

# LEGALFOXES LAW TIMES

## A NOTE ON THE LAWS CONCERNING OBSCENITY AND THEIR STANDING IN THE PRESENT SOCIETY

By Shreya Singh

### INTRODUCTION

Obscenity in the legal aspect is used to classify certain things as offensive to public decency<sup>1</sup>. These things particularly include sexual references. A definite and straight-jacketed definition of obscenity is hard to put down considering it is an abstract concept and varies from person to person, depending on their perception of things. The term has acquired a specifically sexual meaning with evolving times, even though it originally referred to things that were considered repulsive. Various definitions and meanings have been laid down through a plethora of case laws. For example the Supreme Court of India defined “Obscenity” as “the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive,” in the case <sup>2</sup>*Ranjit D. Udeshi v. State of Maharashtra*. “Decency” and “Morality” are vague notions that go through multitude of changes, through time and social changes in society, varying vastly through different cultures. In <sup>3</sup>*Chandrakant Kalyandas Kakodar v. State of Maharashtra*, the Supreme Court observed that notions such as these vary from country to country depending on the moral set by the society, and even within the same country, particularly one as socially disparate and culturally diverse as India, there are widely varying standards of moral acceptability.

### MORALITY AND DECENCY; AN EXCEPTION TO THE RIGHT TO FREE SPEECH

Citizens of India have the right to express themselves freely and speak things they wish to share under Article 19(1)(a) of the Constitution of India. However, there are certain laws in the country

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<sup>1</sup>John Philip Jenkins/<https://www.britannica.com/topic/obscenity/Developments-in-the-20th-century>

<sup>2</sup>*Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881

<sup>3</sup> (1969) SCC 687: AIR 1970 SC 1390

that act as exception to this right as they impose reasonable restrictions in the interest of “decency” and “morality.”<sup>4</sup>

Some of the laws that embody restrictions on the right to free speech and expression are:

- The Indian Penal Code, 1860 makes the sale, letting for hire, distribution, circulation, public exhibition, import, export and advertisement of obscene matter an offence, punishable, with imprisonment and fine.<sup>5</sup>
- The Cinematograph Act, 1952 prohibits the certification of a movie by the Censor Board, if the film or any portion of it is against the interests of morality and decency.<sup>6</sup>
- The Dramatic Performances Act, 1876 prohibits public dramatic performances on the basis of obscenity, punishable with imprisonment and fine.<sup>7</sup>
- The Customs Act, 1962 empowers the Government to prohibit and impose restrictions on the import and export of goods in the interest of morality and decency.<sup>8</sup>
- Post Office Act, 1898 prohibits the transmission, by post, of anything on the ground of decency.<sup>9</sup>
- The Indecent Representation of Women (Prohibition) Act, 1986 prohibits the indecent representation of women through advertisements or other publications, writings, figures etc. and makes the contravention punishable with imprisonment and fine.<sup>10</sup>
- The Young Persons (Harmful Publications) Act, 1956 prohibits publications of any sort that might corrupt a child or young person and incite him to commit crimes.<sup>11</sup>
- The Information Technology Act, 2000 makes the publication and transmission in electronic form of material which is lascivious or appeals to the prurient interests, and corrupt persons who are likely to come across it.<sup>12</sup>

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<sup>4</sup> Art. 19(2), Constitution of India, 1950

<sup>5</sup>Ss. 292-94, IPC

<sup>6</sup>S. 5-B, Cinematograph Act, 1952

<sup>7</sup>The Dramatic Performances Act, 1876, Preamble; S. 3(c); S. 6

<sup>8</sup>S. 11(b), Customs Act, 1962

<sup>9</sup>S. 20, Post Office Act, 1898

<sup>10</sup>Ss. 3-6, Indecent Representation of Women(Prohibition) Act, 1986.

<sup>11</sup>Ss. 2(a), 3-7, Young Persons (Harmful Publications) Act, 1956.

<sup>12</sup>S. 67, 67 A, Information Technology Act, 2000

- The Cable Television Networks (Regulation) Act, 1995 prohibits telecast of programs on cable television, which offend decency and morality and visits a contravention with imprisonment and fine.<sup>13</sup>

## OBSCENITY, INDECENCY, VULGARITY, SEX AND NUDITY: DISTINCTIONS AND WHAT SETS THEM APART

INDECENCY AND OBSCENITY- As stated earlier given the dynamics of social opinions, changing morality and evolving standards, a straightjacketed definition of obscenity would cause more problems than it solved. Indecency as a concept is way wider than the concept of obscenity. Anything that comes under the ambit of obscene would most definitely be considered indecent. <sup>14</sup>On the other hand all things that are recognized as indecent are not necessarily obscene. “Indecency” purely means non-conformance with accepted standards of morality, whereas “obscenity” refers to that which has lascivious appeal.

VULGARITY AND OBSCENITY-The distinction between vulgarity and obscenity was laid down by the Supreme Court in *Samaresh Bose v. AmalMitra*.<sup>15</sup> The Court held that ‘A vulgar writing is not necessarily obscene. Where on one hand, vulgarity arouses a feeling of disgust and revulsion but does not have the effect of corrupting the morals of the reader, Obscenity on the other has the tendency to deprave and corrupt those minds that are to immoral influences.’

OBSCENITY, SEX AND NUDITY - A reference to sex or sexual explicitness is different from obscenity or indecency. In *Ranjit D. Udeshi v. State of Maharashtra*<sup>16</sup> the Supreme Court remarked that “if the rigid test of treating with sex as the minimum ingredient were accepted hardly any writer of fiction today would escape the fate Lawrence had in his days.”<sup>17</sup> In *K.A. Abbas v. Union of India* the Supreme Court observed that sex and obscenity are not always synonymous and it was wrong to classify sex as essentially obscene or even indecent or

<sup>13</sup>Ss. 5, 6, 16, 17, 19 and 20, Cable Television Networks (Regulation) Act, 1995

<sup>14</sup>(*R. v. Stanley*, 1965)

<sup>15</sup>(1985) 4 SCC289, AIR 1986 SC 967

<sup>16</sup>*ibid*

<sup>17</sup>*ibid*

immoral.<sup>18</sup> *Bobby Art International v. Om Pal Singh Hoon*<sup>19</sup> was another case where the Supreme Court drew the distinction between nudity and obscenity. The Supreme Court rejected the petitioner's contention that the scene of frontal nudity was within Article 19(2)<sup>20</sup> and Section 5-B of Cinematograph Act, 1950 and held that "the object of showing frontal nudity of the humiliated rape victim was not to arouse the prurient feelings but revulsion for the perpetrators.

In *Maqbool Fida Hussain v. Raj Kumar Pandey*<sup>21</sup> the Supreme Court observed that 'having been called the Land of Kama Sutra, why is it that we shy away from that very name. The Court contemplated that it is the way of perception to objects which makes the person perceive things in the way they do. The Court was of the opinion that it was unfortunate that India's new 'puritanism' is being carried out in the name of cultural purity and some ignorant people are vandalizing art and pushing the country to a pre-renaissance era.'<sup>22</sup>

## OBSCENITY AS A STRICT LIABILITY

The Supreme Court held in *Ranjit D. Udeshi*<sup>23</sup> that it is not necessary to prove knowledge of obscenity. Section 292 of IPC does not make knowledge of obscenity an ingredient of the offence. The court held that the prosecution is not required to prove something that is not needed according to the law. If knowledge was made part of the *actus reus*, it would place an impenetrable defense in the hands of the offenders. The difficulty of obtaining legal evidence of the offender's knowledge has made the liability of this offence strict.

## THE VARIOUS TESTS OF OBSCENITY

The Supreme Court recognized that there can be no specific test for obscenity and each case would have to be specifically judged on its facts. Some of these tests are as follows:

- The Hicklin's test
- The likely audience test
- Literary merit and "preponderating social purpose"

<sup>18</sup>(1970) SCC 780; AIR 1971 SC481

<sup>19</sup>(1996) SCC I : AIR 1996 SC 1846

<sup>20</sup>Constitution of India, 1950

<sup>21</sup>2008 Cri LJ 4107 (Del)

<sup>22</sup>*ibid*

<sup>23</sup>*ibid*

- The aversion defense
- Contemporary/national standards
- Judging the work as a whole
- Opinion of literary/artistic experts
- Test of the ordinary man

THE HICKLINS TEST-The test is based on the effect a publication would have on the most vulnerable members of society, whether or not they read it. Under this test the defense of literary merit was not available. Although the test was buried in England after the Obscene Publications Act of 1959 the Supreme Court of India adopted it in the *Ranjit D. Udeshi*<sup>24</sup> case. The Supreme Court was of the opinion that should not be given up just because it makes the court the judge of obscenity. The Court relied on this test for the above mentioned case and further interpreted the word “obscene” to mean something that is “offensive to modesty or decency; lewd, filthy and repulsive”.<sup>25</sup> The court held that to decide what could be called obscene attention should be paid to the “community mores and standards”.

THE LIKELY AUDIENCE TEST – The likely audience test replaced the most vulnerable person standard set by the Hicklin’s test by the likely reader test as mentioned in section 292 of IPC. The test was to see the effect of a publication on the audience who were likely to gain access to it. In *Samaresh Bose*<sup>26</sup> the court stated that the judge should place themselves in the position of a reader from every age group who are likely to come across the book and should try to gauge the possible effects that it might have in the minds of the readers.

LITERARY MERIT AND “PREPONDERATING SOCIAL PURPOSE”- There are a lot of instances where art and obscenity are entangled with each other. Under these circumstances it should be seen that whether the literary or social merit outweighs the obscene content. Obscenity without a greater social importance cannot gain protection of free speech and expression. This was applied to Lawrence’s *Lady Chatterley’s Lover* as it was said that there was no specific social gain that the book held which could outweigh the obscene matter. Similarly in

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<sup>24</sup>*ibid*

<sup>25</sup>*ibid*

<sup>26</sup>(1985) SCC 289: AIR 1986 SC 967

*AnandPatwardhan*<sup>27</sup> a film by the name *Father, Son and Holy War* was denied telecast as it could cause law and order problems and further that there was no public gain in its telecast.

THE AVERSION DEFENCE – As discussed in *K.A. Abbas v. Union of India*<sup>28</sup> sex and nudity do not always constitute obscenity. Sometimes sex and nudity is depicted not to arouse sexual desire but to arouse horror and disgust the social evil that the scene depicts. This defense was referred to, as the “aversion defense” in the United Kingdom. The best example of the aversion test in India is the Bandit Queen Case. When a film simply seeks to draw the attention of the public towards social vices and demands remedy through its portrayal it cannot be denied exhibition.

CONTEMPORARY NATIONAL STANDARDS – This test says that the judging of a particular work to find out whether it is obscene should be done on the basis of the national standards and contemporary mores.<sup>29</sup> For example in the present Indian society the concept of pre-marital sex and live-in relationships is no longer uncommon and so any reference to these or an attempt to raise acceptance of these trends cannot be considered as obscene.

JUDGING WORK AS A WHOLE - This test lays down that the entire publication should be scrutinized as a whole and the allegedly offensive portions should be analyzed separately as well to see the effect that it might have and whether they are in reality as obscene that would deprave and corrupt minds of likely readers and viewers. If the publication, when judged in its entirety has a theme and message to convey it cannot be considered as obscene and therefore cannot be stopped from exhibition in front of the public.

OPINION OF LITERARY/ARTISTIC EXPERTS – In the case of *Samaresh Bose*<sup>30</sup> the court held that when a situation comes where the element of subjective or personal preference may remain hidden in the subconscious mind which may affect fair assessment the court can consider the views expressed by reputed or recognized experts in the field.

TEST OF THE ORDINARY MAN – According to this, the test of judgment of a work should be of an ordinary man and not of a hypersensitive person. Something that may strike as normal to an

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<sup>27</sup>(2006)8 SCC 433: AIR 2006 SC 3346

<sup>28</sup>*ibid*

<sup>29</sup>*Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881; *K.A. Abbas v. Union of India*(1970) SCC 780: AIR 1971 SC 481;

<sup>30</sup>(1985) SCC 289: AIR 1986 SC 967

ordinary person of common sense and progressive mindset might appear aggravating to a depraved person. In *Ramesh v. Union of India*<sup>31</sup> the court was of the opinion that the correct approach to judge the exhibition of a film or reading a book is to judge it from the perspective of a reasonable, strong minded and firm person not according to the one's with a weak and irresolute mind.

## CONCLUSION

The society we live in is majorly divided between those with a progressive mindset, trying to help the society grow and those that act as the “moral police” and set standards that they feel are appropriate. State prescribed morality is an issue which is very serious what with the surfacing of self-styled protectors. The suppression of movies, books or other forms publications on the basis of decency and morality ends up blowing up the popularity of such publications more than they originally deserved. People should develop a more liberal mindset and courts should be cautious while imposing restrictions. Even though the varying morals from culture to culture make it difficult to put a definite finger on what a can be considered decent, moral or indecent courts should carefully judge on the basis of facts of a case and arrive at a decision that is in conformance with the standing of morals and social code in the society.



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<sup>31</sup>(1988) SCC 668: AIR 1988 SC 775