decision, any material that *"tend(s) to deprave or corrupt those whose minds are open to such immoral influences"* was obscene.[13] Right from its origin, therefore, the obscenity restriction on free speech was grounded in offence and a moral regulation was imposed on the kinds of sexual expression permissible in society. Whether religious or otherwise, the restriction arose as a consequence of the State taking on the burden to protect its citizens from *offensive* sexual depictions, irrespective of the degree to which they were harmful.[14] As the first concrete formulation of what obscene material was, it is this *Hicklin* test that formed the starting block of obscenity jurisprudence in the USA, Canada and India.

III. THE AMERICAN OFFENSE APPROACH

Unlike § 294 of the Indian Penal Code, 1860, the USA does not have a uniform statutory basis for the obscenity restriction on the First Amendment right to free speech and expression.[15] In judicially developing this restriction, the American courts have developed rich jurisprudence on the relationship between obscenity and pornography.

A. The Modern American Position on Obscenity

[10] The King v Curll, 2 Stra. 788 (1727).
[11] Stone, *supra* note 8 at 714.
[12] Stone, *supra* note 8 at 714.
[12] R v Hicklin [1868] 3 LR 360 (QB).
[13] Rosen v. United States, 161 US 29 (1896) where this test was first formally imported into American jurisprudence by the Supreme Court of the USA, despite its use by lower courts in the USA prior to this.
[14] Cass R. Sunstein, *Pornography and the First Amendment,* 4 DUKE L. J. 589, 592 (1986).
[15] The Constitution of the United States of America, First Amendment, which reads as follows:
"*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*"

The beginning of the United States' own obscenity jurisprudence started with its decision in *Roth v. United States.*[16] In the period prior to that, lower courts in the USA merely used the above mentioned *Hicklin* standard to restrict speech on the grounds of obscenity.[17]

The *Roth* case came down on this standard heavily, holding that the *Hicklin* test was overbroad in requiring that speech be regulated on the basis of the effect it may have on any potential receiver whose mind may be open to an immoral influence.[18] The court observed that accounting for the psyche and vulnerability of *every individual potential receiver* of information led to subjectivity in determining the basis of obscenity. The *Hicklin* test essentially required the obscene material to always cater to the least common denominator – a burden it classified as unfair. In doing so, however, it replaced each individual potential receiver with the "contemporary standards" of the community as the unit of analysis in determining whether content was obscene and therefore undeserving of the First Amendment protection. Its definition was thus: *"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest"*.[19]

Roth brought about a change in the old *Hicklin* test on two levels. First, it changed the impact that obscene material was to have – *Hicklin* sought to ban material that would "corrupt" any potential receiver of the material, while *Roth* sought to ban material that would offend the community's standards. Second, *Roth* required the material to have an impact on the community in general, while the negative effect on any one particular receiver, as prescribed in the *Hicklin* case was abandoned.

While there was a clear shift from *Hicklin*, the test in *Roth* remained unclear on the balance between obscenity and artistic freedom. This issue was taken up in the Supreme Court's subsequent decision in *Memoirs of a Woman of Pleasure v. Massachusetts*.[20] Here, the court held that any offensive depiction of sexual interaction could be excused as long as the material had some redeeming social value. With this, the Court excused the content in the *Fanny Hill* book (which contained detailed descriptions of sexual acts) on the basis of its

[16] Roth v. United States, 354 US 476 (1957).
[17] Sunstein, *supra* note 14 at 593.
[18] Sunstein, *supra* note 14 at 595.
[19] Chris Hunt, *Community Standards in Obscenity Adjudication* 66 CAL L. REV. 1277 (1978).
[20] Memoirs of a Woman of Pleasure v. Massachusetts 383 US 413 (1966).

literary significance. However, the larger part of the test, which required application of community standards to determine whether material appealed to the prurient interest, remained the same as it was before.[21]

This clear prioritization of the community's standards on how sex should be depicted was concretized by the Supreme Court in a test crafted in *Miller* v. *California,*[22] laid down in 1973. The court reiterated that the purpose behind the obscenity restriction on the First Amendment was to ensure that depictions of sex that offended the prevailing view of sexual matters in society were prevented. As a result, the Court created the following three-pronged test:

> *(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.*

In *Miller,* therefore, the court diluted the redeeming social value exception into a markedly less liberal one of serious literary, artistic, political or scientific value.[23] The positive part of the test remained the same – an appeal to the prurient interest and an offensive depiction of sexual conduct would continue to be a requirement for the material to be obscene. The language used in prong (b) of the test did not explicitly indicate whether the offensiveness of the sexual conduct depicted was to be decided on the basis of community standards or otherwise. As a matter of practice, however, subsequent decisions of the US Supreme Court have applied community standards in determining whether both prong (a) and (b) of the *Miller* test are satisfied.[24]

---

[21] *Ibid.*
[22] Miller v. California 413 US 15 (1973).
[23] Sunstein, *supra* note 14 at 596.
[24] *See e.g.,* Ashcroft v. Free Speech Coalition 535 US 234 (2002), where the court applied contemporary community standards to the second prong of the Miller test, in addition to the first prong; J. Todd Metcalfe, *Obscenity Prosecutions in Cyberspace: The Miller Test Cannot go where no [Porn] has Gone Before,* 74 WASH. U. L. REV. 81, 87 (1997).

While the American standard of strict scrutiny applies to the grounds of obscenity as restriction to free speech,[25] this narrowly constructed restriction can only ever be made on the grounds that the material offends society's collective view of sex, and not on the basis of the harm caused by such speech.

B. Offence and Community Standards

While it has adopted and repeatedly affirmed its offence to community standards test for obscenity, the US Supreme Court has not offered a cogent justification for it.[26] In his dissenting opinion in *Miller*, Justice Douglas observed that by the court's own jurisprudence, offence to community standards would not be a justification for the imposition of a restriction on political and religious speech.[27] He then based a part of his dissent on the majority opinion's inability to differentiate obscenity from the other instances in which it had rejected offence to community standards as a justification for a First Amendment restriction.[28] While the majority bench attempted to side-step this by painting "protecting the community from the commercial exploitation of sex" as the goal achieved by the restriction,[29] it was still unable to justify the use of community standards to prevent this exploitation.

By their very nature, community standards are incapable of being specifically defined.[30] In *Miller*, the court grappled with this question, only to conclude that community standards were to be judged at the state level since no uniformity in standards could be expected across the country. In *Hamling* v. *United States,*[31] these imprecise community standards were coupled with an average person test, requiring that they be applied as an average member of the community would determine whether the subject-matter is obscene or not. In effect, the *Hamling* test therefore boiled down to the majority decision of a jury – if most jury members, who constituted *"average members of the community"* found the material to be obscene, its dissemination could be restricted.

---

[25] *See generally* John Galloto*, Strict Scrutiny for Gender*, 93 COLUM. L. REV. 518 (1993).
[26] Hunt, *supra* note 19 at 1280.
[27] *Supra* note 21 at 430.
[28] *Supra* note 21 at 435.
[29] *Supra* note 21 at 420.
[30] Hunt, *supra* note 19 at 1297.
[31] Hamling v. United States 418 US 87 (1973).

Consequently, *Hamling* modified the *Miller* test to require that individual jurors ascertain the community's standards for themselves and then apply them in determining whether material is obscene or not. However, no individual would normally be capable of independently determining what the abstract "community standards" on the depiction of sex are.[32] In practice, the test would result in individuals simply determining whether material offends their own standards on the depiction of sex to adjudge whether material is or isn't obscene.[33] On an average, with juries being roughly representative of the societies within which they operate, the *Miller* test provided a tool for imposition of majoritarian values on sexual depictions on the rest of society.[34]

This imposition has had a well-documented impact on the expression of deviant sexualities.[35] Equally insidious, however, is its exclusion of harms arising out of certain depictions of sex to members/classes of society - a direct consequence of the test's singular focus on *offence* to community standards. Consequently, a community in which a vast majority have heavily internalized patriarchal biases that justify women being depicted as submissive sexual objects upon whom degrading and violent sexual acts may be performed, may not find that such depictions offend the community's standards on sexual depiction.[36] These would, therefore, receive full Constitutional protection, despite the harm caused to women as a class of citizens by such depictions.

C. Harms of Violent Pornography and American Obscenity

Attempts to statutorily tackle the harms arising out of certain depictions of women in pornography are not alien to the US courts. Relying heavily on the views of prominent feminist academic Catharine Mackinnon, the city of Indianapolis, Indiana enacted an anti-pornography Civil Rights Ordinance in 1984. While Mackinnon's position is aligned towards supporting a complete ban on all forms of pornography,[37] the ordinance was directed towards merely effectuating a ban on certain kinds of pornography that were deemed to be excessively harmful.

---

[32] Catharine Mackinnon, *Not a Moral Issue* 2 YALE L. POL. REV. 321, 324 (1984).
[33] *Community Standards, Class Actions and Obscenity in Miller v California*, 88 HARV. L. REV. 1838 (1975).
[34] Hunt, *supra* note 19.
[35] *See e.g.,* C. Peter Magrath, *The Obscenity Cases: Grapes of Roth* 7 SUP. CT. REV. 7, 14 (1966) discussing the effect of community standards on a homosexual pornographic publication.
[36] Mackinnon, *supra* note 31 at 326-328.
[37] Andrea Dworkin and Catharine Mackinnon, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 35-47 (1988).

These included graphic and sexually explicit depictions of women enjoying pain, rape, torture or other forms of sexual violence and the penetration of women by objects or animals.[38] The ordinance failed to fulfil its primarily intent of curbing the unique impact such depictions had on women, men and transsexuals being depicted in an oppressive manner.

The ordinance was grounded in Mackinnon's three gendered harms of pornography and was applied specifically to the context of violent pornography. These are harms to those participating in it, to those affected by violent sexual acts committed as a consequence of it and to society, whose attitudes towards women in matters of sexual relations are corrupted by it.[39]

The first harm arises out of the creation of a legitimate market for pornography. A vast majority of women who enter the pornography industry do so out of economic and social compulsion and are compelled to do so simply because the market exists.[40] However, a market for violent pornography especially affects them once they are within the industry. This is because growing demand for violent pornography creates a specific demand for women to participate in it instead of non-violent porn. With no other option, a large number of them are forced to migrate to violent porn. In this manner, the market's demand directly impacts the women participating in such pornography, resulting in severe abuse and injuries to them in many cases.[41]

In general, pornography positions itself as being representative of reality and the way sexual relations normally take place.[42] Most of its consumers are teenagers and young adults, who are vulnerable to be influenced by the manner in which sexual activity is depicted in pornographic films.[43] Consequently, violent depictions of sex in pornography have the effect of normalizing sexual violence – which is Mackinnon's second harm. A variety of studies have concluded that a strong link exists between the consumption of violent pornography and the proclivity of an individual to commit acts of sexual violence.[44] While no conclusive proof of

[38] Indianapolis Civil Rights Ordinance 1984, §5.
[39] Boyce, *supra* note 6.
[40] Report of the President's Commission, *Obscenity and Pornography*, 235-300 (1986).
[41] *E.g.,* New York v. Ferber, 458 U.S. 747, where the US Supreme Court adopted a similar perspective in upholding a complete ban on child pornography in the State of New York.
[42] Ann Ferguson, *Pleasure, Power and the Porn Wars*, 3 WOM. REV. BOOKS 11 (1986).
[43] *Ibid.*
[44] *See e,g.,* Jae Woong Shim and Bryant M. Paul, *The Role of Anonymity in the Effects of Online Pornography among Young Adult Males*, 42 SOC. BEH. PERS. 823, 830 (2014).

such a link can be provided,[45] it must be acknowledged that continued exposure to such material pushes the narrative that a woman's pain is a source of sexual pleasure for a man. When coupled with the third harm, of a shift in the perception of women in society, the harmful effects of such male entitlement over women's bodies becomes clear.

Pornography is created in a manner that does not seek to trigger any reflection on the content in it from those receiving it. Instead, it is merely created to sexually arouse its recipient, often by portraying women as objects designed just for that purpose.[46] As a consequence, constant exposure to such material distorts expectations that men and women have from sexual relations. Thus, while all kinds of subservient depictions carry a negative message, especially violent and degrading depictions of women not only reinforce male dominance in society, but also create a sense of complete entitlement over female bodies in male consumers. The biases so created, therefore, have implications both within and outside the realm of sexual relations, since they reinforce gendered power dynamics in the society. This shift in perceptions about the female body is Mackinnon's third harm.

Despite its stated motive in preventing such harms, the ordinance was challenged as being unconstitutional. The final decision in this respect was rendered by the US 7th Circuit Court of Appeals in *American Booksellers Association Inc. v. Hudnut*.[47] Here, the court tested the ordinance against the *Miller* test, and held that it was unconstitutional on the ground that it did not account for the exceptions for work with serious merit and that it was not in conformity with the community offence standard.[48]

The court's analysis on the latter ground highlights the *Miller* tests' inability to account for harmful speech. The court called the ordinance "thought control", holding that it legitimized only a "particular view" of women and would consequently amount to viewpoint discrimination - an established ground of non-interference under the First Amendment.[49] In protecting this "viewpoint", the court refused to engage in any analysis of the harms caused by

[45] *See* Michael Castleman, *More Porn, Less Sexual Assault* PSYCHOLOGY TODAY (2016), arguing that an outlet for release without requiring any physical action reduces actual manifestations of violent sexual urges; Thomas Everson, *Pornography and the First Amendment: A Reply to Professor Mackinnon* 13 YALE L. POL. REV. 130 (1984).
[46] Richard Moon, *R v. Butler: The Limits of the Supreme Court's Feminist Re-Interpretation of Section 163*, 25 OTT. L. REV. 361, 379 (1993).
[47] American Booksellers Association Inc. v. Hudnut 771 F.2d 323 (1985).
[48] *Ibid.*
[49] Cynthia Stark, *Pornography, Verbal Acts and Viewpoint Discrimination* 12 PUB. AFF. QUART. 429, 440 (1998).

such speech. It used *Miller* to cop out of this, holding that only "offensive" sexual depictions were exempted from First Amendment protection, not "harmful" ones.

IV. THE CANADIAN HARMS APPROACH

Canadian obscenity jurisprudence began with the *Hicklin* test, much like the United States.[50] Unlike the United States, however, its departure from this test arose out of an amendment to the criminal statute that defined obscenity, as opposed to a change in judicial interpretation. Following this 1959 amendment, obscenity was defined as a publication whose dominant characteristic was the *undue exploitation* of sex. Consequently, the Canadian application of the undue exploitation standard operated along American lines, testing the depictions of sex in material against the offense caused to the community's contemporary standards (at a national scale) on sexual depiction.[51]

In 1985, the Canadian Supreme Court took the first step towards creating its own unique obscenity jurisprudence with its decision in *Towne Cinema Theatres Ltd. v. The Queen*.[52] Here, the court changed its earlier standard of *offence* and community standards to a standard of *tolerance*. This meant that offense *personally* caused to members of the community would no longer justify suppression of free speech – the line was now to be drawn at materials that Canadians would not *tolerate other Canadians* being exposed to. While the implications of adopting tolerance over offence as a standard were unclear then, subsequent interpretations of the term yielded results very different from those seen in the USA.

A. R v. Butler

While a clear shift away from a pure offence based standard, *Towne Cinema's* community tolerance test still required the "community" to determine the kinds of sexual depictions it would not tolerate other Canadians being exposed to. In practice, this could have very well taken the majoritarian route the American interpretation had, with jury members using their own personal convictions to define these abstract community standards of

[50] Moon, *supra* note 46.
[51] *E.g.,* Brodie v. The Queen [1962] SCR 681; Dominion News & Gifts Ltd. v. The Queen [1964] SCR 251.
[52] Towne Cinema Theatres Ltd. v. The Queen [1985] 1 SCR 494.

tolerance.[53] However, in its landmark decision in *R v. Butler*,[54] rendered in 1992, the Canadian Supreme Court revolutionized its approach to obscenity, observing that the fundamental purpose of the obscenity restriction on free speech was not to preserve the morality of the society, but instead to avoid *harm* that may accrue to members of society out of certain kinds of speech.

The court began with the "undue exploitation" standard, observing that previous decisions had not clearly established what it would constitute. It then imported two objective tests into it – the internal necessities test and the degradation or dehumanization test.[55] The former simply provided an "artistic defense" to harmful depictions of women. In applying the test, the courts would be empowered to determine whether a harmful depiction of women was necessary for the purposes of the work, and would only apply the obscenity ban to work that contained *"dirt for dirt's sake"*.[56] Centrality to a piece of art would continue to be a ground of absolute protection.

The *Butler* court's unique contribution is the degradation or dehumanization test. The court observed that the undue exploitation standard would require it to determine whether the depiction of women in pornography had the effect of "degrading or dehumanizing" them in reinforcing prevalent harmful narratives around their role in sexual relations. These would include depictions that painted women as sexual objects who enjoyed acts of painful domination/outright humiliation. The court observed that merely requiring consent between actors in pornographic films would not solve this problem since even consensual material could push the narrative that causes discomfort/pain to women, depicts them as a source of sexual pleasure for men and normalizes the practice of objectifying women – all this would have had a significant tangible harm for women.[57]

Butler relied heavily on Mackinnon's analysis of the harms of pornography to establish the pressing need for its ban.[58] Much like the application of her ideas to only violent kinds of porn in the Indianapolis Ordinance, the court made limited observation about the harms of

[53] Hunt, *supra* note 19.
[54] R v. Butler [1992] 1 SCR 452.
[55] Richard Jochelson and Kirsten Kramar, *Obscenity and Indeceny Law in Canada after R v. Labaye*, 36 CAN. J. SOC. 283, 290 (2011).
[56] *Supra* note 54 at 455.
[57] *Supra* note 54 at 460.
[58] Jochelson and Kramar, *supra* note 55 at 285.

degrading and dehumanizing pornography which showcased women in violent porn, and legitimized a sense of male entitlement over female bodies.[59]

Having established the degradation or dehumanization test and the harms it sought to avoid, the court was faced with two challenges – first was locating the test within the established community standards of tolerance and second, ensuring that the test proportionally restricted free speech.[60] On the former, the court held that depictions of women that met the degrading or dehumanizing test would always be deemed intolerable by Canadian society's standards. In essence, the court completely abolished any offence-based standard for obscenity, and replaced it with a purely harms-based standard instead.[61] In doing so, it emancipated the obscenity restriction from the hands of the majoritarian moral values that caused harm to different members of society. This replacement was subsequently concretised in *R v. Labaye*,[62] where the court held that community standards were wholly irrelevant in the determination of obscenity. Instead, it held that the degrading or dehumanizing harms-based test was the only *independent* test to be used.

The second task for the court was locating the standard within its proportionality test. This required the court to determine whether the infringement of the fundamental right to free speech and expression was *proportionate*. To do this, it divided pornography into three heads – (a) one with explicit sex with violence, (b) one with explicit sex without violence but which subjects people to degrading or dehumanizing treatment and (c) pornography with explicit sex without violence that is neither degrading nor dehumanizing. It then restricted the scope of the obscenity to the kind of pornography which would "always constitute undue exploitation of sex" under (a) and those that caused substantial harm mentioned in head (b).[63] In tailoring the restriction in this specific manner, the court was able to bring it within the "minimum interference" requirement of proportionality, since it interfered with the fundamental right to free speech only to the extent it was necessary to prevent the identified harms.[64]

B. The Aftermath of Butler

[59] *Supra* note 54 at 471.
[60] Jochelson and Kramar, *supra* note 55
[61] Jochelson and Kramar, *supra* note 55
[62] R v. Labaye [2005] 3 SCR 728.
[63] *Supra* note 54.
[64] *See generally* Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence* 57 U. TOR. L. J. 383 (2007).

Butler's deviation from the American offence-based standard was very polarizing. Within the feminist movement, concerns were raised by pro-pornography feminists, who argued that the decision would further push representations of female sexuality under the rug.[65] An example of such a concern was a possible restriction on the depiction of urolagnia – the use of urine as a sexual stimulant. In fact, banning such depictions would also have a chilling effect on depictions of female orgasms (often pictured through urination by women at the end of sexual intercourse which was considered "degrading" and "dehumanizing"), thereby reinforcing the male-pleasure centric nature of all pornography.[66] In addition, *Butler* also drew flak for restricting the terms of engagement on the role of women in sexual activity – the state would now control the manner in which women were to be displayed and curtail deviant depictions that it deemed "harmful".

In addition to these concerns, other sexual minorities also expressed reservations with *Butler,* especially since the material depicting homosexual acts accounting for a disproportionate 75% of all material charged.[67] These issues, however, are not a function of the law laid down in *Butler* and are merely examples of biases around the "violent" and "unnatural" nature of homosexual pornography impacting the way the new obscenity standard was applied. In fact, Justice Sopinka's opinion recognized the importance of creating a space for the expression of female sexuality and forms of sexuality that did not conform to the societal "norm" in pornography.[68]

The only test prescribed in *Butler* is that of harm – expressions of female sexuality that do not contain harmful depictions of other persons would not meet that threshold, whether they contain urolagnia or not. Consequently, blanket bans on depictions like urolagnia are merely a result of poor implementation, and have consequently not withstood further judicial scrutiny.[69] The second concern is also unfounded in law, since *Butler* ensured that the state could not interfere with the publication of any material that contained artistic merit. In any case, the court's decision was restricted to violent or particularly harmful forms of sexual depiction, a

[65] Justine Juson and Brenda Lillington, *R v. Butler: Recognising the Expressive Value and Harm in Pornography* 23 GOLD GATE U. L. REV. 651 (1993).
[66] Tristan Taormino *et al*, THE FEMINIST PORN BOOK 65 (2013).
[67] Jamie Cameron, *Abstract Principle v. Contextual Conceptions of Harm: Comment on Butler* 37 MCGILL L. J.1135, 1140 (1992).
[68] *Supra* note 54.
[69] Catharine Mackinnon, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 237 (1987).

standard that would not be met simply because an expression of sex was "deviant", even if it lacked artistic merit.[70] Illustratively, the display of fetishes of any kind, even in a purely pornographic film, would not be affected by the decision in *Butler*, unless they are of an especially violent nature.

V. THE INDIAN APPROACH

As has been observed on many occasions,[71] applying foreign constitutional rights standards across jurisdictions must always account for differences in impact owing to changed social and legal contexts. Thus, when attempting to apply an obscenity standard for pornography in India that is premised on the harms it causes to women, the Indian social and legal context must be clearly understood.

India faces an acute women's rights crisis.[72] Traditional norms and patriarchal values perpetuate strong gender stereotypes that significantly restrict women's choices and freedoms. These norms have normalized varying degrees of sexual violence directed at women across India, including its largest metropolises. While an estimated 37,000 rape cases were registered in India in 2015,[73] it has been suggested that the real number of such incidents is exponentially larger. This discrepancy exists due to barriers to reporting that operate on two levels – social and institutional.[74] The social barrier operates first, owing to a strong taboo that exists on matters of rape and sexual assault, and a culture of victim blaming that severely dissuades victims from seeking remedies in the law. In fact, a vast majority of Indian sexual violence victims face it at the hands of a close relative or neighbour, making the social barriers even more difficult to surmount.[75] However, even for those who manage to overcome them, the

[70] Cameron, *supra* note 67 at 1140.
[71] *See generally* Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law* 13 IND. J. GL. L. ST. 37, 67 (2006).
[72] For a comprehensive report on the state of womens' rights in India, judged against the touchstone of the UN Convention on the Elimination of all forms of Discrimination Against Women, *see* Madhu Mehra, *India's CEDAW Story* in WOMEN'S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW (Anne Hellum and H.S. Assen eds., 2013). *See also* Aruna Kashyap, 'Indian Women Have the Right to Life Without Fearing Sexual Assault' (Human Rights Watch, 5 May 2017) *available at* https://www.hrw.org/news/2017/05/05/indian-women-have-right-live-without-fearing-sexual-assault (Last accessed May 1 2018).
[73] National Crime Records Bureau, *Report on Crimes Against Women available at* http://ncrb.nic.in/StatPublications/CII/CII2015/chapters/Chapter%205-15.11.16. (Last accessed May 1 2018).
[74] *E.g.* Human Rights Watch, *"Everyone Blames Me"* (8 November 2017) *available at* https://www.hrw.org/report/2017/11/08/everyone-blames-me/barriers-justice-and-support-services-sexual-assault-survivors (Last accessed May 1, 2018).
[75] *Ibid.*

biases entrenched in the patriarchal society play out at the institutional level. For instance, authorities display great hesitance in registering FIRs or launching investigations into such matters.[76]

The law, however, has not been stagnant in this regard. Following the horrific Delhi Gang Rape Case in 2012, the Justice J.S. Verma Committee recommended changes to the Indian penal code to address institutional problems in cases of sexual assault.[77] Indeed, the amendments and the nation-wide outcry that followed the incident have marginally improved the extent to which women remain protected from sexual violence in India.[78] However, increased criminal sanctions have not attacked the root of the problem, which is a culture that has normalized sexual violence. Thus, with a society and a legal system already rigged against sexual assault victims (and indeed women in general), pornography that justifies violent sexual aggression against women simply exacerbates an already serious problem.

A. Mackinnon's Harms and the Vaswani Petition

It is in the context of the prevailing socio-economic situation in India that the Vaswani petition was presented. The petition assumes that the State's approach is limited to increasing sanctions for sexual violence, a tactic that is premised on the assumption that such a threat would deter individuals from committing such acts. Armed with evidence of the scope of the problem in India despite changes in the law,[79] it argues that higher penalties can only have a limited positive impact and that the long-term solution lies in changing the available imagery and narratives that drive individuals to commit such acts in the first place.[80]

In its analysis of pornography in this backdrop, the Vaswani petition may be compared to the harms of pornography that had been identified by Catharine Mackinnon. Specifically, its analysis mirrors the approach adopted by Mackinnon in her second and third harms, referred to previously. This is because her first harm – of individuals being coerced into the production of especially violent pornography, is of limited relevance in India where a strict bar exists on

[76] *Supra* note 72.
[77] Zoya Hasan, *Towards a gender-just society* (*The Hindu* 1 April 2013) *available at* http://www.thehinducentre.com/the-arena/article4569377.ece (Last accessed May 1 2018).
[78] *Ibid.*
[79] *Supra* note 1 at 28-32.
[80] *Supra* note 1 at 37.

the creation of any pornographic material.[81] Furthermore, as the Vaswani petition itself observes, a vast majority of the pornography consumed in India is produced in the United States and the EU, where such production is legal.[82] Despite an acknowledgement of the fact that many participants in pornography are not in a position to validly consent to the acts they perform on screen or are filmed without their consent, the Court fails to make this a ground to justify the reliefs it seeks.

Mackinnon's second harm, which is alluded to on multiple occasions in the petition, draws a direct link between instances of sexual violence directed at women and an "addiction" to pornography that has developed among Indian men. It does so by observing that "brutal" forms of pornography are widely available and publicized on the internet, and have a tendency to entice consumers to repeatedly consume them.[83] This brutal pornography comes in a variety of forms, ranging from outright non-consensual acts being performed on women to excessive physical injury and bodily harm being exacted on them during sexual intercourse. The petition argues that in allowing consumers to access such material freely, the state has permitted publication of the narrative that a woman's pain in such situations should be a source of a man's pleasure, which in turn results into a culture that normalizes sexual violence.[84] The petition further argues that making such material easily accessible to children and young adults is uniquely harmful, since their thoughts and perceptions in this regard get clouded at a young, impressionable age.

Mackinnon's last harm which states that pornography changes the perception of women in society, is also alluded to on multiple occasions. The petition observes that pornography has reduced women to objects upon whom acts of any nature may be performed to fulfill male sexual desire.[85] The constantly degrading depictions of women has the effect of reducing their dignity.[86] The petition then locates this harm in the context of everyday disadvantages women face, arguing that the constant presence of a narrative that reinforces their subservience in

[81] *See* Indian Penal Code 1860, § 293; Information Technology Act 2000, § 67 which make the creation of such content in India punishable as a crime.
[82] *Supra* note 1 at 32.
[83] *Supra* note 1 at 5.
[84] *Supra* note 1 at 50.
[85] *Supra* note 1 at 5.
[86] *Supra* note 1 at 33.

sexual matters would affect their status in society, along with creating unfair and unrealistic expectations for them in sexual relations.[87]

Much like Mackinnon's original work, the Vaswani petition's identification of harms is used to justify a blanket ban on all pornography. However, to arrive at a constitutionally reasonable restriction, the harms must be applied to the context of violent porn alone, as was done by the *Butler* court[88] and during the framing and passing of the Indianapolis ordinance.[89] In fact, in support of *Butler's* position on the more onerous nature of Mackinnon's harms when looked at from just a violent porn perspective, the Vaswani petition itself earmarks "brutal" porn as being primarily responsible for the second kind of harm, which is that of increased sexual violence.[90]

B. The Current Indian Position on Obscenity

The statutory basis for the offence of obscenity is borne out of § 294 of the Indian Penal Code. This definition reflects the English position on obscenity at the time of the *Hicklin* decision which has been as discussed earlier. In *Ranjit Udeshi v. State of Maharashtra*,[91] decided in 1965, Justice Hidayatullah (as he was then) held that D.H. Lawrence's book *Lady Chatterly's Lover* was obscene within the definition in the IPC, since it had material that would tend to corrupt or deprave those most vulnerable to such influences. In doing so, the court adopted the most repressive possible test of obscenity – the *Hicklin* test which required that the most vulnerable actor's reaction be used to censor speech.

Gradually, however, the standard was liberalized in India, with the most vulnerable actor test being changed into an 'average person test'.[92] The positive part of the test, however, remained the same – material would be tested on the basis of its tendency to deprave or corrupt individuals, with most of these terms remaining undefined. This was cleared up in the court's decision in *Aveek Sarkar v. State of West Bengal*.[93] Rendered in the context of a German

[87] *Supra* note 1 at 80.
[88] *Supra* note 54.
[89] Dworkin and Mackinnon, *supra* note 36.
[90] *Supra* note 1 at 79.
[91] Ranjit Udeshi v. State of *Maharashtra* AIR 1965 SC 881.
[92] *See* DG Doordarshan v. Anand Patwardhan (2006) 8 SCC 433 where the court explicitly used the average person test to determine whether the impugned content in that case was obscene.
[93] Aveek Sarkar v. State of West Bengal (2014) 4 SCC 257.

magazine with a picture of a famous male tennis player posing nude with a woman while covering her breasts with his arm being challenged as "obscene", the court abandoned the *Hicklin* test, aligning the Indian position with that in the USA by adopting the American *Roth* test, of testing obscene material against community standard. This brought the concept of "contemporary community standards" into Indian jurisprudence, requiring the courts to determine whether the effect of any material, taken on the whole, was to *offend* the contemporary community standards on sexual depiction.[94]

A necessary consequence of the community standards test was putting courts in a position to determine the standards of obscenity on case-by-case basis. In the United States, as noted earlier, this discretion given to the court took on a majoritarian colour. In India too this test left it to the discretion of the court. In effect, this has resulted in an imposition of its own right whereby the "community standards" were evolved through case laws with judges applying their own conceptions to different fact situations before them.[95] Given the severe lack of diversity in India's higher judiciary,[96] these judges were more likely to be male and thereby conform to a societal norm that doesn't necessarily view all harmful depictions of women as "offensive" – a criticism Mackinnon also relies on in explaining the hesitance for Courts in the US to view harmful depictions of women in pornography as offensive.[97] This predisposition was made most clear by the Delhi High Court's decision in *Vinay Mohan Sharma v. Delhi Administration,*[98] where it observed that obscenity convictions were moulded by the degree of offence caused by any material to the sensibilities of an "average member of society" only, and not the unique impact of such a depiction on any one section alone.

This singular focus towards preventing offence alone is also borne out of the provisions of the Indecent Representation of Women (Prohibition) Act, 1986. § 2(c) of the Act defines an "indecent representation" both as one that is derogatory/denigrating to women *and* one that

---

[94] Gautam Bhatia, *Obscenity: The Supreme Court discards the Hicklin Test* INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG, 7 February 2014 *available at* https://indconlawphil.wordpress.com/2014/02/07/obscenity-the-supreme-court-discards-the-hicklin-test/ (Last accessed May 12018).

[95] Japreet Grewal, *Perumal Murugan and the Law on Obscenity*, CENTRE FOR INTERNET AND SOCIETY BLOG 21 July 2016 *available at* https://cis-india.org/internet-governance/perumal-murugan-and-the-law-on-obscenity (Last accessed May 1 2018).

[96] Aditya AK, *Through the Glass Ceiling: Woman Judges (or lack thereof) in the Higher Judiciary* BAR AND BENCH 4 November, 2017 *available at* https://barandbench.com/woman-judges-higher-judiciary/ (Last accessed on May 1, 2018).

[97] Dworkin and Mackinnon, *supra* note 36.

[98] Vinay Mohan Sharma v. Delhi Administration 2008 CriLJ 1672.

deprives, corrupts or injures public morals. The language, therefore, seems to include both an objective harms approach and a subjective offence to public morals approach. However, in practice, harm to public morals is often not used to try and justify restriction on content under the statute, reinforcing the state's singular focus on protecting community standards instead of preventing harm to its female citizens.[99]

C. Adopting a Harms-Based Approach in India

As demonstrated above, India's American-style offense approach to obscenity has lacked the ability to deal with harms accruing to women. However, Indian courts have not been oblivious to such harms. Illustratively, in *Bobby Art International v. Om Pal Singh*,[100] the court observed that a scene depicting men stripping a woman and humiliating her for pleasure caused harm to women as a class, but did not interfere with it owing to its centrality to a wider story in the film that condemned such practices.

A move towards a harms-based approach would most fundamentally require an acknowledgement of the Vaswani petition's harms. The closest the Supreme Court has come to this has been in its decision in *Ajay Goswami v. Union of India*.[101] Here, the court was faced with a prayer for a restriction on the manner in which women were depicted in newspapers, since such depictions would corrupt the minds of children who have easy access to them. The court acknowledged that sustained exposure to such imagery could negatively impact the perception of women among such children, but ultimately held that the harm was too remote to justify a restriction under Art. 19(2).

Unlike *Ajay Goswami's* approach, any justification for action to prevent these harms would require that they be elevated to the status of a fundamental rights violation. Thus, a reading of the harms contained in it as amounting to a violation of Art. 21 rights would empower the Court to take necessary steps to prevent the harm. This is especially true in the context of the wide powers the Supreme Court has arrogated to itself on many occasions to

---

[99] *See* Monika Gulati and S. M. Begum, *Advertisement and Dignity of Women in India: A Study of Indian Print Advertisement Laws,* 5(4) JOURNAL OF BUSINESS THEORY AND PRACTICE 315, 317-320, describing the manner in which offensive depictions of women alone have been clamped down on under the Indecent Representation of Women (Prohibition) Act, 1986; Jogendra Das, *Reflections on Human Rights and the Position of Indian Women,* 64(3) INDIAN JOURNAL OF POLITICAL SCIENCE 203, 210 (2003).
[100] Bobby Art International v. Om Pal Singh AIR 1996 SC 1846.
[101] Ajay Goswami v. Union of India AIR 2007 SC 493.

cure perceived violations of fundamental rights.[102] A relevant example is that of *Vishakha v. State of Rajasthan*,[103] where the court acknowledged that any sexual harassment or violence meted out to women was a violation of their rights under Art. 21 of the Constitution and actively laid down guidelines to be followed at the workplace to prevent that harm.

In the present context, a reading of § 294 of the IPC to tackle the identified harms would suffice. In particular, the words "deprive and corrupt an individual" contained in it may be read to mean any negative shift in the perception of women and the normalization of sexual violence, instead of the current reading of the phrase which deems an individual to be "depraved or corrupted" if (s)he is exposed to an offensive sexual depiction. In this fashion, the court could read the objective harms test from *Butler* into the IPC, and abandon the current offense-based standard in the process.[104]

As a restriction on free speech rights contained in Art. 19(1)(a), this new standard would have to conform with the grounds contained in Art. 19(2). On the face of it, it would seem that this standard clearly falls within the exception to free speech on the grounds of decency and morality provided in Art. 19(2), given that the proposed interpretation involves reading §294 of the IPC in a way that addresses harms instead of the offence caused. Indeed, from *Ranjit Udeshi* onwards, the court has utilized this part of Art. 19(2) to justify the IPC's obscenity restriction, reading decency and morality in conjunction with one another. However, in *Ramesh Prabhoo v. Prabhakar Kashinath Kunte*,[105] the court re-shaped the meaning of decency in Art. 19(2), holding that it would extend to all kinds of "decent" conduct as envisioned under the constitution. This means that the decency restriction is not limited to the term morality used after it in Art. 19(2), but can independently account for restrictions on speech that do not meet general constitutional goals. If violent pornography is identified to be a violation of Art. 21 rights in the manner described above, this reading of "decency" would bring a *Butler* type restriction that bars only a certain class of especially harmful pornography within the scope of Art. 19(2).

[102] *See generally* Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court* 8 WASH. U. GL. ST. L. REV. 1(2009).
[103] Vishakha v. State of Rajasthan AIR 1997 SC 3011.
[104] *Supra* note 54 at 465.
[105] Ramesh Prabhoo v. Prabhakar Kashinath Kunte, AIR 1996 SC 1113.

However, in addition to falling within the grounds contained in Art. 19(2), the restriction itself must pass the test of reasonability. In its 1952 decision in *State of Madras v. V.G. Row,*[106] the court held that the nature of the right infringed, the extent and urgency of the evil sought to be remedied and the prevailing conditions at the time would have to be considered in evaluating the validity of a restriction on a fundamental right. While there are, indeed, examples of this test simply being ignored in the evaluation of a restriction,[107] it has generally been the yardstick against which restrictions are tested. Illustratively, Justice Shetty in *S. Rangarajan v. P. Jagjivan Ram*,[108] held that a restriction under Art. 19(2) would be reasonable as long as it (a) clearly delineated the kinds of speech being restricted and (b) was made to prevent a real harm that had a proximate nexus with such speech

The first of these requirements would be met by applying the *Butler* court's three-pronged classification of pornography (explicit sex with violence, explicit sex without violence but which subjects people to degrading or dehumanizing treatment and explicit sex without violence that is neither degrading nor dehumanizing) and the limitation of its ban to the first and the second kind, in some instances.[109] In clearly identifying the categories of pornography that are banned, the restriction would meet Art. 19(2)'s specificity requirement, much like the manner in which it was held to have met the Canadian constitutional requirement of proportionality and minimal interference.

The second requirement would require an acknowledgement of a nexus between the above-mentioned Art. 21 harms and violent pornography. In the USA, the *Hudnut* court refused to draw this link, relying on the lack of conclusive evidence of any relationship between the consumption of violent porn and the commission of acts of sexual violence.[110] In India, drawing such a link along the lines of the *Butler* court's approach would not be entirely without precedent. In *Reepik Ravinder* v. *State of Andhra Pradesh*,[111] the High Court of Andhra Pradesh held that continued exposure to violent pornography was partially responsible for the defendant's proclivity to commit acts of rape. While it wrongly used this to justify a lower

[106] State of Madras v. V.G. Row AIR 1952 SC 196
[107] *See* Society for Un-Aided Private Schools v. Union of India, (2012) 6 SCC 1, where the court's pre-occupation with the desirability of imposing a requirement for private schools to allot 25% of their seats to children from under-privileged backgrounds resulted in them simply ignoring the need to justify this restriction on the freedom of trade and commerce in Art. 19(1)(g) as being proportionate under Art. 19(6).
[108] S Rangarajan v. P Jagjivan Ram (1989) 2 SCC 574.
[109] *Supra* note 54.
[110] *Supra* note 46.
[111] Reepik Ravinder v. State of Andhra Pradesh 1991 CriLJ 595.

sentence for the crime, its underlying logic affirms Mackinnon's ideas of a link between violent porn and sexual violence. Since such pornography would now result in a clear violation of Art. 21 rights of female Indian citizens, the court would be in a position to borrow from this analysis and mirror *Butler*'s approach in allowing it to justify a harms-based restriction on violent pornography under Art. 19(2). In doing so, however, it must take care not to repeat *Reepik Ravinder's* mistake of equating a factor influencing the commission of a crime with a ground that justifies reducing the extent of culpability accorded to the perpetrator of such a crime.[112]

Outside the strict legal bounds of the test, the court in *V.G. Row* observed that the surrounding circumstances in which such a restriction is proposed must be taken into account when assessing its validity. In that light, the context laid out above describing women's rights crisis in India with growing instances of sexual violence would lead to the conclusion that *Butler's* restriction is a reasonable way of attacking the problem. Whether the court has the power to use the *Vaswani* petition in its current form (as a Public Interest Litigation) to change the reading of a statutory provision is unclear[113] (although the decision in *Vishakha* was borne out of a PIL). Thus, the argument made in this context takes a more general approach to justifying a different reading of § 294 of the IPC to serve the interests of India's female population. Through the proceedings in *Kamlesh Vaswani* or otherwise, such a re-shaping of the word "obscenity" under the IPC is the only way to tackle the harms highlighted in the petition within the Indian constitution.

VI. CONCLUSION

Owing to its unique origin, the obscenity restriction on free speech stands alone in protecting citizens from "offensive" speech, without accounting for any harms that such speech may cause. In contemporary times, subjective application of the evolving standards of obscenity have resulted in restrictions that have taken on a dangerous majoritarian colour, excluding the harms caused by such speech from its decision-making calculus.

---

[112] Geetanjali Misra and Radhika Chandiramani, SEXUALITY, GENDER AND RIGHTS: EXPLORING THEORY AND PRACTICE IN SOUTH AND SOUTH-EAST ASIA 37 (2005).

[113] *See generally* Avantika Mehta Sood, *Gender Justice in India: Case Studies from India,* 41 VANDERBILT J. TRANSNAT. L. 832 (2008) for a detailed explanation of the manner in which the court has limited its power to some extent when dealing with the interpretation of a statute in a Public Interest Litigation.

In this paper, the author has located this harm in the depiction of women in pornography of an especially violent nature. In doing so, a comparative approach was used by looking at the way free speech rights under the American and Canadian Constitutions have been moulded to account for the harms of violent pornography. It was found that the American approach, which focuses on the offence caused by expressive content and not its impact, protects most forms of violent, harmful pornography. On the other hand, the Canadian approach evaluates the harms of expressive content and not the degree of offense it causes, adopts a more reasonable approach in banning extreme versions of harmful, violent pornography. Upon comparing the position in India with these jurisdictions, it was found that the current position in India is closer to the American offense approach.

It is in this context that the Vaswani petition was discussed. While riddled with moral outrage and broad, unconstitutional proposals, the petition highlights a significant concern with the increased proliferation of and easy access to violent pornography in India. This paper built from that base, highlighting the similarities in the Indian and American approaches to obscenity, which enables us to draw parallels between the harms identified by the Vaswani petition and those raised by Catharine Mackinnon. It therefore suggests that based on observations made in the American context, the Indian courts should shift to a Canadian-style harms approach in order to ensure that violent forms of pornography are banned in India without causing chilling effect to other forms of pornographic content.

Despite being an obvious deviation from the norm of harm-based restrictions on fundamental rights prescribed in the law, the obscenity restriction's deviance has no cogent justification. Thus, the Vaswani petition can form the starting point for a shift towards the Canadian approach, that focusses on the harm caused by pornography instead of the offence caused. Relying on Art. 19(2) of the Constitution and its subsequent interpretation by Indian Courts, this paper has presented a way for this shift to be effectuated in the Indian context. However, while the Vaswani petition forms a good starting point for this shift, it is alone incapable of causing any change. Thus, a petition that relies on the Vaswani petition's identified harms, does away with its use of moral outrage and broad prayers and incorporates a specific prayer for the adoption of a harms-based restriction on only certain kinds of pornography (as provided for in *Butler*) must be presented before the Indian courts. Indeed, this is the only way to strike the delicate balance between free speech and women's rights that pornography requires within the confines of Art. 19(2) of the Constitution.