

OBSCENITY OR ABSURDITY: THE UNCLEAR LAWS IN INDIA



The Haryana Police Journal
Vol.3 | 2020

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Abstract

The term 'Obscene' is used to describe those things which are either disgusting to the senses or offensive to an individual in a sexual manner whereby they aim to incite lust in a person. The Constitution of India has on one hand provided the freedom of speech and expression to its citizens while at the same time IPC and other statutes discussed within the article have curtailed this freedom by penalizing those expressions which come within the ambit of the term 'Obscene'. However, despite having a dictionary meaning, the exact interpretation of the term 'obscene' is not clear and even in instances where this term has been tried to be interpreted, there have been several wrong interpretations of the word, so cumulatively this has led to a denial of freedom of speech and expression as guaranteed by Article 19(1)(a) of the Constitution of India in its true sense and at the same time led to misunderstanding of the penal provisions with respect to the term. This paper deals with the laws which relate to the legal status of obscenity in India and tries to understand the anomaly on the subject as well as discuss the same in other countries like UK and USA. The paper also tries to illustrate the cases and the incidents where the judiciary has been on the wrong foot and has confused art with nudity or reality with vulgarity. There is a need to reform the vague laws which govern obscenity in the country so as to balance the interests of the public at large and the creator or publisher of the content. Through this paper, the author has tried to throw light on the fact that in developing and democratic countries like India, everyone has the same fundamental rights; therefore, consequently, the fundamental right of one cannot supersede the same of another.

Key words: Indecency, Freedom of expression, Obscene, Vulgar, Fundamental rights, Punishment, Offensive, Sexual, Provisions, Judicial system, Tendency, Exceptions, Qualifications, Constitutional remedies, alternative.

Introduction

One of the basic fundamental rights that any human being will acquire on their birth is the Freedom of Speech and Expression. It is by virtue of this right that every person has the liberty to express themselves and to convey their thoughts, speech and feelings. The 1948 instrument known as Universal Declaration of Human Rights or UDHR for short proclaims that the right to freedom of speech, opinion and expression is available with all and includes within its ambit not only the freedom to hold personal opinions without any kind of influence or interference but also the freedom to ask for, to receive and to impart through any media any information or ideas. Thus, the spirit of this fundamental right, which has been guaranteed to us under Article 19 in Part III of the Constitution, is the ability to speak, think and express freely without any fear and to be able to obtain information from others through publications without the apprehension of having to face unreasonable punishment, control, limitation or penalty of any kind².

Man, as a rational being has desires and in order to continue living in a civil society, these desires and wishes are put under limitations and restrictions. These constraints are important as they serve the interest of the public and are enforced for their welfare only. Thus, certain reasonable restrictions are specified under Article 19(2) of the Constitution which restrict the right to freedom of speech and expression and curtail it from being an absolute right³.

With the growing modern technologies and progress in the scientific sector, it has become easier to communicate and circulate information around the world; which has led to renewal of interest in the laws relating to obscenity in India. In order to strike a balance between individual liberty and public good, various steps are taken by the Indian government, at both the national and state level.

What is Obscenity?

When we talk about obscenity under the Indian law, the definition can be summed up as follows:

- Anything having a primary appeal to lustful or voyeuristic tendencies.
- Any work; literary, artistic or otherwise, that offensively in a very clear way shows or outlines sexual conduct.

In legal terms, ‘obscenity’ can be defined as an indecent expression which could be displayed through words, actions or gestures. The concept of obscenity is usually considered synonymous with pornography and thus, the word ‘obscene’ is used interchangeably with the word ‘porn’. Pornography was derived from the Greek word ‘porne’ which meant harlot and ‘graphy’ which translates to writing. On the other hand, the current definition of ‘obscene’, however vague it is considered to be, is based on the Miller Test (explained later in this paper) and needs to fail all the three aspects mentioned in that test to be considered obscene⁴.

In India, anything which is offensive to modesty or decency of a person; or is lewd, repulsive or filthy is covered under the term ‘Obscenity’. In Indian Law, the terms decency and morality are also connected and understood in relation to obscenity. Decency means ‘avoiding the use of obscene language and gestures’. However, the expression decency does not limit itself to sexual morality alone, but also makes sure that the actions are in accordance with the standards of the civil society. Decency can be understood as the accepted codes of maintenance of public and private decorum and morals. Indecent exposure and indecent publication are also treated as criminal offences under the common law. Even though words like vulgar and indecent are used as a substitute for obscene, these terms are different from one another.

1. Vulgarity and obscenity

Vulgarity is said to arise a feeling of disgust, aversion and detestation in someone but does not deprave or degrade someone’s moral while obscenity is more inclined towards corrupting or contaminating the minds which are open to such immoral influence. Thus, a vulgar writing is not the same as obscene one in every case.

2. Indecency and obscenity

As highlighted by the English court, both indecency and obscenity are offences against the set standards of civility, yet there is a difference of degree between these two. The term indecent is of

¹Universal Declaration of Human Rights, 1948

²Constitution of India, 1950

³Constitution of India, 1950

⁴Esmaili (2017), Legal Information Institute.

a smaller scale while obscenity is of a higher scale and thus, it can be safely said that anything obscene must necessarily be also indecent, however, the vice-versa does not hold true in every case. Indecent merely means something that is not in agreement with the standards of our society whereas obscene is something having a lewd behaviour⁵.

OBSCENITY, MEDIA AND THE FREEDOM OF EXPRESSION

India is one of the world's largest democracies. The culture of mass media came to India in the first half of the 18th Century with print, movie screening and radio broadcasting making its entry in the 1780s. The media has always maintained its individuality post-independence, barring the time when emergency was imposed over India in 1975. However the difference in the opinions related to what is communicated, circulated or published by the media has existed since time immemorial. There have been circumstances where people form an opinion that some materials are against the cultural values of the society and then such materials are placed within the bracket of 'obscenity'. Events from the immediate past have shown how writers, actors and painters face prosecution on the charges of propagating the alleged obscene materials.

While according to some there is a need to shield our society from such obscene materials, the recent events suggest that there may be a possibility that the gaps in the laws related to obscenity in India have led to adoption of a series of actions that are of arbitrary nature and the satisfaction provided is of subjective nature. With the growth of mass media over the last few decades, it is of the utmost importance to have a clear vision of what forms a prohibited act. Situations have changed manifold with television and internet becoming another platform for artists to express their views along with literary work, paintings and films which has resulted in attempts to define, objectify and removal of what is obscene through various statutory provisions⁶.

STATUTORY PROVISIONS

Under the Indian Penal Code, 1860, sections 292-294 prohibit publication and selling of obscene materials but at the same time indecent representation of women does not fall under the ambit of the said sections. Often women are portrayed in very derogatory, indecent and obscene light. They are reduced to merely becoming an object of lust and this leads to their victimization in the society and consequential corruption in the mind of viewers or others. Hence, was felt the need to introduce the **Indecent Representation of Women (Prohibition) Act, 1986** so as to outlaw the indecent, improper and scandalous depiction of women, through any kind of publications, writings, paintings, advertisements, etc. Under Section 2(c) of the Act, it not only elucidates what all comprises of the term indecent representation of women; it also prohibits and punishes publication of any kind whereby women are portrayed in an indecent way or they are indecently represented. This is done not only in books, circulars, posters etc but also in any kind of advertisements⁸.

Cable Television Networks (Regulation) Act, 1995 tends to control the telecast of those programs which can cause an outrage in our society by offending the already set standards and outlines a punishment with imprisonment and fine. Rule 6(1)(o) of the Cable Television Networks Rules, 1994, which is read with Section 5 of this Act, restricts the carrying out of programs that seem unfit for "unrestricted public exhibition", which is specified under Section 5-A⁹.

Cinematograph Act, 1952 specifies the provisions for regulation and certification for

⁵Ray (2020), *The Indian Express*.
⁶Kulkarni (2020), *LEXLIFE India*.

⁷*Indian Penal Code, 1860*.

⁸*Indecent Representation of Women (Prohibition) Act, 1986*

showcase of cinematograph films. Section 4 of the Act states the rules for examination of films while Section 5-A address the issue of certification of films. Section 4 of the Act read with Section 5-A of Cable Television Networks Act details the provisions for examination and certification of cinematograph films by the Board of Film Certification (CFBC)¹⁰.

The Young Persons (Harmful Publication) Act, 1956 restricts publication of such matter which might corrupt or adulterate a child or a young person's mind or incite them into committing crimes of violence, cruelty, etc. A punishment with imprisonment and fine is prescribed to anyone who does anything that is in contravention to the provisions of the said Act¹¹.

The Information Technology Act, 2000 prohibits both publication and transmission of those materials which are of lascivious nature or have an appeal of lewd interests if they are in electronic forms. Any publication or transmission that has an effect which leads to degradation or corruption of those who have read, seen or heard the said matter that is embodied or contained in it, is an offence punishable with imprisonment and fine¹².

To control the telecast of advertisements on television, the **Advertising Standards Council of India** (ASCI) was established by the government in 1985. ASCI was formed to protect the interest of the consumers by self-regulating the advertisements. The main objective of the Act is to encourage responsible advertising so as to regain public's trust in advertising. One of the fundamental principles of this Self Regulating Code is to ensure that according to the generally accepted standards of public decency and propriety, the advertisements are not offensive. They don't contain anything indecent, vulgar or repulsive which is likely to cause any kind of grave or widespread offence.

OBSCENITY UNDER INDIAN PENAL CODE, 1860

The Indian Penal Code, 1860 encodes all the offences punishable in India. Section 292 of the Code penalises the offence of Obscenity. It clearly states what is included in the term obscenity. Clause 1 of the section lays a list of materials which would be deemed as obscene if it strikes at the lascivious, voyeuristic, salacious or lustful interests of a person and consequently depraves or corrupts a person in sexual context. Further, Section 293 of the Code provides for punishment of imprisonment or fine for anyone who promotes, sells, possesses, hires, distributes, imports, exports, purchases or makes profit out of anything which can be categorised under the definition of obscene materials. Section 294 of the Indian Penal Code also penalises with regard to obscene songs and acts. However, at the same time it can be seen that certain works are removed from within the ambit of the definition of obscenity by the Code itself if they fall within the confines of public interest. The term public interest includes matters in the interest of literature, science, history or religion¹³.

Since the above laid offences against obscenity as defined under the Penal Code are curtailing an individual's freedom to express himself, hence they are said to be in clear conflict with the Article 19 of the Constitution of India as it is often misused and manipulated into restricting a citizen from exercising their right to freedom of expression. The cure such misuse and at the same time making sure it has been restrained from becoming a trouble to the public interest as well has been outlined under Article 19(2) of the Constitution which contains certain restrictions to the right to freedom of speech and expression¹⁴.

¹⁰Cable Television Networks (Regulation) Act, 1995

¹¹Cinematograph Act, 1952

¹²The Young Persons (Harmful Publication) Act, 1956

¹³The Information Technology Act, 2000

‘Obscenity’ is a complex and an intricate term which is hard to understand. In order to save and uphold democracy, the courts laid down principles which determine whether the said work comes under the ambit of section 292 or comes under the freedom provided by the fundamental rights, as there is a thin line between an individual expressing his own views and depraving or corrupting the minds of others.

WHO DEFINES OBSCENITY IN INDIA?

While the Indian courts have tried their best to strike a balance between the reasonable restrictions imposed on the public and their right to express, their records are still found uneven and imbalanced. Cases have been filed on various occasions to limit reasonable expression in India. While advertisements like Amul Macho (2007) which starred actress/model Sana Khan, who was shown washing a man’s underwear while music playing in the background had lyrics which contained the words ‘ye tohbada toing hai’ which is used as a subliminal sexual innuendo; Tuff Shoes Footwear Print Ad (1995) which had Models MilindSoman and MadhuSapre, who were posing nude with a python wrapped around them and Fastrack TV Commercial (2011) that showed Actress Genelia D’Souza and cricketer ViratKholi making love in an airplane’s cockpit were deemed unfit for viewing as they were challenging conservative Indian sensibilities while at the same time another advertisement of Zatak talcum powder in which the woman was shown as getting aroused by a tailor taking her measurements was not deemed unfit and hence not banned¹⁵.

The problem with Indian judicial system is that it is inefficient and lacks jurisprudential consistency in such matters. Even though the right to freedom of speech and expression is guaranteed by our Constitution, it can be easily silenced due to the presence of over broad laws. India’s legal system remains overworked and overwhelmed, which leads to long and expensive delays. These delays discourage the innocent and the victims to fight for their own rights. There have been cases where the Indian government has failed to protect criminalizing of individuals, who are expressing their minority views. Such individuals are often targeted by local officials or attacked by extremist groups. Rather than focusing on the aforesaid issues, the government tends to focus more on banning certain books, films or works of art that offend certain groups of people. These unreasonable restrictions are then justified citing the importance of public order and under the shade of violent protests and communal violence¹⁶.

CASES RELATED TO OBSCENITY

The Supreme Court has held that there can be no one uniform or standard test which can be applied to judge whether a particular content is obscene or not. Each case is to be dealt with according to the peculiar facts and circumstances of the case. Hence no straitjacket formula can be applied to find out what all is covered under obscenity and what not and the stance of Supreme Court on the matter has seen various interpretations.

In the case of **Ranjit.D.UdeshiVs State of Maharashtra**¹⁷, the Supreme Court applied the English ‘Hicklin test’, which was laid down in R vs. Hicklin , to test the level of obscenity in the matter. In this case, the court upheld the conviction of the appellant, a book seller, who was prosecuted under Section 292 of Indian Penal Code, 1860, for selling and keeping the book, “The Lady Chatterley’s Lover” even though the bookseller contended that since he cannot read English, hence he was unaware that the book had indecent of vulgar material. As per the application of the

¹⁵Indian Penal Code, 1860.

¹⁶The Constitution of India, 1950

¹⁷Ray (2020), The Indian Express.

¹⁸Dahiya (2015), Legal Era Online.

above named test the book was held to be obscene and the contentions of the accused were not headed upon.

In another matter of **K.A Abbas Vs the Union of India**¹⁹, a film was contended to be objectionable. The movie depicted the contrasting lives of the urban and the poor people. Some part of the film dealt with the life of the prostitutes of Bombay. The Censor Board rejected the petition of granting 'U' certificate to the movie. When the Petitioner approached the Central Government (Appellate Authority) for the same, it agreed to grant 'U' certificate subject to a condition that certain scenes, specifically the prostitution part to be removed. Thereafter, the Petitioner moved the Supreme Court under Article 32 for violation of his fundamental rights. The judgment given had many references to the American Jurisprudence on obscenity. It was observed by the court that the two terms of sex and obscenity are not always synonymous and it is wrong that merely the mention of the word sex is classified as essentially obscene or even indecent or immoral. It was further observed that the standard for judging obscenity must not be that of the least capable and most depraved one.

Another popular case is that of a well-known Bengali writer who was prosecuted under Section 292 of Indian Penal Code, 1860 in the case of **Samaresh Bose Vs Amal Mitra**²⁰. He had written and published a novel in a Bengali journal under the title of 'Prajapati'. However, the Supreme Court had set aside the conviction on appeal. The court reasoned its decision by saying that when a question of obscenity arises, the Judge should firstly place himself in the position of the writer of the disputed content and understand his/her viewpoint. He must understand the literary and artistic value of the content and must try to make sense of what the writer wants to convey through his/her work. Then secondly, the Judge should understand the situation from the viewpoint of the readers of every age that has access to the content and should try to discern the influence that the content might have on the minds of the readers.

The banning of the movie – '**Bandit Queen**' by the Delhi High Court in the case of **Bobby Art International v. Om Pal Singh Hoon**²¹ is yet another example on the matter in issue. This judgement was challenged in the Supreme Court. An expert Tribunal, consisting of 3 female members rendered a decision giving 'A' certificate to the movie, clearly showing their opinion that women are not to be degraded, insulted or shown as a medium to depict pornography. The movie was based on the life of a woman named Phoolan Devi, who was married to a man elder than her own father. The film centred on how she became a leader of a dangerous dacoit gang, killing 20 Thakurs in Madhya Pradesh for taking the revenge of her humiliation and plight that she had faced being married. She was made to strip naked and fetch water, while all the villagers watched her. This humiliation turned into revenge and rage, which made her a dangerous dacoit. The movie could not have done justice to the story without depicting nudity to enhance the humiliation faced by the protagonist. The nudity was not shown in the movie to arouse lust amongst the viewers, but to condemn the perpetrators who had done nothing to stop it from happening. However, the decision of the court is a proof of intolerance for even such bitter truths in our country.

Yet another case was the case of **Maqbool Fida Hussain Vs. Raj Kumar Pandey**²² whereby several complaints were filed against a painting by M.F Hussain, which depicted a nude lady in grief. The painting was included as an item in a charity auction for the victims of Kashmir earthquake under the name 'Bharat Mata'. Even though M.F Hussain had no role in the auction, however, he still apologised for hurting the feelings of the people. The issue in this case was whether the said painting

¹⁹ AIR (1965), pg- 881.

²⁰ Law Reporter, Vol-3, pg- 360

²¹ AIR (1971), pg- 481.

²² AIR (1986), SC, pg- 967

was obscene which meant that Mr. M.F Hussain was liable to be prosecuted under Section 292 of the Indian Penal Code, 1860 or not. The court held that prima facie there was nothing in the painting either to arouse sexual or prurient interest in the perverted people or to morally corrupt a person viewing it. The court said that just like sex alone cannot be said to be obscene, likewise nudity alone also cannot be said to be obscene. It was observed that the aesthetic touch of the painting overshadows its nudity. Hence, the judgment was in favour of M.F Hussain.

Another petition was filed in the case of **Ajay Goswami vs. Union of India**²³ to seek protection from the Court in cases to ensure that minors are not exposed to any kind of material which is sexually exploitative in nature irrespective of whether the same is obscene and prohibited by law or not. In this case the court held that wherever art and obscenity are related, the test must be such that it measures the artistic, literary or social merit against its obscenity and then makes a decision. The court also laid a common test for judging the obscenity in such work by viewing it from the viewpoint of an ordinary man. The court said that the material should be viewed as would be viewed by a man of ordinary prudence and common sense. Any person who is hyper-sensitive or not of ordinary prudence should not lay the bar of determining whether the material is obscene or not. Nothing can be viewed in isolation without having regard to the entire context in which it is used. If a publication is being judged, it must be judged as a whole. Any kind of fictitious imagination of any person, especially if that person is a minor, should not be agitated in a Court of law.

The recent case of **Aveek Sarkar vs. State of West Bengal**²⁴ was the landmark on the matter where the Supreme Court abandoned the age old ‘Hicklin test’ and adopted the ‘Community Standard test’ to determine obscenity. In this case, the material of which the obscenity was to be judged was a picture of a nude/semi-nude woman. It was held that the picture cannot by itself be held as obscene if it does not have within itself the tendency of arousing feelings or revealing any kind of overt sexual desire or designed to excite sexual passion in persons who see the picture or are likely to see it. Only such sexual materials will be held to be obscene if they have the capacity to of producing lascivious thoughts, however, the obscenity is to be judged from the point of view of an ordinary man of prudence. On the basis of ‘community standard test’, the Court held the breast of Barbara Fultus fully covered with the arm of Boris Becker, a photograph of course semi-nude had no tendency to deprave and corrupt the minds of people in whose hands the newspaper or magazine would fall.

From the above cases, it is clear that the judiciary has not taken a unanimous stand on the subject of defining obscenity. The position, therefore, remain unclear till today.

COMPARISON WITH LAWS OF OTHER COUNTRIES

Talking about the **American Laws**, the U.S Supreme Court in the landmark case of Miller vs. California laid down the following guidelines for ‘the community standard test’:

1. A person, having contemporary community standard does not believe that the work appeals or pleases to the lustful or voyeuristic interest;
2. If the work is clearly and without any doubt offensive;
3. If there is no literary, scientific, artistic or political value in the work in its entirety.

This test is also known as the ‘Miller Test’. However, this test has now proven to be

²³ AIR (1996), SC, pg- 1846
²⁴ Crl. Revision Petition No. 114/2007
²⁵ AIR (2007), SC, pg- 493
²⁶ SCC (2014), Vol 4, pg- 257

inadequate as it fails to maintain its pace with the modern realities that come along with the present day technology.

Even under the **British Law**, The United Kingdom had enacted the Obscene Publications Act, 1857, which gave origin to the ‘Hicklin test’. This test was initially used both in U.K and U.S. However, in 1957, the U.S Supreme Court blatantly rejected the said test as being inadequate.

The ‘Hicklin test’ laid focus on the vulnerability of those who are exposed to the material under question. The method of testing obscenity under this is to see whether the tendency of the matter alleged to be obscene is to deprave and corrupt those people whose minds are open to such immoral influences.

The **murder of Jane Longhurst**²⁷ by Graham Coutts led to the changes in the U.K Obscenity laws. The jury had held that Coutts strangled Jane for his own sexual satisfaction. During the trial it was found out that before and after killing Jane, Coutts had spent hours watching violent videos of nude women being strangled, suffocated, hanged and drowned. Therefore, everyone targeted the websites for showing such violent pornography and made them responsible. However the case drew up a lot of attention and all the menace led up to the adoption of Criminal Justice and Immigration Act, 2008. This new Act differs from the previous act of 1857 on two grounds. Firstly, the new Act has shifted the focus and blame from the production and publication of obscene materials to the individual who is in possession of such material, thereby, making it an offence against individual person who in possession of extreme pornographic materials. Secondly, the new Act extensively defines the meaning of “extreme pornographic materials”, and hence clears the ambiguity of the Act of 1857. In short, it defines “extreme pornographic materials” as such which has been made only for the purpose of arousing the sexual feelings of a person.

CONCLUSION

As per the analysis done through this paper, it is seen that the Hicklin Test has been watered down by the Supreme Court by introducing new qualifications and exceptions to it. However, the laws related to obscenity are still overbroad, vague and ambiguous leaving enough gaps for the judges to bring in their own personal convictions while judging what is obscene and what is not. The dangers attached to having such wide discretions can be seen through the cases discussed and their judgements, which were a reflection of political agendas and personal convictions. The words ‘in the interest of public order’ used in Article 19 of the Constitution include things that can lead to disorder as well as things that have the tendency to cause disorder, where the word ‘tendency’ creates uncertainty in relation to the nature of the matter being judged. With so much emphasis being put on protecting the minds of the readers, no importance is given to the creator of the material in question. Even though the ‘Hicklin test’ and the ‘Miller test’ have survived the passage of time, it is imperative that the Indian Judiciary finds better and fixed alternatives, in order to provide justice to the citizens of India.



²⁷U.S.R. (1973), Vol- 15, Pg- 175

²⁸Obscene Publications Act, 1857

²⁹EWCA Cr(2005), pg- 52.

³⁰Criminal Justice and Immigration Act, 2008.

REFERENCES

- Legal Era Online* (2015), *Right to Privacy - Reading of Obscene and Censored books.*
<https://www.legaleraonline.com/amp/articles/right-to-privacy-reading-of-obscene-and-censored-books>
- LEXLIFE India* (2020), *Criminal law: Obscenity.* <https://lexlife.in/2020/06/04/criminal-law-obscenity/> *Legal Information Institute* (2017), *Obscenity.*
<https://www.law.cornell.edu/wex/obscenity>
- The Indian Express* (2020), *Explained: What is the measure of 'Obscenity' in India?*
- Universal Declaration of Human Rights, 1948*
- Constitution of India, 1950*
- Indian Penal Code, 1860.*
- Indecent Representation of Women (Prohibition) Act, 1986*
- Cable Television Networks (Regulation) Act, 1995*
- Cinematograph Act, 1952*
- The Young Persons (Harmful Publication) Act, 1956*
- The Information Technology Act, 2000*
- Universal Declaration of Human Rights.*
- All India Reporter (AIR)*
- Law Reporter*
- Supreme Court Cases (SCC)*
- Obscene Publications Act, 1857*
- Criminal Justice and Immigration Act, 2008.*

