

BROWSING PORNOGRAPHIC MATERIAL OVER INTERNET- A LEGAL AND CONSTITUTIONAL PERSPECTIVE

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Introduction:

Recently, an important debate has unleashed in the legal arena and has created uproar in the society. The debate is pertaining to

the 'complete ban on pornographic material which is available over Internet.' This debate is otherwise a cause, rather, a constitutional matter to be determined by the apex court. In 2013, a Public Interest Litigation was filed in the Supreme Court of India seeking a complete ban on websites by Advocate Kamlesh Vaswani.

Basically, the Writ Petition of 2013, *Kamlesh Vaswani vs. Union of India*², was filed seeking direction of the Court to direct Central Government:

- to implement Section 67 of Information Technology Act, 2000 in its true spirit
- to make browsing, viewing or watching as non-bailable offence
- to block pornographic content over Internet

In a free and a democratic country like India³, which is based on a constitutional democracy, no individual in India can be coerced or forced, as to what lifestyle or what mode or way of life one should follow or live. Several freedoms and rights of individuals have been secured. All these

rights are very much secured in the Part-III of the Constitution of India⁴. A State, as has been held in multiple cases and in various contexts, is under a legal obligation, positive as well as negative, not to encroach upon or intervene in, any one's freedom, as mentioned above. "Right to access information" or "Right to receive knowledge or information", no doubt, a part of personal liberty and has been secured under Article 21 of the Constitution of India, in its extended philosophy "right to life" and "right to personal liberty"⁵ This of course is subject to some restrictions to be imposed under or on the basis of Article 19 (2) and by virtue of a legislative power given to the state in the form of expression "procedure established by law" under Article 21 of the Constitution of India.

This article aims at to address the legality of act of 'browsing pornographic material available over Internet' from the perspective of:

- The pending Writ Petition of Kamlesh Vaswani vs. Union of India⁶
- Some Fundamental Rights in the Constitution of India and
- Pornography related provisions in the Information Technology Act, 2000⁷

Browsing Pornography Over Internet: Legal or Illegal ?

This is the question to be answered directly as a part of this paper and is relevant enough address the main concern of this paper. The act of "browsing" is refers in the common parlance to visit a particular location. In the context of Information Technology or the cyber world it does mean '*an act to access or visit any web location with the help of web browser.*'⁸ There are many web browsers aiding a User to visit destined website or web location, such as 'Chrome', 'Safari', 'Bingo' etc. It is not necessary that a User or Visitor of particular web location, is the uploader of or is responsible for making available such content. That's the task to be performed either by the host of a website or a web

portal or a User who, on subscription, may post or upload or make available something. For example, 'YouTube' being the host⁹ and person hosting a channel on a YouTube is the one who make available any video material (file) to be viewed by people.

In order to answer the question posed above, the author of this work would like ascertain first, *whether browsing any (legal) material over Internet is a matter of right?* If it is so, then next question to be answered is, *whether it is a matter of Fundamental Right under Chapter III of the Constitution of India?* And lastly, *whether browsing illegal content, pornographic material in the present case, is illegal?*

Before that it is pertinent to examine, what provisions are laid down in Information Technology Act, 2000, being the only direct legislation dealing with 'pornographic material in cyberspace,' regarding pornography¹⁰ offences.

Obscenity or Pornography Related Provisions in the Information Technology Act, 2000:

The Code of obscenity in Information Technology Act, is divided into following arrangement:

Publishing or transmitting any obscene *material* in electronic form;¹¹

Publishing or transmitting material containing sexually explicit act, etc. in electronic form¹²

Publishing or transmitting of material depicting children in sexually explicit act, etc in electronic form¹³

It is important to note here that none of these provisions, except Section 67B of the Information Technology Act, 2000/2008¹⁴ has made "browsing pornography over Internet" as offence. So, apparently it is not an offence in I.T. Act, to browse the pornography over Internet, except the case of:

child pornography as given in Section 67B and

the act of transmission, or publication of the pornographic material.

Let's now examine the constitutional perspective of the act of browsing such contents over Internet, as the 'right to access internet' is no doubt, be covered in 'freedom of speech & expression' in Article 19 (1) (a) and at the same time the State is also empowered to put reasonable restrictions under Article 19 (2) on the grounds of "public order", "morality", "decency" etc.

Right to Access Internet, Right to Privacy and Right to Receive Information, Knowledge & Idea:

The Constitution of India, 1950, on the equal footings of the Universal Declaration of Human Rights, 1948¹⁵, has adopted, recognised and guaranteed the fundamental human rights under the head of "Fundamental Rights" secured in Chapter-III. These are inalienable, inherent and there is negative and at times positive obligation on the part of State, to not to interfere in the enjoyment of the same or to take positive efforts for the better enjoyment of the same by the individuals and the citizens in India. Also, in *Maneka Gandhi vs. Union of India*¹⁶ the Supreme Court observed, not just in the sense of securing or protecting it by the State but also "to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction, by the judiciary." The Supreme Court of India is the guardian of Indian Constitution in general and Fundamental Rights in particular.¹⁷ Of these Fundamental Rights, the rights with which the paper concerns with, are:

Right to Receive Information & Knowledge¹⁸

Right to Privacy and Right to Personal liberty of a Person¹⁹

Right to Access Internet

These rights are related or closely connected to the main concern of this paper, being the 'act of browsing pornography', which are ought to be assessed in order to come to the conclusion.

1. Right to Receive Information Vis-a-Vis Right to Watch Pornographic or Obscene Material:

Right to receive information & idea, right to communicate the information & idea and right to disseminate the information & idea, no doubt, are part of Article 19 of the Constitution, without which the genus of the rights i.e. "Right to Freedom of Speech and Expression" cannot be enjoyed in its true spirit. The freedom of speech includes the right to propagate one's views through print media or through any other communication channel, e.g. Radio, Television and Internet. The right to impart and receive information & idea is a species of freedom of speech, as is held in *Secretary, Ministry of Information and Broadcasting, Govt. of India vs. Cricket Association of Bengal*.²⁰ Like that of genus i.e. "Right to Freedom of Speech and Expression" under Article 19 (1) (a), this right too is subject to reasonable restrictions under Article 19 (2), on the grounds mentioned therein. Under Article 19 (2), a State may make a law imposing 'reasonable restriction' on the exercise of freedom of speech and expression 'in the interest of the security of the state', 'friendly relations with foreign states', 'public order', 'decency', 'morality', 'sovereignty', and 'integrity of India' or 'in relation to the contempt of Court', 'defamation' or 'incitement to an offence.' Taking into consideration the grounds that are mentioned in Article 19 (2) it appears that the 'national interest' and the 'societal interest' is secured. Information Technology Act, 2000 in general is enacted by the Parliament so as to give enforcement to Article 19 (2), so as to regulate the internet and the activities various type of Users, over the Internet.²¹ Especially, the grounds that are mentioned in Article 19 (2) are closely related to the *subject matter* of sought to be regulated by Section 67, 67A and 67B of the Information Technology Act, 2000. Hence, there is proximity between these provisions and Article 19 (2). So, as the case with respect to Section 292 of the Indian Penal Code. "Morality" and "Decency" are the grounds from Article 19 (2), on these provisions are based.²²

Now question comes, "watching porn" from what sources? Obscene material generated by person for his or her private circulation? or Downloaded pornographic or obscene material from Internet? Or Material purchased from the market in the form of CD or DVD? Or obscene or pornographic material received from an individual? For answering all these questions, one needs to see whether these activities are prohibited by law in Information Technology Act, 2000. Then only one can ascertained of the legality of above mentioned acts or existence of any such "right to watch porn" in his or her privacy.

right of an individual to watch or receive knowledge or information any material which may be obscene or pornographic one, is secured by Article 19 (1) of the Constitution? Only on an analysis of relevant provisions of the Information Technology Act, 2000, one can be ascertained of the fact that whether such right is recognisable in Article 19 (1) or not and whether such act of an individual is covered within the meaning of 'reasonable restriction' under Article 19 (2) and the relevant provisions of the Information Technology Act, 2000. It is also important to note here that although '*right to receive*' knowledge or information in the nature of porn or obscene material could have been covered within the philosophy of Article 19 (1) (a) but certainly not the '*right to disseminate*', the pornographic or obscene material has been included, that being an offence both under the Indian Penal Code and the Information Technology Act, 2000.

2. Right to Privacy and Right to Personal liberty of a Person:

This is the second type of fundamental right which could be discussed in this regard, the right of privacy, as recognised under Article 21 of the Constitution of India. Article 21 again like Article 19 (1) (a), is not to be construed in its literal sense and is thereby comprised of number of rights as has been declared by the higher judiciary from time to time in number of cases. The expression “right to life and personal liberty” also includes “right to privacy” as well, as has been declared and observed by the Supreme Court of India in *Kharak Singh v. State of U.P. and Others*²³ and then in *Govind v. State of Madhya Pradesh*²⁴.

There should not be any problem, legal as well as Constitutional in recognising the right of an individual to access or to watch porn in his or her privacy, by an individual in his or her privacy, as long as the act is not being viewed in public or in the presence of members of the public. Although the right as such is not included in Article 21 nor is read (interpreted) in the same, the Supreme Court of India, as mentioned above, in *Kamlesh Vaswani vs. Union of India*²⁵ has clarified that the State cannot restrain an individual from watching or accessing porn in his or her privacy. Again in this context, one must also check and identify whether Information Technology Act, 2000 or obscenity or pornography related provisions in the same, prohibits a person from accessing or watching porn in his or her privacy? This can only be ascertained after a detailed understanding of the obscenity or pornography related provisions in the Information Technology Act, 2000.

3. Right to Internet and Right to Access Internet vis-a-vis the Right of A Person To Watch Pornographic or Obscene Material:

The human rights recognised in the international and national instruments are evolving and with the pace of change in time, technology, society, culture, education, professions, commerce and governance, new rights are forming up. International Bill of Rights²⁶, has been formed and the instruments have been framed in such manner that it provides for the scope of recognition of new type of rights. In the context, there are couple of rights which could be discussed. One, “right to internet” and the second one, “right to access internet”. It is noteworthy to mention here that these two rights are different in the sense of the term that the former one directly deals with State making provision for citizens or individuals to use internet as a matter of right, like ‘right to water’, ‘right to shelter’, ‘right to electricity’ and ‘right to livelihood, subject to the taxes to be levied by the State. The latter form of right is no doubt, a part and parcel of freedom of speech and expression, as that concerns with exercise of freedom of speech and expression through or with the assistance of *medium* of internet. It is a means to achieve other Fundamental Rights. Even international conventions, by and large, upon their strict interpretation, accept that right to access internet as a fundamental right. Universal Declaration of Human Rights²⁷ declares:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media, and regardless of frontiers.”²⁸

In a similar way, International Covenant on Civil and Political Rights, 1966²⁹ and also European Convention for the Protection of Human Rights and Fundamental Freedoms³⁰ declared so.

It does not necessarily mean, State guarantees the right. It is also not necessary mean that State is the only provider of access to the Internet. There are private players namely, Internet Service Providers³¹ who on a paid subscription provides telecom cum internet services³². The State comes into

the arena only in the sense of regulating the ISPs and this function is given to the The Telecom Regulatory Authority of India (TRAI)³³. Nevertheless, State cannot restrain or restrict any citizen from exercising the or having “access to internet”, unless State is exercising its legislative or executive action so as to give enforcement to Article 19 (2) of the Constitution of India.

In the developing country like India, it is not affordable to have provide “right to internet” as fundamental right considering:

- the internet related infrastructure;
- lack of control over Internet; and
- economic and financial capacity

Some countries have made some efforts in providing right to internet as fundamental right, such as Finland³⁴ which has become the first country in the world to make broadband a legal right for every citizen.

A Glance At Kamlesh Vaswani Vs. Union of India³⁵:

The current writ petition as mentioned above, in addition to seeking complete ban, has also questioned the efficacy of law and the ability (inaction) on the part of Central Government to ban such websites. Thousands of such websites are there, making available such pornographic websites, worldwide. Such websites, in fact the Internet and the whole gamut of cyberspace, defies the territorial jurisdictions. It has no boundaries of its own. Websites which are registered elsewhere, are accessible from any corner of the world, including the territory of India. So, what websites Government should ban? Those registered in India or those accessible in India? or those having close connection with the territory of India or those whose server is located in India? No doubt, that the Information Technology Act, 2000 is having extra-territorial application, but does the Indian Government or Lawmaker has the jurisdiction to ban such websites. Even for the purpose of prosecution before Indian Courts, of persons operating such websites, the question of jurisdiction, is in self a contentious and a global concern in the context of cyber crime law. In addition to Section 67, Section 67A and Section 67B of the Information Technology Act, 2000, one must also refer to the Section 69B.

It is in the context of this case only; the hon’ble Supreme Court of India has clarified the point that the State cannot stop citizens from watching porn in his or privacy, declining to the State to ban online pornography. Defying that, the State blocked around 857 websites showing pornography.³⁶

Conclusion:

On a close examination of certain Fundamental Rights, concerning the central question of the article, a look at the provisions of the IT Act dealing with obscenity and the observation made by the apex court in a pending cause before them, it becomes clear that the act of *browsing* per se, of pornographic material available over Internet is not an offence and that way is not illegal. This is of course subject to, a) that the act of browsing is not regarding the child pornographic material and b) that it is not amounting to “transmission” or “publication” of obscene or pornographic material including child pornography related material. The writ petition and the concern of writ petition in question, is the future course of law and the Supreme Court of India has to clarify that.

(Endnotes)

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- 2 (Writ Petition (C) No. 177 of 2013)
- 3 Preamble to the Constitution of India, 1950
- 4 Mostly under Article 19 & 21 of the Constitution of India
- 5 Francis Coralie v. Union Territory of Delhi 1981 (AIR 746, 1981 SCR (2) 516)
- 6 (Writ Petition (C) No. 177 of 2013)
- 7 As amended by the Information Technology (Amendment) Act, 2008
- 8 <http://www.dictionary.com/browse/browsing?s=t> [Last accessed on July 30, 2017, at 6:41 pm]
- 9 Intermediary as per Section 2 (w) of the Information Technology Act, 2000
- 10 There has been no distinction laid down in Information Technology Act, 2000 between “pornography” & “obscenity”. In fact expression “obscenity” is used in the same, instead of “pornography”. But for all practical purposes, these two expressions are same in the context of the Information Technology Act, 2000.
- 11 Section 67
- 12 Section 67A
- 13 Section 67B
- 14 Hereinafter read as ‘IT Act’
- 15 Part of International Bill of Rights, along with International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966
- 16 AIR 1978 SC 597
- 17 Keshavananda Bharati vs. State of Kerala AIR 1973 SC 771
- 18 Secretary, Ministry of Information and Broadcasting, Govt. of India vs. Cricket Association of Bengal AIR 1995 SC 1236
- 19 Govind vs. State of MP (AIR 1975 SC 1378)
- 20 AIR 1995 SC 1236
- 21 Shreya Singhal vs. Union of India (AIR 2015 SC 1523)
- 22 Ranjit Udeshi vs. State of Maharashtra AIR 1965 SC 881
- 23 AIR 1963 SC 1295.
- 24 AIR 1975 SC 1378.
- 25 (Writ Petition (C) No. 177 of 2013)
- 26 Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966
- 27 Article 19
- 28 <http://www.un.org/en/universal-declaration-human-rights/> [Last accessed on July, 17, 2017, 11:26 am]
- 29 Article 19
- 30 Article 10
- 31 ISPs
- 32 For detailed information: <http://www.ispai.in/UI/index.php> [Last accessed on, July 17, 2017, 11:12 am]
- 33 For detailed information: <http://www.trai.gov.in/> [Last accessed on, July 17, 2017, 11:10 am]
- 34 BBC News, *Finland makes broadband a ‘legal right’*, <http://www.bbc.com/news/10461048> [Last accessed on, July 17, 2017, 11:15 am]
- 35 (Writ Petition (C) No. 177 of 2013)
- 36 The New York Times, *India Blocks 857 Pornography Websites, Defying Supreme Court Decision*, https://www.nytimes.com/2015/08/04/world/asia/india-orders-blocking-of-857-pornography-websites-targeted-by-activist.html?_r=2 [Last accessed on July 17, 2017, 12:28 pm]