

OBSCENITY, NUDITY, AND ABSURDITY: STRUGGLING WITH LEGAL AMBIGUITY

Varalika Bajpai*

INTRODUCTION

In the progressive era of the 20th century, we are developing conflicting thoughts and diverse cultural systems, with people having new and old traditions with their sentiments, which gives us a sense of collective identity to form a modern society. It becomes hard for a society to accept any anomaly in someone's way of self-expression. And often this socially odd or unique way of expressing someone's self, work, and ideas becomes a violation of societal norms. This thinking difference makes the words like obscenity, nudity, and absurdity vague in nature, and it turns their measures and acts questionable in the aspect of violation. According to the ¹Oxford Dictionary, the word 'obscene' is described as "connected with sex that most people find offensive" and the word 'Obscenity' is termed as "obscene behavior or language". This is an unclear definition itself which will be having different interpretations in different societies. ²'Nudity' meaning "a state of not wearing clothes" and ³'Absurdity' meaning "ridiculous act of extreme illogical silliness" are the words that can be covered in the scope of Obscenity as they alone cannot form any violation in Indian laws.

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However, in Indian society, the definition of obscene mentioned in the Indian Penal Code, 1860 under Section 292), [a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."]⁴

There is a use of two words lascivious and prurient for setting a definition for the wrongful expression of sexual desires and interests publicly which creates an ambit for its laws. Unfortunately, it has not been a success in becoming an explicit definition for the cases and conflicts over the period of years. As the circulation and communication of messages, videos,

*BA LLB, FIRST YEAR, GURU GOBIND SINGH INDRAPRASTHA UNIVERSITY, FIMT COLLEGE, NEW DELHI.

and other media in abundance among a large population have become much more feasible and fast after the coming of the internet. A significant rise can be seen in records of criminal cases of cyberbullying child pornography, cyber blackmailing, and circulation of obscene content, etc. Judiciary and the government has been trying to create a balance between the individualistic expression of liberty and societal conformity by making more suitable interpretations of legal provisions.

OBSCENITY TESTS

The word ‘obscenity’ and its definitions are prone to different and altering interpretations highly influenced by individual convictions. So in order to address this in the legal aspect, a lot of legal tests have been tried, tested, and applied over the years to keep pace with the fast-growing societies.

Out of all tests, these are the three prominent legal tests widely used by different legal systems all over the world. Recently even India has seen a shift from using the ‘Hicklin Test’ to using the ‘Community Standard Test’ for stating something obscene.

Miller Test: The eminent case law of the U.S. Supreme Court, Miller v. California (1973) stated the use of ‘The Miller Test’ as the legal test for determining whether the expression comprises obscenity. These suggestions were the three pinpoints of the Miller test which will amount to an obscenity are:

- If the average person applying contemporary community standards would wholly find the work, appeals to the prurient interest;
- If the work depicts or describes sexual conduct specifically defined as publicly offensive by applicable state law; and
- If the work, as a whole, has no significant literary, artistic, political, or scientific value.

But with a sudden increment in online obscenity cases, The Miller test faced its greatest challenge. In 2002, a prominent case “Ashcroft v. ACLU”, challenged the constitutionality of the Child Online Protection Act, the constitutionality of applying the local community standards of Miller to speech on the Internet was questioned. The ACLU claimed COPA for violation of the First Amendment i.e., ‘guarantee of free speech’. The law was challenged on the behalf of online bookstores, and operators of Web sites that offer explicit sex advice or

sexual health information. The Supreme Court concurred with the lower court's ruling that the strict scrutiny test used to judge obscenity was not cleared in the case of COPA.

Hicklin Test: The Hicklin Test⁶ is an obscenity legal test that originated in an English case of 1868 with the title "Regina v Hicklin". Writing from the Queen's Bench courtroom, Chief Justice Alexander Cockburn gave a broad definition of obscenity, "whether the tendency of the matter 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."

Hicklin Test was used when publications constitute influential elements that have the capacity to corrupt 'susceptible' minds. The Hicklin Test, developed in a country with no written constitution and thus no guaranteed First Amendment rights, was initially used in U.S. law. It ultimately did not survive constitutional challenges based on First Amendment and other considerations. The Hicklin Test, developed in a country with no written constitution and thus no guaranteed First Amendment rights, was initially used in U.S. law. It ultimately did not survive constitutional challenges based on First Amendment and other considerations. The Hicklin test was repealed in the 1933 book *United States v. Ulysses*, which was taken from the British case of District Judge James Joyce, in which *Ulysses* was allowed to be sold in the United States. Judge John M. Woosley focused on the literary value of the work as a whole and the impact of sexual instinct on the average person. At the time, the word fornication was interpreted as arousing lust or leading to lewd and lascivious thoughts. The US government challenged Woolsey's decision, but a US court upheld *Ulysses*' decision that the book was not pornographic.

Community Standard Test: After years of deliberations,⁷ a definition of obscenity for criminal prosecution and other purposes was established by the Supreme Court in *Miller v. California* (1973). The test led to the use of contemporary community standards by the juror. But the critics in the field examined some concerns over this legal test. Primarily, the courts made it clear that the concept of community standards did not extend to national standards, but courts and juries were free to decide on whatever definition the community saw fit. Courts have allowed associations to consider anything from nationwide states, including states such as Texas and Illinois, to federal district courts or three-county metropolitan areas.

Second, to the extent that adult content creators can detect regional sensitivities, they should either avoid communities with more restrictive standards or self-censor national distribution to

suit the tastes of those communities. Indeed, the US Department of Justice in *United States v. Extreme Associates* (3rd Cir. 2006), federal agents buy adult movies online in Pittsburgh, allowing the department to sue Los Angeles adult movie producers and distributors in western Pennsylvania.

Third, the fact-based determination of community standards makes it difficult or impossible to know in advance whether an operation will be considered unethical in a particular locality. As Lawrence Walters and Clyde DeWitt (2005), defend the First Amendment, "There have been cases where one juror found the same film obscene and another juror found it obscene.

LAWS IN INDIA

IPC, 1860: Sections 292 and 293 of the IPC⁹ prohibit the printing and sale of obscene books, pamphlets, and other statements deemed "obscene or lascivious" which may contain obscene advertising. Whereas, Section 294 prohibits obscene acts and songs, People who offend others by behaving salaciously in a public building or Drawing, singing, obscene songs, or obscene language in or near public places. Punishment -Imprisonment for a term which may extend to three months or fine or both. All cyber pornography offenses can be dealt with under the IT Act and not the IPC as Section 81 of the IT Act has a superseding effect. However, depending on the facts and circumstances of the case, provisions of both the IT Act and the IPC can be derived.

The Indecent Representation of Women (Prohibition Act), 1986: No¹⁰ one may post or cause to post an advertisement or order the posting, display, or participation in an advertisement that contains indecent depictions of women in any form. No one may use any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, image, or figure that contains an indecent depiction of women in any form.

Punishment - Any violation of the provisions of Section 3 or Section 4 shall be punished in the first sentence with imprisonment of both kinds for a term which may be up to two years, a fine of up to two thousand rupees, and in the case of a second or later sentenced to imprisonment of not less than six months but which can go up to five years and also with a fine of not less than ten thousand rupees but which can amount to one lakh of rupees

Young Person's (Harmful Publications) Acts, 1956: Any person who advertises or propagates that he/she can obtain harmful obscene publications from or through others may be prosecuted for the same under this Act.¹¹

Punishment- Imprisonment for a term which may extend to six months or fine or both.

Cable television Network (Regulation) Act, 1995: When it comes to obligations regarding the broadcasting of any obscene or disparaging remark on television typically a suggestive or disparaging one over the television Section 16 of "The Cable TV Network Regulation Act, 1995".¹² The act prohibits the regulation of anything obscene on the television network.

Punishment - Under Section 16 of the Act can be extended to two years of imprisonment or the penalty can be extended to 1000 rupees or both. Whereas for every repetition, imprisonment can be extended to 5 years or 5000 rupees of fine or both.

The Information Technology Act, 2000: Section 67 of the Information Technology Act 2000¹³ states and describes the obligation for electronic posting or transmission of obscene material. Any person who appeals to the public interest or as a result posts or transmits or causes the posting or electronic transmission of corrupt and salacious material must read its content or practice having regard to all relevant circumstances which includes reading, seeing, or hearing.

Punishment - Under Sec 67 of the Information Technology Act, 2000, the first attempt to breach the act could cause imprisonment which can be extended to three years, or a fine which may be extended to 5 lakhs rupees, or both. And for subsequent breaches, imprisonment can be of 5 years of extension or a fine of 10 lakh rupees or both.

Cinematograph Act, 1952: Certificate applicants¹⁴ (S certificate, U certificate, or UA certificate under Sec 5), distributors, exhibitors, or anyone else to whom rights in a film have been granted shall not be liable under obscene material laws in connection with any matter of a film certified under this section under subclause (a) and (b) of Sec 5 of The Cinematograph Act, 1952.

RELATED CASE LAWS

Ranjit D. Udeshi vs State of Maharashtra¹⁵

Facts- Ranjit D. Udeshi was among the four partners of the book stand company. The partners were charged under section 292 of the IPC for selling a copy of DH Lawrence's *Lady Chatterley's Lover* which they considered obscene allegedly. IPC Section 292 prosecutes anyone who sells any books or other material which shows Obscenity. Udeshi proclaimed that Section 292 violates the right to freedom of speech and opinion under Article 19(1)(a) of the Constitution of India and that the book as a whole is not obscene.

Judgment- Article 19(1)(a) of the Constitution of India guarantees freedom of speech and expression, while Article 19(2) allows reasonable restrictions on these rights on grounds of morality or good morals. Section 292 of the IPC on obscenity is exceptional. It is constitutional because it deals with issues of public decency and morality. The Supreme Court held that obscenity had no value in the circulation of ideas and information of public interest, but made exceptions where obscenity was unavoidably present, for example, when textbooks related to biology could contain intimate images, that are protected under free speech and expression. As "obscenity" is not defined in IPC Sec292. Therefore, the responsibility holds with Supreme Court to distinguish between pornography and artistic representation. The Court dealt with the test of obscenity, which should be used to determine what falls within the scope of the Constitution because just sex and nudity as expressions are not indecent. The court applied the Hicklin test and ultimately held that Article 19 of the Constitution of India was not violated. Under Hicklin, we have to look at the whole work, but in the case of pornography, we have to look separately to see if it fails the test. In India, "obscene material that has no primary social benefit" is not protected. It is an insult to modesty and decency to treat sex "in the erotic way of human nature." However, the scope of such claims should be investigated in any case. So the content of *Lady Chatterley's Lover* was examined by Supreme Court and found to be obscene under the Hicklin test, which lead to the dismissal of the appeal.

Samaresh Bose and Anr v. Amal Mitra and Anr¹⁶

Judgment Overview- In *Samaresh Bose and Anr v. In Amal Mitra* (1986), a line between obscenity and vulgarity was drawn in a specified way. The concept of obscenity is largely shaped by the social attitudes of readers. There is no doubt that the concept of obscenity generally differs from country to country due to the moral standards of modern society. Thus, judges must put themselves in the shoes of readers of all ages who might fall for a book and try to determine the effect a book has on a reader's mind. The judge must then use his legal mind to determine objectively whether the book in question can be considered obscene within

the meaning of Article 292 by viewing the book objectively and entirely not just individual passages complaining about obscenity.

Aveek Sarkar v. State of West Bengal¹⁷

Judgment Overview- In one of the German magazines, the famous tennis player Boris Becker published a photo of himself covering his fiancé's (Barbara Feltus a black actress) chest. The article that included the photo depicted Becker as an anti-racist, choosing love over hate. An Indian newspaper and magazine reprinted the article with the images. These newspapers and magazines were reported under Section 292 of the Indian Penal Code (IPC) and Section 4 of the Indecent Representation of Women (Prohibition) Act 1986, which prohibits the publication of obscene representation of women. After applying the community standards test, the Court found that the photograph was not obscene within the scope of Section 292 IPC on the basis of the message it is trying to convey. It was not sexually provocative to corrupt the minds of people. Additionally, the article published with the photo conveyed a message of racial equality and promoted interracial love and marriage. Accordingly, the court held that there was no violation under Section 292 of the IPC or Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

Bobby Art International v. Hoon¹⁸

Facts- In 1994, the film Production Company Bobby Art International produced 'Bandit Queen', a film based on the true story of a raped and abused village girl who joins a violent crime syndicate to turn society into a means of revenge. The movie contained clear scenes of rape and nudity. In July 1995, the Censor Board stated that the Cinematography Act 1952 (the Act) would grant the film an 'A' certificate (an adult film deemed suitable for screening), but only if certain scenes were removed or altered.

Judgement- India's Supreme Court struck down the Delhi High Court order banning the release of the film Bandit Queen, ruling that the film cannot be banned simply because it depicts lewd and explicit events. The producers of the film, who tried to depict the true story of a woman who was raped and assaulted before taking revenge on her attackers, sued to restore the film's adult rating. Courts have held that scenes of nudity and abuse serve to tell an important story and that producers' freedom of expression cannot be limited to the content of the scenes alone.

RECENT CONTROVERSIES UNDER THE AMBIT OF OBSCENITY

Milind Soman: A case was filed against Milind Soman for running naked on a beach in Goa and sharing lewd pictures on social media. Actor Milind Soman has been charged under IPC section 294 (Obscene acts and songs) and ¹⁹section 67 (Punishment for publishing /transmitting obscene material). He shared nude photos of himself walking naked on a beach in Goa on his Twitter and Instagram pages.

Urfi Javed: On December 11, police officials said in a statement that they filed a complaint against social media influencer and actor Urfi Javed, alleging illegal and obscene behavior on social media and in public places. Advocate Ali Kaashif Khan Deshmukh filed a complaint with the Andheri Police Department against the actor. The complaint was filed under the scope of ²⁰Sec 292 of the IPC.

Ranveer Singh: An actor appeared naked at a photo shoot for a magazine. Photos inevitably circulate on social media. As if inevitable on social media, some netizens voiced their displeasure. This should have put an end to the problem. However, actor Ranveer Singh has now been booked by the Mumbai police for his 'obscenity'. This was completely absurd and what was even more absurd and dangerous was that no one had the authority to correct this absurdity by stepping in and asking the police to withdraw the FIR. Singh was charged under Section 292 of the IPC. This includes anything that is " lascivious, appeals to prurient interest, or tends to deprave or corrupt persons likely to read, see or hear the matter ". Obscenity is defined so ludicrously loose in Indian law that moral workers, police, and lower courts have ample room to prosecute citizens.

COMPARISON WITH OTHER COUNTRIES

USA: With respect to American law, the United States Supreme Court, in the landmark case of ²¹Miller v. California, has established the following suggestions for the "community standard test": 1. A person who has the contemporary community norm does not believe that the Work attracts or appeals to salacious or lustful interest; 2. When the work is clearly and unequivocally offensive; 3. If the work, wholly lacks literary, scientific, artistic, or political value. Miller's test was the basis of these guidelines. However, this test lacks the potential to keep up with the modern realities that come with today's technological and progressive era.

UK: The UK deals with obscenity measures by establishing the origin of the 'Hicklin Test' under the Obscene Publications Act, of 1857. This test's originality mark can be in the United States too Along with the U.K. However, the test faced rejection by the United States Supreme Court in 1957 by quoting it as "inadequate". The "Hicklin test" underscored the vulnerability of those exposed to the material in question. The method of testing obscenity with this is to see whether the tendency of the thing considered obscene is to "corrupt and deprave those people whose minds are open to such immoral influence." The amendments in the U.K Obscenity laws were brought after the brutal murder case of ²²Jane Longhurst by Graham Coutts, where Coutts strangled Jane for his own sexual gratification. Coutts spent hours watching violent videos of naked women being brutally "strangled, suffocated, hanged and drowned", which was found during the trial. Thus, the regulation of violent pornography by the websites was strictly opposed by the people holding them accountable. However, this infamous case led to the establishment of the new "Immigration Act of 2008." This new law differs from the previous 1857 law in two ways-

- The shift of blame and center of attention towards the individual who is in possession of obscene materials and from the producers and publishers of such content.
- The new law broadly defines the meaning of the term "extremely pornographic material," resolving the ambiguity of the previous Act. Briefly, it defines "extremely pornographic material" as such content produced solely for the purpose of arousal of a person's sexual feelings.

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CONCLUSION

This analytical research threw light on the introduction of new qualifications and exceptions to primary legal tests. But obscenity laws are still too broad, vague, and ambiguous, leaving ample room for judges to insert their individualistic beliefs over related judgments. The risks associated with such broad discretion are reflected in the cases and decisions discussed that reflect political agendas and personal beliefs. As we saw the survival journey of 'The Hicklin Test' and the 'Miller Test'. The Indian judiciary urgently needs to find better and more sustainable alternatives to bring justice to the citizens of India.

Whether or not it qualifies as Obscene depends entirely on how officeholders of law interpret it. The obscenity of today cannot be regarded as the obscenity of the future. We know laws need to change from time to time to keep pace with society, but we need a proper definition of

obscenity. It is important to note that in our country the appropriate level of obscenity for films, Internet shows, art, photography or video, and literature has not yet been determined. In India, where many religions and cultures coexist, there are inevitable conflicts between them. Sometimes, to reduce the conflicts in our society, we need to educate people to be more considerate and open-minded. When issues related to one's culture or religion are brought up and artists express their thoughts or views on these vulnerable issues, it is a serious matter and should not be stopped because it may hurt certain feelings in different groups or communities. Thus we can conclude that obscenity, nudity, and absurdity are still struggling with legal ambiguity in India.



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