



## RESEARCH ARTICLE

### OBSCENITY AND FREEDOM OF SPEECH VIS-A-VIS POETIC LICENSE

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#### ABSTRACT

The concept of obscenity denotes the quality of being obscene which means offensive to modesty or decency lewd, filthy or repulsive. Sec 292 of the Indian Penal Code was engrafted to give effect to international convention for suppression of Traffic in obscene publications. Public decency and morality are constitutionally authorised ground of restraint on the right of free speech and expression. With the help of decided cases, the concept of obscenity has been discussed elaborately. The various tests evolved by the courts such as contemporary standards, community tolerance test and others have been discussed. The concept of poetic license and its connection with obscenity has been pointed out. Though poets have the license to express themselves in thoughts and words, they should not travel into the field of perversity and should not move away from a permissible 'target domain'. Recommendations and Suggestions emerging out of the study have been made particularly emphasising on the need to 'define obscenity' and for adhering to the rulings of the courts.

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#### INTRODUCTION

1. Obscenity denotes the quality of being obscene which means offensive to modesty or decency, lewd, filthy or repulsive<sup>1</sup>. The Supreme Court elucidated in Ranjit D. Udeshi's case,<sup>2</sup> that Sec 292 of the Indian Penal Code was engrafted to give effect to International Convention for the suppression of traffic in obscene publications signed by India in 1923 at Geneva, which does not go beyond obscenity but falls directly within the words "public decency and morality"<sup>3</sup> which is a constitutionally authorised ground of restraint on the fundamental right to free speech and expression. There is no doubt that the interest of society needs to suppress obscenity<sup>4</sup>.
2. The Supreme Court in Ranjit D. Udeshi's case<sup>5</sup> drew a distinction between 'obscenity' and 'pornography' in

these terms: "pornography denotes writings and pictures etc., intended to arouse sexual desire, while obscenity includes writings etc., not intended to be so but which have that tendency. Both pornography and obscenity offend against public decency and morals with a difference that pornography is obscenity in a more aggravated form.

**In Udeshi's case,<sup>6</sup> the following principles were also laid down:-**

- i) The cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge;
- ii) The freedom is subject to reasonable restriction which may be thought necessary in the interest of the general public and one such is the interests of public decency and morality;
- iii) Sec 292 IPC manifestly embodies such a restriction because the law against obscenity, of course correctly understood and applied, seeks no more than to promote public decency and morality;

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<sup>1</sup> Ranjit D. Udeshi Vs. State of Maharashtra AIR 1965 SC P881.

<sup>2</sup> Ibid.

<sup>3</sup> See Art 19(2) of the Constitution.

<sup>4</sup> See Art 19(1) (a) of the Constitution

<sup>5</sup> See Note 1.

<sup>6</sup> See Note 1 Para 8.

- iv) Obscenity is not vague but is well understood even if persons differ in their attitude towards what is obscene and what is not;
  - v) Obscenity by itself, has extremely of poor value in the propagation of ideas, opinions and information of public interest or profit;
  - vi) Books on medical science with intimate illustrations and photographs, though in a sense immodest and not considered to be obscene but the same illustrations and photographs collected in a book form without the medical text would certainly be considered 'obscene'.
3. In *Hicklin's case*,<sup>7</sup> Cockburn, CJ laid down the test of obscenity thus:-
- i) The test of obscenity is this – whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall;
  - ii) It is quite certain that it would suggest to the minds of the young of either sex or even to persons more advanced years, thoughts of a most impure and libidinous character.
4. The Indian Penal Code has not defined 'obscene' and hence this delicate task of law to distinguish between what is artistic and that which is obscene has to be performed by the courts.

“The test of the court must be of general character. It should admit of just application from case to case. It must indicate a line of demarcation which is sufficiently distinct to distinguish between what is obscene and which is not”.<sup>8</sup>

This makes out of case for the Indian Penal Code to define 'obscenity'. “Treating sex and nudity in art and literature cannot be regarded as evidence of 'obscenity' without something more. If the rigid test of treating sex as the minimum ingredient is accepted, half the book-shop would close and the other half would deal in nothing but moral and religious books. The interests of contemporary society and particularly the influence of books etc., must not be overlooked”.<sup>9</sup> In other words, the Supreme Court emphasised that sex to be treated in a manner offensive to public decency and morality judged by our national standards and considered likely to ponder to lascivious, prurient or sexually precocious mind, must determine the result. Thus, there is a need to balance between freedom of speech and expression and public decency and morality but when the later is substantially transgressed, the former must give way.<sup>10</sup>

#### The court observed thus:-

“Obscenity without preponderating social purpose or profit cannot have the constitutional protection of free speech and

expression. Obscenity is treating with sex in a manner appealing to the carnal side of human nature or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc., are matters for consideration in each individual case”.<sup>11</sup>

5. In *Chandrakant Kalyanas Kekodkar's case*,<sup>12</sup> the Supreme Court dealt with a short story which was charged as 'obscene'. The court referred to the plot and sub-plots narrated and adverted to emotional thread running in the story and came to the conclusion that none of the passages offended Sec 292 IPC and in the result the accused was acquitted”. In this case,<sup>13</sup> the Supreme Court observed as follows:-

- i) The concept of 'obscenity' would differ from Country to Country depending on the standards of morals of contemporary society;
- ii) What is considered as a piece of literature in France may be obscene in UK and what is not considered in both Countries as not harmful to public order and morals may be obscene in our Country;
- iii) The court emphasised three factors to be considered and they are
  - a) morals of contemporary society;
  - b) the fast changing scenario in the Country ; and
  - c) the impact of the book on a class of readers and not on individual.

iv) In *K.A.Abbas*,<sup>14</sup> the Supreme Court further elaborated three tests thus:-

- a) that the dominant theme taken as a whole appeals to prurient interest according to contemporary standards of the average man;
- b) that the motion picture is not saved by any redeeming social value;
- c) that it is patently offensive because it is opposed to contemporary standards;
- d) the view that it is only commercial and business and therefore not entitled to protection as per ratio in *Mutual Film Corporation's case*<sup>15</sup> is not now accepted;
- v) in *K.A.Abbas*,<sup>16</sup> the Supreme Court further observed:-
  - a) In our scheme of things, having redeeming social and artistic value must also have importance and protection for their growth;
  - b) Sex and obscenity are not synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral;
  - c) It should be the concern of the court to prevent the use of sex designed to play a commercial role by making its own appeal.

<sup>11</sup> Ibid.

<sup>12</sup> AIR 1970 SC P.1370.

<sup>13</sup> Ibid.

<sup>14</sup> AIR 1971 SC P.481.

<sup>15</sup> (1915) 236 US P.230.

<sup>16</sup> See Note 14.

<sup>7</sup> LR 18683 QB 360

<sup>8</sup> *Devidas Ramachandra Tuljapurkar Vs. State of Maharashtra & Others* AIR 2015 SC P.2618.

<sup>9</sup> Ibid Para 38.

<sup>10</sup> Ibid Para 39.

A distinction has to be made between a historical theme without rue history and portrayal of an artistic scene.<sup>17</sup>

**6. In Raj Kapoor's case,<sup>18</sup> the Supreme Court observed:-**

“Art, morals and law’s monocles or aesthetics are a sensitive subject where jurisprudence meets other sciences and never goes alone to bark and bite because the State made straight-Jacket in an inhibition prescription for a free Country unless enlightened administration of justice society actively participates in the administration of justice to aesthetics. The World’s greatest paintings, sculptures, songs and dances, India’s lustrous heritage the Konarks and Khajurahos, lofty epics, luscious in patches, may be asphyseiated by law, if pruders and prigs and state moralists prescribe paradigms and proscribe heterodoxies. It is plain that the procedural issue is important and the substantive issue portentous”.

**In Raj Kapoor's case,<sup>19</sup> the Supreme Court further observed:-**

- i) The root principle is liberty of expression and its reasonable control within the limits of ‘public order’, decency or morality;
- ii) Social dynamics guides legal dynamics in the province of ‘policing’ art forms;

**Justice Krishna Iyer in this case observed thus:-**

- a) Statutory expressions are not petrified by time but must be updated by changing ethos even as popular ethics are not absolute but abide and evolve as community consciousness enlivens and escalates;
  - b) Surely, the Satwa of society must arise progressively, if mankind is to move towards its timeless destiny and this can be guaranteed only, if the ultimate value vision is rooted in the unchanging basics. Truths, Goodness – beauty, Satyam, Sivam, Sundaram;
  - c) The relation between reality and relativity must haunt the court’s evaluation of obscenity expressed in society’s pervasive humanity, not laws penal prescriptions.
7. In S.Khushboo’s case, the Supreme Court observed, “morality and criminality are not co-extensive”.<sup>20</sup> Law should not be used in a manner that has chilling effects on the freedom of speech and expression.<sup>21</sup> An expression of opinion in favour of non-dogmatic and non-conventional morality has to be tolerated as the same cannot be a ground to penalise the author.<sup>22</sup> Thus, the need for tolerance of unpopular views in the socio-cultural space has become imperative.

8. In Aveek Sarkar’s case,<sup>23</sup> the Supreme Court pointed out that “while Judging a particular photograph and the article of the newspaper as obscene in 2014, regard must be had to the contemporary mores and national standards and not the standards of a group of susceptible or sensitive persons”.

9. The Community Tolerance Test laid down in Bobby Art International<sup>24</sup> elucidates that ‘whether a photograph was suggestive of deprave mind and designed to excite sexual passion in persons, who are likely to look at them and see them. Whether the photograph has the tendency to deprave or corrupt the minds of the people because the said picture has to be viewed in the background in which it was shown and the message it has to convey to the public and the World at large.

10. The contemporary community standards test as laid down in Aveek Sarkar<sup>25</sup> lays down that “obscenity has to be judged from the point of view of an average person and it is the main criteria. It has to be appreciated on the foundation of modern perception regard being had to the criteria that develops literature.

There can be neither stagnation of ideas nor there can be staticity of ideas. The innovative minds can conceive of many things and project them in different ways. As far as comparable test is concerned, the courts may sometimes have referred to various books or literature of the foreign authors and expressed the view that certain writings are not obscene, but it is not the applicable test.

**It may at least reflect what the community accepts”.**

11. The Supreme Court in Aveek Sarka’s case,<sup>26</sup> dealt with poetic license and laid down as follows:-

- i) The poet has the right to express himself in thoughts and words;
- ii) Whether the poem has any other layer of meaning or not cannot be gone into at the time of framing of charge;
- iii) The author in his own understanding and through the process of trial can put his stand and stance before the trial judge;
- iv) The judicially evolved test that is, contemporary community standards test is a parameter for adjudging obscenity and in that context the words used or spoken by a historically respected personality, as a medium of communication, through the poem or write up or other form of artistic work gets signification. That makes the test applicable in a greater degree;
- v) India has been fortunate to have been led by Mahatma Gandhi during the freedom struggle for independence by one, who apart from being an astute political leader, was also a great moral

<sup>17</sup> See Udeshi’s case Note 1.

<sup>18</sup> AIR 1980 SC P.258 Para 8 and Para 9.

<sup>19</sup> Note 18 at Para 46.

<sup>20</sup> AIR 2010 SC P.3196 Para 46.

<sup>21</sup> Ibid Para 47.

<sup>22</sup> Ibid Para 50.

<sup>23</sup> AIR 2014 SC P.1495

<sup>24</sup> AIR 1996 SC P.1846. See also Ajay Goswami AIR 2007 SC P.493.

<sup>25</sup> See Note 23.

<sup>26</sup> See Note 23 Paras 100, 101, 104.

crusader who has his place in history along with Buddha or Christ.

For him, means were no less important than the ends.

There was in the personality of the Mahatma a subtle, indescribable, magic touch for all the different persons who came in close contact with him were turned into men of gold – Nehru, Patel, Azad, Rajendra Prasad, Rajaji and J.P.Narayana. Since the death of Mahatma, except for observing his birthday as a national holiday, we have remembered him in no better way thereby riding roughshod over the principles of truth and moral values that he purported all his life.

One can express his views freely about a historically respected personality showing his disagreement, dissent, criticism, non-acceptance or critical evaluation.

12. In *Devidas Ramachandra Tuljapurkar's case*,<sup>27</sup> the court observed that 'if the image of Mahatma Gandhi or the voice of Mahatma is used to communicate the feelings of Gandhiji or his anguish or his agony about any situation, there can be no difficulty.

However, in the name of artistic freedom or critical thinking or generating the idea of creativity, a poet or a writer can put into the said voice or image such language, which may be obscene, it amounts to obscenity.

13. Poetic license or artistic freedom 'is the art of uniting pleasure with truth by calling imagination to the help of reason and its essence is invention,<sup>28</sup> or 'as the expression of imagination'<sup>29</sup> or 'musical thought'<sup>30</sup> or 'the language of imagination and passion'<sup>31</sup> or 'as the utterance of passion for truth, beauty and power'<sup>32</sup>.

14. In *Devidas Ramachandra Tuljapurkar's case*,<sup>33</sup> the poet "has chosen historically respected persons as the medium to put into their mouth obscene words and ergo. Creativity melts with insignificance and obscenity merges with surface even if had chosen a 'Target domain'. In his approach, he has travelled into the field of perversity and moved away from a permissible 'target domain', in the context the historically respected personality – Mahatma Gandhi".

**The Supreme Court further observed:-<sup>34</sup>**

- i) When the name of Mahatma Gandhi is alluded or used as a symbol, speaking or using obscene words, the concept of degree comes in;
- ii) The contemporary standards test becomes applicable with more vigour in a greater degree and in an accentuated manner;
- iii) What can otherwise pass of the contemporary community standards test for use of the same language,

it would not be so, if the name of Mahatma Gandhi is used as a symbol or allusion or surrealistic voice to put words or to show him doing acts which are obscene;

- iv) The poet has to explain the manner he has used the words and in what context.

### Conclusion & Suggestions

#### 15. The following suggestions are made:-

- i) There is an emergent need to define 'obscenity' in the Indian Penal Code incorporating the law laid down by the judiciary in this regard;
- ii) Obscenity which falls directly within the words 'public decency and morality' is a constitutionally permissible ground of restraint on the freedom of speech and expression guaranteed by the Indian Constitution;
- iii) Pornography is obscenity in a more aggravated form;
- iv) The test of obscenity as laid down in *Hicklin's case* is adhered to in judging obscenity;
- v) The test of the court must of general character and applied justly from case to case;
- vi) Sex should not be treated in a manner offensive to public decency and morality judged by national standards;
- vii) There is a need to balance between free speech and public decency and morals;
- viii) In judging obscenity in short stories, court should consider the plot and sub-plots, emotional thread running in the story;
- ix) The concept of obscenity differs from Country to Country depending on the standards of morals of contemporary society;
- x) The principles laid down in *K.A. Abbas* be followed in judging motion pictures in the context of obscenity;
- xi) It should be the concern of the courts to prevent the use of sex designed to play a commercial role;
- xii) The views of Justice Krishna Iyer in *Raj Kapoor's case* be adopted;
- xiii) The need for tolerance of unpopular views in the socio-cultural space is to be observed;
- xiv) The community tolerance test and contemporary community standards test must be applied;
- xv) Poetic license, though gives the right to express thoughts and words, he cannot put such language which may be obscene.
- xvi) In respect of historically respected person like Mahatma Gandhi, the poet should not travel into the field of perversity and should not move away from permissible limits.

<sup>27</sup> Note 8 Para 94.

<sup>28</sup> Dr. Samuel Johnson,

<sup>29</sup> Shelly

<sup>30</sup> Carlyle

<sup>31</sup> Hazlitt

<sup>32</sup> Ligh Hart

<sup>33</sup> Note 8.

<sup>34</sup> Note 8 Para 105.