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# The Position of Obscenity in the 21st Century Indian Legal System

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## ABSTRACT

*We live in a society where everyday we are required to abide by numerous norms, practices, and mores, which are nothing but the standardization of what is acceptable in the society and what is not. 'Obscenity' is anything that leaves an impression, influential enough to shake his entire emotional and psychological make-up. Obscenity, be it in published or physical form, is an offence punishable under the Indian Penal Code and also other legislations like the Information and Technology Act. Since 'obscenity' is a vague and subjective term, the question of if obscenity has been committed is decided by the Court on a case by case basis, as there can be no fixed standard for it since social norms and standards are unceasingly dynamic. Acts that were considered obscene a few decades ago would be considered an usual part of life now as the society becomes increasingly accepting towards prospective obscene acts, and these changes in the societal norms have been reflected in court verdicts over the years. This paper aims to present the position of obscenity in India today, through in-depth research of the appropriate provisions of the Indian Penal Code and other legislations, and various verdicts of Indian Courts at different points of time, amidst the rapidly changing cultural and social dynamics of the 21<sup>st</sup> century.*

## I. INTRODUCTION

In India obscenity has always been a punishable offence though the term has always remained vague and subjective, influenced primarily by the standards of the community. In the case of Chandrakant v. The State of Maharashtra<sup>2</sup>, it was opined that, "the concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered literature in France may be obscene in England and what is considered in both countries as not harmful to morals may be obscene in our country. The standards of contemporary society in India are fast changing."

Well, before we move on to understanding the ways of ascertaining something as obscene, we need to go over the provisions concerning the same."

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<sup>2</sup> (1969) 2 SCC 687 : AIR 1970 S.C. 1390 (4)

**Section 292 and 293** of the **Indian Penal Code** prohibit publication and sale of obscene books, pamphlets, or representation which shall be deemed to be ‘lascivious or appeals to the prurient interests’, which can include obscene advertisements.

**Section 294** prohibits obscene acts and songs stating that whoever, to the annoyance of others: Does any obscene act in any public premises; or signs, recites or utters any obscene song, vulgar words, in or near any public place shall be punished with the confinement of either description for a term which may extend to three months, or with fine, or with both.

Of the **Information Technology (Amendment) Act, 2008, Section 67(A)** makes it clear that a publication of sexual content on a social media site will lead to a punishment under law.

**Section 67(B)** stands against child pornography this law makes it clear that not only publication, viewing but also possession of such pornographic content is punishable.

Indian Courts have always been vigilant while dealing with cases of obscenity, however their approach has undergone severe changes over the years leading till this point, and has become more liberal with time.

#### **(A) Literature review**

The term ‘Obscenity’ isn’t defined in the Indian penal Code, and it falls upon the Courts to label something or some act as obscene. Over the years it has been thought that obscenity has necessarily something to do with sexuality and immorality. But obscenity has an ambit a lot wider than that. In *Sukanta Halder v. State*<sup>3</sup>, the judge noted that “the courts have restricted the use of the term obscenity to sexual immorality only. Such matters as would tend to stir in persons, sex impulse which leads to sexually impure and lustful thoughts are declared to be obscene. The true test is not to find out what depraves the morals in any way whatever, but what leads to deprave in one way-by exciting sexual desire and lascivious thoughts.”

Well obscenity is a vague and subjective term and thus there can be no fixed definition for it. It depends on the culture, community standards, and the consumers to decide something as obscene. It has always been a battle between the right of freedom of expression and the check of obscenity. In India the case of 1964 case of *Ranjit D. Udeshi vs State Of Maharashtra*<sup>4</sup> remains a landmark judgement in the sphere of deciding obscenity.

#### **Ranjit D. Udeshi vs State Of Maharashtra (1964)**

In this case, the validity of Section 292 of the IPC was upheld, as a publishing firm was held

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<sup>3</sup> AIR 1952 Cal 214

<sup>4</sup> (1965) 1 SCR 65 : AIR 1965 SC 881 : (1965) 2 Cri LJ 8

liable for obscenity for selling copies of the book, ‘Lady Chatterley’s Lover’, which allegedly had obscene parts. The Court used the **Hicklin test**, as had transpired from the English case of *Queen v. Hicklin*. The Hicklin test examines whether the impugned matter tends to “deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.” This test states that a work should be viewed as a whole, but the obscene matter should also be separately considered to see if it violates the test.” This test was found not to violate the right of freedom of expression.

In this very case it was opined that “where art and obscenity coexist, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked.” This was indeed a conservative test in place with the existing societal standards of the time. However with changing times, the standard has changed too. In the 1986 case of *Sada Nand And Ors. vs State (Delhi Administration)*<sup>5</sup>, and the more recent 2014 case of *Aveek Sarkar & Anr. vs State Of West Bengal And Anr.*<sup>6</sup>, the Hicklin test was not used and labeled as conservative and redundant, and prime emphasis was given by the Court on the standards of the community and the consumers.

#### **Sada Nand And Ors. vs State (Delhi Administration) (1986)**

Magazine “Debonair” published obscene nude photographs of women in their magazine. It was contended that “Debonair” primarily catered to the needs of educated and sophisticated readers in the society published articles, views, reviews, features and photographs of high quality on various subjects. It also published a large number of photographs of topical as well as artistic value. The photographs were noted to exhibit creativity of the artist. It was stated that the mere fact that the photographs are of nude/semi nude women would not render them obscene or pornographic. It was a recognized principle that the concept of obscenity is molded to a very great extent by the social outlook of the people who are generally expected to read the book or article.

#### **Aveek Sarkar & Anr. vs State Of West Bengal And Anr. (2014)**

In this case the Court put to use the **Community Standards test** instead of the Hicklin test. The case was about a nude picture of Boris Becker and his girlfriend appearing in a German magazine. But the Court opined that a picture of a nude/semi-nude woman “cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of a depraved mind and designed to excite sexual passion in

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<sup>5</sup> 1986 SCC OnLine Del 135 : ILR (1986) 2 Del 81

<sup>6</sup> 2015 SCC OnLine Cal 10455 : (2015) 3 RCR (Cri) 639 : 2015 Cri LJ 2503 : (2015) 3 CHN 285

persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of exciting lustful thoughts can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.”

We can very vividly see the changing standards of ascertaining something as obscene with time. As far as Art is concerned, Indian courts can conspicuously be noticed to become more liberal with time.

### **Maqbool Fida Husain v. Raj Kumar Pandey<sup>7</sup> (2008)**

It was about the graphical representation of Mother Indian as a woman in nude with her hair flowing in the form of Himalayas displaying her agony. It was challenged for being obscene. It was opined that ‘the works of many artists today who have tried to play around with nudity have come under scrutiny and have had to face the music which has definitely made the artists to think twice before exhibiting their work of art. Therefore, looking at a piece of art from the painters' perspective becomes very important especially in the context of nudes’. The artist’s perspective was respected and was taken into consideration.

But Courts have always been stern, irrespective of the timeline, about the exposure of children to potentially obscene material. However various contemporary cases in India and abroad have seen the Courts trying to balance the freedom of expression against children’s welfare. The cases of *Ajay Goswami vs Union Of India & Ors.*<sup>8</sup> and the US case of *United States v. Playboy Entertainment Group*<sup>9</sup> deserve mentions.

### **Ajay Goswami vs Union Of India & Ors. (2006)**

The petitioner had asked the Court to ensure that minors are not exposed to sexually exploitative materials, whether or not the same is obscene or is within the law. The Court ruled that all sex oriented material are not always obscene or even indecent or immoral. The Court ruled that “we believe that fertile imagination of anybody especially of minors should not be a matter that should be agitated in the court of law. In addition we also hold that news is not limited to Times of India and Hindustan Times. Any hypersensitive person can subscribe to many other Newspaper of their choice, which might not be against the standards of morality of the concerned person.”

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<sup>7</sup> (2008) VI AD (Delhi) 533

<sup>8</sup> (2007) 1 SCC 143 : (2007) 1 SCC (Cri) 298 : 2006 SCC OnLine SC 1389 : AIR 2007 SC 493

<sup>9</sup> 146 L ed 2d 865,

**United States v. Playboy Entertainment Group, Inc (2000)**

This case asked for the prohibition of Playboy shows from televisions. The Court ruled that “in order to block a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” Hence mere discomfort of a few parties cannot be grounds for restricting freedom of expression.

However Courts have been strict in deciding cases where physical obscenity was involved.

**Deepa And Ors. vs S.I. Of Police, And Anr.<sup>10</sup> (1985)**

Petitioners were Cabaret dancers and others were managers of restaurants. Inside posh hotels, nude and obscene dances and other cabaret performances were allegedly conducted. However to ascertain an offence under Section 294(a), the obscene act must be done in a public place. The Indian Penal Code does not define 'public place'. The respondents contended that clubs are not public places. However the court opined that there were indications in other decisions to show that places as hotels are considered as public places. The acts were ruled as obscene.

Therefore it becomes conspicuous that existing community standards have the greatest bearing in ascertaining something as obscene. The Courts have taken different approaches in similar cases, at different points of time.

**(B) Methodology**

The paper focuses on the legal position of obscenity in the present day Indian society. The study cites relevant legislations like the Indian Penal Code 1860, and the Indecent Representation of Women (Prohibition) Act 1986, to draw conclusions as to the position of obscenity in the legal parlance in India. The paper also refers to past cases and verdicts delivered by various courts in the Country, related to the aspect of obscenity.

**II. OBSCENITY VS. FREEDOM OF EXPRESSION**

It has always been a tussle between the freedom of expression of individuals against protection of the society from obscenity, or any form of expression that can be construed as obscene. There is ironically a fine line between decency and obscenity and at times both overlap into the other. Decency as a concept does not limit itself to sexual morality alone, but also ensures that actions are in accordance with civil society standards. Decency is defined as the accepted codes for maintaining public and private decorum and morals. Under common law, indecent

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<sup>10</sup> 1986 CriLJ 1120

exposure and indecent publication are also criminal offences<sup>11</sup>. The task of labeling or construing something as obscene lies with the Indian Courts. However the system is not free of shortcomings. The issue with the Indian legal system is that it is inefficient and lacks jurisprudential uniformity in such matters. Even though our Constitution guarantees the right to free speech and expression, it can be easily silenced due to the presence of over-broad laws. India's legal system is still overburdened and overburdened, resulting in lengthy and costly delays. These delays discourage innocent people and victims from fighting for their own rights. There have been instances where the Indian government has failed to protect individuals who are expressing minority views by criminalizing them. Local officials frequently target such individuals, and extremist groups attack them. Rather than concentrating on the aforementioned issues, the government prefers to prohibit certain books, films, or works of art that offend specific groups of people. These unwarranted restrictions are then justified by citing the emphasis on public order and citing violent crime<sup>12</sup>.

Although Courts in India have done their best in almost all cases to find a balance between realistic restrictions imposed on the public and their right to express themselves, their records are still uneven and imbalanced. Several cases have been filed in India to limit reasonable expression, even in the form of commerce. There have been numerous advertisements and commercials that have been banned by the Indian government citing obscenity as the reason. Numerous advertisements such as that of Amul Macho in 2007 which starred actress Sana Khan washing a man's underwear while music played in the background, that had lyrics that included the words 'ye tohbada toing hai,' which was used as a subliminal sexual innuendo was banned; the commercial of Tuff Shoes Footwear Print Ad (1995) which featured Models Milind Soman and Madhu Sapre posing naked with a python rolled up around them, and Fastrack TV Commercial of 2011 which featured actress Genelia D'Souza and cricketer Virat Kohli making love in an airplane's cockpit, were deemed unsuitable for viewing because they challenged conservative Indian sensibilities, while another advertisement for Zatak talcum powder, in which the woman was shown as getting aroused by the smell of a talc was banned too. We find numerous such cases in history where restrictions were imposed on fair use of right of expression, that were beyond reasonable.

### **III. OBSCENITY AND MEDIA**

Media has throughout the course of history, been an important part of educating the public.

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<sup>11</sup> Aashia Jindal and Sanket Gupta, OBSCENITY OR ABSURDITY: THE UNCLEAR LAWS IN INDIA

<sup>12</sup> Dahiya (2015), Legal Era Online.

The culture of mass media arrived in India in the first half of the 18th century, with the introduction of print, and radio broadcasting in the 1780s. Media in this nation has always maintained its independence. However, disagreements over what is communicated, circulated, or published by the media have simultaneously existed since ancient times. Globally, there has been a liberalization of a perspectives of people and about what they consider obscene, which can be evidently noticed through the advent of applications like the 'OnlyFans'. However, there have been instances where people form the opinion that certain materials are contrary to societal cultural values, and such materials are then classified as 'obscenity'. Recent events have demonstrated how writers, actors, and painters have faced prosecution on charges of disseminating allegedly obscene materials. While some argue that there is a need to protect our society from such obscene materials, recent events indicate that there is a possibility that gaps in obscenity laws in India have led to the adoption of a series of arbitrary actions, with subjective satisfaction. With the growth of mass media over the last few decades, it is critical to have a clear vision of what constitutes a prohibited act.

There are various legislations that dictate what content is publishable and what content is not. Some of them are:

- **Indecent Representation of Women (Prohibition) Act, 1986:** that restricts indecent or improper depiction of women through any kind of publications, writings, paintings or even in advertisements. This legislation not only defines what constitutes indecent representation of women; it also prohibits and punishes any publication in which women are portrayed in an indecent manner or are indecently represented. This is done not only in books, circulars, posters, and other printed materials, but also in any type of advertisement<sup>13</sup>.
- **Cable Television Networks (Regulation) Act, 1995:** controls the telecast of such programs which can cause an outrage in our society or offend the established standards of morality, and outlines punishments with imprisonment and fine<sup>14</sup>.
- **The Young Persons (Harmful Publication) Act, 1956:** inhibits the publishing of material that may corrupt or adulterate a child's or adolescent's mind or incite them to commit violent, cruel, or other crimes. A punishment with imprisonment and fine is prescribed in the said Act.

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<sup>13</sup> Ray (2020), The Indian Express

<sup>14</sup> Kulkarni (2020), LEXLIFE Indi

- **The Information Technology Act, 2000:** If the materials are in electronic form, it is illegal to publish or transmit them if they are of a lascivious nature or have an appeal to lewd interests. Any publication or transmission that has the effect of degrading or corrupting those who have read, seen, or heard the said matter that is embodied or contained in it is punishable by imprisonment and a fine.

Over The Top or OTT platforms are not free from scrutiny of the government either, There have been attempts to bring OTT publications under the control of the government. Since major regulations in the nation like the Cable Television Networks Regulations does not apply to OTT platforms, the Government recently brought out the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 (“IT Rules”).

Part – III of the rules deals with OTT platforms, which contains the Code of Ethics, procedure, and safeguards concerning digital media. It has been administered by the Ministry of Information and Broadcasting (MIB).

#### **IV. CONCLUSION**

The debate between the two aspects: expression and morality has been long standing. The laws governing obscenity are still overbroad, vague, and ambiguous, leaving enough room for judges to bring in their own personal convictions when deciding what is and is not obscene. The dangers of having such broad discretion can be seen in the cases discussed and their judgments that reflected political agendas and personal convictions The phrase in it said that it was used in the interest of public order. Article 19 of the Constitution contains provisions that can lead to disorder as well as things that have a proclivity to cause disorder, where the word 'proclivity' creates a ambiguity about the nature of the matter under consideration. Due emphasis is given, in most cases, to the interests of the consumer, and never to the interests of the creator. This is not only flawed rationally, but also not justifiable.

Conflict is unavoidable in our country, with its diverse range of religions and cultures. When sensitive issues relating to someone's culture or religion are touched, and artists express their ideas or views on these controversial subjects, they should not be intercepted simply because these are serious issues that may hurt the sentiment of certain groups or communities. All works of art, literature, and so on do not incite hatred in the public. To reduce tension in our society, it is sometimes necessary to educate people in a subtle and gentle manner.

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