
BLURRED LINES: WHEN DOES ARTISTIC EXPRESSION BECOME OBSCENE

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ABSTRACT

Something that might be the most beautiful creation, a masterpiece for someone might be hideous and immoral for someone else—a very subjective outlook, one must say. This article discusses the significant boundary between obscenity and artistic expression which is very much there yet stands undescribed in the current society. It examines the subjective perspectives surrounding obscenity, its evolution, and how the legal systems defined and regulated content to deem it as obscene or art. Historical analysis divulge on how ancient civilizations respected, or rather celebrated art in all its forms, even in the most sexually explicit ones. Yet as the time went on we can see that this attitude was influenced by religion and the ideas of morality and purity, imposing stricter norms. This article also discusses the legal frameworks and tests and how courts in India and other jurisdictions have evolved and defined obscenity while considering the social standards. Discussions regarding the influence of societal norms in judgments are also made. In the age of AI generated media, questions regarding authorship, intention and accountability while considering problems such as algorithm based censorship makes this topic even more complicated. This article aims to talk about the need of legal clarity and objective outlook on obscenity and to clearly distinguish between artistic freedom and indecent and offensive content. Art is something that can push the society's boundaries and shape it to make it more inclusive.

This article focuses on doctrinal research taking a more qualitative and analytical approach to explore the themes of artistic freedom and obscenity, and how they are defined in the legal context. It examines important legal models used to define obscenity and what crosses the line to become obscene in different jurisdictions like Hicklin Test, Miller Test and Community Standard Test while also focusing on the problems posed by these models. It also compares how these laws are applied in different jurisdictions and how their frameworks differ from each other. This discussion also consist of case laws and the definitions given by the courts to define certain terms. This article does not include any interview or survey and is purely written with the help of analyzing the existing materials.

Introduction: Art or Offence, and the Question of Who Decides

“Even today,” Sadat Hasan Manto once said, “*Society itself is obscene. All I do is represent its essence. It is entirely understandable that people with ugly faces vent their anger at the mirror.*”

¹With this audacious and provocative remark, Manto challenges the existing norms of the society. In his own manner he invites the readers to reflect on a much deeper and philosophical thought: is that the art is obscene, or is it the foundation of the moral lens through which society has been judging the art broken and defective?

This friction between the self-perceived obscenity and artistic freedom has for long been debated on jurisprudential, philosophical, sociological, and cultural discourse. Artists have been, for centuries, discouraged, censored, condemned, and prosecuted. This was not merely done for the content they produced by because their work disrupted the culture and ongoing accepted norms, exposing the unsaid and excruciating truths. They also forced the society to confront the contradictions it presented to itself. This debate further became more byzantine when it got intertwined with the legal frameworks, where society faced the challenge of distinguishing between free expression and obscenity.

This altercation over obscenity and artistic expression has now attained a renewed importance, where the new platforms are evolving and forming strong opinions of the public and also giving them the space to express these opinions loudly. But this debate has also caused the subject to come under the purview of censorship and legal scrutiny. In India, under Article 19(a) of Constitution guarantees the right to freedom of speech and expression, supporting the artist’s right to critique society, and breaking the barriers between him and his creativity. This right is not only protected domestically but also recognized internationally—by Article 19 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)—as a fundamental human right. Justice P.N. Bhagwati, in the landmark judgment of *Maneka Gandhi v. Union of India*², stated, “Democracy is based essentially on free debate and open discussion, for that is the only corrective of Governmental action in a democratic set-up.” Through this statement, he affirmed that if democracy should

¹ Vibha Chauhan & Khalid Alvi, *Manto Saheb: Friends and Enemies on the Great Maverick, Speaking Tiger*, 2018

² *Maneka Gandhi v. Union of India*, 1978 AIR 597

survive in any country, it is through debate, discussion, and open dialogue that it will survive. Thus, artistic expression plays a very crucial role in shaping democratic discourse.

Despite the constitutional protection, the laws in India are still struggling to form a coherent, exact and consistent definition of “obscenity.” The vagueness that surrounds the idea of what is considered to be obscene often results to arbitrary legal actions, which aims to silence the artistic and regulating their content. This article seeks to address the question: *How is the line between obscenity and artistic expression defined? And who is defining it?*

The purpose of this article is to analyze the current legal governing standards of obscenity and artistic expression and to further examine the tests used to define them. It also explores the future problems that we might face, particularly in the realm of AI, robotics and non-human entities, as they increasingly intersect with the creative industries, it make the implications of how obscenity and artistic expression are produced, interpreted and judged, even more complicated.

The primary idea adopted during the research for this article is that the current legal approach towards obscenity is overly subjective, often reflecting the prevalent and dominant social norms and political ideas rather than looking at it through neutral lens. It assumes that a more intricate, nuanced and rights-based approach would serve the society better. This article critically analyzes the relationship between censorship and creativity, while trying to figure out the narrow gaps between public decency and individual rights.

The Long and Complex Relationship of Sex and Art

Obscenity according to the Black’s Law dictionary means, “character or quality of being obscene, conduct tending to corrupt the public merely by its indecency and lewdness.” But obscenity, as we today understand it – something sexual, explicit, vulgar, corrupting, and lewd – hasn’t always been comprehended the same way. In the ancient world, including the civilizations like Greece, Rome, India and Sumer – sex or sexuality was considered as the very natural part of our lives. Sexual expression was celebrated through different forms in art, literature, theater and even religious scriptures.

In the Sumerian society, sexual acts were depicted without any restriction through terracotta figurines and poems. These early Mesopotamians depicted the acts of intercourse, same-sex

relationships, and the businesses like prostitution without any shame. These were not censored by the state in any form. The language had diverse vocabulary to describe the sexual organs yet had no word for the term “nudity.” We can decipher by this that these people did not believe one of the most natural function of human body could be in any form considered scandalous or a taboo.

Similar attitude was noted in the Greek and Roman classical period too. Sexual encounters of all forms could be seen in many Greek art forms like vases, sculptures and dramas. There was no fear of moral or legal judgment. All homosexual and heterosexual activities were depicted without any restriction. Many playwrights and poets depicted the themes of love, lust and eroticism. Censorship regarding political demurs and blasphemy yet no sources show suppression of sexual content.

Later with the rise of Christianity, people’s attitude regarding sex changed. With the Church branding sexuality and sexual acts as something of sinful nature, the ideas of moral purity, restraint and guilt developed. However disputed, the sexual expression in art continued to be exhibited in the Middle Ages and renaissance period, generally in explicit forms. Fabliaux, a great example for this. These were short comic tales, popular in France and were filled with the most indecent, sexual and humorous stories. Even though the Church did disapprove of these, the state didn’t intervene to ban such content.

Even in India, we can see a very open relationship of society with sexuality. Contrary to the current controversies, ancient Indian culture wasn’t very sensitive to the topics of sexuality. Texts like Kama sutra and Anangaranga had detailed depictions of erotic practices, with no one suing them for their content. Temples in Konark and Khajuraho are embellished with beautiful depictions of divine figures engaged in various sexual acts. This suggests that eroticism was once woven into religious and cultural life of Indians. Sexual acts were not considered to be obscene but rather were considered to be that of spiritual nature.

Today, artists, filmmakers, and writers find themselves in the midst of legal battles for portraying their arts which are alleged to be of “obscene” nature. This trend shows the conflict between the rich artistic and sex positive history of our world and modern ideas of morality and purity. This has in a manner led to random prosecutions and concerns related to suppression of free speech. With the multiplication of digital platforms and increase in the content globally,

the need to have a clearer objective on what legally constitutes as obscene and what doesn't has become very urgent.

Getting a Picture: Trying To Define

The concept of obscenity has developed overtime yet with no clear definition. Indian courts have struggled to define terms like lascivious, prurient, vulgar, and explicit, often ending up relying on the dictionaries meanings for clarification. Hon'ble High Court of Bombay in Jaykumar Bhawanrao Gore v. State of Maharashtra, had observed as under: The meaning of "Lascivious" is "feeling or revealing an overt sexual interest or desire". Similarly, prurient means "having or encouraging an excessive interest in sexual matters, especially the sexual activity of others". The other word deprave means "morally corrupt; wicked" The meaning of the word explicit was noted to be "...Insofar as the meaning of sexually explicit act under section 67A concerned, submissions of learned counsel Mr. Ponda are to be accepted, as he pointed out from the dictionary that "explicit" means "describing or representing sexual activity in a direct and detailed way." ³This case is a perfect example to show how such terms that are deeply rooted in subjective morality play a role in determining if some content is obscene or not.

Further in Pramod Anand Dhumal v. State of Maharashtra, it was observed by the Hon'ble High Court of Bombay as under: "...before the offence can be said to be complete under Section 67A of the IT Act prosecution must demonstrate or show that accused has published or transmitted material containing sexually explicit act. Explicit means "clear and detail", with no room for confusion or doubt or when sexual activity is graphically described or represented electronically. When such act is electronically published or transmitted particularly amongst adult, it is punishable under Section 67A of the IT Act. Expression explicit means "stated clearly and precisely and/or prescribing or representing sexual activity in direct and detailed way". Expression "sexual activity" is defined in black's law dictionary as "physically sexual activity or both persons engaged in sexual relations.""⁴ In this case the court further clarifies the meaning of explicit sexual content in the purview of Section 67A of IT ACT.

³ Jaykumar Bhagwanrao Gore v. State of Maharashtra, 2017 SCC OnLine Bom 7283

⁴ Pramod Anand Dhumal v. State of Maharashtra, 2021 SCC OnLine Bom 34

Moreover the Court in the case of *Samaresh Bose v Amal Mitra*⁵ explained the distinction between what is vulgar and what is obscene. The court clarified that vulgarity refers to the offensive and crude language which cause discomfort but cannot be considered as corrupting the morals of someone. Obscenity on the other hand consist of material which has the potential to deprave or corrupt the minds of young audience and harm the society.

These rulings reveal the problems regarding obscenity and its definitions especially in the sexual context. They also expose us to the legal framework of India and how it handles the content, suggesting that a content must follow certain guidelines to be considered not worthy of censorship. With the increase in generated content and digital media the need of having proper definitions has increased too, in order to navigate the issues of free speech, expression while maintaining the social standards.

Judicial Tests and Shifting Ideas

There is a famous quote “Beauty lies in the eyes of the beholder.” The idea that individual’s perspectives and preferences influence their perception of things is very true for obscenity too. It could be said that what one may find obscene might not be obscene for others. There is no simple formula to resolve the dispute of obscenity and artistic expression. Though, throughout the years many attempts to have been made to regulate the artistic content by formulating the gaps between indecency and art through various judicial standards.

Historically one of the foundational test relied on by courts in different countries including England and India was the Hicklin test which was derived from an English Case of the year 1868 known as “*R. v Hicklin*” (or *Regina v. Hicklin*). The test relied on the idea that if any material has tendency to corrupt or deprave the young minds or the vulnerable section of the society then it is deemed to be obscene. One of the significant facet of this test was that it allowed for the isolation of the individual passages and if any isolated portion seemed to be indecent then the entire work was rendered obscene. The test garnered huge criticism for this as it was considered to be overly moral. In India this test was applied in the landmark judgment of *Ranjit D Udeshi v. State of Maharashtra* where the Indian Court upheld this test. A book titled “*Lady Chatterley’s Lover*” was considered to be obscene in this case. It was believed that circulating such content could deprave the young minds and corrupt them. This test faced a

⁵ *Samaresh Bose v. Amal Mitra*, 1986 AIR 967

massive criticism in India for its Victorian era standards which made this test too restrictive and rigid.

With the lack of regard to artistic expression and for being highly narrow minded, the global stage shifted towards a new approach to measure obscenity. One of the well-known test called “Miller Test” evolved in the United States in the case of *Miller v California*. In this case Melvin Miller was indicted for dispatching sexually illustrative images to manager of a restaurant. The key elements of this case were that the material taken as a whole should exhilarate the sexual interest in unhealthy or offensive manner according to the community. The material should be displayed in a patently offensive manner and should not possess any serious literary, artistic, scientific or political value. This case allowed the interpretations to be made in a more varying way based on culture and society.

In India, the shift towards the community standard test was seen from the case of *Aveek Sarkar v. State of West Bengal* in 2014. This test was considered to be more suitable than the earlier *Hicklin Test*. This test judged a material to be obscene or not by the standards that prevailed in the society at that particular time. It also assessed the main theme of the material rather than isolation portions and checked for indecency. It was acknowledged that something that might be obscene at some point of time might not continue being so with the changing values and traditions.

Though this shift was very much welcomed by the people yet it has its own barriers. The community standards that were flexible and allowed the court to interpret variably weren't specified anywhere either. This led to the increase in the vagueness about the matter of obscenity. These social standards could vary on the basis of gender, caste, class, religion and political ideas. This challenge is being worked on. It can be seen in the case of *Samaresh Bose v Amal Mitra*. The court recognized the importance of considering the artistic merit of a work and its social relevance. The court noted that these artistic work may include the sexual references or unrefined language but they should not be automatically categorized as obscene, as these works often explore the complexities of human emotions. Still, it can be seen that differentiating between what is obscene and what is art is a very complex process.

To further make this even more complex digital media is involved in this debatable topic. In *Ekta Kapoor v. State of M.P.*, the Madhya Pradesh High Court has held as under: “The aforesaid concept is importable while interpreting Section 67 of Information Technology Act, 2000. In

the aforesaid provision, there are no such words that the person who publishes or transmits or caused to be published or transmitted in the electronic form any lascivious material or such material which appeals to prurient interest was having or supposed to be having the knowledge about the content of the material. Thus, even if the content is not known and a person publishes or transmits or caused to do so even without knowledge, provisions of Section 67 of Information Technology Act, 2000, would be attracted. Presumption of knowledge on the part of petitioner shall have to be assumed and onus will be upon the petitioner to rebut such presumption by leading evidence”⁶. This highlights the strict liability nature of Section 67 of IT Act. This also goes against the principle of presumption of innocence highlighted time and again in our courts and violates the principles of natural justice. Through such laws we bring disproportionate pressure on the artists.

One of the biggest gaps of our current systems is that we judge obscenity by the social standards. This labels artists’ work obscene not because of its explicit and indecent nature but because they disrupt the social hierarchy.

AI and the New Frontier of Obscenity and Artistic Expression

With the growth of artificial intelligence and its increasing intersection with other creative industries, more complex issues are arising raising serious question on how obscenity and artistic expression will be interpreted and regulated further. AI generated content has taken over the whole world whether it is literature, art, deep fakes or immersive experiences. Challenges regarding the traditional concepts of authorship, intent and accountability pose more multidimensional threats. When some content is produced through algorithm and is considered to be obscene many questions arise, one of them being on responsibility. Who is at fault – programmer, user or the machine itself?

And these questions became more complicated by the speed and scale of AI generation and dissemination of the content. These bots generate thousands and thousands of images and texts of different forms. Some of this content crossing the legal and ethical boundaries with no human intention. This raises concerns over the current legal system. Can these laws be fairly and effectively applied when the machines are involved? If the Section 67 of IT Act presumes the knowledge of the transmitter of the content, then how would it be applied when AI plays

⁶ Ekta Kapoor v. State of M.P., AIR ONLINE 2020 MP 1849

the role of transmitter? Unlike traditional way of artistic expression which involved human consciousness and hence guilty mind how would the concept of mens rea be applied when AI is considered as it has no consciousness?

Moreover, platforms like social media platforms and other content creation platforms etc. have started filtering their content using AI moderators. These moderators detect the obscene content and then remove it. While this is a great technical reform, it also creates the risk of over censorship as AI could misidentify nudity in art, satire or political schism as obscene. Bias in the training data based on the existing social prejudices can also create a threat of silencing the voices marginalized community or of the people who go against the current norms.

Furthermore, this creative talent or potential of AI generated content also brings us to philosophical question —do these machine have the same right of freedom of expression as the human beings? Can their content be under the purview of free speech? The law needs to work on differentiating between these or it might end up applying the same standards to AI generated content, even if it lacks any emotion, or purpose or mens rea.

Global Approaches and Potential Solutions

The primary idea taken in this article that the law's current approach is highly subjective and can be potentially misused has been highlighted throughout the article. This lack of clear statutory definition for the term "obscenity" leaves too much space for the influence personal interpretation and bias intervening the justice system. A framework could be developed which ensured that obscenity, vulgarity, indecency and intent are all separated. Distinguishing artistic content from pornography is very important. This could be done by focusing on the intent, context, and content as a whole as highlighted in the *Samaresh Bose v Amal Mitra* case. Value and contribution of the work towards the society should be regarded as highlighted in the Miller test. Evolution of IT Act is also necessary to safeguard those who might circulate the content unknowingly.

Internationally different jurisdictions have worked on the laws to tackle obscenity in their own ways with their own philosophies and ideas. In the UK, Obscene Publication Act, 1959 is used to regulate the content which can be published while models like Ofcom regulate the content of broadcasted media. Ofcom doesn't criminalize all content but it gives decisive thresholds on what could be broadcasted, when it could be broadcasted, for whom it could be broadcasted

and what shall be the purpose of broadcasting. This ensures that no random regulation is being imposed. The regulation adheres to the prevailing societal norms of that particular time.

Can such a model be implemented in a country like India with diverse culture and multiple ethnicities all having their own relevant norms and customs. Perhaps, yes. However implementing such guidelines won't be a walk in the park. With such diversity the problem of establishing a single regulatory authority to reflect the "Indian social standards" in the guidelines will be a difficult task. Furthermore, issues regarding political interference and the misuse of such regulatory bodies for own benefit leading to increasing censorship cannot be ignored. Concern regarding lack of representation of the minority indigenous ideologies in the Social standards are also present as creation of one regulation model might cause the dominant ideas to be enforced nationwide.

In other countries like Canada and Germany the task of balancing freedom of speech is done by focusing on the intent and harm a content might cause rather than looking at it from the lens of morality. These countries also give the task of regulating the content to the adult viewers themselves by placing their trust on the people while the State only gets involved in the case of targeted harm or exploitation.

While these ideas already exist, India and other countries may also need to start working to create better and adaptive frameworks with AI coming in the equation. They need to develop models to distinguish between intentional human obscenity and automatically generated content. It is also important for the countries to work towards a harm based model rather than the moral panic one to ensure the artistic rights and freedom of humans and maybe machines (depending on the future of technology) are preserved in the world where culture and technology are both evolving rapidly.

Conclusion

This article concludes that the line separating art from obscenity is highly subjective and is shaped by prevailing norms, culture, and political influence. What one society may consider to be art might be condemned by the other for being grossly indecent and offensive. This article advocates for less rigid legal models that consider the context, artistic expression and societal development. This article believes that censorship should only exist to distinguish between genuinely harmful and provocative content rather than the creative expression made by artists

that sometime highlight the issues in society. It is agreed that the freedom of expression should be balanced with the societal norms but it should never be at the expense of artistic growth.

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