Pryanishnikov v Russia (App. No.25047/05), judgment of 10 September 2019 – Setting the foundations for human rights discourse on pornography.

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Abstract

Pryanishnikov v Russia represents the first occasion on which anyone within the European Court of Human Rights has addressed the matter of gender equality and (extreme) pornography to any degree of significance. This case analysis explores Judge Pinto's lengthy Concurring Opinion thereon, which aimed to set down principled guidelines for the Court's approach to pornography proscription on the basis of women's rights interests. This analysis focusses on two arguments made within the Opinion: namely, that the Court's current, "permissive" approach to pornography conflicts with international norms, and that member states have a positive obligation to prohibit "extreme" pornography. It finds that these conclusions are overstated. By breaking down and rebuilding the Opinion's precepts, this analysis seeks to provide the groundwork upon which a more robust, human-rights based discussion of the impact of (extreme) pornography, and regulatory responses thereto, can take place.

Introduction

At first glance, *Pryanishnikov v Russia*[1] does not appear to warrant much note. The majority of the third section found that withholding a film reproduction licence, without providing sufficient reason, had violated the applicant's right to freedom of expression under Article 10 of the European Convention on Human Rights ("ECHR"). A brief allusion to the fact that the domestic courts had not taken into account the impact that withholding a reproduction licence would have upon the applicant, and that the interference was disproportionate, does not provide many revelations about the Court's approach to pornography regulation.

Yet the case, and in particular, the Concurring Opinion of Judge Pinto, may prove highly significant to actors on both the national and international stage, who are considering, with renewed vigour, responses to pornography in the name of gender equality. First, by reconceptualising anti-pornography arguments not as a matter of moral conservatism, but for the purpose of protecting women's rights interests, Judge Pinto provides a *prima facie* stronger human rights basis for justifying pornography regulation. While similar arguments - most notably expressed during the height of the feminist "sex wars" in the 70s and 80s - are again gaining popularity,[2] the Court has not yet fully engaged with them.

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[1] *Pryanishnikov v Russia* (App. No.25047/05), judgment of 10 September 2019.

[2] See e.g. B. Cossman, '#MeToo, sex wars 2.0 and the power of law' (2018) 3 Asian Yearbook of Human Rights and Humanitarian law 18.

Secondly, the Concurring Opinion represents the first time that so-called "extreme" pornography,[3] and regulation thereof, has been explicitly addressed at any level within the European Court of Human Rights. A decade after England and Wales[4] controversially criminalised "extreme" pornography possession, any indication from Strasbourg on the human rights implications thereof should be noted with interest.

Accordingly, this case analysis explores the Concurring Opinion, focussing on two of its core claims: that the Court's "permissive" approach to pornography is out of step with the international consensus, and that member states have a positive obligation to prohibit "extreme" pornography. It concludes that both claims are overstated, and warns against strains of conceptual conflation, generalisation and moral conservatism, which risk entering debates on pornography regulation, even when set ostensibly within a human rights framework.

While this short analysis does not presume to answer the question of how the Court should respond to member states' regulation of pornography, it clarifies the current context and provides some foundations upon which the debate may more constructively take place.

Case facts and judgment

Sergey Viktorovich Pryanishnikov is a Russian film producer, who owns the copyright to over 15,000 "erotic films".[5] At the time in question, film copyright holders had to abide by a two-pronged process in order to reproduce films for sale: by film registration and issue of a distribution certificate,[6] and by applying for and obtaining a reproduction licence.[7] Film registration could be refused if, *inter alia*, it promoted pornography,[8] while a reproduction licence could be refused if the application had contained untrue or misrepresented information, or if the applicant or material in question did not meet the requirements and conditions for licencing. Russia's Criminal Code made it an offence to illegally produce or sell pornographic materials or objects.[9]

In 2003, Mr. Pryanishnikov applied for a reproduction licence. It was refused, thereby disabling him from distributing his films. The decision was upheld by the domestic courts.

In response to Mr. Pryanishnikov's application to the Court, the government argued that the domestic courts had found that he had distributed pornographic films. The interference followed the legitimate aims of protecting the rights and morals of others (particularly children).[10] It had been also necessary to prevent the circulation of ideas which interfered with respect for Article 9 ECHR rights of freedom of thought, conscience and religion of others.[11] The government further provided justification for its regulatory system, which makes it illegal

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[3] Defined by section 63 Criminal Justice and Immigration Act 2008 as a pornographic image (i.e. one that is reasonably assumed to have been produced for the purpose of sexual arousal) which, *inter alia*, portrays, in an explicit and realistic way: an act which threatens a person's life; an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals; bestiality; necrophilia; or rape or penetrative sexual assault. Judge Pinto provides a similar definition, fn. 1, Concurring Opinion of Judge Pinto de Albuquerque, para 30.

[4] Similar provisions exist under the Criminal Justice and Immigration Act 2008 for Northern Ireland and the Criminal Justice and Licensing (Scotland) Act 2010 for Scotland.

[5] Fn.1, para 3.

[6] Government Decree no. 396 of 28 April 1993 on the Registration of Films and Control of their Public Distribution.

[7] Section 17(86) of Law no. 128-FZ of 8 August 2001 on the Licensing of Certain Activities.

[8] Order no. 112 of 15 March 2005.

[9] Article 242 Criminal Code of the Russian Federation.

[10] Relying on *Hoare v United Kingdom* (2011) E.H.R.R. SE1.

[11] Relying on *Otto-Preminger Institute v Austria* (1995) 19 E.H.R.R. 34.

to distribute or sell pornography to any persons. It relied on two international instruments to support its strict regulatory system: the 1923 Convention for the Suppression of the Circulation of and Traffic in Obscene Publications ("1923 Convention")[12] and the Committee of Ministers of the Council of Europe Recommendation concerning Principles on the distribution of videograms having a violent, brutal or pornographic content ("The Committee of Ministers Recommendation").[13] It interpreted the latter as requiring a complete ban on pornography distribution.[14]

The applicant argued that the lack of a reproduction licence, which made it impossible for him to copy and distribute his films, interfered with his ability to effectively exercise his Article 10 ECHR right to freedom of expression. The refusal had not been backed by any evidence that he had ever distributed, or intended to distribute, pornography; the fact that he had obtained a distribution certificate for all of the films to which he held copyright showed that they did not contain any illegal material.

The majority found that there had been a violation of Article 10 ECHR. After reiterating well-established principles relating to Article 10, and finding that the applicant's production and distribution of films fell within its remit, it turned to the question of whether the interference had been necessary. The Court was disparaging as to the evidence presented in support of the claim that the applicant had been involved in pornography production or distribution. It determined that "relevant and sufficient reasons" had not been given on this point.[15] The majority also did not find that the domestic courts had taken into consideration the impact of a reproduction licence refusal upon the applicant's exercise of his Article 10 rights, and found that "such a far-reaching restriction on the applicant's freedom of expression", namely, depriving him of being able to distribute any of his works, did not bear "any reasonable relationship of proportionality" to the aim sought to be achieved.[16]

The Concurring Opinion of Judge Pinto de Albuquerque

Judge Pinto agreed that there had been a violation of the applicant's Article 10 ECHR rights, on the basis that the domestic court decisions had not been based on sufficiently reasoned findings of fact, and because the refusal of a reproduction licence interfered with the applicant's right to distribute films which he had already registered and obtained a distribution certificate for.[17] He wished, however, to expand on a number of issues. Among these, he noted that the Court had "ignored the Russian Government's assertion that they are confronted with contradictory international obligations regarding pornography". Secondly, Judge Pinto stated:

> I find it particularly timely for the Court to deal with the question of pornography, including pornography for adult consumption, in a principled manner, in the light of the fresh impetus which has been given to the Council of Europe's work in the area of violence against women by the Council of Europe Convention on preventing and combating violence against women and domestic violence.[18]

On this basis, and in spite of its tentative relation to the case-facts at hand, Judge Pinto took the extraordinary step of examining gender-based concerns surrounding pornography and the matter of extreme (adult) pornography regulation. This appears to represent the first time that

[12] Adopted 12 September 1923.
[13] CM/Rec(89)7.
[14] The government also argued that the application was inadmissible on a number of grounds: these were refused and are not explored here.
[15] Fn.1, para 61.
[16] Ibid.
[17] Ibid, Concurring opinion of Judge Pinto de Albuquerque, para 35.
[18] Ibid, para 2. CETS No.210. ("the Istanbul Convention").

either element has been dealt with, to any degree of significance, by anyone within the European Court of Human Rights.

The remainder of the case analysis therefore explores the Concurring Opinion in consideration of: first, whether the Court's current approach to pornography conflicts with international norms; and secondly, the gender equality-based arguments provided therein, particularly in relation to "extreme" pornography. It finds that the conclusions which the Opinion reaches should be treated with caution.

Is the Court's stance in conflict with international norms?

The Court's approach to pornography

Judge Pinto suggests that the Court has taken a "permissive" approach to pornography.[19] On his account, the Court will only permit restriction of the production or distribution of pornographic material to protect children (in line with *Müller v Switzerland*)[20] or to protect religious followers from content or materials which are offensive to their religious sensibilities (in line with *Wingrove v United Kingdom*,[21] *Otto-Preminger*[22]). Outside these circumstances, the Court supposedly protects freedom of choice of adults with regard to all pornographic material.[23]

This taxonomical exercise appears to overlook the Court's approach to case-law, in general, and to pornography, in particular. The Court's primary role is to consider the particular facts of each case before it, to determine whether the applicant's ECHR rights have been unjustly interfered with, and to provide individual relief on that basis.[24] This is a contextual matter, and numerous factors will be taken into account and weighed against one another in each case, including, for example: the type of legitimate aim relied upon;[25] the extent to which the measure responds to a "pressing social need";[26] the severity of the intrusion upon the individual's rights and whether other, less intrusive responses were available (proportionality). As a judicial body, and a subsidiary,[27] regional one at that, it is not the place of the Court to set out a comprehensive framework for member state regulation of pornography. If the Court's determinations as to parameters for pornography production or distribution appear limited, therefore, it is not because the Court permits almost everything, but that, at least in part, it has not been called upon to pronounce on many of the permutations of justifications, legal frameworks and their concrete applications, relating to pornography. Some commentators have gone further by arguing that the Court has failed to develop many general standards on pornography regulation because of its "consistent" deference to member states, in such cases, through the margin of appreciation.[28] This would suggest a permissive approach to *regulation and restriction* of pornography, rather than to its production, distribution or use.

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[19] Ibid, para 17.
[20] (1991) 13 E.H.R.R. 212.
[21] (1997) 24 E.H.R.R. 1.
[22] Fn.11.
[23] Fn.17, para 12.
[24] *Karner v Austria* (2004) 38 E.H.R.R. 25, para 26.
[25] *Sunday Times v United Kingdom* (1979-80) 2 E.H.R.R. 245, para 59.
[26] Ibid, para 62.
[27] See *Austin v United Kingdom* (2012) 55 E.H.R.R. 14, para 61.
[28] P. Johnson, "Pornography and the European Convention on Human Rights" (2014) 1(3) *Porn Studies* 299, 316.

The international framework

Judge Pinto argues that "the Chamber has failed to take notice of the existence of conflicting norms of international law".[29] In so doing, he relies on a number of instruments and documents.

First, he refers to the 1923 Convention,[30] which provides that the Parties shall take measures to ensure that various forms of production, possession and distribution of obscene materials shall be subject to criminal sanctions. The continued relevance of a nearly century-old Convention to the current methods, and cultural acceptance, of pornography production and distribution, can be questioned. Today, less than half of the Council of Europe member states are Parties to the Convention, and several have denounced it over the past decades.[31] At any rate, it is not clear that the Court's case-law conflicts with the Convention. Numerous cases have been brought before the Court on the basis of broad obscenity laws, which have not been declared to violate the Convention.[32] In the recent case of *Kaos GL v Turkey*,[33] which Judge Pinto criticises as representing the Court's "sympathetic" approach towards pornography advocates,[34] the law in question did not concern obscenity, *per se*, but a broad provision in the Turkish constitution which permitted the seizure of publications, for the purpose of protecting public morals.[35] In other words, the Court did not find that the existence of an obscenity law violated the Convention.

Judge Pinto moves on to the second instrument relied upon by the Russian government: the Committee of Ministers Recommendation.[36] It appears clear that the Recommendation does not require member states to introduce complete bans on pornography production or distribution, as the Russian government argued. It encourages systems of self-regulation or creation of classification and control systems, "in particular for the purpose of protecting minors".[37] The Court's case law, as Judge Pinto acknowledges, also permits the limitation of distribution for the purpose of protecting minors, including through age-verification systems and/or restrictions on the methods of sale: such as subscription-only sites.[38] Accordingly, the two instruments appear to be well-aligned.

Judge Pinto relies on a number of further instruments and documents which were not raised by either party to the case. All refer to gender-equality based concerns. These are: the UN Committee on the Elimination of Discrimination against Women CEDAW General Recommendation No. 19 on Violence against Women;[39] the UN Human Rights Committee CCPR General Comment No. 28 on Article 3 (equality of rights between men and women);[40] the aforementioned Istanbul Convention; the Parliamentary Assembly of the Council of Europe Resolution on violent and extreme pornography ("PACE Resolution");[41] and the Council of Europe Gender Equality Strategy 2018-2023. All of these, bar the Istanbul Convention, raise

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[29] Fn.17, para 14.
[30] Fn.12.
[31] Denmark, Germany, Netherlands.
[32] See e.g. *Handyside v United Kingdom* (1979-80) 1 E.H.R.R. 737 (the Obscene Publications Act 1959); *Müller v Switzerland,* fn.20 (Article 204 Criminal Code of Austria).
[33] (App. No.4982/07), judgment of 22 November 2016.
[34] Fn.17, para 10.
[35] Article 28 of the Constitution of Turkey.
[36] Fn.13
[37] Ibid, "principles". It further states that member states *remain free* to make use of criminal law or other dissuasive financial and fiscal measures.
[38] See e.g. *Kaos GL*, fn.33, para 61; acknowledged in Judge Pinto's Concurring Opinion, fn.17, para 10.
[39] Adopted at the 11th session of the CEDAW, 1992.
[40] Adopted at the 68th session of the CCPR, 29 March 2000.
[41] Res 1834 (2011).

concerns of a potential link between at least certain forms of pornography and sexist attitudes, as well as the broader effect that this may have upon society (ranging from the promotion of unequal treatment of women and girls,[42] to the contribution to violence against women[43]). None, however, call on states to introduce far-reaching prohibitions in relation to pornography.[44] The Istanbul Convention, the only binding document in this list, does not mention pornography at all.

It is true to say that the Court has not had the opportunity to fully engage with gender equality-based arguments relating to pornography regulation, including extreme pornography regulation.[45] Until it does, however, it is difficult to see how it can be claimed that the Court's approach conflicts with international norms on the matter. This is particularly so, given that the current gender equality-based international norms appear highly open-ended on the responses which concerns around pornography require.

Judge Pinto continues that "[c]omparative law shows that the Court is isolated in its permissive stance".[46] He does so referring to two member states and an observer-state, which have exceptionally introduced (or interpreted) laws which proscribe violent or "extreme" pornography.[47] Along with a brief exposition of the United States' morally conservative obscenity test,[48] the examples provided do not advance the argument much further. This is furthered by the PACE Resolution, earlier cited by Judge Pinto, which noted "great disparities between Council of Europe member states in the degree of pornography regulation".[49]

Gender equality and "extreme" pornography

Judge Pinto's final substantive section is dedicated to "the state's positive obligation to prohibit extreme pornography".[50] It is worth quoting him at length:

> Since pornography reinforces stereotypes, discrimination and gender inequality, exploits existing inequality between the sexes and contributes to gender-based violence, the question arises to what extent the Court should proscribe pornography in the same way it proscribes male violence against women in general. The question is even more pressing with regard to pornographic content which depicts particular types of sexual violence and deviant sexuality like necrophilia and bestiality.[51]

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[42] CEDAW General Recommendation No.19, para 11; CCPR General Comment No.28, para 22.
[43] Gender Equality Strategy 2018-2023, para 45; CEDAW General Recommendation No. 19, para 12.
[44] The PACE Resolution, fn.41, arguably the most far-reaching of these listed instruments, calls on member states to ensure, *inter alia*, effective classificatory systems for audio-visual works, and, *if appropriate*, take into account the *possibility* of introducing specific legislation to criminalise actions surrounding violent and extreme pornography (para 9). The Recent Committee of Ministers Recommendation CM/Rec(2019)1 on preventing and combating sexism makes similar links between pornographic material and the trivialisation of "everyday" sexism (chapter II.C). It calls for member states to support research on the prevalence and impact of sexist portrayals in the media and in pornographic material, and for tools to enhance critical thinking and the skills of parents to deal with internet pornography, i.e. non-prohibitive measures.
[45] See e.g. Johnson, fn.28.
[46] Fn.17, para 17.
[47] The United Kingdom, Germany and Canada.
[48] *Miller v California,* 413 U.S. 15 (1973).
[49] Fn.41, para 4.
[50] Fn.17, section VIII.
[51] Ibid, para 30.

He then provides his answer: a "gender-sensitive" interpretation of the Convention leads to the prohibition of all forms of "extreme" pornography. That prohibition need not be criminal in nature, however.[52] This leaves much to disentangle.

Empirical research: wading into murky waters

It is apt to consider Judge Pinto's bold arguments regarding the harms of pornography, which he sets out in more detail in the preceding paragraph. He argues that "pornography frequently desensitises the consumer to sexual aggression, normalises sexual assault and promotes a rape culture, which impacts seriously on gender equality",[53] and has a disproportionate effect on women. He relies on two resources for this: a 1994 Preliminary Report submitted by the UN Special Rapporteur on violence against women, its cause and consequences,[54] and an article which considers internet search trends.[55] It is unclear how these were sourced: certainly, they do not appear to have been submitted by the parties.

Extreme caution should be exercised before the Court wades into the fraught debate on evidence as to pornography's effects. The broad field of empirical research on the effects of pornography is diverse, contradictory and difficult, if not impossible, to fully reconcile.[56] The likely role of the Court in these matters will be limited to ensuring that member states have seriously engaged with the available evidence[57] and with ensuing questions on how to respond to an evidence gap, as well as to determine whether the resultant interferences with human rights are justified. Conducting its own, in-depth analysis of the available evidence, however, would risk overstepping the limits of its legitimate functioning.

"Extremity", conflation and conservatism

There are also concerns with regard to the conflation of various types of pornography, regulatory schemes and motivations thereof, within the Concurring Opinion's discussion of extreme pornography.[58]

Judge Pinto's conclusion, that only "extreme" forms of pornography should be prohibited, can be questioned. If, as he argues, pornography *in general* reinforces discrimination and inequality and contributes to gender-based violence, then it is not obvious why *all* pornography should not be prohibited. We may see a hint of an answer in the claim that "extreme pornography contributes, *directly* and indirectly, to violence against women".[59] This suggests that "extreme" pornography contains the additional element of real violence against women

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[52] Ibid, para 33.
[53] Fn.17, para 29.
[54] UN Economic and Social Council [ECOSOC], 'Preliminary Report of the Special Rapporteur on Violence Against Women' (1994) UN Doc E/CN.4/1995/42.
[55] D. Makin & A. Morczek, 'The dark side of internet searches: a macro-level assessment of rape culture' (2015) 9(1) *International Journal of Cyber Criminology* 1.
[56] See e.g. E. Mellor & S. Duff, 'The use of pornography and the relationship between pornography exposure and sexual offending in males: A systematic review (2019) 46 *Aggression and Violent Behavior* 116; T. Kohut, J. Baer & B. Watts, 'Is pornography really about "making hate to women"? Pornography users hold more gender egalitarian attitudes than nonusers in a representative American sample' (2016) 53(1) *Journal of Sex Research* 1; E. Short & K Seida, '"Harder and harder"? Is mainstream pornography becoming increasingly violent and do viewers prefer violent content?' (2019) 56(1) *The Journal of Sex Research* 16.
[57] On treatment of evidence, see e.g. *Hatton v United Kingdom* (2003) 37 E.H.R.R. 28. CM/Rec(2019)1 on preventing and combating sexism calls on member states to support further research on the impact of pornography (Chapter II.C.7). Given evidential difficulties in this area, some have advocated for the law to take a "precautionary role": C. McGlynn & E. Rackley, "Written evidence" in Public Bill Committee, *Criminal Justice and Courts Bill: Written Evidence* (Bill 169, 2014) para 3.4.
[58] Fn.17, chapter VIII.
[59] Ibid, para 31. Emphasis added.

(in addition to the indirect violence that it causes), and therefore warrants more urgent attention. Where this is the case, there is a clearer, direct harm-based argument for a legal response. Yet to attach this argument to "extreme" pornography is at the same time overly narrow and broad.

First, it is too narrow because the argument forms part of a larger debate on responses to materials depicting activity which took place, or which were recorded or distributed, without the consent of one of the involved parties.[60] This extends well beyond depictions of physical violence. Further, the content of pornographic material is not an accurate indicator of the conditions in which it was made or distributed. Pornography depicting apparently consensual activity may have been made under conditions of duress or abuse (or filmed or distributed without consent). Conversely, material which depicts violence or non-consensual activity may have been simulated or produced with consent (i.e. the participants may have been acting).

Secondly, the claim is too broad in its treatment of "extreme" pornography as a heterogenous category. It is concerning to see the ease with which the Opinion glides from the question of proscribing violence against women to the proscription of "deviant sexuality", including necrophilia and bestiality. The link between these two concepts is not obvious, and appears to align more with morality-based considerations, than arguments relating to the protection of women. The apparently gratuitous inclusion of necrophilia and bestiality within England and Wales' extreme pornography offence has been criticised on similar grounds.[61]

Finally, Judge Pinto's conclusions do not appear to be consistent with his proclaimed emphasis on gender equality and the need for the Court to interpret the Convention in a "gender-sensitive" manner.[62] While he states that certain forms of pornography, including that which contains offensive portrayals of God or persons and objects of religious veneration, should be subject to criminal sanctions, he finds that "[s]tates should retain some discretion in implementing the prohibition of violent pornography".[63] To advocate harsher sentences for materials which offend religious sensibilities, than for materials which, on his argument, are linked with direct and indirect violence against women, is difficult to understand. This is compounded, when considering that his reasoning for granting violent pornography secondary status is due to a desire to avoid "the excessive expansion of criminal law into new areas" and "a greater invasion of privacy in the investigation of offences".[64] The wish to maintain the status quo with regard to criminal pornography offences jars with Judge Pinto's potentially radical call for a "gender-sensitive" interpretation of the Convention. It is also not clear why investigation into "extreme" pornography would be *prima facie* any more invasive than other investigations into pornography. The level of invasion of privacy will surely depend on who the criminal offence targets: in the case of the UK's offences for possession of materials for personal use, the level of privacy invasion will be very high. Yet that is because they target, and would entail an investigation of, an individual's private use of pornography: the fact that this happens to centre on pornography with a certain content is irrelevant. For this reason, the Concurring Opinion perhaps missed an opportunity to explore the diversity in regulatory responses, and the extent to which these are proportionate interferences in human rights: particularly given its (albeit brief) mention of the UK's possession offences.

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[60] "Image-based sexual abuse", or "revenge pornography", see C. McGlynn and E. Rackley, "Image-based sexual abuse" (2017) 3 Oxford Journal of Legal Studies 1.
[61] See C. McGlynn & E. Rackley, 'Criminalising extreme pornography: A lost opportunity" (2009) *Criminal Law Review* 245, 250-251.
[62] Fn.17, para 31.
[63] As well as necrophilia and bestiality, ibid, para 33.
[64] Ibid.

Harm and "rightsification": not a panacea for prohibition

The Concurring Opinion extends to the difficult jurisprudential question of the limits of the law. It appears to take a broadly Millian approach,[65] by stating that "[t]he harms-and-dangers argument can justify criminal-law policy and other types of policy choices, while the morality-based argument can only justify other types of policy choices, but not criminal-law policy choices".[66] He links this with Article 10(2) ECHR: with protecting the rights of others being a harm-based, legitimate aim for state interference, and the protection of morals being, clearly, a morality-based one.

More could have been said in support of this claim. It can certainly be argued that the Court has shifted its focus to harm and rights-based legitimate aims for criminal sanctions,[67] a move which appears to reflect trends in at least some member states.[68] At the same time, there are clear examples of the Court's acceptance that member state interferences, via criminal sanctions, have followed the legitimate aim of protecting morals.[69] In the current case, Russia's criminal offence of selling pornography appeared to be grounded, at least partly, in protection of morality, particularly of children (an offence of which Judge Pinto appears to approve).[70] This apparent conflict warrants acknowledgment.

Given this apparent trend in moving from morality-based to harm or rights-based justifications for criminal sanctions (particularly in relation to the regulation of sexual activity), important questions should be explored.

Judge Pinto refers to two types of effects emanating from pornography: one is the reinforcement of sexist attitudes; the other is the *manifestation* of these attitudes, through discrimination and gender-based violence. The latter appears to be what Judge Pinto means by "harm", or rights set-backs, which justify criminal prohibition.[71] Yet this raises now-familiar issues of proof of causation: from the production and distribution of pornography to a change in attitudes and, *in turn*, the manifestation of concrete harm or rights interferences. Only the latter appears to warrant criminal prohibition.[72]

In this vein, the nature of "rights-based" justifications for criminal proscription of pornography require further scrutiny than they have hitherto received. The Concurring Opinion approved of criminal prohibition of materials which may be offensive to those who hold religious beliefs, for the purpose of protecting the rights of others to religious freedom under Article 9 ECHR.[73] Yet the nature of this interference amounts only to the fact that mere knowledge of production or

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[65] J.S. Mill, *On Liberty* (New York: Cosimo Classics Philosophy, 2005). See also Feinberg's "interest set backs" approach in J. Feinberg, *The Moral Limits of the Criminal Law, volume 1: Harm to others* (New York: OUP, 1987).
[66] Fn.17, para 31.
[67] See e.g. *Laskey v United Kingdom* (1997) 24 E.H.R.R. 39. See further C. Nowlin, 'The protection of morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2002) 24(1) *Human Rights Quarterly* 264.
[68] As with the UK: see e.g. M. Perkins, "Pornography, policing and censorship" in P. Johnson & D. Dalton, *Policing Sex* (London: Routledge, 2012); Crown Prosecution Service, *Obscene Publications: Legal Guidance* (revised January 2019).
[69] See e.g. fn.32.
[70] Fn.17, para 34.
[71] Ibid.17, para 30.
[72] See similarly the Canadian Supreme Court case of *R v Labaye* [2005] 3 S.C.R. 728, para 59, which may be interpreted as a roll-back on the radical feminist interpretation of Canadian obscenity law in *R v Butler* [1992] 1 S.C.R. 452.
[73] Relying on *Otto-Preminger*, fn.11.

distribution of this material would cause offence to those with religious beliefs. This appears uncomfortably close to more traditional, morality-based justifications.

The move from moral conservative to harm and rights-based justifications for the imposition of criminal sanctions is, on the face of it, a welcome trend. Yet greater work is required, in order to ensure that references to vague rights impacts do not, in practice, end up providing a justification for precisely the moral arguments which they supposedly replace.

Conclusion

Judge Pinto is correct in stating that concerns over gender equality and ("extreme") pornography seem to be on the rise in the European political agenda.[74] It is unlikely that this brush with the matter will be the Court's last. This analysis has argued for caution before accepting the Concurring Opinion's conclusions as to the Court's current and desired position on pornography, and sought to provide the preliminary groundwork for explorations thereof to take place on more solid, human rights-based foundations. It is hoped that future debate on this often-polarised topic engages robustly with the substance: reploughing the familiar furrow of moral conservatism, under the broad banner of rights and harm, would risk placing the European Court of Human Rights on shaky ground.

[74] See e.g. PACE, *Motion for a resolution on gender aspects and human rights implications of pornography* (Doc.14865, 9 April 2019)