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AN ANALYSIS OF LEGAL IMPERATIVES OF OBSCENITY: NATIONAL & INTERNATIONAL PERSPECTIVES

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Abstract
In the present day context the issue of obscenity has always been a debatable as it is related with decency and morality. It is a stupendous task to judge obscenity in isolation as there is no formula for it.. It needs a wider discussions, deliberations and debate.. For example, depiction of a nude body form is indecent and vulgar for some , but for some, it is an artistic expression to be savoured by one and all. When such a dichotomy exists, it is important that a holistic view should be undertaken as any narrow interpretation of statutes may lead to miscarriage of justice. It would be wrong if one were dealing with the vexatious question of 'cyber obscenity'. Believing and interpreting that 'cyber obscenity' is an extension of 'physical obscenity' would be fallacious.[1] At the present day context, the cyber obscenity is rampant and is difficult to detect and investigate to find out the guilty of the culprit. Due to lack of proper training to police officers and investigating agencies the detection of obscenity has not become an easy task. In this article an attempt has been made by the author to explain the meaning and definition of obscenity , cyber obscenity or obscenity in electronic form etc. The author has also focussed on the international perspective of obscenity with special reference to some of the decided cases. The author has also highlighted some of the leading Indian cases in relation to obscenity.

Key Words: Obscenity, Decency, Cyber, International, Electronic Form, Leading Cases Etc.

Meaning & Definition of Obscenity

The word "pornography" comes from the Greek words "porno and "graphia" meaning "depictions of the activities of whores." In common parlance, it usually means "material that is sexually explicit and intended primarily for the purpose of sexual arousal."Obscenity," however, is a legal term which was defined by the U.S. Supreme Court in its 1973 *Miller V. California decision*.[2] For something to be found obscene, and therefore the material has to meet all three tests before it can be found obscene in the eyes of the law and its distribution prohibited. This means that something could be regarded as "pornographic" but still not be obscene, such as an explicit sex film produced and used to teach medical students about human sexuality, or a film or book with serious artistic and/or literary value which has some explicit sexual content. Thus, the Supreme Court has protected a wide variety of sexual matter in movies, books, magazines and in other formats from being prohibited for sale and exhibition to adults (there is a stricter standard with respect to minors). Under the Miller test, however, the distribution of pornographic material which is obscene, such as most of what has been called "hardcore," can be prohibited and penalties can be imposed.[3]

The issues related to publication of obscene information in electronic form has to be looked at from the perspective of 'extra-territorial' jurisdiction and Internet technologies, keeping in view that 'obscenity' is no longer a local or static phenomenon. It is now global and dynamic in nature and thus needs strict interpretation of statute.

International Perspective

Let us examine the position in international boundaries with regard to obscenity. It is pertinent to explain the broader perspective and trace the historical development of 'test for obscenity' under various jurisdictions.

So far international perspective is concerned, the test of obscenity was first laid down in *Regina v. Hicklin*[4] as the tendency "to deprave and corrupt those minds are open to such immoral influences and into whose hands a publication of this sort may fall", and it was understood that this test would apply only to isolated passages of a work. Those " whose minds are open to such immoral influences" primarily meant the young as Lord CJ Cockburn explained in his Hicklin opinion, the danger of prurient literature was that it "would suggest to the minds of the young of either sex, and even to persons of more advanced years, thoughts of a most impure and libidinous character.'' This view was a precedent for U.S anti-obscenity legislation, beginning with the Comstock Law of 1873, which broadened the 1865 Mail Act essentially to its present form by providing fine and imprisonment to any person mailing or receiving "obscene", "lewd", or "lascivious" publications.

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[1] *Vakul Sharma, " Information Technology Law and Practice, Cyber Law & E-Commerce" Reprint, 2005 at p. 50.*
[2] *See m.catholicnewsagency.com/resource.ph. Accessed on 12/12/2015 at 4.45 p.m*
[3] *Available at https://docs.google.com/document/d/1kqY.../edit. Viewed on 2/1/2016 at 8.45 a.m*
[4] *(1868) 3 QB 360*

The test was slightly modified in United States v. One Book Entitled " Ulysses"[5]. The superior court held that the criterion for obscenity was not the content of isolated obscene passages but rather " whether a publication taken as a whole has a libidinous effect".

In *Roth v. United States*[6], the U.S Supreme Court tendered a basic redefinition of obscenity: " whether, to the average person , applying community standards, the dominant theme of the material taken as a whole appeals to prurient interests".

With the enactment of The Obscene Publications Act, 1959 of U.K, the definition of obscenity has been articulated as the tendency to deprave and corrupt the likely audience i.e persons who are likely to read, see or hear the contents of the publication rather than those into whose hands the publication may accidentally fall. But even after this enactment, the test for obscenity in U.K is still based on the perceived vulnerability of the likely audience for example, capacity of the 'violent' bubble gum cards to "deprave and corrupt" the youthful clientele.[7]

Whereas in *Miller v. California*[8], the U.S.Supreme Court declared that the states might prohibit the printing or sale of works, " which appeal to prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic , political or scientific value". It held that the definition of "prurient" should be that of "the average person, applying contemporary community standards " and that it would be no defense for a work to have some "rendering social value". The test is therefore not the effects of the material, but whether it contravenes locally determined standards of acceptable sexual depiction.

In *Miller v. California,* the U.S.Supreme Court set-out s three-prong test for obscenity, called the " Miller Test" :

1. Whether "the average person" , applying contemporary community standards would find the work , taken as a whole, appeals to the prurient interest.
2. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law.
3. Whether the work, taken as a whole, lacks serious literary, artistic , political or scientific value.

It is pertinent to mention here that the third prong of the Miller needs a more objective assessment based on a "reasonable person" test. As it was held in Pope v. Illinois[9], that the proper inquiry was not whether an ordinary member of any given community would find serious value in the allegedly obscene material but whether a reasonable person would find such value in it., taken as a whole. Thus, we should reiterate that the factors and standards for obscenity vary greatly, depending on the culture of the state, city or town, or for that matter foreign country. This makes it virtually impossible for a provider and others to determine, with any degree of predictability, whether the material they distribute, transmit, post and so on would be deemed obscene.

National Perspective

So far the comparative aspect of obscenity is concerned, the leading *Ranjit Udeshi*[10] case established a modified version of the *Hicklin* test as the test for obscenity in India. The Apex Court of India has observed that the test of obscenity laid down by Cockburn, C.J should not be discarded. It held:

" that the test of obscenity to adopt in India is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity in treating sex in a manner appealing to the carnal side of human nature or having that tendency. The obscene matter in a book must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book on it must not be overruled."

[5] *72 NY 705 (1934)*
[6] *254 US 476 (1957)*
[7] *See Regina v. Clayton and Halsey, (1962) 3 All ER 500, Director of Public Prosecutor v. A and B.C.Cheating Gum Ltd., (1969) 1 QB 159; 2 All ER 504.*
[8] *413 US 15 (1973)*
[9] *481 US 497 (1987)*
[10] *(1965) 1 SCR 65 SC.*

It further interpreted the word "obscene" as that, which is " offensive to modesty or decency, lewd, filthy and repulsive". It upheld the constitutionality of Section 292, IPC holding that it constituted a reasonable restriction on the right to freedom of expression under Article 19(2) of the Constitution in the interests of decency and morality.

In subsequent cases, the Supreme Court further articulated on the test for obscenity. In *Chandakant Kalyandas Kakodkar v. State of Maharastra*[11], the Court held:

"What is obscenity has not defined either in S. 292, IPC or in any of the statutes prohibiting and penalizing , mailing, importing, exporting, publishing and selling of obscene matters. It is the duty of the Court to consider the obscene matter by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall and in doing so one must not overlook the influence of the book on the social morality of our contemporary society.
In *Samaresh Bose v. Amal Mitra*,[12], the Court held that :

"The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society". The court differentiated between "vulgarity'' and "obscenity ". A vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of distrust and revulsion and also boredom but does not have the effect of depraving , debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences".

It clarified further that , " In our opinion, in judging the question of obscenity, the judge in the first place should try to place himself in the position of the author and form the view point of the author, the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The judge thereafter should place himself in the position of a reader of every age group in whose hand the book is likely to have in the minds of the readers. The judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of the section by an objective assessment of the book as a whole and also of the passages complained of as obscene separately.

It is clear from the aforesaid pronouncement that the Supreme Court has been following the "likely-audience'' test, a clear departure from the " most vulnerable person" test of *Hicklin*. The reason of this departure lies in the wordings of S. 292 (1) of IPC, which speaks of "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".

For the last few years , the lawmakers have been in quandary whether to apply these 'tests for obscenity' or to amend the existing laws to adjudge growing incidences of obscenity in the electronic environment.

Publication of Obscene Information in Electronic Form
Publication is defined as " the action of making publicity known". The Supreme Court held in *Bennett Coleman & Co v. Union of India*[13] that "publication means dissemination and circulation". In the context of Internet, the term publication includes dissemination, storage and transmission of information or data in electronic form. In general, if a book , magazine or an article is obscene, it is an offence to publish it or to sell the publication for gain.

Conclusions and suggestions
So far the above discussions are concerned, we can conclude with the following findings and suggestions:

1. Mass awareness is required. Legal literacy is to be imparted to create awareness among the people so that commission of offence of obscenity can be gradually be checked. In this context, awareness programmes are to be organized regularly.
2. The word "obscene" is very wide in its ambit and whatever is 'vulgar' and 'indecent' should not be construed as such. This is also a global and dynamic phenomenon and cannot be relegated to being local and static. In identifying 'Obscenity' over internet or cyberspace or on electronic medium, test to be resorted should be the same although manner of investigation and way of prosecution could be different.

[11] *AIR 1970 SC 1390*
[12] *(1985) 4 SCC 289.*
[13] *(1972) 2 SCC 788.*

3. The World Wide Web and Internet is a very complex network and is vulnerable to several illegal activities. In the wake of different electronic instruments having potential to be used as 'Computer' more threats and challenges are being thrown before the Law. The IRW Act, 1986 and the provisions of IPC, 1860 along with the IT Act of 2000/2008 are unable to deal with cyber obscenity, due to the difficulty in identifying obscene content on the Internet Recognition of obscenity in a so-called obscene material should not be at the cost of the art, literature and freedom of speech and expression. Blocking websites, regulating and providing checks & guidelines for intermediaries, (including Internet Service Providers, Search Engines, Cyber Cafes or any other person or authority) preventing the publication of or propagation of pornography from certain forums would be the viable option to regulate the same.[14]
4. On a priority basis, the Enforcement Mechanism must get well-equipped, well informed and trained since they are the ones who are directly responsible for the prevention, detection, investigation and enforcement of prosecutions of or cases of Cybercrimes including that of Electronic/cyber obscenity or pornography.
5. Speedy trial and disposal of cyber cases are crying need of the hour. More cyber courts are to be established and need to be modernized so that cyber pornography can be detected in a better manner and the culprit can be punished severely and can not escape from the clutches of law.
6. Law is not sufficient to regulate obscenity. There must have proper implementation of laws relating to obscenity. Enforcement agencies have the responsibility to look after the matter.

[14] *Dr. Shashikant Hajare And Mr. Ashok Wadje, "Obscenity In Cyberspace: Response Of Indian Cyber Law" South Asian Journal Of Multidisciplinary Studies (SAJMS) ISSN:2349-7858 :SJIF 2.246:Volume 2 Issue 2 Universal Multidisciplinary Research Institute Pvt Ltd.*