

Obscenity and the Legal Ambiguity in India: A Critical Analysis

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Abstract

The term "obscene" refers to materials or acts that are either repugnant to the senses or offensive in a sexual context, with the intent to provoke lust or immoral thoughts in individuals. While the Constitution of India guarantees the right to freedom of speech and expression under Article 19(1)(a), provisions of the Indian Penal Code (IPC) and other statutes discussed herein impose restrictions by penalizing expressions deemed "obscene." However, despite the term's dictionary definition, the precise legal interpretation of "obscene" remains unclear. Judicial efforts to define the term have often resulted in misinterpretations, leading to a restriction on the freedom of speech and expression in its full constitutional sense, while also contributing to a misapplication of penal provisions surrounding obscenity. This paper critically examines the legal framework governing obscenity in India, analyzing the inherent ambiguities and comparing these with the laws in jurisdictions such as the United Kingdom and the United States. It highlights instances where the judiciary has misjudged artistic expression as nudity or confused reality with vulgarity. The need for reform in India's obscenity laws is paramount, with the goal of striking a balance between protecting public interest and safeguarding the rights of creators and publishers. Moreover, in a democratic nation like India, where all citizens are entitled to equal fundamental rights, one individual's right cannot unjustifiably override the same rights of another. This paper endeavors to shed light on the legal complexities surrounding obscenity, underscoring the importance of clearer and more just legal interpretations.

Keywords: Indecency, Freedom of expression, Obscene, Vulgar, Fundamental rights, Punishment, Offensive, Sexual, Provisions, Judicial system, Tendency, Exceptions, Qualifications, Constitutional remedies, alternative.

Introduction

The right to freedom of speech and expression is a fundamental human right that every individual acquires upon birth. This right grants individuals the liberty to express their thoughts, speech, and feelings freely. The Universal Declaration of Human Rights (UDHR), adopted in 1948, proclaims that the right to freedom of speech, opinion, and expression is a universal entitlement. It encompasses the freedom to hold personal opinions without interference and the right to seek, receive, and impart information or ideas through any media without undue restriction. This essential right is enshrined in Article 19(1)(a) of the Indian Constitution, which guarantees freedom of speech and expression to all citizens. The essence of this right is to allow individuals to communicate their views and access information without fear of unreasonable punishment, control, or penalties. As rational beings, humans are guided by desires and opinions, but to coexist within a civil society, certain limitations and restrictions are imposed. These constraints are

necessary for maintaining public order and welfare and are outlined as reasonable restrictions under Article 19(2) of the Constitution, preventing the right to freedom of speech from becoming absolute. With the advent of modern technology and rapid advancements in the dissemination of information, there has been renewed interest in the regulation of obscenity laws in India. The Indian government, at both the national and state levels, has taken various measures to strike a balance between individual liberty and the greater public interest. Internationally, the United Nations has addressed the issue of obscenity through the International Convention for the Suppression of the Circulation of Obscene Publications, which seeks to protect the public, particularly youth, from exposure to pornography. The convention prohibits the exhibition and distribution of pornographic materials, including unsolicited publications, and regulates certain marketing practices related to obscene content. Obscenity, as a legal concept, generally refers to explicit depictions of sexual or excretory conduct that violate contemporary community standards. In the United States, the Supreme Court has established criteria for determining obscenity. According to the Court, material is deemed obscene if it:

1. Appeals to prurient interests,
2. Depicts sexual conduct in a patently offensive manner, and
3. Lacks serious literary, artistic, political, or scientific value.

The right to freedom of opinion and expression, as enshrined in both national and international legal frameworks, includes the freedom to hold opinions without interference, and the right to seek, receive, and impart information and ideas through any form of communication, without regard to national boundaries. However, these rights must be exercised within the confines of the law, taking into account reasonable restrictions imposed in the interest of public morality, decency, and order.

What is considered as Obscene?

Under Indian law, obscenity is broadly defined as any material or conduct that primarily appeals to prurient interests or voyeuristic tendencies, or that depicts sexual conduct in an explicit and offensive manner. Legally, obscenity encompasses indecent expressions that may be communicated through speech, actions, or gestures. The concept of obscenity is often conflated with pornography, with the terms "obscene" and "porn" used interchangeably. The term pornography itself is derived from the Greek words "porne" (meaning prostitute) and "graphy" (meaning writing or depiction).

When determining whether certain material qualifies as obscene, Indian courts frequently reference the Miller Test, derived from U.S. jurisprudence. This test establishes three essential criteria, all of which must be satisfied for content to be legally deemed obscene (this test will be elaborated upon later in this paper). In the Indian legal framework, obscenity includes any material that offends modesty, decency, or morality, or is considered lewd, repulsive, or offensive to societal standards. The terms decency and morality are closely intertwined with obscenity in Indian law. Decency refers not only to the avoidance of obscene language or gestures, but also to broader societal expectations of civil conduct, both in public and private spheres. This legal interpretation ensures that decorum and morality are preserved in accordance with community standards. Offenses such as indecent exposure and indecent publication are recognized as criminal acts under both Indian and common law. While terms like vulgar and indecent are sometimes used synonymously with "obscene," they hold distinct meanings within legal discourse:

1. Vulgarity vs. Obscenity:

Vulgarity refers to language or actions that provoke disgust or revulsion, but it does not necessarily degrade an individual's moral standing. Obscenity, however, is more pernicious, as it is intended to corrupt

or deprave the minds of individuals susceptible to immoral influence. As a result, while vulgar material may be offensive, it does not always meet the legal threshold for obscenity. For instance, in a notable decision, the Bombay High Court restrained authorities from arresting members of the AIB comedy group, holding that while their material was vulgar, it did not qualify as obscene. This distinction underscores the legal precision with which courts analyze language. According to Merriam-Webster, "vulgar" refers to something "offensive in language" or "lewdly indecent," whereas "obscene" is defined as "disgusting to the senses," "excessive and offensive," or "abhorrent to morality and designed to incite lust or depravity."

2. Indecency vs. Obscenity:

While both indecency and obscenity are considered violations of societal norms, they differ in degree. Indecency refers to a less serious breach of public morality, whereas obscenity is a more egregious offense. Consequently, all obscene material is inherently indecent, but not all indecent material qualifies as obscene. Indecency refers to behavior or content that violates societal standards without necessarily being overtly lewd or offensive, whereas obscenity involves more explicit, lewd, and morally corrupting conduct. Indian law carefully distinguishes between vulgar, indecent, and obscene content, each of which has unique legal implications. Obscenity, as the most serious of these offenses, is subject to stricter penalties and greater scrutiny under Indian statutes and judicial precedents. This legal differentiation is essential to balancing individual freedom of expression with societal norms of decency and morality, ensuring that while free speech is protected, it does not cross the boundary into offensive or harmful material.

Obscenity and Media in India: Navigating Legal Ambiguity in a Changing Landscape

India, as one of the world's largest democracies, has a long-standing and dynamic relationship with mass media. The introduction of mass communication tools such as print media, film screenings, and radio broadcasting dates back to the early 18th century, with the first wave arriving in the 1780s. Since gaining independence, the media has predominantly preserved its autonomy, except during the period of emergency in 1975, when certain freedoms were curtailed. However, disputes over the nature of what is communicated, disseminated, or published have persisted throughout history. One recurring issue has been the public's reaction to content perceived as conflicting with societal norms, often categorizing such content under the umbrella of "obscenity."

There have been numerous instances where individuals—writers, filmmakers, actors, and painters have faced legal action, accused of propagating material deemed to be obscene or offensive. While some argue that protecting societal values necessitates shielding the public from such material, recent developments suggest that the existing legal framework governing obscenity in India is fraught with ambiguity. This has led to arbitrary enforcement and subjective determinations about what constitutes obscenity.

With the rapid expansion of mass media over the past few decades, the necessity for a clear and consistent legal standard on obscenity has become increasingly pressing. The advent of television and the internet has provided artists with new avenues for expression, alongside traditional mediums such as literature, paintings, and cinema. This shift has prompted further efforts to define, regulate, and, where deemed necessary, restrict content considered obscene under various statutory provisions. In light of these developments, it is crucial to ensure that the legal system effectively balances the right to free expression with the protection of societal values, preventing the arbitrary use of obscenity laws while safeguarding artistic and cultural diversity.

Legal Framework Governing Obscenity and Indecent Representation in India

The **Indian Penal Code, 1860**, under Sections 292 to 294, criminalizes the sale, distribution, and publication of obscene materials. However, these provisions do not address the indecent portrayal of women, a lacuna that has allowed for the derogatory and objectifying depiction of women in various media, reducing them to mere objects of sexual desire and contributing to their exploitation and victimization within society. Such representations corrupt the minds of viewers and reinforce harmful societal stereotypes. To address this issue, the Indecent Representation of Women (Prohibition) Act, 1986, was enacted to criminalize the indecent, improper, and scandalous depiction of women in any medium, including but not limited to publications, writings, paintings, and advertisements. Section 2(c) of the Act defines the term "indecent representation of women" and provides for penalties for any publication or representation that portrays women in an obscene or indecent manner, covering all forms of media, including books, circulars, posters, and advertisements.

In conjunction with these efforts, the **Cable Television Networks (Regulation) Act, 1995**, seeks to regulate television broadcasts to prevent the telecast of programs that could potentially outrage public decency or offend societal standards. Rule 6(1)(o) of the Cable Television Networks Rules, 1994, read with Section 5 of the 1995 Act, prohibits the transmission of content deemed unfit for "unrestricted public exhibition," as specified under Section 5-A of the Act.

Similarly, the **Cinematograph Act, 1952**, governs the regulation and certification of cinematographic films in India. Section 4 of the Act provides for the examination of films by the Central Board of Film Certification (CBFC), while Section 5-A addresses the certification of films for public exhibition. Together with the **Cable Television Networks Act**, these provisions aim to ensure that films adhere to societal standards of decency and morality.

The Young Persons (Harmful Publications) Act, 1956, further reinforces the legal framework by prohibiting publications that may corrupt or influence the minds of minors or incite them to commit acts of violence or cruelty. Violations of this Act are punishable with imprisonment and fines, providing deterrence against the dissemination of harmful material to children and young persons.

The Information Technology Act, 2000, takes a modern approach to regulating electronic and digital content. It criminalizes the publication or transmission of any lascivious or lewd material in electronic form that could degrade or corrupt those exposed to such content. The Act prescribes stringent penalties, including imprisonment and fines, for violations. Recently, the Ministry of Information and Broadcasting banned 18 OTT (over-the-top) platforms for disseminating obscene, vulgar, and pornographic content, citing concerns over the accessibility of explicit material on digital platforms. The government's action was prompted by the portrayal of inappropriate relationships, such as those between teachers and students or incestuous family dynamics, which depicted nudity and sexual acts in a degrading and demeaning manner.

To regulate advertisements, the **Advertising Standards Council of India (ASCI)** was established in 1985 as a self-regulatory body. Its purpose is to protect consumer interests by ensuring that advertisements adhere to the accepted standards of public decency and propriety. ASCI's Code of Conduct mandates that advertisements must not contain anything indecent, vulgar, or repulsive, and must not cause grave or widespread offense. This system of self-regulation seeks to uphold ethical advertising standards and restore public trust in commercial messaging. India's legal framework surrounding obscenity and indecent representation is multifaceted, involving various statutes that address different forms of media and content. However, despite these laws, the need for clearer guidelines and consistent enforcement remains critical

to curbing the indecent and obscene portrayal of individuals, particularly women, in the media.

Legal Framework for Obscenity under the Indian Penal Code, 1860

The Indian Penal Code, 1860 codifies offences punishable in India, including obscenity under Sections 292, 293, and 294. Section 292 criminalizes the sale, distribution, or production of obscene material, defining such material as that which appeals to lascivious, salacious, or voyeuristic interests and has the effect of depraving or corrupting the minds of individuals in a sexual context. Section 293 prescribes punishment for anyone engaged in the sale or distribution of obscene materials, while Section 294 penalizes acts or performances involving obscene songs or gestures in public. However, the Penal Code exempts certain works from the purview of obscenity if they serve the public interest, including materials related to literature, science, history, or religion. While these sections seek to address moral concerns, they are often critiqued for conflicting with the fundamental right to freedom of speech and expression under Article 19 of the Indian Constitution. To reconcile these tensions, Article 19(2) imposes reasonable restrictions on the right to free speech in the interest of public order, decency, or morality. Obscenity, being an inherently complex and subjective concept, requires careful judicial scrutiny to ensure a balance between individual rights and societal interests. Courts have, over time, delineated principles to distinguish between permissible expression and content that corrupts or depraves the minds of others, particularly under the scope of Section 292.

The Definition and Challenges of Obscenity in India: Legal Inconsistencies and Judicial Struggles

The Indian legal system, particularly the judiciary, has grappled with the challenge of defining obscenity while attempting to balance individual rights of expression with societal morals and values. Despite efforts to create a coherent framework, the courts have produced inconsistent rulings, reflecting the complexities of maintaining this balance. Obscenity laws in India, though guided by constitutional principles, remain contentious and subject to varying interpretations.

Several cases have highlighted the subjective nature of what is deemed "obscene." For instance, in the 2007 Amul Macho advertisement, actress Sana Khan's depiction of washing a man's undergarments to suggestively charged lyrics sparked public outrage and was censored for allegedly challenging conservative sensibilities. Similarly, in 1995, a controversial print advertisement for Tuff Shoes featuring models Milind Soman and Madhu Sapre posing nude with a python was deemed obscene and pulled from circulation. Meanwhile, other sexually suggestive ads, such as the Zatak talcum powder commercial showing a woman seemingly aroused by a tailor's measurements, escaped censure.

Inconsistencies in the judiciary's approach are not new. Decades ago, renowned writer Saadat Hasan Manto faced prosecution for his provocative works that pushed societal boundaries. Manto was criticized for his use of explicit language, such as describing a woman's breasts as "bosom," which some witnesses in court found indecent. Although Manto defended his work successfully, the case underscored the arbitrary and culturally bound nature of obscenity trials in India.

The judiciary, while aiming to uphold the constitutional right to freedom of speech and expression under Article 19, often finds itself constrained by laws that allow for wide-ranging restrictions. These include vague provisions concerning decency and morality, leading to overreach in censorship. The Indian judicial system's inefficiencies, compounded by overwhelming caseloads and slow legal processes, further complicate matters. Protracted delays discourage victims and innocents from seeking justice, while the overly broad scope of obscenity laws allows for misuse and stifling of legitimate expression.

In many instances, instead of safeguarding the right to free expression, the focus of the state has been on imposing bans on books, films, and other creative works that provoke certain groups. Governments and courts frequently justify these measures under the guise of maintaining public order, responding to communal tensions, or preventing violent protests. This reliance on public order provisions often curtails minority viewpoints, emboldening censorship at the cost of free speech. While the judiciary plays a pivotal role in interpreting obscenity laws, its record remains inconsistent. The lack of jurisprudential clarity and the tendency to prioritize public sentiment over individual expression highlight the ongoing challenges in defining and regulating obscenity in India.

Judicial Precedents on Obscenity in India: Evolving Standards and Judicial Discretion

The legal treatment of obscenity in India has been a subject of considerable judicial scrutiny, with the Supreme Court repeatedly confronting the issue through a variety of precedents. The Court has consistently maintained that the determination of what constitutes obscenity is not susceptible to a fixed or uniform standard, as the judgment must be grounded in the specific facts and circumstances of each case. This evolving jurisprudence reflects the inherent tension between safeguarding public morality, preserving freedom of expression, and accommodating societal norms, which vary across time and cultural contexts.

In *Ranjit D. Udeshi v. State of Maharashtra*, the Supreme Court adhered to the *Hicklin test*, which had its origins in *R v. Hicklin (1868)*, to assess the obscenity of the book *The Lady Chatterley's Lover*. The Court upheld the conviction of the appellant, a bookseller, for violating Section 292 of the Indian Penal Code (IPC) by selling the book, despite the defendant's assertion of ignorance regarding the book's content. The application of the *Hicklin test*—which determines obscenity based on its potential to deprave and corrupt minds open to immoral influences—was deemed appropriate by the Court, reinforcing the legislative stance on regulating potentially harmful literature.

Similarly, in *K.A. Abbas v. Union of India*, the Supreme Court examined the obscenity of a film that portrayed the lives of prostitutes in Bombay. The Court, drawing upon American obscenity jurisprudence, reiterated that mere reference to sexual conduct does not inherently render a work obscene. The Court emphasized that obscenity should not be determined by the sensibilities of the most depraved members of society, and underscored the importance of distinguishing between artistic expression and offensive material. The judgment further illuminated the distinction between obscenity and indecency, asserting that sex, in itself, is not synonymous with obscenity.

In *Samaresh Bose v. Amal Mitra*, a Bengali writer faced prosecution under Section 292 IPC for publishing a novel alleged to be obscene. However, the Supreme Court overturned the conviction, adopting a more nuanced approach to the assessment of literary works. The Court opined that in obscenity cases, judges must first endeavor to understand the author's intent and the literary or artistic merit of the work. Furthermore, the Court emphasized that the impact on the audience—particularly across different age groups—should also be considered, thereby introducing a contextual evaluation of the material in question.

In *Bobby Art International v. Om Pal Singh Hoon*, the Delhi High Court initially banned the film *Bandit Queen*, which graphically depicted the life of Phoolan Devi, a woman subjected to severe social and sexual humiliation. However, upon review, the Supreme Court reversed the decision, granting the film an 'A' certificate, acknowledging that the portrayal of nudity and sexual violence was crucial for conveying the protagonist's traumatic experience. The Court elucidated that the purpose of nudity in this context was not

to provoke lust but to condemn the sexual violence inflicted upon the character, demonstrating the judiciary's sensitivity to the broader socio-cultural context in which the film was made.

The case of *Maqbool Fida Hussain v. Raj Kumar Pandey* involved a controversial painting by M.F. Hussain, depicting a nude female figure. The Court ruled that nudity, in isolation, does not constitute obscenity and that the artistic value of the painting should be considered in the context of its aesthetic merit. The Court dismissed the charges under Section 292 IPC, emphasizing that art should not be reduced to mere prurient material, and that its cultural and artistic value should outweigh its depiction of nudity.

In *Ajay Goswami v. Union of India*, the Court stressed the importance of shielding minors from sexually exploitative material, irrespective of whether such material meets the legal definition of obscenity. The Court reiterated that the standard for evaluating obscenity must be that of the average person, endowed with ordinary prudence and common sense, and not a hypersensitive or excessively prudish individual. This judgment highlighted the need to balance the protection of societal morals with the preservation of individual rights to freedom of expression.

A pivotal shift in judicial approach occurred in *Aveek Sarkar v. State of West Bengal*, where the Supreme Court abandoned the *Hicklin test* in favor of the *Community Standard test*. The Court ruled that a semi-nude photograph could not be deemed obscene unless it had the potential to elicit lascivious thoughts or corrupt the minds of the average viewer. The *Community Standard test* entails evaluating material in its entirety and considering its potential to deprave or corrupt an ordinary viewer, thereby introducing a more flexible and context-sensitive standard for assessing obscenity.

Comparative Analysis with International Jurisprudence

The legal frameworks for assessing obscenity in India exhibit notable parallels with those in other jurisdictions, particularly the United States. In the landmark case *Miller v. California*, the U.S. Supreme Court formulated the *Miller test*, which assesses whether a work appeals to prurient interests, depicts sexual conduct in an offensive manner, and lacks serious literary, artistic, political, or scientific value. Though the Indian judiciary has refrained from adopting a singular test like *Miller's*, the evolving approach to obscenity in India appears to draw on these international principles, albeit with contextual modifications to suit Indian socio-cultural and legal norms.

The development of obscenity laws in the United Kingdom also provides an interesting contrast. The *Obscene Publications Act, 1857* originally laid the groundwork for the *Hicklin test* in the U.K. However, in the wake of the notorious case of *Graham Coutts*, which involved the murder of Jane Longhurst after the perpetrator consumed violent pornography, the U.K. enacted the *Criminal Justice and Immigration Act, 2008*. This new law shifted the focus from the producers of obscene material to those possessing extreme pornography, criminalizing the mere possession of such material. It also introduced a more precise definition of "extreme pornographic material," focusing on material intended to arouse sexual feelings, thereby refining the standards for obscenity in the U.K.

Conclusion

The jurisprudence surrounding obscenity in India remains an area of legal ambiguity, with no uniform or conclusive standard emerging from the Court's judgments. The Court has progressively diluted the rigid application of the *Hicklin test* and introduced more sophisticated and contextual evaluative criteria. Nevertheless, the laws governing obscenity remain vague, often allowing judicial discretion to operate within broad parameters, which can be influenced by personal biases or political considerations. This

unpredictability undermines the clarity that is necessary for the protection of both artistic freedom and societal values. As the Indian judiciary continues to grapple with the complexities of defining obscenity, it is imperative that more defined, consistent, and balanced legal standards are established. This would not only ensure greater predictability in judicial outcomes but also protect the fundamental rights of individuals while safeguarding public order. The reliance on outdated tests such as *Hicklin* and the absence of a clear, modern framework for obscenity continue to pose challenges in aligning legal norms with contemporary societal sensibilities. The introduction of more refined tests, akin to the *Miller* or *Community Standard* tests, may provide a more coherent path forward in the regulation of obscene material in India.

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