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Scanning Legal Construction of Obscenity in India through a Feminist Lens

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ABSTRACT

Obscenity is considered objectionable because of varied reasons, like 'immorality' and 'patent offensiveness' or 'indecency'. Defining obscenity is quite difficult as what is obscene varies according to time and place. Also it depends on individual and community perception of what is deemed moral and indecent. However, the legal definition of obscenity centres on sexual immorality and directly comes in conflict with free speech. Feminist on the other hand questions to limit obscenity only to sexual immorality. They claim that obscenity relates to power and the dominance of male over female. And this dominance is represented through societal and cultural values. The paper will analyze how law addresses the question of obscenity concerning women and will explore the relationship between law, morality, power and dominance.

Keywords*: Obscenity, feminist jurisprudence, morality, dominance, indecency*

I. INTRODUCTION

Definition of obscenity might be different from person to person. It may also differ according to the time and place. The state constructs obscenity through laws and judgments. But the construction of obscenity is not limited only to the law. Academicians from different fields have also tried to define obscenity. For example, Janny H.C. Leung and Marco Wan used the experientialist, linguistic cognitive account to find how people construct obscenity[2]. While anthropologists suggest that descriptive content of the term obscene is challenging to discover. What is obscene according to law may not be obscene in the eyes of many people. The legal perspective on obscenity centres on sexual immorality.[3] Most feminists claim that obscenity relates to power, i.e. the dominance of male over female, which legal jurisprudence doesn't look into.[4]The legal and non-legal regulations on obscenity are not consistent in history. What

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[2], Janny H.C. Leung & Marco Van, *Constructing the Meaning of Obscenity: An Empirical Investigation and an Experientialist Account,* 25 INT J SEMIOT LAW 415, 426 (2012) DOI 10.1007/s11196-011-9251-8.

[3] Sue Bessmer, *Anti Obscenity: A Comparison of the Legal and the Feminist Perspectives*, 34 (1) THE WESTERN POLITICAL QUARTERLY, 143, 144 (March 1981).

[4] *Id.* at 146-147.

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is obscene for a particular period may not be obscene for another period. Most of the cases on obscenity arises on the question of free speech as guaranteed in the Constitution. The court balances the regulation of obscene materials or literature with that of free speech. Because of this, the general tendency is to relate obscenity and free speech as competing but unavoidable components. The concern of the present paper is instead to analyse how the law addresses the issue of obscenity with regards to the question of women's sexuality. Within the legal debates on obscenity, one tends to forget to ask whose sexuality we are talking about. Who controls whose sexuality? And what is the role of morality in the legal construction of obscenity? For the feminists, the outset of the debate starts with the assumption that "law is not neutral and favour the dominant culture, at the expense of the others."[5] They question the existence of a single 'interpretive community' from which the law draws its shared meaning and legitimacy.[6] The issues regarding obscenity are that the law has purely given it a sexual connotation.[7] Further the argument is that laws on obscenity have failed to consider the dimension of dominance and power embedded within the law. The paper will examine the question of power and dominance as construe by feminist jurisprudence. Taking this aspect, the article will endeavour to explore the relationship between law, morality, power and dominance in the legal construction of obscenity in India from a feminist perspective.

II. PRIMER TO LAW AND MORALITY

The analysis of law under the normative jurisprudence has profoundly influenced the understanding of law in modern times. Legal positivism within normative jurisprudence has been intermittently challenged. It has been subjected to criticism by various schools of thought in legal theory. Despite the incessant attack on legal positivism, being preoccupied with individual choice, will and liability; the structural and institutional concerns are still marginalized in the legal scholarship.[8] The general tendency in analyzing law and its interpretation is to follow the standard norm as according to the language of normative jurisprudence, and especially that of legal positivism.

Law has been defined differently by many legal theorists and aptly, the differences in understanding law are pretty apparent in the academic world. However, in practice, one may argue that such differences get blurred and what is generally seen is the acceptance of the

[5] Denis Patterson (ed.), A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 290 (Wiley Blackwell, 2nd ed. 2010).
[6] Raymond Wacks, UNDERSTANDING JURISPRUDENCE; AN INTRODUCTION TO LEGAL THEORY 299 (Oxford University Press 2006).
[7] Bessmer, s*upra* note 3 at 16.
[8] Costas Douzinas & Adam Gearey, CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE, 5 (Hart Publishing 2005).

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standard understanding of legal positivism. In legal practice, the process of argumentation and reasoning are adopted within the limits of institutional discourse, i.e. the point of view of judge or lawyer, while neglecting the wider non-legal explanatory contexts.[9] Enquiring such phenomenon becomes significant as one can argue that the "values a legal system promotes represent the dominant ideology of society- [i.e.] they are the canonical expressions of its social and political power."[10] The early understanding of law was associated with morality, i.e. the natural law theory and later the work of legal positivism led to many scholarships discarding the idea that law should be concerned with morality. Many developments in legal theory have proceeded where law as neutral was subjected to close scrutiny. Among them, the feminists took the issue of gender discrimination and violence associated with patriarchy into the legal sphere. The movements of the feminists consisted of demands for equal treatment under the law, recognition of the difference between men and women, and also considering law as a tool which is patriarchal in nature for the dominance over women by men.

There have been many theoretical debates on law and morality. The Positivist school deny any relation of law with moral, but the natural law school posit that law and morality are inseparable.[11] Ronald Dworkin's legal interpretation critiqued the stand of legal positivism, especially of the work of HLA Hart by arguing that moral principles can be legally binding based on the fact that they express an appropriate dimension of justice or fairness. According to him, the judicial interpretation based on hermeneutic presents the operation of law as embodying and following moral values and principles which leads to an ethics of legal reading.[12]

III. INTERFACE OF LAW WITH FEMINIST JURISPRUDENCE

The feminist jurisprudence has put forward a fundamental critique of legal jurisprudence. Feminist jurisprudence as a discipline is diverse and consists of theories that may be contrary to one finding, but the author will confined to a particular selected few feminists. Despite broad diversity on theoretical framework, most of the feminist jurisprudence is based on proving that

[9] They argue that "the truth about law can be uncovered by two approaches. The internal theories, which adopt the point of view of the judges or lawyers and try to theorise the process of argumentation and reasoning used in institutional discourse. The external theories treat reasons, arguments and justifications as 'facts' to be incorporated in wider non-legal explanatory contexts. The task here is to identify the causal chains that shape or are shaped by legal practices". Cited in Costas Douzinas & Adam Gearey, CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE, 5 (Hart Publishing 2005).

[10] *Id.* at 8.

[11] Raymond Wacks, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY, 33 (Oxford University Press 2012).

[12] Douzinas, s*upra* note 8, at 8.

"law is not neutral and favour the dominant culture, at the expense of the others."[13] According to Raymond Wacks, the feminist legal theory generally question the existence of a single 'interpretive community' from which the law draws its shared meaning and legitimacy. The feminist writers focus and examine the inequalities found in the criminal law and other branches of the substantive law, including aspects of public law and public international law.[14]

According to Roger Cotterrell,

> Feminist most strongly emphasise, however social conditions, institutions and attitudes that reinforce patriarchy; that is, the organisation and patterning of society in terms of male power, prerogative and perceptions. So, beyond whatever difference in circumstances might be implied from sexual division itself, gender differences are seen as socially constructed. In other words, they exist as systematic patterns of domination expressed in, for example, work conditions and opportunities, domestic institutions, education, culture, politics and law.[15]

The first wave of feminist movement can be associated with liberal feminism. While many women were restraint within the boundary of personal life; the liberal values of equality, freedom and autonomy remained elusive for them as the problems faced by women at home, like domestic violence, gender inequities in rape homicide and family law, employment law was side-lined by the mainstream. In order to claim on entitlement to equal rights within the prevailing liberal paradigm, they argued that private life is symbiotic to public spheres. Thus, Liberal Feminism gives importance to individual rights, both civil and political. It argues that since women and men are equally rational they ought to have the same opportunities to exercise rational choice. Though they consider that legal and political system is patriarchal, they emphasised to fight for equality within the existing institutional framework of discrimination.[16]

This contestation for entitlement by the feminist led to formalistic equality in various legal spheres. At the same time, a new critique on liberal feminism critiqued the understanding of trying to equate men and women. They argued that such formalisation would be incorrect as for the women to claim inequalities and sex discrimination; it would have to show that they are in the same or similar position as those of the men. Limitation of this understanding espoused

[13] *Id.* at ii.
[14] Wacks, s*upra* note 11, at 299.
[15] Roger Cotterrell, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY 217 (Oxford University Press, 2008).
[16] Wacks, s*upra* note 11, at 302.

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many feminist to argue for the celebration and acceptance of the gender difference. Carol Gilligan's psychological theory espoused that woman- as a class speak with a 'different voice'.[17] Difference feminism or cultural feminism rejects the sympathetic view of the formal equality and gender, which, it is argued, undermine the difference between men and women. It seeks to uncover the unstated premises of the law's substance, practice and procedure. It thus explores the diverse forms of discrimination implicit in the criminal law, the law of evidence, tort law, and the process of legal reasoning itself.[18] So it attacks the concept of the 'reasonable man', and the language of law which is based on the male view of female sexuality deployed in rape cases.[19]

The difference feminist considers equality as a more complex and ambiguous aspiration. Carol Gilligan shows how women's moral values tend to stress responsibility, whereas men emphasize rights. Women look to context, where men appeal to neutral, abstract notions of justice. In particular, she argues, women endorse an 'ethic of care' which proclaims that no one should be hurt. This morality of caring and nurturing identifies and defines an essential difference between sexes.[20]

By the late 1980s, feminist jurisprudence moved beyond the issue of equality and started to analyse the nature of law itself. Leading radical feminist Catherine MacKinnon challenges the view that women can ever achieve equality since men have defined women as different. She argues that since men dominate women, the question is ultimately of power. Law is effectively a masculine edifice and it cannot be changed by merely admitting women through its door or accepting women's values in its rules and procedures. Further, any reformation in law will not help as the law being masculine; it will simply produce male oriented results and reproduce male dominated relations. She rejects the idea of the neutrality of law.[21] Despite the criticism of the existing patriarchal legal system; she does not repudiates the law as a vehicle of radical change.[22]

According to MacKinnon, the social relation between sexes is organized in such a manner which allow men to dominate women. She emphasises that the relation is sexual and particularly men sexualise inequality. She further argued that the notion of gender as difference

[17] Margaret Thornton, *The Development of Feminist Jurisprudence*, (May 12, 2020, 11:15 am), http://www.ler.edu.au/Vol%209_2/Thornton.pdf
[18] *Id.* at 306.
[19] *Ibid.*
[20] Carol Gilligan, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT, Cambridge, 307 (Harvard University Press, 1982).
[21] Raymond Wacks, A PHILOSOPHY OF LAW: A VERY SHORT INTRODUCTION 102-103(Oxford University Press, 2006).
[22] Wacks, *supra* note 11 at 304.

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is incorrect but rather is hierarchical. The reason is that if gender is construed as difference then it, in her opinion "obscures and legitimizes the way gender is imposed by force"[23] and helps to maintain the status quo of male dominance.

She vociferously rejected both the sameness and difference theory. She argued that "gender is an inequality of power, a social status based on who is permitted to do what to whom"[24] She further argues that sexual discrimination law with mainstream moral theory, sees equality and gender as issues of sameness and difference. This approach has dominated politics, law and social perception.[25] She critiqued the difference theory for treating these characteristics as natural when they are a consequence of male domination. For MacKinnon, male domination is obscured by dominant social ideas of the nature of consent (especially to sexual activity), normal heterosexual relations, the family and feminity. While critiquing pornography, she argues that it changes sexual inequality into sexuality and turns male dominance into sex difference. She rightly claims that pornography, cloaked as the essence of nature and the index of freedom, turn the inequality between women and men into those twin icons of male supremacy, sex and free speech, and a practice of sex discrimination into a legal entitlement.[26]

She puts forth a "dominance approach" to understand the question of equality. Her thesis argued that equality is a distribution of power and gender is a question of power, that of male supremacy and female subordination.[27] It adopts a point of view of male supremacy on the status of sexes and argues that by treating the status quo as 'the standard', it invisibly and uncritically accepts the arrangements under male supremacy. [28] She declares that law itself is gendered and the concepts, ways of reasoning, practices and procedures embody 'the male point of view' and 'the male experiences'.

IV. OBSCENITY AND THE TRYST WITH LAW AND SOCIETY

The history of obscenity is quite different and continuously changes according to time and place. In Greece, sexual license was celebrated,[29] while later in the Christian and common law tradition, sexual expression was regulated along with blasphemy[30]. Some theorized the

[23] Catherine A. Mackinnon, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 3 (Harvard University Press, 1987).
[24] *Id.* at 8.
[25] Catherine A. Mackinnon, TOWARD A FEMINIST THEORY OF THE STATE 216 (Harvard University Press, 1989).
[26] *Ibid.*
[27] *Id.* at 40.
[28] *Id.* at 43.
[29] Geoffrey Robertson, OBSCENITY - AN ACCOUNT OF CENSORSHIP LAWS AND THEIR ENFORCEMENT IN ENGLAND AND WALES 16 (Weidenfeld and Nicholson, 1979).
[30] Bret Boyce, *Obscenity and Community Standards* 33 YJIL. 299, 304-305 (2008).

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regulation of obscene materials as a response to democratization of culture[31]. Objectively, defining obscenity is difficult. Even some anthropologists present the failure of discovering the absolute descriptive content of the term obscene in different societies in the world. For this, it has been claimed that "nothing is obscene that has not been culturally defined as such."[32]

One can argue that the historical journey of obscenity exhibits certain core ideas; the essence is deeply rooted to our human experience which is ultimately the moral experience. Such formulation is constantly challenged by feminist but traditionally it has held a significant position in influencing the concept of obscenity. Many have defined obscenity in terms of the "arousal of sexual passion"[33]; "degradation of sexual act and human body"[34]; distorted form of human sexuality leading to debasement of sexual act[35]. Comparing different definitions of obscenity, Harry Clor argued that law defines obscenity in terms of prurient interests and the stimulation of lust. He further contends that sexual obscenity is not the only form of obscenity. He thus defines an obscene book, story, magazine, motion picture, or play is one which tends predominantly to

> 1. Arouse lust or appeal to prurient interests.
>
> 2. Arouse sexual passion in connection with scenes of extreme violence, cruelty, or brutality.
>
> 3. Visually portray in detail, or graphically describe in lurid detail, the violent physical destruction, torture, or dismemberment of a human being, provided this is done to exploit morbid or shameful interest in these matters and not for genuine scientific, educational, or artistic purposes.[36]

The legal regulation of obscenity has not been a constant in human society or even more narrowly in the common law tradition. Regulation of sexual expression through legal system was not a concern in the classical society, while it was done incidentally in the Christian and

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[31] *Id.* at 310.
[32] Richard Fox says that: It is true that sexual and excretory functions are often at the basis of obscenity, but in those communities where public coition, urination and defecation are condoned the association of obscenity with these practices is not to be found. The carvings of copulating figures on the ancient Indian temples at Khajuraho may be obscene to the Western tourist but of great religious significance to the worshipping Hindus. In each society obscenity inheres in representations, words or acts which may not necessarily be prohibited elsewhere. See Richard G. Fox, THE CONCEPT OF OBSCENITY 3 (The Law Book Company Limited, 1967).
[33] Harry M. Clor, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY 212 (The University of Chicago Press, 1969).
[34] *Id.* at 215.
[35] *Id.* at 216.
[36] *Id.* at 245.

the common law tradition for some other offences (especially blasphemy). Moreover, historically, obscenity law was never the end in itself[37]. In the common law, obscene libel was added only in 1727, as until then it was not illegal to publish "bawdy stuff". The crime of obscene libel is generally deemed to have been created in 1727 by *Dominus Rex* v. *Curl*[38] in which the Court of King's Bench held that it was unlawful to publish material that was so "objectionable solely because of its offensive sexual content."[39] Even after, for more than a century no prosecution was made against publication of obscene materials until the nineteenth century where it was lobbied to legislate outlawing obscenity.[40] Sue Bessmer argued that despite various pretexts, all legal definitions of obscenity presume sex to be its subject and capture the traditional concerns in this area. She said,

> The law has given 'obscenity' a purely sexual connotation. Material that is merely profane or vulgar, reprehensible, scatological, or that portrays violence and sadism is not obscene. Obscenity must be pornography.[41]

Obscenity is considered objectionable because of varied reasons, like immorality[42] and 'patent offensiveness' or 'indecency'.[43] The earliest and authoritative definition of obscenity is the English case *Regina* v. *Hicklin*[44] (hereinafter *Hicklin*). which holds that a publication is obscene if it has a "tendency... to deprave and corrupt those whose minds are open to such immoral influences."[45] Obscenity could be distinguished in terms of sexual immorality and patent offensiveness. The definition locates 'obscenity' outside the mainstream of the dominant cultural values and it is rejected because it is considered to be without any redeeming social importance. For this reason, the problem of obscenity is seen to balance the protection of important social value and freedom of speech with the curtailment of the materials which offend the dominant cultural norms in taste and sexual morality.[46]

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[37] Boyce, *supra* note 30, at 304.
[38] 93 Eng. Rep. 849 (K.B.1727).
[39] *Ibid.*
[40] Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Datas be Criminalised*, 13 *ALB. L.J.SCI. & TECH.* 273, 308 (2003).
[41] Bessmer, *supra* note 3, at 144.
[42] Immorality is seen in relation to sexual impurity or it is because it depraved the morals of the reader by exciting sexual desires and libidinous thoughts. In *Roth* v. *United States,* 354 U.S. 476,487 (1957), it was said it appeals to 'prurient interest'; in *Kingley Pictures* v. *Regents,* 360U.S. 684 (1959), Justice Frankfurter pointed out that the word 'obscene' in American law has long referred to 'sexual immorality'.
[43] A material is obscene if it is 'offensive to modesty or decency; lewd, filthy, repulsive.' See *Ranjit D. Udheshi* v. *State of Maharashtra,* AIR 1965 SC 881 (885).
[44] 1868 LR QB 360.
[45] *Ibid.*
[46] Bessmer, s*upra note* 3 at 144-146.

V. WHAT REALLY IS OBSCENITY?

Observing the above explanations on obscenity within legal perspective, sexuality or eroticism is the *sine qua nom* of obscenity. Feminist on the other hand tend to relate obscenity with the power. They consider that "obscenity deals with the domineering, aggressive, degrading or objectifying relations between people, particularly male dominance over females"[47] Broadening the concept of obscenity, they tend to include non-sexual materials. At the same time, they question the traditionalists' view of certain sexually oriented materials as harmless. The presentation of the scantily clad or 'sexy' female models in modern advertisement is regarded as degrading, exploitative and thus pornographic. Feminist disapproves the moral values behind anti-obscenity statutes and is critical towards enforcement of laws which are manifestation of such values.[48] Despite having differences among feminists on the issue of censorship, they view that "obscenity is not about sex and it cannot be either praised or damned because it questions the 'old morality', candidly or otherwise. Rather, "obscenity' is the undiluted essence of anti-female propaganda."[49]

Feminists consider obscenity as an extension of the dominant values of society. They perceive that the hallmark of obscenity is misogyny, male supremacy, the glorification of power, aggression and dominance, permeating all facets of everyday life. Obscenity is in fact a debasing portrayal of power relations between people, in particular male dominance over women. Because of this some feminist treats obscenity as a direct, linear extension of conventional norms.[50] Obscenity is thus seen as a development based on the 'moralities of the ladder'[51] and the liberal and conservative approaches has been traced to a male defined concept of justice and individual rights[52]. Concurrently, it has been argued that the law as a social institution is a product of culture, not of nature.[53] On the other hand, an empirical investigation by Jenny H.C. Leung and Marco Van points that educational experience, political ideology, exposure to foreign culture etc., all interact with an individual's perception of obscenity. Based on their study, Leung and Van, argued that since the meaning of obscenity lie with the

[47] *Id. at* 146-147.
[48] *Id. at* 148.
[49] *Id. at* 149.
[50] *Id.* at 149-150.
[51] Carol Gilligan express that the perception of the morality represented by the metaphor ladder is associated with men. She states that moral development in men is largely a process of individualisation. Morality of the metaphor ladder represents rights and hierarchy of rules, regulating the contest between highly competitive, independent individuals. Thus from a male perspective, justice is best served by the least interference with the autonomy of others. See Kathleen E. Mahoney, *Obscenity, morals and the law: A feminist critique,* 14 OLR 33. 34-35 (1984).
[52] *Id.* at 41.
[53] Nicola Lacey, *Feminism and the Tenets of Conventional Legal Theor* in HILAIRE BARNETT (ed.), SOURCE BOOK ON FEMINIST JURISPRUDENCE 309 (Cavendish Publishing Limited, 1997).

interactive process, the legal attempt to identify 'obscene meaning' will be fruitless.[54]

VI. LAWS AND OBSCENITY IN INDIA

Originally, the law in India which deals with obscenity was laid down by the British under the Indian Penal Code, 1860 and could be traced to the "Victorian moral sensibilities and attitudes about nudity and sex were transferred to India and diffused to all parts of the British Raj."[55] The British perception of obscenity in India was complex. They were selective in appreciating the Hindu past. For example, they would place higher accord to the philosophical abstractions and other aspects like the erotic temple carvings, 'indecent' sexual portrayal in texts, or emotional bhakti cults were either understood as 'lower' or ignored.[56]

Section 292 of IPC defines obscenity[57]. Section 292 was amended in 1969 to give more precise meaning to the word 'obscene'. 'Public good' as an exception for specific works[58] were added. Prior to its amendment, Section 292 contained no definition of obscenity. The original Section 292 of the Indian Penal Code (Act XLV of 1860) states:

> Whoever sells or distributes, imports or prints for sale or hire, or wilfully exhibits to public view, any obscene book, pamphlet, paper, drawing, painting, representation, or figure, or attempts or offers so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine or with both.
>
> Exception-This section does not extend to any representation sculpture, engraved painted, or otherwise represented, on or in nay temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.[59]

The amendment also literally does not provide for a definition of 'obscenity' inasmuch as it introduces a deeming provision. On a bare reading of Sub-section (1) of Section 292 it is

[54] They showed that there is an inherent incompatibility between obscenity as a personal, cognitive-affective response and the legal conception as a tacit standard a community shares. Leung, *supra* note 1, at 426.
[55] Lyombe Eko, THE REGULATION OF SEX-THEMED VISUAL IMAGERY: FROM CLAY TABLETS TO TABLET COMPUTERS 84 (Palgrave Macmillan 2016).
[56] Charu Gupta, SEXUALITY, OBSCENITY, COMMUNITY: WOMEN, MUSLIMS, AND THE HINDU PUBLIC IN COLONIAL INDIA 34 (Palgrave 2001).
[57] Under sub-section (1) of section 292 of the Indian Penal Code, book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object shall be deemed to obscene, if it is lascivious or appeals to the prurient interests or if its effects are such as to 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.
[58] Works in the interest of science, literature, art or learning or other objects of general concern.
[59]Original Indian Penal Code (Act XLV of 1860), (May 4, 2020, 3:07pm), https://ia800203.us.archive.org/27/items/indianpenalcode00crangoog/indianpenalcode00crangoog.pdf

obvious that any material or work will be obscene if it is lascivious, appeals to prurient interest, and deprave or corrupt persons. It is only once the impugned matter is found to be obscene that the question of whether the impugned matter falls within any of the exceptions contained in the section would arise.

The definition of obscenity in section 292 of the Indian Penal Code is borrowed from the tests laid down in *Hicklin*[60] and *Roth* v. *United States*[61] (hereinafter *Roth*). Section 292(2) (c) specifically deals with people involved in pornography industry where obscene objects are produced. It prohibits taking part in such business. And Sub-section 2(d) makes it an offence to advertise or making known that such act. This sub-section is very wide and covers middleman that procure girls through human trafficking who are used for the purpose of production of pornography. This sub-section does not restrict itself to prosecuting these middlemen but it also attempts to punish those who advertise the sources from where the obscene material may be procured.

The word obscene was explained by Madras High Court in *Public Prosecutor* v. *Sabapathy*[62] in terms of offensive to chastity or modesty, purity and decency. It forbids to express anything unchaste and lustful ideas. In *Ranjit D. Udeshi* v. *State of Maharashtra*[63] (hereinafter *Ranjit Udeshi*) the Supreme Court of India stated that the word 'obscene' in section 292 of the Indian Penal Code can be referred from the English statute as it was borrowed from the English statute.

The earlier view of the Indian Courts was that the book infringes section 292 of IPC even if it contains one single passage that is obscene as can be seen from the case of *Empress of India* v. *Indarman*[64]. This view reflects the understanding of the *Hicklin* case that permitted the books to be judged obscene on the basis of isolated pages. That is why courts followed *Hicklin* case for a long time. With the impact of *Roth* this prolonged view of Courts changed. In *Ranjit D. Udeshi* the court said,

> In judging a work, stress should not be laid upon a word here and a word there, or a passage here and a passage there. Though the work as a whole must be considered, the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided

[60] Hicklin test follows that 'whether the tendency of the matter charged as obscenity is to deprave and corrupt the minds'.
[61] (1957) 35 US 476. Roth test follows that 'whether the work, taken as a whole, appeals to the prurient interest' as determined by a community standard test.
[62] AIR 1958 Mad 210.
[63] 1965 SCR (1) 65.
[64] 1881 ILR 3 AII 837 cited in Brajesh Rajak, PORNOGRAPHY LAW: XXX MUST NOT BE TOLERATED 49 (Universal Law Publishing Co. Pvt. Ltd., 2011).

> that it is likely to deprave and corrupt those whose minds are open to influences of this sort.[65]

Earlier, a single mention of any obscene passage in a book would have made it obscene. *Ranjit Udeshi* brought a welcome departure by bringing the test of objectivity. Now, the obscenity would have to be judged by considering the work as a whole. In *Samaresh Bose* v. *Amal Mitra*[66] the court reiterated the opinion of *Ranjit Udeshi* of seeing the matter complained of as obscene in the setting of the whole work. The test of objective assessment to judge obscenity as per the dominant theme of the work was introduced. Further in *Aveek Sarkar* v. *State of West Bengal*[67] (hereinafter *Aveek Sarkar*) the Supreme Court reiterated that the correct test to determine obscenity would be the 'contemporary community standard test' from the point of view of the average person.

As established by the court, the test for obscenity in India is based on the 'contemporary community standards', and whether the dominant theme of the work appeals to prurient interest. This test has been argued that it suffers from an overtly 'moral paternalistic approach'[68]. Further, the test remains unsatisfactory as the court has yet to interpret 'public good exception' in section 292. And *Roth* which was referred in *Aveek Sarkar* has been superseded by *Miller* v. California[69] (hereinafter *Miller*). *Miller* has refined the test of obscenity by introducing the requirement of patent offensiveness as per the applicable *state* law in America. In addition, the problem in 'community standard' test arises in ascertaining the assumptions surrounding the legal concept of 'community standard'.

It is impossible to define a single 'community standard' in a diverse country like India. The vagueness of the definition of obscenity in Section 292 IPC creates a problem where dominant views of a certain groups within the society are accepted as a norm. Such norm finds acceptance through the 'community standard test' and often marginalise the voice of the suppressed, especially those of women's. In *S. Khushboo* v. *Kanniammal and Anr.*[70], complaints were filed against a well-known actress after she gave an interview and expressed to have a societal

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[65] *Id.* at 63.
[66] 1985 SCR Supl. (3) 17.
[67] (2014) 4 SCC 257.
[68] In R*anjit Udeshi* the motivating concern of the court was based on legal paternalism and legal moralism. Legal paternalism involves the use of law to prevent a person from causing harm to herself, whatever her own views of the matter. In certain matters it is assumed that state knows the best what is in the interests of its citizens. Legal moralism, on the other hand, justifies prohibiting action on the sole ground of immorality (public or private), regardless of harm. See GAUTAM BHATIA, OFFEND, SHOCK, OR DISTURB: FREE SPEECHUNDER THE INDIAN CONSTITUTION 118-119 (Oxford University Press 2016).
[69] 413 U.S. 15 (1973).
[70] MANU/SC/0310/2010.

acceptance on live-in relationships and pre-marital sex. Among many complaints, it was alleged that the "remarks were an abuse against the dignity of Tamil women and they had grossly affected and ruined the culture and morality of the people of the State."[71] The case could be seen in terms of moral paternalism. And it has be endorsed by the legislature in the Indecent Representation of Women (Prohibition) Act 1986. It was enacted with the aim of prohibiting indecent representation of women through the means of "advertising or in publication, writings, paintings, figures, or in any other manner and for matters connected therewith or incidental thereto."[72] Without defining indecent, deprave and public morality, it defined 'indecent representation of women'.[73]

Flavia Agnes critiqued that the Indecent Representation of Women (Prohibition) Act confuses the issue of indecent representation of women with morality by introducing the test of 'anything that which tends to deprave and corrupt'. Dangerously, the definition of 'indecent representation' being vague, it vest incredible power to the state. Extending her argument, she states that there is an understanding which associates women as sexless and any sexualized form are condemned in the society.[74] Interestingly, in *Union of India and Ors.* v. *Film Federation of India and Anr*[75] when the question of indecency was connected to the prevailing custom and tradition which reinforces subordination of women, the High Court of Bombay gave its judgment against the Central Board of Film Certification for refusing to certify the movie *Pati Parmeshwar*. The film was denied any certification by the Central Board of Film Certification citing that it violates guidelines issued under the Cinematograph Act, 1952 as the film glorify servility of the women. The court's underlying assumption of neutrality with regards to women in the Hindu culture and tradition led to a decision that glorifying servility of a wife does not amount to 'ignoble servility' under the Cinematograph Act, 1952. In this case, the court applied the contemporary standard of morality. Thus, non-sexualized representation of women which depicts women's subordination under custom and tradition are seldom considered indecent. This case rightly proves the feminist argument that the Court generally followed the assumption that sex and sexuality is bad; sexually explicit representations are immoral; and sex and sexuality are not a normal part of our humanity, but

[71] Para 6, MANU/SC/0310/2010.
[72] Preamble of the Indecent Representation of Women (Prohibition) Act, 1986.
[73]Section 2 (c) of the Indecent Representation of Women (Prohibition) Act, 1986. is defined indecent representation of women as the "depiction in any manner the figure of a woman, her form or body or any part thereof in such a 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."
[74] Falvia Agnes, *Protecting Women Against Violence? Review of a Decade of Legislation*, EPW. WS19, WS29-WS34 (1980-89).
[75] The Bombay Law Reporter Vol. XC, 594, 1988.

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an evil, corrupting, poisonous influence from which 'decent people' must be protected.[76]

Moreover, the purpose of obscenity law is confusing. Is it to protect from immoral, indecent and sexual exposures? Or is it about protecting the morality of the society as a whole? Can a concern about moral harm justify the suppression of obscenity, which is vaguely defined? In addition, if government could legislate to suppress material that causes moral harm, it could suppress all kinds of expression, not just obscenity. Furthermore, even if we concede that obscenity may cause moral harm, it is impossible to show that it does, as "it is hard to find a single demonstrable instance of moral harm caused by obscenity."[77]

VII. CONCLUSION

Whatever the purpose, one cannot deny that sex is fundamentally the subject associated with obscenity. It may be regulated, curbed or restricted or banned. It is either considered immoral, patently offensive, or indecent and is generally located outside the mainstream of the dominant cultural values. Drawing from feminist jurisprudence; its critique of the law and its application, it can be contended that obscenity is an extension of the dominant values of the society. Any 'immoral' values which challenges dominant values are considered as reprehensible. So, it exist beyond societal values and norm, which need to be strictly dealt by the law. Meanwhile, the societal values and non-sexualized representation of women, which enforces misogyny, male supremacy, the glorification of power, aggression and dominance over women are hardly considered obscene. The role of the law in such scenario is to deal women's issue in a paternalistic manner or to label as obscene.

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[76] Ratna Kapur (1997) *The profanity of prudery: The moral face of obscenity law in India,* 8:3 WOMEN: A CULTURAL REVIEW, 293, 294, DOI: 10.1080/09574049708578318.
[77] Boyce, *supra* note 30, at 356-57.

VIII. REFERENCES

- Agnes, Falvia. 1980-89. "Protecting Women Against Violence? Review of a Decade of Legislation" *Economic and Political Weekly.* WS-29-WS34.
- Bessmer, Sue. March 1981. "Anti-Obscenity: A Comparison of The Legal and The Feminist Perspectives", 34 (1) *The Western Political Quarterly,* 143-155. Special Issue on Women and Politics.
- Bodenheimer, Edgar (Revised Edn). 2004. *Jurisprudence: The Philosophy and Method of the Law,* New Delhi: Universal Law Publishing Co. Pvt. Ltd.
- Bhatia, Gautam. 2016. *Offend, Shock, or Disturb: Free Speech Under the Indian Constitution,* New Delhi: Oxford University Press 2016.
- Boyce, Bret. 2008. "Obscenity and Community Standards", Vol.33 *The Yale Journal of International Law* 299-368.
- Brenner, Susan W. 2003. "Complicit Publication: When Should the Dissemination of Ideas and Datas be Criminalised" 13 *ALB. L.J.SCI. & TECH.* 273.
- Cotterrell, Roger. 2008. *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, 2nd Edition, New Delhi: Oxford University Press.
- Clor , Harry M.1969. *Obscenity and Public Morality: Censorship in a Liberal Society,* Chicago:The University of Chicago Press.
- Douzinas, Costas and Gearey, Adam. 2005. *Critical Jurisprudence: The Political Philosophy of Justice,* Oregon: Hart Publishing.
- Eko, Lyombe. 2016. *The Regulation of Sex-Themed Visual Imagery: From Clay Tablets to Tablet Computers,* Hampshire: Palgrave.
- Gilligan, Carol. 2003. *In a Different Voice: Psychological Theory and Women's Development,* Massachusetts: Harvard University Press.
- Gupta, Charu. 2001. *Sexuality, Obscenity, Community: Women, Muslims, and the Hindu Public in Colonial India,* New York: Palgrave.
- Kapur, Ratna.1997. "The profanity of prudery: The moral face of obscenity
- law in India, Women: A Cultural Review", 8:3, 293-302, DOI: 10.1080/09574049708578318
- Kapur, Ratna. April 20-27, 1996. "Who draws the Line? Feminist Reflections on Speech and Censorship" Vol. 31 No. 16/17 *Economic and Political Weekly* WS15-WS19+WS21-WS30.

- Lacey, Nicola, *Feminism and the Tenets of Conventional Legal Theor* in HILAIRE BARNETT (ed.), SOURCE BOOK ON FEMINIST JURISPRUDENCE 309 (Cavendish Publishing Limited, 1997).
- Leung, Jenny H.C.and Van, Marco. 2012. "Constructing the Meaning of *Obscenity*: An Empirical Investigation and an Experientialist Account", *Int J Semiot Law* 25:415-430 DOI 10.1007/s11196-011-9251-8.
- MacKinnon, Catherine A. 1987. *Feminism Unmodified: Discourses on Life and Law,* Cambridge: Harvard University Press, Cambridge.
- MacKinnon, Catherine A. 1989. *Toward a Feminist Theory of the State,* London: Harvard University Press.
- Mahoney , Kathleen E. 1985. "Obscenity, Morals and the Law: A Feminist Critique", 17 *Ottawa Law Review,* 33-71.
- Patterson, Dennis (ed.) 2nd Edn. 2010. *A Companion to Philosophy of Law and Legal Theory,* Singapore: Wiley Blackwell.
- Rajak, Brajesh. 2011. *Pornography Law:XXX Must Not Be Tolerated*, Delhi : Universal Law Publishing Co. Pvt. Ltd.
- Robertson , Geoffrey. *Obscenity - An Account of Censorship Laws and their Enforcement in England and Wales,* London: Weidenfeld and Nicholson.
- Wacks, Raymond. 2012. *Understanding Jurisprudence: An Introduction to Legal Theory*, 3rd Edition. New York: Oxford University Press.
- Wacks, Raymond. 2006. *Philosophy of Law: A very Short Introduction*, New York: Oxford University Press.

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