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THE AMBIGUITY OF 'OBSCENITY' UNDER INDIAN LAW & ITS IMPACT ON THE ENTERTAINMENT INDUSTRY

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"I know it when I see it"[2]

ABSTRACT

These candid words phrased together by US Supreme Court Justice Potter Stewart were elevated to the status of a binding judgment, and were held to be the primary determining factor in judging whether a movie was obscene or not.

It seems to defy all our notions regarding the absoluteness of law that the mere viewpoint with which a work is regarded may alter its status from that of a positive expression of art for the purpose of entertainment, to an obscene work worthy of being shunned from the eyes of society. However, it is this personal analysis, that stems from an individual's opinion on whether a work is obscene or not, that forms the essence and foundation of the laws governing obscenity.

OBSCENITY LAWS IN INDIA

The Indian position with respect to obscenity has been clarified in the Indian Penal Code by virtue of Section 292 and 294. Both these are prohibitory statutes which prevent the dissemination, in any manner whatsoever, of obscene books, writings etc. as well as prevent the utterance or performance of any obscene words or acts in public. Besides being a prohibitory statute, Section 292 also provides a definition for the term 'obscene', and thereby states that a work shall be deemed 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*

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[2] Jacobellis v. Ohio, 378 U.S. 184 (1964)

to all relevant circumstances, to read, see or hear the matter contained or embodied in it".[3] This meaning of obscene has been incorporated into the Information Technology Act, 2000, whereby Section 67 penalizes the publication and transmission of obscene material in electronic forms.

A definition, by its very nature, is intended to be the statement of meaning of a particular phrase or word. However, it is evident by a mere glance at the given definition of obscene that it has the potential to raise more questions as compared to those it can clarify. The psychology of human minds is a science so vast that deciphering, encapsulating and incorporating it into a law is an impossible feat. It hence raises the question about how any work can be judged as obscene on the basis of whether it appeals to the 'prurient interest', when the development of this interest in itself is an unexplained and random figment of human psychology?

VAGUENESS OF THE PROVISION

Uncertain, indefinite, unclear; these are words that one would place at the lowest rung while pondering the nature of a law, as it goes against the basic principles of what laws are and what they stand to achieve. Yet, when a law, or any statue or provision thereof is vague, these qualities portray themselves strongly in the understanding and application of the law in question.

The issue of vagueness of a statute was first addressed in a landmark case decided by the Supreme Court of India, namely *State of Bombay vs F.N. Balsara*[4]. The case pertained to the validity and interpretation of the Bombay Prohibition Act, 1949, which, like the laws pertaining to obscenity, contained a prohibitory provision so wide that rendered it ambiguous to interpret. With respect to this provision, the Supreme Court of India held that "*The words 'which frustrates or defeats the provisions of the Act or any rule, regulation or order made thereunder' are so wide and vague that it is difficult to define or limit their scope. I am therefore in agreement with the view of the High Court that this provision is invalid in its entirety".*

The scope and ambit of the laws pertaining to obscenity were primarily discussed in the US Supreme Court judgement in the case of *Kingsley Int'l Pictures Corp. v. Regents*[5], in which the matter being deliberated was the grant of a license to a film that came under scrutiny for being obscene and immoral. Similar to the Indian law pertaining to this subject matter, the law under

[3] Section 292 from the Indian Penal Code, 1860
[4] 1951 AIR 318
[5] 360 U.S. 684 (1959)

deliberation in the present matter, which was the New York Education Law[6], also gave an arbitrary explanation of what would be deemed obscene. A unanimous judgement was passed by the US Supreme Court in favour of the grant of license, in which a highly pertinent stand was taken by Justice Frankfurter whilst concurring, which reads as "*The legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion for sweeping within its condemnation what is permissible expression as well as what society may permissibly prohibit*".

The case of *Grayned v. City of Rockford*[7] has been hailed as a legendary case to address the issue about the numerous perils of a vague law. The opinion of the US Supreme Court, as delivered by Justice Marshall stated that vague laws affected and offended societal norms and values in multiple ways, namely "*First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them*". This landmark judgment accurately described the problems arising in the understanding, interpretation, and enforcement of a law which was vague.

If one were to consider the impact of the obscenity laws in India with respect to the judgments in the *F.N Balsara* & *Grayned* case, it seems evident that the underlying problem with these laws is their vagueness, which leads to a lack of clarity in the minds of people. The very essence behind the codification of laws is to provide individuals with a manual for acceptable conduct within the realms of the law; to enable them to starkly differentiate lawful acts from unlawful acts. This differentiation becomes blurred and murky when the worded provision is vague.

How can one be expected to respect and uphold a law when its boundaries are so distorted? The vague laws of obscenity force a person to employ advanced standards of interpretation of law, a task usually delegated to the brightest minds in the field, simply to understand the acts being prohibited by it. The current law, as it stands, has the potential to categorise any work as obscene merely based on the work appealing to the prurient interest. By diversifying the statute to such an extent, and not having standardized norms for its applicability, the law has condemned all works of art and entertainment to be put under scrutiny for obscenity at the

[6] New York Education Law, as amended in 1954
[7] 408 U.S. 104 (1972)

whim of an arbitrary definition.

THE DOCTRINE OF READING DOWN

The judgment in the case of *F.N Balsara* paved a way for discussions regarding vague, arbitrary and ambiguous laws. The recent case of *Indian Social Action Forum v Union of India*[8] adopted an ingenious rectification for a provision deemed vague. In this case, a provision of the Foreign Contribution (Regulation) Act Rules, 2011 was challenged on grounds of unconstitutionality due to its vague provisions. The Supreme Court of India held that, "*We are in agreement that the words 'political interests' are vague and are susceptible to misuse. Where the provisions of a statute are vague and ambiguous and it is possible to gather the intention of the legislature from the object of the statute, the context in which the provisions occur and purpose for which it is made, the doctrine of 'reading down' can be applied"*.

The Doctrine of Reading Down is essentially a process of harmonious construction, applied for provisions that are unclear in their present state, so as to provide a more straightforward application of the provision and protect it against claims of unconstitutionality. In the case of *Indian Social Action Forum*, the doctrine was applied so as to 'read down' the ambiguous term of 'political interest', which can encompass a very wide range of activities, to narrower and more identifiable terms of 'active politics' and 'party politics'.

This slight, yet impactful clarification offered by the Apex Court provided certain definition to an otherwise abstract concept. It then leads one to think whether such a clarification could rectify the underlying problem in the obscenity laws. The most pertinent issue with the present provision is that the determination of an unlawful act has been made subject to the effect it has on people, and not on the act itself. Granted, that law cannot be construed as merely pragmatic and rational words, and has to have the interplay of societal norms and socially acceptable standards of human behavior. However, it is essential that these work only as a secondary factor to illuminate the path towards complete natural justice for law, and are not made the primary determining factor for the very course of law. If the legal interpretation of obscenity is read down, it may provide a more tangible meaning to the term, which can enable people to act within the confines of the provision.

POSITION OF THE COURTS

[8] Civil Appeal No.1510 of 2020

The judicial system, comprised of Courts and the learned minds serving as Judges, are the interpreters and upholders of laws. Whilst laws are merely bare written text, it is the judiciary that provides them with a deeper meaning by applying their provisions in real circumstances to uphold the intention behind the law and serve justice. This challenging role assigned to Courts becomes further arduous when the matter being deliberated is one that does not have the backing of a concrete and complete law.

Due to their highly entwined nature, the laws against obscenity and the Freedom of Speech & Expression guaranteed by Article 19 of the Indian Constitution are on a constantly turbulent plane, wherein one is always at the risk of being infringed due to the enforcement of the other. Hence, when it comes to the deliberation of obscenity of a work, the delicate balance between safeguarding the freedom of speech and safeguarding the society from deviant expressions of speech has to be maintained by courts.

The most preliminary determination standard adopted by Indian Courts was the Hicklin Test[9] which considered the effect of any isolated part of a work on the minds of people prone to immoral influences, and who may be exposed to such work. This test was erroneously applied by the Apex Court in the case of *Ranjit D. Udeshi vs State Of Maharashtra*[10]. Over time, the courts recognised the inherent flaws with this test and adopted newer principles being developed in the US Supreme Court, first in the case of *Roth vs United States*[11], which was subsequently superseded in the case of *Miller vs California*[12]. The determination standard for obscenity that emerged from these cases was that 'Community Standards' must be taken into consideration. This new principle was first adopted in the case of *Aveek Sarkar vs State Of West Bengal*[13]wherein the Supreme Court of India held that "*the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards*".

While the progress made by Indian Courts in understanding the need of a more progressive test to determine obscenity is commendable, the core problem regarding the vagueness of the law is still intact. By providing an ambiguous test to determine an already ambiguous concept, the clarity required in the law is far from achieved. We are a nation with a wide range of demographics in areas of population age, gender, ethnicity and literacy, all of which are pivotal in the formation of a person's opinions, and hence will not always align or be in consensus for

[9] Regina vs Hicklin [1868] LR 3 QB 360; Court of the Queen's Bench
[10] 1965 AIR 881
[11] 354 U.S. 476 (1957)
[12] 413 U.S. 15 (1973)
[13] CRIMINAL APPEAL NO.902 OF 2004

us as a society. When the development of a common community standard is made the foundation of legal interpretation, it is bound to result in an inaccurate determination. This problem was efficiently addressed by the recent landmark judgement in the case of *Iancu vs Brunetti*[14] declared by the US Supreme Court. The judgement struck down a law preventing registration of 'immoral' and 'scandalous' marks, the determination of which was left to its perception by society, by stating that "*this facial viewpoint bias in the law results in viewpoint discriminatory application".*

IMPACT ON THE ENTERTAINMENT INDUSTRY

"*The entertainment industry is vast and a reflection of the society we live in".*[15]

The entertainment industry in India was birthed in the year 1913, with the movie '*Raja Harishchandra',* and has presently become one of the most monetarily viable industries, with its expansion into cinema, television serials, theatre, Over the Top (OTT) transmissions, music albums etc. The change in the industry has not just been in physical terms of expansion and newer modes of communication of the work, but also in the content being made. The entertainment industry strives to maintain a balance between showing us a mirror about society, and being a fanciful escape into fictional worlds. When focused on the former, works of entertainment are bound to contain visuals and speech which address some uncomfortable realities of our society, or some aspects that create a generational divide in opinion as they are normal and common for the younger generation, yet hard to accept for older generations. There are scenes, storylines, dialogues/lyrics, costumes etc. that are perceived differently by the masses due to varying levels of exposure that leads to modernization in thoughts, education and awareness regarding the activities being carried out by general public.

As is the case with any art, it is a utopian fantasy to imagine that a particular work will be liked and appreciated by all. However, is it fair on the industry that certain individuals' dislike or disapproval of the work makes it liable for legal action? The laws of obscenity are exercised maximally against the entertainment industry. While it is essential to have a system of checks and balances regarding the work being displayed to the general public, it circles back to the inherent problem that the present law does not provide for any actual system. A law cannot be based on the foundation of how the particular act will be seen or perceived by people, because

[14] 139 S. Ct. 2294 (2019)
[15] Quoted from the author Karrine Steffans

that destroys the very purpose behind codification of laws, which was that its interpretation and applicability should be straightforward. By making peoples' feelings towards a work the only determining factor, the obscenity laws have enabled all individuals to bring legal action against entertainment works on the mere basis of their personal feelings towards it.

In the past years, there has been a plethora of such claims raised against various entertainment works. A PIL[16] was recently filed against the obscenity and vulgarity of shows being displayed on OTT platforms. The mechanism of seeking justice for public good was instituted to protect the general masses from gross violations of natural justice that stood to materially impact their lives. It is essential that there must be an actual wrong which is sought to be remedied through a PIL. This wrong cannot be derived from the personal viewpoint of a few individuals of the public, as is the case with the concerned PIL. In a classic example of a domino reaction, the ambiguity of the legal definition of obscenity has resulted in every aspect pertaining to it becoming ambiguous, including the remedies sought from legal action. If the industry is to be cured from the evils of propagation of obscenity, what exactly can it display? There is no concrete answer to this, which has a massive adverse effect on the industry. It has been left completely unaware regarding what can and cannot be included in its works. The present law is such that it is almost impossible for the entertainment industry to comply with it, leaving it vulnerable to all legal claims of obscenity.

The film poster of the movie '*PK'* was dragged through the institution of a suit for obscenity for having its pivotal character being displayed without clothes, yet being mindful enough to cover sensitive body parts. When viewed objectively, why would anyone perceive the visuals of a man's face, chest, hands and legs as obscene? Yet, the blurred lines of obscenity laws allowed this poster to be brought under legal scrutiny. Yet another example is the FIR filed against obscenity in the television serial '*Big Boss*'. People are rightly entitled to have negative opinions regarding any work, and express their opinion against the frivolity, insensitivity etc. of any work. However, initiating legal action is not the same as expressing opinions; it is a much more severe action with drastic consequences.

A recent case decided by the Madhya Pradesh High Court displayed the actual perils on the entertainment industry of the ambiguous law and the abstract court standards to determine obscenity. In *Ekta Kapoor vs State Of M.P*[17], an FIR was filed against the obscenity in a show being displayed on an OTT platform, and the HC was approached to quash the said FIR. The

[16] PUBLIC INTEREST LITIGATION NO. 127/2018
[17] M.Cr.C.No.28386/2020

scene in question pertained to the development and continuance of a physical relationship between a doctor and the step-mother of his betrothed. While this fictional situation offends the norms of societal relationships, is obscene an appropriate label for it? The show was based on the theme of interpersonal human relations. The sad reality of the society is that infidelity and development of extra-marital physical relations is more common than one might think. A show which is advertising itself as a fictional depiction of relations was bound to contain some of these aspects that we usually do not address. We are a nation that was captured and enamored by a popular television serial of the west that out rightly displayed acts of incest, violent rapes and other sexual acts. The staggering number of 10 million people who viewed this show in India is the same community whose standards were allegedly taken into account while declaring the scene in the case of *Ekta Kapoor* to be obscene.

The irony of this situation is blatant, as it succinctly captures the problem of using community standards to determine obscenity under law. For a maker of a work of entertainment, it is unclear whether they should rely on the standards of the community that accepts such western shows as described above, or the community who considers it obscene to have a man displayed without clothes, yet covering the sensitive body parts. The entertainment industry, like all individuals who are subject to the applicability of the law, needs to be enlightened about the exact scope of obscenity that they need to abide by in order to comply with the law. This enlightenment can only happen if the law itself delves deeper into a concept that has, at present, been superficially addressed. It is hence the need of the hour to have clearer laws of obscenity that are free from ambiguity, to allow individuals to freely pursue their creative skills without being unfairly shackled by the looming threat of legal action.