



# Obscenity Law In India And Artistic Freedom: A Critical Appraisal From The Perspective Of Public Morality And Public Decency

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## ARTICLE INFO

## ABSTRACT

The lack of clarity in defining 'obscenity' under the law causes hardships not only to the common folks but also to those working in the field of print and visual and other art forms. Since art forms may include some aspects of sexual and feminine depictions, it remains unclear as to where to draw the line. Meanwhile the harassment of artists continues in the name of corrupting of human minds and causing depravity in the society.

## INTRODUCTION

Since 'obscenity' isn't clearly defined in our statute books, the job of interpreting this term is left to the courts as and when the cases come up before them. The definition given in the Indian Penal Code is inspired by the Hicklin test which is more than a century old. It gives a vague and obscure definition which is not in clear and explicit terms. Thus obscenity which is already a subjective concept finds no helping hand from legislature. The uncertainty and obscurity surrounding the legal concept of obscenity often ends up in confusing it with public morality and decency. The persons with feudalistic and sensitive mindset not only take the matters to the courts but also take it as their right to express their anguish through vigilantism, moral policing and violence. Apart from the destruction of public property what follows is unfair and wrongful prosecutions and victimization of artists, since trial is a long process after all. In most obscenity prosecutions, there are very few convictions as it is held at the end of the trial that the 'objectionable content' was not obscene by legal standards. But the time-consuming and cumbersome court procedures leave the artist victimized beyond compensation in terms of his creative pursuits. The paper cites instances where artists have been harassed and prosecuted due to lack of clarity on what constitutes legal obscenity. In this paper the author will try to highlight the victimization of artists in obscenity prosecutions and how the law reforms are urgently needed for undoing this injustice.

## CONTROVERSIAL DEFINITION

It is widely accepted that 'obscenity' is an obscure and dynamic concept. Law has tried to confine the concept within its boundaries but it fails to give a clear idea about what is obscene.

If we look at definition part of obscenity in Section 292 of Indian Penal Code (hereinafter IPC), it says any written or printed material in the form of book, drawing, pamphlet, figure, representation or any object is deemed to be obscene provided it is lascivious or appeals to prurient interest or it tends to deprave or corrupt persons who may happen to go through it or come across the material by means of reading, seeing or hearing. The words, 'lascivious' and 'prurient interest' in the IPC definition point towards the material or depictions restricted as 'obscene'. According to dictionary meaning, the word 'prurient' means lascivious, lustful, inordinate interest in sex. The law defines obscenity in terms of 'prurient interests' and the 'stimulation of lust'.<sup>1</sup> The expression 'tendency to deprave and corrupt' is rather confusing and does not help much in deriving a clear meaning of the term 'obscenity'. What depraves one may have a different impact on another. Even the very famous *Hicklin* test which for the first time used this term did not explain its meaning though it appears that all that it was talking about was 'a ban on sexual content'. But again there is no clarity on how much is to be banned.

<sup>1</sup>Harry M. Clor, *Obscenity and Public Morality* 244 (The University of Chicago Press, 1969).

### CREATIVITY AND OBSCENITY

Creativity is the foundation for growth, progress and replenishment of the mankind from both individual and social perspective. It generates positive changes in terms of growth in spirituality, art, science, technology, economic and other such areas.<sup>2</sup> [It] is also often regarded as being more or less synonymous with beauty. Artists particularly those related to painting, poetry, music, writing, acting etc. and also critics look at creativity in aesthetic sense.<sup>3</sup> Creativity imparts spiritual enrichment to the individual as well as to the society. The Courts therefore give primacy to merits of 'artistic, social, political or advancement of human knowledge' in a work before declaring it as obscene.

The obscurity of obscenity law encompasses grave risk of doing injustice to genuine works of art. The obscenity law is based on no more than the mere unproven suspicion of unintentional evil-doing. Under this law, a man can be punished not because of what he does (writing or painting) but also for those consequences of his doing which may remain unproved i.e. corrupting reader's or viewer's mind.<sup>4</sup> It is rather impossible to know beforehand whether the work of art would cause any such depravity or corruption to those coming across it.

In the case law, *Ranjit Udeshi v. State of Maharashtra*<sup>5</sup>, the Apex Court of India clarified that "where obscenity and art are mixed, art must be so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. It is necessary that a balance should be maintained between 'freedom of speech and expression' and 'public decency and morality'; but when the latter is substantially transgressed the former must give way.

Thus the Courts take into consideration artistic merit for protecting a work. As can be seen from various case laws nudity per se is not obscenity.<sup>6</sup> Our historical monuments such as Khajuraho though consist of nude depictions of human form, are considered great works of art and are also legally protected. Pablo Picasso in his famous quote says, "Art is never chaste. If it is chaste, it is not art".<sup>7</sup> Despite the clarity in interpretation by the Courts, what happens actually is quite different. Criminal cases are filed against unconventional depictions of art without distinguishing between the 'honest work of art' and 'depiction by a perverted mind'. This is then followed by public shaming of the artist affecting not only his reputation but also his peace of mind. The ultimate sufferer is the artist and his art which becomes a victim of ill-defined offence. The reaction of general masses is based on traditional mores or rather ill-conceived notions of obscenity by the majority population. The legal definition given in the IPC does not offer much help to the law enforcers either as the language used is complicated.

One such example is the case of renowned painter Maqbool Fida Hussain, who was driven into self-imposed exile due to several hundreds of criminal complaints in different States in India for his nude paintings of hindu goddesses and *bharat mata*. Though the artist made a public apology for hurting the sentiments of the complainants but they refused to accept the same. It was contended that his painting of *bharat mata* was not only obscene but also sacrilegious. These religious groups kept hounding *Hussain* and vandalized his prized paintings creating so much threat and terror that the octogenarian artist was not able to return to India till his death. His ordeal came to an end only with his death! This despite the fact that around five cases against him were quashed by courts in India. Even if all the cases were quashed against him, there would have been fresh complaints. This raises several important questions? What about justice to the artist who was wrongly prosecuted? Can Hussain be ever compensated for all that he and his family went through? For even if an artist is acquitted later on, will his creativity not receive a set back? Obviously, he won't be able to create anything new with the same vigor and enthusiasm after so much harassment. This was not the first case where an artist was harassed and probably will not be the last if we do not bring about a clarity on what constitutes legal obscenity. What is needed is an urgent clarity in the meaning of obscenity and explicit parameters of what is obscene and what is not.

<sup>2</sup>Ref. David H. Cropley and Arthur J. Cropley, *Creativity and Crime*, 1 (Cambridge University Press, 2013).

<sup>3</sup>*Id* at 98.

<sup>4</sup>The Obscenity Laws, A Report by the Working Party set up by a Conference convened by the Chairman of the Arts Council of Great Britain, p. 31.

<sup>5</sup>AIR 1965 SC 881.

<sup>6</sup>Ref. *Bobby Art International v. Om Pal Singh Hoon & Ors*, AIR 1996 (SC) 1846. (popularly known as Bandit Queen case). *Aveek Sarkar v. State of W.B.*, (2014) 4 SCC 257. *Maqbool Fida Hussain v. Rajkumar Pandey*, Crl. Revision Petition No.114/2007 in the High Court of Delhi.

<sup>7</sup>As quoted in *Maqbool Fida Hussain v. Rajkumar Pandey*, Crl. Revision Petition No.114/2007 in the High Court of Delhi.

## CONCLUSION

As ignorance of law is not an excuse but is it not logical to expect law to be clear to all for strict adherence. An artist when painting or depicting would not know what is going to deprave and corrupt and whom is it going to deprave and corrupt. Even the test of contemporary community standards is rather confusing in the age of internet. The concept of 'community morality' has been vigorously criticized because it leads to the maintenance of a 'brute-dogma' that morality is only what the majority of the population thinks it to be. While it is equally possible that the minority opinion may also be superior to that of the majority.<sup>8</sup> In *Khushboo v. Kanniamal*<sup>9</sup> the Court was of the view that such disagreements need to be contested through media or any other public platform.

The obscurity in these tests and definition in the IPC has made the position of artists and film makers rather vulnerable. With no compensatory mechanism for the artist if found innocent post-trial, obscenity law has become a tool for the harassment of artists. It is high time for legislative reforms to define clear-cut parameters of 'obscenity' under section 292 IPC so that law enforcers are able to identify the same before registration of FIR. Also it would be in the interest of justice to introduce some compensation mechanism for harassment and loss incurred by the artist if found innocent after trial. Though it may not always be practically possible to compensate the loss of creativity and artistic zeal.

## References:

1. David H. Cropley and Arthur J. Cropley, *Creativity and Crime*, 1 (Cambridge University Press, 2013).
2. Harry M. Clor, *Obscenity and Public Morality* 244 (The University of Chicago Press, 1969).
3. The Obscenity Laws, A Report by the Working Party set up by a Conference convened by the Chairman of the Arts Council of Great Britain.
4. *Bobby Art International v. Om Pal Singh Hoon & Ors*, AIR 1996 (SC) 1846.
5. *Aveek Sarkar v. State of W.B.*, (2014) 4 SCC 257.
6. *Maqbool Fida Hussain v. Rajkumar Pandey*, CrI. Revision Petition No.114/2007 in the High Court of Delhi.

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<sup>8</sup>Inder S. Rana, *Law of Obscenity in India USA and UK*, 5 (Mittal Publications, Delhi, 1990).

<sup>9</sup>2010 (4) SCALE 467. Also see Gautam Bhatia, *Offend, Shock or Disturb*, 123 (Oxford University Press, 2016).