
CRIMINALISING OBSCENITY THROUGH THE PERSPECTIVE OF CONSTITUTIONAL MORALITY

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ABSTRACT

Through the prism of constitutional morality, this article critically analyzes India's criminalization of obscenity, focusing on the conflict between societal norms of decency and individual liberty. Throughout history, the definition of obscenity has remained ambiguous and subjective, frequently influenced by governmental morality, court interpretation, and prevailing societal standards. Indian obscenity laws, which are mainly found in Sections 294 of the Bharatiya Nyaya Sanhita and other related laws governing publications, digital content, and artistic expression, continue to raise serious constitutional issues with regard to the freedom of speech and expression protected by Article 19(1)(a) of the Indian Constitution. The progression of judicial standards from the Hicklin test to the modern community standards approach used by Indian courts is examined in this article. It also assesses how the Supreme Court of India's judicial rulings on constitutional morality offer a transformational framework that puts individual choice, equality, autonomy, and dignity ahead of majoritarian societal morality. The essay makes the case that the criminalization of obscenity must be interpreted narrowly to avoid arbitrary restrictions on expression by looking at significant rulings pertaining to artistic freedom, sexual expression, and privacy. It comes to the conclusion that in a democratic society, constitutional morality is an essential constitutional defense against moral paternalism and overbearing state control over individual and creative liberties.

I. INTRODUCTION

“Art, morals and law's manacles on aesthetics are a sensitive subject where jurisprudence meets other social sciences and never goes alone to bark and bite because State made straight-jacket is an inhibitive prescription for a free country unless enlightened society actively participates in the administration of justice to aesthetics”

- VR Krishna Iyer¹

Criminal law provides a mechanism wherein the rights and liberties of an individual is pitted against the might of the State. The fundamental object of criminal law is not only to protect and to conserve the safety and security of personal rights but also to protect and guard public morals and public decency through the machinery of the State. Indian laws proscribe ‘obscenity’ and make its practice punishable under the extant laws of the land. However, the rule punishing the act of obscenity has always been fraught with controversies and ambiguities. The issue arises right from its definition which doesn’t find place in any Indian statute book. There is no clear definition of what is indecent enough to warrant a criminal penalty. Recently there was an amendment in POCSO Act² which makes using of children for pornographic purposes punishable with imprisonment not less than 5 years and fine. If at all this incident has done anything, it has resurrected the old debate on the criminalisation of obscenity, esp. in the world of electronic media, and the penological principles which should guide the State for punishing the perpetrator of this peculiar and undefined offence.

The word ‘obscenity’ is not defined under any Indian statute book. Cambridge Dictionary define it as anything "offensive, rude, or shocking, usually because of being too obviously related to sex or showing sex."³ Merriam Webster Dictionary interprets it as anything (1) disgusting to the senses: Repulsive; 2(a) abhorrent to morality or virtue specifically: designed to incite to lust or depravity..... the dance often becomes flagrantly obscene and definitely provocative.....- Margaret Mead, (b) containing or being language regarded as taboo in polite usage obscene lyrics obscene literature, (c) repulsive by reason of crass disregard of moral or ethical principles an obscene misuse of power, (d) so excessive as to be offensive obscene

¹ Raj Kapoor v State, AIR 1980 SC 258

² The Protection of Children from Sexual Offences (Amendment) Act, 2019

³ Vallabhaneni Vamsi Mohan vs. State of Andhra Pradesh and Ors. (03.12.2019 - APHC): MANU/AP/0350/2019

wealth obscene waste."⁴

Soman's case reminds us of the famous late-19th Century Amil Mitra's novel "Prajapati" which was castigated as being vulgar (inclusion of kissing scenes) and was seen to portend "obscene" depiction of love on the charge of it being morally depraved and debased and capable of encouraging the readers of any age to lasciviousness.⁵ In a similar vein, critics accused Oscar Wilde's novel "The Picture of Dorian Gray" of being lewd because it included allusions to homosexuality. Sadat Hasan Manto's "trials and tribulations," wherein he wrote about "sex and lust, alcoholics and prostitutes, and was charged with obscenity six times,"⁶ seem to be significant to the debate.

As beauty lies in the eyes of the beholder so does the vice of obscenity. The debate around laws criminalising obscenity predicates over differential notions of morality, especially between the moral perceptions of "literary elite" and the "average readers." This led Wilde to make the famous remark in the 1891 edition of his book that "*there is no such thing as a moral or an immoral book. Books are well written, or badly written.*"⁷ Every person presents his point of view respecting the essence of obscenity in his own way. It is sometimes termed as the "subversion of accepted standards of sexual morality",⁸ the "individual or communal feelings of indignation",⁹ the "leer of the sensualist",¹⁰ or the "community sense of shame at the exposure of sexual or excremental matters."¹¹ Like India, several countries impose restrictions on circulation of obscene material. However, the vacillating standards to determine obscenity have often invited opprobrium on such standards being brandished as a tool for "cultural regulation".

⁴ *Ibid*

⁵ Samaresh Bose vs Amal Mitra, 1986 AIR 967: *In one of the passages of the novel, a person is shown to have taken his paramour out to show the sights of the city of Bombay but instead takes her to a picture where after the lights go off, seeing a soldier and his paramour in front kissing.*

⁶ Osama Siddique, Capturing Obscenity: The Trials and Tribulations of Saadat Hasan Manto, 5 NNJLSR 15, 22 (2014).

⁷ Emily Temple, A Close Reading of the 'Censored' Passages of The Picture of Dorian Gray (Dec. 27, 2020, 6:15PM), <https://lithub.com/a-close-reading-of-the-originally-censored-passages-of-the-picture-of-dorian-gray>

⁸ Lockhart and McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn. L. Rev. 295, 333 (1954) cited in Richard G. Fox, Obscenity, 12 Alberta L. Rev. 172, 173 (1974).

⁹ MARCUSE, OBSCENE: THE HISTORY OF INDIGNATION 11 (1965) cited in Richard G. Fox, Obscenity, 12 Alberta L. Rev. 172, 173 (1974).

¹⁰ U.S. v. One Book Called "Ulysses", 5 F. Supp. 182, 183 (1933).

¹¹ U.S. v. Kennerley, 209 Fed. 119, 121 (1913).

II. WHAT DRIVES THE INDIAN PENAL POLICY?

Being a culture known for its 'moral' and dogmatic origins, India was in a moral quandary on variegated liberal notions borrowed from occidental constitutions. With commencement of the constitution came a case challenging the constitutionality of §292 IPC in *Ranjit Udeshi v. State of Maharashtra*¹² on the ground of being contrary to the freedom of speech & expression. The apex court upheld the impugned provision holding it a reasonable restriction on the exercise of the said freedom in the interest of public decency and morality.¹³

The Court followed Hicklin's test and considered its application justified owing to its emphasis on potentiality of the impugned provision to deprave and corrupt by immoral influences.¹⁴ It, however, modified the application of the test to the extent that its application in India could not be said to hold ground on stray excerpts of obscene connotations but should be judged on the altar of community standards without a preponderating social purpose or profit.¹⁵

A. Enforcement of Morality:-

The Hart-Devlin debate continues to be of cardinal importance in the domain of legal moralism. Upholding §292 of the Penal Code, the Court held the restrictions reasonable and found them well in the interest of public decency and morality as required by the Constitution thereby regarding moralism to be the deciding factor.¹⁶ The judges noted that obscenity appeals or has a tendency to appeal "to the carnal side of human nature"¹⁷ and no protection of free speech exists for "obscenity without a preponderance of social purpose or profit."¹⁸ A material is deemed obscene under §292 if it is lascivious or appeals to the prurient interest, or if the overall effect of any of its products is to deprave and corrupt people who are likely to read, see, or hear the matter contained or embodied in it. §2(c) of Indecent Representation of Women (Prohibition) Act, 1986, also reflects legal moralism by prohibiting any matter which is "likely to deprave, corrupt or injure the public morality or morals" from entering the public domain. §§ 67, 67A and 67B in IT Act, 2000 which criminalize publishing or transmitting obscene material in electronic media also talk in terms of "lascivious material appealing to prurient

¹² *Ibid*

¹³ *Ibid*

¹⁴ *Ibid*

¹⁵ *Ibid*

¹⁶ *Ibid*

¹⁷ *Ranjit Udeshi v. State Maharashtra*, AIR 1965 SC 881

¹⁸ *Ibid*

interest” and “sexually explicit act.” The language of the provisions and the test for obscenity followed in the said legal provisions indicate - what is obscene (and hence, worthy of criminalisation)? It is determined on the basis of prevailing notions of morality and decency in the society. On closer analysis, it is found that the Court had advocated curbs on freedom of speech and expression in the interest of contemporary society. Public decency and morality should direct these restrictions. This viewpoint is similar to Lord Devlin's belief that humanity has the right to defend itself against something that threatens its moral convictions. The criterion for deciding it was to be that of "the man in the jury box," which seems to be the "interest of contemporary society," according to the Court in *Udeshi*. A public showing of this interest in sexual affairs has been deemed intrinsically unethical by society because it goes against society's sexual mores. It is commonly believed that social institutions of marriage and family might collapse by the presence of obscene material as the latter has the potential to change the social perception about sex and relationship for which it is widely believed that India is not for.¹⁹

The desire to preserve the social fabric militates against the inclusion of obscene content in the public domain, and this cultural interest appears to direct the criminalization of obscenity. The use of criminal penalties to avoid the reshaping of society's moral contours toward public expectation, as well as the need to instil a proper attitude against obscenity²⁰, can be contained in the state's penal policy. In *Sukanta Haldar v. State*²¹, the court opined that obscene matters tend to increase “sex impulse which leads to sexually impure and lustful thoughts”. It can thus be said that what is criminalised is the conduct that scatologically influence the discourse of a ‘civilised’ society and not the conduct which harms another or entail an offensive mental reaction in another person²²

B. Protection from Depravity:-

A careful examination of court’s observation in *Udeshi* reveal that law proscribing obscenity

¹⁹ Gautam Bhatia, Ranjit Udeshi – II: The Enforcement of Morals (Dec. 25, 2020, 7:50 PM), <https://indconlawphil.wordpress.com/2013/08/05/ranjit-udeshi-and-the-enforcement-of-morals/>

²⁰ M. Cathleen Kaveny, Obscenity, Communal Values, and the Law: Joel Feinberg and the Failure of Liberalism, 9 The Annual of the Society of Christian Ethics 93, 97 (1989)

²¹ AIR 1952 Cal. 214

²² This point can also be backed up by Henkin, who claims that "obscenity laws are not primarily motivated by any belief that obscene materials inspire sexual offences." Obscenity laws, on the other hand, are founded on conventional conceptions of government accountability for communal and individual decency and morality, which are rooted in this country's religious antecedents. ``L. Henkin, Morals and the constitution-The sin of obscenity, 63 Column L.R. 391, 391 (1963)

was concerned not only with moralism but extend to insulating society from immoral influences causing depravity and corruption in the social landscape²³, and the intention of law is to protect “not those who can protect themselves but those whose prurient minds take delight and seek sexual pleasure from erotic writings.”²⁴ The obscenity laws are concerned more towards precluding individual/social morality from getting degenerated.²⁵ This importance the Court ascribes to “protection” evinces that the court was conscious of the harm of moral depravity and corruption of an individual. This makes the provision more of a kind that satisfies the attributes of legal paternalism as an instrument of State’s penal policy. The terms used by the legislature in §292 and §293 of the IPC further support this. The aim of criminalising obscene content, according to the second limb of §292, is to prevent the mind of the person who is likely to see, hear, or read it from being depraved or corrupted. The court believes that “moral depravity and corruption” are harmful to individuals. When we examine obscenity laws to see what kind of paternalism they represent, we find that they adhere to the hard version of moral paternalism, in which the state uses coercion to preserve the individual's beliefs and improve their moral character in order to improve their well-being.²⁶ The state takes on the duty of strengthening the moral fabric of society by allowing or prohibiting such actions that, in the State's opinion, will improve a person's moral character and prevent him from harming himself morally. A review of obscenity case law decided after *Udeshi* is required to demonstrate that, despite significant changes in the test for defining obscenity, the cultural standards test still reigns supreme. This cultural norm represents the societal consensus on the moral correctness of every action. The concepts established after *Udeshi* will be discussed in the following section.

III. THROUGH THE PERSPECTIVE OF CONSTITUTIONAL MORALITY

The court recently ruled in *Indian Hotel and Restaurant Association v. State of Maharashtra*²⁷ that the concept of obscenity is culture and community-specific²⁸, and that the word is used in the legal sense to denote expressions that are contrary to the prevalent sexual morality²⁹. Social morality is ephemeral, and if the law does not keep pace, it is up to the Court to use imaginative

²³ Ranjit Udeshi v. State Maharashtra, AIR 1965 SC 881, ¶19.

²⁴ Ranjit Udeshi v. State Maharashtra, AIR 1965 SC 881, ¶26

²⁵ Gautam Bhatia, Ranjit Udeshi – III: Paternalism and the Meaning of “Morality” (Dec. 26, 2020, 8:15 PM), <https://indconlawphil.wordpress.com/2013/08/06/ranjit-udeshi-paternalism-and-the-meaning-of-morality/>

²⁶ Dworkin, "Paternalism", (Dec.26,2020,9:25M) <https://plato.stanford.edu/archives/fall2020/entries/paternalis>

²⁷ (2019) 3 SCC 429.

²⁸ *Ibid*

²⁹ *Ibid*

judicial interpretation to build a bridge between the past and the present. This gives the courts a lot of leeway in deciding what is and isn't obscene on the altar of constitutional morality.

The laws against obscenity, according to Henkin, are based on conventional conceptions of morality and decency. As a result, the definition of obscenity is based on the "terms in which culture has framed it." He also sees a religious foundation in the origins of the crime, tracing the words "lascivious" and "prurient interest" to Christian notions of sexual morality. Any sex that isn't for the purpose of reproduction is considered a "original sin."³⁰ This idea was imported in the IPC. As a result, this moral interpretation tends to have religious roots.

It's worth noting that Hart and Dworkin aren't against enforcing morality, but they are in favour of establishing a high bar for what constitutes morality³¹. According to Latika Vashist, redefining the state's criminalization policies along the lines of constitutional morality will help address the problem of unprincipled criminalization³², which can lead to "under-criminalization" or "overcriminalization"³³ This section takes this argument further in the context of obscenity laws.

Morality in today's Indian culture cannot be dismissed as a personal matter. However, the question of which definition of morality can be used to constrain human autonomy arises. The three conceptions of morality which could be used are- public morality, individual morality and constitutional morality. Lord Devlin's standard of "man in jury-box" is synonymous with public or popular morality. It refers to the society's viewpoints at any given point in time. If this definition of morality is adopted, it will become clear that mainstream morality has the capacity to morph into majoritarian morality. This majoritarian morality can then suffocate the minority's right to self-determination and, as a result, sovereignty. Using this viewpoint, free expression will be subject to majoritarian notions of right and wrong. In the case of Naz Foundation v. NCT³⁴, this was realised. In a pluralistic society like India, determining what constitutes obscenity in the eyes of the community becomes extremely difficult, and relying on

³⁰ Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 *Column. L. Rev.* 391, 393–94 (1963) cited in Mary-Rose Papandrea, *Sex and Religion: Unholy Bedfellows* 116 (6) *Michigan Law Review* 859, 870 (2018)

³¹ Lord Devlin's concept of "religious conviction" as "a degree of disgust growing to bigotry," according to Dworkin, would subject an individual's freedom to the biases and personal aversions of the majority. See Ronald Dworkin, *Lord Devlin And The Enforcement Of Morals*, 75 *Yale L.J.* 986, 988 (1965-1966).

³² See, Andrew Ashworth, *Is Criminal Law a Lost Cause* 116 *L.Q. Rev.* 225 (2000).

³³ Latika Vashist, *Re-Thinking Criminalisable Harm in India: Constitutional Morality as a Restraint on Criminalisation*, 55 (1) *Journal of the Indian Law Institute*, 73, 92 (2013)

³⁴ 160 (2009) DLT 277

a single moral opinion can stifle the voices of dissenting minorities and lead to restrictions on their freedom of speech on arbitrary grounds. Individual morality is based on individualistic values and emphasises autonomy. This kind of morality, on the other hand, would make regulating obscene matter exceedingly difficult because it will jeopardise uniformity in obscene matter regulation standards.

Constitutional morality is distinct from both popular and individual morality. It represents a dedication to the fundamental political and moral philosophy that underpins our Constitution. It forbids any act that smacks of arbitrariness³⁵. Constitutional morality has “inherent elements in the constitutional norms and conscience of the Constitution³⁶”.

The standard for obscenity has become outmoded in the digital age, according to the *Ajay Goswami case*³⁷. In terms of constitutional morality, this necessitates a rethinking. Even the tiniest segment of society has the right to have different tastes and desires as long as their choices “stay within the legal structure” and do not infringe on the rights of other people³⁸. It falls on the State to “curb any propensity or proclivity of popular sentiment or majoritarianism”³⁹.

While it is appropriate for the state to try to protect the established morality of a given time and location, enforcing obscenity penalties would limit an individual's choice of both voluntary and involuntary exposures to topics of dubious taste. A person's opinion cannot be shaped by state policies. Finally, it's about moral values. “Are not simply the moral convictions or mores of a particular society,” but are questions of justice at the centre of morality⁴⁰. Using constitutional morality as a principle would ensure the required uniformity while also eliminating the possibility of arbitrariness. Using the constitutional morality principle would ensure the desired uniformity while also eliminating the possibility of arbitrariness. Furthermore, when a constitutional right is limited, the reason for the limitation can be traced back to the Constitution. This line of thinking was first expressed in the *Naz Foundation*, and it has since resurfaced in the post-*Puttaswamy* period⁴¹. Individual autonomy has been recognised as a facet of the fundamental right to privacy, and moral values have been recast in the mould of

³⁵ *Manoj Narula v. Union of India*, (2014) 9 SCC 1, 49.

³⁶ *Government of NCT of Delhi v. Union of India and Ors.* 2018 (8) SCALE 72

³⁷ *Ajay Goswami*, 2007 1 SCC 143, ¶67.

³⁸ MANU/SC/0947/2018

³⁹ *Ibid*

⁴⁰ A. R. Blackshield, *The Hart Devlin Controversy in 1965*, 5 *Sydney Law Review* 441, 452 (1967).

⁴¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Joseph Shine v. Union of India*, (2019) 3 SCC 39

constitutional morality⁴². The Supreme Court has agreed that constitutional morality, rather than "general morality at any moment," should govern the law⁴³.

IV. CONCLUSION:-

It is indisputable that all civilized nations strive to advance the interest of its people by employing a variegated set of means. Criminal law is aimed at dealing with the vices of the society through the legitimate violence of the State. The ideals of criminalization that seem to be best justifying the criminalization of obscenity in Indian penal policy are a mix of legal moralism and legal paternalism. Laws prohibiting obscenity are a legal limitation on freedom of speech and expression that the State enforces for the advancement of public interest⁴⁴.

In India, the judicial trend has been to view obscenity as sexual explicitness based on its moral underpinnings. Since morality is such a nebulous concept, it must be approached with caution. The authors believe that Constitutional morality should serve as a useful guide for the judiciary in regulating obscenity in such a way that "liberty" does not become "licence" and a careful balancing of the interests of the majority and minority in society is achieved. According to Ashworth, if the descriptive, normative, and practical elements of criminal law are considered⁴⁵, the State can only use the sword of criminal law when "obscenity" exceeds a certain level. Regulation of such material without criminalization can also act as a means of social control below that level. Stripping of a person's liberty for publication of an allegedly obscene material without strongly heeding to the intent of the publisher on the ground of public morality, traced from arbitrary sources, does not go well with the constitutional spirit of Indian Constitution, and a sound application of "constitutional morality" to deal with such cases should become the guiding norm for the application of criminal law in a liberal State like India.

Obscenity changes with time, values, society, popular culture etc. The number of things that have a direct impact on the standards and level of obscenity are many and locking them into one line or a few lines is not possible.⁴⁶ To avoid the uncertainty and aberrations that currently characterise the problem, it is critical to resolve this paradigm shift and bring the law into

⁴² Joseph Shine v. Union of India, (2019) 3 SCC 39

⁴³ *Ibid*

⁴⁴ INDIA CONST, Art 19 §, cl 2

⁴⁵ Andrew Ashworth, Is Criminal Law a Lost Cause 116 L.Q. Rev. 225 (2000)

⁴⁶ Vallabhaneni Vamsi Mohan, *Supra* note.2

compliance with it. The Supreme Court's recent move towards constitutional morality⁴⁷ in assessing criminalizable behaviour is a welcome development. The apex court has sought to establish a normative framework to help in the rigorous judicial review of legislation. The constitutional courts are required to ensure that constitutional morality prevails in their judicial involvement and imagination, and that their decisions are not swayed by the tides of popular understanding of societal morality.

⁴⁷ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1; Joseph Shine v. Union of India, (2019) 3 SCC 39