



JUXTAPOSITION OF OBSCENITY LAWS IN INDIA AND U.S.A.

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Today's modern generation is of digitization, where media industry is one the most powerful and influential in the world which contain all areas information of everyday life in arts, education, politics, culture, economy, entertainment etc. due to mass-communication it is possible to reach an any and unlimited audience with a click of a mouse or use of a Smartphone. Advertisement plays an important role in everyone's life. Civilization has seen different forms of advertisement from ancient period to till now. Earlier wall printings, announcements, campaign displays, pamphlets, posters, television advertisement, e-advertisement, telephonic advertisement, etc. A transformation has been seen in the advertisement industry, which had increased in the misuse of promotion of many products. Due to this reason government has to keep check and balance by drafting provisions.

United States obscenity provisions deals with laws that relate to how to reduce, suppress the obscene matter and matter which is on mass media. The state law punish the person who sell such material inside or outside the boundaries of the State. If state prevents other doing such act hence it is not violating the freedom of any individual of their speech and expression. If any person is keeping any such matter at his own use in his house, it is not an offence but such material is child pornography it will be an offence. The State is facing many problems for the pornography films which is available online mass media. Though the bill of rights provides many freedom to its citizens but there must be control on such materials.

The basic roots of American law of obscenity is the "community standards test". Every state has their own standard of accepting the matter as obscene or not. Obscenity depends in which community you belong, the standard of community is on the average members of community in which they belong. What is obscene in one state of America might not be obscene in other parts of the State. Every state has their own law of obscenity and accordingly the matter is decided whether it is obscene or not. The community standard test of landmark

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judgments of the Supreme Court the test of Roth and Miller, is now no longer adopted by the courts. Every State of America have their own level of identify that matter falls in the obscenity category or not. Hence every jury of its local area, applies there community standard test and decide the cases.

The supreme court of America had adopted the ruling of R. v. Hicklin in the case of In Rosen v. United States (1896)³, which says that it depends in whose hand such obscene matter falls. In New York v. Ferber, the Court recognized another category of expression that is outside the coverage of the First Amendment, the pictorial representation of children in films or still photographs in a variety of sexual activities or exposures of the genitals. The basic reason such depictions could be prohibited was the governmental interest in protecting the child from such participation. This will prevent them from psychological harm.⁴ The Court defined material appealing to prurient interest as “material having a tendency to excite lustful thoughts,” and defined prurient interest as “a shameful or morbid interest in nudity, sex, or excretion.”⁵

It is often said that if one’s child is spending too much of time alone on a computer then one should be careful. The reason is that the material available in cyberspace is as diverse as human thought. It also contains obscene information and material. As impressionable mind can be misled or lured by such material. The United States, in order to curtail it, enacted the Communications Decency Act of 1996 (CDA). Section 223(a)(1)(B)(ii) of the CDA criminalized the deliberate transmission of obscene messages to any recipient less than eighteen years of age. Section 223(d) prohibited the deliberate sending or displaying, to a person less than eighteen years of age, any message that is patently offensive (sexual or excretory activities or organs) as measured by contemporary community standards. Under the CDA it was a valid defence, for those who,

- In good faith, took effective actions to restrict access by minors to the prohibited communications [section 223(e)(5) of the CDA] and
- Restricted such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number [section 223(e)(5)(B) of the CDA].⁶

³ 161 U.S. 29 (1896)

⁴ 458 U.S. 747 (1982).

⁵ First Amendment, U.S.A Constitution, RELIGION AND EXPRESSION, (<https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-2.pdf>) (Last accessed 14th June 2020).

⁶ Justice Singh Yatindra, Cyber Laws, Universal Law Publishing Co, Delhi, Second Edition 2005, p. 16

These provisions of the CDA Act were challenged in the US. They were struck down by the District Court of Pennsylvania holding:

‘It is true that many find some of the speech on the Internet to be offensive and aimed at the din of cyberspace many hear discordant voices that they regard as indecent. The absence of government regulation of internet contents has unquestionably produced a kind of chaos, but what achieved success, was the very chaos that the Internet is. The strength of the Internet is that chaos’.⁷

The US Government enacted another law known as the Child Online Protection Act (COPA) after the CDA was struck down to prohibit the dissemination of indecent material to the minors on the web or internet. Under the COPA, commercial Web publishers are to ensure that minors do not have access to the harmful material on their Web site. The COPA was also challenged in the US courts in *ACLU v. Reno II*. The District court and the US Court of appeal for the third circuit had granted preliminary injunction preventing COPA’s enforcement but the US Supreme Court remanded the case to the appellate court for fresh consideration. The appellate court again granted the injunction. The US Supreme Court in June 2004 upheld the injunction however now the case goes back to lower court for full trial.⁸

In order to have broader perspective in any field it is worthwhile to trace the historical development of ‘test of obscenity’ under various jurisdictions.

The test of obscenity was first laid down in the *Regina v Hicklin*⁹, which says that obscenity depends in whose hands the matter falls. And it was understood that this test would apply only to isolate passages of a work. Those “whose minds are open to such immoral influences” primarily meant the young as; as Lord CJ Cockburn explained in his *Hicklin* case. 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.¹⁰

The enactment of United Kingdom Obscene Publications Act, 1959, the test for obscenity in United Kingdom is still based on the perceived vulnerability of the likely audience, it says the matter is obscene according to whose hands the matter falls, if his mind is open for obscenity then the matter will also be. For example, capacity of the ‘violent’ bubble gum cards to “deprave and corrupt” the youthful clientele.¹¹ In America also the obscene materials were prohibited from the 19th century. Anthony Comstock passed law against the obscenity in which indecent material are prohibited to send by post and at that time it was illegal to send birth control devices.

⁷ *ACLU v Reno*, 521 US 844.

⁸ *Ashcroft v American Civil Liberties Union*, 535 US 564.

⁹ (1868) 3 QB 360.

¹⁰ Sharma Vakul, *Information Technology Law and Practice*, Universal Law Publishing Co. New Delhi, Third Edition, 2011, p.188.

¹¹ *Ibid*, p.189.

The test was slightly modified in *United States v. One Book Entitled Ulysses*. 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.¹²

In *Miller v. California*, the U.S. Supreme Court, 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 “redeeming social value”. The test is therefore not effects of the material, but whether it contravenes locally determined standards of acceptable sexual depiction.¹³ In the case the U.S. Supreme Court set-out test for obscenity, called the “Miller Test”: the test is on following points that the person applying the community standard or not, whether the content of work have the sexual act or indecent representation and the work nature has the political, scientific, artistic, literature or not.

In the *Pope v. Illinois* case, it was held that 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.¹⁴

Though the Miller has been used successfully to convict perpetrators of obscenity in electronic form, but it is important that the three prongs of the test must not be applied in a selective manner. An over emphasis on ‘contemporary community’s standards would be highly damaging and may result in the miscarriage of justice.¹⁵

In *United States v. Thomas*, the defendant was operating the Amateur Action Computer Bulletin Board System (AACBBS). He used to convert, by means of a scanner, sexually explicit magazine pictures into computer files and later sell them to the subscribers. Against the complaint of Tennessee resident, he was tried and convicted in a Tennessee court for violating obscenity laws. The court held that it is well established that: venue for federal obscenity prosecution lies “in any district from, through, or into which” the allegedly obscene material moves. This may result in prosecutions of persons in a community to which they have sent materials, which are obscene under that community’s standards though the community from which it is sent would tolerate the same material.¹⁶

Since the freedom of expression is mainly governed by the first amendment of the constitution and first amendment did not talk about obscenity and freedom of expression, The Supreme Court has usually refused to give obscenity any protection. The governments, both federal and state, have been permitted to make suitable

¹² 72 NY 705 (1934).

¹³ 413 US 15 (1973).

¹⁴ 481 US 497 (1987).

¹⁵ Ibid.

¹⁶ 74 F.3d 701 (6th Cir.), cert. denied 117 S. Ct 74 (1996).

legislation. However the court from time to time developed various tests to examine obscenity. The Supreme Court has found that obscenity is an exception to the constitutional rights under the First Amendment, and is usually limited to content that directly refers to explicit sexual acts that are publicly accessible, though it has at times encompassed other subject matters, such as spoken and written language that can be publicly transmitted and received by the general public.¹⁷

The Georgia statute, which defines obscene material in language similar to that of the definition of obscenity set forth in U.S Supreme Court's plurality opinion in *Memoris v. Massachusetts* case as:

“Material is obscene if considered as a whole, applying community standards its predominant appeal is to prurient (unhealthy) interest in sexual matters), that is, a shameful or morbid (unnatural, unhealthy) interest in nudity, or excretion and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters.”¹⁸

On screening the film to make an independent assessment, as mandated by Miller, the court said that “carnal knowledge” (sex) could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments to US Constitution because it is obscene.” The court applying the constitutional standard, held that the Georgia obscenity statutes under which appellant Jenkins was convicted are invalid and Jenkins conviction was set aside.¹⁹

Comparison between India and United States of America:

The two great democracies of the world the United States of America and India very aptly recognizes for the right of freedom of expression. The United States and India almost have similar free expression provisions in their Constitutions. Article 19(1) (a) of Indian constitution corresponds to the First Amendment of the United States. However, the provisions in the US Constitution have two notable features i.e.:

- freedom of press is specifically mentioned therein,
- No restrictions are mentioned on the freedom of expression.²⁰

In the famous case, *Express Newspapers (Private) Ltd. v. Union of India*, Justice Bhagwati said the fundamental rights were adopted from the American constitution, both the countries have similarities. Despite similarities in their constitutional provisions, the United States and India have their own unique jurisprudence on freedom of expression. Consequently, they differ as to what is and what is not acceptable free expression.

¹⁷<http://jurisonline.in/?p=6185>(Last access 26th May 2020).

¹⁸ 303 US 413, 418 (1966).

¹⁹ *Paris Adult Theatre v. Slutin*, 413 US 92 (113).

²⁰<http://jurisonline.in/?p=6185> (Last access 26th May 2020).

As mentioned, the real difference in freedom of expression enjoyed in the United States and India is a question of degree. This difference in degree is attributable to the reasonable restrictions provision and the moral standard of the communities. India has progressed from an authoritarian system of control and is now attempting a legislative model of control, quite similar to that of the United States.²¹

Free expression is meaningless unless it has space to breathe. It is important to note that false statements made honestly are equally a part of freedom of expression. The supreme court of India applied the famous doctrine of *New York Times v Sullivan* standard of American constitutional law against public officials. Accordingly, statements made against persons in the public eye cannot be considered defamatory unless they were made with “actual malice”. The reason for this is very simple, democratic governance mandates the strict scrutiny of public official duties.²²

The consequence of this very high degree of constitutional protection to freedom of expression in the United States is that ideas most Americans consider very repugnant, and that may be hurtful to some people, such as racial hatred, can be expressed freely. At the same time, the expansive protection to freedom of expression under the First Amendment ensures robust debate on all public issues and the widest dissemination of all ideas. The remedy for bad expression is said to be “more expression, and not enforced silence. It is part of our culture that people are “free to speak their mind” and need not fear that they will be sanctioned for saying something that is offensive or unpopular. The government is not required to and, more importantly, is not permitted to make decisions about what ideas may be expressed and what ideas may not be expressed. The constitutional guarantee of freedom of expression under the First Amendment then means freedom of expression in the fullest sense. For better or worse, this is the American way.²³

However in the case of India constitutional provisions have been widely influenced by the moral standard of the society. Constitution has tried to adapt and embody those freedom and restrictions enjoyed by the Indian people from long time. The provision of freedom of expression and restrictions are the result of that way of thinking, and this is the Indian way.

One of the most important case decided by the Supreme Court of India, on the subject is that of *Ranjit D. Udeshi*²⁴. One of the book seller in his shop ‘Happy Book Stall’ in Bombay, was convicted by the Magistrate under section 292, I.P.C. along with the other partners for being in possession of a obscene book called *Lady Chatterley’s Lover* which inter alia contained obscene matters.

²¹ (1985) 1 SCC 641.

²²<http://jurisonline.in/?p=6185> (Last access 26th May 2020).

²³ *Ibid.*

²⁴ AIR, 1965 SC 881

The decision of the lower court was upheld by the High Court and Supreme Court. While dismissing the appeal, Justice Hidayatullah speaking through the court said:

There is no loss to society if there was a message in the book. The divagations with sex are not legitimate embroidery but they are the only attractions to the common man. When everything said in its favour we find that in treating with sex the impugned portions viewed separately and also in the setting of the whole book pass the permissible limits judged of from our community standards and as there is no social gain to us which can be said to preponderate, we must hold the book to satisfy the tests we have indicated above.

As regards, the contention of the petitioner that section 292, I.P.C. violates Article 19(1)(a) of the Constitution, since it puts restriction on the freedom of speech and expression, the court said in the negative. Justice Hidayatullah speaking for the court said that with the fundamental rights one has to read the restriction also, the restrictions are violating the rights of an individual, they are there only to maintain the stability in the state, if rights have no restrictions than any other person will infringed your rights while saying that he has right to do that work due to rights gifted in the constitution. To safeguard the nation, individual, society these restriction are provided by the constitutional makers.

In United States of America the Communications Decency Act of 1996 was the first notable attempt by the U.S. Congress to regulate pornographic material on the Internet, but it was declared unconstitutional by Supreme Court as it was violating First Amendment, only section 230 of the Act was valid. Section 230 of the Communications Decency Act of 1996 (a common name for Title V of the Telecommunications Act of 1996) is a piece of Internet legislation. It provides immunity from liability for providers and users of an interactive computer service who publish information provided by others. With changing time many other provisions of U.S.A dealing with obscenity declared unconstitutional and new laws were adopted.

This is not a new development in Indian jurisprudence, given that the Supreme Court, as per the facts and circumstances of the case, has always accepted exceptions as mentioned under Art. 19(2). This is despite the fact that even the Indian Supreme Court has taken note of the great importance of the freedom of speech and expression. On this count, the Supreme Court, in determining the reasonableness of a restriction upon the freedom of expression, is to take a stricter view than in the case of any other fundamental right; it is to annul any imposition that has the resultant effect of operating harshly on freedom of speech and expression.²⁵

A nation's culture is generated and developed by limiting the transmissibility of obscene and indecent literature and horror comics, though in of sense pornography exists in all societies. It cannot be denied that a proliferation of obscene literature lowers the whole moral tone of a community. A culture helps its members to get what they need and avoid what is dangerous for them and society.

²⁵Seshadri R.M. v. District Magistrate, Tanjore, AIR 1954 SC 747.