Tracing the Evolutionary Trend of Decency and Morality in India: A Comparative Analysis

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Abstract

This paper seeks to chart the transformative journey of the concept of 'Decency and Morality', a key component of Article 19(2) of the Indian Constitution, which allows the State to reasonably restrict an individual's freedom of speech and expression on grounds of obscenity.

In doing so, the paper seeks to explore the historical trajectory of the obscenity jurisprudence in India and analyse how India has gradually but certainly shifted away from the archaic and hyper-conservative Hicklin Test. It also aims at comparing the Indian evolutionary trend with simultaneous advancements in the UK and US obscenity laws.

Keywords*: Decency and Morality, Article 19(2), UK and USA Obscenity Laws*

I. Introduction

This paper seeks to explore the evolution of the obscenity jurisprudence in India, and seeks to compare it with the evolution in UK and the US. The purpose of this exercise is to try and explore the ever-liberalizing approach of the Judiciary to the notions of what is obscene and what is not. In other words, this paper would go on to show that the notions of 'Decency and Morality' have undergone a sea change along our constitutional journey. Comparisons with UK and the US will also show how at different points of time, the Indian judiciary has taken interpretational shifts to create completely overhauled paradigms of obscenity tests. Through this analysis, the conclusion that will be sought to be achieved will be that pre-censorship of pieces of artistic and creative innovations should not be carried out on grounds of 'decency and morality' in

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any medium, and only *post facto* imposition of liabilities should be resorted to, in view of the prevalent trends of the obscenity jurisprudence.

II. Evolution of the Obscenity Jurisprudence In UK, US And India – A Comparative Analysis

This part looks at the contrasting patterns of the obscenity laws and their judicial interpretations in UK, US and India. The contrast, as will be evident from the analyses, could be partly attributable to social and historic factors. But, it is without doubt that the contrast is also symptomatic of the robustness of the judicial systems in the respective countries that have contributed towards more pragmatic readings of the law on obscenity and therefore contributed immensely towards the doing away with the unfair and unreasonable fetters arbitrarily imposed on free speech and expression on grounds of indecency and immorality.

A. United Kingdom

It has been historically accounted that throughout the ancient and medieval ages, the offences of 'sedition', 'heresy' and 'blasphemy' have been used to ban publication and circulation of books that were considered to be immoral and indecent.[2] The development of technology in the form of the printing press provided an impetus in transportation of such books from other parts of the world to England.[3] However, even in the eighteenth century, obscenity as a specific offence was not recognised by the English law. Thus, English courts were prevented from imposing punishment on this ground.[4] In 1724, a bookseller named Edmund Curll was convicted on the charge of obscenity for the first time for the publication of a book entitled "*Venus in the Cloister*" or "*The Nun in Her Smock*".[5]

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[2]John Philip Jenkins, *Obscenity,* BRITANNICA, (July 19, 2020, 10.15 A.M.), http://www.britannica.com/EBchecked/topic/424001/obscenity.

[3]*Id.*

[4]PATRICK J. KEARNEY, A HISTORY OF EROTIC LITERATURE49-50, (Macmillan, 1st Ed., 1982).

[5]*Id.*

In 1802,the Society for the Suppression of Vice was established by William Willberforce following a Royal proclamation by King George III in 1787 quite prophetically titled 'The Proclamation for the Discouragement of Vice', ostensiblydedicated to promote 'public morality'.[6] The Society created widespread demands for a legislation criminalising obscenity.[7] This culminated into the Obscene Publications Act 1857 which criminalised 'obscene libel'.[8] However, interestingly enough, obscenity still continued to remainundefined till this point.[9]

In 1868, Lord Cockburn, C.J., formulated the definition of obscenity in the landmark case of *R v. Hicklin*[10] that has been followed extensively throughout the globe ever since.[11]The test for obscenity, as famously evolved in *Hicklin*, was "*whether the tendency of the matter is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands publication of this sort may fall*."[12] This test has been subjected to widespread criticism because it is a purely subjective one.[13] It disregards a contextual reading and mere isolated passages would be sufficient to constitute an offence of obscenity.[14] At the same time, the target audience is not a reasonable man, rather it could even be the most vulnerable person, meaning thereby, even a highly impressionable adolescent,[15]setting a really low threshold.[16]It took close to hundred years for the court steeped in the precincts of Victorian morality, to finally change its position on obscenity when in *R v Martin Secker and Warburg Ltd.*,[17] the court adopted a liberal stance and stated that the prevalent attitude on

[6]M.J.D. ROBERTS, MAKING ENGLISH MORALS: VOLUNTARY ASSOCIATION AND MORAL REFORM IN ENGLAND, 1786-1886, (Cambridge University Press, 1st Ed., 2004).
[7]GEOFFREY ROBERTSON & ANDREW NICOL, MEDIA LAW 195 (Penguin,5th Ed., 2008).
[8]*Id.*
[9]*Id.*
[10] (1868) LR 3 QB 360.
[11]DANY LACOMBE, BLUE POLITICS: PORNOGRAPHY AND THE LAW IN THE AGE OF FEMINISM 167-168 (University of Toronto Press, 1st Ed., 1994).
[12]*Id.*
[13]ROBERTSON & NICOL, *supra* note 6, at 195.
[14]PETER CAREY, MEDIA LAW149-150 (Sweet and Maxwell, 4th Ed., 2007).
[15]*Id.*
[16]*Id.*
[17] (1954) 2 All ER 683.

'sex and context' have to be used to determine obscenity even while employing the *Hicklin* formula.

Persistent efforts for framing a liberal law and the change in the societal outlook on obscenity resulted in adoption of the Obscene Publications Act, 1959,[18]which incorporates a 'likely audience' test marking a departure from the *Hicklin* formulation, and denotes that determining factor as to what is obscene and what is not is the opinion of the likely reader, and not any random person.[19] A holistic reading signifies that the 'dominant effect' of the entire piece of work is to be considered.[20] These positive changes shaped the future course of law in a progressive direction. The first major case was *R v. Penguin*[21]where the court relied on the progressive parameters incorporated in the 1959 Act to arrive at the conclusion that the book is not obscene, having regard to the artistic merit and the dominant effect of the work.[22]

A significant development in the law took place in the form of the Obscene Publications Act, 1964.[23] While the 1959 Act law criminalises "*publication*" of an obscene material, the 1964 Act treats "possession*, ownership or control of an obscene article for publication for gain*" as an offence.[24] The law, therefore, became more streamlined.

A landmark and interesting development occurred in the famous *Oz* trial in 1971,[25]which resulted in greater liberalisation in the attitude of British society towards acceptability of so-called "obscene" articles. In *DPP v. Whyte*,[26] the House of Lords stated that the fact that the audience is already "depraved or corrupted" is no defence against liability under obscenity. This is because the

[18]ROBERTSON & NICOL, *supra* note 6.
[19]*Id.*
[20]ROBERTSON & NICOL, *supra* note 6, at203.
[21] (1961) Cr LJ 176.
[22]ROBERTSON & NICOL, *supra* note 6, at196.
[23]CAREY, *supra*note13, at 153.
[24]*Id.*
[25] R v. Anderson (1971) 3 All ER 1152.
[26] (1972) AC 849.

law also protects already corrupted individuals from further exposure to obscenity.[27]

There are three specific defences to obscenity. Section 4 of the 1959 Act states "public good" is a defence if the publication is in the interest of science, literature, art, learning or "other objects of general concern".[28] However, therapeutic effect of pornography may not be treated as one such object.[29] Innocent publication or possession of an obscene material is a defence under Section 2(5) of the 1959 Act.[30] However, this defence is used in a limited sense and the general rule is that the intention of the publisher is irrelevant to constitute an offence.[31] Another defence is that of aversion as laid down in *R v Calder & Boyars Ltd*where the court held that the effect of the work should be such that it creates an aversion in the minds of the audience.[32] Moreover, it was added, that "a significant proportion" of the audience must be affected to constitute an offence[33].

An interesting trend can be observed during this phase. The focus of obscenity charges have been gradually shifted from written works to visual forms of media owing to their greater potential for creating an impact.[34] This has been reiterated in the Williams Committee Report in 1979.[35]

The advent of the internet poses myriad kinds of problems so far as regulation of internet obscenity is concerned owing to its inter-geographical reach across the globe. In *R v. Stephane Laurent Perrin*,[36] it has been held that the mere publication of a web-page that is obscene and is accessible by one and all is subjected to criminal liability under the obscenity law. In a rather important

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[27]CAREY*, supra* 13, at 151.
[28] The Obscene Publications Act 1959, § 4.
[29]DPP v. Jordan (1977) AC 699.
[30] The Obscene Publications Act 1959,§ 2(5).
[31]ROBERTSON & NICOL, *supra* note 6, at196.
[32]*Id.*
[33]*Id.*
[34]*Id.*
[35]A.W.B. SIMPSON, PORNOGRAPHY AND POLITICS: THE WILLIAMS COMMITTEE IN RETROSPECT (Waterlow, 1983),
[36] (2002) EWCA Crim 747.

formulation in *R v Gavin Smith,*[37] the Court of Appeal has held that even internet relay chat among two individuals involving conversation on sexual abuse of children in the form of fantasising also amounts to publication and is an offence. This brings up the question whether obscenity law actually tramples on the right to privacy of individuals.

A landmark development has happened with the introduction of Criminal Justice and Immigration Act, 2008 which has aimed to deal with extreme forms of pornography owing to its impact on individuals that propels them to commit violent offences.[38] In a rather novel attempt, the Parliament has accorded a nuanced and highly specific definition of "extreme pornographic image" which criminalises mere possession of such material even in the absence of a motive for commerce. Extreme pornographic image is defined as "grossly offensive, disgusting or otherwise of an obscene character" and falls into one of four sub-categories of obscenity:[39]

(a) an act which threatens a person's life,

(b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,

(c) an act which involves sexual interference with a human corpse, or

(d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive).'

The most recent development is the case of *R v Peacock*[40]wherein it has been held that acts of 'fisting' or 'urolagnia' portrayed in pornography does not constitute an offence of obscenity having regard to the fact that these acts are not in themselves offences in reality. However, this decision has to be understood in the context of the dictum in *R v Brown*[41] wherein it has been laid down that sexual assault and violence even for the purpose of pleasure are

[37](2012) 2 Cr App R 14.

[38]William T. Goldberg, *Two Nations, One Web: Comparative Legal Approaches To Pornographic Obscenity By The United States And The United Kingdom,* 90 B.U. L. REV. 2140 (2010).

[39] The Criminal Justice and Immigration Act 2008, § 63.

[40](2009) All ER (D) 32 (Apr).

[41] (1994) 1 AC 212.

impermissible in law. *Peacock* is a decision that has been hailed by many as the beginning of a new approach towards obscenity that reflects the necessity for modification of the 1959 and 1964 laws in consonance with the demands of a digital age.

From the above trajectory of the evolution of the obscenity jurisprudence in the England, one clear fact emerges – from a very conservative perception of morality and decency, the judiciary and the lawmakers alike have come to a liberal standpoint with respect to their notion of obscenity. If one looks at the contemporary laws, one can clearly perceive that only universally abhorred forms of expression like those pertaining to paedophilia, necrophilia, bestiality, self-destructive sexual conduct etc. have criminal sanctions imposed on them. Other than these, even vivid sexual content in the form of pornography is subject only to regulation, and not prohibition. Definitely, this is a path-breaking step in itself.

B. The United States of America

The United States of America offers a unique jurisprudential analysis owing existence of a federal legal system whereby the Centre and the States have separate laws even it comes to obscenity. The First Amendment that guarantees the right to freedom of expression has often been argued as a defence against obscenity.[42] A body of case law and legislations has created an extremely liberal framework pertaining to obscenity.

The historical evolution of the obscenity laws in the US has been very intriguing, right from its genesis. The period of Civil War (1861-1865) witnessed the prevalence of the strict 'Comstock Law' in order to prevent access of obscene pornographic material to soldiers.[43] Until 1934, courts in USA have by and large followed the *Hicklin* dictum.[44] In 1934, for the first time,the courts took a departure from *Hicklin* and observed that obscenity has to be judged by looking into the effect of the whole work from the perspective of a person with

[42]PAUL C.WEILER, ENTERTAINMENT, MEDIA AND THE LAW-TEXT CASES PROBLEMS11 (West Group,2nd Ed., 2002).
[43]ROY L. MOORE & MICHAEL D. MURRAY, MEDIA LAW AND ETHICS465-466 (L.E.A, 3rd Ed., 2008).
[44]*Id.*

"*average sex instincts*".[45] Obscenity was defined as stirring the "*sex impulses or to lead[s] to sexually impure and lustful thoughts*".[46]

Hicklin was finally abandoned in *Butler v. Michigan*[47] wherein a provision in the Michigan Penal Code aimed at banning "any material" which had the tendency to incite minors and youth was held as unconstitutional.[48] The court observed that "burn the house to roast the pig" approach is not desirable and adult individuals should get access to materials that are not obscene even if they are inappropriate for children.[49]

Popularly known as the *Roth* test,[50]the majority opinion delivered by Brennan, J. in a 1957 case, laid down the following parameters to decide obscenity-[51]

1. Whether to average person applying contemporary community standards, the dominant theme of the material taken as whole appeals to prurient interest.
2. Whether the material produced before the Court is patently offensive.
3. Whether the material produced before the Court has no redeeming social value.

It was also laid down that "*sex and obscenity are not synonymous*" and mere portrayal of sex does not constitute an offence of obscenity unless the above test is satisfied.[52]

In *Smith v. California*,[53]it was mandatedthatthe requirement of "*scienter*" or knowledge on the part of the book-seller has to be established to constitute an

[45]*Id.*
[46]*Id.*
[47] 1 L Ed 2d 412 (1957).
[48]MOORE & MURRAY, *supra* note 42, at 466-467.
[49]*Id.*
[50]Samuel Roth v. US, 354 US 476 (1957).
[51]*Id.*
[52]*Id.*
[53] 4 L Ed 2d 205 (1959).

offence, in order to encourage sale and circulation of books without the possibility of a "chilling effect".[54]

In 1962 in the case of *Manual Enterprises v. Day*[55], patent offensiveness (sexual explicitness) was added as a ground which was defined as "*material that affronts community standards*".[56] However, the court in this case failed to define what constitutes "community" and later cases were confronted with the same issue.[57]

In*The Fanny Hill* Case,[58]while applying the *Roth* test,[59]the Court also reworded the third prong of the *Roth* test to "*utterly without redeeming social value*" as a ground to constitute obscenity.[60]

In*Stanley v. Georgia*[61] the court held that that private possession of obscene works does not constitute an offence and is protected by the First and the Fourteenth Amendments. Therefore, invasion into privacy is not envisaged by the obscenity law.[62] In 1970 Presidential Commission on Obscenity and Pornography submitted a report that aimed to liberalise the law on obscenity so far as adults are concerned.[63] However, protection of minors was recommended to be an objective to be abided by rigorously.[64]

The conjunctive test of obscenity was laid down in the most significant decision in the trajectory, *Miller v. California.*[65] The three prongs to constitute obscenity as laid down are-[66]

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[54]MOORE & MURRAY, *supra* note 42, at468.
[55] 8 L Ed 2d 639(1962).
[56]MOORE & MURRAY, *supra* note 42, at 469-470.
[57]Jacobellis v. Ohio,12 L Ed 2d 649 (1965).
[58]A Book Named John Cleland's Memoirs of Woman of Pleasure v. Attorney General of United States, 383 US 413(1966).
[59]MOORE & MURRAY, *supra* note 42, at471-472.
[60]*Id.*
[61] 394 US 557 (1969).
[62]MOORE & MURRAY, *supra* note 42, at475-476.
[63]*Id*.
[64]*Id.*
[65] 413 US 93 (1973).
[66]*Id.*

1. Whether the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest.

2. Whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law.

3. Whether the work taken as a whole lacks serious literary, artistic, political or scientific value.

The dissenting opinion of Justice Brennan in *Paris Adult Theatre*[67] that except in "*legitimate state interests*" such as protection of minors and "*non-consenting adults*" there should not be unnecessary interference through obscenity laws, is another interesting milestone.In *Billy Jenkins v Georgia*,[68] the court categorically laid down that mere nudity does not constitute obscenity.

It is observed that in spite of an extremely open-minded approach towards obscenity, USA follows a strict approach as regards child pornography.[69] In *New York v. Ferber*,[70] it was held that the standards for adult and child pornography are not the same. There can be stricter laws to address child pornography. Besides, possession of child pornography in private may also constitute as a valid ground for offence.[71]So far as access of children to pornographic material is concerned, Zoning laws are employed as a means to restrict availability of pornographic material to specific places often away from residential areas and are accessible by adults only.[72]

USA has also been confronted with a multitude of novel problems with the advent of internet and the ease of circulation of obscene material. Communications Decency Act was enacted in 1996 which included criminalised any usage of computer to transmit "indecent material". In *Reno v. ACLU*,[73]parts of the Act were held unconstitutional. The court held that the nature of Internet

[67] 413 US 49 (1973).
[68] 418 US 153 (1974).
[69]MOORE & MURRAY, *supra* note 42, at485.
[70] 458 US 747 (1982).
[71]Osborne v Ohio 495 US 103 (1990).
[72] Alfred C. Yen, *Judicial Review of the Zoning of Adult Entertainment: A Search for the Purposeful Suppression of Protected Speech*,12 PEPP. L. REV. 651-678 (1985).
[73] 521 US 844 (1997).

is different from other forms of media such as TV and radio.[74] The latter are easily accessible by all.[75] On the other hand, internet is accessed only by a certain section of the population, and its benefits should not be denied to individuals by creating such offences.[76] In 2000, *ACLU v. Reno*[77] was decided where the court laid down that community standards test cannot be made applicable to internet webpages so far as Child Online Protection Act, 1998 was concerned. However, in *Ashcroft v ACLU,*[78] the Supreme Court held that community standards test would be applicable to COPA as well. Moreover, internet should be subjected to the same tests as the other forms of media. In *US v Kilbride*,[79] it has been settled that community standards in the context of internet refers to national standards.

Thus, one can observe that in USA, a highly libertarian approach is adopted with respect to issues pertaining to obscenity, barring very specific areas like child pornography. One can distinctly witness a relaxed regime where speech and expression, even highlysexual in nature, gets the protection of the First Amendment.

C. India

It is pertinent to mention that obscenity as an offence has existed in the Indian Penal Code since the British era. The definition of Obscenity in Section 292 (as amended in 1969),being very similar to the one in the English Obscene Publications Act 1959,[80] incorporates a contextual and holistic reading as well as focuses on the 'likely audience' test.[81] It is important to note that as per the Indian Penal Code, not only is publication, distribution, circulation,

[74]MOORE & MURRAY, *supra* note 42, at497-498.
[75]*Id.*
[76]*Id.*
[77]217 F 3d 162, 180 (7th Cir 2000).
[78]535 U.S. 564, 575-79 (2002).
[79] 584 F 3d 1240, 1254 (9th Cir. 2009).
[80]MADHAVIGORADIA DIVAN, FACETS OF MEDIA LAW53 (Eastern Book Co., 2nd Ed., 2018).
[81]*Id.*

advertisement and sale are treated as offences, even possession is also an offence.[82]

The first famous Indian case on obscenity, *Ranjit Udeshi v. State of Maharashtra*[83] pertained to the publication of the novel '*Lady Chatterley's Lover*'.[84]Interestingly, during the trial, produced as witness Mr. Mulk Raj Anand, a renowned writer and art critic, who presented a detailed analysis of the novel and opined that the novel was a classic work of considerable literary merit and not obscene.[85] Nonetheless, the Trial Court found the appellant guilty and the Bombay High Court upheld the verdict. On appeal, the Supreme Court too upheld the conviction.

In this case, the Supreme Court took a stance whichwas a direct replication of the then century-old *Hicklin* test justifying the banning of the book and imposing sanctions on the appellant.[86] It was held that obscene means '*offensive to modesty or decency; lewd, filthy and repulsive*', and there should be regard to *"our community mores and standards*" and also needs to be seen whether material "*appeals to the carnal side of human nature, or having that tendency*".[87] The court observed that knowledge of seller is irrelevant to establish obscenity.[88] Where art and obscenity are mingled, one has to consider the artistic merit and '*preponderating social purpose*' of the work.[89] Thus, sex and nudity would not be regarded as obscene *per se*.[90]The court concluded that section 292 of the IPC is a reasonable restraint on Article 19(1)(a).[91]

[82]*Id.*
[83] AIR 1965 SC 881.
[84]*Id.*
[85]*Id.*
[86]*Id.*
[87]*Id.*
[88]*Id.*
[89]*Id.*
[90]*Id.*
[91]*Id.*

On the question of whether the yardstick of judgement as to whether a particular work can be deemed obscene or not, the Court decided to stick to the standard of the vulnerable, rather than the reasonable man or the likely audience.[92]

In *Chandrakant Kalyandas Kadodkar v. State of Mahrashtra,*[93]the Court held that notions of morality and decency vary from one country to another[94]. In a distinct departure from the *Udeshi*position, the court declared that the standard to be used to determine obscenity is that of an average person, not a hypersensitive or out of the ordinary person.[95]

In *K.A.Abbas v Union of India*,[96]the Court declined to accept the petitioner's plea challenging the constitutionality of pre-censorship in films, recognising the fact that Cinema as a medium has a greater reach and deeper impact among people, and therefore, some amount of prior restraint was necessary.[97] It also did not accept the arbitrariness challenges on the censorship process because, in its opinion, the guidelines were by and large understandable to all, and need no further definiteness.[98]

In *Raj Kapoor v. State*,[99]the court held that law should not act as an obstruction to art and aesthetics and free expression through these media.[100] Therefore, once film has been passed by the Censor Board, it is a justification for display under Section 79 of the IPC.[101] Therefore, the court was clearly not in favour of any kind of subterranean form of censorship.

The case of *Samaresh Bose v. Amal Mitra*[102]concerned the publication of a Bengali novel '*Prajapati*' which was a story depicting the life of a local goon, and the book comprised usage of "unconventional words" and slangs, reference

[92]*Id.*
[93] (1969) 2 SCC 687.
[94]*Id.*
[95]*Id.*
[96] AIR 1971 SC 481.
[97]*Id.*
[98]*Id.*
[99] (1980) 1 SCC 43.
[100]*Id.*
[101]*Id.*
[102] AIR 1986 SC 967.

to sex.[103] The court refused to consider the book as obscene and distinguished between vulgarity and obscenity.[104] It observed that the book could be treated as vulgar but not obscene.[105] There is a marked departure from *Hicklin* and *Udeshi*where in the court states that the judge has to consider the intention of the writer, and the effect on the readers.[106] Thus, the likely audience test is acknowledged in place of the archaic 'most vulnerable person' formula.[107]It was made amply clear that thenovel intended to portray the reality of lives of such men in society and not to appeal to the prurient interests of individuals.[108]

In 1996, the fate of the movie '*Bandit Queen*' was decided in *Bobby Art International v. Om Pal Singh Hoon.*[109]The film was based on the life of Phoolan Devi and contained graphic scenes of gang-rape and frontal nudity.[110]The court acknowledged the aversion as a defence.[111] Referring to the famous Hollywood movie *Schindler's List*, the court held that such scenes are not meant to incite lascivious thoughts in the mind of the audience.[112] Rather, the intention is to portray the horrific reality that Phoolan Devi had to experience.[113] These scenes are meant to shock and discourage the audience from such acts rather than creating an encouragement.[114]The Court went on to underline the point that in the case of the film 'Bandit Queen', the enforced '*naked parade'* of Phoolan Devi was central and integral to the film.[115]

In the last decade or so, the focus has largely shifted away from Cinema to Television, a media with an even greater reach. Also seen in the same period of time is a tendency of the courts to step into a more paternalistic role insofar as

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[103]*Id.*
[104]*Id.*
[105]*Id.*
[106]*Id.*
[107]*Id.*
[108]*Id.*
[109] (1996) 4 SCC 1.
[110]*Id.*
[111]*Id.*
[112]*Id.*
[113]*Id.*
[114]*Id.*
[115]*Id.*

matters pertaining to issues of sex and obscenity are concerned. In *Pratibha Naitthani v. Union of India,*[116] the Court held that television channels would not be allowed to show any programme that is 'unsuitable for unrestricted public exhibition'.[117] When a contention was raised as to an adult viewer's right to view programmes with adult content, the Court observed that such a person always has the option to watch such programmes in cinema halls and VCDs and DVDs. But,television being a universal medium well within the accessibility of children, such programmes would not be allowed on TV.[118]

In *SuoMotu v. State of Rajasthan*,[119]the Rajasthan High Court took *suomotu*cognizance of the 'undignified' portrayal of women in the mass media and appreciating the implementation difficulties of many of the laws aimed at preventing indecent representation of women, observed *inter alia* that use of scantily clad women in advertisements for products like car batteries, tobacco, electric inverters, shaving appliances and other advertisements should be stopped immediately.[120] The Court also went on to order that posters of 'A' rated films should be displayed in a "*more healthy and less revealing manner*" at public places and near cinema halls.[121]

In *Ajay Goswami v. Union of India*,[122]the Court carefully analysed the existing legal safeguards to regulate obscene content on newspapers and observed that a blanket ban on publication of certain photographs and news items would be unjustified, because such a ban would put unreasonable fetters on the free press, which would not be a desirable goal in a democracy.[123] Focussing on the need to have a culture of "*responsible reading"*, the Court held that the petition was not maintainable because accepting the petition would mean that a newspaper would only be catering to children and adolescents, and depriving adult readers of the

[116] AIR 2006 Bom 259.
[117]*Id.*
[118]*Id.*
[119] AIR 2005 Raj 300.
[120]*Id.*
[121]*Id.*
[122] AIR 2007 SC 493.
[123]*Id.*

information and entertainment they are lawfully entitled to, within permissible norms of decency, in the Indian legal system.[124]

In *Maqbool Fida Hussain v. Raj Kumar Pandey,*[125]a case involving putting up for auction an originally unnamed nude painting by the renowned artist M.F. Hussain by giving it the name 'Bharat Mata', the Court accepted the argument of the petitionerthat the said painting contained nothing that can be called lascivious, or appealing to prurient interest, or tending to deprave and corrupt persons likely to view the painting, and that the identity of the subject matter was irrelevant to the obscenity of the painting.It went on to elaborate on the place that erotica finds in the Indian cultural forms, not hesitating however to state in clear terms the responsibilities of an artist as well.

The most recent Supreme Court case on the issue is that of *Aveek Sarkar v State of West Bengal*[126]involved a naked picture of the famous sportsperson Boris Becker and his fiancé Barbara Fultusin a sports magazine in order to support the cause of anti-apartheid and racial parity.[127] The court applied the community standards test as laid down in *Roth*, stating that the rejection of obscenity as an exception to freedom of speech and expression was implicit in the First Amendment itself.[128] Having considered the effect and the context of the picture, the court held that it is not obscene.[129]

After the *Aveek Sarkar* judgement, one fact is made absolutely clear. It is now certain that India has finally rejected the *Hicklin* Test which would look at obscenity in terms of the impact one isolated sentence or image would have on the minds of a vulnerable teenager.

III. A Comparative Critique

A study of all three jurisdictions suggests that there is a trend towards gradual liberalisation the obscenity laws, the United States being the most liberal

[124]*Id.*
[125](2008) CrLJ 4107 (Del).
[126] (2014) 4 SCC 257.
[127]*Id.*
[128]*Id.*
[129]*Id.*

jurisdiction. It is to be carefully observed thatboth in the UK and the US, the primary starting point of evolution of a standard of obscenity was the *Hicklin* test. It is also submitted that the definition of obscenity in the English Obscene Publications Act, 1959 and the contemporary community standards test evolved in the US, both lead to a subjective determination and an imprecision in definition.[130] However, if one considers the different prongs of the American definition in unison, it comes across as far more nuanced than the definitions in other nations.[131]It is also observed that strangely enough in both these jurisdictions, private possession of obscene material is not criminal; but the publication, distribution, transportation or sale is subjected to penalty.[132] Another similarity between UK and US is the defence of social or artistic value that is available. In both the jurisdictions, one finds a strict attitude towards child pornography. UK, however, has made a novel attempt in the form of the Criminal Justice and Immigration Act 2008 and has adopted a staunch approach so far as extreme pornography is concerned, and makes individual possession a crime; such a measure is not noticed in the US. Another noticeable difference is that in UK, knowledge or intention of the seller is irrelevant to constitute an offence, and absence of knowledge is only a limited defence. In the US, however, *scienter* on the part of the seller has to be established.[133]

In India, the court has for many years applied the *Hicklin* test. At the present moment, the English and the Indian definition of obscenity is largely the same. Similar to UK, intention is irrelevant. Artistic value, aversion etc. are treated as defences just as in UK. However, mere private possession is treated as a crime, thus privacy law hardly plays a part in rescuing a person from liability under obscenity law. It may also be commented that unlike in the UK and the US, in India subterranean forms of censorship on grounds of obscenity often curtail the free expression in various forms of media. A highly nuanced law relating to pornography similar to UK is absent in India. The recent judicial development signifies that India has adopted the contemporary community standards test deriving it from the United States and has thus over the years shifted away from the *Hicklin*legacy.

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[130]Goldberg, *supra* note37, at 2136-2137.
[131]*Id.*
[132]*Id.*
[133]*Id.*

On the need for amore precise definition of obscenity in the Indian context, it is submitted that India frames a legislation similar to UK to deal with extreme form of pornography. This is necessary to distinguish between pornographic and non-pornographic forms, such that only the severest forms should be regulated. Similarly, an amendment in the IPC is also necessary to facilitate a reconciliation between privacy and obscenity. The fact that mere possession of an obscene article constitutes an offence is redundant in the modern digital age where pornography is so readily available and accessible. Moreover,possession should be illegal only in cases of child pornography and other extreme forms of pornography, and not for pornography *simpliciter*. Finally, since the level of reach and impact of different forms of media are different, there should be separate guidelines framed for every form of medium. A 'one-fits-all' approach is not a desirable one, and a sector-specific law which would cover regulation of the different sectors of media, would be a better solution.

IV.Conclusion

It can be seen that as much as issues of 'decency and morality' do play a major role in restricting the freedom of speech and expression, the courts in UK, US and India have been progressively moving towards a narrowly tailored usage of such restrictions. The laws dealing with obscenity have been undergoing gradual yet significant transformations towards more libertarian approaches, and the judiciary in all these countries have been strenuously carving out more liberal tests in order to lessen the stringency of the nature of such restrictions.

Quite interestingly, India has undergone a major policy shift towards the government's tolerance of obscenity in recent times. One could witness a farcical staging of this purported attempt at tackling the so called 'cultural pollution' when, arguably following a Supreme Court dictum,[134] the Department of Electronics and Information Technology issued an order under Section 79(3)(b) of the Information Technology Act, 2000, directing all Internet Service Providers to prevent access to a list of 857 sites whichcontained pornographic material.Intriguingly, within days of imposing such restrictions, the government revoked its orders and limited the prohibition to child pornographic sites only.

[134]KamleshVaswani v. Union of India, (2014) 6 SCC 705.

This is indicative of the degree of moral paternalism that the court and the government continue to exercise in the name of a steadfast adherence to norms of decency and morality.

It is imperative that in any liberal democratic society, the government and the Courtsshould acknowledge the fact that the legitimacy of the legal tools and processes is also based on that democratic justification which tolerates and respects the voice of the other – the lone dissenter, the weird *auteur* who is vulgar and scathing in his representation of all that he thinks is wrong in the world around us. Thus, the Boses and Hussains around us need to be given that assurance by the state that aspires to call itself a democracy that their voices would be preserved at all costs. The focus therefore should be not to search and highlight tools of clamping down, but to show how best to tailor opportunities and access such that the societal fabric is maintained without making any compromises to the intrinsic message that it sought to be delivered.