

## OBSCENITY – A LEGAL DILEMMA

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**ABSTRACT:** *The vagueness and ambiguity surrounding the concept of 'obscenity' has intrigued the legal fraternity all over the world. It is a maze and a riddle which has remained unresolved till date despite all sincere efforts which makes it a troublesome concept. The definitions given by the judiciary all over the world are as obscure and confusing as ever.*

*But since the Indian law punishes obscenity under the Indian Penal Code, 1860 and the Information Technology Act, 2000, it becomes significant to have an understanding as to what it means precisely. The authors here try to analyse the concept of 'obscenity' from various perspectives.*

**Key Words:**

### I. INTRODUCTION

Obscenity is an obscure and a variable term as it means different things to different people. 'Everyone seems to know what is obscene and to have the greatest difficulty in explaining his understanding to someone who is not already convinced.'<sup>1</sup>It is quite amusing to note that even the delegates to the Geneva Conference on Suppression of the Circulation and Traffic in Obscene Publications admittedly failed to attempt any definition of the term 'obscenity'.<sup>2</sup>Morris Ernst says, "Many courts and commentators have attempted to define the concept; all have inevitably failed."<sup>3</sup>However most people would invariably agree that precise definition of obscenity is impossible.<sup>4</sup>Justice Potter Stewart admitted this difficulty when he said "I shall not today attempt further to define [hard-core pornography]...; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it...."<sup>5</sup>The authors here try to examine the concept of obscenity from different perspectives to get an insight into what comprises obscenity in clear terms.

### II. VARIABLE NATURE OF OBSCENITY

The difference in viewpoints regarding the term 'obscenity' is present not only between various communities but also from individual to individual. This makes 'obscenity' a confusing and perplexing term. All this maze around the concept of obscenity arises on account of its variable nature as it adapts itself to the cultural, ethical, religious and moral codes of the society. 'What is considered obscene by one may not be considered so by another at the same or at some later stage.'<sup>6</sup> This lack of consensus gives it a chameleon-like quality, changing and adapting itself to the norms of the community under consideration. Thus, what is obscene in India may not be so in USA.

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<sup>1</sup>Monrad G.Paulsen, *The Problem Of Drafting An Obscenity Statute* 69-70 (Joint Committee on Continuing Legal Education of the American Law Institute & American Bar Association, 1961).

<sup>2</sup>See Lockhart and McClure, "Literature, the Law of Obscenity and the Constitution", (1954) 38 *Minnesota Law Review* 295, 323. as cited in Richard G. Fox, *The Concept Of Obscenity* 1 (The Law Book Company Ltd., Australia, 1967). Also see Inder S. Rana, *Law of Obscenity in India, USA and UK* 3 (Mittal Publications, Delhi, 1990).

<sup>3</sup>Roth Briefs, "Brief of Morris L. Ernst, amicus curiae," p.52 as cited in Harry M. Clor, *Obscenity And Public Morality* 210 (The University of Chicago Press, Chicago & London, 1969).

<sup>4</sup>Also see Monrad G.Paulsen, *The Problem Of Drafting An Obscenity Statute* 13 (Joint Committee on Continuing Legal Education of the American Law Institute & American Bar Association, 1961).

<sup>5</sup>As quoted in Wendy McElroy, XXX: A Women right to pornography 41 (St. Martin Press, New York, First Edition, 1995).

<sup>6</sup>See A. K. Sarkar, *The Law and Obscenity* 5 (N. M. Tripathi P. Ltd. Bombay, 1967).

### III. MORALITY AND OBSCENITY LAWS

The purpose of moral values is propagation of good and diminution of evils from the society. That is to say that 'the aims of morality in its social signification are directed towards increasing social harmony by diminishing the incidence of excessive selfishness, noxious conduct towards others, internecine struggle, and other potentially disintegrative forces in societal life.'<sup>7</sup> Morality is, therefore directed towards increasing the virtues and decreasing the sins from public lives of individuals. 'It is possible to extract from Plato's *Republic* and *Laws*, and perhaps from Aristotle's *Ethics* and *Politics*, the following thesis about the role of law in relation to the enforcement of morality: the law...exists not merely to secure that men have the opportunity to lead a morally good life, but to see that they do. According to this thesis not only may the law be used to punish men for doing what morally it is wrong for them to do, but it should be so used; for the promotion of moral virtue by these means...'<sup>8</sup> The obscenity laws serve this purpose in the society, i.e. to keep the sexual desires within reasonable limits and to promote a virtuous society.

### IV. OBSCENITY FROM VARIOUS PERSPECTIVES

#### Etymology

Etymologically, the term 'obscenity' can be trace to Latin origin, a combination of the preposition *ob* (on account of) and the noun *caenum* (filth) which would account for the character of the Latin words *obscenus* (adverse, unfavourable, evil omen) and *obscena* (the excrements).<sup>9</sup> Thus 'obscenity' would mean something which is dirty, lustful and filthy.

#### Historical perspective

Descriptions of sex are as old as sex itself....Greek and Roman drama and poetry was frequently highly specific, and the works of Aristophanes, Catullus, Horace, and Ovid, to name just a few, contain references to sexual activity that, by the standards of the time, are highly explicit....*The Thousand and One Nights* and the *Kamasutra* (Italics mine) are but examples of the fact that numerous eastern cultures also have a long history of comparatively explicit depictions and descriptions of sexuality. In western cultures the explicit treatment of sex continued through modern history.'<sup>10</sup> Ancient Indian art has been never devoid of eroticism where sex worship and graphical representation of the union between man and woman has been a recurring feature.'<sup>11</sup> Therefore some societies make exceptions for sexual content if it is of historical value.

#### Liberal and Conservative view

The conservatives view sex as legitimate, proper and moral only within the bonds of marriage and that too for procreation and carrying forward of family lineage.<sup>12</sup> The liberals insist that sexual activities between consenting adults should not be restrained legally rather it should be protected under the law as part of free speech. Liberalists are against any kind of suppression of sexual desires because far from being an evil, it is a requirement in modern conventional society. They see it as a safety valve protecting the society from criminal outburst. Liberals contend that adults should be left free to make their choices as to what they would like to see and express and that State should not intervene in such free choices. Accordingly, while the conservatives are in favour of obscenity laws, the liberals are against obscenity laws.

#### Feminists' perspective

Feminists specifically use the term 'pornography' rather than 'obscenity'. To them it is a part of patriarchal set up of the society where females are meant to serve the males. It is seen as unequal power

<sup>7</sup>Edgar Bodenheimer, *Jurisprudence – The Philosophy and Method of the Law*, 190-191 (Universal Law Publishing Co. Pvt. Ltd., Delhi, Fourth Indian Reprint, 2004).

<sup>8</sup> H. L. A. Hart, *Essays in Jurisprudence and Philosophy*, 248 (Clarendon Press, Oxford, 1983).

<sup>9</sup>Ref. Ellis, "The revaluation of Obscenity", in *More Essays in Love and Virtue*, London, 1931, p.104. as cited in Richard G. Fox, *The Concept Of Obscenity* 1 (The Law Book Company Ltd., Australia, 1967). Also see Harry M. Clor, *Obscenity And Public Morality* 210 (The University of Chicago Press, Chicago & London, 1969).

<sup>10</sup>Attorney General's Commission on Pornography (Messe Commission Report) July 1986, p.233-234. available at <https://babel.hathitrust.org/cgi/pt/id=mdp.39015058809065> (last visited on July 10, 2017).

<sup>11</sup>As quoted by Justice S. K. Kaul in *Maqbool Fida Hussain v. Raj Kumar Pandey*, Crl. Rev. P. No.282/07;114/2007 & 280/2007.

<sup>12</sup>Ref. Introduction, *Philosophy and Sex* 1-7 (R. Baker & Elliston eds. 1975) as quoted in Eric Hoffman "Feminism, Pornography and Law" Vol.133:497 *University of Pennsylvania Law Review*, 519 (1985) available at [scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4030&context=penn\\_law](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4030&context=penn_law) (visited on July 19, 2017).

equations between males and females. Feminists identify pornography with objectification and sexual enslavement of women by men. They look at it as objectification of bodies and indulgence in 'over-sex'. According to them, pornography entails institutionalization of male dominance over females thereby perpetuation of gender inequality. In this perspective, pornography is not harmless fantasy or a corrupt and confused misrepresentation of an otherwise natural and healthy sexuality.<sup>13</sup> Then there is another group of moderate feminists and sex workers who try to differentiate between pornography and erotica, terming the latter as healthy sex based on consent.

### Legal perspective

Law has not been able to define with clarity as to what it specifically wants to ban under the obscenity laws. It seeks to address the obscene content as one that 'tends to deprave and corrupt'<sup>14</sup> or that appeals to 'prurient interest' or is not in accordance with 'community standards'<sup>15</sup>. Thus the legal terminology is too confusing and obscure. It leaves it to the reader to have his or her own interpretation of what is obscene, thus resulting in total chaos.

### V. CONCLUSION

Although the language of law and the terminology used therein may not be quite clear as to what is obscene. But in practical terms, over indulgence in 'sex' is what is aimed to be curbed by the law. Law desires its citizens to lead a disciplined and balanced life whereby they are able to make the best use of their capabilities and talents. It is submitted that a population enslaved for the satisfaction of sexual cravings and passions is not a truly democratic nation. Seen in this perspective, the obscenity laws may constitute a valid restriction on freedom of speech.

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<sup>13</sup>Catharine A. Mackinnon, *Feminism Unmodified: Discourses on Life and Law*, 147-148 (Harvard University Press, 1987).

<sup>14</sup>*Regina v. Hicklin* (1868) L.R. 3B.360.

<sup>15</sup>*Miller v. California* 413 U.S. 15 (1973).