



THE IMPACT OF DIGITAL MEDIA ON OBSCENITY STANDARDS VIS A VIS VAGUENESS OF LAWS IN INDIA

¹Ms. Neha khanna ²Mr. Rohit Khanna

¹ Research Scholar, Panjab University, Chandigarh, ² Scientist 'C'

ABSTRACT

Obscenity which is a multifaceted concept is deeply rooted in the cultural, legal and moral frameworks and it remains as a contentious subject across different societies. The paper will elaborate and explore the dynamic nature of the word obscenity, encompassing its historical evolution, cultural creativity and legal implications. As it is very much evident that the term "obscenity" have various connotations with respect to region, age, religion and use of technology. Therefore, the paper will delve into the challenges defining obscenity amidst changing societal norms and of course, technological advancements. Additionally, it will examine the psychological and emotional impact on the persons who some way or the other got access to those obscene or absurd content. It needs a broader perspective and a comparable approach to quantify the notion of obscenity. The obscenity is directly related to morality and decency[1]. Hence, what is immoral for one may not be for others because it depends on the moral and cultural values that have shaped that particular country. The Indian Constitution has on one hand guarantee the right to freedom of speech and expression to its citizens while at the same time penal statutes and other legislative Acts discussed within the article have somewhere curtailed this freedom by penalizing those expressions which come within the ambit of the term 'Obscene'. Because of the presence of ambiguity with the meaning of this term, there were many misunderstandings with the term and hence a lot of challenges were faced by the judiciary. This paper will deal with the legislations relating to the legal status of obscenity in India and tries to compare with the other countries like UK and USA on the same subject matter in order to understand the complexity of the term 'obscenity'. The paper will also try to illustrate various case laws where the judiciary has misinterpreted and has confused it with nudity, vulgarity and absurdity. Hence, there is a dire need to reform the laws so as to balance the interests of the public at large and as well as to respect the artistic freedom.

Key words: *Indecency, Freedom of expression, Obscene, Vulgar, Fundamental rights.*

1. Introduction-

The word obscenity is derived from the Latin term 'obscaena' i.e. offstage meaning a strong moral repugnance. One may confuse to consider obscenity as synonymous with pornography as the words "pornography" and "obscenity" are frequently interchanged in normal conversations. Rather they are in reality two different discrete definitions of materials which can be considered indecent. Pornography describes sexually explicit material, but it is not a legally defined term. Obscenity, on the other hand, is legally defined; however, the legal definition is not comprehensive and completely vague.[2] In order to understand obscenity, it is important not to define it as Obscenity changes with time, region, values, society and culture etc. The number of things that revolve around this word and things that evolve from this word have a direct impact on the standards and level of obscenity and locking them into one line or a few lines is not literally possible. As such, there is no exact definition of obscenity as it changes with the circumstances of cases that come into light. Obscenity is a global, complex and dynamic phenomenon and is utterly not possible to understand it as a local and static phenomenon.

Advancement of Science causes rapid growth in the use of internet and technology creating more adverse and complicated situation because identification of an obscene content on Internet is very difficult, also the regulation relating to this is also not proper. Because of the growth of the internet the pornographic content, videos, messages,

pictures and other materials are easily disseminated worldwide without any border barriers. The worldwide nature of such materials makes them able to download images by anyone irrespective of age and anywhere across the world which makes the whole system virtually impossible to censor. The problem of cyber obscenity become more graver than offline obscenity in the form of language, literature etc.

Obscenity is a kind of mind pollution and a social problem affecting the society mainly women and children at large. In "*State of U. P. v. Thakur Prasad*"[3], obscenity was defined as meaning offensive to chastity or modesty, expressing or personating to the mind or view something that delicacy, purity or decency forbid to be expressed; anything expressing or suggesting unchaste and lustful ideas; impure; indecent and lewd." [4] Defining obscenity is very difficult as this concept is not uniform across the world as it goes on changing with time, region and with the advancement of age. The basic problem is to identify the definition of obscenity that balances the power of legislature to regulate the worst forms of pornography, and at the same time respect the artistic freedom of speech and expression guaranteed by the Indian Constitution.

2. Overview of Obscenity, absurdity and other synonyms –

In India the terms like decency and morality are considered interrelated and understood in relation to obscenity. In literal sense, Decency means 'not to use obscene language and gestures. And also, to make sure that the actions are in consonance with the standards of the civil society. Decency can be understood as the accepted codes of ethics and morals of the civilized society. Generally, the words like vulgar and indecent are used as a substitute for obscene but in actual these terms are different from one another.

i. Vulgarity and obscenity –

Vulgarity refers to language or behaviour that is coarse, rude or offensive, often lacking refinement or good taste. Obscenity, on the other hand, typically refers to material that is considered morally offensive and sexually explicit, often violating societal standards of decency. While vulgarity can encompass a broader range of inappropriate behaviour or language, obscenity specifically pertains to content that is sexually explicit or morally objectionable. Thus, a vulgar writing is not the same as obscene one in every case.

ii. Indecency and obscenity-

Indecency generally refers to behaviour, language, or content that is offensive, inappropriate, or morally questionable, but it may not necessarily include sexually explicit materials. Obscenity on other hand specifically deal with materials that is sexually explicit or morally offensive beyond indecency. Moreover, indecency is broader and can include non-sexual offences, whereas obscenity specifically involves sexually explicit or more objectionable material.

iii. Obscenity and absurdity-

Absurdity refers to something that is widely unreasonable, illogical and nonsensical. It often involves situation, actions or statements that defy common sense or rationality. Obscenity on the other hand pertains to material that is considered morally offensive particularly in a sexual context. Obscene material can include explicit sexual content or representations that violate societal standards of decency. While both absurdity and obscenity may provoke strong reaction or discomfort, they are distinct concepts; absurdity relates to irrationality or illogicality while obscenity involves material that is morally offensive especially regarding sexuality." [5]

3. Emergence of the word 'obscenity'-

In 1857, the Obscene Publications Act was passed in Great Britain and that led to the emergence of the word 'obscenity' around 150 years ago. The House of Lords was stubborn about this act but the Lord Chief Justice Campbell addressed the body that "the measure was intended to apply exclusively to works that are written for the only purpose of corrupting morals and minds of young youth, and also, of a nature calculated to shock the common feelings of morality and decency in any well-regulated mind." [6]

Regina v. Hicklin (1868) was the first known case tried under the Obscene Publications Act. This case at the first instance, addressed the issue of obscene material published on an anti-Catholic pamphlet titled "*The Confessional Unmasked*" and published by the Protestant Electoral Union. [7] Lord Cockburn J. stated that material was considered obscene, "... whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." [8]

"The Hicklin test constitutes of 6 significant ingredients which are as follows: -

- a) 'tendency to deprave and corrupt, or to suggest to readers thoughts of a most impure and libidinous character';
- b) 'minds that are open to such immoral influences'; this was a significant aspect as the court did not test it from the reasonable person standpoint, but rather any person in whose hands the thing in dispute may land.
- c) 'the intent of the wrongdoer was to be presumed from the words which he had used. His actual intent was not relevant.'; this way even those who might have intended a social message or challenge to some practice might land up in trouble.

d) 'prevailing contemporary circumstances of no relevance'; the social construct and the type of literature prevailing at the time was not considered as significant either.

e) 'accessibility'; the fact that how easily the disputed material is available to the public was another factor to be considered.

f) Another crucial and rather draconian constituent of the test was that any portion, part, or passage of the material could be judged separately and the whole material can be considered obscene on its basis." [9]

The *Hicklin* test became the standard for dealing with the obscenity cases in the United States. And with time it got strengthened by statutory regulations that were passed in the late nineteenth century. In 1873, "Anthony Comstock, a private citizen felt that it was his duty to improve the morals of people by rendering obscene literature and photographs inaccessible and hence he succeeded in persuading Congress to pass an "Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use ,1873, more commonly known as the Comstock Act". [10] This Act basically controlled the circulation of obscene materials through the mail. He was appointed as a special postal agent to directly play a role in the suppression of obscenity.

In 1913, the *Hicklin* test faced resistance in the case of *United States v. Kennerly*. [11] *Kennerly* was involved mailing a book defined as "obscene" by the standards set by the Comstock Act. Judge Hand felt that the "average conscience" of the people was the right approach to deal with the question relating to what obscenity is and what is not. This concept was first elaborated in this particular case. [12] Hand J. was of the view that the *Hicklin* test to determine the question of Obscenity is vague and focussed on the most sensitive persons and that there is a dire need to have some legislatively perceived regulation. [13] The concept then was continuously evolved with time.

INDIA- Historical evolution of the term obscenity as an offence traces back to colonial rule and it was basically introduced as a check over freedom of speech and expression. Surprisingly it was one of the few laws which were applicable as similar in India and England. Indian penal code, 1860 provides Section 292 which penalised obscenity but it was not the first time rather its criminalisation can be traced back to an Act which is to Prevent the Sale or Exposure of Obscene Books and Pictures', 1856. Accordingly, this made the government a moral guardian to keep a check about what the society shall be reading or viewing. However, with the passage of time the judiciary took more liberal approach in deciding what is obscene and what is not. Another important fact to mention here is that at that point of time merely purchasing or viewing of obscene material was not at all a crime but at the same time the selling or exhibiting of such material constituted a crime.

At the very first instance, The *Hicklin* test (6 features) was applied not only in British India but also in the Republic of India for several decades. The turning point was seen in 1964 when the *Ranjit Udeshi* case came up for the very first time before the Supreme Court of India it. "It held that sex or nudity by itself was not enough to corrupt or deprave minds and thus to hold something as obscene". Further, it was held that the complete work is to be taken as a whole and the obscene part has to be weighed against the whole work to determine whether the obscenity is so serious to term the whole work as obscene or not." [14] Moreover is to be held that an obscene publication would be considered justified if it made for public good unless the said publication was so serious that it weighs down the public good.

Few years after this judgment was passed, in 1969 an amendment to section 292 was done so as to include 'public good' as an exception to charges of obscenity, which was in consonance with what was decided in *Ranjit Udeshi* case. Further, the materials kept in a bona fide nature for the religious purposes', sculptures or any 'ancient monument' were also exempted from the definition of obscenity. Also, the work used will be considered as a whole in order to determine the test for obscenity.

Another significant point to consider is whether the usage of vulgar language shall constitute obscenity or not? This issue was addressed in the case of *Samaresh Bose v Amal Mitra* [15]. The Bengali novel 'Prajapati' used some sort of vulgar language and acts which the trial court held to be obscene. However, the Supreme Court dissented this opinion and held that publication relating to kissing, descriptions of the female anatomy, and 'suggestions of sexual acts, by themselves, were insufficient to constitute obscenity and therefore, vulgarity and obscenity were not meant to be confused. Another same issue came into question in *Chandrakant Kalyandas Kakodkar v. State of Maharashtra*, [16] case, wherein a short story deal with a protagonist who had sexual relationships with three ladies. In this case too, court held that although the story was of different context but still it did not amount to obscenity. However, the use of vulgar and abusive language used against important historical and public figures will amount to obscenity such as Mahatma Gandhi, as was in the case of *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*, [17] wherein a Marathi poem 'Gandhi Mala Bhetala' ('Gandhi Met Me') was under question and was held to be obscene by the Supreme court of India.

Another recent and very significant judgement that needs to be looked upon is *Aveek Sarkar v. State of West Bengal* [18] where the question before the Supreme court was if a semi-nude photograph of renowned tennis player Boris Becker with his dusky fiancée was obscene or not? This particular judgement abandoned the *Hicklin* test that is

why this case has a special significance and the Supreme Court further held that the material cannot be judged by its effect on the most susceptible readers, rather, the court has to apply a 'community standard test' and to be judged from an average person's point of view, having contemporary relevance. Moreover, held that nudity cannot be at first instance held obscene until and unless it has the potential of exciting irregular lustful thoughts. Also, the intention of imparting anything should be considered first. Means even if something is obscene but the message that it intends to deliver is for public good, that will not amount to obscene at all. As in this case, the pictures delivered were intended to raise awareness against a prevalent social evil, i.e. Racism and thus the court dismissed the allegation of obscenity. A similar situation arose in the case of *Bobby Art International v. Om Pal*[19] "wherein the objectionable scenes in the film 'Bandit Queen' were considered and held that they were not considered as obscene because the objectionable content was not to incite lust rather, it was to create a sense of sympathy for the victim"[20].

4. Obscenity, Media and the Freedom of Expression-

India which is one of the world's largest democracies has witnessed that advent of the culture of mass media 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 tried to maintain its individuality. However, there is always a continuous battle about what is communicated, circulated or published by the media. 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."

It is very much evident that India comprised of various different cultures and communities which make India slight back from the western culture, hence according to some there is a need to shield our society from such obscene materials. The recent events and the case studies suggest that there is the gaps in the laws related to obscenity in India which consequently have led to the adoption of a series of actions that were arbitrary in nature. Because of the technological advancement and the proliferation of internet, it is of the utmost importance to have a clear vision of laws relating to obscenity. Situations have hence, changed to allow the artists to express their views along with literary work, paintings and films and nowadays through OTT platforms content which has resulted in attempts to define, objectify and removal of what is obscene through various statutory provisions."[21]

In the case of *Ajay Goswami vs. Union of India*[22], the court also laid a common test for judging the obscenity in work by viewing it from the viewpoint of an ordinary prudent man. 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."[23]

5. Legislations governing obscenity in India:

India as country is very dynamic and the culture, custom and communities existing here makes it more diverse. Similarly, the defining obscenity, as said earlier is very difficult. There are various words like indecency, vulgarity, nudity and pornography which are considered as synonym of word 'obscenity' but actually they are not. Our Indian constitution treat men and women equal and guaranteed that they should be treated alike but Indian dynamic society is not like that and there is visible distinction seen from the history period. Therefore, so as to bring equality and to remove this biasness constitution has made certain special provisions to favour women and children. Some of them are Art. 14. Art. 15(i), Art. 15 (3) ,(4), Art. 16, Art. 39 (a), Art. 39 (d), Art. 42, Art. 46, Art. 47, Art. 51 (A) (e), Art. 243.

In any democratic country freedom of speech and expression is the most essential element to be followed. In India, Article 19 is explicitly recognized as a fundamental right to freedom of speech and expression which is not absolute and can be restricted under Art. 19(2) where several grounds are prescribed including "decency or morality and public order". This exception is made so as to protect people from depravity and corruption by immoral influence. For the first time in "*Ranjit D. Udeshi v. State of Maharashtra*"[24] the Hon'ble Supreme Court interpreted the word obscene and relied on the test followed in the famous *Hicklin's case*, But the Hicklin test cannot be followed in every case related to obscenity, because there are cultural and moral standards that differs from nation to nation, meaning thereby there may be some sexually explicit content which may not be obscene in Western countries but the same may be considered obscene in India.

While the constitution guarantees the freedom of speech and expression to media, the criminal law at the same time imposes certain restrictions on that freedom for protecting the community interests and to maintain public

tranquillity. But the Media are basically under the same obligation as the people in general to abide by general principles of penal law.

Different laws relating to obscenity:

- **Obscenity under The Indian Penal Code 1860**

It is very evident that today is the technological age and with the proliferation of the use of internet as a medium the age-old provision section 292 of Indian penal code is no longer comprehensive as with the advent of technology, the modes of transmission & distribution are no longer limited to books, pamphlets, etc. Now web content is taking the global spread and considering the same the Information Technology Act"[24] was introduced in 2000. Sec 67[25] which deals with online obscenity is somewhat similar to Section 292 as Section 67 also does not provide for an exact and precise definition of obscenity but only penalizes the publication & transmission of such material over the internet.

- **Obscenity under The Information Technology Act 2000**

However, IT Act, 2000 is a special Act and it will have the overriding effect over IPC in determining the questions relating to obscenity as held by the Supreme court in the case of *Sharat Babu Digumarti v Government (NCT of Delhi)*[26] where it was held that if an alleged offence comprised of an electronic record then the offence will be out from the purview of IPC, in that case IT Act will come into play. Another point worth mentioning here is that while the various courts of the country have held that nudity or sex by itself cannot be regulated or prohibited under IPC, the IT Act under Section 67A[27] 'prohibits the transmission or publication of materials containing sexually explicit act or conduct as well. This shows how the IT Act goes one step forward in terms of regulating decency & morality of the masses as compared to the Indian Penal Code.' Under the Indian Penal Code (IPC), Sections 292, 293 and 294 deal with the offence of obscenity. **Section 67 of the IT Act of 2000** says that anyone who publishes or transmits obscene material in electronic form can be punished. "Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees."[28]

- **Indecent Representation of Women (Prohibition) Act, 1986** so as to address the issue of 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 advertisements."[29]

- **Cable Television Networks (Regulation) Act, 1995**

This Act aims to control the telecast and publicity 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-A.[30]

- **Cinematograph Act, 1952**

specifies the provisions for regulation and certification for showing and publication of cinematographic 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)."[31]

- **The Young Persons (Harmful Publication) Act, 1956**

This "restricts publication of such matter which might corrupt or adulterate the mind of child or a young person' or incite them into committing crimes of violence, cruelty, etc."¹

¹ The Young Persons (Harmful Publication) Act, 1956

6. Conclusion and way forward-

As per the analysis done through this paper, it is seen that the Hicklin Test has been diluted down by the Supreme Court by introducing new qualifications, tests and exceptions to it. However, the laws related to obscenity are still vague and ambiguous with gaps making difficult 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. The words 'in the interest of public order' and morality used in Article 19 clause 2 of the Constitution include things that are exceptions to freedom of speech and expression and 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. Also with the advancement of usage of internet worldwide has caused the problem more grave. As this has emerged a new problem relating to OTT Platforms content like amazon, hotstar, sony liv, voot etc. wherein the content is available without any regulating procedures worldwide. The lot of controversies have emerged too and many petitions have been filed by various lawyers or lay mans against some contents passed on OTT which considered as obscene, vulgar, or hurting sentiments of religions and communities etc. this has hence, proved be a disturbing problem today which need to be addressed as soon as possible through a specific and robust legislation.

References

- [1] Advocate Kriti, "Growing Indecencies or Obscenity In Cyber World And Legal Regime In India", available at, <http://www.legalserviceindia.com/legal/article-1593-growing-indecencies-or-obscenity-incyber-world-and-legal-regime-in-india.html>, last accessed on 30-04-2023
- [2] Twinkle Kataria, "Law Of Obscenity: An Indian Perspective", Journal Of Legal Studies And Research, available at, <http://thelawbrigade.com/wp-content/uploads/2019/05/twinkle.pdf>, (last accessed on 31-03- 2023).
- [3] State of U. P. v. Thakur Prasad AIR 1959 All 49.
- [4] *ibid*.
- [5] Ray (2020), The Indian Express
- [6] Robert W. Haney, *Comstockery in America: Patterns of Censorship and Control* (Boston: Beacon Press, 1960), 16.
- [7] Charles Rembar, *The End of Obscenity: The Trials of Lady Chatterley, Tropic of Cancer, and Fanny Hill* (New York: Random House, 1968), 20.
- [8] Lester A. Sobel, ed., *Pornography, Obscenity & The Law* (New York: Facts on File, 1979), 8.
- [9] *Regina v Hicklin*, 1868 LR 3 QB 36
- [10] Haney, *Comstockery in America*, 20.
- [11] *United States v. Kennerly*, 209 Fed. 119 (S.D.N.Y. 1913)
- [12] Chris Hunt, "Community Standards in Obscenity Adjudication," *California Law Review* 66 (1978): 1279.
- [13] Hunt, "Community Standards in Obscenity Adjudication," 1279
- [14] *Ranjit Udeshi v. State of Maharashtra*, AIR 1965 SC 881.
- [15] *Samaresh Bose v Amal Mitra*, (1985) 4 SCC 289.
- [16] *Chandrakant Kalyandas Kakodkar v. State of Maharashtra*, (1969) 2 SCC 687.
- [17] *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*, (2015) 6 SCC 1.
- [18] *Aveek Sarkar v. State of West Bengal*, (2014) 4 SCC 257.
- [19] *Bobby Art International v. Om Pal*, (1996) 4 SCC 1.
- [20] *ibid*
- [21] Kulkarni (2020), LEXLIFE India.
- [22] AIR (2007), SC, pg- 493
- [23] *ibid*
- [24] The Information Technology Act, 2000.
- [25] The Information Technology Act, 2000, S.67.
- [26] *Sharat Babu Digumarti v Government (NCT of Delhi)*, (2017) 2 SCC 18.
- [27] The Information Technology Act, 2000, S.67A.
- [28] Section 67 of IT Act, 2000
- [29] *Indecent Representation of Women (Prohibition) Act, 1986*
- [30] *The Young Persons (Harmful Publication) Act, 1956*
- [31] *Cable Television Networks (Regulation) Act, 1995*