
LAW OF OBSCENITY AND LITERATURE

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INTRODUCTION

“Whatever glory belongs to the race for a development unprecedented in history for the given length of time, a full share belongs to the womanhood of the race”

- Mary McLeod Bethune¹

The reality of women’s lives remains invisible to men and women alike and this invisibility persists at all levels beginning with the family to the nation. Although geographically men and women share the same space but they live in different worlds. The mere fact that “women hold up half the sky” does not appear to give them a position of dignity and equality. Even though, women have excelled in various areas over the years yet, the world in which we live is characterised by a deep sense of uneven sharing of the burden of adversities between a man and woman. Extensive inequalities persist in their access to education, health care, physical and financial resources as well as in opportunities in the political, economic, social and cultural spheres.²

The origin and genesis of Earth and Mankind as mentioned in the stories of several “*Puranas*” (Indian philosophy). It is found that despite a little similarity between *Manu – Satarupa* (Indian Philosophy) and *Adam – Eve*, *Manu-Satarupa* was not ‘naked’. It seems while the said Puranas were written, the concept of “*Shame*” was among the people of that time although dynamic developmental processes were going on. Women in India during Vedic period enjoyed equal status with men and were even considered to be valuable for making the society socially rich. *Manu Smriti* mandates that the highest respect and regard must be extended and full protection should be given to women throughout their life.³

¹ Mary Jane McLeod Bethune was an American educator, stateswoman, philanthropist, humanitarian, womanist, and civil rights activist.

² Dr. Nuzhat Parveen Khan, *Women and the Law 1* (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2016).

³ Justice M. Rama Jois, *Legal and Constitutional History of India: Ancient, Legal, Judicial and Constitutional System* 30 (Universal Law Publishing Co. Pvt. Ltd. New Delhi. 2004)

In India the ideals of contemporary society are fast changing like anywhere in the world. Years ago, women hesitated to expose themselves to media but now the time has changed. The adults and adolescents make use of a huge number of masterpieces, novels, stories and fragments of literature which have a content of sex, love and romance. In the field of art and movies also the young is shown situations which would be considered offensive to public morality even a quarter of a century ago, but having regard to changed conditions are more taken for granted without in any way tending to humiliate or ruin the mind.

Every day we live through the interpretations of truth that have been created around us. These notions develop a congenial identity that makes us members of society. A certain moral conduct is maintained by the common sense found in the operation of community. Law is an agency that advocates this common sense through policy discourses. Indian culture has experienced significant transition over time. However, given the passage of various rulers and ages, the dominant conservative school of thinking still seems to have reigned over the people, the state and its institutions. Criminal Law is the body of law which describes wrongs that are criminal in nature. It defines the offence, regulates the detention, sentencing and prosecution of accused criminals and sets the sentences and treatment relevant to convicted offenders. When dealing with 'obscenity' the common question which arises is that "*why is obscenity of a criminal nature?*" Over the time, scholars have put forth the contention that 'obscenity' contains representation in a form that is likely to undermine the stability of a community. The offensive nature of the material is such that it corrupts and depraves its readers or viewers to such an extent that their criminal tendencies get aroused.⁴

The concept of obscenity is to a larger extent shaped through the social perception of the people, who are usually expected to confront with obscene materials. The term obscenity is dynamic in nature, as it constantly varies with the passage of time and from nation to nation. Basically, it depends upon the standards of morality of contemporary societies around the world. The long-term effect of obscenity in the society has resulted in corrupting the thought process. Obscenity can be considered as any act or statement which strongly offends the prevalent moral standards of the society. The term can be defined as any picture, video, and photograph, write - up, figure, article etc. or a public act which depraves or corrupt the mind

⁴ Available at <https://lexlife.in/2020/06/04/criminal-law-obscenity/> (visited on 05 June, 2022)

and which appeals to the prurient interests of the society or which is against the acceptable social moral standards.⁵

STATUS OF WOMEN

There have been countless debates on gender in India over the years. Much of it includes women's position in the world, their education, health, financial position, gender equality etc. Women are discriminated at different places, starting from home or work to all the phases of life. This distinction between men and women, gender and sex were presented to deal with the common tendency which is attributed to women's structure. On the development of society and women gender inequality had an adverse effect.

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⁵ Vishnu D. Sharma and F. Wooldridge, *The Law Relating to Obscene Publications in India*, 632 (ICLQ, Cambridge University Press, United Kingdom, 1973).

⁶ Dr. Nuzhat Parveen Khan, *Women and the Law 1* (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2016).

⁷ *Ibid*

Women in outdated India pleased to meet status and rights with men in all arenas of life, they were qualified; they married at a develop age and were most likely allowed to pick their spouses. Amid the medieval period, the Indian lady's situation in the general public weekend. Amid the British control several activists battled for the social and financial upliftment of the ladies. Customs, for example, *Sati*, *Jauhar* and *Devadasis* were restricted. Today, irrespective of whether it is wellbeing, death rate or some other improvement parameter, women of India are on extremely powerless balance. Notwithstanding endeavours to raise to raise the economic wellbeing of ladies for over a century, India still positions 118 among 177 countries on sexual orientation value. Regardless of the fact that every curative test deciding the sex of the kid have been prohibited, India has a high manly sex percentage.

Status of Indian Women began to change radically during the modern period. Historically the period after 1750 A.D is known as the modern period. Though the quality of life of women during this period remained more or less the same, some substantial progress was achieved in eliminating inequalities between men and women in education, employment, social right and so on. Some social evils such as child marriage, sati system, devadasi system, purdah system, prohibition of widow remarriage etc., which were a great hurdle in the path of women's progress were either controlled or removed by suitable legislations. After the lapse of several centuries for the first time some attempts were made all India basis to tackle the problems that confronted women. Social reformers with patriotic spirit on the one hand and the British Government on the other together took several measures to improve the status of women and to remove some of their disabilities.⁸

To see our Nation economically prepared, politically developed, socially established and culturally notable then we definitely have to cheer women in all spheres of life. Late Dr. Radhakrishnan said, "*Without the participation of our mothers, wives, sisters and daughters the progress of our land towards our goal of democratic socialism cannot be achieved.*"

ART, LITERATURE AND OBSCENITY

In discovering the relationship between art and obscenity it is easy to wandering into a whole jumble of disconnect issues. Art can be defined in several ways. The issue gives itself to scrutiny from the variety of viewpoints – the purely realistic such as from the moral, religious

⁸ Available at <https://www.yourarticlelibrary.com/women/status-of-women-in-modern-india/47637> (visited on 05 June, 2022)

or political angle, the combination of two when it is hoped that hypothetical inquiry will produce guidance for a working policy.

When Penguin publishers decided to go ahead with D.H. Lawrence's *Lady Chatterley's Lover*, they were tried under England's obscenity law. The charge of obscenity was levelled due to the content of the novel, which allegedly had sexually explicit writings and descriptions. The novel revolves around Mrs Chatterley, whose husband is a war veteran paralysed below the waist and there is no connect between them whatsoever, physically or emotionally. It is a story about the adulterous affair of Lady Chatterley with a gamekeeper Oliver Mellors and highlights various themes on class difference, human relationships and female sexuality. Before the publishers were tried in the UK, the book had faced a similar trial in the US. As the book found acceptance across the West, The Supreme Court of Japan found the text to be obscene. It ruled that the book ignites a sense of shame upon its reading and it opposed to the idea of sexual morality. The court said that there is an inherent sexual morality and it is necessary that one does not breach it to affect the societal order. The Japanese Supreme Court put itself in the centre of the debacle by bestowing upon itself the duty to secure and safeguard society's prevailing morals and ideas. In India too, the Supreme Court found the book obscene.⁹

In *Bobby Art International v. Om Pal Singh Hoon*,¹⁰ the Hon'ble Supreme Court of India set aside the decision of the Hon'ble Delhi High Court which had restrained screening of the movie "*Bandit Queen*", holding that the screening of a film cannot be banned merely because it depicts obscene and graphic events. The producers of the film which told the true story of a woman who was raped and brutalized before taking revenge on her attackers, had approached the Court seeking the replacement of the classification of the film as "adult only". The Court held that the scenes featuring nudity and exclamations served the purpose of the telling the important story and the producers' right to freedom of expression could not be constrained simply because of the content of the scenes.

Mismanagement of literature is possible, even as misuse of other good thing in life is possible, but that is no reason for the destruction of all the good things in life .We cannot give up the use of electricity because there are risks of electrocution, nor can we abolish medicine because an

⁹ Available at <https://livewire.thewire.in/out-and-about/books/literature-and-obscenity-the-ghost-of-lady-chatterleys-lover/> (visited on 05 June, 2022)

¹⁰ AIR 1996 SC 1846

overdose can prove incurable. Many dedicated writers present the absolute truth about life –sin and holiness, beauty and ugliness, love and hate – in a language that is intended to endure.

CONSTITUTIONAL PROVISIONS

Constitution is the spine of every law in India. In order to pass the constitutional test the law must be in harmony with the Fundamental Right mentioned in the part III of it. Fundamental Rights, among others, ensure equality before the law and equal protection of law; prohibits discrimination against any citizen on grounds of religion, race, caste, sex or place of birth, and guarantee equality of opportunity to all citizens in matters relating to employment. Articles 14, 15, 19, 21, 39, 42 and 51A (e) of the Constitution are of specific importance in this regard.

The right to equality enshrined in Article 14 is available to all, irrespective of whether the person claiming it is a citizen or not. It guarantees the general right of equality. It is the first of the five articles grouped together under the heading “*Right to Equality*.” The underlying ideal of the article is to secure to all persons, citizens or non-citizens, the equality of status and of opportunity referred to in the glorious Preamble of our Constitution.

Article 15 Clause (3), (4) and (5) itself stands as an exception to Article 15 Clause (1) and (2). Article 15 Clause (3), (4) and (5) states that the legislature is free to formulate special provisions:

- For women and children
- For the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes,
- Make provision relating to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions.

Freedom of speech is the most important freedom in any democracy, without which, it would be impossible to reach at political truths in public life. It promotes a 'marketplace for ideas' and allows society to progress continuously by spreading new ideas, thoughts and discussion. It is equally necessary for self - expression, which is an important vehicle of

free conscience and self-fulfillment, playing a pivotal role in facilitating artistic and scholarly endeavors of all sorts.

“Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties”

– John Milton¹¹

In India, Freedom of Speech and Expression is constitutionally protected and guaranteed under Article 19 (1) (a) of the Constitution of India, 1950. However, this fundamental right is not absolute and a rider is provided under Article 19(2), which allow the state to restrict and regulate the right provided under sub clause (a) of clause (1), through imposing reasonable restrictions on this freedom in the light of *“the interest of sovereignty and integrity of India, friendly relation with foreign states, the security of the state, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.”*¹²

Article 42 directs the State to make provisions for securing just and humane conditions of work and for maternity relief. Under Article 42 many Acts have been enacted. Some of the major Acts are: Factories Act, 1948, Employees State Insurance Act, 1948, Payment of Bonus Act, 1965, Maternity Benefit Act, 1961, Payment of Gratuity Act, 1972, Plantations (Labour) Act, 1951. If there is an obligation upon the State to secure to the citizen an adequate means of livelihood and the right to work; it would be sheer pedantry to exclude the right to livelihood from the context of the right to life.

Various provisions in the Indian Constitution have given effect to various legislative enactments like the Immoral Trafficking (Prevention) Act 1956, The Cinematograph Act 1952, The Press (Objectionable Matters) Act 1951, Dowry Prohibition Act 1961, Indecent Representation of women Act 1986, The Obscene Publication Act 1959, The Information technology Act 2000, The Young Person (Harmful Publication) Act 1956 and the recently enacted Protection of Women from Domestic Violence Act, 2005. The rights of women have been marginalized due to various factors like patriarchal background, social and customary practices, and economic dependence, to name a few. But the Constitution has provided many rights to women. The legislation has been enacting laws favouring women. As seen from the

¹¹ John Milton was an English poet and intellectual who served as a civil servant for the Commonwealth of England under its Council of State and later under Oliver Cromwell.

¹² M.P. Singh (ed.), V.N. Shukla, *Constitution of India* 124 (Central Law Agency, Faridabad, 11th ed. 2008)

various judgements of the Apex Court, the Apex Court has been in favour of granting rights to women and protecting the rights whenever possible.

OTHER STATUTORY PROVISIONS

Decency varies from place to place, person to person. With the progress of the society and change in the lifestyle of the people, standard of propriety etc. keep on changing. So with the passage of time, the meaning of decency kept on changing, the degree of morality and decency also took a new look. The 21st century is known as the age of the information and scientific development. In the traditional society exposure of women through advertising, painting, publications or otherwise was not accepted but today it has become a fashion. In the present era, Women, instead of being portrayed as sex objects or glam dolls should be projected in a proactive and empowered manner, which can have maximum impact on the society and bring about an attitudinal/ behavioural change among people towards women. The Indian Constitution in its Preamble, not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women. Within the framework of a democratic polity, our laws, development policies, plans and programmers have aimed at women's advancement in different spheres. India has also enacted various laws to secure equal rights of women.¹³

The statutory laws relating to obscenity has been discussed under various heads, they are as follows:

a. Indian Penal Code, 1860

The Indian laws relating to obscenity are laid down in section 292 to section 294 of the Indian Penal Code, which came about by Act 36 of 1969. Section 292 of the Indian Penal Code, 1860 titled as "*Sale etc. of Obscene Books etc.*" The original section dealing with obscenity laws before the amendment of 1969 was introduced into the Indian Penal Code by the Obscene Publications Act, 1925. The purpose was to give effect to the provision of Article 1 of the International Convention for the Suppression of the Circulation of Traffic in Obscene Publications, signed at Geneva Conference on behalf of the Indian government in 1923. The scope of the section was widened and the exception provision was also enlarged by inserting the words, '*any pamphlet, book, painting, drawing or writing bona fide used or kept for*

¹³ Available at <https://www.ijlmh.com/wp-content/uploads/2019/04/Laws-Relating-to-Obscenity-and-Indecent-Representation-of-Women.pdf> (visited on 06 June, 2022)

religious purposes'. The exception applied to any publication connected with religious affairs. Later on, the section dealing with obscenity laws was again drastically amended by Act 36 of 1969. Through this amendment, the meaning and scope of the word 'obscene' was introduced. The sentence which is earlier provided was also enhanced to make the repetition of the offence deterrent.¹⁴

An analysis of section 292 of the Indian Penal Code, 1860 broadly define obscene materials as that, which is lascivious or appeals to the prurient interest of the individual or society or if its effect, or (where it contains two or more than two distinct and separate items) the effect of any items, is, if taken together, such as to tend to corrupt or persons who under all relevant circumstances, acquainted with such materials. At the same time, the section makes an exception to the general provision that any material, the publication of which is justified as being for the purpose of public good and that such drawing, books, representation, writing, pamphlet, papers, or figure is in the interest of art, literature, science, or learning or any other objects of general concern.¹⁵

The Indian Penal Code deals with the hire, sale, circulation, public exhibition, distribution, export or import of material etc. For the sale of obscene books etc., the punishment is imprisonment up to a period of 2 years and fine up to the value of Rs.2000 on first conviction and for imprisonment up to a period of 5 years and fine up to the value of Rs.5000 on each subsequent conviction. However, the provision of section 292 is not applied to any publication or work, which is carried out on account of the public interest, or related to science or literature or meant for religious purposes.¹⁶

The underlying principle of section Sec.509 of the Indian Penal Code is causing annoyance to a woman by insulting her modesty. Hence the singing of an obscene song, uttering obscene words with intent that the woman should hear them or exposure of one's nude person would be punishable under this section by reason of their depraved suggestiveness. What constitutes an insult to female modesty is a question of fact though it requires no description. Thus any word, spoken or sung, exhibiting of picture or figure which is suggestive of lewdness is

¹⁴ S.K. Sarvaria (ed.), R.A. Nelson, *Indian Penal Code* 2498 (Lexis Nexis Butterworths, Nagpur, 9th ed. 2003).

¹⁵ K.D. Gaur, *Commentary on Indian Penal Code* 699-701 (Universal Law Publishing Company, New Delhi, 10th ed. 2006).

¹⁶ Indian Penal Code, Section 292

immoral and insults female modesty, unless the woman was a consenting party to it. Insulting the modesty of a girl, the word modesty has not been defined anywhere in the Code.

State of Punjab v. Major Singh,¹⁷ In this case, the accused interfered with the vagina of a seven and half month-old child and was tried under section 354 of the IPC. The Patna and Haryana high courts held that the modesty of the victim could not be outraged as the victim was of a tender age. However, in an appeal to the Supreme Court, the apex court held that knowledge or intention on the part of the accused is the decisive factor and not the feelings of the woman against whom such an act is committed. Moreover, where such an intention or knowledge has not been proved, the proof of the fact that the woman felt her modesty was outraged does not constitute an offence, as an intention or knowledge on the part of the accused is the essential ingredient. Therefore, the appeal was allowed and the accused was convicted by the Supreme Court and was awarded rigorous imprisonment for a period of two years. A fine of rupees 1000/- was to be paid by the accused out of which rupees 500/- was paid as a compensation to the child.

Yet another section of the IPC, section 509 deals with words, gestures or acts intended to insult the modesty of a woman. Offences of a less severe degree in comparison with section 354 fall under the ambit of this section. This section is also commonly referred to as the 'eve-teasing section' and finds its place under chapter XXII of the IPC which deals with offences of criminal intimidation, insult and annoyance.

b. The Indecent Representation of Women Act, 1986

Indecent Representation of Women (Prohibition Act), 1986 was enacted under Article 51(e) of the Constitution. Section 2 of this Act defines indecent representation of women as the depiction in any manner of the figure of a woman: her form or body or any part thereof in such way as to have the effect of being indecent or derogatory to or denigrating women or is likely to deprave, corrupt or injure the public morality or morals. In spite of the statutory provisions relating to obscenity under the Indian Penal Code, 1860, there is a growing incident of indecent representation of women in reference to publication, particularly in the field of advertisement etc. Such indecent representation has an adverse impact on the society and is derogatory to the dignity of the women.

¹⁷ AIR 1967 SC 63

The purpose of the Act is to prohibit obscenity which has resulted from indecent representation of women through advertisement. Such Act requires the morality of a given society, being offensive to the modesty and decency. Neither the provisions of Indian Penal Code, 1860 related to obscenity laws nor section 2 of the Indecent Representation of Women (Prohibition) Act, 1986 makes any attempt to define obscenity, and the Courts in India are still rely upon the principles laid down in the *Hicklin Case*. On one hand, the Act deals with Prohibition of such advertisement which contains indecent representations, and on the other hand, the Act talks about Prohibition of publication of material which contains such indecent representations. The offenders liable under the provision of this Act are punished with imprisonment up to a period of 2 years and fine of Rs.2000 on the first conviction, and imprisonment for a period between six months to five years and fine of not less than Rs.10000 on each subsequent conviction.¹⁸

However, the provisions contain the same exceptions as are dealt under the Indian Penal Code with regard to *bona fide* use for public moral or meant for spiritual purposes.

c. The Immoral Trafficking (Prevention) Act, 1956

Prostitution and the evil of traffic in human beings for the purposes of prostitution acquired such monstrous proportions that the International Community responded to it by signing various conventions like the International Agreement for the Suppression of White Slave Traffic, International Convention for the Suppression of Traffic - Women and Children and the International Convention for the Suppression of Traffic in Persons and of the Exploitation of Prostitution. India is a signatory to the 1950 Convention for the Suppression of Traffic in Human Beings and Exploitation of Children. India has also signed the Convention on Rights of the Girl Child, 1990. Article 18 of this Convention recognizes the child's right to protection from sexual exploitation and abuse including prostitution.¹⁹ The expression '*traffic in human beings*' implies buying and selling of human beings as if they are chattels, such practice is constitutionally abolished.²⁰

d. The Cinematograph Act, 1952

The Cinematograph Act, 1952 was introduced into the statute book by the Parliament of India for the purpose of the certification of motion films for exhibition in the public domain and also

¹⁸ Indecent Representation of Women (Prohibition) Act, 1986, Section 3-6

¹⁹ Dr. G.B.Reddy, *Women and the Law* 129 (Gogia Law Agency, Hyderabad, 4th Ed. 2001)

²⁰ M.P.Jain, *Indian Constitutional Law* 1392(Wadhwa and Co., Nagpur, 5th Ed. 2003)

provides regulation for such exhibitions. An analysis of this Act bring out the criteria that there is a board of film censors known as the Central Board for Film Certification (CBFC), which consist of a Chairman and not less than 12 and not more than 25 other members, appointed as Official Members of the board.. These members are appointed by the Central government.²¹ Such board will examine the film sought to be exhibited into public domain and pass a certificate of exhibition in relation to that film.²² The board while issuing such certificate have issued certificate as specific to adult public, called as a 'UA Certificate', or to exhibit to persons not below the age of twelve years or the board will certify a film as universal, called as a 'U Certificate'. The board may also, after examine the film refuses to sanction the film for public exhibition. The board refuses to give sanction to a film only after providing an opportunity to the applicant to representing his matter before the board.²³

CONCLUSION

Despite Constitutional guarantee of equality, justice, right to live with dignity, freedom of speech, it is found that women suffer from discrimination at various levels and various kinds of crimes are perpetuated on them. In spite of progressive and protective legislations, women's rights are subjugated and they suffer inequality in many fields. The trauma that a woman undergoes in fighting for her legal rights is highly demoralizing.²⁴ *Dhanvanti* More, mother of four girls was forced to undergo 10 abortions over 23 years because her husband *Ramachandra*, wanted a son. For economic reasons women from all States indulge in the trade of body exposition. The trend of vulgar display of women's bodies for marketing various products is on rise. A rather shockingly sad head line of the newspaper is 'Donkeys get paid more than women. The donkeys employed by the Bombay Municipal Corporation to cart off muck during delisting are paid more than the women contract labourers. A lot needs to be done to uplift the socio-economic and political status of women in different walks of life.

There are a number of factors including the changing social norms regulating sexuality, morality and open explicitness that are responsible for escalating obscenity in the society. The mass media namely television, newspapers and magazines are saturated with obscene photos, images, language and the obscene undercurrents in all communications. In the name of religion,

²¹ The Cinematograph Act, 1952, Section 3

²² *Ibid*, Section 4

²³ *Ibid*, Section 5-A

²⁴ Roma Mukherjee, *Legal Status and Remedies for Women in India* 29 (Deep and Deep Publications, New Delhi 1997)

literature, art, sculpture, cinema, fashion and beauty contests, fashion shows and calendars, the bodies of women are deliberately exposed.

The rising levels of obscenity in the Indian films, poses a threat to the foundation of Indian society and its culture. If care not taken immediately and that too at war footing by the society, law would disrupt the Indian society forever by giving a death blow to our ageless culture and ethos by opening the floodgates of fornication. the on-going explosion of obscenity in Indian cinema and the increasing public tolerance of unwanted, unwarranted and excessive depiction of sex and obscenity in the Indian films has raised concerns over the effect of such depictions on the society in general and the Indian youth in particular. Today the campaign against violence includes domestic violence, rape and sexual harassment, degrading portrayal of women in the media, and the practice of selective abortion of female foetuses. Many games and gaming websites in India include content which may be categorized as objectionable under the pornographic and obscenity laws of India. For instance, some of the popular websites offer games which have animated caricatures of human beings, including women, depicted in a manner which may be construed as an offence as per the moral standards of India.