



**THE OFFENCE OF OBSCENITY
UNDER THE INFORMATION
TECHNOLOGY ACT, 2000 AND THE
INDIAN PENAL CODE**

*By Advait Raj
From School of Excellence In Law, The
Tamil Nadu Dr. Ambedkar Law University*

INTRODUCTION

Obscenity is an offence under the Indian Penal Code, 1860 and the Information Technology (Amendment) Act, 2008. Obscenity is defined as certain material which is characterized as being offensive in relation to the public sense of decency¹. The definition of obscenity in terms of the legal and lingual aspects are vague and not universal, often varying according to the moral standards and notions of communities and countries, what may be termed obscene in India may not attract the same meaning in western countries. Obscenity can be found in movies, magazines, speeches and times even in artistic expressions. It is important to find the thin line which demarcates the boundaries between what is deemed to be “obscene” and what is considered to be morally acceptable to the society. The subject of obscenity is of great importance in recent times due to the rise in technology which has a sway over the young vulnerable minds and which in turn has become the most important medium through which it is expressed. The Indian Parliament has enacted various Laws and Acts to curb the menace of obscenity.

**OBSCENITY WITHIN THE AMBIT OF
IPC**

Sections 292, 293 and 294 of IPC have been enacted with the ulterior motive to protect and safeguard the public moral by making the sale, etc., of obscene literature and publications in general, and to young persons in particular, a cognizable offence.

The word obscenity and obscene have not been defined in the IPC. Section 292 of the IPC in simple terms states that if any material is taken as a whole is lascivious or appeals to the prurient interest and also tends to deprave and corrupt the persons who read, see or hear the matter contained in it, then the matter will come under the purview of obscenity. Further clause (2) of section 292 goes on to state the extent of punishment for those indulging or aiding in the offence of obscenity in any manner, which includes the sale, hire, distribution, public exhibition, circulation, import, export and advertisement, such a person will be punished with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees on first conviction and in the event of second or

subsequent conviction then with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.²

One important point to note is that the provisions of section 292 under IPC cannot be invoked to penalize works done in public interests such as in the cases of scientific, literary or scientific purposes. Section 292 also conflicts with Article 19(2) of the constitution which is about the freedom of speech and expression, however, the Constitution provides that the fundamental rights are subjected to reasonable restrictions

¹ <https://www.britannica.com/topic/obscenity>.

² Sec 292 of Indian Penal Code.



to prevent indecency in public. Section 293 also bans the selling of obscene objects to young persons and prescribes punishments for the same. Obscene acts and songs are also made an offence under section 294 which states that whoever, to the annoyance of others-

- (a) does any obscene act in any public place, or
 (b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

PENAL OFFENCE OF OBSCENITY UNDER I.T. ACT, 2000

Section 67 of the Information Technology Act, 2000 deals with the penal offence of publishing or transmitting obscene material in the electronic form. The section states that, Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees³.

Section 67 of the Information Technology Act, 2000 is modelled on the basis of section

292 of IPC, the only material difference being that section 67 of the Information Technology Act, 2000 has made the offence of obscenity applicable to any material in the electronic form and in the electronic world. Hence each and every electronic content which is obscene would come under the ambit of section 67 of the Information Technology Act, 2000. It is pertinent to note that any offence relating to obscene content in electronic form can be only tried under the Information Technology Act of 2000 and not IPC because section 81 of the Information Technology Act states that provisions under the Act shall have an overriding effect.

TEST OF OBSCENITY

A test for defining what constituted the offence of obscenity was first laid down in the English case of Regina v. Hicklin. The court held that all material tending "to deprave and corrupt those whose minds are open to such immoral influences" was obscene, regardless of its artistic or literary merit⁴. Obscenity is regularly used in the same sentence as vulgarity, and the two terms are often used to denote the same concept but in the legal aspect there is a slight difference between them. In a landmark case the apex court of the Indian Judiciary held that, a vulgar writing need not necessarily be obscene, the court further expounded that vulgarity instills a feeling of disgust, revulsion and also boredom but does not have the effect of depraving and corrupting the morals of any reader of the novels, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such

³ Sec 67 of the Information Technology Act, 2000.

⁴ L. R. 3 Q. B. 360, 371 (1868).



immoral influences⁵. The ruling of the court in the above mentioned case has elucidated on the difference between obscenity and vulgarity and has shown that obscenity has a larger context to it which includes depraving and corrupting the minds of those who are open to such immoral influences and not merely a feeling of revulsion or disgust.

Further in the case of Ranjit D. Udeshi v State of Maharashtra⁶, the Hicklin test was found to be valid for determining what constitutes obscenity, the court stated that, “Treating sex in a manner appealing [or tending to appeal] to the carnal side of human nature” is offensive to modesty and decency and is obscene. But the extent of such appeal must be examined in each case”. The Court examined the text of the book—under question and concluded that it was obscene under Hicklin Test. In the case of Chandrakant Kalyandas Kakodar vs The State Of Maharashtra And Ors⁷, the court held that when considering the question of obscenity of a publication what the court has to check is for whether a class, and not an isolated case into whose hands the book, article or story falls, becomes depraved by reading it or might have lecherous or impure thoughts that aroused in their minds.

SHORTCOMINGS OF HICKLIN TEST

The supreme court had by and large followed the the Hicklin test until the year 2014, where in the case of Aveek Sarkar v. State of West Bengal⁸, the apex Court made a departure and held that contemporaneous community standards would be equally relevant in

determining whether any particular information is obscene or not. The supreme court held that, “we have to therefore apply the community standard test rather than Hicklin test to determine what constitutes obscenity. A picture of a nude/semi-nude, woman as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire⁹. The picture should be suggestive of a depraved mind and designed to excite sexual passion in persons who are likely to see it. Only those sex-related materials which have a tendency of exciting lustful thoughts can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards”.

The Hicklin test for obscenity was also followed in the U.S.A, where the American judiciary had followed the rule laid down in the case until when the U.S. Supreme Court laid down a 3 rule test for obscenity in the case of Miller v. California¹⁰, which held that work is deemed to be obscene if:

- a) The average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interests.
- b) The work depicts or describes, in a patently offensive, way according to contemporary community standards, sexual conduct specifically defined by the applicable state law, and
- c) The work taken as a whole, lacks serious literary, artistic, political or scientific value.

⁵ Samaresh Bose v. Amal Mitra,(1985) 4 SCC 289.

⁶ A.I.R. 1965 SCR (1) 65.

⁷ (1969) 2 SCC 687: AIR 1970 SC 1390.

⁸ (2014) 4 S.C.C. 257.

⁹ Sarkar v West Bengal, Global Freedom of Expression Columbia University, <https://globalfreedomofexpression.columbia.edu/cases/sarkar-v-west-bengal>.

¹⁰ 413 U.S. 15 (1973).



In another instance Commenting critically on Hicklin test more than than eighty years later in *Commonwealth v. Gordon et al.*, Judge Curtis Bok of the Philadelphia County Common Pleas Court complained that if strictly applied the rule laid down will render any book unsafe, since a moron could pervert to some sexual fantasy to which his mind is open to the listings in a seed catalogue and not even the Bible would be exempt¹¹.

DIFFERENCE BETWEEN OBSCENITY AND PORNOGRAPHY

Pornography and obscenity are two terms that are often used interchangeably, but in reality the two terms have different meanings and are different penal offences under the Information Technology Act, 2000. Obscenity is generally defined as any material which is offensive to modesty or decency and is lewd, on the other hand pornography is intended to directly arouse sexual desire. Section 67A of The Information Technology Act, 2000 deals exclusively with the broad ambit and parameters of electronic or digital pornography. Thus section 67A focuses on any material in the electronic form which contains sexually explicit act or conduct. Section 67A does not give any explanation as to what the terms “sexually explicit act or conduct” mean. Hence it is to be taken that any content in the electronic form which contains explicit sexual intercourse and other sexually explicit acts including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse: or lascivious

exhibition of the genitals or pubic area of any person in this regard, would be covered under the term, “sexually explicit act or conduct”¹²

Section 67A of the Information Technology Act, 2000 provides punishment for whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct and such a person shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees¹³. Hence it can be encapsulated that both terms without doubt offend public decency and morals but pornography is a more aggravated form of obscenity which intends to arouse sexual desire.

LANDMARK CASES AND JUDGEMENTS

In the *Maqbool Fida Husain v. Raj Kumar Pandey* case, the Delhi High court held that, the “Bharat Mata” painting by M.F. Hussain Was not obscene under section 292 of the Indian Penal Code. In this case the acclaimed artist M.F. Hussain depicted the Bharat Mata in the form of a naked woman. The advertisement of the painting led to several protests on the ground that the painting was obscene. Justice Sanjay Kishan Kaul in his observation stated that, "we have been called as the land of Kama Sutra then why is that in this land we shy away from its very name?"

¹¹ ERICK M. BACHMAN, LITERARY OBSCENITIES : U.S.CASE LAW AND NATURALISM AFTER MODERNISM 16 (2018).

¹² PAVAN DUGGAL, TEXT BOOK ON CYBERLAW 122-123 (2 ed. 2016).

¹³ Sec 67A of The Information Technology Act,2000.



Beauty lies in the eyes of the beholder and so does obscenity". Further the court held that the allegations against the painter were baseless and that nudity was a part of contemporary art¹⁴.

In Avnish Bajaj v. State¹⁵, popularly known as the Baazee.com case an IIT Kharagpur student named Ravi Raj, uploaded an obscene MMS video clip on a website called baazee.com for sale. Upon investigation, a chargesheet was filed against Ravi Raj, Sharat Digumarti and the Avnish Bajaj who was the owner of the website. The state contended that there was an offence made under section 292 of the IPC and that the failure to have adequate filter in a system which is entirely automated entails serious consequences and a website cannot escape such legal consequences. The Delhi High Court observed that a prima facie can be made out against the website under section 292(a) and section 292 2(d) of IPC. The court further observed that, "by not having appropriate filters that could have detected the words in the listing or the pornographic content of what was being offered for sale, the website ran a risk of having imputed to it the knowledge that such an object was in fact obscene", and thus it held that as per the strict liability imposed by Section 292 of IPC. Obscenity relating to the photograph of a woman exposing her thighs and cleavage in a magazine was scrutinized in the case of P.K.Somnath v. State of Kerala¹⁶, the court was of the view that the picture in question cannot be called an obscene picture and went on to state that nudity per se was not obscene or indecent since the facial expressions were not at all provocative. The court further held that "something more has to be present" and

until that criteria has not been satisfied, the nude body of a woman cannot be considered as obscene or indecent.

CONCLUSION

Obscenity in any form is unacceptable and should be rightly denounced at the very beginning. To ensure that the offence of obscenity does not turn into an unstoppable social menace, certain changes need to be implemented in the existing laws, for example Section 67 of the Information Technology Act, 2000 penalizes only those who publish or transmit any lascivious or prurient material in the electronic form and stays silent on those who access or view such pornographic or obscene electronic content. Punishment including to those who indulge in the viewing of obscene content in the electronic form will help in deterring the effect of such influences on young minds who are a click away from viewing obscene content on the internet. At the same moment there is a need to differentiate and demarcate the boundary that separates content which are obscene from those which are not, so that laws which curb obscenity are not used in a manner which is draconian and thereby penalizing every content that is against the so called "community standards". Recent judgments of the Indian Courts indicate that the judiciary is of the opinion that the concept of obscenity is bound to change with the passage of time and due to progressive changes taking place in the modern society.

¹⁴ Delhi HC quashes obscenity case against MF Husain, The Times of India, May 9, 2008.

¹⁵ (2005) 3 CompLJ 364 Del.

¹⁶ (1990) CriLJ 542.