

One Man's Vulgarity is another Man's Lyric: Treatment of Obscenity as a Crime under Indian Law and Society

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What is Obscenity?

Obscenity is described as an act extremely offensive under contemporary community standards of morality and decency², something that is calculated to shock the moral sense of man by a disregard of chastity and modesty³, one common ground among all these interpretations of obscenity is an evident revelation and acceptance of the fact that obscenity is a dynamic and temporary concept. It is not rational to determine a particular standard as to what will or will not be considered as obscene especially in the most diverse civilization in the world i.e. India. India is very conservative societies although the situation is improving even today people's beliefs are based upon whims and fancies. Obscenity is viewed with a completely different perspective in different countries, although categorising it on the basis of countries is also an over-estimation of its dynamic character.

As was very rightly expressed by *Justice A.N. Sen* in the case of *Samaresh Bose v. Amal Mitra*⁴ that obscenity is moulded to a very great extent by the social outlook of the people and in fact the outlook of a judge may differ from another judge on the question of obscenity and it is possible that his decision may be unconsciously influenced by his outlook on the same. The omission of a concrete definition under the Indian Penal Code has contributed to the ambiguity in determining an outline as to what will constitute to be obscene although the Supreme Court had a contrary opinion in the case *Ranjit D. Udeshi v. State of Maharashtra*⁵ where *Justice M. Hidayatullah* remarked that the word obscenity is really not vague because it is a word which is well understood even if the attitude of people is different. The current interpretation of obscenity although is not definite but found its basis from *Miller's case*⁶ which was decided by the US Supreme Court.

¹ Student, ILS Law College, Pune

² Obscenity, Black's Law Dictionary (7th ed. 1999)

³ Obscenity, Law Lexicon (4th ed. 2010)

⁴ *Samaresh Bose & ors. V Amal Mitra*, AIR 1986 SC 967

⁵ *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881

⁶ *Miller v. State of California*, 413 U.S 15

Obscenity and Pornography- Distinct Concepts

The terms obscenity and pornography should not be misinterpreted as synonymous concepts. Pornography can be understood as material that depicts erotic behaviour and is intended to cause sexual excitement including pictures, writings etc. Although they are overlapping concepts as pornography is also against the standards of moral behaviour but it is a much more aggravated degree of obscenity and will also fall under Section 292 of the Indian Penal Code which governs obscenity. But despite that, it is imperative to understand that both of these terms are distinguishable should not be equated.

Indian Heritage and Obscenity

In the words of Heraclitus, a Greek Philosopher, “*Change is the only thing constant in life*”. These words perfectly define the need for adaptation to the changing needs of the society which is precisely what the law regarding obscenity and censorship demands, or for that matter all the laws and regulations governing social behaviour.

The concept of obscenity and the standards of moral behaviour which form the foundation of obscenity have undergone a drastic transition from the ancient era to the 21st century. What was precisely considered to be obscene ten years down the lane may not be considered to fall within the ambit of vulgarity and obscene today. Change is an indispensable element of human behaviour and it also casts a duty upon the law enforcement and adjudicating authorities to evolve and adapt to the ever-changing dynamics of the society.

Sex worship and erotic art have been a part of the Indian heritage since ancient times. One of the most evident displays of the same can be found engraved on the wall of religious structures. Sexual Puritanism exists in India, although the complex cultural heritage of the country includes such elements at the temples at Khujuraho and Konark, where sculptures depict certain sexual activities, and also tantric writings which sometimes treat the sexual expression as a way to spiritual knowledge.⁷ However, unfortunately after these elements existing since centuries as a part of the Indian culture and heritage still there exists a taboo around sexual depictions and chastity.

⁷ Vishnu D Sharma & F. Woolbridge, The law relating to obscene publications in India, 22 The International and Comparative Law Quarterly, 632-647(1973)

If we consider the approach of the Indian society towards obscenity there has been a shift from a conservative to a slightly liberal approach. In ancient times, it was considered to be an offence against the political structure and religious tenets of a state than an offence against sexual licentiousness and moral perversion. India specifically has a very low tolerance to obscenity as compared to other western civilizations such as the US & UK.

Impact of Technological Advancement on Obscenity

While discussing the topic of obscenity and censorship, not laying due emphasis on the role of technological advancements on the same would leave the objective unfulfilled. In this technological revolution, cyber obscenity has become a very major concern. It is even more important to give it due consideration because it is easily accessible by individuals of all ages including minors. A presumption of a responsible user or reader cannot be attached to cyberspace.

Provisions under The Information Technology Act, 2000 are one of the primary protections provided against obscene materials in cyberspace with regard to the Indian jurisdiction. The first case decided under the IT Act pertaining to obscene materials was *State of Tamil Nadu v Suhas Kutti*⁸, in this case, obscene and indecent messages relating to the victim were uploaded on a yahoo messaging group as a result of which the victim was receiving indecent calls. A case was filed and the accused was held guilty under Section 67 of the IT Act (which will be discussed further) along with the relevant provisions under IPC, 1860.

However, the provisions under the Information Technology Act, 2000 are not adequate to deal with the raising concerns in cyberspace with regard to obscenity and vulgarity as people are becoming technologically oriented and are evidently overlooking their duties while accessing the same. It is giving rise to more criminals and many other undetected defaulters who are misusing the freedom conferred on them by law.

Legal Provisions Governing Obscenity and Censorship in India

Indian laws have always aimed towards protecting the integrity and dignity of individuals specially women and children. Apart from the constitutional safeguards guaranteed by the Indian Constitution, like the right to live with dignity, and several other enactments have been advanced for protecting the dignity of each and every individual. We will be discussing

⁸ State of Tamil Nadu v Suhas Kutti, Appeal (Crl.) 453 of 1991

the various legal provisions including the law of the land that aim to restrain obscenity and vulgarity in the society.

The Constitution of India

The law of the land, i.e. the Indian Constitution under Article 19(1)(a) guarantees the freedom of speech and expression and Article 21 guarantees the protection of life and personal liberty.

Indian Penal Code, 1860

Section 292 and 293 of the Indian Penal Code shall be the relevant provisions governing obscenity and objectionable materials.

Section 292

It states that any physical material or any representation of any figure of an object that is lascivious or appeals to the prurient interest or has the ability to corrupt the users will be considered to be obscene.

Section 293

It provides for a provision for punishment of imprisonment and fine against any person who sells, lets to hire, distributes, exhibits or circulates to any person under the age of 21 any obscene object which is covered under the ambit of Section 292 of the Code.

Information Technology Act, 2000

Section 67 and 68 of the Information Technology Act will be the relevant provisions on this subject.

Section 67

It states that whoever is indulged in the publishing or transmitting in an electronic form, any material which is lascivious or appeals to the prurient interest or has the ability to corrupt users shall be entitled to the conviction which shall include imprisonment and fine the intensity of which will increase in case of subsequent convictions.

Section 68

This section confers the power of controller to give directions to a certifying authority or any employee to undertake adequate measures or cease to carry activities that are directed by the court of law and in case of failure to do the same the person shall be guilty and will be liable for conviction which shall include either imprisonment or fine.

Young Person's (Harmful Publication) Act, 1956

Section 3

This Act deals with the penalty for sale etc. of harmful publications. As per this section any person who sells, lets to hire, exhibits, circulates, advertises any harmful publication he/she shall be entitled to a punishment which can either be an imposition of fine or imprisonment or both.

Protection of Human Rights Act, 1993

The human rights Act under Section 2 includes within the ambit of human rights, right to life, liberty, equality and dignity of individuals which is guaranteed by the Indian Constitution and International Covenants.

Indecent Representation of Women (Prohibition) Act, 1986

Section 3

The Act prohibits the publication and exhibition of any advertisements comprising of indecent representation of women.

Section 4

The Act prohibits the production, sale, letting for hire distribution and circulation of indecent representation of women in any form.

Judicial Response

The judiciary plays an integral role in the development and evolution of concepts which have long existed in the society. Especially in recent times, the courts of law have adopted a more liberal approach and have attempted to adapt its decisions and opinions to the changing times, i.e. towards a more modern outlook. This can also be evidently seen in the judgments

passed by the courts of law especially the Hon'ble Supreme Court with regard to obscenity and censorship. There has been an evident development towards a more progressive approach towards such issues.

Further, we shall be analysing the major developments in law pertaining to obscenity through landmark judgments over the course of years.

Ranjit D. Udeshi v. State Of Maharashtra⁹

A five-judge bench of the Supreme Court dealt with the question of the constitutionality of Section 292 of the Indian Penal Code with respect to the book named '*Lady Chatterley's Lover*'. In this case, the Supreme Court relied upon the test that was laid down in the case of *R. v Hicklin*¹⁰ by C.J. Cockburn. However, as per the current position the Supreme Court has struck down the Hicklin Test and has adopted a more socially-oriented approach in the case of *Aveek Sarkar v State of West Bengal*.¹¹

Justice M. Hidayatullah dismissing the appeal and considering it to be obscene, spoke for the bench that,

"Treating sex in a manner offensive to public decency and morality judged of by our national standards and considered likely to pander to lasciviousness, prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerize all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the letter is substantially transgressed the former must give way.

There is no loss to society if there was a message in the book. The divagations with sex are not legitimate embroidery but they are the only attractions to the common man. When everything said in its favour we find that in treating with sex the impugned portions viewed separately and also in the setting of the whole book pass the permissible limits judged of from our community standards and as there is no social gain to us which can be said to preponderate, we must hold the book to satisfy the test we have indicated above."

⁹supra note 5

¹⁰ *Queen v Hicklin*, (1868) L.R. 3 Q.B. 360

¹¹ *Aveek Sarkar & Anr. v State of West Bengal & Ors.*, AIR 2014 SC 1495

K.A. Abbas v. Union of India & Anr.¹²

In this case, the major issue involved was as to whether pre-censorship is violative of the fundamental right of speech and expression among other issues.

The decision was that pre-censorship was an exception to the fundamental right and it was imperative to have it especially in the case of films like in this particular case. The court while deciding on the issue also opined that the artistic value of the expression should be given due consideration by the certifying authorities while deciding upon the point of censorship.

Samaresh Bose & Anr. v. Amal Mitra & Anr.¹³

In this appeal before the Supreme Court the issue involved was whether references in a book pertaining to body figures of females, kissing, and sexual acts would be considered to be obscene according to the prescribed test.

The Bench was of the opinion that reference to kissing, description of female body, sexual per se may not have the effect of depraving and encouraging the readers of any age to lasciviousness and the novel shall not be considered to be obscene due to this reason even though it was a very popular publication among all age groups.

Bobby Art International & Ors. v. Om Pal Singh Ors.¹⁴

A writ petition was filed to restrain the display of the film 'Bandit Queen' which was granted certification and was inspired by a book which was already in the market without any objections. The primary issue that came before the Three-judge bench of the Supreme Court was as to whether the presence of nudity, lust, & gang-rape in the movie was obscene.

The writ petition was dismissed. The court restored the Adult certificate for the film along with the conditions imposed by the concerned authority. Speaking for the Bench Justice S.P. Bharucha remarked that,

“A film that illustrates the consequences of a social evil necessarily must that social evil. The guidelines must be interpreted in that light. No film that extols the social evil or encourages it is

¹² K.A. Abbas v. Union of India & Anr., AIR 1971 SC 481

¹³ supra note 4

¹⁴ Bobby Art International & Ors. v. Om Pal Singh Ors., AIR 1996 SC 1846

permissible, but a film that carries the message that the social evil is evil cannot be made impermissible on the ground that it depicts the social evil. At the same time, the depiction must be just sufficient for the purpose of the film.”

Pratibha Naitthani v. Union of India¹⁵

This writ petition was filed by a teacher against the obscene content shown on electronic media before the Bombay High Court. The primary issue under consideration was as to whether TV Cable operators had the authority to portray films certified under adult category.

The court was of the opinion that Rule 6(1) of the Cinematographic Act which prohibits the portrayal of any programme depicting unsuitable content for unrestricted public exhibition does not hamper the right of an adult user to watch that content. Every adult user has a right to view it even on his personal TV set. The court held that the films that are sanctioned by the concerned authority for exhibition could be telecasted.

Ajay Goswami v. Union of India & Ors.¹⁶

A petition was filed alleging that the freedom of speech and expression enjoyed by the newspaper publishers was not at par with the protection advanced towards children from derivative or immoral materials. The matter under consideration was whether the content in newspapers was according to the moral standards for children.

The court took a different approach and stressed upon the need to press upon responsible reading among the users. The court held that,

“Fertile imagination of anybody especially of minors should not be a matter that should be agitated in the Court of law.

Where sufficient safeguards in terms of various legislations, norms and rules and regulations are available to protect society in general and children in particular, any step to ban publishing of certain news pieces or pictures would fetter independence of the free press.”

¹⁵Pratibha Naitthani v. Union of India, AIR 2006 Bom 259

¹⁶Ajay Goswami v. Union of India & Ors., AIR 2007 SC 493

The Way Forward

When we interpret the term obscenity it does not seem like a very complex concept but when he attempts to interpret and expound it in light of all the surrounding factors and circumstances it becomes clear as to why this concept cannot be given a straightjacket approach. It becomes even more clear as to why it is considered as a dynamic concept. It has been a continuous topic of debate as to what will fall within the ambit of obscene. Especially focusing towards the Indian Society which is a bundle of thousands of cultures, religions, beliefs, rituals and castes it will be absolutely immature to eliminate consideration towards these factors while determining the scope of such socially dominant concepts. Obscenity has to be viewed through a much wider perspective and not in isolation. It cannot be denied that India is attempting to progress in its outlook despite being a conservative society. An attempt is being made by the authorities as well as citizens to maintain a balance between values and modernization. Although this task is becoming much more difficult due to the advent of the technological era, despite the same an attempt is being made to progress without hampering or restricting the fundamental rights conferred to every individual by the constitution. But there is still a very long way to go, there is a need to adopt a more liberal approach and to understand the impact of other western civilizations on Indians especially the youth. There is a need to undertake reasonable measures to protect the Indian culture and heritage but it does not give the authorities and independent political groups the liberty to act arbitrarily and violate the freedoms conferred on every individual in the country. We cannot let the history repeat itself where there is the imposition of censorship on press and artists do not have the liberty to express their art. It is imperative for the Indian society to adopt a more progressive approach and take a step ahead towards eradicating the taboo revolving around sex & sexually explicit materials.