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**OBSCENITY: - THE MODERN WORLD AND THE CONTEMPORARY
WORLD**

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Obscenity is a moral concept in the verbal arsenal of the establishment, which abuses by the term by applying it, not to expressions of its own morality, but to those of another

: - Herbert Marcuse

ABSTRACT

Vulgarity, indecency, crudity, indecency etc., are some words through which the explanation of the expression obscenity begins. Every society is made up of social values, societal values, family values etc., and these play some important role in the society as whole while the young one's are nurtured in the society. Obscenity is just a mere term consisting of nine letters but the impact of these letters have a great impact on society and its repercussions are uncountable. Article 19 of the constitution of India has provided certain freedoms and rights under Article 19 (1) and has also provided with certain restriction under Article 19 (2). The most cherished and most important right for a person, though every right and freedom has equal importance in life, is right or freedom to/of speech and expression. The freedom of speech and expression is provided to every citizen of the country but only with important restrictions as these are the freedoms that cannot be curtailed or curbed but it can only be regulated or it should be given under every circumstance but under certain restriction. One of the such reasonable restriction is morality and decency. Through this restriction the legislature or the constituent assembly has tried to or intended to preserve the

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morality and decency of the society and to preserve the moral fiber of the country so that the young generation has every bit of it.

One such societal evil for which this restriction is required is obscenity. Now, though everyone has the right to speak, express etc., but no one has the right to corrupt the minds and damage the moral fiber of the obscenity. The obscenity itself is self-explanatory, meaning anything which is gravely indecent, morally ill, filthy and which produces a feeling of disgust in the eyes of a reasonable man. It is the definition of obscenity, but what makes obscenity as crime under Indian statutes is, capacity or veracity of the object to corrupt the minds of the person, in the hands of whoever it falls. An object so filthy and lewd that might damage the moral fiber in the society by the virtue of its presence. Obscenity is a crime under Section 292 of the The code and under Section 67 of the The technology act . The definition of obscenity is not given under both the statues but it can be made out by the word itself that what could constitute obscenity. The obscenity mentioned under both the statues are one and the same. There is no difference in deciding as the principles deciding the fate of the object, whether it is obscene or not, is one and the same. The difference lies in the ways or in the forms it is presented to the society. Obscenity mentioned Section 292 is basically meant for the publications done in the conventional form or the hardcopy books. It basically prevents any activity related to the obscenity books, or any publication, which is conventional form of reading, i.e., if any object that is covered under print media, and if obscene, then the accused related to its any activity will be prosecuted under this very section.

The early 21st century and the ending of 20th century were are recorded in golden words as it marks the invention of internet and other advancement in the electronic fields. The internet now became a main source of transferring, receiving and sharing data. Now since there was a new mode of publication or new mode through which people can read, i.e., in their computer screens, through the internet, then is when the technology act came into play and was legislated. Section 67 of the act basically penalizes the same old obscenity but only in its new mode of transmission or in a new mode of reading. The definition of obscenity or the test of obscenity has been changed from time to time, and with the changing morals and thinking and with changing of the social outlook of the society, the judiciary and the legislature checks, changes and verifies, new test for obscenity, and new dimensions for the term itself.

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1. INTRODUCTION

Freedom of speech and expression being a fundamental right, is given to every citizen of India by the Indian Constitution under Article 19(1)(a). Giving the people freedom to express their feelings, thought and opinion by the virtue of any medium or mode, this freedom or rights are not the absolute one. Though it can't be abridged or suspended or terminated totally but can surely be subjected to certain limitations or restrictions. If these freedoms are not restricted, there might arise a situation of chaos and anarchy. These limitations should only be allowed by the parliament and not by the executive without any backing of law. This will ensure the reasonability of the restrictions and an establishment of equal freedoms for everyone and law and order at the same time and hence, reasonable restriction must be backed by something concrete. The ground for reasonableness was laid down by Supreme Court in *Papnasam Labour Union v. Madhura Coast Ltd*². The restrictions must not be so excessive or arbitrary to avoid injustice and mischief, and must be made with an objective to achieve. There needs to be a direct connection between the restriction and the objective for which it is being made. The term reasonable is very complex. While interpreting the intention of legislature must be kept in mind that with what objective the reasonable restriction has been made³.

The first restriction is to protect sovereignty and integrity of India. The restriction came when India was being united and there were number of states and union territories who were demanding separate identity which could have jeopardized India's sovereignty and integrity. Second restriction being the security of state and freedom of speech and expression cannot be exercised in a way that will endanger the security of state. In *State of Bihar v Shailabala Devi*⁴ court said that restriction will be imposed on the speech which will result in encouragement of crimes and put state in danger. The next in the queue being public order. The term public order was amended in constitution in 1951 by first amendment and was to reduce the effect of *Romesh Thappar v State of Madras*⁵. The fourth restriction is decency and morality. In *Ranjit D Udeshi v state of*

² AIR 1995 SC 2200.

³ Madhavi Goradia Divan, Facets of Media Law 71-91 (2nd ed. 2013).

⁴ AIR 1952 SC 329.

⁵ AIR 1950 SC 124.

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*Maharashtra*⁶ state said that Section 292 of the code is constitutionally valid as it makes obscenity a punishable offence simultaneously promoting decency and morality. The fifth being with respect to contempt of court. Justice is as important as freedom of speech and expression. In the case of *C.K. Daphtary v O.P. Gupta*⁷ the court clearly said that Section 228 of the code and 129 of the Constitution are valid and hence are covered under the definition of reasonable restriction of 19(2) of Constitution. The sixth restriction is for the offense of defamation. Freedom of speech and expression should not include in anyway, anything that harm the reputation and image of someone unless the act itself is covered by the exceptions of defamation. The seventh restriction is for protection of friendly relation with foreign states. This restriction was also added to constitution by the first amendment 1951. It was to prohibit any hostile activity having the capacity to ruin friendly relation with our nation state. The eighth restriction prohibits incitement of offense. Under IPC, 1860 inciting an offense in itself is a separate offense and freedom of speech and expression by inciting offence will also jeopardize public order as whole.

2. WHAT IS OBSCENITY?

There is no proper definition of obscenity till date as “decency” and “morality” are very dynamic in nature and change constantly with people’s mind and in turn changing people’s mind. What may be obscene and derogatory to one may not be to the other person as obscenity is very subjective and is based upon various factors which includes psychological as well⁸. In the case of *Chandrakant Kalyandas Kakodhar v. State of Maharashtra*⁹ the apex court held that the standards for obscenity, vary from country to country and contemporary world and in a country like India with such a huge diversity the standards for obscenity can vary due to different moral acceptability hence it will not be possible to establish concrete rules to define this concept. In the case of *Baragur Ramchandrappa v. State of Karnataka*¹⁰, the court held that it would be very difficult for establishing fixed standards and then guiding different materials on common ground. Therefore, decency and morality must not be confined to sexuality only. But then again in case of

⁶ AIR 1965 SC 881.

⁷ AIR 1971 SC 1132.

⁸ *Supra* note 2.

⁹ AIR 1970 SC 1390.

¹⁰ 1998 SCC OnLine Kar 229.

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*Sukanta Halder v. State*¹¹ it was said that the term obscenity is restricted to sexual immorality only and anything that leads to or might lead to sexually impure and lustful thoughts should be and declared obscene. The true test is not to define what object is obscene or deprave the moral, but what leads to deprave by exciting those lustful and lascivious thoughts.

Obscenity according to Section 292 of the Indian Penal Code, 1860, hereinafter referred as the code, is any item having lascivious or appeal to a prurient interest or either its effect or effect of any of its item taken as a whole is tending to deprave and corrupt the mind of those who are likely to read, see or hear the matter contained or embodied in it; these items can be a book, paper, pamphlet, painting, drawing, etc.¹² Obscenity is also defined in the English Obscene Publication Act 1959 which is very similar to that of Section 292 of the code. “Obscene”: “an article if taken as a whole or any of its part is having the effect the audacity to corrupt or deprave the mind of an individual who are likely to read/hear or are prone to such exposure to these kinds of objects. To deprave means to make wicked or which is morally against the societal norms. To corrupt means to be morally broken, which is not pure or having the good qualities being destroyed.” Penguin Books Ltd [1961] Crim LR 176¹³.

3. **PRINCIPLES OF CRIMINALIZATION**

Four principles are articulated by Fienberg with the help of which coercive powers of the state can be exercised against the individual limiting their liberty. All offenses will have to justify their existence in the statute is based on the –

1. Harm to other principles (or harm to self)
2. Offense Principle
3. Legal Paternalism
4. Legal Moralism

¹¹ AIR 1952 Cal 214.

¹² Indian Penal Code, 1860, No. 16, Act of Parliament, 1860.

¹³ UK government, <https://www.cps.gov.uk/legal-guidance/obscene-publications>, (last visited, May 1st, 2022).

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To check whether something forms the basis of obscenity these principles need to be examined. The strongest reason for criminalization and hence the least controversial is the harm principle. If there is a direct link that shows the harm is caused to the individuals in the society, then the criminalization of the offense would be legitimized. In India, no attempts were made to link harm principle and obscenity. The harm principle was explored by Catherine Mackinnon and Andrea Dworkin in the nature of the ordinance enacted in Minneapolis proposed in antipornography legislation and the statute was based on three distinct categories of harm namely:

- 1) Harm to those who participate in the production of pornography.
- 2) Harm to victims of sex crimes, which would not have been committed in the absence of pornography.
- 3) Harm to society through social conditioning that fosters discrimination.

In pornography, women are just seen as a sexual object and show women as a subordinate gender to men and create a collective mindset of stereotype image of women which leads to the discrimination of women by men and the end product of pornography is thus distinct harm to women which should be criminalized.

The Offence principle is based on the concept of privacy which is a privileged territory over which an individual has full right and authority to determine who may enter and who may not, offense that is less serious than harm is measured in terms of revulsion, a shock to moral, religion or disgust, etc. Section 292 of the code preclude the concept of offense as it says “the effect needs to have the tendency to deprave and make an individual’s mind corrupt. This was explained in *Regina Martin Secker v. Warburg & Ltd.*” “The charge is that the book has the tendency to corrupt and deprave not that the tendency is to shock or disgust. Prevention is always better than remedy that is probably mandatory to prevent harm to the actor himself, this is Fienberg’s definition of legal paternalism.

The prohibition of conduct is morally legitimate if it’s inherently immoral, even though it’s no offense or harm this is Fienberg’s legal moralism. The definition of obscenity as given in *Ranjit D. Udeshi v State of Maharashtra*¹⁴ and *Sukanta Halder v State*¹⁵ is seen as the legal moralism the

¹⁴ *Supra* note 4.

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basis of which is Criminalization. “Obscenity can be defined in a manner of treating sex relating only to carnal feelings of humans having no regards to spiritual feeling but only to sexual and physical desire” “Such things which can stimulates the feeling of sex which are sexually impure and lustful thoughts are considered obscene”. The above definitions clarify that obscenity is not an offence/harm but something that is going against the societal general discourse and norms. Thus, it can be concluded that impulse of criminalization, can be located in legal moralism, with implications for the offense of Obscenity being different in jurisprudential terms.

From all this, we can reach a conclusion that obscenity is largely seen in terms of legal moralism by Henkins who says that the law of obscenity is not influenced by any conviction that obscene object inspires sexual offenses rather these laws are based on traditional notions, that are deeply rooted in country’s religious antecedents of government responsibility for communal and individual decency and morality.

4. **OBSCENITY AND CONSTITUTION (SCC)**

No right can be absolute, it was strenuously contended in *Ranjit Udeshi’s case*¹⁶ that there is no reasonable restriction to support Obscenity validity according to Section 292 of the code and hence it violates the freedom of speech and expression. The validity of Section 292 was upheld by the court by stating that freedom is subjected to a reasonable restriction which is seen necessary for public good, morality and public decency and the law should be in the interest of the general public.

Obscenity is not the same for every individual it varies from place to place and community to community hence there are different laws for different places and community and hence the courts and lawyers have to deal with the problem of obscenity according to the society that they are living, as there will be different laws and belief. Laws are made by humans for humans not by any god or deity. Laws are made by the people living in a particular area this can be derived from observing the punishments for breaking the law. There is different punishment for the same crime and even at some place or in some culture it may not even be considered a crime. Obscenity law

¹⁵ *Supra* note 8.

¹⁶ *Supra* note 5.

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derives its significance from the moral, traditional and religious sentiment of people and that cannot be questioned as to the principle for deciding or the base for deciding what will be considered obscene was derived on the basis of morality and religious sentiments.

The term “Lascivious and Prurient intent” gives an indication that obscenity is generally seen as something related to sexual activity; In the Christian religion, it is believed that procreation is the only purpose to have sex, and sex for any other purpose is considered a sin. The preamble of India states that India is a secular country so the question that arises is that how a country that is secular or a government that is not based on religion or a government that doesn't allow the free practice of religion will deal with an offense or make law for that offense which is explicitly originated from religion? The question is answered by analyzing the principles of criminalization, murder is rooted in harm principle while obscenity is rooted in moral principles. Quoting Henkins “even a large majority or a general consensus cannot have their morality written into law”¹⁷. Legal moralism and religious principle are so closely linked that the validity of legal moralism would be itself affected in respect of constitutional mandate. Though Section 292 has surpassed the Article 19's challenge but in the statute or books there should be some restrictions regarding legal moralism and religion.

Analyzing the offences based on obscenity legal moralism was identified as one of its important elements, of obscenity is defined only by the words of Section 292 then it will be restricted only to sexual immorality as the words lascivious and prurient indicates and the offense principle of criminalization will be disregarded in respect of statutory ‘requirement of deprave and corrupt’. Thus, these things need to be taken into consideration only then the Section 292 will be useful.

5. OBSCENITY AND INDECENCY

Decency and Morality are two terms that are frequently used with Obscenity. Obscenity is defined by Supreme Court as something filthy, repulsive, or something which is offensive to modesty and decency Facet law page 75. In *Directorate General of Doordarshan v Anand Patwardhan*¹⁸ The Supreme Court said that the definition of obscenity given in Section 292 of the code is vague and

¹⁷ Morals and the Constitution: The Sin of Obscenity – JSTOR.

¹⁸ (2006) 8 SCC 433.

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it's not easy to apply; the changing morality, norms, and thinking of the society makes it difficult to give a straitjacketed definition of obscenity and if given it will create much more problem than the present situation that's why there is no straitjacketed definition of Obscenity. Indecency is a wider concept than obscenity, anything that is obscene will be indecent but every indecent thing necessarily needs not to be obscene. Obscenity refers to an article having lascivious or prurient interest but 'indecent' is something which is just inappropriate according to accepted morality.

Obscenity and Vulgarity

People might think that abusive words are also obscene but there is a difference between obscenity and vulgarity. In *Samaresh Bose v. Amal Mitra*¹⁹, the Supreme Court held that vulgarity is not necessarily obscene vulgarity is something that arouses the feeling of disgust and repulsion and not having the tendency of depraving the and corrupt the mind and morals whose mind is open to those such immoral influences.

6. OBSCENITY AND THE INFORMATION TECHNOLOGY ACT, 2000

The Information and Technology Act, 2000, hereinafter referred as the technology act, is a sole piece of legislature that deals with the electronic transactions and other communications done in the electronic form. This a and act which basically provides legal recognition to the transaction carried out electronically. The changes which the machines, computers or any electronic mode of communication or transaction has brought is so dramatic that currently the world is shifting towards a new electronic era, in order to save environment, tress, to lessen the paper work and to fasten the speed of day-to-day works. The most important part in this was to facilitate the usage of digital signatures because there were many laws only facilitating the pen paper-based signatures and not the digital one and hence to legally recognize this act was brought.

Also, in 1996 the UNCITRAL brought model laws and requested all the states to comply their laws in accordance with these model laws whenever the laws are being amended or any new piece of legislation is being drafted. The model laws basically equalized the treatment of pen paper-based users and electronic users. Further the technology act was also legislated so that there is no

¹⁹ AIR 1986 SC 967.

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misuse of electronic transactions and that there is no crime committed as far electronic mode of communication is discussed, also this act was legislated to bring changes in the provisions of various laws relating to with offences relating to documents and paper-based transactions.

In order to regulate the messages in any form, (photos videos, text etc.), Section 66A, Section 67, Section 67A, Section 67B come into play²⁰. Though Section 66A doesn't exist anymore as far as the law is the act itself is concerned as the apex court in 2015 struck down Section 66A declaring it to be unconstitutional and ultra vires²¹ and from then anything posted on social media will only be penalized when it is considered an offence under the code otherwise it will not be considered as any violation of law, the section. The Supreme court gave this judgment as this Section violated the fundamental rights of the people, the said Section violated Article 19(1)(a) which is freedom of speech and expression²².

Like wise in order to control the messages or any such other thing present in the electronic world having contents relate to obscenity, Section 67 has been inscribed in the act. Section 67 deals only and only with obscenity, it can also be said that this Section is the electronic version of Section 292 in the code. Where Section 292 of the code covers in its ambit only the printed version or the pen- paper based version Section 67 of the technology act covers all the electronic media or versions.

Now in order to understand the Section 67 of the technology act, it should be divided into three parts first part being that what kind of material is considered as obscene, second being what kind of activity done with the obscene material will be charged under this act and third being its punishment. For the first part, any material that is lascivious. That is to say that any material which brings forth a feeling of overt sexual desire or which openly reveals any sexual desire or which encourages excessive interest in sexual matters and which effects or the effect of that publication is such that it might corrupt the minds of those in the hands or whose it falls, should be considered as obscene. The second part mentioned above is actually the one by which the Section actually begins but in order to understand properly it was necessary to make it second. It basically says that anyone who publishes any material or tries to bring into effect the publication of any material,

²⁰ The Information and Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).

²¹ Shreya Singhal v Union of India, AIR 2015 SC 1523.

²² *ibid.*

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sends or transmits any material or tries to bring into effect the transmission of any material in the electronic form and the material being the obscene material, as described above, shall be charged under this Section as of obscenity.

The third part which deals with the punishment. The punishment given under this Section two-fold, i.e., there is a provision of increment of punishment if the accused is convicted second time under this very Section and the extension of which depends upon the bench. Maximum punishment for first conviction under this Section which can be given is an either descriptive imprisonment for three years including as fine of five lakh rupees, the term either description means that the imprisonment given can be both rigorous or simple depending upon the discretion of the court. On the second conviction everything remain same what changes is that now a maximum imprisonment which can be given of either description is of five years and the fine included with the imprisonment making it punishment as whole can be taken is ten lakh rupees, depending upon the discretion of the court.

Section 67 of the technology act, is the only provision and the first by the legislator to deal with obscenity on virtual world, on the internet. It is the first statutory provision dealing with the internet obscenity and the only provision dealing with obscenity on the internet. The test determining the violation of the said penalizing Section under the technology act is similar to the test which determines obscenity under the code²³.

The current law of obscenity is concrete and clear in India as the law totally suggest that what is regarded as obscene and what should not be considered as obscene. The various illustration or any other things, nude photos, pornography, literature, or any other thing depicting and sexual activity, is everything considered obscene? The answer to this is no. Nude or semi-nude photos of women or anything cannot be considered as obscene unless the content illustration suggests that the same is engineered in way to arouse or excite the sexual passion or sexual interest of the person, in whoever's hands it falls, and as far as nude photos are considered, it totally depends upon the posture, background and every other thing that if the content is obscene or not²⁴.

The circumstances are a part of or just single pillar which might tell what is obscene but the primary thing or the test still remains the principles on which the society works. Obscenity or any

²³ Sharat Babu Digumarti v. Govt. of NCT of Delhi, AIR 2017 SC 150.

²⁴ Sada Nand v. State (Delhi Administration), ILR (1986) || Delhi.

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such crime which are still judged from the lens of the society always take the due consideration about the thinking of the current society as these concepts are truly very much affected by the viewpoint of the people or the stance of the people and by the status quo²⁵. Hence it is been said that the social outlook is very important and whenever obscenity is judged upon it should be judged as whole and not in part in order to deliver the correct judgment in accordance with law and so that justice could prevail²⁶. The ordinary meaning of the expression decency or of the word decency, basically indicates conformity with the ongoing or status quo standards of propriety²⁷.

7. SECTION 67A AND SECTION 67B OF THE TECHNOLOGY ACT

Next in line is Section 67A and Section 67B of the technology act. Section 67A says about and regulates not obscenity per se but the sexually explicit content and it will be not wrong to say that every obscene content is sexually explicit but every sexually explicit content is not obscene. Section 67A states that whoever publishes any material or tries to bring into effect the publication of any material, sends or transmits any material or tries to bring into effect the transmission of any material in the electronic form and that material being the material which is sexually explicit then the person will be charged under this very Section of the Information technology Act, 2000. The conviction given under this Section is same as given under Section 67 of the technology act. Section 67 B of the aforesaid act is related to the child pornography where it is specifically mentioned and said that any person who anyone who publishes any material or tries to bring into effect the publication of any material, sends or transmits any material or tries to bring into effect the transmission of any material in the electronic form and the material being the material which depicts children in any form of sexually explicit manner, the person shall be liable under this section.

The material mentioned under this Section should be a material which depicts children in any sexually explicit manner and any person who collects any electronic record or promotes, advertises in any electronic manner anything which indecent or sexually explicit shall be liable. Also, this Section mentions a ground under sub clause a where anything offends in relation to the children might offend a reasonable adult shall be considered as an offence under this act or anything

²⁵ Vinay Mohan Sharma v. Delhi administration, 2008 Cri.L.J. 1672.

²⁶ Indibly Creative (P) Ltd. v. State of W.B, (2020) 12 SCC 436.

²⁷ Ramesh Yashwant Prabhoo v. Prabhakar Kashinath Kunte, AIR 1996 SC 1113.

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through which a child is been abused shall be an offence under this very section. The imprisonment being same the same under this Section is the two folded one.

One of the major cases related to this Section is *Fathima A.S. v. State of Kerala*²⁸ that exceptions mentioned under this Section will not be applicable as far children are concerned. The HC rejecting the bail petition said that children are not born with morality or the knowledge of right and wrong and it is the duty of the parents to teach them. The facts were that there was a video of a mother where the children were coloring her naked body and it was posted with a caption mentioning "Body Art and Politics". The children were minor and the mother asked them to paint the body above the navel. The petitioner said that the video was uploaded to teach the children about sex education. Encouraging the children and rejecting the bail, Kerala HC said that this is no way of teaching any sex education to the children and this is prima facie obscene and the court is in no position to accept this.

8. DIFFERENCE BETWEEN THE CODE AND THE TECHNOLOGY ACT

There is no difference at all as far judging the grounds of obscenity is considered as the obscenity under the code is same under Technology act as well the only difference which lies is of the medium through which the material being judged for obscenity is delivered. The court in the case of *Maqbool Fida Husain v Raj Kumar Pandey*²⁹ the court has already said that the grounds for deciding obscenity is same in both the code and Technology act and has affirmed that the grounds on which the obscenity will judged under any of the statute will similar only leaving aside the part which discusses the medium through which the content being judged for obscenity is being delivered in the society. Supreme court has cleared its view on judging obscenity but still if we compare the Section 292 of the code with Section 67 of the technology act, we find that even though the grounds for obscenity are same but still the exceptions are not mentioned in the latter act, i.e., to say that what kind of materials will not be considered as obscene, even though they might be obscene if one goes by the very principles deciding obscenity is not given under technology act. The exceptions are written under the Section 67C but not immediately after.

²⁸ 2020 SCC Online Ker 2827.

²⁹ 2008 SCC Online Del 562.

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9. NEXUS BETWEEN CODE AND THE ACT.

The apex court after due diligence and after being reported of several plethora of cases came upon the conclusion that if a person is discharged of under Section 67 of the technology act, he/she cannot be held liable under Section 292 of the code as far as electronic records are concerned or obscenity in any electronic form is concerned. The infamous case of *Avnish Bajaj*³⁰, where one website Bazeer.com hoisted or acted as intermediary for the purpose of selling of the obscene video sold by one Ravi Raj. The case was brought under both the code and technology act.

The Delhi High Court found in during the proceedings of Avnish Bajaj he was not liable under Section 292 of the code as far his liability under the Section was concerned as the company itself was not a plaintiff and the code didn't recognize the auto mated liability but the court did find his liability under Section 67 of the technology act. Following the wording of Section 85 which provided that every in charge of the company will be prosecuted if the company has committed any offence under the technology act. The apex court in 2012 turned this judgment stating there can be no vicarious liability unless the company is called upon for the offence.

In the case of *Sharat Babu Digumarti*³¹ the question before the apex court was that whether a person can be proceeded under Section 292 if he is been already discharged under Section 67 of the technology act. The Supreme Court said that if their material is deemed as electronic record only technology act, can be applied. The Delhi High Court since proceeded the petitioner under the code the apex court said that the DHC committed a grave error by proceeding the petitioner under Section 292 of the code even after dropping the charged under Section 67 of the technology act. Further Supreme Court in this case said that no statute can be read in isolation and gave a relief to intermediaries by reaffirming the principle of "*generalia specialibus non derogant*" the provisions of a general statute must yield to those of a special one, also known as the rule of implied exception, held that if there is a connection between the crime and the electronic record or the material in question is an electronic record then the safe harbor principle under Section 79 cannot be ignored.

10. TEST OF OBSCENITY

³⁰ Avnish Bajaj v. State (NCT) of Delhi, (2008) 105 DRJ 721.

³¹ *Supra* note 29

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It is recognized by the Supreme Court that there cannot be a proper test of obscenity as there is no proper definition of obscenity but through various judgments, the supreme court has laid down broad parameters which are being followed by the courts for determining whether a particular publication is obscene or not.

10.1 HICKLIN'S TEST

Hicklin test was laid down in *Regina v. Hicklin*³² by Chief Justice Cockburn, even though it was a long-outdated English test Indian Courts had chosen to adopt this test, Cockburn laid down that an article is obscene if it has the tendency to deprave and corrupt the mind of those who are open to such immoral influences or into whose hands this type of stuff may fall. Hicklin's test was based on the principle that how an obscene object will affect the vulnerable Section whether they will be able to understand it or not was not the point of concern.

Hicklin test was not having any exception/protection even for the content which was having literary merit, which destroyed the work of D.H. Lawrence's *The Rainbow* in 1915 and *The Well of Loneliness* in 1928. As a result of this, *The Obscene Publication Act 1959* was passed to protect articles that were having literature and to strengthen the laws concerning pornography, the act changed the definition of obscenity according to this act obscene is something that depraves or corrupts the mind of those who are likely to get into contact with such content rather than what effect it will be having if the content falls in the hand of a vulnerable group of people. (facet law)

Though Hicklin Test was discarded after passing of 'The Obscene Publication Act' it was still adopted by the Indian Courts stating that the test can't be discarded just on the basis that the court is the judge of obscenity in relation of impugned book and its emphasis the particular impugned object that has the tendency to deprave and corrupt the minds and morals but it gives rise to contention as according to Section 292 of the code as it lays emphasis on the people who are open to such objects than those in whose hand the publication may fall accidentally. In *Ranjit D. Udeshi case*³³ appeal was for the conviction of the bookseller and his partner for selling *Lady Chatterley's Lover* Supreme Court confirmed the conviction of the accused and rejected the appeal that challenged the constitutionality of Section 292.

³²1868 LR 3 QB 360.

³³ *Supra* note 5.

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10.2 THE LIKELY AUDIENCE TEST

This test emphasizes targeting the audience who will be having access to such content and then determining what effect that article will be having on such Section not on the isolated Section of society this was confirmed in *Chandrakant Kalyandas Kakodkar v State of Maharashtra*³⁴ that writer should take into consideration that if they are writing something for adolescents then it should be for them only not for adults as if it will be for both then maybe there might be some content which might not be obscene but at the same time might not be suitable for adolescents, therefore, publication according to Likely Audience Test must be targeting the Section of the society for whom the content is being made.

In *Samaresh Chandra Bose v Distt. Magistrate*³⁵ Supreme Court held that in judging an obscene article the Judge should place himself in the place of every age group and understand what impact it will have on that individual section.

In the Ajay Goswami case, the Supreme Court held that adults can't be restricted of their entertainment just because it's inappropriate for children, adults can't be deprived of their entertainment till they are within acceptable norms and regulations of society. There was a contention between the *Ajay Goswami case*³⁶ and *Shankar v State of Tamil Nadu*³⁷ where the court had a less liberal approach toward the adult entertainment content which might be unsuitable for children, in Shankar's case the channel was broadcasting Big Boss 4 which seems to be unsuitable for children and it was being broadcasted at the prime time of day when even children will be having access to that show here the court stated that though this was not obscene but was unsuitable for children that's why it can't be broadcasted at the prime time of day but late night.

In the United States "Channel Zoning" is a common practice in which the content can be delivered according to respective time, rather than banning the show because it might be inappropriate for children the show can be broadcasted at the odd time i.e., in the late-night the idea was that the

³⁴ *Supra* note 6.

³⁵ *Supra* note 13.

³⁶ AIR 2007 SC 493.

³⁷ 1994 (4) SCC 478.

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children are generally asleep or there are parents at home to monitor their children that what content they are watching³⁸.

10.3 ORDINARY MAN'S TEST

The Test for judging an obscene article must be in accordance with an ordinary man and not according to an isolated Section of society; an ordinary man is someone who's having common sense and prudence according to the general public. If the test is being made considering in mind what impact it will have on depraved minds it has been clarified by Chief Justice Hidayatullah in *K.A. Abbas v Union of India*³⁹ that if a depraved person begins to see things with more sensitivity than an ordinary man then it will be right said that a Frenchman sees women's leg in everything. In *Ramesh v Union of India*⁴⁰, the Supreme Court held that words must be used according to people of ordinary prudence, strong mind, and reasonableness not according to weak-minded those who are state of hostile.

10.4 CONTEMPORARY/NATIONAL STANDERD TEST

In judging whether an article is obscene or not emphasis must be laid on national standards and contemporary mores. Though Indian Courts held that Lady Chatterley's Lover is obscene it wasn't held obscene in England and the accused were freed the point where contradiction came between the judgment of India and the UK judges that community mores and standards are also required while giving judgment which is way different from each other; this test is of no use while using the internet as the whole world is connected there's no such restriction as almost everyone can access it.

Pre-marital sex and live-in relationship have become very common in India and are also being accepted by people though there a Section of society who see it as something that may harm the culture and society and will ruin their values and thoughts won't make these activities obscene just because a Section of society thinks that these things will corrupt and deprave their minds.

³⁸ *Supra* note 2.

³⁹ AIR 1971 SC 481.

⁴⁰ AIR 1988 SC 775.

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In *S. khushboo v Kanniammal*⁴¹ a complaint was filed against film star Khushboo when she expressed her views and supported the live-in relationship and premarital sex and wanted the society to not see them as taboo and to accept it as any other normal activity of life, her views created a furore in Tamil Nadu and there was an outrage against her and people were filing many complaints; a petition was filed by Khushboo in Madras High Court to quash complaints but her request was denied, here supreme court came into play and emancipated Khushboo of the complaints by stating that these complaints are not only mala fide but also these complaints aren't having enough entropy to make a case of obscenity and defamation.

11. CONCLUSION

Obscenity under Indian laws or statutes is basically a restriction and for that matter a reasonable restriction on the freedom of speech and expression. Obscenity under Indian statutes though is mentioned under various statutes in which IPC, 1860 and the Technology act, 2000 play a very small role, apart from these statutes it is also regulated by the Indecent Representation of Women (prohibition) Act, and also by the Young Persons Harmful Publications Act, and also under Human Rights. The code and the act though mention different ways through which obscenity can be expressed or the material in question can be transmitted, sold or published, but the basic the definition of obscenity irrespective of their modes of transmission remains same and hence the test for it also remains same.

It can be truly said that the obscenity under the act is basically meant for the advanced world or for the advance modes of transmission and the obscenity under the code is meant for the contemporary world or for classic mode of transmission or publication. There is not a single difference in judging the obscenity but the difference lies in the way the object or the material in question is been published.

⁴¹ (2010) 5 SCC 60.



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